



ROCKY MOUNTAIN MINERAL LAW FOUNDATION

# MINERAL LAW NEWSLETTER

PUBLISHED BY THE ROCKY MOUNTAIN MINERAL LAW FOUNDATION

Volume XXIII, Number 1, 2006

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## FEDERAL — MINING

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PATRICIA J. WINMILL  
— REPORTER —

### FOURTH CIRCUIT UPHOLDS NWP 21

A federal appellate court has reinstated the Army Corps of Engineers' (the Corps) streamlined permit process for mountaintop-removal coal mines in West Virginia. In *Ohio Valley Environmental Coalition v. Bulen*, 429 F.3d 493 (4th Cir. 2005), the U.S. Court of Appeals for the Fourth Circuit overruled a district court decision that had invalidated NWP 21, a nationwide permit issued by the Corps allowing the discharge of fill material associated with surface coal mining activities.

NWP 21 was issued under section 404(e) of the Clean Water Act (CWA), which permits the Corps to issue general, nationwide permits for classes of activities determined to have only "minimal adverse environmental effects." 33 U.S.C. § 1344(e)(1). Typically, once a category of activities receives a "nationwide permit," or "NWP," individual dischargers need not seek further approval from the Corps. Thus, an NWP provides a more streamlined permitting process than applies to individual permits issued under section 404(a) of the Act, which requires a notice and comment public process. 33 U.S.C. § 1344(e)(2). Unlike other nationwide permits, however, NWP 21 requires mining companies to submit a mitigation plan to the Corps for each fill project, and receive written authorization from the Corps before depositing any fill material from their mountaintop mining activities.

The district court found that NWP 21 "does not comply with the plain language, structure, and legislative history of the Clean Water Act." *Ohio Valley Environmental Coalition v. Bulen*, No. A.3:03-2281, 2004 WL 1576726 at \*1 (S.D.W.Va. July 8, 2004), but the appellate court disagreed on every point. The Fourth Circuit held that NWP 21 represents a reasonable interpretation of the CWA and that, under the *Chevron* doctrine, it must defer to the Corps's interpretation and uphold the permit. 429 F.3d at 497-98.

The district court had concluded that NWP 21 violated the CWA because it did not define in advance a category of activities that would have only minimal adverse environmental effects. The lower court found that NWP 21 impermissibly defines the category, not by substantive standards, but rather with a procedure, i.e., the category includes only those activities determined, on a case-by-case, post hoc basis, to have only minimal effects. 2004 WL 1576726 at \*13. The appellate court dismissed this reason-

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ROBERT C. MATHES  
— REPORTER —

### NEW WILDERNESS AREAS AND WILD AND SCENIC RIVER DESIGNATIONS

To date, the 109th Congress has created two new wilderness areas. The Ojito Wilderness Area in New Mexico is comprised of approximately 11,183 acres and was created on October 26, 2005. Ojito Wilderness Act, Pub. L. No. 109-94, 119 Stat. 2106 (2005). In addition to creating the new wilderness area and "grandfathering" several existing uses of the area, the Ojito Wilderness Act releases certain lands surrounding the newly created Ojito Wilderness Area after determining that the lands have been adequately studied for wilderness designation pursuant to section 603 of the Federal Land Policy and Management Act of 1976. As such, the released lands are no longer subject to the requirements of section 603(c) of the Act pertaining to the management of wilderness study areas in a manner that does not impair the suitability of such areas for preservation as wilderness.

The 109th Congress also created a new wilderness area within Puerto Rico, the El Toro Wilderness Area. The El Toro Wilderness Area is comprised of approximately 10,000 acres of land within the Caribbean National Forest/Luquillo Experimental Forest in the Commonwealth of Puerto Rico. Caribbean National Forest Act of 2005, Pub. L. No. 109-118, 119 Stat. 2527 (2005).

Finally, Congress added an approximately 20-mile segment of the White Salmon River and Cascade Creek to the list of wild and scenic rivers. The streams are located in the State of Washington downstream of the Mount Adams Wilderness boundary within the Gifford Pinchot National Forest. *See* Upper White Salmon Wild and Scenic Rivers Act, Pub. L. No. 109-44, 119 Stat. 443 (2005).

### CONGRESS EXTENDS THE PITTMAN-ROBERTSON WILDLIFE RESTORATION ACT

On September 29, 2005, Congress extended by 10 years the date after which surplus funds in the wildlife restoration fund become available for apportionment under the Pittman-Robertson Act. Previously, the funds were to become available in 2006, but under the new law the funds will not be available for apportion

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ing, concluding that nothing in the CWA prohibits the Corps from defining a category by a procedure, rather than a set of substantive standards. 429 F.3d at 498.

The appellate court also rejected the lower court's holding that NWP 21, which "provides for a *post hoc*, case-by-case evaluation of environmental impact," violates section 404(e), because the statute "unambiguously requires determination of minimal impact before, not after, the issuance of a nation wide permit." 2004 WL 1576726 at \*13. The Fourth Circuit dismissed the reasoning, observing that the Corps did make extensive "minimal-impact determinations" before issuance of NWP 21. 429 F.3d at 499-500. The higher court concluded that nothing in the CWA precludes the Corps from making its initial impact determinations, relying in part on the fact that "its post-issuance procedures will ensure that the authorized projects will have only minimal impacts." *Id.* at 501. The court cautioned, however, that it was not suggesting that impact determinations under section 404(e) could be based solely on post-issuance reviews. Instead, it only endorsed what it characterized as a "comprehensive, pre-issuance review" that relied in part on the fact that a post-issuance procedure would ensure that the permitted activities would have only minimal impact. *Id.* at 502.

The appellate court also readily rejected the district court's conclusion that the structure of section 404, which contains separate provisions for individual permits and general permits, does not allow the Corps to create a general permit that requires individualized approval. The Fourth Circuit simply observed that because nothing in the statute requires that conclusion, the Corps's contrary interpretation will be upheld. *Id.* at 503.

Finally, the Fourth Circuit concluded that the district court was wrong in concluding that NWP 21 impermissibly allows the Corps to issue individual authorizations without public notice and comment. The appellate court concluded that the notice and public hearing procedures that preceded the issuance of the nationwide permit was all that the statute requires. In the court's view, the CWA requirement that notice and a hearing precede issuance of an individual permit does not suggest that similar requirements apply when authorizations are given under a nationwide permit. *Id.* at 503.

#### PERMITTEES ARE PARTIES IN IBLA APPEALS OF CITIZENS' COMPLAINTS UNDER SMCRA

In *Richard S. & Cathy L. Maddock (On Reconsideration)*, 167 IBLA 200, GFS(MIN) 39(2005), the Interior Board of Land Appeals (IBLA) concluded that the Department of the Interior's regulations give permittees under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328, status as parties in appeals from decisions made by the Office of Surface Mining (OSM) arising out of citizens' complaints.

Under SMCRA, anyone who is adversely affected by a surface coal mining operation may notify OSM of his or her reason to believe a violation of SMCRA exists. 30 U.S.C. § 1267(h)(1). If OSM concludes that there is reason to believe a violation exists,

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The Mineral Law Newsletter is compiled by Professors John S. Lowe and Mark S. Squillace, and edited jointly with the Rocky Mountain Mineral Law Foundation. The Newsletter is distributed on a paid circulation basis, four issues per year; 2006 price (4 issues and permanent storage binder) is \$72.00. Copyright ©2006, Rocky Mountain Mineral Law Foundation, Westminster, Colorado.

it must order an immediate inspection of the operation. *Id.* § 1271(a)(1). *Maddock* arose out of a citizen complaint alleging that the operator's borehole drilling contaminated a nearby drinking water supply. 167 IBLA at 201. The state SMCRA authority ruled that there was no reason to believe a violation had occurred, and in the appeal of that ruling OSM upheld the decision. *Id.* The matter was appealed to the IBLA, but the permittee was not made a party to the appeal. Upon review of OSM's decision, IBLA

initially reversed, concluding that OSM erred in determining that there was no reason to believe a violation existed. *Id.* at 202. The effect of the reversal was to require an inspection of the operation. OSM then filed a Motion for Reconsideration, asking the Board to rule that because the permittee should have been made a party to the case, the order should be vacated and an opportunity given the operator to be heard on the matter. *Id.* IBLA agreed and vacated its prior order. *Id.* at 211.

The majority opinion distinguished *Dixie Fuels Co.*, 132 IBLA 331, GFS(MIN) 29(1995), a prior IBLA decision that had reached a contrary result, reasoning that the case was decided under a different regulatory scheme. 167 IBLA at 206-08. The Board observed that under the current version of 43 C.F.R. § 4.1105(a)(5) a permittee is deemed to be a statutory party in any appeal from an OSM decision issued in response to a citizen complaint made under 30 C.F.R. § 842.15(d). Furthermore, the Board reasoned that 43 C.F.R. § 4.1109(a)(1) requires all statutory parties to be served with the documents initiating an IBLA appeal. Based on these regulations, the majority concluded that its prior order requiring an inspection of the permittee's operation must be vacated to allow the permittee to participate in the appeal. *Id.* at 211.

Judge Hemmer dissented from the *Maddock* decision, arguing that allowing a permittee to participate in the appeal of a citizen's request for inspection is contrary to SMCRA's citizen's complaint provisions. The dissent argued that under SMCRA a permittee is subject to inspection without notice and that the statutory scheme allowing citizens to request the agency to consider whether an inspection should be made provides no role for the permittee to play. In Judge Hemmer's view, the permittee acquires the right to participate only when an inspection leads to enforcement action. *Id.* at 214-17. The dissent also objected to the majority's conclusion that 43 C.F.R. §§ 4.1105(a)(5) and 4.1109(a)(1) require a different result. Characterizing the regulations as merely a "service rule," Judge Hemmer reasoned that while the regulations might require that notice of the appeal be given to the permittee, they do not give the permittee the right to participate in the appeal. *Id.* at 218-19. In any event, in the dissenting judge's view, the regulations cannot be construed as conferring participation rights, because to do so would contravene SMCRA. *Id.* at 222. In sum, the dissent concluded that the majority's decision improperly allows a permittee to inject itself into the citizen's complaint process, converting the protective process intended by SMCRA into "litigation between the mining company and the citizen." *Id.* at 225.

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ment until 2016. Pub. L. No. 109-75, 119 Stat. 2034 (2005), 16 U.S.C. § 669b(b)(2)(C).

### FOREST SERVICE ISSUES NEW PLANNING DIRECTIVES

On January 31, 2006, the U.S. Forest Service issued 10 final directives to Forest Service Manuals 1900 and 1920 and Forest Service Handbook 1909.12, Chapters Zero Code, 10, 20, 30, 40, 50, 60, and 80. The directives establish procedures and responsibilities for implementing national forest land management planning regulations at 36 C.F.R. part 219, subpart A, published in the *Federal Register* on January 5, 2005. The directives are intended to provide overall guidance to the Forest Service line officers and employees in developing, amending, or revising land management plans for units of the National Forest System. 71 Fed. Reg. 5124 (Jan. 31, 2006).

On January 5, 2005, the Department of Agriculture adopted final planning regulations for the National Forest System at 36 C.F.R. part 219. The 2005 Planning Rules provide broad programmatic direction for developing land management planning. The new Forest Service planning regulations mark a departure from the planning regulations previously in effect. *See* Vol. XXII, No. 1 (2005), and Vol. XXI, No. 4 (2004), of this *Newsletter* for a discussion of the history of the Forest Service planning rules and regulations.

The new planning directives cover a wide variety of subjects from the development of land management plans, the adaptive planning process, public participation and collaboration during the planning process, the role of science and sustainability, the new objection process for future plans, forest vegetation resource planning, and wild and scenic river evaluation. The new permanent directives replace the interim directives issued by the Forest Service. *See* 70 Fed. Reg. 14,637 (Mar. 23, 2005). Although the new directives replace the majority of the interim directives, the Forest Service indicates that it will separately issue new directives regarding wilderness evaluation. 71 Fed. Reg. 5124 (Jan. 31, 2006). The Forest Service will also separately issue new directives regarding the use of environmental management systems. As reported in Vol. XXII, No. 1 (2005), of this *Newsletter*, the Forest Service has replaced the requirement to prepare an EIS with a new forest plan with a requirement to prepare an environmental management system. Copies of the new Forest Service directives are available at the Forest Service website: [www.fs.fed.us/publications](http://www.fs.fed.us/publications).

**EDITOR'S NOTE ON UNPUBLISHED OPINIONS:** This *Newsletter* sometimes contains reports on unpublished court opinions that we think may be of interest to our readers. Readers are cautioned that many jurisdictions prohibit the citation of unpublished opinions. Readers are advised to consult the rules of all pertinent jurisdictions regarding this matter.

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RANDALL E. HUBBARD  
— REPORTER —

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#### MINING CLAIM FEES REINSTATED

On December 8, 2004, President Bush signed into law the Department of the Interior and Related Agencies Appropriations Act, 2005, as part of the Consolidated Appropriations Act, 2005. Pub. L. No. 108-447, 118 Stat. 2809 (2005). That law suspended the increases in mining claim location and maintenance fees that had been adopted by the Bureau of Land Management (BLM) pursuant to regulations issued on July 1, 2004. 69 Fed. Reg. 40,294 (July 1, 2004). Those regulations had raised the claim location fee from \$25 to \$30, and raised the annual claim maintenance fee from \$100 to \$125, effective on June 30, 2004. The 2005 appropriations act included language that prohibited the Department of the Interior from increasing the mining claim location and maintenance fees until the Departments of the Interior and Agriculture:

- (b) establish[ed] a nationwide tracking system to determine and address the length of time from submission of a plan of operations to mine on public lands to final approval of such submission; and
- (c) Within 1 year of enactment, . . . file[d] a detailed report with the House and Senate Committees on Appropriations and the Committee on Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate providing detailed information on the length of time it takes the Department to approve mining plans of operations and recommending steps to reduce current delays.

Pub. L. No. 108-447, § 120(b) & (c) (2005).

On June 30, 2005, the Department of the Interior announced that the conditions set forth in the 2005 Appropriations bill had been satisfied and accordingly, the increased fees (\$30 per claim for claim location and \$125 per claim for annual maintenance) were reinstated for all mining claims and sites filed with the BLM on or after June 30, 2005. 70 Fed. Reg. 38,192 (July 1, 2005).

#### OTHER NEW MINING CLAIM FEES

On October 7, 2005, the Department of the Interior issued final regulations increasing certain fees and imposing new fees to cover BLM's costs of processing documents relating to its minerals programs. 70 Fed. Reg. 58,854 (Oct. 7, 2005). Those regulations became effective on November 7, 2005. *Id.* New fees for unpatented mining claims, millsites, and tunnel sites include:

Filing notice of location with BLM	\$15
Filing amended notice of location with BLM	\$10
Filing notice of transfer of interest with BLM	\$10
Filing of annual FLPMA filing with BLM	\$10

70 Fed. Reg. at 58,873; see 43 C.F.R. § 3000.12. As a result of the new regulations, the total fee for filing a location certificate

for a new mining claim or site location with the BLM is now \$170 (\$30 location fee, \$125 initial claim maintenance fee, and \$15 service charge).

#### INTERIOR SOLICITOR RESCINDS LESHY OPINION ON ANCILLARY USES; ISSUES NEW OPINION ON DETERMINING THE VALIDITY OF MINING CLAIMS IN APPROVING MINING PLANS

On November 14, 2005, Interior Solicitor Sue Ellen Wooldridge issued two opinions pertaining to the uses that mining claimants may make of their mining claims. The first of those opinions rescinded in its entirety a January 18, 2001, Solicitor's Opinion authored by then-Solicitor John Leshy, *Use of Mining Claims for Purposes Ancillary to Mineral Extraction*, M-37004 (Jan. 18, 2001). *Rescission of 2001 Ancillary Use Opinion*, M-37011 (Nov. 14, 2005). The Leshy opinion had found "that the Mining Law does not prohibit altogether the use of mining claims for ancillary operations. In some circumstances, however, this type of use can call into question the validity of the mining claims so used, by suggesting that they are not supported by the discovery of a valuable mineral deposit."

The second opinion, *Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operations*, M-37012 (Nov. 14, 2005), concluded that, although the Department of the Interior may determine claim validity at any time until a patent is issued, it is under no legal obligation to determine mining claim or millsite validity before approving a proposed plan of operations to explore for or develop minerals on lands open to operations under the General Mining Laws, except where the lands on which operations are proposed to be conducted have been withdrawn from mineral entry.

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ROBERT C. MATHES  
— REPORTER —

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#### MMS ISSUES NEW SUSPENSION OF OPERATIONS REGULATIONS FOR ULTRA-DEEP DRILLING

On December 16, 2005, the Minerals Management Service (MMS) modified its regulations governing Suspensions of Operations (SOO) for oil and gas leases on the Outer Continental Shelf. The revision allows the MMS to grant an SOO to a lessee or operator in order to encourage the drilling of ultra-deep wells, defined in the regulations as wells below 25,000 feet true vertical depth below the datum at mean sea level. The MMS made this revision because of the "added complexity and costs associated with planning and drilling an ultra-deep well. MMS expects that this revision will lead to increased drilling of ultra-deep wells and increased domestic production." 70 Fed. Reg. 74,659 (Dec. 16, 2005) (to be codified at 30 C.F.R. § 250.175). The current regulations allow the lessee or operator to request an SOO if (1) by the end of the third year of the primary term, geophysical information was gathered that indicated the presence of a salt sheet; (2) all or

a portion of the hydrocarbon-bearing formation may lie beneath or adjacent to the salt sheet; and (3) the salt sheet interferes with identifying the potential hydrocarbon-bearing formation. The new regulations became effective on January 17, 2006.

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## ALASKA — MINING

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J.P. TANGEN  
— REPORTER —

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### **COURT UPHOLDS DISSOLUTION OF MINING PARTNERSHIP FOLLOWING BANKRUPTCY**

At issue in *Hall v. TWS, Inc.*, 113 P.3d 1207 (Alaska 2005), was the ownership of mining claims following bankruptcy. In 1990, Hall and Moore acquired 35 mining claims as partners. Moore then borrowed more than \$50,000 from Cook. In 1993, Hall filed for bankruptcy. In 1996, Cook obtained a judgment against Moore and assigned it to TWS. During an attempt by TWS to collect on the judgment, Hall testified that, following the dissolution of the partnership precipitated by the filing of his bankruptcy, a new partnership was formed to hold the claims. The superior court held that the partnership was dissolved by the bankruptcy, that no new partnership was formed subsequent to the bankruptcy, that the claims were held by Hall and Moore as tenants in common, and that TWS could foreclose on Moore's half interest.

Upon review, the Alaska Supreme Court ruled that whether Hall and Moore owned the Marshall Dome claims as tenants in partnership or tenants in common affects whether and how TWS can reach the claims to satisfy its judgment against Moore. . . . [I]f the claims are held as tenants in partnership TWS could only foreclose on Moore's interest in the partnership . . . [and] could reach the mining claims only if it requested a judicial decree of dissolution. . . . But if Hall and Moore purchased the claims as tenants in common, or if the partnership dissolved in 1993 when Hall filed for bankruptcy . . . TWS could foreclose directly on Moore's interest in the underlying claims.

113 P.3d at 1210.

The court found that Hall and Moore did form a partnership when they purchased the claims, even though it was an oral partnership that was not supported by a letterhead, a phone number, a bank account, a tax identification number, or federal tax returns. The court further found that the partnership was dissolved by force of law when Hall filed for bankruptcy and that no new partnership was thereafter created. Accordingly, the decision of the superior court was upheld and TWS was authorized to foreclose directly against Moore's interest in the Marshall Dome claims.

### **STAY IN BANKRUPTCY WILL NOT BE EFFECTIVE AGAINST NON-DEBTOR DEFENDANT IN THE ABSENCE OF UNUSUAL CIRCUMSTANCES**

The case of *Morris v. Rowallan Alaska, Inc.*, 121 P.3d 159 (Alaska 2005) also involved a bankruptcy proceeding. Morris

filed a complaint against McDonald/Gold Hill Mining Co. and Ascension, LLC for, *inter alia*, breach of a contract under which Morris would permit tailings and overburden to be deposited on his claims in exchange for drilling services and for help in obtaining permits and approval of a reclamation plan. In July 2003, Gold Hill and Ascension filed for bankruptcy. Thereafter, McDonald moved for summary judgment against Morris contending that she acted only in a representative capacity for Gold Hill and that no personal claims against her had been asserted in the complaint. Morris defended by stating that the bankruptcy filing acted as a stay against McDonald's proceeding in the superior court. The superior court granted summary judgment without discussion. The Alaska Supreme Court reviewed the matter *de novo*.

The supreme court ruled that the stay did not reach McDonald because she was not a debtor in the bankruptcy filing. Despite the evidence that McDonald acquired the claims as "Annette R. McDonald et. al., D. B. A. Gold Hill Mining Company" and the subsequent conveyance of the claims to Ascension, LLC by "Annette R. McDonald," the supreme court determined that there was not a sufficient identity of interest between McDonald and Gold Hill to trigger 11 U.S.C. § 362(a)(1), which provides that the filing of a bankruptcy petition stays actions or proceedings "against the debtor."

The court found that § 362(a)(1) applies narrowly to the debtor and not co-defendants except in "unusual circumstances," such as when the debtor and the non-debtor are so bound by statute or contract that the liability of the non-debtor is imputed to the debtor by operation of law. The court further found that there was no allegation in the briefing or suggestion in the record that the relationship between Gold Hill/Ascension and McDonald was one of absolute indemnification. The court went on to reverse McDonald's summary judgment against Morris because she had failed to establish that there were no genuine issues of material fact raised by the pleadings and because it remained unresolved whether she acted solely in a representative capacity for Gold Hill.

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## ALASKA — OIL & GAS

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RANDAL G. BUCKENDORF  
— REPORTER —

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### **COURT UPHOLDS ORDER FINDING TRANS-ALASKA PIPELINE SYSTEM INTRASTATE RATES NOT "JUST AND REASONABLE"**

On January 18, 2006, in an unpublished decision, the Alaska Superior Court upheld the November 2002 Order No. 151 in Docket P-97-4 by the Regulatory Commission of Alaska (RCA) which concluded that the 1997–2000 intrastate rates on the 800-mile Trans-Alaska Pipeline System (TAPS) were not "just and reasonable" and were "excessive" under Alaska Stat. §§ 42.06.140 and .410(a) of the Alaska Pipeline Act. Decision and Order, Case No. 3AN-02-13511 CI. According to the superior court, what the RCA did in Docket P-97-4 was to fully litigate the intrastate rates on TAPS for the first time 26 years into the life of the pipeline, rather than allow the owners of the line to continue to base their rates on a settlement agreement. In its lengthy 51-page decision,

the court endorsed every aspect of the more than 200 pages of Order No. 151 that had been appealed by the TAPS owners and the State of Alaska, including an endorsement of the RCA's own imposed ratemaking formula, which was based on straight-line depreciation of the TAPS assets, rather than a continuation of the accelerated depreciation schedule that had been used in the 1986 Settlement Agreement between the TAPS owners and the State of Alaska.

The case originated from a 1997 protest by the state's two in-state refiners: Tesoro Alaska Co. and Williams Alaska Petroleum Inc. The RCA and its predecessor agency, the Alaska Public Utilities Commission, held a series of lengthy administrative proceedings and five years after the initial challenge issued its decision. Although the Order only covered the years 1997–2000 (the years that were officially adjudicated before the RCA) the Order essentially applies to all intrastate rates from this point forward. The TAPS owners appealed the RCA Order and sought a stay of the more than \$100 million of RCA ordered refunds. The TAPS owners are expected to appeal the Alaska Superior Court decision to the Alaska Supreme Court.

The same parties also are now involved in litigation in Washington, D.C., before the Federal Energy Regulatory Commission on the 2005 and 2006 interstate rates on TAPS. A hearing is currently scheduled to begin in late 2006.

#### **DNR GRANTS ROYALTY MODIFICATION REQUEST**

On February 1, 2006, the Alaska Department of Natural Resources (DNR) granted Pioneer Natural Resources Alaska, Inc. (Pioneer) a royalty modification request under Alaska Stat. § 38.05.180(j) for nine state leases that make up the Oooguruk (bearded seal) field offshore Alaska's North Slope. Four of the leases were issued August 1, 1983, with a primary term of 10 years, a 12.5% fixed royalty rate, and a 30% net profit share for the state. Prior to expiration of each of these leases, prior owners of the leases drilled on each lease and the wells were certified as capable of producing in paying quantities, thereby extending the leases' primary terms indefinitely. The other five leases were issued August 1, 2002, with a 16.66667% fixed royalty and a seven-year primary term. All of the leases are committed to the Oooguruk unit.

Numerous assignments of the working and royalty interest shares have occurred over the years, with 70% of the working interest currently held by Pioneer and 30% held by ENI Petroleum Exploration Co., Inc. (ENI). The leases in the unit are subject to a farm-in agreement with ConocoPhillips Alaska Inc., the successor company to ARCO Alaska, Inc., one of the companies that drilled several of the initial wells to hold the early leases.

Alaska Stat. § 38.05.180(j)(1)(A) provides the DNR Commissioner the authority to grant a modification of royalty to unitized or individual leases. Alaska Stat. § 38.05.180(j)(2) provides that the Commissioner may not grant a royalty modification unless the lessee or lessees requesting the royalty modification make a clear and convincing showing that

- (1) those leases are subject to a drilling agreement or operating agreement under a cooperative unit plan of development or operation;

- (2) the oil or gas field or pool has been sufficiently delineated to the satisfaction of the Commissioner;
- (3) the field or pool has not previously produced oil or gas for sale;
- (4) oil or gas production from the field or pool would not otherwise be economically feasible; and
- (5) a modification of royalty is determined to be in the best interests of the state.

The DNR determined that Pioneer's application made a clear and convincing showing that it met each of these requirements and that the royalty terms should be modified. By its decision, DNR cut the royalty to 5% until the leases reach payout, at which time the rate will increase at 1.875% per year with a cap of 12.5%. The state kept the net profit share as it applied to certain leases at 30%. The approval is projected to decrease the state's overall revenue by \$68 million over the life of the project. DNR, however, felt that Pioneer made it clear that the Oooguruk was a "stressed" project that would not be economically feasible unless it paid the state a smaller royalty and that the state would still collect an estimated \$160 million in royalties and taxes over the field's life.

The same day as the DNR decision, Pioneer also received its final permits for the Oooguruk project and has since started construction of the offshore gravel island facility. With Oooguruk, Pioneer will be the first independent oil and gas company to produce crude oil on the Alaskan North Slope. All of the other currently producing fields are operated by either BP Exploration (Alaska) Inc. or ConocoPhillips Alaska, Inc.

Kerr-McGee also has a similarly situated offshore oil find in the same vicinity as Oooguruk that it wants to develop and has asked for a deal similar to Pioneer's. DNR has not yet issued a proposed finding on this application.

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## ARKANSAS — OIL & GAS

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THOMAS A. DAILY  
— REPORTER —

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#### **ARKANSAS LEGISLATION CREATES ABANDONED AND ORPHANED WELL PLUGGING FUND**

The 2005 Arkansas General Assembly enacted Acts 1265, 1266, and 1267 which create and provide funding for a fund to be known as the Abandoned and Orphaned Well Plugging Fund. The Arkansas Oil and Gas Commission is authorized to levy annual assessments for this fund upon operators of wells producing liquid hydrocarbons and to also deposit therein any forfeited plugging and restoration bonds. The Commission will then use the fund, at Commission discretion, to plug any abandoned wells under circumstances where the person or persons liable for plugging cannot be compelled to do so. The initial assessment levied by the Commission is as follows: 1-5 wells, \$100 per well; 6-15 wells, \$750; 16-50 wells, \$1,250; 51-150 wells, \$2,000; 151-300 wells, \$3,000; 301 or more wells, \$4,000.

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## CALIFORNIA — MINING

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PATRICK G. MITCHELL  
G. BRAIDEN CHADWICK  
— REPORTERS —

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### COURT REJECTS INCIDENTAL TAKE PERMITS ISSUED PRIOR TO LISTING A SPECIES

On December 12, 2005, California's First Appellate District Court handed down its decision in *Environmental Protection Information Center v. California Department of Forestry and Fire Protection*, 134 Cal. App. 4th 1093, 37 Cal. Rptr. 3d 31 (Cal. Ct. App. 2005). The court held that the California Department of Fish and Game (DFG) exceeded its authority in granting an incidental take "permit-in-advance" for species not yet listed as endangered or threatened. The import of this decision is enormous, given the fact that many developers and mining projects, in reliance on the incidental take permits, have implemented mitigation measures that would not otherwise be required, seeking to anticipate future listed species and avoid surprises that could impact the future use of the land. The validity of these previously issued permits remains in doubt, as the developers and mining companies brace for the potential onslaught of litigation challenging the permits and/or unilateral changes to the permits by DFG. Such unilateral changes are expressly authorized by DFG regulations. See Cal. Code Regs. tit. 14, § 783.6(c)(2).

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## NEBRASKA — OIL & GAS

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ANNETTE M. KOVAR  
— REPORTER —

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### RENEWABLE FUELS GET A BOOST

Reducing reliance on foreign oil and reducing emissions of global warming pollutants and other forms of air pollution are just two reasons frequently given for developing renewable sources of energy, including ethanol and other biofuels. Many states, including Nebraska, have promoted production of ethanol and other biofuels for several years.

The cause for renewable fuels got a further boost last year when Congress enacted, and President Bush signed into law, the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005). This act amended the Clean Air Act, adding a new section 211(o), establishing a national renewable fuel program, commonly known as the Renewable Fuel Standard (RFS) program. This program sets a renewable fuels standard that requires the volume of renewable fuels blended into gasoline sold or dispensed to consumers in the United States to increase from 4 billion gallons in 2006 to 7.5 billion gallons by 2012. Congress set a default standard in the act that requires 2.78% of gasoline to be renewable fuel.

The act requires the U.S. Environmental Protection Agency (EPA) to adopt implementing regulations and a credit trading program for renewable fuel usage. EPA adopted a limited set of

regulations for the default standard for 2006. 70 Fed. Reg. 77,325 (Dec. 30, 2005). EPA concluded that the industry (those involved with the production, distribution, and sale of gasoline or renewable fuels, such as ethanol and biodiesel) would be able on a national basis to collectively meet or exceed the default standard for 2006 without any added requirements by the agency. In the future, EPA will be issuing comprehensive regulations to implement the full program.

There is still considerable debate about whether on balance producing ethanol and other biofuels consumes more energy than it generates as fuel. Whether ethanol and biofuels will make more than a marginal improvement in energy supplies is still an open question. While renewable fuels may make gasoline a less polluting means of transportation, it may not make up for increases in air pollution in areas where the ethanol and biofuels are produced.

In 2003, Nebraska had seven ethanol plants. As of the date of this report, Nebraska has 12 operating plants, with 18 more in various stages of construction and permitting.

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## OKLAHOMA — OIL & GAS

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JAMES C. T. HARDWICK  
— REPORTER —

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### ATTORNEYS' FEES AND COSTS RECOVERABLE BY SUCCESSFUL PARTY UNDER PRODUCTION REVENUE STANDARDS ACT

*Newfield Exploration Mid-Continent Inc. v. El Paso Natural Gas Co.*, No. 100,699 (Okla. Civ. App. Sept. 30, 2005) (not released for publication), was a suit over whether successors in interest to El Paso Natural Gas were entitled to recover attorneys' fees and costs following summary judgment in their favor. Under a May 1957 Exchange Agreement between Phillips Petroleum and El Paso, El Paso was entitled to gas recovered from oil wells drilled by El Paso, and Phillips was entitled to oil recovered after a well's payout. Phillips claimed that, for the period 1957 to 1999, El Paso had failed to pay Phillips for oil sold. Phillips labeled its claims as claims for conversion and an accounting, and the parties stipulated that those were the only claims made. As a consequence, Phillips denied that El Paso was entitled to recover attorneys' fees and costs since its claims were tort claims and not contract claims or claims under the Production Revenue Standards Act (PRSA). However, the principal amount sought by Phillips was \$27 million, and total damages sought were \$555 million, the larger sum being attained by the addition of 12% compounded interest. The court noted that the PRSA was the only basis for a claim for 12% compound interest and that Phillips had specifically relied on the PRSA's 12% compounded interest rate applicable to late payment of production proceeds. The court, thus, reasoned that notwithstanding that Phillips had labeled its claims as conversion and accounting, it litigated its claims under the PRSA and, by so doing, brought its claims under that statute. As a consequence, Phillips was bound by the PRSA provisions entitling the prevailing party to recover costs of suit, including reasonable attorneys' fees and expert witness fees. However, the court did find that certain copy costs and costs for file folders,

binders, index tabs, and other office supplies were not properly awarded as costs, but were part of the general costs of running successful counsel's law firm.

#### **ACTIONS TO AVOID ELECTION TO PARTICIPATE AND PAYMENT OF WELL COSTS NOT PERMITTED**

*Harding & Shelton, Inc. (H&S) v. Prospective Investment & Trading Co., Ltd. (PITCO)*, 123 P.3d 56 (Okla. Civ. App. 2005) was a dispute over whether PITCO was required to pay certain costs in connection with the workover of a well in which it had initially sought to participate and later sought to undo its election to participate. PITCO acquired an interest in the Metzler leases and the Metzler #1-13 well in 1996. The Metzler well ceased producing in 1997. H&S became operator in January 1999, and in late March of 1999, Consolidated American Resources, L.L.C. purchased top leases on the underlying minerals. The mineral owners, with H&S' backing, filed a lawsuit (Lawsuit #1) against PITCO to have the base leases declared terminated for lack of production. While this lawsuit was pending, Consolidated filed a pooling application with the Corporation Commission to conduct a workover operation on the Metzler well. While both the Commission proceeding and Lawsuit #1 were pending, PITCO filed another lawsuit (Lawsuit #2) to force H&S to offer it an interest in the top leases on the basis that they were renewals of the base leases. The Commission entered a pooling order in February 2001 for the deepening and recompletion of the Metzler well, naming H&S as operator. That order did not address the uncertain status of PITCO's interest. PITCO subsequently filed a motion to reopen and correct the pooling order to allow it to participate in the recompletion of formations already open, but not in the deepening of the Metzler well. PITCO later withdrew its request when it reached a letter agreement with H&S allowing PITCO to defer prepayment until H&S was ready to recomplete the well in existing open zones. This letter agreement stipulated that H&S did not admit the validity of PITCO's interest.

Lawsuit #1 resulted in a judgment canceling the base leases for lack of production, but did not determine the effective termination date. PITCO continued to pursue Lawsuit #2 for a determination of the date the base leases terminated to support its argument that the top leases were renewals of the base leases. This attempt was unsuccessful. Then, at the point of recompletion of the well, PITCO tendered its share of recompletion costs to H&S with a letter asserting a condition on participation, stating that if the Metzler well ownership dispute was dismissed by the court or by PITCO, PITCO's funds would be returned. H&S refused to accept the condition, responding that PITCO could withdraw its prepayment if the condition was not withdrawn within 48 hours. Otherwise, H&S would consider the prepayment as being submitted under the Commission order and letter agreement.

The workover yielded disappointing results at higher than estimated costs. As a result, H&S capitulated to PITCO's demand, offering PITCO an interest in the Metzler leases upon payment of its share of excess costs and lease costs. Without responding to the offer, PITCO dismissed Lawsuit #2 with prejudice, and demanded the return of its "conditional" prepayment, which H&S refused. H&S then filed Lawsuit #3 in May 2002, seeking judgment for PITCO's share of excess expenses (in addition to the

prepayment that it retained) and foreclosure of a statutory oil and gas mechanic's lien under Okla. Stat. tit. 42 § 145. PITCO counterclaimed for return of its prepayment. The trial court granted H&S judgment and foreclosed the lien on PITCO's interest, reasoning that PITCO elected to participate and, as such, obligated itself for these expenses.

On appeal, the court framed the issue as whether PITCO became obligated for recompletion and operating costs by "electing to participate" in the recompletion. The court noted that the parties, which it labeled as "sophisticated and canny players" in the Oklahoma oil and gas business, had now assumed positions diametrically opposed to those they held in the earlier litigation and the Commission proceedings. PITCO argued the Commission lacked jurisdiction to compel it to pay workover costs because it never had record title. Further, its prepayment of costs was conditional. The court rejected PITCO's challenge to the Commission's authority, reasoning that the Commission's order did not compel payment, but merely allowed owners to elect to participate by making payment, and that PITCO chose to avail itself of the terms of the pooling order by its assertion that it owned an interest. The court further reasoned that if the Commission's order was flawed for failing to address the uncertain status of PITCO's interest, PITCO could have sought modification to clarify that status, which it did not do. Thus, PITCO's challenge was an impermissible collateral attack on a Commission order by seeking at this time a redetermination of the terms of its participation.

The court next rejected PITCO's argument that its participation and payment were conditional. The court noted that H&S refused to accept PITCO's condition, had notified PITCO of its position, had offered to return PITCO's payment if H&S' terms were not acceptable, and PITCO took no action in response. The court also rejected PITCO's argument that it could not be liable because it did not actually have record title to an interest in the well, reasoning that by failing to successfully condition its acceptance of the pooling order, PITCO at least secured a contractual interest in the reworked Metzler well—something it had long sought, despite the fact that PITCO no longer wanted it.

PITCO next sought to invoke the court's equitable powers, arguing that H&S was guilty of inequitable conduct. However, the court could not ascertain what H&S should have done differently short of immediately acceding to PITCO's demands. H&S had entered into a letter agreement to accommodate PITCO's desire to participate only in the recompletion and not the deepening. H&S had immediately communicated its refusal to accept the conditions of PITCO's participation. The only thing that H&S refused to do until the very end was accept PITCO's claim that it had an ownership interest. The court did invoke equitable estoppel as a means to prevent PITCO from taking a legal position inconsistent with its earlier action and place H&S at a disadvantage. The equities favored H&S and even if they did not, they did not favor PITCO.

On its cross appeal, H&S asserted that the trial court had improperly limited its recovery of attorneys' fees and costs to 125% of the amount of its lien claim. The trial court had done so based upon Okla. Stat. tit. 42 § 147.1, which allows a property owner to discharge the amount of a mechanic's lien by posting a bond for 125% of the claimed amount or depositing that sum in

court. The court of appeals agreed with H&S, holding that the 125% statutory bonding or deposit requirement applied only to the amount required to discharge the lien, but did not limit the debtor's ultimate liability. Attorneys' fees should have been awarded without a 125% limitation.

#### **ENFORCEMENT OF FORGOTTEN CONTRACT BARRED BY LACHES AND ESTOPPEL**

In *Chesapeake Operating, Inc. v. Carl E. Gungoll Exploration, Inc.*, 116 P.3d 213 (Okla. Civ. App. 2005), Chesapeake and Gungoll entered into an agreement in April 1996, whereby Gungoll was afforded the option to acquire interests in formations above the base of Pennsylvania formations that Chesapeake might acquire in certain lands in Oklahoma. The agreement required notice to Gungoll of a Chesapeake acquisition, provided an election period, and stipulated that a failure to elect within the period was deemed an election not to acquire. After the execution of this agreement, Chesapeake and its affiliates began acquiring producing gas reserves in the area. Gungoll was aware of some of these transactions. Further, in 1997, 1998, and 1999, affiliates of Chesapeake proposed drilling and did drill certain wells on the affected lands, and acquired from Gungoll some rights in some shallow wells. As late as 2001, Chesapeake affiliates and Gungoll continued negotiations as to interests in the affected lands. Further, Chesapeake's affiliates either operated or participated in several shallow wells, some of which Gungoll operated. Then, after 5½ years, Gungoll made demand on Chesapeake for an inventory of leases acquired as a prelude to exercising its option to acquire these leases.

On appeal from summary judgment in favor of Chesapeake on the basis of laches and estoppel, each party admitted that they had forgotten the letter agreement. However, on these facts, the trial court concluded Gungoll acted inconsistently with the letter agreement by continuing to deal with the Chesapeake affiliates as if no agreement existed. However, Gungoll claimed that because it had forgotten about the agreement, it did not have notice of its rights against Chesapeake as required for laches until the letter agreement was rediscovered. Laches is not a defense when notice of a right to proceed or of a cause of action is lacking. However, the court reasoned that ignorance of the facts does not excuse delay. One must be diligent and make such inquiry as the circumstances suggest, and possessing the means of knowledge is equivalent to actual knowledge. Further, the duty to act with dispatch is especially imperative when one claims an interest in property that is highly speculative. After reciting a few more maxims, the applicability of which may be questioned, the court stated that Gungoll entered into the agreement and had knowledge of it and its enforcement at this late date would be inequitable.

As for estoppel, the court said it applies against a party asserting rights when the other party in good faith has relied upon the conduct of the asserting party and was led to change his position to his detriment. The court concluded that Gungoll's course of business with Chesapeake and Chesapeake's affiliates for 5½ years led them to rely on Gungoll's conduct and change their position to their detriment. Gungoll's attempt to enforce the contract after years of ignoring it would result in inequity to the Chesapeake affiliates in an "unearned windfall" to Gungoll.

#### **PREEXISTING OVERRIDE DID NOT ATTACH TO SUBSEQUENTLY ACQUIRED LEASES UPON RELEASE OF BURDENED LEASES**

In *Olson v. Continental Resources, Inc.*, 109 P.3d 351 (Okla. Civ. App. 2004), *cert. denied* Apr. 5, 2005, Olson was the owner of an overriding royalty on certain leases in Blaine County, Oklahoma. The only producing well holding those leases was the Matli #1-17 well. In September 1998, Continental, the operator, set a bridge plug and removed the tubing from the well. In February 1999, Continental proposed to all working interest owners that the Matli well be plugged. One of the working interest owners refused to consent to the plugging, and Continental assigned its interest in the wellbore to that owner. That owner then assigned its interest in the leases to Davis Operating Co. Continental then acquired new leases on the unit in September 1999. Also in September 1999, Davis recompleted and brought the well back into commercial production. In October 1999, Continental sued Davis and Olson to quiet title. Continental and Davis reached settlement and dismissed Olson from the suit. The settlement called for Continental and Davis to release the old leases and to operate under the new leases. Releases of the old leases were filed in October 2000. Later, an additional well, the Matli #2-17, was drilled and put into production. Olson demanded, and was refused, payment for his override, which Olson asserted carried forward and applied to the new leases. However, the override did not contain a provision making it applicable to extensions and renewals.

The court stated that an overriding royalty does not survive termination of the underlying lease absent fraud, breach of fiduciary relationship, or an agreement otherwise. Further, creation of an override does not in and of itself result in a fiduciary relationship and, thus, there was no relationship of trust and confidence between lessee and override owner that prevents the lessee from acquiring a new lease unburdened by the override upon the expiration of the prior lease. Because the instrument governing the override did not provide that the override applied to extensions and renewals, coupled with the fact that the underlying leases specifically provided that the lessee might surrender the leases by placing a release of record, the court held that the release of the old leases effectively terminated Olson's override, and the override did not apply to the renewed leases.

The court also rejected the override owner's claims seeking recovery on the basis of a sham legal process and civil conspiracy.

#### **ASSIGNEE'S OBLIGATION TO REPAY TAKE-OR-PAY PAYMENTS**

In *Oklahoma Natural Gas Co. v. Apache Corp.*, 124 Fed. Appx. 604 (10th Cir. 2005), Kaiser-Francis Oil Co. entered into a take-or-pay gas sale contract with Oklahoma Natural Gas (ONG) for the Giles well in 1980. In 1981, because ONG failed to purchase the required volume, ONG made a deficiency payment to Kaiser of approximately \$2 million which ONG could recover by taking future production in excess of current requirements or by demanding repayment at the end of the 20-year contract term. During the term of the contract, ONG had recouped about \$766,000 of its deficiency from production, leaving \$1.24 million due at the end of the term. In 1983, Kaiser assigned its rights in the Giles well and the 1980 contract to Apache. In its contract

with Kaiser, Apache agreed to take an assignment encumbered by a potential liability to repay any outstanding balance for ONG's 1981 deficiency payment. Further, Apache delivered to ONG a letter in lieu of transfer and division orders in which Apache agreed to "assume and be bound by all of the . . . purchase and sale agreements heretofore executed by Kaiser-Francis . . . with the same force and effect as though Apache had executed such original . . . purchase and sale agreements." Then, in 1988, Kaiser and ONG negotiated a settlement in which they terminated all existing contracts, and Kaiser released all claims against ONG, specifically including those relating to the Giles well.

In suit by ONG against Apache for the unrecouped take-or-pay payments, Apache contended that Kaiser's obligation to repay accrued in 1981 when ONG's deficiency payment was made. Under the sale agreement between Kaiser and Apache, Kaiser remained liable for all obligations arising before the sale. Further, the 1980 gas sale contract provided that Kaiser would be relieved of all obligations accruing under that contract to the extent of any subsequent assignment of seller's interest. Apache argued that, as assignee in 1983, it could only be liable for those obligations "thereafter accruing" rather than those previously accrued including the repayment obligation. Apache also argued that the obligation to repay was extinguished by the 1988 settlement agreement between Kaiser and ONG.

The court of appeals reasoned that, although when ONG made the deficiency payment a liability for the repayment accrued, none of this altered the express contractual provisions by which Apache agreed that it would repay the unrecovered deficiency payments at the end of the contract term. Given this express contract provision to repay, the court rejected Apache's argument that its position was analogous to a purchaser taking property subject to, but not assuming, a mortgage.

As for the Apache/Kaiser contract, it further stipulated that Apache would perform obligations which were attributable to the purchased assets, which were incurred in the ordinary course of operation, and "which arise out of events occurring subsequent to the effective date of the 1983 contract." Focusing on the third element, the court noted the obligation arose out of events occurring both before and after the 1983 effective date. However, having assumed the express contractual duty for the repayment obligation at the end of the term, the court found the third element was satisfied. Finally, the court found that the 1988 settlement between Kaiser and ONG had no effect on the 1980 contract. Even though the 1988 settlement was to resolve all claims and disputes, the only parties to that settlement were Kaiser and ONG, not Apache and ONG. Because the liability on the 1980 contract as to the Giles well was assumed by Apache in 1983, the 1988 settlement between Kaiser and ONG did nothing to alter Apache's liability.

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## SOUTH DAKOTA — MINING

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MAX MAIN  
— REPORTER —

### URANIUM EXPLORATION AND MINING LEGISLATION

In anticipation of renewed uranium exploration activity in South Dakota, the Department of Environment and Natural Resources caused legislation to be introduced amending existing uranium exploration and mining statutes. Senate Bill No. 62 (2006) has been passed by both the House and Senate and forwarded to the Governor for signature. Regarding exploration for uranium, S.B. No. 62 raises the surety level to guarantee the costs of plugging all proposed test holes and reclamation of affected public and private lands, rather than just 10% of the costs. In addition, a statewide uranium exploration bond in the amount of \$20,000 is no longer allowed. As to mining for uranium, S.B. No. 62 authorizes the Board of Minerals and Environment to promulgate rules regarding the "requirement for construction, operation, monitoring, and closure of uranium and other mineral mines using in situ leach processes." No indication has been given as to when the Board's staff may begin drafting such rules.

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## TEXAS — OIL & GAS

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WILLIAM B. BURFORD  
— REPORTER —

### DAMAGE AWARD UPHELD FOR BREACH OF MAINTENANCE OF UNIFORM INTEREST PROVISION OF OPERATING AGREEMENT

*ExxonMobil Corp. v. Valence Operating Co.*, 174 S.W.3d 303 (Tex. App.—Houston [1st Dist.] 2005, pet. filed), illustrates the potential hazard in ignoring, as parties to joint operating agreements frequently do, the agreement's maintenance of uniform interest provision.

ExxonMobil and Valence were parties to a 1983 operating agreement governing the operation of an oil and gas lease in Gregg and Upshur Counties, Texas, known as the Gladewater Gas Unit No. 16, ExxonMobil owning 81.8% of the contract area and Valence the remaining 18.2%. Three wells produced gas from the Cotton Valley Lime. Data derived from the drilling of the wells indicated that there were also recoverable gas reserves in the shallower Cotton Valley Sand. In 1996 ExxonMobil entered into a farmout agreement with Wagner & Brown, Ltd. and C.W. Resources, granting the farmees the right to earn an assignment or assignments by drilling and completing wells in the nonproductive Sand interval. Acting under the farmout agreement, Wagner & Brown and C.W. proposed two wells to Valence. Valence did not respond to the proposals, although it made inquiry to ExxonMobil and learned of the farmout. Not having elected to participate in drilling the two Sand wells, Valence was deemed under provisions of the operating agreement to have relinquished its interest in the

wells until the farmees that drilled them had recouped out of Valence's share of production the nonconsent penalty of 300% of Valence's share of the drilling and completion costs and 100% of its surface equipment costs. When the farmees proposed three more wells to Valence, it elected to participate "under protest."

Valence sued ExxonMobil, contending that it had breached the maintenance of uniform interest provision of the parties' operating agreement, which provided in pertinent part that

no party shall sell, encumber, transfer or make other disposition of its interest in the leases embraced within the Contract Area and in wells, equipment and production unless such disposition covers either:

1. the entire interest of the party in all leases and equipment and production; or
2. an equal undivided interest in all leases and equipment and production in the Contract Area.

174 S.W.3d at 311. Interestingly, the parties had stricken the word "Uniform" from the heading of the section of the printed form of operating agreement, Article VIII.B.E., "Maintenance of Uniform Interest," and the beginning words of its first sentence, "For the purpose of maintaining uniformity of ownership in the oil and gas leasehold interests covered by this agreement, and. . ." 174 S.W.3d at 311.

ExxonMobil made two arguments that its farmout had not violated the agreement. By striking the language stating that the purpose of the provision was to maintain "uniform" ownership, it urged, the parties had indicated their intention not to require maintenance of uniform interests. It further argued that since the agreement, by its terms, prohibited only the sale, encumbrance, transfer, or other disposition of a party's interest in the leases *and* in wells, equipment, and production, it had not breached the agreement because its farmout had not included any wells, equipment, and production. Not surprisingly, the court rejected ExxonMobil's arguments and held that it had breached the agreement.

A farmout agreement is a conditional assignment, the court observed, and by its own terms ExxonMobil's farmout evinced its agreement to convey its entire leasehold interest in only a portion of the Contract Area, namely the Cotton Valley Sand. When ExxonMobil agreed to assign its entire interest in the Sand, it agreed to transfer a real property interest that included the wells, equipment, and production pertaining to the Cotton Valley Sand. The court also agreed with Valence's dubious argument that the parties' striking references to maintenance of "uniform" interests merely recognized that the parties did not have uniform interests to maintain, ExxonMobil having 81.8% and Valence 18.2%. Uniform does not mean equal, of course, and it would have been sufficient, it seems, for the court to have pointed out that the parties had not vitiated the obligations clearly stated in the agreement regardless of their intent in striking the statement of purpose.

Less obvious than whether ExxonMobil breached the operating agreement is whether the breach resulted in the damages awarded by the trial court. The trial court had assessed damages both for the three wells in which Valence participated and for the two wells it was deemed to have nonconsented. It awarded Valence \$310,867.28 for its share of the difference between the cost of drilling the three wells and the cost to recomplete the

existing wells to produce from the Sand and \$523,432.00 for its having wrongfully been subjected to the operating agreement's nonconsent provisions, as well as attorneys' fees and prejudgment interest.

ExxonMobil contended that Valence's proof of damages for being forced to drill the Sand wells was speculative because there was no evidence Valence had ever proposed dually completing the wells, that it would have done so, and that ExxonMobil and the Railroad Commission would have permitted it. The court disagreed. Valence had shown, the court pointed out, that the operating agreement allowed Valence to complete the existing wells in the Sand, that it wanted to produce the existing wells from the Sand, and that recoverable reserves were there. After farming out, ExxonMobil was no longer concerned about the cost of exploiting the Sand, and its farmees had no interest in minimizing the number of additional wells since they had no right to use the existing wellbores. If ExxonMobil had not farmed out its interest in the Sand, it would have continued to have the same interest as Valence in capturing as much gas as possible from the entire unit by the most economical means. Valence, the court concluded, had incurred additional drilling costs as a result of ExxonMobil's breach.

ExxonMobil also urged that Valence's loss of the value of production from the two nonconsented wells had resulted not from the farmout but from Valence's inaction in response to the farmee's well proposals. But ExxonMobil did not notify Valence of the farmout and did not make the proposal. Valence's obligation to give timely notice of consent could be triggered only by a well proposal made as required by the operating agreement. Notice of a well proposal by a nonparty failed to satisfy the purpose of the operating agreement's notice requirement, namely that Valence be given the opportunity to consent or not to a proposal made by a party that had agreed to all its terms and provisions—not a stranger to the agreement with different interests. The court held that ExxonMobil's breach of the notice provision had therefore relieved Valence of the burden of paying the nonconsent penalties.

#### **TEXAS FAIR NOTICE REQUIREMENTS HELD INAPPLICABLE TO AGREEMENT TO INDEMNIFY AGAINST CLAIMS BASED ON PAST OCCURRENCE**

The court in *OXY USA, Inc. v. Southwestern Energy Production Co.*, 161 S.W.3d 277 (Tex. App.—Corpus Christi 2005, pet. filed), declined to extend the requirements in Texas law that agreements for indemnity against a party's own negligence must be expressed in unambiguous terms and conspicuously. These "fair notice" requirements of express negligence and conspicuousness limit releases and indemnity clauses exculpating a party from its own future negligence but do not apply, the court held, to indemnity agreements that shift liability for actions that have already occurred.

OXY and Southwestern entered into a Seismic and Exploration Agreement for the joint acquisition and ownership of seismic data and oil and gas leases in Southwestern's Bouré project. After it learned of Southwestern's preexisting inconsistent agreements that gave certain rights to Skelly Exploration Co., OXY informed Southwestern that it would not proceed unless Skelly were removed from the project. The parties then entered into a new

agreement in which Skelly would not participate. Because OXY had expressed concern about potential claims by Skelly if the agreement were renegotiated and Skelly eliminated, Southwestern agreed to indemnify OXY against liability to anyone claiming any interest from Southwestern through the Seismic and Exploration Agreement or any subsequent agreement. After settling its claims against Southwestern based on the preexisting agreements, Skelly sued OXY, alleging tortious interference with contract, conversion, and abuse of rights. Southwestern contributed to OXY's defense but refused to indemnify OXY against liability to Skelly. After settling with Skelly by paying it \$2.5 million, OXY sued Southwestern on its agreement to indemnify. The trial court granted summary judgment to Southwestern on the basis that the indemnity agreement was unenforceable under Texas law, and OXY appealed.

In reversing the summary judgment for Southwestern and rendering judgment for OXY on its own motion for summary judgment, the court noted that the fair notice requirements concern the injustice arising when a contracting party buries a provision substantially releasing itself from its own negligence in a way that is inconspicuous. Those concerns were not present here, it explained. Here instead were two large oil companies with equal bargaining power after negotiations that specifically contemplated an agreement whose nature and scope were well known to both. Moreover, the public policy of deterring misconduct would not be served by a rule prohibiting indemnity for intentional actions that have already occurred. To apply such a rule here would have had the opposite result. It would have allowed Southwestern to induce OXY to forgo a breach of contract claim and renegotiate based on a promise of indemnity, and then disavow that indemnity, thus taking advantage of its own misconduct.

#### **SURFACE OWNERS RECOVER NO DAMAGES FOR NEGLIGENT OPERATIONS**

*Mieth v. Ranchquest, Inc.*, 177 S.W.3d 296 (Tex. App.—Houston [1st Dist.] 2005, no pet.), involved oil and gas operations on the plaintiff Kaechele family's 973-acre ranch under an oil and gas lease owned by Ranchquest and operated by its affiliate, Texical Energy Corp. Drilling operations seem clearly to have been negligent and polluted some four acres of the ranch. The jury awarded \$200,000 as the reasonable cost to repair the property, plus exemplary damages and attorneys' fees. The trial court rendered judgment for the defendants, however, on the basis that the correct measure of damages was diminution in the value of the land and that the jury had found none. The court of appeals affirmed.

Expert real estate appraisers testified for both sides. Moorman, the lessee's and operator's expert witness, testified that the market value of the land was \$750 per acre, or \$730,000. If four acres were contaminated, in his opinion the maximum diminution in the land's value would be \$3,000. The surface owners' appraiser, Haley, concurred that the land's value was \$730,000 before the contamination but testified that it was worth only \$430,000 afterward. His basis for the \$300,000 diminution in value was the cost to remediate, plus management or administrative costs typically incurred in decontamination.

The court of appeals first addressed whether the injury to the land was permanent or temporary. When an injury to land is temporary and can be remediated at reasonable cost, the proper measure of damages is the cost of restoration to its condition immediately preceding the injury. Temporary injuries are intermittent, sporadic, or recurrent injuries to land that are contingent upon some irregular force, such as rain. The measure of damages for permanent injuries, those that are of such a character that they are presumed to continue indefinitely though they may not be perpetual, is the diminution in the land's value. In this case the ground was so injured as to impair the soil's productivity and had been constant for several years. The trial court had not erred in determining that the damage to the land was permanent.

The jury found the diminution of the value of the land to have been zero. There was no evidence to support that finding, since testimony from both sides indicated that there was damage to the land's value. That being the case, the plaintiffs had the burden on appeal to show that they had established the correct amount as a matter of law. The evidence regarding the amount of damages was conflicting, even if the surface owners' expert testimony that diminution is measurable by cost of repair were considered, so that they failed to do so. The court did not hold, as it might have done, that the cost of remediation could not serve as a basis for determining the diminution in the value of land permanently injured, although the effect of its decision is the same.

#### **MINERAL OWNERS ENTITLED TO HUGE DAMAGES FOR ABANDONING LESSEE'S HARM TO WELLBORES; PROSPECTIVE NEW LESSEE ALSO MAY GET DAMAGES**

*Exxon Corp. v. Miesch*, 180 S.W.3d 299 (Tex. App.—Corpus Christi 2005, pet. filed), stands as a sharp warning, as the court undoubtedly intended, against a lessee's poor stewardship of its lessor's minerals.

Exxon held leases on several thousand acres in the Mary Ellen O'Connor Field near Refugio, Texas, under terms that were evidently extremely favorable to the lessors, including a 50% royalty obligation. Unable to negotiate a lower royalty rate and other acceptable terms as its operations began to become uneconomical, Exxon plugged its wells and abandoned the leases. The mineral owners then negotiated new leases with another operator, Emerald Oil & Gas, L.C., which sought to redevelop the field by reentering the abandoned wellbores. Emerald encountered unusual and serious difficulty in using the wellbores and concluded that the tubing, junk, cut casing, tank bottoms, and other refuse and contaminants it found in the wells demonstrated a deliberate pattern on Exxon's part of sabotaging the wells. The mineral owners and Emerald sued Exxon for waste, negligence, and tortious interference, and the jury awarded \$5 million in damages to the mineral owners for the cost to drill new wells, the value of their minerals that could no longer be recovered, and loss of prospective bonuses, as well as \$10 million in exemplary damages. It awarded them another \$3.6 million for Exxon's breach of their leases' express provision requiring the lessee to fully develop the lease. The court of appeals upheld the verdict against all of Exxon's challenges and reversed the trial court's judgment against Emerald's claims of tortious interference.

Not very remarkably, the court rejected Exxon's arguments that the mineral owners had no cause of action for waste and that the evidence Exxon committed waste was insufficient. There is a private cause of action, the court declared, for violations of the Texas Natural Resources Code's prohibitions against waste, and those extend broadly to violations committed in plugging wells, not just those involving "production, storage or transportation" of oil or gas, the specific words found in the statute. Moreover, Texas law has long recognized a common law cause of action for negligent waste or destruction of minerals. Exxon's duties and responsibilities were not governed wholly by the lease, as it contended: the plaintiffs' injuries were not merely the loss of the subject matter of the lease contract itself but damaged or destroyed wellbores and, ultimately, the loss of oil and gas reserves. The mineral owners' claims based on intentional destruction of the wellbores and the intentional prevention of their reentry were independent of and unrelated to any contractual relationship. There was ample testimony, the court observed, of junk and debris in the wellbores and that Exxon's plugging procedures were not standard; and Exxon's witnesses did not dispute that (1) there was junk in the wells, (2) Exxon was the only party who could have put the junk in the wells, and (3) the junk in the wells made reentry difficult or impossible.

The court agreed with Exxon that the mineral owners' cause of action, brought more than two years after the wells were plugged, would be barred by the statute of limitations unless the discovery rule applied to defer its accrual. The discovery rule did apply, the court held, because the injury was of the type that is inherently undiscoverable in the exercise of reasonable diligence and is objectively verifiable. Neither visual inspection nor information from public records or provided by the lessee would have indicated waste, and physical evidence of the wells' condition made the injury objectively verifiable.

The court's treatment of the measure of damages for waste is less straightforward. The proper measure, according to Exxon, was the difference between the value of the mineral property immediately before the injury and its value afterward, and of course there is abundant authority that this is the standard in cases of permanent injury to land. The measure of damages when minerals are removed in bad faith, the court observed, is the "enhanced value," or their fair market value without considering the cost to recover them. Without explaining why a case of damage to wells is like a case of bad-faith trespass, the court tersely stated it saw no reason not to apply the same law to waste. The law is clear, the court further noted, that if a destroyed well can be reproduced and its costs do not exceed the well's value, the plaintiff can recover damages for the cost of reproducing and equipping the well, so that damages for the cost to redrill were proper. And the plaintiffs' claim for lost bonus was not speculative: there was evidence that Emerald had offered \$600,000 for an additional lease but did not follow through after becoming aware of the well problems. In view of testimony that there were more than \$4.75 million of unrecovered reserves in the portion of the field Emerald had not leased, another \$535,000 in the portion that Emerald had leased, and lost bonus of \$600,000, the jury's \$5 million award was not clearly wrong. The opinion does not make clear why the plaintiffs should be entitled both to the cost of replacing the dam-

aged wells and the value of the unrecovered minerals, since it would seem that the lower of those two values would make them whole.

Turning to the mineral owners' claim for Exxon's breach of the leases' express development obligation, the court rejected Exxon's arguments that the habendum and surrender clauses had relieved it of any duty to comply. The clauses provided that if a producing well were completed, the lessee would prosecute a continuous development program until the land was fully developed with at least one well completed in each horizon or stratum capable of producing in paying quantities for each spacing protocol. The surrender clauses of the leases expressly prohibited surrender until full development, the court pointed out. Taking the lease provisions as a whole, the court determined that the development clause was intended to control over the habendum clause. Exxon argued that to uphold the plaintiffs' recovery for its alleged failure to develop and for the value of unrecovered minerals in place would be to allow double recovery. These damage awards were for the same minerals, Exxon maintained, and its argument has a great deal of appeal. The court brushed Exxon's argument aside, without any clear explanation, on the basis that the plaintiffs' damages were separate and distinct.

The plaintiffs' breach of contract claims were, like their tort claims, not barred by limitations, the court explained, because Exxon had fraudulently concealed its failure to develop. The court emphasized that the lease expressly entitled the lessors to "full information covering all of lessee's operations on the leased premises or otherwise pertinent to lessor's interests," but that Exxon had withheld interpretive data. Well files that Exxon had withheld apparently would have disclosed the existence of horizons capable of production that the plaintiffs could not otherwise have known of.

Finally, the court determined that fraudulent misrepresentations made by Exxon, in the form of incorrect plugging reports, entitled Emerald to maintain an action for its losses in attempting to redevelop the field. One who makes a fraudulent misrepresentation is liable to the persons or classes of persons he intends, or has reason to expect, to act in reliance on the misrepresentation for loss suffered through their justifiable reliance. Exxon knew, according to testimony, that subsequent lessees and operators would rely on its filings in making decisions about plugged wells. Moreover, even though there was no contract between the mineral owners and Emerald when Exxon filed its incorrect plugging reports, Emerald could maintain an action for tortious interference with "economic opportunity." Texas law protects existing as well as prospective contracts from interference, the court declared.

#### **DRILLING CONTRACT'S INSURANCE PROVISION DID NOT SHIFT OPERATOR'S LIABILITY BACK TO CONTRACTOR**

The court in *Helmerich & Payne International Drilling Co. v. Swift Energy Co.*, 180 S.W.3d 635 (Tex. App.—Houston [14th Dist.] 2005, no pet. h.), construed the application of the indemnity provisions of a drilling contract to the cost to clean up a spill of drilling fluids that occurred during Helmerich & Payne's drilling of Swift's Post No. 1 Well in Goliad County, Texas.

Subparagraph 14.11 of the parties' daywork drilling contract, after a boldfaced heading identifying the section as one allocating

responsibility for loss or damage, indemnity, release of liability and allocation of risk, provided in pertinent part as follows:

Notwithstanding anything to the contrary contained herein, . . . the responsibility for pollution and contamination shall be as follows: . . . [Swift] shall assume all responsibility for, including control and removal of, and shall protect, defend and indemnify [Helmerich & Payne] from and against all claims, demands, and causes of action of every kind and character arising directly or indirectly from all other pollution or contamination [i.e., other than that originating above the surface] which may occur during the conduct of operations hereunder, including, but not limited to, that which may result from fire, blow-out, cratering, seepage or any other uncontrolled flow of oil, gas, water or other substance, as well as the use or disposition of all drilling fluids . . . [Swift] shall release [Helmerich & Payne] of any liability for the foregoing.

180 S.W.3d at 639. Paragraph 13 of the contract required the contractor, Helmerich & Payne, to procure and maintain specified insurance coverage, including a policy of comprehensive and general liability insurance, and to include Swift as an additional insured. Among other things, it required that all policies provide that “all deductibles . . . shall be the sole obligation of [Helmerich & Payne],” but it otherwise contained no requirements regarding the deductible for the policy. Helmerich & Payne obtained the required policy, under which Swift was named as an additional insured, with a deductible of \$750,000 per occurrence. The policy made no provision for allocation of any deductible between Helmerich & Payne and Swift.

After Swift spent \$155,078.86 in cleaning up the spilled drilling fluids, it made a claim to the insurer. The claim was denied since its amount was below the deductible. Helmerich & Payne then refused to reimburse Swift’s cleanup costs and filed suit for a declaratory judgment that the drilling contract allocated liability for the spill to Swift. The court of appeals reversed the trial court’s summary judgment for Swift and rendered judgment for Helmerich & Payne on the contractor’s own summary judgment motion.

Swift argued that although Paragraph 14.11 allocated liability for the spill to the operator, Paragraph 13 constituted an independent obligation that formed the basis of its claim. The court disagreed. The court declined to decide whether the language of Paragraph 13 specifying the required contents of an insurance policy imposed an obligation on Helmerich & Payne to reimburse Swift. Assuming it did, it would be contrary to Swift’s assumption of responsibility and indemnification of the contractor under Paragraph 14.11. The words “notwithstanding anything to the contrary contained herein” at the beginning of Paragraph 14.11 meant that it was intended to supersede conflicting provisions. Accordingly, the contract imposed liability for spills on Swift.

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## WYOMING — OIL & GAS

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WILLIAM N. HEISS  
— REPORTER —

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### RESERVATION OF “OIL RIGHTS” DOES NOT INCLUDE GAS

In *Mullinnix LLC v. HKB Royalty Trust*, 126 P.3d 909 (Wyo. 2006), two cases were consolidated, both of which addressed the issue of whether the reservation of “oil rights” in deeds in the 1940s in Campbell County, Wyoming, included gas. In the first case, predecessors of the appellants (Hickmans) granted a warranty deed to Willard, reserving “to the grantors one-half of all oil and commercial gravel rights” in the property. The appellees (Groves) are the successors in interest to the grantee. In 2001, Groves filed an action seeking to quiet title to all coalbed methane underlying the property, while Hickmans filed a counterclaim seeking a declaration that they owned one-half of all gas. Hickmans contended that the term “oil rights” had a particular meaning when the deeds were executed in 1944 in Campbell County, which included gas, and they filed affidavits supporting that contention. The district court granted summary judgment in favor of Groves, ruling that the warranty deed was unambiguous and, as a matter of law, the reservation of “oil rights” did not include a reservation of gas. Hickmans appealed that summary judgment to the Wyoming Supreme Court, which reversed and remanded for trial, finding that a question of fact was raised as to whether oil rights had a particular trade usage at the time the deed was executed. *Hickman v. Groves*, 71 P.3d 256 (Wyo. 2003).

After reversal of this summary judgment in *Hickman*, the district court consolidated the *Hickman* case with a factually similar district court case (the *Mullinnix* case). In the *Mullinnix* case Rothwells executed a warranty deed conveying certain property to Parnells, reserving “one-half of all the oil rights” in most of the property and “one-fourth of the oil rights” in the remainder. In 1968, Johny Mullinnix, acting on behalf of Mullinnix 67 Associates, contacted Rothwells regarding their mineral interests. Mullinnix LLC is the successor in interest to Mullinnix 67 Associates. In 1968 Rothwells signed a mineral deed conveying their mineral interests to Mullinnix, paid for with a 10-day sight draft which was specifically subject to approval of title to the property by Mullinnix. Mullinnix paid the draft when it was presented. Before paying the draft, however, Mullinnix conducted a title search and discovered that Rothwells had reserved an interest “in oil rights.” He was concerned the reservation created some uncertainty and contacted Parnells to clarify the matter. Toward such end, Mullinnix prepared a document entitled “Declaration of Interest” for Parnells’ signature, which stated that they owned an undivided one-half interest in the oil, gas, and associated hydrocarbons and other minerals in some lands, and an undivided one-fourth interest in the oil, gas, and associated hydrocarbons in other lands. Parnells’ attorney struck the “other minerals” language from the declaration, leaving the reference to “oil, gas and associated hydrocarbons.” With such form, Parnells signed the declaration and it was recorded in Campbell County in 1968.

In 2001, Mullinnix LLC filed an action in district court for declaratory judgment and to quiet title to the mineral interests it had acquired through its transaction with Rothwells. The district

court granted summary judgment to Mullinix in which it found that the declaration of interest achieved its stated intent of clarifying the interest held. After the *Hickman* case was reversed by the Wyoming Supreme Court, the district court withdrew its original grant of summary judgment to Mullinix. After trial, the district court ruled that Mullinix's claims of estoppel and waiver pursuant to the declaration of interest were not supported by the evidence.

In the consolidated cases, the district court ruled that Mullinix and Hickmans did not satisfy their burden of proving that use of the term "oil rights" in deeds in Campbell County in the 1940s had a particular trade usage which included the "gas rights." The court found that, while the term "oil rights" was undoubtedly used during the 1940s in Campbell County during informal discussions to refer to the bundle of rights associated with surface and subsurface holdings, warranty deeds recorded during that period generally referred with more exacting specificity to those substances being reserved by the grantor in a conveyance. Both Hickmans and Mullinix appealed to the Wyoming Supreme Court.

The supreme court found substantial evidence supporting the district court's conclusion that "oil rights" in deeds does not include gas. One of the appellees, Pennaco Energy, Inc., requested that the supreme court revisit decisions holding that even when the language of a deed is unambiguous the court should consider the "surrounding circumstances" in determining the meaning of its terms. Since deeds are relied upon by parties other than those to the deeds, Pennaco argued that the interpretive procedure introduces too much uncertainty into real property title. The supreme court declined to do so, stating that such a decision would result in real property documents being interpreted in accordance with the meaning of terms as the court understands them at the time and place of interpretation of the document, rather than at the time and place of execution of the document. The court distinguished this from the parol evidence rule by stating that the parol evidence rule prohibits parties from supplementing or contradicting the terms of a contract whereas the rule does not prohibit use of extrinsic evidence of the circumstances surrounding the execution of the deed to interpret the meaning of its terms. Once the terms of the agreement have been identified, the parol evidence rule ceases to operate. The court quoted its first decision in *Hickman*, relying on *Williston's Treatise on Contracts*, and stated that "evidence of usage may be admissible to give meaning to apparently unambiguous terms of a contract where other parol evidence would be inadmissible." *Mullinix*, 126 P.3d at 921.

The court stated that "[i]t is currently the widely-accepted rule that custom and usage may be proved to show the intention of parties to a written contract or other instrument in the use of phrases of a peculiar technical meaning which, when unexplained, are susceptible of two or more plain and reasonable constructions." *Id.* Parol evidence is admissible to establish trade usage and that is true even though the words are, in their ordinary or legal meaning, entirely unambiguous. Thus the supreme court declined Pennaco's request to adopt the definition of the term "oil rights" to be applied in every legal document coming before Wyoming courts, since this would not serve to effectuate the intent of the parties to documents and would undermine the court's deed interpretation jurisprudence developed over more than 100 years.

Mullinix then argued that the district court erred in refusing to recognize the declaration of interest as defining the ownership of Rothwells and Parnells. The supreme court upheld the district court's conclusion that the declaration of interest did not affect the parties' interest in the mineral estate. It was signed only by Parnells so it could not modify their interest, nor did it transfer any interests, since it lacked words of conveyance. Mullinix then claimed that under the doctrine of equitable estoppel, laches, and/or waiver, the declaration of interest prohibited Parnells from claiming they owned the entire gas estate. The court found two problems with this argument. One, the language of the declaration did not support Mullinix's claim that Parnells relinquished or waived their interest in the gas by signing it, and the record indicated that Mullinix did not rely on Parnells' execution of the declaration when it purchased Rothwells' mineral interest. Since Parnells did not sign the declaration of interest until one week after the draft was paid, there was no detrimental reliance by Mullinix at the time it purchased the interest. In addition, the supreme court found that the declaration of interest lacked a recognition by Parnells that Rothwells or Mullinix owned a portion of the gas interest. The declaration did not include any language of exclusivity to indicate that Parnells *only* owned the stated interest. Consequently, there was no basis in equity to prevent Parnells from asserting they owned the disputed gas estate.

While the supreme court declined Pennaco's request to adopt the definition of the term "oil rights" to be applied in every legal document coming before Wyoming courts, it effectively provided an interpretation of the numerous Wyoming deeds reserving "oil rights." Such reservations, in the absence of other language, do not include gas.

#### **LESSORS OF LEASE WITH NO WARRANTY ARE ESTOPPED FROM ASSERTING AFTER-ACQUIRED TITLE**

In 1975, members of the Harriet and Marton families (Harriet-Martons), who collectively owned the oil and gas under the N/2 of Section 19, executed a lease in favor of Gibbs, in which Gibbs obligated themselves to commence drilling an exploratory well. The lease was conditioned upon completion of the well and had a primary term of three years. Although the lease agreement was not recorded, a memorandum referring to it was recorded in 1976. Pursuant to the lease, the Catherine No. 1 and Catherine No. 2 wells were completed in 1976 and 1977, respectively. Upon William Gibbs' death, a probate was opened and Harriet-Martons filed creditors' claims in the probate proceedings, based on the 1975 lease agreement. The claims sought an accounting of income received and expenses paid and payment of any sums due in regard to the Catherine No. 1 well. The creditors' claims were settled in 1994 in an Agreement Concerning Creditors' Claims (Agreement) entered into between the personal representatives of the estate and the then current Harriet-Martons entities. The Agreement recognized that Harriet-Martons was not entitled to any production proceeds at that time because expenses had exceeded revenues.

In 1998, Harriet-Martons granted to Lance-Williams (Appellees) oil and gas leases covering the same property. The lessors were the same as, or successors in interest to, the Harriet-Martons mineral owners who were parties to the 1975 agreement with Gibbs. In each of the 1998 leases, the lessors struck the warranty

provision. In 2002, Harriet-Marton recorded in the county a Notice of Claim of Interest in Real Property, stating that an interest was claimed based on the 1975 lease agreement. Harriet-Marton then filed a civil action against the Gibbs distributees. The complaint alleged breach of the Agreement and the 1975 lease agreement, and alleged that the 1975 lease agreement had terminated due to lack of oil and gas production in paying quantities. After filing their suit, Harriet-Marton formed a limited liability company called the Catherine No. 1, LLC, whose members were either original mineral owners or successors in interest to the original mineral owners who signed the 1975 lease agreement and who were also the lessors or successors in interest to the original lessors who signed the 1998 leases. The action against the Gibbs distributees was dismissed with prejudice in 2003 prior to any adjudication. As part of the settlement the Gibbs distributees assigned their interest in the 1975 lease agreement to Catherine No. 1, LLC, leaving it with a 96% interest in the rights granted in the 1975 lease agreement. Subsequently, Harriet-Marton and Catherine No. 1, LLC assigned to the appellant, Kennedy Oil, all of their right, title, and interest in the 1975 lease agreement. As part of the same transaction, Harriet-Marton and Catherine No. 1, LLC leased to Kennedy the oil and gas on the subject property.

As part of its agreement with the lessors, Kennedy undertook to pursue for itself and the lessors a quiet title action against conflicting claimants, being Lance-Williams, lessees under the 1998 lease agreement. In 2004, Kennedy filed a quiet title action, giving rise to this case. The primary basis of Kennedy's complaint was that the 1998 leases were executed while the 1975 oil and gas lease remained in force and effect by virtue of production from or allocated to the leased lands. On cross motions for summary judgment the district court ruled in favor of Lance-Williams, finding that (1) Harriet-Marton manifested an unequivocal intention to enter into the 1998 leases; (2) at the time of the 1998 leases the lessee had no actual knowledge of the 1975 lease agreement, while at the time of the 2003 leases Kennedy had actual knowledge of the 1998 leases; (3) Harriet-Marton's attempt to re-lease minerals to Kennedy that were already leased to Lance-Williams offends notions of justice and equity; and (4) equity demands application of the doctrine of relation as set forth in *Walliker v. Escott*, 608 P.2d 1272 (Wyo. 1980).

On appeal to the Wyoming Supreme Court in *Kennedy Oil v. Lance Oil & Gas Co.*, 2006 WY 9, 126 P.3d 875 (Wyo. 2006), the court found the dispositive issue to be whether Harriet-Marton and Kennedy were estopped from denying the Lance-Williams' title. After the supreme court discussed in depth the doctrine of relation or relation back in patent situations, water right appropriations, and under the rules of civil procedure, the court found the doctrine of relation back not applicable to this case. In *Walliker*, the successors to a grantee under a quitclaim deed of an undivided 1/3 mineral interest brought suit against their grantor who had homesteaded lands and obtained a certificate of location and receipt for those lands but not yet a patent at the time of the quitclaim deed. The supreme court held that Walliker's equitable title was sufficient to apply the doctrine of relation such that when Walliker acquired legal title to the lands the title related back to give effect to the quitclaim conveyance. The supreme court held that a document conveying only a partial mineral interest rather

than all interest is not a deed in substance in the statutory quitclaim form and therefore not a quitclaim deed within the meaning of Wyo. Stat. § 34-2-105, which provides that after-acquired title does not pass under a statutory quitclaim form unless expressly provided.

The conveyances at issue in this case were the 1998 leases which the court found in no way to resemble the quitclaim deed form prescribed under Wyo. Stat. § 34-2-104. However, the court found that the doctrine of relation back was not applicable to this situation since there were no issues of entry or patent. The question here was the effect of a series of leases emanating from the same grantor, which the court found not to meet the circumstances necessary for application of the relation back doctrine. In this case, even though the Gibbs distributees had assigned to Catherine No. 1, LLC their rights under the 1975 agreement, and Catherine No. 1, LLC and Harriet-Marton in turn assigned to Kennedy their rights under that agreement, the Kennedy "assignment" was in reality a new lease. The district court concluded that any interest in the mineral estate obtained by Harriet-Marton and Catherine No. 1, LLC as a result of the 2003 assignment from the Gibbs distributees related back in time so as to give effect to the 1998 leases. The supreme court concluded that the relation back doctrine does not apply under these circumstances, but a similar result is reached by application of the doctrines of estoppel by deed and after-acquired title. The court stated the general rule that one who acquires a title or estate which he has previously conveyed is estopped to assert his after-acquired title as against the grantee or his successors and that while estoppel is based generally upon covenants contained in a warranty this rule is not absolute. Despite being a quitclaim in form, a conveyance may give rise to estoppel by deed when it "contains language showing that the grantor intended to convey and the grantee expected to acquire a particular estate." *Kennedy*, 126 P.3d at 884 (quoting 28 *Am. Jur. 2d Estoppel and Waiver* § 6). Wyo. Stat. § 34-2-105 does provide a bar to conveyance of after-acquired title via quitclaim deed specifically in those instances where the deed appears in the statutory form.

Because the 1998 leases do not resemble the statutory form, the statutory bar does not apply in this case. The court held that the 1998 leases conveyed certain and particular mineral interests notwithstanding the lessor's excision of the warranty language. Based on such finding, Harriet-Marton and Catherine No. 1, LLC are estopped from denying the title Lance-Williams obtained therefrom and they are estopped from raising their after-acquired title in derogation of Lance-Williams' interest. On appeal, Kennedy argued that the 1975 lease takes precedence over the 1998 leases acquired by Lance and Williams based on Wyoming's race notice recording statute, provided that there are no bases for application of the doctrine of after-acquired title or relation back. The supreme court did not discuss this issue at length because to do so would violate the fundamental principle of the doctrine of estoppel by deed.

Given the court's holding, it appears that an oil and gas lease in Wyoming, with or without a warranty clause, covers any title subsequently acquired by the lessor, and that only by express language will any title subsequently acquired by the lessor not be covered by an oil and gas lease.

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