

FEDERAL -- MINING

Daniel A. Jensen, Reporter

IBLA Upholds BLM Decision Rejecting Irregular Placer Claims

The recent decision in *Melvin Helit*, 157 IBLA 111, GFS(MIN) 18(2002), illustrates the possible consequences of locating an oversize or irregularly shaped placer mining claim. Helit and seven others located an association placer claim with dimensions of approximately 14,300 feet by 600 feet. The claim was located in a canyon and was meant to be an irregular "gulch" or "shoestring" placer claim. The shape of the claim was a long polygon with seven segments following the general course of the canyon. However, the claim as described in the location notice bore little resemblance to the boundaries of the claim shown on the required map, making the actual size and location of the claim unclear.

Federal law requires that placer claims "conform as near as practicable with the United States system of public-land surveys and the rectangular subdivisions of such surveys." 30 U.S.C. §35; 43 C.F.R. §3842.1-5. Federal law also limits the size of association claims to 20 acres per locator, with a maximum of 8 locators. 30 U.S.C. §§35, 36; 43 C.F.R. §3842.1-2. The Bureau of Land Management (BLM) declared Helit's claim void *ab initio* because of its irregular shape and because, at 197 acres, it exceeded the size limit of 160 acres. Helit appealed to the Interior Board of Land Appeals (IBLA or Board), arguing that "gulch placers" are legally permissible and that his claim was in fact smaller than 14,300 feet by 600 feet and less than 160 acres.

The IBLA agreed with the BLM that Helit's ambiguous claim encompassed approximately 197 acres and was grossly irregular in shape. The Board acknowledged that, as a general rule, claimants whose locations fail to conform to the rectangular survey system or contain excess acreage should be allowed an opportunity to cure those defects prior to a declaration of invalidity, as long as the defect was inadvertent. Helit, however, had refused to modify his claim boundaries after discussions with the BLM, and accordingly, the claim was properly deemed void *ab initio*.

The principal opinion does not decide whether the claim might have also been void because of its shape, but a concurring opinion by Judge Hemmer so found. In that opinion, Judge Hemmer summarizes the history of gulch or shoestring placer claims, and concludes that such claims are permissible on an ad hoc basis only where the canyon walls are so steep or inaccessible as to make location of a normal rectangular claim impracticable. The concurring judge found that Helit's claim did not meet these requirements and should be void for that additional reason.

FEDERAL -- OIL & GAS

A recent issue of this *Newsletter*, Vol. XVIV, No. 2 (2002), discussed the Interior Board of Land Appeals (IBLA) decision in *Wyoming Outdoor Council*, 156 IBLA 347, GFS(O&G) 6(2002), in which IBLA held that significant omissions in both the Buffalo Resource Management Plan and the Wyodak Environmental Impact Statement (EIS) rendered the

documents insufficient to provide the requisite preleasing environmental analysis for the issuance of leases on three parcels. Shortly after IBLA entered its decision, the Bureau of Land Management (BLM) filed a motion for reconsideration. In *Wyoming Outdoor Council*, 157 IBLA 259, GFS(O&G) 13(2002), a two-judge panel of the IBLA denied BLM's motion and provided a more in-depth legal analysis of its prior holding.

In its motion for reconsideration, BLM argued that the IBLA decision was incorrect for several reasons. First, BLM argued that IBLA erred in failing to decide what level of National Environmental Policy Act (NEPA) compliance is required at the leasing stage. Second, BLM contended that IBLA incorrectly decided that new circumstances associated with coalbed methane (CBM) production and transportation methods required additional analysis under NEPA. Finally, BLM argued that IBLA failed to give proper weight to the "hard look" BLM had given to the effects of coalbed methane development in numerous project level environmental documents considered by BLM when issuing the leases.

In denying BLM's motion for reconsideration, IBLA ruled that BLM did not conduct sufficient NEPA analysis prior to selling the leases in question. "Given the admittedly serious and unique impacts of CBM extraction and development, including water quantity and quality and air quality issues, the utilization of the proposed leases for CBM activities is a relevant matter of environmental concern which must be addressed in a pre-leasing analysis." *Wyoming Outdoor Council*, 157 IBLA 259, 264 (2002). In response to the specific concerns raised by BLM, IBLA held that it was not required to determine what level of NEPA analysis was required prior to lease issuance, a full EIS or merely an environmental analysis, since a pre-leasing EIS had been prepared for the resource management plan. IBLA stated that the issue presented in the case was not whether BLM was required to evaluate full field development prior to lease issuance, but whether the existing NEPA documents were sufficient to provide the requisite pre-leasing NEPA analysis for the sale of the affected parcels in light of the probable use of the parcels for CBM development. IBLA also held that BLM failed to take the required "hard look" at the environmental consequences of the proposed leasing, considering all relevant matters of environmental concern. IBLA found that BLM's "hard look" at the effects of CBM development in previous NEPA documents was insufficient since those documents failed to consider appropriate leasing alternatives in light of the unique impacts of CBM activities. Specifically, IBLA was concerned that BLM failed to consider a no action alternative in its leasing decision analysis.

Readers should also be aware that Pennaco Energy, Inc., the holder of the federal leases in question, has filed litigation challenging the IBLA decision in the U.S. District Court for the District of Wyoming. *Pennaco v. U.S. Dep't of the Interior*, No. 02-CV-116-B (D. Wyo. filed June 20, 2002). The Petroleum Association of Wyoming and the State of Wyoming have intervened in the litigation in support of Pennaco Energy. The Wyoming Outdoor Council, the Powder River Basin Resource Council, Natural Resources Defense Council, and Defenders of Wildlife have intervened in support of the IBLA decision.

BLM has announced that the Powder River Basin EIS, which is currently being drafted and is scheduled to be released in February of 2003, will address IBLA's concerns regarding CBM development on federal lands. BLM is hopeful the document will sufficiently provide the required NEPA analysis necessary to support BLM's leasing decisions and activities.

D.C. Circuit Permits MMS to Base Royalty on Affiliate Resale Price

In *Fina Oil & Chemical Co. v. Norton*, 209 F. Supp. 2d 246 (D.D.C. 2002), the U.S. District Court for the District of Columbia held that the Minerals Management Service (MMS) could order a lessee to pay royalty based on the value of an affiliate's resale price to a non-affiliated third-party purchaser. The court upheld the decision of the Interior Board of Land Appeals (IBLA) that the lessee's royalties should be based on the affiliate's arm's-length resale price rather than on a benchmark-derived value, in part because the differential between the values represented a marketing fee that could not be excluded.

After a 1992 audit, MMS determined that Fina was selling gas to an affiliated purchaser at a non-arm's-length price and ordered that royalty payments be derived from the gross proceeds of the purchaser's arm's-length sales. Fina appealed the ruling to the IBLA and in *Fina Oil & Chemical Co.*, 149 IBLA 168, GFS(OCS) 228(1999), IBLA rejected Fina's argument and adopted its previous decision in *Texaco Exploration & Production, Inc.*, MMS-92-0306-O&G (May 18, 1999). On appeal, the district court affirmed and held that the Department of the Interior had a rational basis for concluding that Fina had a duty to market the gas for sale and determining that Fina's royalty payments should be based on the prices received by its affiliated purchaser in its arm's-length sales. The court further held that Fina must include downstream marketing services in its gross proceeds calculation, saying "it is the nature of the cost--i.e. whether it is a transportation cost, processing cost, or marketing cost--that determines whether it is deductible, not where or by whom that cost is incurred." 209 F. Supp. 2d at 254. In addition, the court held that aggregation services, storage, handling inventory, finding purchasers, and negotiating sales contracts were all functions that involve costs and risks associated with creating, developing, and finding markets for Fina's gas.

IBLA Finds EA Sufficient to Support FONSI Decision

The Southern Utah Wilderness Alliance and other groups (SUWA) appealed the Bureau of Land Management's (BLM) finding of no significant impact (FONSI) related to its approval of a notice of intent to conduct oil and gas exploration operations on federal lands in Grand County, Utah. In *Southern Utah Wilderness Alliance*, 157 IBLA 150, GFS(O&G) 9(2002), the Interior Board of Land Appeals (IBLA) affirmed BLM's decision and held that BLM took a hard look at the problems addressed, identified relevant areas of environmental concern, and properly considered a range of alternatives to the proposed action.

This case arises from a notice of intent filed by Western Geco seeking approval of a two-dimensional swath vibroseis geophysical project covering approximately 36 square miles of private, state, and public lands. BLM's environmental assessment found that the proposed action was consistent with the resource management plan which designated the land in the project area as open to oil and gas leasing with standard stipulations. The environmental assessment also stated that the bulk of the proposed action would occur in an area designated for off-road vehicle use. In affirming the FONSI decision, IBLA stated that the nature of the project area was particularly important to its decision since the area did not have wilderness characteristics and had been previously impacted by mineral development and other uses.

IBLA also addressed a dispute about the administrative record. Both BLM and SUWA supplemented the administrative record before the IBLA. SUWA argued that IBLA's review of BLM's decision should be limited to the record before BLM at the time of BLM's decision. IBLA rejected this position holding that IBLA has authority beyond that of federal courts to review information submitted on appeal to demonstrate the sufficiency of BLM's NEPA analysis. IBLA stated that the information could cure, if necessary, an otherwise perceived deficiency in

the analysis, since, when IBLA ultimately acts in deciding an appeal, the decision becomes the agency decision for purposes of any court review.

IBLA Reverses BLM Decision Denying Renewal of Federal Lease

The Wyoming State Office of the Bureau of Land Management (BLM) rejected BHB Oil Company's (BHB) application for renewal of a federal lease. The lease had been issued under section 14 of the Mineral Leasing Act which allows for successive renewals of the lease term. In *BHB Oil Company*, 157 IBLA 187, GFS(O&G) 11(2002), the Interior Board of Land Appeals (IBLA) reversed the BLM decision holding that under the circumstances of this case there was no reason for BLM not to exercise its discretion to consider the application to be timely filed despite certain defects.

The expiration date of BHB's federal lease was June 30, 1999. On May 7, 1999, BHB filed an application for renewal and the required \$75 filing fee. BHB also submitted rental payments under the terms of the lease but the record did not reflect the dates of the payments. BLM promptly reviewed the merits of the application and concluded on July 2, 1999, that there were no objections to renewal but failed to transmit the renewal lease forms for BHB's execution until September 7, 2000. BHB then failed to return the executed lease forms within 30 days and BLM rejected the renewal application.

Under 43 C.F.R. §1822.15, BLM may consider a late filed document or late payment to be timely filed anyway if: (1) the law does not prohibit BLM from doing so; (2) no other BLM regulation prohibits doing so; and (3) no intervening third party rights have been created or established during the intervening period. Under the circumstances of this case, IBLA held that there was no reason to prevent application of this regulatory provision. IBLA noted that BHB made an honest mistake but had timely filed its application before the period demanded by BLM. IBLA specifically stated that its decision was influenced by BLM's failure to timely return the submitted renewal lease forms for execution.

CONGRESS / FEDERAL AGENCIES -- GENERAL

Laura Lindley, Reporter

BLM Names Five New State Directors

On October 29, 2002, Bureau of Land Management (BLM) Director Kathleen Clarke announced the appointment of new State Directors for five BLM State Offices. Ron Wenker, who most recently served as District Manager in the Medford, Oregon, office, will be the Colorado State Director. K. Lynn Bennett will serve as State Director in Idaho. Martin C. Ott, who has been with the National Park Service as Superintendent of Zion National Park, will be the State Director in Montana. Linda Rundell, currently Associate State Director in Alaska, will become the New Mexico State Director. Finally, Bob Bennett returns to Wyoming from his job as Associate State Director in Utah to become Wyoming State Director. The State Director positions are not subject to Senate confirmation.

DOI Publishes New FOIA Regulations

The Department of the Interior published completely revised regulations implementing the Freedom of Information Act (FOIA), effective November 20, 2002. 67 Fed. Reg. 64,527 (Oct. 21, 2002) (to be codified at 43 C.F.R. part 2). The new regulations are in the now familiar question and answer format. The regulations increase from 20 to 30 days the time limit in which a party requesting information must file an appeal of a denial. 43 C.F.R. §2.29(a). There is also a new provision that describes information which is generally available to the public (either on the agency's website or otherwise) and which therefore need not be requested under a formal FOIA request. The revised regulations contain clearer guidance on the procedure the agency will follow to notify the submitter of confidential commercial or financial information when a third party has requested such information. 43 C.F.R. §2.23.

ALASKA -- MINING

J.P. Tangen, Reporter

Supreme Court Upholds Dump Lien Priority

On September 20, 2002, the Alaska Supreme Court, in *Blattner v. Rothschild*, 55 P.3d 37 (Alaska 2002), upheld a ruling that a contractor who had filed a lien on a mine dump had priority over a deed of trust lien with respect to the proceeds from the sale of production from the mine.

In 1998, USMX sought protection under Chapter 11 of the Bankruptcy Code. USMX owned two state mining leases for the Illinois Creek Gold Mine in western Alaska. N.M. Rothschild & Sons, Ltd. advanced USMX \$19.5 million under a deed of trust to operate the mine, and D.H. Blattner & Sons, Inc. had provided mining services to the mine under a contract with USMX. After obtaining relief from the U.S. Bankruptcy Court, and with the approval of both Rothschild and Blattner, USMX surrendered its interest in the mine, heap, and all equipment to the State of Alaska. The proceeds from the sale of gold and silver from the heap was deposited into a bank account. Blattner and Rothschild each filed separate foreclosure actions against the proceeds. The two cases were consolidated in January 1999.

Blattner's complaint was for the full balance due under its contract. Rothschild responded by asserting that the deed of trust had priority over the dump lien and that the dump lien was limited to costs accrued in production from the dump. The superior court held that to the extent the lien was valid, it had priority over the deed of trust; that Blattner was a "person" entitled to file a lien under Alaska Stat. §34.35.140; and that Blattner could include in its dump lien labor other than that directly involved in the extraction of minerals from the mine. The superior court held, however, that Blattner could not include non-labor charges such as those for material, equipment rental, and standby time. The superior court further held that the lien was limited to work performed during the nine months preceding the date the mining work stopped. The court also held that a \$500,000 protection payment made by the trustee during the bankruptcy proceedings must be applied against the dump lien. Finally, the superior court found that Blattner was entitled to attorneys' fees under Alaska Civil Rule 82.

In a lengthy opinion, the Alaska Supreme Court upheld most of the superior court's findings and conclusions. In particular, the court held that (1) because of the stipulation agreements entered into by both Blattner and Rothschild, Blattner's dump lien attached to the account holding the proceeds from the mine; (2) Blattner could include the cost of heavy machinery in its dump lien; (3) Blattner could not include unanticipated standby charges in its dump lien; (4) supervisory charges could be included only if they were on-site; (5) Blattner must apply a

\$500,000 protection payment against the amount for which it claimed a dump lien; and (6) Blattner was entitled to reasonable attorneys' fees under a statute authorizing recovery of attorneys' fees for enforcing a lien.

ALASKA -- OIL & GAS

John K. Norman, Reporter

State Shallow Gas Leasing Program Revised

Since 1999 the State of Alaska has had a shallow gas leasing program authorizing development of shallow gas fields to a depth of 3,000 feet. Earlier this year the Alaska state legislature authorized changes to this newest leasing program. In S.B. 319, the legislature made changes to Alaska Stat. §§38.05.177(a)-(c), (f), (j), (k); 46.03.100(f); and 46.04.040(b) which govern shallow gas leasing. The Division of Oil and Gas (DOG) subsequently finalized a regulation implementing Alaska Stat. §38.05.177(b)(2). This regulation amends Alaska Admin. Code tit. 11 §05.010(O) and is effective November 13, 2002. At the time of this writing, the DOG has been preparing proposed regulations implementing several of the remaining statutory changes.

The new law has made two fundamental changes to the existing shallow gas leasing program: (1) a lessee is authorized to continue drilling below a depth of 3,000 feet in order to develop a gas field encountered above 3,000 feet; and (2) aggregate chargeable acreage limits were expanded from 46,080 acres to 138,240 acres. Alaska Stat. §38.05.177(b), (j). Additionally, the state legislature authorized the DOG to increase the application fee for a shallow gas lease from \$500 to \$5,000 and the annual lease rental from \$0.50 per acre to \$1.00 per acre. The application fee increase is intended to encourage only serious developers to apply for and receive shallow gas leases and to recover administrative costs incurred by the DOG in issuing the leases.

Under the law as amended, a shallow gas lease gives a leaseholder the right to explore for, produce, and sell natural gas from a field to a depth of 3,000 feet, and if the field extends below 3,000 feet the leaseholder has a right to pursue the gas to the depth of the field. The DOG is currently attempting to define this statutory right more precisely; e.g., what exactly constitutes a "field"? The DOG will likely define this statutory right with more particularity in the shallow gas lease itself or through regulation.

Under the state's shallow gas leasing program, if oil is discovered in the course of drilling for shallow gas, a shallow gas lease owner must immediately cease operations, and the shallow gas lease owner has no preferential right to any oil that might be discovered. Shallow gas leases are issued on a first-come, first-served basis from available state-owned mineral estates. No "best interest finding" is required; however, there is a required 60-day public comment period before the shallow gas lease may be issued by the state. The maximum size of a shallow gas lease is 5,760 acres, and no single operator may hold more than 138,240 acres in the aggregate.

Shallow gas leases are not available in areas covered by existing oil and gas leases or exploration licenses, or in areas scheduled for future oil and gas lease sales, unless otherwise approved by the Commissioner of the Department of Natural Resources. Shallow gas leases are issued for three years, but lessees have the ability to extend the leases in a variety of ways including by production, unitization, and drilling. A royalty of one-sixteenth (6.25%) applies to gas production, unless the gas is sold in competition with gas produced at higher royalty rates, in which case the royalty is one-eighth (12.5%). Currently, the DOG requires a \$25,000 bond only

for drilling operations, but the agency is considering a bond requirement for obtaining the shallow gas lease itself.

Existing shallow gas leaseholders who wished to convert their leases to the new program were allowed to do so between July 1, 2002 and October 1, 2002.

CALIFORNIA -- MINING

Patrick Mitchell & Christopher Jones, Reporters

Proposed Legislation Would Modify Mining and Geology Board Procedures

A.B. 1878, which would modify the procedures by which the California Mining and Geology Board would take over lead agency functions, remains in the appropriations committee.

New Law Limits Surface Mining Operations Near Native American Sites

S.B. 483 was signed into law on September 30, 2002. The new law prohibits approval of a reclamation plan and financial assurances for certain surface mining operations located on or within one mile of any Native American sacred site and/or area of special concern. The prohibition applies unless the reclamation plan requires that all excavation be backfilled and graded to achieve the approximate original contours of the mined lands prior to mining, and the financial assurances are sufficient in amount to provide for the backfilling and grading. Operations for which final approval had been issued prior to September 1, 2002, are exempt. The law also extends from January 1, 2003, to January 1, 2007, the time in which the Director of Conservation may remediate or complete reclamation of abandoned mined lands.

Rule Required for Managing Waste at Mine Reclamation Sites

A.B. 173 gives the California Integrated Waste Management Board a January 1, 2004, deadline to adopt regulations establishing oversight of the management of construction and demolition waste and the management of inert waste at mine reclamation sites. Under the prior California Integrated Waste Management Act of 1989, each operator of a disposal facility in the state was required to pay a quarterly fee to the State Board of Equalization for all waste disposed of at each disposal site. Recycled materials and inert waste disposed of in property currently or formerly used for surface mining operations were exempt from such fees where such disposal was for purposes of reclamation. A.B. 173 repeals this fee exemption for recycled materials and inert materials when the required new regulations take effect. The law then reestablishes the exemption for certain other recycled materials and inert waste not specifically repealed by A.B. 173.

COLORADO -- OIL & GAS

Sheryl L. Howe, Reporter

Creation of Nonparticipating Royalty Interest in 1972 Ruled Valid

In *Keller Cattle Co. v. Allison*, 55 P.3d 257 (Colo. Ct. App. 2002) the Colorado Court of Appeals held that a nonparticipating royalty interest in oil and gas could be created in 1972. There had been some question as to whether nonparticipating royalty interests could be created in Colorado before 1991, due to the rulings in *Simson v. Langholz*, 133 Colo. 208, 293 P.2d 302 (Colo. 1956), and *Corlett v. Cox*, 138 Colo. 325, 333 P.2d 619 (Colo. 1958). In 1991, the

legislature passed a statute that expressly permitted the creation of nonparticipating royalty interests in Colorado. Colo. Rev. Stat. §38-30-107.5.

Keller Cattle Co. involved interpretation of a 1972 contract for purchase and sale of a ranch and the warranty deed executed pursuant to that contract, which contained a reservation of an undivided one-half of the one-eighth royalty interest, in, on and under and that may be produced and saved from the lands, with a reference to future leases in the clause. The contract contained a provision that the reservation would expire July 1, 1997, whereas the time limitation did not appear in the deed. Summary judgment had been entered in favor of Keller Cattle Co., the successor to the grantees under the deed, based on the statute of limitations and laches. Based on the facts relating to execution of the contract and the warranty deed and on a procedural issue, the appeals court reversed the summary judgment that had been entered in favor of Keller Cattle Co. The case was remanded to the trial court, and the court went on to address the question of whether nonparticipating royalty interests were valid in Colorado in 1972 when the contract and deed were signed.

The court of appeals distinguished *Simson v. Langholf* and *Corlett v. Cox* and found the deed in this case evidenced a clear intent to reserve a nonparticipating royalty. The court also found that the 1991 statute, which validated the creation of nonparticipating royalty interests, was not a change in the law but rather was intended to clarify disagreements about the state of the law in Colorado, relying on testimony before the legislature by David Ebner, who was at that time Chairman of the Mineral Law Section of the Colorado Bar Association. The court affirmed the trial court's decision to the extent it determined that creation of a nonparticipating royalty interest was legally permissible. This decision provides useful guidance for lawyers seeking to interpret deeds that appear to create nonparticipating royalty interests in Colorado before 1991.

Court of Appeals Upholds Town of Frederick Decision

In *Town of Frederick v. North American Resources Co.*, No. 01 CA 0893, 2002 WL 1766027 (Colo. Ct. App. Aug. 1, 2002), *petition for cert. filed* Sept. 16, 2002, the Colorado Court of Appeals affirmed the district court decision concerning the extent to which a town ordinance can regulate oil and gas wells within the town's boundaries. The Town of Frederick had enacted an ordinance in 1994 that required oil and gas operators to obtain a special use permit before drilling an oil and gas well within the town limits. The ordinance set forth procedures for applying for the permit, required payment of a \$1,000 application fee, and provided that the town's board of trustees had to approve the application if it conformed to the requirements set forth in the ordinance. The requirements included specific provisions for well location and setbacks, noise mitigation, visual impact, and aesthetics regulation. The ordinance provided penalties for failure to comply with its terms and authorized injunctions to enforce the ordinance. In 1999, North American Resources Company (NARCO) drilled a well in the town in accord with the drilling permit it had obtained from the Colorado Oil and Gas Conservation Commission (Commission), but without having applied for a special use permit from the town. The case was decided by the trial court on cross-motions for summary judgment.

The trial court and the Colorado Court of Appeals found that the town had the power to enact an ordinance regulating aspects of oil and gas drilling and that the entire ordinance was not preempted by state law and the Commission's power to regulate. To the extent there are operational conflicts between the ordinance provisions and the Oil and Gas Conservation Act, Colo. Rev. Stat. §§34-60-101 through 34-60-124 or the Commission's regulations, however, the ordinance is unenforceable. The ordinance's requirements for a special use permit, the \$1,000

application fee, and an inspection fee were all found to be valid, as were the requirements for building permits for above-ground structures and provisions regarding access roads and emergency response costs. The court found there was operational conflict as to the ordinance's provisions regarding setbacks for the location of wells, noise abatement, and visual impact, and that these provisions of the ordinance were unenforceable. The court held the town may not impose its own fines for violation of Commission rules. The town was entitled to an injunction enjoining NARCO from drilling or operating its well unless it obtained a special use permit. The court also upheld the award of attorneys' fees to the town under the ordinance's provision that the town could recover attorneys' fees if it prevailed in an enforcement action. This decision further refines the law in Colorado on preemption of local power by state law in oil and gas matters.

1964 Tax Deed Declared Void

In *Timroth v. Oken*, No. 01 CA 1416, 2002 WL 1766032 (Colo. Ct. App. Aug. 1, 2002), *petition for cert. filed* Oct. 15, 2002, the Colorado Court of Appeals reviewed Colorado's statutes regarding tax sales and treasurer's deeds. A mining claim had been sold at a tax sale in 1908 and a tax certificate issued to Pitkin County. In 1964, a treasurer's deed was issued to the county based on the 1908 sale and certificate. In 1979, a man who claimed to be an heir to an original owner conveyed his interest in the property by quit claim deed, and the grantee of the quit claim deed brought this case. The case was a quiet title action, asserting title based on deeds properly in the recorded chain of title, adverse possession, pursuant to Colo. Rev. Stat. §§38-41-101, *et seq.*, and possession and payment of taxes pursuant to Colo. Rev. Stat. §38-41-108. On cross-motions for summary judgment, the trial court held in favor of the county, relying on extrinsic evidence which showed that the 1964 treasurer's deed was valid.

The court of appeals held that the 1964 treasurer's deed was void, because the sale was not held on the date required under the statute and there was no explanation in the deed as to why the sale was not held at that time. The court of appeals found that extrinsic evidence could be admitted to validate the tax sale. The court held that a void deed fails to convey legal title even if the sale was valid. On the other hand, if the proceedings were valid, but the deed was defective because of some mistake of the treasurer, the holder of the defective deed is entitled to a corrective deed anytime before the owner's redemption. Further, any deed based on a void sale is also void, even if it appears valid on its face. The court agreed that the 1908 tax sale was valid and that the county was entitled to a new treasurer's deed. However, the court reversed and remanded the case as to the plaintiff's adverse possession claims. If the plaintiff is able to prove legal title by adverse possession, the court stated, the plaintiff would be entitled to redeem the property prior to execution of a new treasurer's deed.

NEVADA -- MINING

Richard W. Harris, Reporter

Court Denies Extralateral Rights

In a throwback to nineteenth century mining litigation, the Fifth Judicial District Court of Nevada denied an extralateral rights claim for a disseminated gold deposit in the historic Bullfrog Mining District. *Barrick Bullfrog, Inc. v. Parador Mining Co.*, No. 11877 (Nev. D. Ct. 1995). The Nevada Supreme Court re-cently affirmed this decision without comment. *Id.*, *aff'd*, *reh'g denied* (Nev. 2001). The General Mining Law states that a locator "has the exclusive right of possession and enjoyment . . . of all veins, lodes, and ledges throughout their entire depth, the

tops or apexes of which lie inside of such surface lines extended downward vertically, though such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side line planes of such locations" at 30 U.S.C. §26.

In the district court decision Judge John Davis noted the distinction between mining practices in the 1800s, which involved underground mining operations on well defined lodes, and modern operations characterized by "large earth-moving equipment [and] the treatment technology to mine and process the ores having a grade approaching 0.01 ounces of gold per ton of ore." Furthermore, "with gold currently having a value of almost \$400 per ounce, . . . economics allow today . . . the treatment and processing of material as ore that in previous years would have been waste."

After hearing and analyzing expert geological testimony, the court concluded that Parador had not met its burden of proving the existence of a defined vein structure with its apex on Parador's mining claim. The court ruled on three issues: (1) that the ore body was bounded by a stockwork that lacked distinct boundaries, as required by the Mining Law of 1872; (2) that Parador failed to meet its burden of proof as "the claimant of the extralateral rights [who] is claiming mineralization beneath another claimant who had actually found and developed the 'lode, vein, or ledge' at issue"; and (3) that Parador failed to meet its burden of proof in showing that the highest point, or apex, of the claim lay within its Sunset #1 claim.

Having reached these conclusions of law, the court entered judgment in favor of Barrick Bullfrog, Inc. Parador and its co-defendants were limited to those minerals "that exist within their claims as determined by vertical lines extending downward from their claims' end and side lines."

Copies of the unreported Findings of Fact, Conclusions of Law and Partial Judgment can be obtained from this reporter, who acknowledges and thanks Tom Erwin for his contribution to this report.

NEW MEXICO -- MINING

Stuart Butzier, Reporter

New Mexico Reclamation Law Applies to Conventional Uranium Mining After All

An earlier issue of this *Newsletter* reviewed a New Mexico district court decision finding that uranium mining was exempt from New Mexico's non-coal reclamation law. *See* "Retroactive Application of Reclamation Law Upheld, But Not Applied to Uranium Mines," Vol. XVII, No. 2 (2000). On September 9, 2002, the New Mexico Court of Appeals reversed the district court, holding that conventional uranium mining is covered by the New Mexico Mining Act. *See New Mexico Mining Commission v. United Nuclear Corp.*, Nos. 21,288, 21,290, slip op. (N.M. Ct. App. Sept. 9, 2002).

In the district court case, United Nuclear had successfully argued that the definition of "mineral" excluded uranium mining by excepting "commodities . . . that are regulated by the nuclear regulatory commission." *See* N.M. Stat. Ann. §69-36-3(G). Accordingly, the district court vacated notices of violation that had been issued by the Mining and Minerals Division in connection with three of United Nuclear's uranium mines. In reversing, the court of appeals reviewed the Nuclear Regulatory Commission's jurisdiction and the jurisdiction of its predecessor, the Atomic Energy Commission, under the Atomic Energy Act. The court concluded that the New Mexico Mining Act should not be construed to exclude conventional

uranium mining because such activities had never been regulated under the federal law. *United Nuclear*, Nos. 21,288, 21,290, slip op. at 3-5, citing 5 *Am. L. of Mining* §177.02[1] (2d ed.).

In dictum, however, the court suggested that *in situ* uranium mining operations might be excluded from the state reclamation law. Again referring to the *American Law of Mining*, the court reasoned that since *in situ* operations combine extraction with actual processing of the ore, federal licensing may be necessary to conduct *in situ* operations. *United Nuclear*, Nos. 21,288, 21,290, slip op. at 4 n.2. If so, then the state reclamation law would presumably not apply.

OKLAHOMA -- OIL & GAS

James C.T. Hardwick, Reporter

Corporation Commission Authority Under Gathering Act

In 1995, Oklahoma enacted its first comprehensive legislation dealing with gathering. This act provided a complaint-based procedure whereby the Oklahoma Corporation Commission could require a gatherer to provide open access on its gathering line to a producer/shipper. In the event of disputes between the gatherer and shipper, the Commission could determine an appropriate fee. Okla. Stat. tit. 52, §24.3 (now repealed). Because the 1995 act was considered to impose too many hurdles on its availability to producers/shippers, the act was repealed in 1999 and replaced by the current act, Okla. Stat. tit. 52, §§24.4-24.5. The current act (Gathering Act) also provides for a complaint-based procedure, confers upon the Corporation Commission authority to order open access to a complaining producer/shipper, and also gives the Commission authority to set an appropriate fee and terms of conditions of service in the absence of agreement between gatherer and shipper. Under this act, the conditions excusing gathering are substantially narrower than in the 1995 act. As with the 1995 act, the fee set by the Commission is a fee that would result from arm's-length bargaining in good faith in a competitive market between persons of equal bargaining power upon consideration of all economically significant factors that the Commission determines to be relevant.

The first reported case to arise under the Gathering Act is *Prairie Exploration v. Tri-Star Energy, L.L.C.*, 2002 OK CIV APP 110, No. 97,366, 2002 WL 31496662 (Okla. Ct. App. Oct. 4, 2002). In *Prairie*, after some period of gathering by Tri-Star of Prairie's gas without dispute, a dispute arose. Tri-Star apparently removed or disabled certain of its equipment or connections rendering the continued carriage of gas on behalf of Prairie by Tri-Star either impossible or difficult. Prairie applied to the Corporation Commission for an emergency order alleging Tri-Star's manager was interfering with Prairie's operations. After a hearing, the Commission entered an emergency order allowing Prairie to repair and restore, at Tri-Star's expense, valves and lines disrupted by Tri-Star. It further ordered Tri-Star to return to Prairie equipment Tri-Star had removed. Finally, it also allowed Prairie to repair and restore lines necessary to gather gas from certain wells. Subsequently, at a hearing on the merits, the Commission issued a final order directing Tri-Star to provide Prairie access to its gathering system at a gathering fee of \$.0584 per mmbtu. Tri-Star appealed both orders.

After review of the Gathering Act, the Oklahoma Court of Appeals concluded that the emergency order had exceeded the Commission's authority under the Gathering Act. It concluded that the Commission had jurisdiction to order access and to set a fee, but it could not remedy Tri-Star's violation by allowing Prairie to exercise control over Tri-Star's system--only the district court could effect such a remedy by ordering a receivership. Although it reversed the Commission's emergency order, the court of appeals upheld the Commission's final order,

finding that the Commission was well within its authority under the Gathering Act to require Tri-Star to provide open access. The court of appeals noted that the reasonableness of the gathering fee was supported by testimony of Prairie's expert. However, since Tri-Star had not challenged the amount of the fee, the court did not review whether a reasonableness standard complied with the standard under the act for setting a fee.

The Gathering Act was given a section number that placed it within the numeric confines of the Pipeline Act of 1913, Okla. Stat. tit. 52, §§21-34. However, neither the 1995 Act nor the 1999 Act were expressly enacted as amendments to the 1913 Pipeline Act. The court of appeals in *Prairie* in reviewing the Commission's remedial authority under the Gathering Act considered the remedial provisions of the 1913 Pipeline Act to be available. This is questionable. However, since the court found none of those remedial provisions supported the Commission's emergency order, the court of appeals' statements on that point are dicta.

Abuse of Process in the Oil Patch

Marlin Oil Corp. v. Barby Energy Corp., 2002 OK CIV APP 92, 55 P.3d 446 (Okla. Ct. App. 2002) was a case concerning abuse of process in litigation arising out of an oil and gas relationship. Marlin was the operator of two gas wells in which Barby owned working and royalty interests. Barby disputed certain charges assessed by Marlin in operating the wells. In 1993, Barby initially filed suit against Marlin for \$2,643.33 in small claims court in Woodward County. When the matter was moved to district court, Barby dismissed. Later in 1993, Barby sued Marlin in Beaver County alleging breach of the operating agreement by charging Barby for expenses not recoverable under the operating agreement and converting Barby's royalties. During the discovery process, Marlin sought a protective order asserting Barby's discovery tactics were abusive and oppressive, interfered with Marlin's normal business operations, and caused Marlin to incur unreasonable expenses. The protective order was denied and Marlin was ordered to respond to the discovery requests. While this action was pending, Marlin filed suit against Barby in Oklahoma County in December 1995 asserting claims for tortious interference with contract and prospective business advantage, defamation, abuse of process, and seeking a declaration of rights under the operating agreement. Among other things, Barby answered by asserting Marlin's claims were barred by estoppel. The defamation claim was later dismissed by Marlin.

In mid-1997, judgment was entered in the Beaver County case against Marlin for \$2,500 pursuant to an offer of judgment tendered by Marlin. The Oklahoma County case was tried to a jury in December 2000, with a directed verdict for Barby on the tortious interference claims. The abuse of process claim went to a jury which returned a verdict for Marlin for \$154,261 in actual damages and \$150,000 in punitive damages, specifically finding Barby acted with malice.

On appeal, the jury's verdict was upheld. The Oklahoma Court of Appeals rejected Barby's contention that the abuse of process claim was barred by the doctrine of issue preclusion arising from the Beaver County case because Barby had not raised this defense at the trial level. The court noted that no proper objection was made when Marlin presented evidence that in the Beaver County case Barby sought discovery relating to 100 wells other than the two wells at issue in that case and had obtained access to hundreds of thousands of documents relating to almost every well that Marlin had operated over the past several years which were also totally unrelated to the two wells at issue in that case.

In finding sufficient evidence to support the jury's verdict, the court of appeals ruled that evidence that Barby sought and obtained discovery in the Beaver County case of documents

relating to wells in which Barby had no ownership interest was relevant to the factual issue of whether Barby improperly used the court's process and whether Barby did so for an ulterior purpose. There was evidence that Barby had represented to the Beaver County court that the case justified extensive discovery and that later Barby's own expert valued Barby's claim at only \$600. There was evidence that Paul Barby used his access to Marlin's office during document production to enter Marlin's file room alone and look at files not marked for production. The court concluded this was competent evidence from which the jury could find Barby improperly used the court's process.

With regard to the element that the court's process had been used primarily for an ulterior purpose, the court noted testimony that Barby customarily participated in audits and resolved operating disputes without litigation and further that Barby had never sought an audit of the operating agreement with Marlin. One of the principals with Barby admitted he was trying to gather information to proceed with a class action. The court of appeals concluded this was competent evidence from which the jury could find Barby brought the Beaver County case not to recover the disputed charges but to use the court's process to discover evidence for use in a class action.

Barby challenged whether Marlin had established damages. Marlin's damages were based solely upon the attorneys' fees it paid to defend the Beaver County case. Relying on the rule that Marlin was entitled to compensation for all detriment proximately caused by Barby's abuse of process, Okla. Stat. tit. 23, §61, the court concluded that the detriment includes attorneys' fees required to defend the lawsuit.

Although the court of appeals affirmed the jury's award of damages on the merits of the abuse of process claim, it reversed the trial court's award of prejudgment interest to Marlin. The applicable statute authorized prejudgment interest for (among other things) injury to personal rights. The court of appeals concluded that because the parties' dispute emanated from their business relationship, namely, between an oil and gas operator and a working interest owner, the loss involved was an economic loss emanating from a business venture and not an injury to personal rights.

TEXAD -- OIL & GAS

William B. Burford, Reporter

Pooling Clause Did Not Authorize Lease's Inclusion in Waterflood Unit

Freeman v. Samedan Oil Corp., 78 S.W.3d 1 (Tex. App.--Tyler 2001, pet. granted and cause remanded pursuant to settlement) addressed the scope of the lessee's pooling authority under a 1966 oil and gas lease covering the Freeman sisters' 1/10 interest in a 25-acre tract. The lease's pooling clause was typical, the pertinent portion reading as follows:

Lessee is hereby given the power and right . . . at its option and without Lessor's joinder or further consent, to . . . pool and unitize the leasehold estate . . . so as to create by such pooling and unitization one or more drilling or production units Each drilling or production unit shall not exceed 40 acres, plus an acreage tolerance not to exceed ten per cent (10%) of 40 acres, when created for the purpose of drilling for or producing oil therefrom and 640 acres, plus an acreage tolerance not to exceed ten per cent (10%) of 640 acres, when created for the purpose of drilling for or producing gas . . . provided, however, if the maximum drilling or production unit fixed or allowed by the

Texas Railroad Commission . . . as the basis for the development and operation of or the production from the field in which the above described land is located, be more or less than said maximum, then, in either such event, each such unit created hereunder shall not exceed the maximum so prescribed or permitted and in force in the field at the time such unit is created plus an acreage tolerance not to exceed ten percent (10%) of such maximum.

Id. at 6.

A 19.83-acre tract out of the lease was included in an 88-acre pooled unit, and a producing oil well, the Price Oil Well, was drilled in the pooled unit. Shortly after completing the well the lessee formed two waterflood units that included the leased premises, one containing 1,414 acres and the other containing 1,529 acres. The unit agreement was approved by the Texas Railroad Commission in mid-1967, and on September 1, 1967, the lessee ceased production from the Price Oil Well to convert it to a water injection well. Although the lessee obtained approval for the unitization from 99.98% of the working interest ownership and 99.65% of the royalty ownership, the Freeman sisters never ratified the unit agreement.

There was no production from the leased premises or the 88-acre pooled unit from September 1, 1967, until 1991. The lessee pooled the Freeman sisters' lease with others to form a 674.25-acre gas unit and drilled and completed a gas well on their tract, which began sales on February 21, 1991. In 1998 the Freeman sisters sued Samedan, the lessee, for a declaratory judgment that the lease terminated in 1967 due to cessation of production and for an accounting for their share of gas production as co-tenants.

The lessee argued that the pooling provision of the lease authorized the lessee to include it in the waterflood units, so that unit production had maintained it in effect after the Price Oil Well ceased to produce. The court disagreed, pointing out that the pooling provision limited the size of a "drilling or production unit" to only 40 acres for oil or 640 acres for gas, plus a 10% tolerance, unless Railroad Commission field rules allowed larger units. Although the Railroad Commission approved the unitization, it never promulgated field rules requiring units approaching the size of the waterflood units. (There is no compulsory unitization in Texas, so Railroad Commission approval of the unit had no effect, in and of itself, on the lessors' and lessee's rights.) The Freeman sisters' lease therefore terminated in 1967 by reason of cessation of production. Against the affirmative defenses of laches, estoppel, and waiver raised by the lessee, the court held simply, and perhaps too broadly, that once a lease terminates by its own terms, it cannot be ratified or revived.

Fraud and Tortious Interference Damages Recoverable in Contract Case

Samedan Oil Corp. v. Intrastate Gas Gathering, Inc., 78 S.W.3d 425 (Tex. App.--Tyler 2001, pet. dismissed), involved a settlement agreement in which Samedan acquired a gas gathering system from Intrastate. In addition to cash consideration and other terms, the agreement provided that the parties would enter into a processing agreement under which, among other things, Samedan would deliver pipeline quality gas to Intrastate's plant for processing and transport gas purchased by Intrastate from third parties. The processing agreement was never finalized, largely because Samedan demanded a provision under which it would terminate if Samedan were ever classified as a utility, which Intrastate regarded as a near certainty. Also, according to evidence presented by Intrastate, Samedan rerouted third party gas, depriving it of sufficient pressure to be processed by Intrastate, and delivered Samedan's own gas

with greater liquid content than pipeline quality gas. Samedan purported to cancel its transportation agreement with Intrastate and ultimately disconnected Intrastate's plant from the gathering system following a dispute over a payment due Samedan from Intrastate. Intrastate sued and won actual and exemplary damages from Samedan for fraud and tortious interference.

In a long opinion laden with discussion of procedural issues, the court of appeals upheld the damage awards. Fraud, the court noted, consists of (1) a material misrepresentation, (2) which was false, (3) which was either known to be false when made or was asserted without knowledge of its truth, (4) which was made with the intent that it be acted on by the other party, (5) which was acted on by the other party in reliance on the representation, and (6) which caused injury to the party. Either an act of concealment or a false promise can satisfy the misrepresentation element. Samedan made promises to Intrastate in the settlement agreement and concealed the fact that it intended not to honor its terms and to demand the utility-termination provision in the processing agreement. Although failure to perform, standing alone, cannot establish fraudulent intent, slight circumstantial evidence that a party never intended to perform can support a fraud claim. Here the evidence was sufficient.

Samedan contended that there could be no tortious interference with Intrastate's contracts to process third parties' gas, because title to the gas passed to Intrastate at the wellhead, and there was no evidence that Samedan interfered with the passage of title. The court disagreed, first pointing out the elements of tortious interference with a contract: (1) the existence of a contract subject to interference, (2) willful and intentional interference, (3) interference and proximately caused damage, and (4) actual damage or loss. The tort embraces all intentional invasions of contractual relations, including any act interfering with the performance of a contract, regardless of whether breach of contract is induced. It follows, the court said, that where a person's intentional acts serve to frustrate the purpose of another's contract with a third party, thereby causing damage, such acts constitute the requisite interference. Here there was sufficient evidence that Samedan procured Intrastate's pipeline by fraud, depriving it of the ability to transport third-party gas, and wrongfully disconnected Intrastate's plant and third-party wells from the pipeline system, frustrating the purpose of Intrastate's processing contracts. Without the ability to move the gas it purchased from third parties for processing, Intrastate's contracts were rendered effectively useless. Samedan countered that there could be no interference as a matter of law because its conduct was in pursuit of its own legal rights under the settlement agreement and as owner of the pipeline. Because the jury found, on sufficient evidence, that Samedan procured the agreement by fraud, the court held, its conduct was not a legal right but rather a breach of a legal duty.

Drilling Contract Did Not Violate Anti-Indemnity Act

In *Ranger Insurance Co. v. American International Specialty Lines Insurance Co.*, 78 S.W.3d 659 (Tex. App.--Houston [1st Dist.] 2002, no pet. h.), the court reversed the trial court's summary judgment, which had held that the indemnity provisions of a drilling contract were void under the Texas Oilfield Anti-Indemnity Act, Tex. Civ. Prac. & Rem. Code Ann. §§127.001-127.007.

The contract in question contained mutual indemnity provisions: The drilling contractor agreed to indemnify the operator against claims by the contractor's employees, and the operator agreed to indemnify the drilling contractor against claims by the operator's employees. A blowout occurred, injuring two of the contractor's employees. They sued the operator, who, after

settling with the injured workers, sued the drilling contractor and its insurers on the indemnity agreement.

The Anti-Indemnity Act, subject to certain exceptions, voids indemnity provisions of drilling contracts that purport to indemnify a party against liability for damage or injury caused by the indemnitee's own negligence. One of the exceptions recognized by the statute is that of mutual indemnity obligations if, under the 1995 version of Tex. Civ. Prac. & Rem. Code Ann. §127.005(b), applicable here, "the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as indemnitor has agreed to provide in equal amounts to the other party as indemnitee." (A 1999 amendment to §127.005(b) replaced the phrase "provide in equal amounts to" with "obtain for the benefit of"). The court held that the mutual indemnity provision of the drilling contract at issue here satisfied this exception.

The drilling contractor and its insurers first argued that the contract did not meet the requirements of §127.005(b) because it specified that the indemnity obligation was "without limit and without regard to the cause or causes thereof or the negligence of any party or parties." Following *Ken Petroleum Corp. v. Questor Drilling Corp.*, 24 S.W.3d 344 (Tex. 2000), the court held that this language did not invalidate the contract. Instead, the contract was enforceable up to the dollar limits of insurance coverage that applied equally to both parties.

The contractor also argued that the exception did not apply because the contractor was required to indemnify the operator against the operator's gross negligence, but the operator was not likewise required to indemnify the contractor. This interpretation was based on a specific exclusion in the drilling contract of the operator's obligation to indemnify against the contractor's gross negligence, without a reciprocal provision for the contractor's benefit. Assuming this interpretation to be correct, the court held that the mutual indemnity was nevertheless enforceable, but only up to the *extent of coverage* the parties agreed to provide in equal amounts. In other words, the court said, the indemnity obligation is limited to the lowest common denominator of coverage.

Further, the indemnity obligations were not voided by a provision that they be supported by "available liability insurance." This is outdated language designed to fit the statutory exception to the Anti-Indemnity Act in its pre-1989 form, held in *Greene's Pressure Testing & Rentals, Inc. v. Flournoy Drilling Co.*, 113 F.3d 47 (5th Cir. 1997), not to meet the later requirement of "equal amounts" of liability insurance. The drilling contract in this case included a provision not found in the contract at issue in *Greene's*, the court noted, requiring the operator to maintain insurance coverage of the same kind and *in the same amount* as required of the contractor.

Finally, the court rejected the contractor's argument that the indemnity language of the contract was not conspicuous, as required under *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993). The indemnity language here was not conspicuous, the contractor asserted, because it was scattered, not on the front of the document, not in contrasting color, not in a different typeface, and among unrelated terms. To the contrary, the court pointed out that the indemnity language was on the front of the drilling contract (not on the back of a work order as in *Dresser*), in numbered paragraphs entitled "Contractor's Indemnification of Operator" and "Operator's Indemnification of Contractor," both contained under a general section heading set off in slightly larger font and in all bold, capital letters, "RESPONSIBILITY FOR LOSS OR DAMAGE, INDEMNITY, RELEASE OF LIABILITY AND ALLOCATION OF RISK." The indemnity provisions were not among unrelated terms but were instead within this general

heading with subparagraphs dealing with indemnity, loss or damage, releases of liability, and allocation of risk. The indemnity provisions were conspicuous, the court held.

Perpetually Renewable Lease for Gas Booster Station Facilities Held Enforceable and Usable for Radio Tower

In *Haley v. GPM Gas Corp.*, 80 S.W.3d 114 (Tex. App.--Amarillo, 2002, no pet. h.), the court considered a 1956 lease on a five-acre tract of land. The lease authorized the lessee to use the tract for any lawful purpose in connection with the erection, maintenance, operation, and repair of a gas booster station and other appurtenances and facilities useful or proper in connection with gas pipelines, except the erection or use of dwellings. It provided for a term of one year, with the lessee to have an option to extend the lease for successive one-year periods thereafter, "indefinitely and perpetually," by advance payment of rental before each anniversary date.

In 1996 GPM, the lessee, constructed a radio tower on the tract for the transmission of gas measurement information from electronic meters at wells and delivery points on its pipeline system. Haley, the landowner, contended that the lease did not authorize GPM to construct and operate the tower and sued to terminate the lease on the grounds that it was a tenancy at will, also seeking damages for breach of contract and trespass. The trial court granted GPM's motion for summary judgment, declaring that GPM had the option to renew the lease annually in perpetuity and that Haley had no right to terminate the lease. Based on a jury finding that GPM had not failed to comply with the lease agreement by constructing the radio tower, the lower court also ruled against Haley's damage claims.

The court of appeals upheld the summary judgment, noting precedent that no legitimate reason exists to prevent parties from freely contracting for lease terms. Where a lease's plain and unambiguous provisions clearly evidence an intent to create a right of perpetual renewal, the lessee's right to extend the lease indefinitely will be enforced.

Haley also argued that the trial court had erred in submitting the jury the question of whether GPM had failed to comply with the lease agreement by building the radio tower, in that the question was purely one of law, not fact. Haley had not objected to the question at trial and had in fact requested submission of substantially the same question, thus waiving objection on appeal.

Sheriff's Deeds in Tax Foreclosure Held Void for Inadequate Property Descriptions

Hanzel v. Herring, 80 S.W.3d 167 (Tex. App.--Fort Worth 2002, no pet. h.), decided the appeal of a summary judgment setting aside a sheriff's sale. Alice Hanzel and D.O.H. Oil Company had purchased the overriding royalty interests in question, owned by Harold E. O'Connor, on foreclosure of property tax liens against O'Connor. The sheriff's deed included three tracts, all described in a manner similar to each other, the first of which, for example, was as follows:

Tract #1 .025000 Overriding Royalty Interest, Crumpton-Williams Wells, Lease 1404, Texas Railroad Commission Number 19281, T. H. Wooley Survey, Abstract 1634 and James Karcher Survey, Abstract 276, Palo Pinto County, Texas (Tax Account Numbers 140420007515, 1404200075151).

Id. at 171.

The court of appeals first ruled on the appellants' argument that the district court lacked subject matter jurisdiction because O'Connor had filed a petition for Chapter 11 bankruptcy before the filing of the state district court interpleader action against him. A debtor in possession in a Chapter 11 bankruptcy proceeding has the right to perform all the functions and duties of a trustee serving in the case under 11 U.S.C. §1107, the court of appeals pointed out, and O'Connor therefore had the right to pursue recovery of the interests. Nor did the proceeding violate the automatic stay mandated by Bankruptcy Code §362. It involved the resolution of whether the property was part of the debtor's estate rather than being an action seeking to obtain possession of part of the debtor's estate. Moreover, the automatic stay is for the benefit of the debtor, and if the debtor does not challenge stay violations, parties not part of the bankruptcy proceeding cannot use stay violations to their advantage.

Turning to the validity of the sheriff's deed, the court reiterated the rule that in order for a conveyance to meet the requirements of the statute of frauds, it must furnish, within itself or by reference to other existing writings then in existence, the means or data by which the particular land to be conveyed may be identified. The descriptions here, held the court, did not furnish such means or data. The appellants appear to have relied principally on affidavit testimony showing that the land could be identified using the five-digit railroad commission numbers used in the descriptions and relating them to documents filed with the commission. However, noted the court, the lease that the number represents was not one of the documents found and presented with the testimony. The descriptions were therefore inadequate.

Some further explanation of why the references to railroad commission records were insufficient to identify the property would have been helpful. Presumably the court did not intend to suggest that the land could be adequately identified by railroad commission documents only if the lease out of which the overriding royalty was created were among the documents. The court did note that there appeared to be numerous documents in the railroad commission file with respect to each number. One supposes that these documents must have been inconclusive in the identification of any specific tract to which they related. It is also unclear why the descriptions in the sheriff's deed should not have been construed as purporting to convey the specified overriding royalty interest in the entirety of the described surveys, which appear to have been adequately described by name and abstract number.

Alleged Oral Agreement for Working Interest in Nigerian Offshore Block Held Unenforceable

Exxon Corp. engaged Breezevale Ltd. to provide local assistance such as arranging appointments, conducting briefings, and obtaining technical information in Exxon's efforts to procure offshore exploration rights from the Nigerian government. Breezevale provided these services for some 18 months without a formal agreement for compensation but eventually sought to negotiate a long-term relationship, expressing an interest in participating with Exxon in its Nigerian exploration. Breezevale claimed that at their last meeting, on April 3, 1992, Exxon offered, and Breezevale accepted, a 2-1/2% working interest in all of Exxon's Nigerian oil operations. The next day a Breezevale representative traveled to Nigeria on Exxon's behalf and reported, a few days later, that Exxon had been awarded one of the offshore acreage blocks it sought. On April 13, 1992, Exxon sent Breezevale a letter terminating its relationship with Breezevale, with a \$30,000 check for Breezevale's services. Breezevale returned the check and sued Exxon, claiming Exxon had breached its oral contract for Breezevale's working interest participation and its fiduciary duty to Breezevale. The trial court entered judgment on a \$34.3

million jury verdict for Breezevale on its breach of contract claim, and Exxon appealed. In *Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429 (Tex. App.--Fort Worth 2002, pet. filed), the court of appeals reversed the trial court's breach of contract judgment.

It was undisputed that there was no written and signed agreement for Breezevale's working interest. As enacted in Texas, the statute of frauds holds a contract for sale of real estate unenforceable unless in writing and signed by the person sought to be bound. Under Texas law, an oil and gas working interest is real property. The court therefore refused to enforce Breezevale's alleged oral agreement.

Breezevale contended its agreement was only for an interest in Nigerian "Production Sharing Contracts," under which the foreign state would retain title to the minerals in the ground, not an interest in real property like an oil and gas lease. The relevant inquiry, the court held, is not whether title to the minerals passes, but whether the interest is derived from rights to oil and gas in the ground. A right to profits of land is regarded as a right to the land itself. The court also rejected Breezevale's argument that Nigerian law, not the Texas statute of frauds, should apply; it had waived the issue by failing to give notice and prove Nigerian law at trial.

Breezevale could not avoid the statute of frauds on the basis of promissory estoppel or partial performance, the court further held. Promissory estoppel can be applied to enforce a contract otherwise violative of the statute of frauds, the court noted, when the promisor makes a promise that he should have expected would lead the promisee to some definite and substantial injury, such injury occurred, and the court must enforce the promise to avoid the injury. However, where the promise is to sign an agreement, the agreement that is the subject of the promise must be in writing at the time the promise is made. Here there was never an unsigned written agreement.

Breezevale relied on its representative's trip to Nigeria after the April 3 meeting as partial performance in avoidance of the statute of frauds. The partial performance must be unequivocally referable to the agreement and corroborative of the fact that a contract actually was made, however: The acts of performance must be such as could have been done with no other design than to fulfill the particular agreement sought to be enforced. Breezevale's trip performed a function similar to its prior services for Exxon, and there was no evidence its actions were unequivocally referable to the alleged working interest contract. Moreover, the doctrine of partial performance requires that the party acting in reliance on the oral agreement suffer a substantial detriment for which there is no adequate remedy. Here Breezevale could, and did, receive reliance damages of \$1 million to compensate it for its services, the award of which Exxon did not appeal. (Interestingly, the court upheld the trial court's award of \$3.495 million in attorneys' fees to Breezevale based entirely on the \$1 million quantum meruit damage award.)

Finally, the court rejected Breezevale's cross appeal of the trial court's directed verdict against it on a claim that Exxon breached a fiduciary duty. There was no evidence that the parties were partners, and Breezevale's claim that it subjectively trusted Exxon to provide it a working interest agreement was insufficient to impose a fiduciary obligation on Exxon. The fact that one businessman trusts another and relies on another to perform a contract does not give rise to a confidential relationship, because something apart from the transaction between the parties is required.

Court of Appeals Decides Another Case on Inability to Agree on Damages as Jurisdictional Requirement for Pipeline Condemnation

The preceding issue of this *Newsletter*, Vol. XVIV, No. 3 (2002) reported several cases, with practically identical facts, deciding whether a pipeline company's offer to a landowner was sufficient to meet the Texas jurisdictional requirement that the parties be unable to agree on the amount of damages before a condemnation action may be instituted. *ExxonMobil Pipeline Co. v. Bell*, 84 S.W.3d 800 (Tex. App.--Houston [1st Dist.] 2002, no pet. h.), is another.

As in the cases previously reported, before filing its condemnation suit the pipeline company made a final offer that included certain rights beyond those it had the statutory right to condemn. Here those rights were the specific right to assign the easement and a warranty of title by the landowner. The court followed its own precedent in *Hubenak v. San Jacinto Gas Transmission Co.*, 65 S.W.3d 791 (Tex. App.--Houston [1st Dist.] 2002, pet. filed), and declined that of the Texarkana Court of Appeals, *MidTexas Pipeline Co. v. Dernehl*, 71 S.W.3d 852 (Tex. App.--Texarkana 2002, pet. filed), holding that a condemnor is not limited to negotiating for only the condemned easement and may negotiate for and offer to buy more than it condemns. Accordingly, it reversed the trial court's order that had dismissed ExxonMobil's condemnation action for want of jurisdiction.

WYOMING -- OIL & GAS

William N. Heiss, Reporter

Suits Under Wyoming's Royalty Payment Act Can Be Brought in Any County in Which One of Numerous Wells Is Located

In *BP America Production Co. v. Madsen*, 53 P.3d 1088 (Wyo. 2002), the Wyoming Supreme Court answered two certified questions concerning jurisdiction under the Wyoming Royalty Payment Act (WRPA), Wyo. Stat. Ann. §30-5-303(b). The certified questions were:

1. Does Wyo. Stat. §30-5-303(b) confer exclusive jurisdiction over claims under the Wyoming Royalty Payment Act in the district court for the county in which a well producing oil, gas, or related hydrocarbons is located?
2. If so, may the provisions of Wyo. R. Civ. P. 23 override the grant of exclusive jurisdiction such that a district court may, in the context of a class action, adjudicate WRPA claims relating to wells not located in the county in which the class action is pending?

BP America, 53 P.3d at 1090.

The position of the defendants was that the WRPA statute contains an unambiguous geographic limitation that allows claims to be brought under the WRPA only in the district court for the county in which *the* well is located. The plaintiffs contended that the statute clearly allows for suits to be brought where *a* (meaning any) well is located.

The Wyoming Supreme Court found the statute to be unambiguous and that the district court for the county in which *any well* producing oil and gas is located has jurisdiction over proceedings under the WRPA. Answering the first certified question in the negative rendered the second certified question moot.

Mineral Reservation Interpreted by Wyoming Supreme Court to Include Coalbed Methane

The Wyoming Supreme Court issued a pleasantly well-written decision in a case of importance to coalbed methane development in Wyoming's Powder River Basin. In *Newman v. RAG Wyoming Land Co.*, 53 P.3d 540 (Wyo. 2002), the plaintiffs (collectively the Morgan Mineral Heirs) sought a declaratory judgment as to ownership of coalbed methane and recovery of unpaid royalties.

In 1968, landowners who owned both the surface and mineral estate granted an oil and gas lease covering oil, gas, casinghead gas, and other minerals. Production was established under the lease. In 1971, Meadowlark Farms, Inc. began surface coal mining on state and federal coal leases in the area. Pursuant to a 1974 option agreement, Meadowlark acquired from the landowners their ranch of approximately 1,560 acres. The warranty deed conveyed the lands and "all coal and minerals commingled with coal that may be mined or extracted in association therewith or in conjunction with such coal operations" and reserved to the grantor "all oil, gas and other minerals except as set forth above." *Id.* at 542. The landowners owned the coal under approximately 200 acres of the ranch.

The oil and gas lease was subsequently assigned to Torch Energy Advisors (Torch), who by 1997 was producing gas from the coal seams on the property. The Morgan Mineral Heirs, as successors to the grantors of the warranty deed, demanded payment of royalties for gas production. RAG, the coal operator, and Torch entered into an indemnity agreement wherein RAG agreed to indemnify Torch from all liability in exchange for its agreement to resume making royalty payments to RAG.

The district court granted summary judgment in favor of the coal operator. On appeal to the Wyoming Supreme Court, the court stated the issue to be resolved was whether the parties to the warranty deed intended the coalbed methane to be conveyed along with the coal estate or reserved to the grantor as part of the oil and gas estate. Specifically, the court framed the determinative question as whether the parties intended "minerals commingled with coal that may be mined or extracted in association therewith or in conjunction with such coal operations" to include natural gas found in the coal seam. *Id.*

The court first recognized that coalbed methane is a mineral under Wyoming law. It also looked at the three states of coalbed methane and determined that the methane was "commingled" with the coal. For the coalbed methane to have been granted in the deed, the court stated that the mineral must be one that "may be mined or extracted in association" with the coal or "in conjunction with coal mining operations." *Id.*

In determining this issue the court found that in 1974 when the warranty deed was granted, any gas found in the coal seam was not mined through a well bore but was ventilated or wasted during the surface mining of the coal. Since the coalbed methane could only be produced through wells, like any other gas, the court found that the gas was not "mined or extracted in association therewith or in conjunction with such coal operations." *Id.*

While this finding was sufficient to dispose of the case, the court felt the issues presented were sufficiently important to warrant further discussion. The court addressed the coal operator's argument that coalbed methane could be most efficiently produced in advance of mining operations thereby reducing the water problems involved with mining. As such, the methane was mined "in association" or "in conjunction with" coal mining operations. The court disposed of this argument by finding that the gas production does not occur automatically in the process of mining coal, but only when and if the coal operator decides to undertake gas well drilling in

advance of mining operations. Secondly, the court noted that such "mining" technique for coalbed methane did not exist until 20 years after the deed in question was granted.

This issue led the court to a lengthy discussion of how the parties' intent is to be determined when minerals become valuable long after a conveyance by discovery of new methods of production, changes in economics making profitable the production of a previously known but unwanted mineral, or the discovery of minerals not previously known to exist. The specific intent of the parties to the 1974 deed is not readily apparent because the identity, value, or feasibility of production was unknown to the parties at the time of conveyance, and, as a result, they likely had no intent at all with regard to the substance in question. Consequently, the court focused upon the "general intent of the parties," concentrating on the "purposes of the grant in terms of respective manner or enjoyment of surface and mineral estates." *Id.* at 546.

The coal owner argued that its right to mine the coal, and thereby ventilate or waste the coalbed methane implies ownership. The court was thus required to determine whether that right is tantamount to ownership or simply incidental to the right to mine.

In addressing this question the court reviewed the cases from Pennsylvania, Alabama, and Montana addressing ownership of coalbed methane, and found them to display "confusing and inconsistent reasoning." *Id.* at 548. The court rejected using the nature of the ownership (rule of capture vs. ownership in place), stating that in jurisdictions adopting both rules, courts have concluded the gas owner is entitled to all of the gas it can capture, yet the coal owner owns the coalbed methane. The court looked to the U.S. Supreme Court case of *Amoco Production Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999), the reasoning of which the Wyoming court found persuasive.

Rather than following some rigid rule of law, the court looked at the facts and circumstances surrounding the execution of the warranty deed at issue. Following the reasoning in the *Southern Ute* case, the court stated that it could "safely presume the parties to the warranty deed herein knew generally that methane existed in the coalbed, posed some safety problems . . . and was not viewed as having independent value." *Newman*, 53 P.3d at 540. The purposes of the mining company's purchase of the property was to allow the development of a surface coal mining operation, while the landowners were fully aware that their property had value for gas development, and wanted to realize additional value from the property through sale of the surface and limited coal rights. "The general intent which can logically be ascribed to these parties is that the landowners would retain any oil and gas found within the property and the coal operator would be able to fully exploit the coal resource." *Id.* at 549. The court, citing the *Southern Ute* case and others, found that the right to ventilate gas, which is an essential element of the right to mine, is not equivalent to ownership.

In holding that the parties to the 1974 warranty deed intended the coal to be conveyed and the gas, wherever located, to be reserved to the landowners, the court did not imply that in all circumstances the conveyance of coal excludes the conveyance of the coalbed methane. Parties can certainly sever the coalbed methane from the remainder of the oil and gas estate with an appropriate conveyance, the court stated.

The case is important to numerous tracts in the Powder River Basin where the same or similar grant and reservation language has been used.