

FEDERAL -- MINING

Daniel A. Jensen, Reporter

Statute of Limitations Applies to Governmental Damage to Mining Claims

In *Dahl v. United States*, 319 F.3d 1226 (10th Cir. 2003), the owners of a remotely situated unpatented mining claim brought suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §2674, alleging that the Bureau of Land Management (BLM) had wrongly destroyed a large stockpile of ore stored on the claim. The BLM erroneously assumed that the claim had been abandoned and had leveled the land and removed the stockpile that measured a quarter-mile wide and 30 feet high. The owners did not visit the claim until nearly a year after the leveling and did not file a complaint until almost two years after the damage was discovered.

The FTCA allows suits against the government for injury or loss of property caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his employment. 28 U.S.C. §1346(b)(1). However, a claim for damages must be presented in writing to the appropriate federal agency within two years after it "accrues." *Id.* §2401(b). The issue was whether the damage claim accrued when the stockpile was destroyed (the injury-occurrence rule) or when the damage was discovered by the owners (the discovery rule). The federal district court applied the injury-occurrence rule, which precluded relief because the owners had commenced action more than two years after the damage actually occurred.

The Tenth Circuit affirmed. *Dahl*, 319 F.3d at 1227. The court noted that the destruction of the large stockpile was easily visible, and was neither inherently unknowable nor latent. Even though the claim is remotely located, the court found that it is fair to charge a property owner with knowledge of what happens on his land, at least when the occurrence would be obvious upon inspection.

This decision serves as a warning to those claim owners who may not inspect their claims regularly.

Corporate Officers Not Personally Liable for Reclamation of Public Lands

In *David J. Timberlin*, 158 IBLA 144, GFS(MIN) 5(2003), the Bureau of Land Management (BLM) sought to impose on the president of a defunct corporation personal liability for reclamation of abandoned unpatented mining claims. The corporation was the last operator and owner of the claims. In light of the corporation's dissolution, Timberlin, who was an investor, director, and president of the company, was ordered to reclaim the property by recontouring and reseeding disturbed areas. BLM's argument was that Timberlin's status as corporate president at the time the corporation explicitly committed itself to perform necessary reclamation, his signature on various corporate documents, and his communications with BLM after the company's dissolution established his individual accountability for the reclamation. 158 IBLA at 153.

The Interior Board of Land Appeals (IBLA) rejected BLM's attempt to pierce the corporate veil and hold Timberlin personally liable for the company's reclamation obligations. The IBLA held that Timberlin's actions, as characterized by the BLM, "clearly do not establish that he was conducting the business on a personal basis, nor do they evince any intent on his part to personally adopt the corporation's responsibilities." *Id.* at 154.

FEDERAL -- OIL & GAS

Gregory R. Danielson, Reporter

D.C. Court Determines That Buydown Portions of Settlement Payments Are Royalty-Bearing

In a Memorandum Opinion dated March 26, 2003, Judge Lamberth of the U.S. District Court for the District of Columbia granted summary judgment affirming the Minerals Management Service and holding that buydown portions of settlement payments made to gas purchasers in order to amend or replace take-or-pay contracts have a sufficient nexus with production to make them royalty-bearing. *Chevron USA Production Co. v. U.S. Dep't of the Interior*, Civ. A. 01-1577 (RCL), 2003 WL 1618083 (D.D.C. Mar. 26, 2003).

Chevron entered into numerous settlement agreements with gas purchasers to amend or replace take-or-pay contracts that had been executed prior to the deregulation of natural gas. Rather than continuing the higher set price contained in the original agreements, upon execution of the replacement contracts, the purchasers were able to take the gas at a price tied to the market value of the gas when taken. In determining if the settlement payments were royalty-bearing, the court examined a number of factors including: (1) to whom the gas subject to the settlement was

ultimately sold; (2) the quantity of the gas ultimately sold to the subsequent purchaser; (3) the date(s) of delivery of the gas identified in the settled contract; and (4) the price per unit of the gas ultimately sold and how that price compares with the open market price of gas at the time of the sale or, more specifically, to what extent the settlement payment appears to be part payment for gas actually delivered. Based on these factors and its review of the record, the court determined that no royalties were due when the settlement payment was made because there had been no production; however, as soon as gas was produced and purchased at the reduced price, the buydown settlement payment was transformed into a payment for gas produced. The court concluded that a company may not use creative contractual devices to avoid make-up contracts that should be subject to royalties.

IBLA Rules That BLM May Deny Royalty Rate Reduction Even after Approving a Royalty Rate Reduction Earlier

In *Union Oil Company of California*, 158 IBLA 265, GFS (O&G) 3(2003), the Interior Board of Land Appeals (IBLA) affirmed the decision of the deputy state director of the Wyoming State Office of the Bureau of Land Management (BLM) who denied Union Oil's application for a royalty rate reduction. The IBLA held that just because BLM once granted a royalty rate reduction to make oil and gas development economic, it is not bound to approve a second reduction application.

The appellant, Union Oil, applied for and received from the BLM in 1989 a royalty rate reduction from 1981 through 1985 to encourage tertiary recovery of high viscosity crude oil. When Union Oil applied for a second royalty rate reduction totaling \$996,651 for the time period between April 1, 1988, through April 1993, the BLM would not grant relief. The IBLA held that the BLM's 1989 approval of the royalty rate reduction was expressly limited to the time period between 1981 and 1985 and that in granting such approval, the BLM did not intend to create any unintended consequences for the future or otherwise bind the agency. Having rejected Union Oil's arguments that BLM was estopped from considering the facts of the second application, the IBLA went on to hold that the second royalty rate reduction was not "necessary to promote development." The IBLA specifically noted that Union Oil began its tertiary recovery operation in April of 1988, prior to a decision on its initial application. Thus, the IBLA found that "Union's action makes clear that whether it achieved a positive result on a royalty rate reduction for any period of time was not determinative of its decision to restart the tertiary enhancement project using existing infrastructure." *Union Oil*, 158 IBLA at 275. As such, Union Oil "failed to show that the goals of recovery of the oil and conservation of natural resources would not have been met in the absence of such a reduction." *Id.* at 277.

IBLA Confirms That Assignee of Indian Oil and Gas Lease Is Responsible for Compliance with All Lease Terms

The New Mexico State Director of the Bureau of Land Management issued a decision on June 17, 1999, recognizing Marlin Oil Corporation as the legal operator and holder of record title of an applicable Indian oil and gas lease and further requiring Marlin to submit plans to plug and permanently abandon a well located on the lease. Marlin appealed arguing that legal liability and responsibility for plugging and abandoning the well lay with Sun Oil Company, the party that originally drilled the subject well. Marlin additionally argued that, under Oklahoma law, an abandoned wellbore is the property of the surface owner.

The Interior Board of Land Appeals (IBLA), in *Marlin Oil Corporation*, 158 IBLA 362, GFS(O&G) 4(2003), affirmed the state director and held that under federal law and regulations applicable to federal and Indian oil and gas leases, lease obligations flow to the lease holder. The IBLA held that Marlin, as both operator and sole record title holder of the lease in question, was responsible for performance of all lease obligations, notwithstanding any terms in the transfer to the contrary. The IBLA noted that while the well operator has primary responsibility for plugging wells, the ultimate responsibility remains with the record title owner of the lease. The IBLA rejected Marlin's reliance upon Oklahoma law in support of its contentions, stating that all operations conducted on a federal or Indian oil and gas lease are subject to federal regulations issued pursuant to the Mineral Leasing Act of 1920.

IBLA Partially Reverses BLM's Dismissal of Protest to Federal Oil and Gas Lease Sale

The Wyoming State Office of the Bureau of Land Management (BLM) dismissed the protest of Wyoming Outdoor Council and others (WOC) of the April 2000 competitive lease sale of parcels located within the jurisdictions of several BLM field offices in the State of Wyoming. The Interior Board of Land Appeals (IBLA), in *Wyoming Outdoor Council*, 158 IBLA 384, GFS (O&G) 5(2003), reversed the decision in part and held that the BLM failed to conduct appropriate pre-leasing analysis under the National Environmental Policy Act (NEPA) with respect to the parcels located within the jurisdiction of the Buffalo and Rawlins Field Offices, but affirmed the sale of the parcels within the jurisdiction of the Rock Springs Field Office.

WOC protested the inclusion of 122 parcels located in counties covering three separate field offices in Wyoming. With respect to the parcels located under the jurisdiction of the Buffalo Field Office, the IBLA determined that its previous decision in *Wyoming Outdoor Council*, 156 IBLA 347, GFS(O&G) 6(2002), controlled. The IBLA determined that the BLM had failed to conduct appropriate pre-leasing NEPA analysis regarding the impacts associated with coalbed methane (CBM) development in the environmental impact statement (EIS) accompanying the resource management plan (RMP) for lands under the jurisdiction of the Buffalo Field Office. The IBLA specifically held that the "unique problems created by the magnitude of water production from CBM extraction in the Powder River Basin and the critical air quality issues presented by CBM development and transportation had not been adequately addressed in the Buffalo RMP/EIS." *Wyoming Outdoor Council*, 158 IBLA at 390.

The IBLA additionally held that the BLM failed to conduct adequate pre-leasing NEPA analysis of the impacts of CBM development before offering parcels under the jurisdiction of the Rawlins Field Office. The IBLA specifically found that the Great Divide RMP, like the Buffalo RMP/EIS, does not satisfy BLM's obligation under NEPA to take a hard look at the impacts associated with CBM extraction and development. In an attempt to avoid this result, one of the purchasers of the leases in question argued that an environmental assessment (EA) prepared for its nearby CBM pilot project exhaustively analyzed the impacts of CBM development in the portion of the Hannah Basin containing the disputed parcels. The IBLA disregarded this argument noting that the EA for the CBM pilot project was not prepared until after the April 2000 lease sale and thus could not have contributed to the BLM's decisionmaking process.

Finally, the IBLA upheld the BLM's dismissal of WOC's protest with regard to parcels covering lands within the jurisdiction of the Rock Springs Field Office. The IBLA found that the Green River RMP and accompanying EIS, which were issued in 1997, constituted a sufficient hard look at the effects of CBM development to meet the BLM's obligation under NEPA. The IBLA held that:

the Green River RMP/EIS considered CBM issues before designating lands ... as open to oil and gas development. Although the Councils contend that the RMP/EIS' analysis of CBM impacts ... is insufficient to qualify as the requisite hard look at those effects, they have not convinced us that the RMP/EIS's evaluation of those impacts is inadequate ... especially since the impacts associated with CBM development will be analyzed in greater detail in site-specific environmental documents prepared for any proposed development on the lease issued for that parcel.

Wyoming Outdoor Council, 158 IBLA at 395.

MINING -- OIL & GAS, ENVIRONMENTAL ISSUES

Gregory R. Danielson, Guest Reporter

Ninth Circuit Holds Coalbed Methane Water Is Pollutant Under Clean Water Act

In *Northern Plains Resource Council v. Fidelity Exploration & Development Co.*, 325 F.3d 1155 (9th Cir. 2003), the Ninth Circuit Court of Appeals reversed the decision of the federal district court and held that groundwater produced in association with coalbed methane (CBM) and discharged into the Tongue River is a pollutant within the meaning of the Clean Water Act. The State of Montana, which had been delegated authority by the Environmental Protection Agency to implement the water discharge permit programs under the Clean Water Act, advised Fidelity that a permit was not required to discharge its produced groundwater into the Tongue River. However, a citizen suit was filed against Fidelity alleging that unpermitted discharges into the river violated the Clean Water Act. The federal district court held that water produced with coalbed methane was not a pollutant under the Clean Water Act and no permit was required. *Northern Plains Resource Council v. Redstone Gas*, No. 00-CV-105, 2002 WL 31054969 (D. Mont. Aug. 23, 2002) (unpublished).

In reversing the district court, the Ninth Circuit Court of Appeals held that the unaltered groundwater produced with the methane is an "industrial waste" under the statute since it is an unwanted byproduct of the extraction process. The court found that the produced water does not have to be altered by man in order to be a pollutant. The court also held that Montana cannot exempt CBM water from the requirements of the Clean Water Act.

CONGRESS / FEDERAL AGENCIES -- GENERAL

Laura Lindley, Reporter

DOI Settles Wilderness Reinventory Lawsuit with Utah

On April 11, 2003, the State of Utah (for itself, the Utah School and Institutional Trust Lands Administration, and the Utah Association of Counties) and the Department of the Interior signed a stipulated settlement of the lawsuit filed by the state in federal court in Utah in 1996 seeking to set aside the Bureau of Land Management's (BLM) "reinventory" of lands having wilderness characteristics. *Utah v. Norton*, No. 96CV0870B (D. Utah Apr. 11, 2003). Judge Dee Benson approved the settlement on April 14, 2003. A copy of the settlement agreement is available at the Wilderness Society website, www.wildernesssociety.com, under Library, Legal Documents (last visited May 27, 2003).

The state had asserted that the designation of additional lands as having wilderness characteristics in the 1999 Utah Wilderness Inventory Report was not authorized by the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§1701-1782 (2000). Section 603 of FLPMA required the BLM to provide its wilderness recommendation to the President by October 21, 1991. The state also challenged the management of these newly inventoried roadless areas as de facto wilderness study areas (WSAs). The settlement agreement provides that the authority of the BLM "to conduct wilderness reviews, including the establishment of new WSAs, expired no later than October 21, 1993, with submission of the wilderness suitability recommendations to Congress pursuant to Section 603." The Tenth Circuit Court of Appeals had earlier ruled that the state lacked standing to challenge the BLM's authority to conduct the reinventory, although it did agree that the state had standing to challenge the de facto management of the lands as WSAs. *Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998).

The settlement agreement further provides that the BLM will rescind the Wilderness Handbook that was released in 2001 under the previous Administration. Most importantly, the settlement provides that the BLM will not manage as wilderness or as wilderness study areas any of its lands other than previously designated wilderness areas and WSAs. The Southern Utah Wilderness Alliance, the Natural Resources Defense Council, and other environmental groups have filed a lawsuit challenging the settlement. The groups had moved to intervene in the original lawsuit but Judge Benson has not yet ruled on that motion.

On the same day that the settlement agreement was signed, Secretary of the Interior Gale Norton sent letters to members of the jurisdictional committees of the House and Senate advising them that the policies stated in the settlement agreement with the State of Utah would be applied nationwide. However, the Secretary reserved the right to consider wilderness characteristics of lands during BLM's land use planning processes. Therefore, unless lands are recommended for wilderness during land use plan revisions, BLM will only manage as WSAs the 22.8 million acres of BLM land that were included in the Secretary's recommendation to the President in 1991 (9.66 million acres recommended for wilderness designation and 13.16 million acres recommended as not suitable for wilderness designation).

CONGRESS / FEDERAL AGENCIES -- OIL & GAS

Laura Lindley, Reporter

BLM Announces APD Approval Policy for Split Estate Lands

On April 2, 2003, the same date that the House Resources Committee defeated a proposal by Congressman Udall (D.-N.M.) that would have forbidden oil and gas operations on severed federal minerals unless the operator had the consent of the surface owner, the Bureau of Land Management (BLM) announced a plan to ensure that surface owners are consulted before drilling operations are commenced. Instruction Mem. No. 2003-131 requires all applications for permit to drill (APD) on split-estate lands (i.e., lands where the patent reserved the minerals to the United States but the surface is owned in fee) to include a certification by the operator that it has entered into a surface use agreement with the surface owner. If the operator is unable to secure the consent of the surface owner, then the operator must post a bond to cover potential loss or damage to crops and tangible improvements before BLM will approve the APD. See www.blm.gov/nhp/efoia/wo/fy03/im2003-131.htm.

The Instruction Memo makes it clear that the bond for the protection of the surface owner is separate from the oil and gas operations bond posted by the operator to secure the plugging obligation. The surface owner bonding procedures are those set forth in 43 C.F.R. §3814.1 (2002). Although that rule on its face applies only to minerals reserved in patents issued under the Stock-Raising Homestead Act of 1916, the BLM will apply it to any severed minerals, including those reserved in patents issued under the Agricultural Entry Act of 1914. The amount of the bond will be not less than \$1,000 and, if the surface owner objects to the amount of the bond within 30 days after receiving a copy of it from the operator, then the BLM authorized officer will set the amount of the bond. 43 C.F.R.

§3814.1(c) & (d). The APD will not be approved during the 30-day period in which the surface owner can object to the amount of the bond.

The Instruction Memo further provides that BLM will attempt to schedule the onsite inspection at a time when the surface owner can attend, and BLM will take into consideration any conditions on the APD that the surface owner might request. If those conditions are made a part of the APD, then they will be enforceable by BLM the same as any other conditions of approval.

BLM Releases Package of APD Streamlining Directives

On April 14, 2003, BLM announced a series of measures designed to improve processing of applications for permit to drill (APDs). Instruction Mem. No. 2003-152 lists strategies that can be used to more efficiently process APDs, including using a "master drilling plan" when multiple wells are being proposed in a given area. It also suggests using a "Geographic Area Development Plan" when a field is being developed and recommends that BLM and an operator or operators enter into a "Standard Operating Procedures" agreement that identifies the practices the operator will follow in the development of that field. *See* www.blm.gov/nhp/efoia/wo/fy03/im2003-152.htm.

On the same day, the BLM released Instruction Mem. No. 2003-147, which encourages the use of "block" surveys for cultural resources so that if a road or pipeline has to be relocated during the onsite inspection it won't be necessary for the new alignment to then be surveyed by the archaeologist. In addition, BLM will begin a review of conditions of approval imposed on APDs in an effort to standardize them across the country and apply only those that are effective. *See* www.blm.gov/nhp/efoia/wo/fy03/im2003-147.htm. Finally, the BLM has established work groups to draft changes to Onshore Order No. 1 and the "gold book" which contains instructions for preparing an APD. *See* Instruction Mem. Nos. 2003-151 & 2003-153 at www.blm.gov/nhp/efoia/wo/fy03/im2003-151.htm and at www.blm.gov/nhp/efoia/wo/fy03im2003-153.htm.

Powder River Basin RODs Issued and Challenged

On April 30, 2003, the BLM issued the record of decision (ROD) on the environmental impact statement (EIS) for the Wyoming Powder River Basin Oil and Gas Project which would allow the drilling of some 39,000 new wells (approximately 24,000 on federal minerals) in the 8-million-acre area examined in the EIS. *See* 68 Fed. Reg. 23,159 (Apr. 30, 2003). It also issued the ROD on the Montana Statewide Oil and Gas EIS and amendment of the Billings and Powder River Resource Management Plans. Both EISs analyze the potential impacts of oil and gas development, including development of coalbed methane.

The next day, three separate lawsuits were filed in U.S. District Court for the District of Montana challenging these decisions. The complaint filed by the Northern Plains Resource Council challenges only the ROD on the Montana EIS, although one of the bases for its challenge is that the BLM should have prepared a single, basinwide EIS rather than a separate one covering the portion of the basin in Montana and in Wyoming. The Wyoming Outdoor Council's action challenges both RODs, as does the suit brought by the American Lands Alliance and Biodiversity Conservation Alliance.

ARKANSAS -- OIL & GAS

Thomas A. Daily, Reporter

Arkansas General Assembly Enacts Three Measures Affecting Oil and Gas Ownership and/or Development

During its recently concluded 2003 regular session the Arkansas General Assembly enacted three pieces of legislation of interest to oil and gas practitioners. They are 2003 Ark. Acts 276, 964, and 1279.

Act 276 amends Ark. Code Ann. §15-72-305 (Michie) to increase the minimum amount of royalty payment that must be remitted from \$25 to \$100. The statute still requires royalty to be paid at least annually, regardless of amount.

Act 964 amends Ark. Code Ann. §15-72-302 (Michie) to change the definition of "unit." The previous definition required the unit to consist of the largest area capable of being effectively and efficiently drained by a single well. The new definition is simply a governmental section (640 acres) unless a larger or smaller unit is established by order of the Arkansas Oil and Gas Commission. This change recognizes the reality that geologic knowledge is constantly evolving and thus permits the Oil and Gas Commission to authorize additional wells within existing units and the formation of new units without limiting the number of wells therein. This act also allows the Oil and Gas Commission to form exploratory drilling units that are larger or smaller than governmental sections. The prior statute effectively required exploratory units to contain 640 acres.

Act 1279 amends Ark. Code Ann. § 26-37-314 (Michie) to allow the surface owners to purchase from the state any tax-forfeited severed mineral interests beneath their lands by paying the delinquent taxes only. The act also

attempts to retroactively cure procedural irregularities in prior purported tax forfeitures of severed mineral interests. For that reason it is constitutionally suspect.

CALIFORNIA -- MINING

M. William Tilden & Penelope Alexander-Kelley, Reporters

New State Rules Require Backfilling at Certain Open Pit Mines

On April 10, 2003, the State Mining and Geology Board (SMGB) adopted permanent regulations that require the open pit excavation created by a metallic surface mine to be backfilled to at least match the surrounding surface elevation. The new regulation as well as the staff report considered by the SMGB on April 10, 2003, can be reviewed at www.consrv.ca.gov/smgb/staffreports2003/APR/0410b3.pdf.

The SMGB action indicated that this requirement was necessary in order to "prevent open pits from being left as environmental hazards on the landscape." Exec. Officer's Rep., State Mining & Geology Board, Item 3, at 4 (Apr. 10, 2003) (Exec. Rep.). The regulation defines a "metallic mine" to include "one where more than ten percent of the mining operation's gross annual revenues as averaged over the last five years are derived from the production of, or any combination of," listed metallic minerals including precious metals (gold, silver, platinum), iron, nickel, copper, lead, tin, ferroalloy metals (tungsten, chromium, manganese), mercury, uranium and thorium, minor metals including rubidium, strontium, and cesium, niobium, and tantalum. Exec. Rep., at 9. The regulation is to be codified at Cal. Code Regs. tit. 14, §3704.1(f). Open pit metallic mines were specifically targeted by the regulation as these types of mines "often create very large excavations with at least equally large overburden and rock waste piles." Exec. Rep., at 4.

The new regulation provides that the backfilling and backfill material are subject to engineering and other requirements of the State Water Control Board's regulations on mining waste management "to ensure that the ground and surface waters are protected from any undesired effects from backfilling." *Id.* Further, any overburden or excavated material from the pit that cannot be used in the backfilling activities must be contoured to grade to create a final land surface that is consistent with the surrounding topography in order to "prevent large, unnatural mounds and piles of overburden and waste rock material from imposing on the natural landscape and creating undesirable environmental conditions." *Id.*

Subsection (i) of the new regulation exempts any surface mining operation as defined in the State Surface Mining and Reclamation Act of 1975 (SMARA), Cal. Pub. Res. Code §2735(a) and (b), for which the lead agency has issued final approval of a reclamation plan and a financial assurance prior to December 18, 2002.

The emergency backfilling regulations adopted by the SMGB in December (*see* Vol. XX, No. 1 (2003) of this *Newsletter*) were also readopted by the SMGB on April 10, 2003, pending final effectiveness of the permanent regulations.

Emergency Legislation Requires Backfilling of Open Pits Near Indian Sites

On April 7, 2003, Governor Davis signed emergency legislation, S.B. 22 (Sher), to implement the restriction on open pit mining near Indian sites, which was the subject of legislation from last year, S.B. 483. As reported in Vol. XX, No. 1 (2003) of this *Newsletter*, S.B. 483 would have prevented open pit mining activities for certain mining operations located within a prescribed proximity of any Native American sacred site and/or area of special concern, as defined. Although S.B. 483 was signed by the Governor last year, it contained a specific provision that it would not take effect unless a related bill, S.B. 1828, was also enacted. The Governor vetoed S.B. 1828. The new legislation removes the contingency with respect to S.B. 1828. The new law is specifically directed at the proposed Glamis Gold Mine in Imperial County, California, but has general application as well. Senate Bill 22 was emergency legislation, and it was passed by a 2/3 majority in both the Assembly and the Senate.

The new law amends the Surface Mining and Reclamation Act of 1975 (SMARA) to prohibit a lead agency from approving a reclamation plan and financial assurances for a surface mining operation for gold, silver, copper, or other metallic minerals located on, or within one mile of, any "Native American sacred site," and in an "area of special concern," unless the reclamation plan requires that all excavations be backfilled and graded to achieve the approximate original contours of the mined lands prior to mining, and the financial assurances are sufficient to cover the costs of backfilling and grading.

"Native American sacred site" is defined (in S.B. 483) as "a specific area that is identified by a federally recognized Indian Tribe, Rancheria or Mission Band of Indians, or by the Native American Heritage Commission, as sacred by virtue of its established historical or cultural significance to, or ceremonial use by, a Native American group, including but not limited to, any area containing a prayer circle, shrine, petroglyph, or spirit break, or a path or area linking the circle, shrine, petroglyph, or spirit break with another circle, shrine, petroglyph, or spirit break."

"Area of special concern" (as defined in S.B. 483) means "any area in the California desert that is designated as Class C or Class L lands, or as an Area of Critical Environmental Concern under the California Desert Conservation Area Plan of 1980, as amended by the United States Department of the Interior, Bureau of Land Management, pursuant to Section 1781 of Title 43 of the United States Code."

Pending Legislation May Further Limit Surface Mining Operations

Other pending legislation may further impact mining in the state. Senate Bill 218 (Sher) would terminate the mineral classification authority of the State Mining and Geology Board, which would effectively end the state's program of identifying mineralized areas in the state to assist with long-term local urban planning and prevent land use designations that lead to the loss of valuable minerals. This amendment would require a mine operator to pay for the state geologist's investigation of mineral resources.

Senate Bill 649 (Kuehl) is proposed to raise mining fees to fund a new abandoned mine program with a fee of \$5.00 per ounce of gold produced and \$0.10 per ounce of silver.

At its April meeting, the State Mining and Geology Board indicated it will consider at its May 23, 2003, meeting a change to its mining regulations concerning financial assurances. Under the existing Surface Mining and Reclamation Act of 1975 (SMARA), the local lead agency has authority to review and approve of financial assurance adjustments and releases of financial assurances applicable to existing mining operations. Such determinations are to be reviewed by the Department of Conservation, and the lead agency is obligated to respond to such comments. The proposed new regulation would grant to the Director of the Department of Conservation greater authority by requiring the lead agency to obtain the Director's concurrence, and the Director's recommendations would become binding on lead agencies.

COLORADO -- MINING

Howard R. Hertzberg, Reporter

Court Upholds Prescriptive Easement for Access to Mining Claims

In *Weisiger v. Harbour*, 62 P.3d 1069 (Colo. Ct. App. 2002), the Colorado Court of Appeals affirmed a district court decision finding that the plaintiffs had acquired a prescriptive easement for access to their mining claims.

The plaintiffs acquired several mining claims in 1970. Those claims were surrounded by national forest, except for a point of contact with property that the defendants acquired in 1983. The plaintiffs had been crossing the defendants' property 10 to 12 times a year on a historic mining road since 1970. In 1983, however, the plaintiffs had to partly change their access route over the defendants' property because a new subdivision partially blocked their access to the mining road.

The plaintiffs sued in 1998, claiming they acquired a prescriptive easement or easement by necessity for access to their property over the defendants' property. The district court agreed and the court of appeals affirmed. The court of appeals noted that an easement by prescription arises "when the use is open or notorious, continuous without effective interruption for the prescriptive period, and either adverse or pursuant to an attempted but ineffective grant." 62 P.3d at 1071. The use during the prescriptive period (18 years) must "be sufficiently obvious to apprise the owner of the servient estate, in the exercise of reasonable diligence, that another is making use of the burdened land However, actual knowledge by the owner need not be proved." *Id.* at 1073.

The court of appeals went on to note that with easements, the adverse claimant does not have to be in continuous possession of the land, "because a prescriptive easement is only a right to use the route whenever the holder desires passage." *Id.* A key factor appears to be crossing the servient property whenever the adverse claimant wants to reach his property.

The court also noted that although the party claiming a prescriptive easement must confine its use to a "single, definite, and certain path," *id.* at 1071, minor deviations are inconsequential to the right to claim a prescriptive easement, where such deviations result from circumstances beyond the adverse claimant's control (in this case, it was the new subdivision). Here, that need to change the routing was viewed as an acceptable minor deviation, which did not affect the running of the 18-year prescriptive period. There apparently was no Colorado precedent for the "minor deviation" exception, as the court of appeals relied on cases from New Mexico and Nebraska.

COLORADO -- OIL & GAS

Sheryl L. Howe, Reporter

Oil and Gas Lessee's Surface Use Reasonably Accommodated Surface Owner

In *Amoco Production Co. v. Thunderhead Investments, Inc.*, 235 F. Supp. 2d 1163 (D. Colo. 2002), the court found that Amoco had reasonably accommodated the surface owner's surface use and that Amoco was not required to request variances from setback and safety regulations.

Amoco drilled a well and constructed a road and water and gas gathering lines on the surface owner's property. The surface owner planned to develop the surface, but at the time it was used as a pasture. No final subdivision plat had been approved and would not be approved until certain easements were obtained and other steps were taken by the surface owner. The surface owner requested Amoco to move the well site, and Amoco did move the well site from the original intended location to accommodate the surface owner. Amoco did not move the well site as far as the surface owner wanted, however, citing the fact that this would put the well outside the drilling window and would require an exception location from the Colorado Oil and Gas Conservation Commission (COGCC), which was unlikely to be obtained because adjoining owners had refused to waive the benefits of the regulatory setbacks.

The court cited Colorado case law that the "owner of a severed mineral interest or lessee is privileged to access the surface and use that portion of the surface estate that is reasonably necessary to develop the severed mineral interest." 235 F. Supp. 2d at 1171 (quoting from *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 926 (Colo. 1997)). The court found that Amoco's well, road, and pipelines complied with all COGCC and county regulations and permit requirements. Amoco's refusal to make certain changes requested by the surface owner was reasonable because it was based on physical constraints. The court concluded that Amoco's choices were reasonable and necessary in conformance with standard industry customs and practices.

One interesting point made by the court is that the Texas Supreme Court limits the accommodation doctrine to existing uses. The surface owner had requested Amoco to utilize subdivision roads that were to be developed in the future; the court found that the subdivision roads were speculative at this point and subject to unknown future events. The court concluded that Amoco had reasonably accommodated the surface owner's present surface use and speculative future surface use.

Cert. Denied in *Town of Frederick* Decision

In Vol. XIX, No. 4 (2002) of this *Newsletter*, we reported the decision in *Town of Frederick v. North American Resources Co.*, 60 P.3d 758 (Colo. Ct. App. 2002). On January 6, 2003, the Colorado Supreme Court denied the petition for certiorari in this case.

LOUISIANA -- OIL & GAS

Edward B. Poitevent, II, Reporter

Louisiana Court Awards \$30 Million for Failure to Comply with Reassignment Obligation

In *Amoco Production Co. v. Texaco, Inc.*, 838 So. 2d 821 (La. Ct. App. 2003), Amoco Production Co. subleased its interest in certain oil, gas, and mineral leases (Leases) to a third party. Amoco reserved an overriding royalty interest in the Leases, and required the sublessee to give advance notice of any intended surrender, expiration, abandonment, or release of the Leases. The sublessee's successor in interest allowed one of the leases to expire due to lack of production. As to the other four Leases, it released certain acreage located outside of a producing unit. Eighteen years after the expiration of the first Lease and 13 years after the release of the acreage outside of the unit, Amoco filed suit alleging breach of the sublease for the failure to give it notice and for damages for the breach. The trial court found for Amoco, and the judgment was appealed to the Third Circuit Court of Appeal. The appellate court affirmed.

Amoco subleased the Leases in 1955. In turn, the sublessee assigned the sublease (and the Leases) to another company (IMC) in 1976. Soon after the assignment, IMC experienced mechanical problems in a unit well maintaining one of the Leases, the "Jenkins Lease." The attempted repairs were unsuccessful and the Jenkins Lease was allowed to expire. IMC executed a formal release a year later. IMC then took new leases on the lands formerly covered by the Jenkins Lease.

As to the remaining four Leases, they were maintained by production from the "Miogyp Unit." These Leases did not contain a Pugh Clause. In 1980, the landowners sued IMC for underpayment of royalties. That case was settled by releasing the portion of the leased premises located outside the unit, and taking new leases on the outside acreage. Shortly after the acquisition of these new leases, gas was found. Later, an individual hired by Amoco to

conduct an audit of Amoco's properties operated by outside parties brought this situation to its attention. Amoco then sued for damages.

Initially, IMC argued that Amoco's claims had prescribed, because the 10-year prescriptive period for breach of contract claims had expired. The Jenkins Lease had expired more than 18 years earlier, and the outside acreage had been released more than 13 years prior to suit being filed. IMC stipulated that it had not given written notice to Amoco as required by the sublease, but argued that Amoco knew or should have discovered the Jenkins Lease's expiration and the other Lease cancellations. The court noted that, while the evidence demonstrated that Amoco possibly could have known these facts, a contrary ruling would mean that an oil company would be bound to canvass the public records on a continuing basis to look for cancellations of which it had not been notified.

IMC also argued that Amoco's measure of damages was the market value of the canceled leases on the date of the breach. As there was no production at that time, IMC argued that this should be limited to the "signing bonus" given to leases in that area without any consideration of the value of production later obtained. The court held that the proper measure of damages was "the amount necessary to place [the plaintiff] in the same position [it] would have been in had [the defendant] completely fulfilled [its obligation]." 838 So. 2d at 837 (quoting *Gibbs Construction Co. v. Thomas*, 500 So. 2d 764, 770 (La. 1987)).

IMC next argued that Amoco was only entitled to its over riding royalty on the production that would have been obtained had the Jenkins Lease not been released and the four other Leases not been partially cancelled. The evidence suggested that this would have been about \$1.2 million. Amoco countered that it would have taken new leases and drilled its own wells and/or would have sought farmouts. Under this scenario, Amoco would have been entitled to the entire working interest in the new leases or their farmout share of same. The court held that there was enough evidence that Amoco would have entered into farmouts or farmins so as to obtain a lease position in the field, and awarded Amoco damages in the amount of \$30 million.

Louisiana Supreme Court Affirms \$33 Million Judgment for Damage to Land by Oil and Gas Producer

In *Corbello v. Iowa Production*, 02-0826 (La 2/25/03), No. 2002-C-0826, 2003 WL 536727 (La. Feb. 25, 2003), the Louisiana Supreme Court awarded \$33 million to a landowner for various claims against an oil company for trespass, unauthorized disposal of salt water, and damages to the leased premises.

After expiration of a surface lease, plaintiff sued Shell Oil Company for (1) restoration of the surface, (2) unauthorized disposal of salt water, (3) trespass for continuing to use his land after lease expiration, and (4) exemplary (punitive) damages. The trial court held in favor of plaintiff on the first three issues, but remitted damages awarded for the trespass. It dismissed the claim for exemplary damages. The court of appeal affirmed the restoration and salt water claims, reversed and remanded the trespass claim on the issue of damages, and also reversed the dismissal of the claim for exemplary damages.

The Louisiana Supreme Court affirmed the court of appeal's decision, in part, but reversed on the method of computing damages for unauthorized disposal of salt water, holding that the exemplary damages claim should be dismissed.

The supreme court acknowledged that the damages awarded for breach of contract (the obligation of restoration) exceeded the market value of the property by a factor of 300, that is, \$33 million awarded for land with a market value of \$108,000, but nevertheless so held, rejecting Shell's argument that the damage award should be reasonably or rationally related to the market value of the property.

Section 8 of the surface lease provided as follows:

Lessee agrees to indemnify and hold lessor harmless from any and all loss, damage, injury and liability of every kind and nature that may be caused by its operations or result from the exercise of the rights or privileges herein granted. Lessee further agrees that upon termination of this lease it will reasonably restore the premises as nearly as possible to their present condition.

2003 WL 536727, at *4. The court held that the terms of the contract "overrule any policy considerations behind such a rule limiting damages in tort cases." *Id.* at *5. It thus held that the contract was the law between the parties and was enforceable as such.

In awarding damages, the court upheld \$28 million (of the \$33 million awarded) for groundwater cleanup. The court found that there was evidence of potential groundwater contamination and accepted the testimony of plaintiff's expert concerning the steps to be taken to remedy the potential problem, in spite of Shell's argument that this would be paying the plaintiff for a "public injury." The court said that to hold otherwise would be to "leave only understaffed and underfunded state agencies to oppose the oil companies," in spite of the fact that the landowners were not obligated to spend any of this recovery on remedying the public injury. *Id.* at *12.

The surface lease also provided general language concerning the rights of the oil company to use the property "as may be necessary or useful in the general conduct of Lessee's business in the Iowa Field and/or other fields, ... without restriction as to source, ownership or destination thereof." *Id.* at *14. Following this general language, the lease stated as follows:

Without limitation of the foregoing, Lessee shall have the right to use the above described premises for the disposal of saltwater produced by it from its mineral leases or leases operated by it in the Iowa Field, or extensions thereof, whether such salt water be produced during operations on land owned by Lessor or land owned by others.

Id. Shell apparently disposed of salt water produced from other fields on the plaintiff's lands. The court interpreted the above-quoted language as limiting its disposal rights to salt water produced from the leased premises or any other property in the Iowa Field. As Shell did not do this, the court held that Shell had violated the terms of the lease.

The court noted that the award for this item of damage included an investment/inflation factor, in lieu of prejudgment interest. The court also noted that the evidence supported damages of over \$1 million, with the remaining \$15 million based upon this factor. The court held that only prejudgment interest may be assessed in such a case and remanded this portion of the award for a determination of such interest.

The trespass issue centered on the issue of continuing possession of the property after the lease terminated. The court of appeal held that whether the plaintiff was limited to the rental value depended upon the good faith of the possessor, noting that, during negotiations, the oil company's possession was in good faith. Once negotiations broke down, however, the oil company's possession was in bad faith. The court of appeal remanded for a determination of damages during the bad faith period. The supreme court affirmed this holding.

Article 2315.3 of the Louisiana Civil Code (repealed in 1996, as to causes of action which arise on or after the effective date of the repeal) provided, in part, for a short period of time, as follows: "In addition to general and special damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances." *Id.* at *17.

The supreme court held that such damages are not recoverable in a breach of contract suit. Accordingly it refused to address whether the oil company's actions constituted the type of activity giving rise to a claim for exemplary damages under Article 2315.3.

MISSISSIPPI -- OIL & GAS

W. Eric West, Reporter

NORM Litigants must First Seek Administrative Remedies Before Oil and Gas Board

The Mississippi Supreme Court, in *Chevron U.S.A., Inc. v. Smith*, No. 1999-CA-01658-SCT, 2002 WL 31320495 (Miss. Oct. 17, 2002) (not released for publication), reversed a judgment of \$2,349,275 for naturally occurring radioactive material (NORM) found on saltwater pipelines and storage tanks on the plaintiffs' 55-acre tract (which had a present market value of \$55,000). The jury deadlocked on the issue of punitive damages. Chevron appealed the judgment and the Smiths appealed the issue of punitive damages. The court held the trial court erred in allowing a jury trial as the Smiths failed to exhaust their administrative remedies before the Mississippi Oil and Gas Board. The court stated the Mississippi legislature gave the Oil and Gas Board the duty to make rules for the disposal of oil and gas waste, including NORM, and to protect Mississippi citizens from pollution resulting from oil and gas production. The court was of the opinion that because of the specialized knowledge and collective experience of the Board and its staff, "[t]he Board is more suited than the average juror to understand the broad scope of the regulations and the factual scenarios presented by each case of environmental pollution." *Chevron*, 2002 WL 31320495, at *3. The court pointed out that (1) the Smiths had refused all offers of a clean-up, (2) they "obviously have no intention of cleaning up their property," *id.*, (3) no court could order them to do a cleanup, so that (4) the interest of the public was better served by having an expert regulatory agency enforce the environmental statutes.

The court said it was following its prior holding in *Donald v. Amoco Production Co.*, 735 So. 2d 161 (Miss. 1999), in which the court first held that before a purchaser of land could bring a claim for negligence per se against an oil company based on the previous owners' transportation of oil field waste (NORM scale on stored oil field pipe) to the property, the purchaser was required to exhaust his administrative remedies before the state Oil and Gas Board.

For background as to the transfer of jurisdiction for NORM to the Oil and Gas Board from the Mississippi Department of Health, Division of Radiological Health, and the Board's subsequent adoption of Statewide Rule 68 -- Disposal of Naturally Occurring Radioactive Material (NORM) and Statewide Rule 69 -- Control of Oil Field Naturally Occurring Radioactive Material (NORM), see *Boyles v. Mississippi State Oil & Gas Board*, 794 So. 2d 149 (Miss. 2001).

Copies of the cases cited above may be obtained at www.mssc.state.ms.us. Copies of Mississippi Oil and Gas Board Statewide Rules 68 and 69 may be obtained at www.ogb.state.ms.us.

NEW MEXICO -- OIL & GAS

John S. Nelson, Reporter

Lessee Under State Lease Liable for Damages to Surface

In 1985, the New Mexico Supreme Court held that an oil and gas lessee generally is entitled to use as much of the surface of the leased land as is reasonably necessary for its drilling and production operations. *Amoco Production Co. v. Carter Farms Co.*, 103 N.M. 117, 703 P.2d 894 (1985). This generally means that the oil and gas lessee is not liable for using or damaging the surface, or restoring it to its original condition, so long as the lessee's use of the surface is not negligent, excessive, or unreasonable, and so long as the lessee has "due regard" for the rights of the surface owner. *Id.*

For decades, however, the forms of oil and gas leases covering mineral rights owned by the State of New Mexico (such forms being prescribed by statute) have included a provision by which the lessee is liable for, and agrees to pay for, "all damages to the range, livestock, growing crops or improvements caused by lessee's operations on [the leased] lands." The situation with respect to such leases is frequently that the surface of the leased land is either owned by or leased to parties other than the state or the oil and gas lessee.

In 1954, the New Mexico Supreme Court held that this provision makes the oil and gas lessee liable to the surface owner or lessee for the specified damages regardless of whether the oil and gas lessee's use of the surface is negligent, excessive, or unreasonable. *Tidewater Associated Oil Co. v. Shipp*, 59 N.M. 37, 278 P.2d 571 (1954).

In the recent case of *Dean v. Paladin Exploration Co.*, 64 P.3d 518 (N.M. Ct. App. 2003), the New Mexico Court of Appeals reaffirmed the holding in *Tidewater* as an exception to the general principles announced in *Amoco*.

This case is not remarkable, and merely clarifies existing case law as opposed to changing or extending it. It is, however, a good reminder that while the principles set forth in *Amoco* are commonly understood and generally recognized, they are nevertheless subject to contrary provisions contained in relevant deeds, leases, contracts, and patents, and in the statutes that authorize or authorized such patents, all of which must be carefully reviewed when analyzing the rights and obligations of mineral owners or lessees with respect to the surface of any particular tract of land.

TEXAS -- OIL & GAS

William B. Burford, Reporter

Railroad Commission Field Rules Properly Adopted Through "Contested Case" Procedures, Not Subject to Challenge by Declaratory Judgment Action

Railroad Commission v. WBD Oil & Gas Co., 46 Tex. Sup. Ct. J. 442, No. 01-0177, 2002 WL 31992122 (Feb. 13, 2003), addressed the jurisdiction of the district court to entertain a declaratory judgment action challenging Texas Railroad Commission field rules.

In January 1987, after notice to affected operators, all other interested persons, and the public, the Railroad Commission began a hearing on the consolidation of 13 separate fields into a single Panhandle Field and on changing the field rules. In March 1989 it issued its final order, including new field rules. Several parties sought review in district court, but the suit was ultimately dismissed. The hearing, order, and appeal were all typical of the trial-type "contested case" procedures the commission has long followed in determining field rules. WBD, the plaintiff in this case, although notified of the hearing, declined to participate. Instead, in 1995, it sued the commission, challenging the validity and applicability of its 1989 field rules. The trial court dismissed the action as an improper attempt to circumvent the Administrative Procedure Act (APA) requirements for obtaining review, but the court of appeals reversed, holding that the trial court had jurisdiction under Tex. Gov't Code Ann. §2001.038 (Vernon 2000), a provision of the APA that the validity or applicability of a rule may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff.

The supreme court first framed the controversy by noting that the APA provides two significantly different modes of judicial review, one for contested case decisions and the other for rules. To obtain review of a contested case decision, an aggrieved person must generally move for a rehearing, must have exhausted all available administrative remedies, and must file a court petition within 30 days of the decision. By contrast, a person seeking judicial review of a rule need not follow any of those procedures and, in most cases, may sue at any time. Further, the scope of review in a contested case is often limited to a determination of whether the agency decision was supported by substantial evidence, whereas judicial review of rules is largely unlimited in scope. The court also contrasted the profound procedural differences between contested case proceedings and rulemaking proceedings, emphasizing that informal and flexible rulemaking procedures maximize public participation, while the much more formal contested case procedures limit participation to those directly affected. The two sets of procedures are mutually exclusive, the court observed, and cannot be mixed in one hybrid proceeding as the court of appeals had believed the commission's Panhandle Field hearing to be.

The court of appeals' analysis had rested largely on its determination that field rules came within the APA's definition of a rule as "a state agency statement of general applicability that ... implements, interprets, or prescribes law or policy" Tex. Gov't Code Ann. §2001.003(6) (Vernon 2000). While this definition may be read abstractly to encompass field rules, the supreme court said, it is clear in the context of the APA as a whole that field rules are not rules of "general applicability" which must not be made without public comment. They are instead an adjudication of the individual interests principally affected. To see the difference one need only compare field rules detailing spacing and proration requirements in a specific reservoir having its own peculiar geology with statewide rules governing the entire oil and gas industry. By "general applicability," the court went on, the APA definition references statements that affect the public at large such that they cannot be given the effect of law without public input. The definition does not reference statements made in determining individual rights, even if the number of individuals is large.

Judicial review of orders adopting field rules should therefore, the court held, be the same as in the other contested case decisions. Such review affords the participants ample opportunity to challenge the commission's decision but also provides for the reasonable finality necessary for conducting operations in the field. To allow field rules to be challenged in a declaratory judgment action that can be filed at any time would deny them the certainty essential to their effectiveness. Accordingly, the court concluded, field rules adopted in a contested case cannot be challenged under Tex. Gov't Code Ann. §2001.038.

Another Decision on Good Faith Negotiation Before Pipeline Condemnation

ExxonMobil Pipeline Co. v. Harrison Interests, Ltd., 93 S.W.3d 188 (Tex. App.--Houston [14th Dist.] 2002, pet. filed), joins several recent court of appeals decisions now pending in the Texas Supreme Court that have addressed a pipeline easement condemnor's alleged failure, under very similar circumstances, to conduct good faith negotiations with the landowner before it may petition the court for condemnation. Tex. Prop. Code Ann. §21.012 (Vernon 1984) conditions a condemning entity's right to condemn a gas pipeline right-of-way on its being unable to agree with the landowner on the amount of damages, and this has been construed as requiring a bona fide offer on the part of the pipeline company. Here ExxonMobil had submitted Harrison a final offer of \$45,950 for an easement across Harrison's land, far more than the \$7,858 appraised value. The form of agreement ExxonMobil submitted with its offer, however, included a warranty of title by the landowner and the unrestricted right to assign the easement, rights that are not specifically obtainable by statutory condemnation. ExxonMobil's offer was thus not made in good faith, Harrison argued. The trial court agreed and granted Harrison's motion to dismiss the condemnation proceeding.

Following *Hubenak v. San Jacinto Gas Transmission Co.*, 65 S.W.3d 791 (Tex. App.--Houston [1st Dist.] 2001, pet. granted), and *Cusack Ranch Corp. v. MidTexas Pipeline Co.*, 71 S.W.3d 395 (Tex. App.--Corpus Christi 2001, pet. granted), the court of appeals reversed, holding that inclusion of additional property rights that may or may not be condemnable in a final offer prior to condemnation does not evidence the condemnor's failure to negotiate in good faith. To hold otherwise would unnecessarily complicate the negotiation process and frustrate the purpose behind the good faith negotiation requirement of promoting the resolution of property acquisitions through negotiations rather than litigation, the court declared, citing the dissent in the only contrary decision, *MidTexas Pipeline Co. v. Dernehl*, 71 S.W.3d 852 (Tex. App.--Texarkana 2002, pet. granted). The focus, according to *Hubenak*, should instead be on the amount of compensation offered. On the undisputed evidence that ExxonMobil's offer far exceeded the value of the easement and that Harrison had never complained about the inclusion of additional rights or indicated the compensation should be adjusted for them before the condemnation proceeding was instituted, the court held that summary judgment should have been granted ExxonMobil.

Two-Year Statute of Limitations Applies to Unjust Enrichment Claim

In *Mobil Producing Texas & New Mexico, Inc. v. Cantor*, 93 S.W.3d 916 (Tex. App.--Corpus Christi 2002, no pet. h.), Mobil sought to recover overpayments of production revenue to the defendants, who had elected not to participate in the reworking of a well operated by Mobil. After the reworking, apparently, the nonparticipating defendants had continued to receive their shares of production from the well, contrary to the nonconsent provisions of the applicable operating agreement. Mobil asserted breach of contract and, in the alternative, unjust enrichment, and was granted summary judgment only on its unjust enrichment claim. Mobil had sought reimbursement of \$197,062.03, representing revenues from production during the four years prior to suit, the limitation period applicable to breach of contract actions, but was awarded only \$6,348.85, the amount of revenues received by the defendants during the two-year unjust enrichment limitation period.

Mobil contended it had only argued breach of contract in its motion for summary judgment, but the court's review of Mobil's motion revealed it had asserted both issues. By denying Mobil's request for damages outside the two-year unjust enrichment limitation period, the trial court had disposed of all of Mobil's claims for recovery of erroneously paid revenues. Contrary to Mobil's argument now, the trial court's final judgment was proper.

A short concurrence illuminates, as the opinion of the court fails to do, the only real issue in the case, whether Mobil should have been granted summary judgment on a breach of contract theory. The operating agreement, the concurring justices pointed out, did not place an obligation on the nonconsenting parties to take any action to suspend the payments being erroneously made to them. They had not breached the contract. Rather, they received moneys to which they were not entitled under the agreement, a classic case of unjust enrichment. The mere receipt of money to which the defendants were not entitled did not constitute a breach.

Purchaser of Land After Conclusion of Operations Had No Standing to Sue for Injury to Property

Exxon Corp. v. Pluff, 94 S.W.3d 22 (Tex. App.--Tyler 2002, pet. denied), decided Exxon's appeal of a \$30,000 damage award against it for failure to clean up a 10-acre tract of land after its oil production from the land ceased.

Exxon drilled wells on the tract in the 1930s and produced them until sometime before 1984. It then plugged the wells and removed derricks and tanks from the property but left derrick corners, concrete pumping unit bases, and miscellaneous pieces of pipe and concrete. By 1992, when Pluff bought the surface of the land for \$10,000, Exxon no longer owned any interest in it and had conducted no operations on it since 1984. After his purchase Pluff concluded the land was useless until removal of the remaining oilfield debris and sued various current and former operators, including Exxon, alleging excessive use and negligence causing damage to the surface of the property.

The court of appeals, following *Senn v. Texaco, Inc.*, 55 S.W.3d 222 (Tex. App.--Eastland 2001, pet. denied), agreed with Exxon that Pluff had no standing to sue it. Generally, a cause of action for injury to real property accrues when the injury is committed and is a personal right that belongs to the person who owns the property at the time of the injury. It was undisputed that Exxon had ceased its activity on the lease prior to Pluff's purchase and that all of the oilfield materials he complained of were already on the property. Pluff's deed did not purport to assign any cause of action the prior owner may have had.

Even if Pluff had standing to assert a cause of action against Exxon, the court went on, under *Warren Petroleum Corp. v. Monzingo*, 157 Tex. 479, 304 S.W.2d 362 (1957), Exxon had no duty to restore the property. The clause in its lease giving Exxon the right to remove its property did not impose a duty to do so.

Landowners' Nonconstitutional Claims Against State in Riverbed Boundary Suit Barred by Sovereign Immunity

State v. Riemer, 94 S.W.3d 103 (Tex. App.--Amarillo 2002, no pet. h.), decided an interlocutory appeal in a suit originally filed by the State of Texas against Riemer in 1993 over possession of the surface of land alleged to be in the riverbed of the Canadian River and thus owned by the state. While the suit was pending, the supreme court's decision in *Brainard v. State*, 12 S.W.3d 6 (Tex. 1999), established that as a result of the construction of the Sanford Dam upriver, the state had lost title to a large amount of land adjacent to the river. Now with the upper hand under the *Brainard* precedent, the defendants counterclaimed for trespass on the mineral estates in the land the state had originally sued for, as well as additional land. After the state filed a nonsuit of its claims, other parties intervened with their own claims against the state with respect to other similarly situated land. After various amended pleadings, the claims against the state, primarily focused on the mineral estate, included actions for trespass, conversion, accounting, fraud, unjust enrichment, quiet title, and declaratory judgment regarding the correct boundary, as well as constitutional claims for taking of property for public use without compensation.

The state conceded that the doctrine of sovereign immunity should not shield it from an action for compensation under the Texas Constitution's takings clause, and the landowners had adequately pled claims for constitutional takings. The court agreed with the state, however, that sovereign immunity protected it against suit on all of the

other claims except those germane to the surface estate in the land on which the state had originally sued. Except for the constitutional takings claims, therefore, sovereign immunity barred Riemer's counterclaims concerning the mineral estate of all his land and both the surface and mineral estates of the land not involved in the state's original suit and all of the claims by the intervening landowners.

Texas Choice of Law Upheld in Anti-indemnity Statute Case

In *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163 (Tex. App.--Houston [14th Dist.] 2002, no pet. h.), a sharply divided court of appeals decided *en banc* that Texas law applied to the indemnity provisions of a drilling contract that included a Texas choice of law provision, even though the accidents giving rise to liability occurred in Louisiana.

Operator Chesapeake, an Oklahoma corporation, entered into a contract with drilling contractor Nabors, a Texas corporation, to drill a well in Louisiana. The contract, on a standard International Association of Drilling Contractors (IADC) form, included mutual indemnity provisions protecting each party against suits by the other's employees and subcontractors, regardless of fault, with the indemnity obligations backed by equal insurance. It included a provision that the contract would be governed and the parties' relations determined according to Texas law. Employees of two subcontractors hired by Chesapeake were injured in separate accidents during the drilling of the well and sued both Chesapeake and Nabors in Texas. Nabors sought indemnity against Chesapeake under the contract in both suits. One trial court applied Texas law and granted Nabors' indemnity claim; the other applied Louisiana law and denied it. The court of appeals consolidated the suits for appeal.

Texas and Louisiana both have oilfield anti-indemnity statutes, generally voiding contractual provisions of drilling contracts purporting to indemnify against the indemnitee's own negligence. The Texas statute excepts mutual indemnity provisions supported by liability insurance, but Louisiana's contains no similar exception. Whether the indemnity provisions of the Chesapeake-Nabors contract were enforceable therefore turned on which state's law applied.

Texas courts look to the *Restatement (Second) of Conflict of Laws* §§187 and 188 (1971), the court noted, in determining the law applicable to oilfield indemnity clauses. In a contract without an express choice of law, indemnity is governed, according to §188, by the law of the state that, with respect to that issue, has the most significant relationship to the transaction. In a contract with an express choice of law, under §187 the indemnity is governed by the law chosen by the parties unless (1) there is a state with a more significant relationship to the transaction (applying §188), *and* (2) applying the chosen law would contravene a fundamental policy of that state, *and* (3) that state has a materially greater stake in the determination of the particular issue.

The court first sought to determine the state that, with respect to the issue to be decided, had the most significant relationship to the transaction and to the parties, taking into account five contacts identified in *Restatement* §188(2): (1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties. Chesapeake argued that the first, second, and last of these were inconclusive, but the court observed that at least one of the parties was domiciled in Texas and negotiated and signed the contract there -- more than could be said for Louisiana -- and that the laws of Oklahoma, Chesapeake's domicile and place of contracting, would reach the same result as those of Texas. The place of performance, of paramount importance in the court's view, was, it said, more difficult to pin down. There are two possible meanings of "the place of performance": (1) where the drilling services were performed, and (2) where the indemnity obligation was performed (by defending against the injured employee's suit). Here, the court observed, the drilling took place in Louisiana, but the lawsuit took place in Texas. The proper analysis, the majority believed, was to consider which state's law had the most significant relationship to the particular substantive issue to be resolved, i.e., whether the indemnity clauses were enforceable. Nabors' claims were for liability and legal services incurred in Texas, not for drilling services performed in Louisiana, so that the place of performance of the indemnity obligation was Texas.

The court acknowledged that it must apply to the contacts identified in *Restatement* §188 the principles listed in *Restatement* §6: (1) the needs of the interstate and international systems, (2) the relevant policies of the forum, (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (4) the protection of justified expectations, (5) the basic policies underlying the particular field of law, (6) certainty, predictability, and uniformity of result, and (7) ease in the determination and application of the law to be applied. All of these principles pointed to Texas, the court held, emphasizing the strong Texas policy of parties' freedom to contract.

Even if Louisiana were determined to have the most significant relationship to the dispute, the court went on, the parties' choice of Texas law could be disregarded only if it contravened a fundamental policy of Louisiana and Louisiana had a materially greater interest in the determination of the indemnity issue than Texas. The state policies

addressed by the conflicting anti-indemnity statutes are the same, the court held -- limiting the abuse of indemnities-- although the approaches may differ and the two statutes may lead to different outcomes in particular cases. Further, according to the majority, Louisiana has no greater interest than Texas in policing the bargains made by the contracting companies. As the policy of both statutes is to regulate contractual negotiations, the interests of Texas and Oklahoma, where the contract was actually negotiated, are simply more significant than that of Louisiana, where there were no negotiations. For Louisiana to have a materially greater interest, there would have to be some connection between unfair bargaining, the policy concern of both statutes, and the location of the well; the court found none.

Three vigorous dissents, collectively longer than the majority opinion, which is not short, would have the court emphasize the place of performance of the contract as a whole, Louisiana, largely in the interest of certainty and the belief that the state in which the contract is performed has paramount interest in the enforcement of its own contract laws.

Overriding Royalty Applies to Renewals and Extensions Notwithstanding that Base Letter Agreement Had No Provision

EOG Resources, Inc. v. Hanson Production Co., 94 S.W.3d 697 (Tex. App.--San Antonio 2002, no pet. h.), decided the applicability of a reserved overriding royalty interest to new leases acquired after the expiration of those out of which the override was originally created.

A June 6, 1997, letter agreement between EOG and Hanson called for Hanson to assign six leases to EOG, delivering a net revenue interest of 75% and reserving the difference between 25% and any other lease burden as an overriding royalty. The parties then executed an assignment of the leases, which included the following overriding royalty reservation to Hanson:

Assignor [Hanson] reserves unto itself ... an overriding royalty equal to the difference between the aggregate of the basic royalties, overriding royalties and similar burdens chargeable to Assignor's leases existing on the effective date of this Assignment and twenty-five percent (25.00%). The overriding royalty reserved herein shall burden any extensions and renewals taken within one (1) year of termination of the subject leases;

94 S.W. 3d at 700. At EOG's request, the assignment included a provision making it subject to the unrecorded June 6, 1997, letter agreement.

After the assignment from Hanson to EOG, two of the six leases expired. EOG obtained new leases from the same landowners, at royalty rates of 1/4, increased from the 1/6 royalty under the Hanson leases. After EOG drilled a producing well, it disputed that Hanson was entitled to an overriding royalty interest under the new leases, both on the basis that the increased royalty must be deducted from the overriding royalty and on the basis that the overriding royalty did not apply to extensions and renewals.

EOG contended that the language of the assignment making it subject to the June 6, 1997, letter agreement meant that the letter agreement alone defined the scope of Hanson's override. The court disagreed, holding that the agreement of the parties was embodied in both the letter and the assignment. The assignment expressly provided that the overriding royalty would burden extensions and renewals. To solely consider the June 6, 1997, letter, which was silent on the issue, the court would be contradicting established contract interpretation principles requiring it to examine the entire agreement, give effect to every clause, and not render any clause meaningless. Under EOG's interpretation, the clause providing that Hanson's overriding royalty would burden extensions or renewals would be rendered meaningless. The court thus affirmed the trial court's determination that Hanson's original overriding royalty of 25% minus 16.666%, or 8-1/3%, would apply to the two new leases.

The court did not address the possible argument that the new leases, with a higher royalty rate, should not be regarded as "extensions" or "renewals" of the prior leases but seems to have assumed that they were.

Agreement for Gas Purchaser to Pay Share of Additional Royalties on Future Gas Production Held Not Applicable to Payment for Royalty Claim on Take-or-Pay Settlement

The court in *Moncrief v. ANR Pipeline Co.*, 95 S.W.3d 544 (Tex. App.--Houston [1st Dist.] 2003, pet. filed), considered the provisions of a 1989 agreement between members of the Moncrief family, as sellers of gas from the Madden Deep Field in Wyoming, and ANR, the gas purchaser. The agreement settled the Moncriefs' claims against ANR for breach of the take-or-pay provision of the gas purchase contract between them and reduced the price payable on future purchases. The settlement agreement required ANR to pay the Moncriefs \$80 million and provided that the Moncriefs were to be responsible for payment of any taxes, sums due, or other burdens of any kind

that may be claimed, on or by reason of any payment by ANR to the Moncriefs under the agreement, whether claimed by any public or governmental body or other entity entitled to production or payment for production. A separate document entered into as part of the settlement, called "Agreement on Future Royalties," provided that if the Moncriefs were required to pay "Additional Royalties," defined as the amount of royalty payments the Moncriefs were required to pay lessors on gas sold on or after June 1, 1989, over the amount the royalty payments would have been if computed on the price actually paid under the parties' renegotiated contract, ANR would reimburse the Moncriefs for 50%.

After the Moncrief-ANR settlement the Minerals Management Service (MMS), on behalf of the federal government as a principal royalty owner in the field, demanded \$6.5 million in royalty on the settlement payment, plus \$1.7 million in interest. The Moncriefs settled with MMS for \$1,711,788 and billed ANR for 50% of that amount, asserting that it constituted payment of "Additional Royalties." The court of appeals affirmed summary judgment in favor of ANR. The MMS payment was based entirely on the settlement payment, the court said, despite the MMS' having indicated in a letter to the Moncriefs that it was allocating a portion of the \$80 million settlement to gas produced after June 1, 1989. The funds paid could not have been attributed to any gas sold by the Moncriefs after June 1, 1989, the court held, so that the "Agreement on Future Royalties" did not apply.

The court's perfunctory decision in this case may be correct but is disappointing in that it fails to address directly, or even expose, the substance of the Moncriefs' real argument. The Moncrief-ANR agreement not only settled damages for breach of ANR's take-or-pay obligation but also significantly reduced the price to be paid by ANR for future purchases. Part of the cash sum paid by ANR certainly was allocable to the buydown of ANR's price obligation. The court chose to ignore the Moncriefs' legitimate argument, which is not unreasonable although it was evidently unpersuasive to the court, that its payment of part of the settlement sum to a royalty owner was referable to claims against future production.

Securities Act Gives Auction Buyer of Expired Working Interest Right to Rescind

A case with potentially far-reaching implications, *Geodyne Energy Income Production Partnership I-E v. Newton Corp.*, 97 S.W.3d 779 (Tex. App.--Dallas 2003, no pet. h.), applied the Texas Securities Act (TSA), Tex. Rev. Civ. Stat. Ann. arts. 581-1 to 581-43 (Vernon 1964 & Supp. 2003), to the sale, through a third-party auctioneer, of Geodyne's nonoperated working interest in an offshore oil and gas lease.

Geodyne owned a 10% working interest in the lease. Production from the only well on the lease permanently ceased on December 10, 1996. Although there evidently were some subsequent attempts to reestablish production, the lease had expired by its own terms. Geodyne nevertheless placed its interest in a lease auction held on December 10, 1997, and sold it to Newton for \$300. The sale documents included agreements that Geodyne had made no representations or warranties regarding oil and gas production, marketable title, condition, quantity, fitness for general or particular purpose, merchantability, accuracy of interest, or accuracy or completeness of any information or material supplied to Newton, and that Newton took the property "as is." A few months after the sale the well's operator completed its plugging at a cost of \$742,409.67. Geodyne and Newton both declined to pay, and the operator sued them. This appeal resulted from the dispute between Geodyne and Newton over which bore responsibility for 10% of the plugging cost.

The court of appeals decision focused on the jury's finding that Geodyne had violated the TSA. To recover under the TSA, the court noted, a buyer must prove a security was sold by means of (1) an untrue statement of material fact or (2) an omission to state a material fact that is necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading. An interest in an oil and gas lease is a security under the TSA. An omission or misrepresentation is material, according to the court in *Texas Capital Securities, Inc. v. Sandefer*, 58 S.W.3d 760, 776 (Tex. App.--Houston [1st Dist.] 2001, pet. denied), if there is a substantial likelihood that a reasonable investor would consider it important in deciding to invest.

Geodyne had represented it was selling a 10% working interest in the lease, the court said, but by the time of the sale there was no lease. (Presumably the representation consisted of the description of the interest in the transfer documents and in information made available to potential buyers before the auction; the court noted that Geodyne did not dispute that a misrepresentation was made prior to the sale.) Newton was unaware that the lease had expired, although it knew the well was not producing, and Geodyne was in possession of joint interest billings not provided Newton that would have informed a sophisticated oil and gas purchaser that there was a potential problem with the lease. This evidence was legally and factually sufficient, the court held, to support the jury's finding that Geodyne omitted a material fact necessary to make its statement that it owned a 10% interest in the lease not misleading. Newton could therefore rescind the purchase, as its remedy under the TSA, and escape the plugging liability.

What of Geodyne's broad disclaimer, accepted by Newton, that it made no representations or warranties with respect to, among other things, marketable title and accuracy of interest? The "as is" clause of its assignment,

Geodyne argued, conclusively negated the claim that it made any representations, much less misrepresentations, and that without representations there can be no omissions. A claim based on violation of the TSA cannot be waived, the court observed, absent actual or constructive knowledge of the matured claim. Tex. Rev. Civ. Stat. Ann. art. 581-33(L) (Vernon 1964 & Supp. 2003). Moreover, Newton was not required to show either that it relied on the misrepresentation or that the misrepresentation caused it injury. The mere showing of a material misrepresentation, as found by the jury, gave Newton the absolute right of rescission under state securities law.

Geodyne also disputed the jury's finding that it was a non-operator of the well at the time it was required to be plugged, giving rise to statutory plugging liability. An operator is required to plug a dry or inactive well within one year after drilling or operations cease, the court noted, under applicable Railroad Commission rules promulgated under Tex. Nat. Res. Code Ann. §89.001(a) (Vernon 2001 & Supp. 2003), and a nonoperator is liable for its proportionate share of plugging costs if it owned an interest at the time the well ceased operation. Tex. Nat. Res. Code Ann. §§89.002(a)(2), (3); 89.083(g) (Vernon 2001 & Supp. 2003). (The latter statute actually imposes liability on a nonoperator at the time the well "should have been plugged," rather than at the time the well ceased operation.) The well ceased to produce on December 10, 1996, requiring the operator to commence plugging by December 10, 1997. The one-year period after operations cease commences on the date a producing well ceases to produce, the court said; the word "operations" does not refer to mechanical operations that may have been conducted after cessation of production. Despite any efforts after December 10, 1996, to reestablish production, the date on which plugging was required was not extended beyond one year from the cessation of production. There was sufficient evidence to support the jury's finding that Geodyne was, during this period of time, a nonoperator with plugging liability.

If the court's analysis of the Texas Securities Act is accurate, it seems virtually impossible for the selling of an oil and gas property to describe the interest it offers in much detail and successfully disclaim the intent to represent the interest that will be conveyed. Where a seller is not entirely familiar with all aspects of the properties it desires to sell, as is often the case today, there arguably is no sure way to avoid the characterization of any information it provides about the property as a misrepresentation that might give the buyer the right to rescind the trade. Should sophisticated buyers and sellers not be entitled to agree that no information provided by the seller amounts to a representation of any interest?

Court Upholds Railroad Commission Denial of Permit to Produce from Reservoir Not in Communication with Those in Nearby Well

The Waskom (Cotton Valley) Field is composed not of a continuous reservoir but of multiple lenticular gas-bearing sands not in communication with each other. There were three potentially producible gas sands underlying the Seagull Energy E&P, Inc. Albert Davis lease, the "C," "Stroud," and "Taylor" sands, all within the Waskom (Cotton Valley) Field, whose Railroad Commission field rules prohibited wells less than 1320 feet apart on the same lease. Seagull's No. 1 well produced only from the C sand, and Seagull planned to drill another well, its No. 4, to produce from all three sands. Once drilled, however, the No. 4 well could produce from the Stroud and Taylor sands but not from the C sand. Seagull sought an exception from Railroad Commission spacing rules allowing it to reopen the No. 1 well, only 1,200 feet from the No. 4, for production from the C sand. The Texas Railroad Commission denied Seagull's application for a "Rule 37" exception, and the trial court upheld the denial. Seagull's appeal resulted in the decision in *Seagull Energy E&P, Inc. v. Railroad Commission*, 99 S.W.3d 232 (Tex. App.--Austin 2003, pet. filed).

Seagull maintained that the Railroad Commission was without statutory authority to disregard its property interest in the C sand by treating the three disconnected sands as a common reservoir for purposes of its spacing and density rules. The Commission's authority, it argued, rests on its ability to regulate each "field" or "common reservoir," the statutory definition of which is that of a "physically separate" accumulation of gas or oil. Seagull was able to cite case authority that the Commission may statutorily prorate and regulate gas only within each such common reservoir. In upholding the Commission's decision the court relied on subsequent statutory amendments. In 1979 the legislature added provisions allowing the Commission to permit commingled production from separate gas accumulations based on a finding that such production would prevent waste, promote conservation, or protect correlative rights. Then, in 1981, it enacted a provision that when the Commission permits production from non-connected gas deposits, it has the power to prorate, allocate, and regulate production from them as if they were a single common reservoir.

The Commission's permit allowing Seagull to drill its No. 4 well allowed commingled production, contemplating that the three reservoirs would be treated as a single administrative unit. Once it issued a permit for commingled gas production from separate reservoirs, the Commission acquired broad powers under the 1981 amendment to regulate gas production from the group of reservoirs as though they were a single common reservoir.

Those powers included the authority to restrict production from one of the two wells completed in the group of reservoirs.

Lessor Alleging Cessation of Production in Paying Quantities Must Meet Two-Prong Test

The opinion in *Dreher v. Cassidy Limited Partnership*, 99 S.W.3d 267 (Tex. App.--Eastland 2003, no pet. h.), revisits some well-worn pathways of oil and gas law, interpreting the habendum clause of a 1948 oil and gas lease. Typical of those in most oil and gas leases, the clause in question provided for the lease to extend for a specified primary term, here 10 years, and as long thereafter as oil, gas or other mineral is produced. The trial court granted summary judgment to the plaintiff lessor that the lease had terminated because of the absence of production in paying quantities, and the defendant lessee appealed.

The word "produced," noted the court, has been defined as requiring production in paying quantities. To prove that the lease had terminated because production in paying quantities had ceased, the lessor was required to meet a two-prong test. It had to prove (1) that the lease failed to yield a profit over a reasonable period of time, and (2) that a reasonably prudent operator would not have continued operation of the well under the circumstances. Here the lessor showed that the lease was not profitable for a period of eight months. It had produced no evidence to show why the eight months was a reasonable period of time, however, nor any evidence, such as expert evidence, that a reasonably prudent operator would have discontinued operation of the well under the circumstances. The lessor had therefore not established that production in paying quantities had ceased, and the court of appeals reversed the summary judgment.

Operating Agreement Held Implied Agreement Not to Partition

The court in *Dimock v. Kadane*, 100 S.W.3d 602 (Tex. App.--Eastland 2003, no pet. h.), considered the appeal of a summary judgment against Dimock denying partition of the working interest leasehold in a 320-acre producing tract. The jointly owned leasehold was subject to a 1973 exploration agreement providing for the drilling of certain test wells and a contemporaneous operating agreement, on a modified AAPL Form 610-1956. Neither agreement expressly prohibited partition among the working interest owners. Joint owners may agree not to exercise their statutory right to partition either expressly or impliedly, however, and the court examined several provisions of the operating agreement in an effort to ascertain the parties' intent.

The court first focused on Paragraph 10 of the operating agreement, providing that it would remain in effect as long as any of the oil and gas leases subjected to it continued in force, and Paragraph 12, the nonconsent provision. The provisions, considered together, implied an agreement not to partition, the court held. Paragraph 12 presupposed that a nonconsenting party owns an interest subject to transfer to the consenting parties during recoupment of the prescribed nonconsent penalties and would be rendered meaningless if a party were allowed to partition and destroy the joint ownership. Paragraphs 10 and 12 indicated a desire of the parties to retain the cotenancy and operational status during the entire life of the leases. The provisions for maintenance of uniform ownership in Paragraph 20, the opportunity of each party to participate in renewals and extensions under Paragraph 23, and the prohibition against surrender of leases by any party in Paragraph 24 further evidenced the parties' intent to maintain joint ownership. By partition, the court observed, a contracting party could frustrate or completely avoid responsibilities and rights under a contract to which it had agreed.

UTAH -- MINING

Daniel A. Jensen, Reporter

Utah Requires Reclamation Bonds for Small Mining and Exploration Operations

Effective May 5, 2003, Utah law requires small mining operations (less than five acres) to obtain a suitable reclamation surety from the Utah Division of Oil, Gas and Mining (DOGGM) prior to the commencement of mining and surface disturbing exploration activities. Previously, small mining operations and exploration activities disturbing less than five acres were exempt from reclamation bonding and only large mining operations (more than five acres of surface disturbance) were required to provide a reclamation bond. A relatively simple notice of intent, rather than an approved reclamation plan, is still allowed for small mining operations and exploration activities that will disturb less than five acres. The notice still does not require DOGM approval, but the amount and form of reclamation surety do require DOGM approval. If the operator fails to properly complete reclamation, the bond may be forfeited to pay for the cost of reclamation. These changes were created by S.B. 65, which amends portions of the Utah Mined Land Reclamation Act, Utah Code Ann. §§40-8-1 to 40-8-23.

WYOMING -- OIL & GAS

William N. Heiss, Reporter

Supreme Court Finds Ambiguous a Reservation of 3-1/8% of 8/8 Overriding Royalty

The Wyoming Supreme Court has departed from what is the practice of most title examiners in its holding in *Wadi Petroleum, Inc. v. Ultra Resources, Inc.*, 65 P.3d 703 (Wyo. 2003). Wadi's predecessor in interest, Hondo, reserved overriding royalties in federal leases of "3-1/8% of 8/8ths," without any reference to proportionate reduction. The reservations were contained in federal form assignments of record title made by Hondo at a time it owned a 20% leasehold interest. The assignments were made pursuant to a "more-or-less contemporaneous document" (1978 Agreement) that provided:

and reserving, however, unto Hondo, and El Paso does hereby, as may be necessary assign unto Hondo, an undivided 1/16th of 8/8ths overriding royalty interest as to [lands not at issue], ..., which overriding royalty shall not be proportionately reduced if El Paso owns less than the entire leasehold interest

El Paso hereby agrees ... and further acknowledges that Hondo shall by separate assignments transfer unto El Paso all of the record title of Hondo [to the subject lands and leases] reserving unto Hondo a 3-1/8% overriding royalty interest in addition to any existing leasehold burdens.

65 P.3d at 706.

The trial court found that the assignments reserving the overriding royalty were ambiguous as to the amount reserved. Based on extrinsic evidence including division orders signed by Hondo crediting it with a .625% overriding royalty, the court found in favor of the working interest owners, Ultra and Questar.

On appeal, the Wyoming Supreme Court upheld the trial court, finding that the "reservations of the overriding royalty interests were ambiguous due to a lack of clarity and incompleteness of expression." 65 P.3d at 710. The court relied upon and quoted extensively from Richard Hemingway's treatise on oil and gas law, including the following: "If it is the intent that a full 1/16 interest be created the clause should read, '1/16 of 8/8 of production,' or '1/16 of gross production.'" *Id.* at 709.

The court's legal basis for its decision is not particularly clear. Based on the language quoted from Hemingway, the omission of the words "of production" in this case apparently resulted in the ambiguity. The court stated it also relied on discussions in other treatises of proportionate reduction clauses in leases and in cases of mineral title failure, though it is not clear how these have much bearing on the issue in this case.

In an apparent response to Wadi's contention that the terms of the 1978 Agreement were merged into the assignments of record title, the court could not see how the doctrine of merger had any application, since the reservation in the actual assignment was found to be ambiguous.

Wadi also contended that Wyo. Stat. Ann. §30-5-305 (Michie) prevented the use of the division order to "alter or amend" the terms of a contractual agreement. The court stated that the division order was only used to assist the trial court in resolving the inherent ambiguity in the assignments.

This case does nothing to help Wyoming title examiners, most of whom do not imply proportionate reduction in the absence of language indicating reduction. A reservation of an overriding royalty of "3-1/8% of 8/8" in Wyoming is apparently ambiguous if the working interest owner owns less than the full working interest. Based on the language from Hemingway quoted by the court, it would appear such a reservation can be made unambiguous by adding "of production" or "of gross production."