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FEDERAL — MINING

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— REPORTER —

D.C. CIRCUIT EXAMINES FLPMA'S WITHDRAWAL AND SEGREGATION AUTHORITY

In *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745 (D.C. Cir. 2007), the D.C. Circuit examined the Department of the Interior's (DOI) withdrawal and segregation authority under the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (FLPMA). One of the issues considered in the case was whether Interior had authority to impose two consecutive two-year segregations under 43 U.S.C. § 1714(b) of the statute, by submitting two consecutive withdrawal proposals.

The segregations and withdrawals arose in the context of the Bureau of Land Management's (BLM) land use planning process undertaken in Montana's Sweet Grass Hills. The 1992 Resource Management Plan (RMP) for the area designated a large tract of land as an area of critical environmental concern, but kept the area open to mineral location. In 1993, public opposition to proposed mining in the area led BLM to reassess its RMP. To protect the land while it conducted that reassessment, BLM submitted an application to withdraw almost 20,000 acres of land from mineral entry for 20 years pursuant to § 1714(c) of FLPMA. Under § 1714(b) of the statute, publication of a notice of such an application results in a two-year segregation of the land, allowing DOI to process the application. The stated purpose of the proposed withdrawal was to protect potential habitat for the endangered peregrine falcon, areas of religious importance to Native Americans, aquifers providing the only potable water in the area, and seasonally important habitat for elk and deer.

In 1993, BLM published notice of its intent to amend the RMP and its supporting Environmental Impact Statement (EIS) in order to address the proposed withdrawal. By 1995, however, it became clear that the agency could not complete the RMP amendments before the two-year segregation would lapse. At the same time, legislation had been introduced in Congress that would permanently prohibit mineral location within the Sweet Grass Hills. Accordingly, the BLM again made application for a withdrawal under § 1714(c), declaring that the purpose was to protect the same resource values as the first withdrawal proposal, to preserve the status quo, and to aid in legislation. Again, the publication of the second proposed withdrawal resulted in a two-year segregation

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IBLA AFFIRMS BLM DECISION ALLOWING LEASING IN WYOMING BIG GAME WINTER RANGE

The Wyoming State Office of the Bureau of Land Management (BLM) denied the Wyoming Outdoor Council and Biodiversity Conservation Alliance's (collectively, WOC) protest of the sale of nine parcels in a federal oil and gas lease sale. In *Wyoming Outdoor Council*, 171 IBLA 108, GFS(O&G) 2(2007), the Interior Board of Land Appeals (IBLA) affirmed the BLM's decision and held that the BLM complied with sections 202(c)(9) and 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA) prior to the sale of federal oil and gas leases.

Since certain parcels of land in the sale (Subject Area) contain crucial big game winter ranges for pronghorn, mule deer, and elk, the BLM made the oil and gas leases covering these parcels subject to the BLM's timing limitation stipulation (TLS) that prevents drilling activities in the Subject Area from November 15 through April 30. WOC's protest was based upon its assertions that (1) the standard TLS was inadequate as applied to the crucial winter range; (2) the BLM did not abide by or adopt Wyoming's policies, programs, and guidelines for crucial winter ranges as required under sections 202(c)(9) and 302(b) of FLPMA; and (3) the BLM failed to abide by two Resource Management Plans (RMP) and an Umbrella Memorandum of Understanding (MOU) between the State of Wyoming and the U.S. Government that required the BLM to consult and coordinate with the appropriate Wyoming agency on land planning issues.

Section 202(c)(9) of FLPMA provides, in part, that in the development and revision of land use plans, the Secretary shall . . . to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of . . . the States and local governments within which the lands are located.

The IBLA affirmed the BLM's conclusion that the BLM is only required to consult and coordinate with the appropriate Wyoming agency on land use, planning, and management activities and that

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of the land under § 1714(b). Shortly thereafter, Mount Royal and the other appellants in the case located mining claims within the segregated area. In 1997, DOI approved the withdrawal of the area from mineral location for 20 years. 477 F.3d at 749-53. When BLM declared the appellants' claims void because they were located on land segregated from location, the appellants appealed the decision to the Interior Board of Land Appeals (IBLA), challenging the segregation and withdrawal. *See Mount Royal Joint Venture*, 144 IBLA 277, GFS(MIN) 76(1998). After IBLA upheld the agency's actions, the appellants appealed the decision first to the district court and then to the D.C. Circuit.

Appellants argued that FLPMA does not allow consecutive withdrawal proposals, whether for the same or for different purposes, because the process violates FLPMA's two-year limitation on segregations. Alternatively, the appellants argued that even if the statute does allow consecutive proposals with different purposes, the two proposed withdrawals had the same purpose—to protect the same resource values. In the appellants' view, stating that the withdrawal was proposed to "protect the status quo" did not change that purpose. Nor was the purpose changed by the assertion that the proposed withdrawal was in aid of legislation, because § 1714(c) and (d) do not authorize the agency to withdraw a tract of land in excess of 5,000 acres in aid of legislation.

According to *Chevron* deference to the agency's decision, the court rejected these arguments, upholding IBLA's conclusion that § 1714(b) does not prohibit consecutive withdrawal proposals that have different purposes. The court reasoned that consecutive withdrawal proposals with different purposes are not inconsistent with FLPMA's two-year limit on segregations, because a proposal with a different purpose does not renew or extend the prior segregation. Instead, the new proposal responds to new developments. In the instant case, the second proposal responded to the fact that legislation had been proposed to protect the area. 477 F.3d at 755.

The court rejected the contention that aiding the proposed legislation could not be a legitimate purpose of a proposed withdrawal of more than 5,000 acres of land. Section 1714(d)(3) expressly allows withdrawal of a tract of less than 5,000 acres to preserve the tract for a use then under congressional consideration. In contrast, § 1714(c), which governs withdrawals of tracts larger than 5,000 acres, does not expressly mention that purpose. The court dismissed the argument that because § 1714(d) expressly authorizes withdrawals to aid in legislation, § 1714(c), which does not mention that purpose, must be read to prohibit withdrawals made for the purpose of aiding legislation. The court observed that § 1714(c) authorizes Interior to withdraw land, but allows Congress to disapprove the withdrawal. Accordingly, withdrawals under that section can be made for any purpose as long as Congress does not disapprove. 477 F.3d at 755-56. Because the appellants' mining claims were located on land segregated from mineral location, the court upheld IBLA's conclusion that the claims were void.

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FOURTH CIRCUIT RULES THAT THE UNITED STATES OWNS SAND AND GRAVEL UNDER SMALL TRACT ACT PATENTS

In an unpublished decision, *New West Materials LLC v. Interior Board of Land Appeals*, No. 05-2362, No. 05-cv-371-DRH, 2007 WL 446729 (4th Cir. Feb. 8, 2007), the Fourth Circuit affirmed the holdings of the IBLA and the lower court that sand and gravel were reserved to the United States in patents issued under the Small Tract Act, § 1, ch. 270, 68 Stat. 239, *repealed by* Pub. L. No. 94-579, tit. VII, § 702, 90 Stat. 2789 (1976). *New West Materials, LLC v. IBLA*, 398 F. Supp. 2d 438 (E.D. Va. 2005); *New West Materials*, 164 IBLA 126 (2004), GFS(MIN) 2(2005). As noted in this *Newsletter's* previous discussion of the IBLA decision in *New West*, because of the small amount of acreage patented under the Small Tract Act, the direct impact of this ruling is limited. Nevertheless, the decision is an interesting twist in the ongoing debate as to when Congress intended to include sand and gravel in authorizing surface patents. See Vol. XXII, No. 2 (2005) of this *Newsletter*.

Like IBLA and the district court, the Fourth Circuit had no difficulty concluding that the issue was controlled by the U.S. Supreme Court's decision in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), and not its more recent decision in *BedRoc Ltd., LLC v. United States*, 541 U.S. 176 (2004). In *Western Nuclear*, the Court concluded that sand and gravel was reserved under the reservation of "all the coal and other minerals" contained in patents issued pursuant to the Stock-Raising Homestead Act (SRHA). In *BedRoc*, the plurality decision distinguished *Western Nuclear*, concluding that the SRHA's reservation of "all the coal and other minerals" reflected a different intent than the Pittman Underground Water Act's reservation of "all the coal and other valuable minerals." Reasoning that sand and gravel were not deemed to be valuable minerals at the time the Pittman Act was enacted, the plurality decision concluded that the reservation did not include those materials. *Id.* at 183-84.

The *New West* court examined contemporaneous understanding of the meaning of the term "minerals," congressional history, and Congress' purpose in enacting the Small Tract Act in reaching its conclusion that the Act contemplated a reservation of sand and gravel, 2007 WL 446729, at *4-5; however, the thrust of the decision hinges on the result in *Western Nuclear* and the similarities between the language of the Small Tract Act and the SRHA. The court concluded that the reservation language in the Small Tract Act of "oil, gas, and all other mineral deposits" was "strikingly similar" to the language of the SRHA, which required a reservation of "all the coal and other minerals." *Id.* at *4. Like the district court, the appellate court concluded that the addition of the modifier *valuable* was required to distinguish the Pittman Act reservation from that of the SRHA reservation. Without that modifier, the reservations contained in the Small Tract Act and the SRHA could not be distinguished. Accordingly, the court reasoned that the *Western Nuclear* holding is "persuasive, if not, controlling" that sand and gravel were reserved under the Small Tract Act.

SUBSIDENCE CLAIMS BARRED BY CONSTRUCTION STATUTE OF REPOSE

Construction statutes of repose, which have been enacted in many states, are typically thought of as protecting architects and contractors from lawsuits claiming design or construction defects long after a building is completed. The decision in *Wilke Window & Door Co. v. Peabody Coal Co.*, No. 05-cv-371-DRH, 2007 WL 924463 (S.D. Ill. Mar. 27, 2007), indicates the statutes can also provide similar protection for mining companies.

The court in *Wilke* ruled that the Illinois construction statute of repose barred a surface owner's claims for damages arising from subsidence of an underground coal mine. The mine was a room and pillar mine that closed in 1960. The subsidence occurred in 2000. The surface owner filed suit, claiming negligence and violation of Illinois's Surface Coal Mining Land Conservation and Reclamation Act. Peabody Coal Company, which owned the mine, moved for summary judgment on the grounds that both claims were barred by the statute of repose. The Illinois statute provides that no action based on tort, contract, or otherwise may be brought for an act or omission in the design or construction of "an improvement to real property" more than 10 years after the time of the act or omission. 735 Ill. Comp. Stat. 5/13-214(b).

The sole issue facing the court was whether a coal mine can be deemed to be the "construction of an improvement to real property." The court first considered whether a coal mine is constructed or is, as the plaintiff claimed, merely an excavation. The court readily concluded that the creation of a room and pillar mine is construction. 2007 WL 924463, at *6. As to the question of whether a mine is an improvement, the court noted that Illinois law requires an examination of a number of factors to determine whether an addition to property is an improvement. The factors to be considered include whether the addition is a valuable addition to the property, whether it adds utility to the property and adapts it to a further or additional purpose, whether it is permanent, and whether it adds value to the property. Examining these factors, the court concluded that a coal mine is an improvement. *Id.* at *6-7. Accordingly, the court ruled that the 10-year statute of repose barred both common law and statutory claims for subsidence damage arising out of a mine that had closed more than 40 years prior to the subsidence.

SMALL MINER PREVAILS IN FILING DISPUTE

In *Dimitrov v. Norton*, No. CV-06-58-BLG-RFC, 2007 WL 894215 (D. Mont. Mar. 14, 2007), the U.S. District Court for Montana reversed the decision of the IBLA that had invalidated the claimant's mining claims on the basis of a defective small miner certification under 30 U.S.C. § 28f(d)(1). The court adopted the magistrate judge's findings and recommendations that concluded that although the claimant's filing did not meet all of the requirements for a small miner certification, the omissions were curable, not fatal, defects. The claimants timely filed a document, entitled

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.

“Affidavit of Annual Representation Work,” which listed the claims, their serial numbers, the owners of the claim, and described the assessment work that had been conducted on the claims. 2007 WL 894215, at *3. The filing was not signed and did not “certify” that each owner owned less than 10 claims or that the assessment work had been performed, as required by the small miner statute. Nevertheless, as the magistrate observed, these facts were evident from the face of the document, and the document “easily could and should have been construed” as a request for waiver. *Id.* at *4. Rejecting the “bright-line test” adopted by the BLM and the IBLA, the magistrate concluded that the lack of certifying language and a signature were curable defects that did not render the claims void. *Id.* at *5.

MINER LOSES FILING DISPUTE OVER POSTMARKS

The court in *Utah Marblehead, LLC v. Kempthorne*, No. 05-00844 (HHK), 2007 WL 1020822 (D.D.C. Mar. 29, 2007), upheld IBLA’s conclusion that a stamp from a private postage meter stamping machine is not the postmark of a “bona fide delivery service” that could serve as evidence that maintenance fees were timely filed. The claimant argued that it had postmarked the envelope containing the fee payment for 96 unpatented mining claims with a private postal meter and delivered it to the U.S. Postal Service prior to the filing deadline. The envelope was returned to the sender with no stamps indicating it had been handled by the post office. Fifteen days after the filing deadline, the fees were delivered to BLM by overnight courier. *Id.* at *1.

BLM regulations provide that a maintenance fee filing is considered timely if it is received within 15 days after the filing deadline and the package containing the payment is postmarked by a “bona fide delivery service” prior to the filing date. 43 C.F.R. § 3833.0-5(m) (2001) (similar provision now codified at 43 C.F.R. § 3830.24). IBLA concluded that because a private postal meter is in the control of the claimant, the meter’s stamp cannot be considered the postmark of a bona fide delivery service. Accordingly, it ruled that the claimant’s filing was not timely and the claims were void. 2007 WL 1020822, at *4. Deferring to the agency’s interpretation of its own regulations, the D.C. district court agreed and upheld the IBLA’s decision. *Id.* at *5.

COMPETING USES UNDER THE MINING CLAIMS RIGHTS RESTORATION ACT MUST BE SUBSTANTIAL, BUT NEED NOT BE ECONOMICALLY QUANTIFIABLE

The Mining Claims Rights Restoration Act of 1955 (MCRRA) opened lands withdrawn for power sites to mining location, but placed restrictions on placer claims located within such sites. 30 U.S.C. §§ 621-625. Under the statute, a placer claimant can conduct no operations on the claim until 60 days after filing the notice of location with BLM. During the 60-day period, the Department of the Interior can notify the claimant that it intends to conduct a hearing as to whether placer mining operations would substantially interfere with other uses of the land included within the claim. If the agency determines that the benefits of mining are outweighed by the injuries mining would cause to other uses of the land, it can prohibit mining. *E.g., United States v. Stone*, 136 IBLA 22, 32, GFS(MIN) 46(1996). A recent IBLA decision, *United States v. Eno*, 171 IBLA 69, GFS(MIN) 4(2007), examines the nature of the balancing analysis required by the MCRRA. *Eno*

was an appeal by the Forest Service from an administrative law judge’s (ALJ) decision to allow placer mining operations to be conducted within a power site. Although IBLA ultimately agreed with the ALJ that placer mining would not substantially interfere with competing uses of the land, it disagreed with much of the ALJ’s reasoning, and in doing so clarified the factors to be considered in an MCRRA analysis.

In considering the competing uses and values of the land, the ALJ discounted the scenic, cultural, and geological values of the land, because the Forest Service had failed to provide any evidence of the economic value of those resources. 171 IBLA at 94. The IBLA rejected the analysis, citing *United States v. United Mining Corp.*, 142 IBLA 339, GFS(MIN) 38(1998), in which the Secretary of the Interior overruled the IBLA’s holding that in determining whether land is chiefly valuable for building stone under the Building Stone Act, 30 U.S.C. § 161, only economic values of the land can be considered. The IBLA reasoned that like the Building Stone Act, the MCRRA does not limit what kind of uses may be considered in weighing the competing uses of the land. Accordingly, in making the comparison required by the statute, the agency has discretion to consider unquantifiable uses, including conservation and preservation uses. 171 IBLA at 94.

The Forest Service argued that the ALJ had erred in concluding that only substantial competing uses can be considered in an MCRRA analysis, arguing that even insubstantial interests should be considered and protected from mining if they outweigh the value of the mining. Looking to established precedent on the issue, IBLA disagreed. It concluded that in weighing the benefits and injuries of mining within power sites, Interior can consider only “substantial” competing uses of the land. *Id.* at 93 & 102, n.15.

In addition, the IBLA concluded that in assessing the harm posed by mining, the agency must consider all types of legal placer mining operations, not just the particular method proposed by the miner. In assessing the impact of mining within the power site, the ALJ had considered only the impact of the particular mining method proposed by the mining claimant, without considering more intrusive methods that legally could be used. IBLA rejected that reasoning. Observing that because Interior has only one opportunity to consider whether mining on a mining claim within a power site is appropriate, that determination must address all legal methods that might be suitable to extract the deposit. *Id.* at 98-99.

The claim at issue in *Eno* contained both gold and travertine deposits, which the claimant contended was an uncommon variety. The ALJ, however, concluded that he need only consider the impact of gold mining on the power site uses, because extraction of travertine is done by quarrying methods and not traditional placer mining methods. Thus, the ALJ applied a literal reading of the statute, which in his view only allowed a consideration of “placer mining operations.” IBLA readily dismissed the reasoning. Because building stone is located with placer claims, the Board concluded that whatever mining method is used to extract the mineral “necessarily constitutes placer mining operations.” *Id.* at 97-98.

Despite its disagreement with the ALJ’s reasoning, the IBLA affirmed the judge’s conclusion that mining should be allowed in the power site. While it agreed with the Forest Service that the ALJ had improperly discounted the cultural and geologic values of the area (which the Board concluded were substantial uses of

the land) and failed to account for all of the impacts mining might have on those values, the Board nevertheless concluded that the Forest Service had failed to establish a credible case that, in light of the regulatory constraints that would be imposed on the operation, mining in the power site would substantially interfere with the competing uses of the land. *Id.* at 100-01.

NOTATION RULE—A RULE OF FAIRNESS?

Joe R. Young, 171 IBLA 142, GFS(MIN) 8(2007), is another in a series of notation rule decisions in which IBLA has ruled that notation of the existence of a segregation on BLM's master title plats and historical indices closes the land to entry, even when the underlying segregation is void. *Young* involved location of a mining claim on land that the records of BLM's Alaska Office indicated were located in the Chugach National Forest (established in 1909) and had been selected by the State of Alaska in 1963 in satisfaction of its state land grant. The filing of a state selection for national forest lands has no segregative effect, because forest lands are not available for state selection. Nevertheless, IBLA concluded that the notation rule precludes entry until the notation is removed. As it has in the past, IBLA emphasized that the notation rule is required by fairness—it allows the public to rely on notations in the agency's records and affords everyone an equal opportunity to file entries or mining claims. *Id.* at 146, n.4.

Young is interesting, not because of the result—which was predictable—but because of the history of the state selection and the concurring opinion's comments regarding that history and the continued viability of the notation rule. The selection, A-058731, was filed in 1963. In 1985, IBLA issued two decisions that considered, but did not decide, whether the selection was void or voidable. Instead, in both cases IBLA concluded it need not address the validity of the underlying selection because the notation rule operated to segregate the land from entry. *B. J. Toohey*, 88 IBLA 66, 105, n.12, 92 I.D. 317, GFS(MIN) 118(1985); *David Cavanagh*, 89 IBLA 285, 92 I.D. 564, GFS(MIN) 162(1985) (both cases *aff'd sub nom. Cavanagh v. Hodel*, No. 86-041 Civil (D. Alaska Mar. 18, 1988)). See *Young*, 171 IBLA at 145, n.6 (noting treatment of the state selection in *Toohey* and *Cavanagh*). It appears, however, that BLM itself rejected the selection in 1985, presumably because it was illegal. 171 IBLA at 147. Thus, although the selection was invalid from its inception and BLM was aware of the invalidity of the selection for at least 20 years, it allowed the notation to remain on its records, effectively barring any entry on the land for 43 years.

Judge Harris, in a concurring opinion, discussed this history, and concluded that the effect of the notation rule in this case was not fairness but to treat “all citizens equally unfairly.” The rule has functioned to allow “egregious agency inaction” to create a “de facto closure of public lands to all entry for forty-three years.” The Judge concluded by observing, “Surely there is a better way to ensure fair entry onto the public lands.” *Id.* at 147-48.

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this coordination applies during the application for permit to drill (APD) stage rather than the oil and gas lease sale stage. This analysis is supported by the fact that no surface disturbance can occur

prior to the issuance of an APD which, in turn, requires the BLM's completion of a National Environmental Policy Act (NEPA) analysis on the Subject Area which will include consultation and coordination with Wyoming state policies, procedures, and guidelines as they relate to the crucial winter range. The IBLA further held that the BLM complied with the MOU when it provided the Wyoming Game and Fish Department with notice of the oil and gas lease sale five months prior to the sale and received no objection from the department.

Section 302(b) of FLPMA requires the BLM to take any action necessary to prevent unnecessary or undue degradation of public lands. WOC argued that the BLM violated section 302(b) because it did not consider Wyoming policies prior to the lease sale. The IBLA determined that BLM's analysis of Wyoming state policies, procedures, and guidelines during the APD process to determine the degradation of the crucial winter range satisfies section 302(b) of FLPMA. The IBLA also held that WOC presented no evidence that the oil and gas lease sales would result in adverse impacts to the big game in the Subject Area and, therefore, the IBLA could not analyze whether an injury may occur as a result of the lease sales.

IBLA HOLDS THAT BLM INSTRUCTION MEMORANDUM IS NOT BINDING

In another case, the Wyoming State Office of the Bureau of Land Management (BLM) denied the Wyoming Outdoor Council and Biodiversity Conservation Alliance's (collectively, WOC) protest of the sale of nine parcels in a federal oil and gas lease sale. In *Wyoming Outdoor Council*, 171 IBLA 153, GFS(O&G) 3(2007), the Interior Board of Land Appeals (IBLA) affirmed the BLM's decision that the Instruction Memorandum (IM) at issue had no application to the issuance of oil and gas leases and that an IM is not binding on the IBLA or the public at large.

Certain parcels of land in the sale (Subject Area) contained big game migration routes. Prior to the sale, the Director of the BLM issued IM 2004-194 (Change IM) that instituted a policy that the BLM field offices consider Best Management Practices (BMPs) in their National Environmental Policy Act (NEPA) analysis to mitigate impacts to surface and subsurface resources and to encourage operators to consider BMPs during the APD process. WOC argued that the Change IM required the BLM to evaluate BMPs when taking leasing actions on the Subject Area and that the BLM should have prepared new NEPA documentation addressing BMPs prior to the lease sale. In affirming the BLM, the IBLA held that the Change IM does not require BMPs to be considered at the oil and gas leasing stage and the appropriate time for the evaluation of a BMP is at the APD stage of development. The IBLA further mandated that the BLM's IM only provides internal policies that are not binding on the IBLA or the public at large because the guidance provided in an IM is not a duly promulgated regulation under the Administrative Procedure Act.

IBLA UPHOLDS APPROVAL OF PACIFIC RIM SHALLOW GAS EXPLORATION AND DEVELOPMENT PROJECT

The Wyoming State Office of the Bureau of Land Management (BLM) approved the Rock Springs Field Office's decision approving the Pacific Rim Shallow Gas Exploration and Development Project (Project). The Project consists of drilling and devel-

oping up to 120 natural gas wells, roads, and pipelines on approximately 47,589 acres in Sweetwater County, Wyoming. The Biodiversity Conservation Alliance and Wyoming Wilderness Association (collectively, BCA) appealed the BLM's decision that no significant impact would occur as a result of the Project. In *Biodiversity Conservation Alliance*, 171 IBLA 218, GFS(O&G) 4(2007), the Interior Board of Land Appeals (IBLA) affirmed the BLM decision and held that the Project was supported by an existing Environmental Assessment (EA), Resource Management Plans (RMPs), and the Rock Springs Field Office's Decision Record/Finding of No Significant Impact (DR/FONSI), and that the BLM did not have to conduct additional National Environmental Policy Act (NEPA) analysis until the application for permit to drill (APD) stage of development on the Project.

In preparation of the section of the EA regarding the effects that drilling may have on sage grouse habitat within the Project area, the BLM analyzed various EAs, RMPs, and the DR/FONSI. The BLM determined that any effects were either not significant or could be mitigated to insignificance and that a further analysis of the matter would be undertaken at the APD stage of development. The BLM also considered various alternatives, i.e., S-turn directional drilling and larger buffer zones, for the construction and development of the Project. The BCA argued that the BLM violated the procedural requirements of section 102(2)(C) of NEPA because it failed to take a "hard look" at the likely environmental impacts on the greater sage grouse and to consider alternatives to the Project. In affirming the BLM's actions, the IBLA held that the BLM was not required to prepare an Environmental Impact Statement under 102(2)(C) of NEPA prior to approval of the Project because (1) the BLM will conduct a site-specific environmental review at the APD stage, and (2) the Project will not have any significant impact on the human, natural, or physical environment.

BCA also argued that the BLM violated section 7 of the Endangered Species Act because it failed to consult with the Fish and Wildlife Service (FWS) when it determined the effects the Project may have on four threatened and endangered Colorado River fish species. The IBLA held that the BCA failed to acknowledge that formal consultation is not required when the BLM determines that the proposed action "may affect, but is not likely to adversely affect," or there will be "no effect" on threatened and endangered species. The BLM provided in its EA, as well as subsequent letters to the FWS, that the Project will have "no effect" on the four threatened and endangered Colorado River fish species and the FWS concluded that no consultation was required under NEPA. Adhering to the plain language of NEPA, the IBLA held that the BLM was not required to formally consult with the FWS concerning the impact of the Project on the four threatened and endangered Colorado River fish species during the approval stage of the Project.

CONGRESS /
FEDERAL AGENCIES
OIL & GAS

ROBERT C. MATHES

— REPORTER —

FOREST SERVICE ISSUES NEW CATEGORICAL EXCLUSIONS FOR OIL AND GAS ACTIVITIES

On February 15, 2007, the Forest Service revised its procedures for implementing the National Environmental Policy Act of 1969 (NEPA), 43 U.S.C. §§ 4321-4347, authorizing categorical exclusions to facilitate oil and natural gas activities on National Forest System lands. 72 Fed. Reg. 7391 (Feb. 15, 2007). Categorical exclusions are defined as actions that do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require further analysis and documentation in either an environmental assessment (EA) or environmental impact statement (EIS). 40 C.F.R. § 1508.4. The Forest Service issued the new categorical exclusions in response to Executive Order 13212 which requires federal agencies to expedite the increased supply and availability of energy to the nation. The new categorical exclusions allow the Forest Service to approve a Surface Use Plan of Operations for oil and natural gas exploration and initial development activities associated with or adjacent to a new oil and/or gas field or area so long as the approval will not authorize activities in excess of any one of the following:

- (1) one mile of new road construction;
- (2) one mile of road reconstruction;
- (3) three miles of individual or co-located pipelines and/or utilities disturbance; or
- (4) four drill sites.

See Forest Service Handbook (FSH) 1909.15, ch. 30, § 31.2, ¶ 17. According to the Forest Service's internal policies, categorical exclusions are not to be used when extraordinary resources, such as endangered or threatened species or inventoried roadless areas, may be impacted. FSH 1909.15, ch. 30, § 30.3.

The proposed categorical exclusions were originally released for public comment on December 13, 2005. 70 Fed. Reg. 73,722 (Dec. 13, 2005). The new categorical exclusions became effective February 15, 2007.

BLM AND FOREST SERVICE ISSUE NEW ONSHORE ORDER NO. 1

On March 7, 2007, the Bureau of Land Management (BLM) and the Forest Service issued a new Onshore Oil and Gas Order No. 1, Approval of Operations, revising the existing Onshore Oil and Gas Order No. 1 which had been in effect since October 21, 1983. 72 Fed. Reg. 10,308 (Mar. 7, 2007). The revision was necessary due to provisions of the 1987 Federal Onshore Oil and Gas Leasing Reform Act, the Energy Policy Act of 2005, and various legal opinions and court cases issued since the original Onshore Order No. 1 was published. The new Onshore Order significantly revised the procedures for filing an application for permit to drill

(APD) including requirements for the submittal of a complete APD package. Under the new Onshore Order, an APD package must contain a Drilling Plan, Surface Use Plan of Operations, evidence of bond coverage, and Operator Certification. The new Onshore Order clarifies the regulations and procedures that are to be used when operating on split estate lands, including those lands within Indian country. It also addresses using Master Development Plans to approve multiple well development proposals and encourages the voluntary use of Best Management Practices as part of the APD processing. Finally, it requires additional bonding on certain off-lease facilities and clarifies the BLM's authority to require this.

In particular, operators will note that, under the new Onshore Order, the owners of split estate lands are entitled to attend onsite inspections as part of the APD approval process. Further, split estate surface owners have the right to appeal the adequacy of bonds when operators and surface owners are unable to reach a surface access agreement. The new Onshore Order also makes onsite inspections mandatory, as compared to the voluntary procedure used under the 1983 order. An APD is not considered complete until after the onsite inspection has been conducted; thus, the 30-day time frame in which the BLM is required to process the APD does not begin until after the onsite inspection. On National Forest System lands, the 30-day time frame does not begin until the Forest Service has approved a Surface Use Plan of Operations. As always, APDs cannot be approved without adequate NEPA analysis. The new Onshore Order became effective May 8, 2007, and should be carefully reviewed by operators, practitioners, and other interested parties. 72 Fed. Reg. 10,608 (Mar. 9, 2007).

COLORADO — MINING

HOWARD R. HERTZBERG
— REPORTER —

COUNTY BAN ON USE OF CYANIDE IN MINING OPERATIONS UPHELD BY COURT OF APPEALS

Colorado Mining Ass'n v. Board of County Commissioners, No. 05CA1996 (Colo. Ct. App. 2007) involves an action by the Colorado Mining Association (CMA) challenging amendments to Summit County's land use and development code. The amendments banned "any mining or milling operation that utilizes cyanide and other toxic or other toxic/acidic ore-processing reagents in heap or vat leach applications in any zoning district" and set "performance standards for designated chemicals and hazardous materials." Because the CMA had not applied for a permit, the suit sought "facially to invalidate" the amendments.

The trial court held that the amendments were expressly preempted by the Mined Land Reclamation Act (MLRA). The court of appeals held that the performance standards were preempted, but that "the ban on cyanide and other reagents in leach applications is not preempted." In a nutshell, the court of appeals' rationale for upholding the ban appears to be that the ban does not seek to regulate any aspects of actual mining operations (including, in particular, reclamation activities), but instead simply prohibits certain types of mining operations; in other words, since the ban

precludes such operations from ever being conducted in the first place, Summit County is not regulating the conduct of such operations and as such there can be no conflict with the MLRA.

The opinion included a detailed discussion of preemption, noting that a statute can preempt local regulations by expressly providing for preemption. Also, preemption can be inferred "if the statute impliedly evinces a legislative intent completely to occupy a given field." Finally, there could be partial preemption. Against that framework, the opinion included a lengthy discussion of the interplay between the amendments to Summit County's land use and development code and the MLRA.

The court of appeals in large part appears to have based its decision on a county's zoning powers. It noted that a 1983 court of appeals' case in effect held that the MLRA "does not prohibit local regulation by permit of all aspects of land use for mining, including the location of mining operations" (citing *C & M Sand & Gravel v. Board of County Commissioners*, 673 P.2d 1013, 1017 (Colo. Ct. App. 1983)), and further noted that the MLRA was amended after *C & M* was decided but the amendments to the MLRA did not alter the judicial construction that *C & M* had given the MLRA. As such, *C & M's* interpretation of the MLRA was deemed to have been ratified. Having determined that Summit County has broad zoning powers with respect to mining, and having determined that the ban applies before mining even takes place, the court of appeals consequently had no problem upholding that ban. There is a strongly worded dissent regarding the ban.

A petition for rehearing was filed on April 5, 2007, but at the time of this report a decision on the petition had not been issued. Ultimately, the Colorado Supreme Court may have to resolve this dispute.

COLORADO — OIL & GAS

SHERYL L. HOWE
— REPORTER —

COURT OF APPEALS UPHOLDS JURY VERDICT FOR UNDERPAID ROYALTIES

In *Clough v. Williams Production RMT Co.*, 673 P.3d 1013 (Colo. Ct. App. 2007), petition for certiorari filed April 2, 2007, No. 07SC199, the court of appeals rejected arguments regarding evidentiary rulings, jury instructions, and how damages were calculated, and affirmed a judgment based on a jury verdict awarding the mineral owner \$4,091,561.30 in damages. Clough sued Williams alleging that royalties had been underpaid because Williams failed to account for all of the gas obtained, failed to pay the full amount due for the natural gas liquids removed from the gas stream, and improperly deducted the cost of gathering, processing, and transporting the gas to the commercial marketplace.

At trial, Williams sought to introduce evidence that it had received an offer in 1984 to purchase gas at the wellhead. The trial court excluded evidence of this offer and other pre-1992 sales and marketing evidence. The court of appeals upheld the trial court's exclusion of this evidence, after reviewing the history of the natural gas industry, noting that prior to deregulation most gas was

purchased at or near the wellhead and now most gas is purchased away from the wellhead. F.E.R.C. Order No. 636 was issued in 1992, requiring interstate pipelines to “unbundle” transportation services and to provide transportation services to others that wished to ship gas. The appellate court noted that the case involved gas sold from February 1996 to February 2004 and agreed with the trial court that the pre-1992 evidence was too dissimilar and too remote to be relevant to the claims involved in the case.

The court of appeals also rejected Williams’s appeal challenging the jury instructions. The opinion does not set forth the language of the disputed jury instructions. The court of appeals cites *Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2001) holding that whether a lessee acted in bad faith is a separate issue from the determination of marketability for the purpose of allocating costs and calculating royalty payments, and that these issues should be addressed and instructed upon separately. The court rejected Williams’s argument that the jury instructions in this case violated the principles expressed in *Rogers*. The court also rejected Williams’s arguments that the jury should have been instructed that the leases were silent on the allocation of costs. The opinion notes that the jury had been instructed that the leases were to be strictly construed against the lessee.

On the question of damages, the court found that the plaintiff’s expert analysis, based on data from February 1996 to December 1999, was adequate. The time period covered by the claim extended to February 2004. The court cited cases from other states for the proposition that loss involving royalties is, by its nature, difficult to show. The court noted that the expert had spot-checked her calculations with data from one month in 2001, there had been extensive cross-examination of the expert’s analysis, and the jury heard this testimony and was responsible for weighing it and determining the amount of damages.

Although it was not included in the appeal, it is interesting that plaintiffs had made a claim for violation of the Colorado Consumer Protection Act and for triple damages. The trial court granted Williams’s motion at trial for judgment notwithstanding the verdict as to the Consumer Protection Act claim and denied Clough’s motion for treble damages.

MISSISSIPPI — OIL & GAS

W. ERIC WEST
— REPORTER —

TITLE SEARCH ROLL OF THE DICE: BUYER LOSES

The case of *Alamac LLC v. Travelers Bank & Trust, FSB*, 941 So. 2d 219 (Miss. Ct. App. 2006) demonstrates what can happen when a buyer of real property fails to examine the general index of county records. Mississippi land records are maintained by the Clerk of the Chancery Court of the county in which the land is situated. Miss. Code Ann. § 89-5-33 requires the Chancery Clerk to maintain a general direct/reverse index or grantor/grantee index and a sectional index (tract index) in which land instruments are entered under the government survey section in which the lands are located. This statute also requires that there be entered on each instrument submitted for filing “an indexing instruction” stating

the section number and other data to aid the recorder in indexing the instrument.

Prior to 1994, Mississippi law did not require that a sectional index be maintained. Nevertheless, over the years nearly every county in the state established one as an accommodation. A few counties did not. For example, Adams County, the county seat of which is Natchez, for many years did not have a sectional index because of the numerous irregularly sized and configured private land grants in the county. These land grants, which were made by England, France, and Spain prior to U.S. sovereignty were often described with reference to the Mississippi River, making it impractical, if not impossible, to maintain a sectional index.

Under a dual index system, the practice for examining title is to examine the sectional index in order to establish a “chain of title,” i.e., a list of the owners and the time periods in which they owned the land. The general index is then searched with respect to each owner for the time period in which the land was owned. Such title examinations can be time consuming and expensive particularly in Mississippi counties that had oil and gas exploration activities for many decades.

Because of the time and expense, some Mississippi operators limit title examinations to the sectional index and assume the risk associated with not examining the general index absent an obvious problem. Operators also use a graduated level of title security. For leasing purposes the examination will be limited to the sectional index. For drilling or division order purposes the examination will include both the sectional and general index. For a large area of interest, where land transactions have been numerous and land subdivided, horizontally and vertically, due to oil and gas operations, the trade-off is probably a prudent business practice. In any event, it is an accepted practice.

An occasion when the odds caught up with a buyer is reported in *Alamac*. A land owner mortgaged property to Travelers. The deed of trust correctly described the property on the face of the instrument. The indexing instruction, however, contained an error, placing the land in another section. The deed of trust was filed for record and correctly entered in the general index and incorrectly entered under the wrong section in the sectional index. Later the land owner agreed to sell the property to Alamac. Before the sale, Alamac caused a title search to be made. The title search was limited to the sectional index and, as a result, did not reveal the mortgage in favor of Travelers. The opinion does not indicate whether the failure to examine the general index was a conscious business decision or resulted from an oversight. It is hard to believe it is the latter as no one familiar with Mississippi title examinations could forget the general index.

The transaction closed and thereafter Travelers began foreclosure proceedings. Alamac then filed suit asserting that it was a bona fide purchaser for value without notice of the deed of trust and asking for declaratory judgment that Travelers’ interest in the property was subordinate and junior to Alamac’s interest. The trial court held the general index remains the official index primarily relied upon in the State of Mississippi and that any document correctly indexed in such index will stand as constructive notice for any particular purpose. The Mississippi Court of Appeals affirmed the trial court. This is in line with the provisions of Miss. Code Ann. § 89-5-32, which specifically provides that: “[i]n the event

of conflict between the general and the sectional indices, the notice imparted by the general index shall prevail except to the extent the land is described by lot number for platted subdivisions, official surveys and unofficial subdivisions and surveys commonly in use, the sectional index shall prevail.” 941 So. 2d at 221. In other words, if it is “country land” the general index will prevail. If it is a platted subdivision with lots and blocks, the subdivision plat index will prevail. The appeals court concluded: “Alamac had a duty to search the general index, as it would prevail over an incorrect entry in the sectional index.” *Id.* The buyer lost this one. Let’s hope this does not happen to an operator after it drills a successful well.

NEBRASKA — OIL & GAS

ANNETTE M. KOVAR
— REPORTER —

PROPER CONSTRUCTION OF JOINT OPERATING AGREEMENT

The Nebraska Supreme Court issued a decision in *Coral Production Corp. v. Central Resources, Inc.*, 273 Neb. 379, 730 N.W. 2d 357 (Neb. 2007), which involved a dispute between oil and gas companies over the proper construction of executory promises under a joint operating agreement (JOA). The parties had used the 1977 version of Form 610, Model Form Operating Agreement, developed by the American Association of Petroleum Landmen and had made several amendments by interlineations in the JOA. The dispute centered on the JOA provision relating to the preferential right to purchase and exceptions thereto. The JOA made an exception to the preferential purchase right when a party is selling substantially all of its assets to a nonaffiliated third party. The court concluded that the sale of all or substantially all of a party’s assets to one or more nonaffiliated third parties would not trigger the preferential right to purchase provision in the JOA.

Central Resources, Inc. (Central) and Coral Production Corporation (Coral) initially entered into a joint venture agreement in 1988 to purchase oil and gas interests in Nebraska from Marathon Oil Company. In 1989, immediately after the sale, Central entered into a JOA with Coral and two other corporate entities, which designated Central as the operator of the properties. The court found that the parties began having disputes over low production and performance as early as 1990. In 2000, Central offered for sale all of its assets and overriding royalty interests in four states including Nebraska. Central ultimately sold all of its assets in Nebraska to EXCO Resources, Inc. (EXCO). EXCO eventually transferred overriding royalty interests in the Nebraska assets to Paul Zecchi, Central’s chief executive officer. EXCO and Zecchi were both parties to this lawsuit. Coral claimed it had a preferential right to purchase the assets under the JOA, based in part on the fact that Central sold all of its assets to more than one party.

The case was essentially one of contract interpretation. Although the model JOA provided that the governing law for any disputes would be “the law of the state in which the Contract Area is located,” the parties added a provision that Texas law would govern any disputes between the parties. The court found that because the dispute involved a contract claim to purchase property

interests rather than one affecting title to Nebraska property directly, the parties could choose Texas law to govern. The court applied Texas law accordingly.

Coral argued that Central’s sale of assets did not fall within the exception to preferential right to transfer because the sale was to more than one nonaffiliated third party. The court found, however, that the definitions in the JOA provided that words used in the singular include the plural and vice versa unless the context indicates otherwise.

With regard to the transfer of overriding royalty interests, the court noted that “[n]either the JOA nor Texas law limits the opportunity to purchase ‘valuable rights’ in the subject property to operating rights” and that the parties’ amendment to the JOA included overriding royalty interests in those interests Central acquired. The question left for the court was whether the transfer between EXCO and Zecchi constituted an arm’s-length transaction or a “sale.” The court remanded to the district court for further proceedings the question of whether a sale of overriding royalty interests had occurred and whether the transfer triggered Coral’s preferential right to purchase.

NEW MEXICO — OIL & GAS

JOHN S. NELSON
— REPORTER —

SURFACE OWNERS PROTECTION ACT

Effective July 1, 2007, Governor Richardson signed into law the Surface Owners Protection Act (Act). 2007 N.M. Laws ch. 5. It is not yet known where the Act will be codified in N.M. Stat. Ann. The Act changes long-standing New Mexico case law providing that an oil and gas operator (1) has the right to use such portion of the surface of land as is reasonably necessary for oil and gas operations, and (2) need not compensate the surface owner for such operations if operations are not negligently conducted, unreasonable, or excessive, subject to a duty to reasonably accommodate the surface owner’s uses.

The Act applies to oil and gas operations conducted on “private fee surface land” (not defined) owned by a “surface owner,” defined as “a person who holds legal or equitable title, as shown in the records of the county clerk, to the surface of the real property on which the operator has the legal right to conduct oil and gas operations.” At least one commentator has stated that the Act only applies to situations in which the owner of the surface estate does not also own the mineral estate. However, this writer suggests that it is not clear if this was the intent of the drafters of the Act. Nowhere does the Act specifically state that it applies only to situations in which the surface owner owns no interest in the mineral estate. The Act also applies to situations in which a surface lessee incurs damages to leasehold improvements as a result of oil and gas operations. Presumably, this means that the Act applies to damages incurred by a surface lessee even if the owner of the leased surface is a governmental entity.

The heart of the Act is section 4, which requires the operator to compensate the surface owner for damages “for loss of agricul-

tural production and income, lost land value, lost use of and lost access to the surface owner's land and lost value of improvements caused by oil and gas operations." Such compensation payments "only cover land affected by oil and gas operations." The Act does not otherwise set out the elements of, scope of, or standards for measuring the enumerated items for which compensation is required. Section 4 also requires the operator to compensate a surface lessee "for any leasehold improvements damaged as a result of the operator's oil and gas operations if the improvements are approved and authorized by the surface owner." Finally, section 4 requires the operator to "reclaim all the surface affected by the operator's oil and gas operations." The term "reclaim" means "to substantially restore the surface affected by oil and gas operations to the condition that existed prior to oil and gas operations, or as otherwise agreed to in writing by the operator and surface owner." The Act does not state when or how often such reclamation must be undertaken.

Section 5 of the Act requires the operator to give the surface owner five business days notice by certified mail or hand delivery prior to entering the land for activities that do not disturb the surface, "including inspections, staking, surveys, measurements and general evaluation of proposed routes and sites for oil and gas operations." Section 5 also requires the operator to give the surface owner 30-calendar days notice by certified mail or hand delivery before first entering the land to conduct oil and gas operations. The Act does not state whether notice is effective when it is mailed or received. However, it does state that notice is deemed to have been received five days after certified mailing, or immediately upon hand delivery.

Section 5 contains detailed requirements for the 30-day notice, which must be accompanied by a copy of the Act and a proposed surface use and compensation agreement (surface agreement). Section 5 also contains detailed requirements for the proposed surface agreement. The surface owner may accept or reject the proposed surface agreement, but an acceptance must be made within 20 calendar days after receipt by the surface owner or it is deemed to be rejected. The Act does not set out a required method for acceptance, nor does it state whether an acceptance is effective when communicated, mailed, or received by the operator. If the proposed surface agreement is rejected or deemed rejected, the parties are free, but not required, to negotiate an alternate form of surface agreement.

If the parties fail to enter into a surface agreement within 30 days after the surface owner's receipt of the 30-day notice, section 6 permits the operator to enter the land and conduct oil and gas operations without a surface agreement in place, provided the operator first satisfies one of two requirements. The operator may "[deposit] a surety bond, letter of credit from a banking institution, cash or a certificate of deposit with a New Mexico surety company or financial institution for the benefit of the surface owner in the amount of . . . \$10,000 per well location." Or, the operator may "[post] a blanket surety bond, letter of credit from a banking institution, cash or a certificate of deposit with a New Mexico surety company or financial institution in the sum of . . . \$25,000." A blanket bond suffices for all oil and gas operations undertaken by the operator in New Mexico, provided that if any portion of the

bond or other deposit is ever paid to a surface owner, it must be replenished to remain effective as a blanket bond.

If there is no surface agreement in place and the operator enters the land and conducts oil and gas operations, the surface owner may file suit to collect any amounts to which the surface owner is entitled under section 4. In such case, the court may, under section 7(A) of the Act, award attorney's fees and costs if the operator conducts operations without providing the required 30-day notice, or if the operator fails to satisfy the bonding requirements before entering. If a surface agreement is in place, the court may award fees and costs if the operator conducts operations outside the scope of the surface agreement and knew or should have known such operations would be conducted. Similarly, the court may award fees and costs to the operator if the surface owner fails to exercise good faith in complying with the provisions of the Act or a surface agreement. In addition to the foregoing, under section 7(B) the court may award treble damages if it finds, by "clear and convincing evidence," that the operator willfully and knowingly entered the land for the purpose of commencing the drilling of a well without giving the required 30-day notice or without satisfying the bonding requirements if there is no surface agreement in place. The court may also award treble damages if either the operator or the surface owner willfully and knowingly violates any surface agreement.

The Act does not apply to "maintenance and ongoing production activities related to an oil or gas well producing or capable of producing oil or gas on June 30, 2007 for which the operator has a valid permit from the [New Mexico Oil Conservation Division]." However, re-entries, workovers, and other oil or gas operations pertaining to such wells are subject to the Act if the activities "disturb additional surface." The duty to "reclaim" the surface applies to any well that is not plugged and abandoned on July 1, 2007. The Act also does not apply to oil and gas operations conducted within the scope of a surface agreement entered into prior to July 1, 2007.

As mentioned above, there are several aspects of the Act that are unclear or that leave various details unaddressed. Certainty in these areas will have to await elaboration by the courts. In addition, a new section 2 was added to the final version of the Act before it was enacted, which resulted in renumbering several sections of the Act. This is important because subsequent sections of the Act make reference to previous sections by referring to their section numbers. However, these references were not changed when the new section 2 was added. The result is that several references to previous section numbers are incorrect in the final version of the Act. Once again, it will be interesting to see how the courts deal with this.

NORTH DAKOTA — MINING

KEN G. HEDGE
— REPORTER —

NORTH DAKOTA SUPREME COURT CONFIRMS PERTINENT MINERAL TITLE STANDARD

In *Hild v. Johnson*, 723 N.W.2d 389 (N.D. 2006), the North Dakota Supreme Court held that a grant of an undivided mineral interest expressed as a fraction conveys that quantum in the entire described tract of land, even if the tract contains more or less acreage than was contemplated by the parties, thereby confirming the pertinent North Dakota mineral title standard. The court further held that, when there is a discrepancy in a deed between the specific description of the property conveyed and an expression of the quantity conveyed, the specific description controls.

The dispute in *Hild* centered on mineral acres underlying the Little Missouri River. Joe Hild acquired title to all of Section 21 in January 1960 by virtue of a marshal's deed which described the land conveyed as all of Section 21, "containing 582.76 acres, more or less." The 582.76 acres represented all of Section 21, less 57.24 acres underlying the river. At that time, it had not been conclusively determined whether the Little Missouri was navigable at the time of statehood in 1889, leaving it unclear who owned the minerals underlying the river. In March 1960, Hild conveyed an undivided 382.76/582.76 interest in the oil, gas, and minerals in all of Section 21 to J.E. and Thalia Harding. The deed described the land as: "All of Section Twenty-one (21) in Township One Hundred Thirty-nine (139) North of Range One Hundred Two (102) West, containing 582.76 acres, more or less." Subsequently, in 1992, the Eighth Circuit upheld a federal district court's ruling that the Little Missouri River was not navigable at the time of statehood and, therefore, the owners of the adjacent land owned the minerals underlying the river. *North Dakota v. United States*, 972 F.2d 235 (8th Cir. 1992).

In 2000, Hild conveyed his mineral interests in Section 21 to John Hild, Betty Jo Ridl, and Robert Hild (Hilds). The Hardings' mineral interests in Section 21 had passed to Robert Johnson and various other mineral owners (collectively Johnson). The Hilds sought to quiet title to all of the mineral interests underlying the river.

The court noted that the three most commonly used methods of stating the quantum of a mineral interest conveyed or reserved are by percentage interests, fractional interests, and interests denoted by a particular number of mineral acres. It pointed out that there is generally no difference in consequences in the use of percentage interests versus fractional interests. However, a conveyance by a particular number of mineral acres can cause differing consequences when the described tract of land contains more or less than the assumed number of acres. Thus, the court followed numerous authorities in holding that a transfer of an undivided interest by fraction or percentage gives that quantum of interest in the land described by the deed, to the extent the grantor has title to such land. The grantee of a fractional or percentage mineral interest gains by an excess of acreage and loses by a shortage of acreage. On the other hand, the grantee of undivided mineral acres

neither gains nor loses by variations in acreage. His mineral acres becomes the numerator and the grantor's total acreage becomes the denominator in calculating the fractional interest grantee owns in the land. North Dakota Mineral Title Standard 3-02 is similarly phrased.

The court, in *Hild*, held that the 1960 mineral deed expressly conveyed an undivided interest, expressed as a fraction, in the minerals in all of Section 21. As such, the grantees acquired the stated fractional interest in all of the described tract, and gained when there was an excess in acreage above the amount contemplated by the parties. Thus, the 1960 deed conveyed to the Hardings an undivided 382.76/582.76 mineral interest in all 640 acres of Section 21. The court did not, however, have the opportunity to address the more interesting question of which controls when a deed purports to convey or reserve minerals by recitation to both a fractional or percentage interest and a certain quantum of mineral acres and the two conflict.

The court also held that, when there is a discrepancy in a deed between the specific description of the property conveyed and an expression of the quantity conveyed, the specific description is controlling. It noted that quantity "is the least reliable of all elements in a description in a deed." In *Hild*, the 1960 mineral deed granted a specific fractional interest in "All of Section Twenty-one." The court indicated that it would not look at the quantity of land stated, that is, 582.76 acres, unless there was some ambiguity or uncertainty in the other elements of description in the deed. There being no such ambiguity, the Hardings and their successors acquired an undivided 382.76/582.76 interest in the minerals in all 640 acres of Section 21, including that portion underlying the river.

SOUTH DAKOTA — MINING

MAX MAIN
— REPORTER —

IN SITU LEACH MINING RULES

As reported in the last issue of this *Newsletter*, the Board of Minerals and Environment adopted administrative rules regarding in situ leach mining on January 18, 2007. The rules are provisionally effective until July 1, 2008. S.D. Codified Laws § 1-26-6. On April 17, 2007, the Interim Rules Review Committee met to consider the rules, and took no action to suspend any of them.

TEXAS — MINING

WILLIAM B. BURFORD
— REPORTER —

COAL MINING PERMIT MAY BE EXTENDED FOR ECONOMIC REASONS

In *Railroad Commission v. Coppock*, 215 S.W.3d 559 (Tex. App.—Austin 2007, pet. filed), the court interpreted provisions of the Texas Surface Coal Mining and Reclamation Act, which re-

quires surface coal mine operators to obtain a permit from the Texas Railroad Commission before mining. The permit automatically expires three years after it is issued if mining has not begun. The Railroad Commission may grant reasonable extensions of time, however, if necessary because of "conditions beyond the control and without the fault or negligence of the permit holder." Tex. Nat. Res. Code Ann. § 134.072(b).

In anticipation of bidding to supply power plants in Mexico, Dos Republicas Resources Co. obtained a permit to engage in coal mining on its 2,700-acre tract near Eagle Pass, Texas. Mexican politics denied it the opportunity to bid for the power plant contract, however, and it was unsuccessful in efforts to find other markets for its coal. When it received a promising inquiry about purchasing its prospective mine, Dos Republicas filed a request with the Railroad Commission to extend its permit beyond the three-year deadline. The Commission granted the extension, finding that Dos Republicas's failure to begin mining was due to the absence of a market for the coal and that the market condition was beyond its control and without its fault or negligence. Coppock and others owned land near the proposed mine and appealed the Commission's order to the district court, which ruled in favor of the appellants, concluding that the statute did not authorize extensions based on the absence of a market or other economic, political, or social conditions.

Dos Republicas and the Railroad Commission appealed to the court of appeals. The appellate court reversed the district court, finding first that the Commission could issue an order after the three-year expiration date as long as an application was filed before the permit expired and further that the district court erred in rejecting the Commission's permit extension.

The appellee-landowners argued that the statute allowing extension of a permit was intended as a force majeure provision to address conditions beyond the holder's control such as where the permit holder is physically prevented from commencing operations. They could cite no authority, however, and the court of appeals rejected the argument, finding no close analogy between a contractual force majeure clause and the statute authorizing permit extension. Nor did anything in the statute preclude its application if the circumstances relied on for extension were foreseeable. The court observed that the subsection uses very broad language authorizing the Commission to grant an extension whenever it believes it is necessary due to conditions beyond the permit holder's control and without its fault or negligence. On its face, this language is broad enough to justify extension for market conditions that are not caused by the permit holder. Given the broad authority bestowed by the legislature on the Railroad Commission to regulate surface coal mining and reclamation, deference to its expertise in assessing circumstances surrounding a permit holder's activities and factual situations that might justify a permit extension is appropriate. For all these reasons the court concluded that the Commission's interpretation of the statute as allowing permit extension because of unfavorable market conditions was consistent with the statute's plain meaning.

TEXAS — OIL & GAS

WILLIAM B. BURFORD
— REPORTER —

RAILROAD COMMISSION DENIAL OF PERMIT TO PRODUCE FROM SEPARATE RESERVOIR, REGULATED WITH OTHERS AS IF A COMMON RESERVOIR, HELD NOT CONFISCATION

Seagull Energy E&P, Inc. v. Railroad Commission, No. 03-0364, 2007 WL 1299163 (Tex. May 4, 2007), addressed the scope of the Texas Railroad Commission's authority in regulating oil and gas production from a field in which multiple stratigraphic or lenticular accumulations are regulated as though a common reservoir.

The Waskom (Cotton Valley) Field underlying Seagull's Davis lease included three separate lenticular sands, the "Stroud," the "C," and the "Taylor." As statutorily authorized, the Railroad Commission in 1985 had adopted special field rules allowing gas production from any of the field's sands to be commingled and regulating gas production as if all the sands were a single common reservoir. Seagull completed its No. 1 Well to produce from the C sand in 1991. In 2000 it obtained a permit to complete its No. 4 Well in all three sands, at the same time shutting in the No. 1 Well to avoid violating field rules allowing no more than one well to produce from the same reservoir on the acreage within the lease. Well No. 4 was thereupon successfully completed in the Stroud and Taylor sands but did not produce from the C sand. Seagull sought an exception to the field rules to authorize it to reopen the No. 1 Well to produce from the C sand. The Railroad Commission denied the permit, concluding that Seagull was not entitled to an exception from the field rules because it had not shown confiscation. The trial court and the court of appeals both upheld the Railroad Commission's decision. Some four years after Seagull's filing of its petition for review, so did the supreme court.

Seagull's main contention was based on the fact that the statute authorizing the Railroad Commission to prorate, allocate, and regulate the production of commingled separate accumulations of oil and gas as if they were a single common reservoir, Tex. Nat. Res. Code Ann. § 86.081(b) (Vernon 2001), did not also authorize it to regulate drilling to those zones in the same manner. (The statute was amended in 2005 to specifically authorize the Commission to regulate "all activities" associated with such accumulations.) Seagull thus argued that the permit it sought to reopen the No. 1 Well was a drilling permit that the Commission lacked authority to deny. The supreme court agreed with the court of appeals and the Railroad Commission that the ultimate issue was Seagull's right to produce from both wells at the same time. Even if it were to agree with Seagull that its request was technically a request for a drilling permit, the court said, it would still not agree that the Commission lacked statutory authority. The legislature intended the Commission to have broad discretion in regulating commingled oil and gas, and this intention was confirmed by the 2005 amendment of the statute to encompass all activities, not just production, which was found by the court to be intended merely to clarify the Commission's authority.

Seagull's contention relied on *Benz-Stoddard v. Aluminum Co. of America*, 368 S.W.2d 94 (Tex. 1963), which upheld the Railroad Commission's treatment of well completions in separate reservoirs in a single wellbore as separate wells. The legislature's subsequent enactment of Tex. Nat. Res. Code § 86.081(b) was intended to facilitate development by enabling the Commission to regulate commingled production on a unitary basis, according to Seagull's position, but not to deprive it of the right to produce from each separate reservoir underlying its land. The applicable statute when *Benz-Stoddard* was decided contemplated that the Railroad Commission would treat reservoirs underlying the same tract separately, the court pointed out, and the statutes at that time did not recognize commingled production. When the Commission has commingled production from separate strata, treating them as though they were one common reservoir, the court held, *Benz-Stoddard* does not require that field rules be applied separately to each commingled stratum.

Seagull further maintained that the Commission's denial of the permit was unconstitutional because it amounted to a taking of its gas in the C sand. It had a vested property right in each separate gas deposit underlying its land, Seagull asserted, and the denial, as well as the designation of the separate sands as a common reservoir itself, deprived it of its right. In rejecting Seagull's contention, the court observed that although a mineral owner has a right to its fair share of the minerals on and under its property, this right does not extend to specific oil and gas. Thus, the Commission was correct in insisting on proof that the No. 4 Well would fall short of producing the remaining reserves, which Seagull was unable to provide. Nor was the Railroad Commission's promulgation of rules commingling the field's reservoirs an arbitrary act depriving Seagull of its interest. The rules were adopted after an adversarial hearing on findings that they would maximize recovery of hydrocarbons. The rules apply to all operators in the field, none of whom, including Seagull, have ever requested any sand to be designated as separate in the 20 years since their adoption.

ARBITRATION PROVISION OF OPERATING AGREEMENT HELD INAPPLICABLE TO ACQUISITIONS OUTSIDE DELINEATED AMI

The court in *In re Great Western Drilling, Ltd.*, 211 S.W.3d 828 (Tex. App.—Eastland 2006, pet. filed), decided the scope of an arbitration provision of two operating agreements, covering different depth intervals in the same land, between Great Western, as operator, and nonoperating working interest owners. The agreements included area of mutual interest (AMI) provisions requiring any party that acquired an interest in land within the AMI to offer the others the right to participate in the acquisition. They also each included a provision requiring arbitration of any dispute, controversy, or claim arising out of or relating to the agreement or its breach or validity.

Great Western acquired leases covering land adjacent to, but not within, the AMI and drilled two successful wells offsetting the contract area of the operating agreements. The other working interest owners filed a demand for arbitration, contending Great Western had breached its duty to keep information acquired during joint operations confidential and, by using the information to acquire offsetting acreage solely for its own benefit, its duty to act in the best interests of the venture's members. These actions also

amounted to breach of fiduciary duty and fraud, they alleged. They requested damages, an assignment of the interests they would have received but for the wrongful actions, and disgorgement of profits. Great Western filed suit for a declaratory judgment concerning the parties' respective rights and obligations with respect to the offset acreage and a declaration that the operating agreements' arbitration provisions did not apply to the dispute. When the trial court ordered the parties to arbitration and stayed the litigation, Great Western filed a petition for writ of mandamus with the court of appeals.

The arbitration provisions were broadly written, the court observed, and if the parties' agreement concerning arbitration were determined solely by reference to it, their dispute would clearly be arbitrable. Even broad arbitration provisions have their limits, however. When the parties specifically limit their duties and obligations, these limitations must be considered when determining the scope of the arbitration agreement. Regardless of whether the working interest owners' claims might prevail, they were outside the scope of the arbitration clause, the court held. The operating agreements specifically disclaimed the duties upon which the claims must necessarily rest, and the wells were beyond the boundary of the parties' obligation to share future acquisitions. Although the arbitration clause had broader reach than the operating agreements and fact questions concerning the existence or breach of duties under the agreements would be arbitrable claims, it could not be reasonably said that the parties intended the arbitration clause to apply to claims clearly beyond the parties' specifically defined duties and, with regard to future acquisitions, geographic and time limitations.

The agreements specifically disclaimed any fiduciary duty or confidential relationship, and any obligation to act in good faith extended only to activities under the operating agreements, not to acquisitions outside their contract area. With respect to the working interest owners' allegations of misuse of confidential information, the court noted that the operating agreements prohibited the disclosure of confidential information to others but not its use for a party's own purposes. Great Western's actions might give rise to one or more causes of action, but because they were based on claims clearly and indisputably beyond the operating agreements' defined duties and obligations, they would not be subject to the arbitration provisions. The trial court had thus abused its discretion when it stayed the litigation and compelled the parties to attend arbitration.

PREFERENTIAL RIGHT TERMINATED WITH PRODUCTION PAYMENT

The court in *First Permian, L.L.C. v. Graham*, 212 S.W.3d 368 (Tex. App.—Amarillo 2006, pet. denied), considered the viability of a preferential right reserved to the Graham family in a 1963 assignment to Pan American Petroleum Corporation. In their assignment of certain oil and gas leases covering land in Cochran County, Texas, the Grahams reserved (1) a production payment in the amount of \$400,000, plus interest calculated at 5½% per annum, and (2) a preferential right to match any offer to purchase the leases accepted by Pan American. The production payment was retired in 1975, and First Permian eventually succeeded to the Pan American interest.

First Permian sold the leases to Energen Resources Co. in 2002. Although First Permian initially sent notices of the sale to all holders of preferential rights, including the Grahams, Energen notified the Grahams after the First Permian-Energen closing that it considered the preferential right to have expired on payout of the production payment. One family member, James Graham, sued First Permian for breach of contract and Energen for tortious interference with contract and specific performance. First Permian and Energen counterclaimed seeking a declaratory judgment that the Graham preferential right had expired. After a trial court judgment for Graham notwithstanding the adverse jury verdict against him, First Permian and Energen appealed. The court of appeals reversed, agreeing with First Permian and Energen that the preferential right was a covenant running with the land and, as such, that it terminated when the Grahams' interest in the land ceased.

Graham contended that the preferential right was a separate and independent covenant from the production payment. Paragraph 5 of the 1963 assignment, creating the preferential right, did not contain any provision terminating the preferential right on completion of the production payment, he pointed out, and paragraph 2, reserving the production payment, likewise contained no clause connecting it to the preferential right. The court rejected Graham's argument as a matter of contract construction. After observing simply that the production payment was a vehicle to finance part of the purchase price for the assignment and that the Grahams' interest would terminate and vest in Pan American when it was paid, the court declared that the only construction that gave full meaning to all of the provisions of the assignment was that the preferential right was intended to exist only so long as necessary to protect the Grahams' interest in full payment for the leases. Why this is so must remain something of a mystery, since the court provided no explanation. It followed with only a confused and not altogether persuasive effort to distinguish contrary authority.

CANADIAN COMPANY CAN BE SUED IN TEXAS OVER DISPUTE INVOLVING MONTANA AND NORTH DAKOTA OIL AND GAS LEASES

In 1997 Heep Petroleum sued two Texas residents who had worked with it in marketing various oil and gas projects, including the "Williston Program," involving oil and gas leases in Montana and North Dakota. In 1999 Heep amended its petition to join Navasota Resources, Ltd., a Canadian public company involved in the project. Navasota filed a special appearance, asserting that it was not subject to personal jurisdiction in Texas because the agreements in question concerned oil and gas leases in Montana and North Dakota and it had not done business in Texas. *Navasota Resources, Ltd. v. Heep Petroleum, Inc.*, 212 S.W.3d 463 (Tex. App.—Austin 2006, no pet.), affirmed the trial court's order overruling the special appearance.

The Texas long-arm statute, the court began, authorizes a trial court to exercise jurisdiction over a nonresident who "does business" in Texas. Tex. Civ. Prac. & Rem. Code § 17.042. Personal jurisdiction may arise through either specific jurisdiction, under which the cause of action is tied to the defendant's act in Texas, or general jurisdiction, which arises from continuing and systematic contacts in Texas. A nonresident defendant may be subject to specific jurisdiction in Texas if (1) it purposefully does some act or consummates some transaction in Texas, thus establishing

minimum contacts with the forum; (2) that act or transaction gives rise to the cause of action; and (3) the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice.

Here one Jim Simpson, representing himself to be looking for oil and gas projects on Navasota's behalf, traveled to Texas and met with Heep concerning Heep's Williston Program. Navasota denied that Simpson had authority to act on its behalf, but the trial court found that his discussions with Heep led ultimately to a formal agreement between Heep and Navasota that was the basis for the suit. Although the Williston leases were not located in Texas, Navasota had thus purposefully availed itself of the benefits of doing business in Texas. It thereafter made numerous contacts with Heep in Texas. The claims at issue arose directly out of Navasota's purposeful contacts with Texas, so that the requirements for specific jurisdiction were satisfied.

RAILROAD COMMISSION DOES NOT HAVE PRIMARY JURISDICTION OF INJECTION WELL DISPUTE

In re Discovery Operating, Inc., 216 S.W.3d 898 (Tex. App.—Eastland 2007, pet. denied), decided a mandamus petition seeking to vacate the district court's order abating Discovery's suit against BP America Production Company. In its petition, Discovery Operating sought damages against BP for its alleged wrongful injection of salt water in violation of Railroad Commission rules. The trial court referred the dispute to the Railroad Commission for a determination of whether BP's injection had violated any regulations or permits.

BP contended the Railroad Commission has either exclusive or primary jurisdiction over issues involving underground injection and that the trial court's deferral to it was proper. The court of appeals disagreed and conditionally granted mandamus, holding that the Railroad Commission had neither exclusive nor primary jurisdiction. Although the court agreed with BP that the legislature has designated the Railroad Commission the agency responsible for underground injection control, it disagreed that this designation gave the agency exclusive jurisdiction of disputes such as this. Although the statutes provide for a pervasive regulatory scheme involving oil and gas production, they also specifically provide for private causes of action, the court pointed out.

Nor did the Railroad Commission have primary jurisdiction, the court then held. It acknowledged that an agency may have primary jurisdiction of a dispute although its jurisdiction is not exclusive, when the agency is staffed with trained experts and benefit is derived from uniform interpretation of its laws, rules, and regulations. The primary jurisdiction doctrine does not apply, however, to actions or disputes that are inherently judicial in nature if the legislature has not vested exclusive jurisdiction in an administrative body. The causes of action asserted here—negligence, negligence per se, and waste—were inherently judicial in nature, the court found. Besides, to apply the judicially created primary jurisdiction doctrine would be in direct contravention to the legislature's specific mandate that Railroad Commission actions not impair or delay a cause of action for damages or other relief.

INVESTORS' CLAIM BASED ON NEGLIGENT RESERVE REPORTS HELD NOT PROPERTY OF BANKRUPT OIL COMPANY'S ESTATE

Highland Capital Management, L.P. v. Ryder Scott Co., 212 S.W.3d 522 (Tex. App.—Houston [1st Dist.] 2006, pet. filed), involved claims by investors in Seven Seas Petroleum, Inc., a failed publicly traded corporation with working interests in the Guadas Oil Field in Colombia. Between 1998, when Seven Seas began trading on the American Stock Exchange, and 2002, the Ryder Scott engineering firm provided estimates to Seven Seas of its proved oil reserves, which Seven Seas incorporated into its public securities filings. The plaintiff investors, relying on the reserve reports, purchased unsecured notes issued by Seven Seas, which were subordinate to secured notes issued to Robert A. Hefner, III, the company's chairman and chief executive officer, and others. In 2002 Ryder Scott issued a reserve report in which its estimate of Seven Seas' proved reserves was revised downward by about two-thirds from prior estimates. Seven Seas was no longer able to meet its financial obligations and was forced into bankruptcy. A few weeks after the bankruptcy filing, the investors in the unsecured notes filed suit against Ryder Scott for negligent misrepresentation. After the Dallas County district court granted Ryder Scott's motion to transfer venue to Harris County, they filed an amended petition adding Hefner as a defendant, alleging conspiracy to defraud. Investors also added a claim of fraud and aiding fraud against Ryder Scott. The trial court granted summary judgment to both Ryder Scott and Hefner on the basis that the plaintiffs lacked standing, and the plaintiffs appealed.

The court of appeals upheld the summary judgment for Hefner, agreeing with his position that the investors' claims were based on general harm to all creditors and thus were property of Seven Seas' bankruptcy estate and belonged exclusively to the bankruptcy trustee. The nature of the injury for which relief was sought against Hefner in state court, which the court described as the depletion of Seven Seas' assets to the detriment of the plaintiffs and all its other creditors, was derivative of Seven Seas' direct injury.

The summary judgment for Ryder Scott presented a different issue, the court said. To begin with, the bankruptcy court had expressly enjoined the plaintiffs from proceeding against Hefner in state court but had not rendered any decision on claims against Ryder Scott. Moreover, claims against Ryder Scott could not be characterized as property of the bankruptcy estate because Seven Seas could not itself have asserted them. The investors' misrepresentation and fraud claims against Ryder Scott were based on their own reliance on Ryder Scott's estimates and on direct harm to themselves, i.e., loss of their investments, not a derivative harm to Seven Seas. The bankruptcy trustee, the court concluded, would not have standing to pursue claims against Ryder Scott. The fact that there were a large number of creditors who purchased the same subordinated notes could not convert the appellants' personal state law claims into claims that belonged to the bankruptcy estate.

The plaintiffs also raised the issue on appeal of the transfer of venue, on Ryder Scott's motion, from Dallas to Houston. The applicable venue statute permits plaintiffs to sue in the county where all or a substantial part of the events or omissions giving rise to the claim occurred. The court was therefore called upon to deter-

mine whether there was any probative evidence that all or a substantial part of the events giving rise to the lawsuit occurred in Dallas County. It found that there was not. The only "event" cited by the plaintiffs as having occurred in Dallas County was their portfolio manager's receiving Seven Seas' SEC 10-K forms there. There was no allegation that Ryder Scott or Seven Seas had directed the forms to the investors there or that the investors had met or spoken there with anyone from Ryder Scott or Seven Seas.

TRIAL COURT'S DETERMINATION OF LIEN PRIORITY VIOLATED AUTOMATIC BANKRUPTCY STAY

The court in *Houston Pipeline Co. v. Bank of America*, 213 S.W.3d 418 (Tex. App.—Houston [1st Dist.] 2006, no pet.), reversed a declaratory judgment that the bank's security interest in certain gas was superior to Houston Pipeline's right to use the gas. The judgment was void, the court held, as a violation of the automatic stay imposed by federal bankruptcy law on the estate of the owner of a leasehold interest in the gas.

The trustee of the Bammel Gas Trust, created by Enron Corp. and Bank of America, owned most of the natural gas in the Bammel Gas Reservoir, a gas storage reservoir in southeast Texas operated by Houston Pipeline, subject to a security interest in the Bammel Trust's gas held by Bank of America. The Bammel Trust leased the gas to BAM Lease Co. (referred to as "LeaseCo" in the court's opinion), an Enron subsidiary. Houston Pipeline had the right to use the LeaseCo gas pursuant to a "Right to Use Agreement" to which the bank consented. Enron and affiliates, including LeaseCo, filed for bankruptcy protection not long after these arrangements were made. The bank thereupon obtained a summary judgment in state district court declaring that Houston Pipeline's right to use the gas was subordinate to Bank of America's security interest in the Bammel Trust gas. Houston Pipeline appealed on the basis that the trial court's declaratory judgment violated the automatic bankruptcy stay of 11 U.S.C. § 362(a)(3) and (4), which upon a bankruptcy filing stay "any act to obtain possession of . . . or to exercise control over property of the estate" and "any act to create, perfect, or enforce any lien against property of the estate."

Although the trial court's judgment was between the bank and Houston Pipeline and did not purport to affect LeaseCo or any other Enron affiliate, the court of appeals nevertheless concluded that it constituted an act to enforce the bank's security interest. A determination of what party held a superior interest in the LeaseCo gas was a necessary prerequisite to the bank's entering into a settlement agreement with Enron in bankruptcy court, and the trial court declarations were therefore an act to control estate property and to enforce a lien against it in violation of the Bankruptcy Code's stay provisions. Furthermore, the declaratory judgment action would have been more properly handled in the bankruptcy court in order to prevent conflicting judgments and because the bank's need to enforce its security interest, which could only be done in bankruptcy court, and the priority controversy both arose from the same factual and legal basis. Since an action taken in violation of the automatic stay is void under Texas law, the trial court had no jurisdiction, and its judgment had to be vacated.

GAS CONTRACT BREACHED BY PURCHASER'S FAILURE TO PAY FOR UNACCOUNTED-FOR GAS

Apache Corp. v. Dynege Midstream Services, Limited Partnership, 214 S.W.3d 554 (Tex. App.—Houston [14th Dist.] 2006, pet. filed), resulted from an accounting audit by Apache of its gas purchaser, Versado Gas Processors, which operated a plant for the extraction of liquid hydrocarbons. Versado sold the liquids and residue gas, paying Apache a percentage of the proceeds. The contracts under which Apache sold its gas to Versado defined the residue gas for which Versado was required to pay as all gas remaining after extraction of the liquids and after deduction of lost gas, fuel gas, and flared gas. In its audit, Apache discovered that Versado had also deducted “unaccounted-for” gas in its calculation of residue gas. Apache sued and obtained a jury verdict that Versado had breached the contracts by failing to pay more than \$1.5 million for unaccounted-for gas. Versado was granted judgment notwithstanding the verdict, and Apache appealed.

Versado’s argument, which had persuaded the trial court, was that the unaccounted-for gas it had deducted was actually the same as lost gas that the contracts allowed it to deduct, although it was incapable of measurement. The court of appeals reinstated the jury verdict, holding that there was sufficient evidence to support it, apparently on the simple basis that the contracts were unambiguous, they contained no provision allowing Versado to deduct “unaccounted-for” gas (although some other contracts did specifically allow such a deduction), and Versado in fact deducted unaccounted-for gas.

Versado’s position seems to deserve more analysis than the court here gave it. There is no definition in the court’s opinion of the unaccounted-for gas that Versado deducted. If Versado’s explanation that “unaccounted-for” gas is a separate category of lost gas is incorrect, then what is it? If it is unaccounted-for and presumably gone, then where is it if not lost? Perhaps there are explanations apparent to those versed in the arcana of gas accounting but, if they were known to the court, it did not share them.

The court went on also to address Versado’s appeal of the trial court’s declaratory judgment that Apache was entitled to “liquid hydrocarbon products” collected at compressors known as the North and South Eunice booster stations. The parties’ contracts gave Apache the right to payment for liquids “saved and sold at the Plant.” Versado, not Apache, was entitled to “all drip, condensation, or scrubber oil collected prior to the first stage of compression within the plant.” 214 S.W.3d at 563. Although there had once been extraction plants at the locations of the North and South Eunice stations, Versado had converted them to booster stations in 2000 and consolidated all gas processing into its Middle Eunice plant. By the contracts’ plain language, the court of appeals held, Versado owned the liquid hydrocarbon products collected at the North and South Eunice locations.

OWNERS OF MINERALS UNDER CITY’S LANDFILL SITE HAVE POTENTIAL INVERSE CONDEMNATION CLAIM

City of Anson v. Harper, 216 S.W.3d 384 (Tex. App.—Eastland 2006, no pet.), involved a quarter section containing undeveloped surface deposits of copper and having potential for oil and gas leasing and development. The surface and mineral estates had been entirely severed since 1942. The City of Anson

acquired the surface to construct a municipal solid waste landfill and, while its application to the Texas Commission on Environmental Quality was pending, began clearing the entrance and constructing a road. The plaintiff mineral owners and their oil and gas lessee filed suit for an injunction, a declaratory judgment, damages, and attorneys’ fees. The city countered that the plaintiffs failed to state a claim for inverse condemnation because they did not show that the city had acted with the intention to exercise eminent domain power, that they had not alleged a presently justiciable controversy, and that their claim for injunctive relief was barred by sovereign immunity. The trial court denied the city’s plea to the jurisdiction, and it appealed.

The court first addressed the city’s contention that the mineral owners’ claim for inverse condemnation was not yet ripe because there was not a presently justiciable controversy. It agreed that because the city’s permit application was still pending and the city could not, at the time of the suit, construct or operate a landfill, the trial court had no jurisdiction to hear any claim based on the effects of the planned landfill. However, the city’s preliminary dirt work had already damaged a portion of the copper deposit and had restricted surface use. The court could resolve the plaintiffs’ claims based on events that had already taken place if not prevented by the city’s other defenses.

The court next turned to the city’s argument that the plaintiffs failed to state a claim for inverse condemnation. The plaintiffs, according to the city, had not shown the city had acted with the intention of exercising its eminent domain power as contrasted with its rights as a surface owner. To establish a takings claim, the court observed, the plaintiffs must prove that (1) the city intentionally performed certain acts (2) that resulted in a taking of property (3) for public use. Here the city’s work was done intentionally; the plaintiffs were not required to establish that the city knew it would cause the plaintiffs harm. It had caused some destruction, a variety of taking. And, since the operation of a municipal landfill is a governmental function, the city’s actions were done as a sovereign, for public benefit, and not as a private landowner. To the extent of the effects of the existing dirt work, therefore, the plaintiffs’ allegations and evidence were sufficient to establish a potential takings claim.

With respect to their requests for a declaratory judgment and an injunction, the plaintiffs were barred by sovereign immunity as the city contended. Although a declaratory judgment action may be brought against the state or a municipality to seek the construction of a statute or ordinance, for example, the plaintiffs’ declaratory judgment action here was merely a restatement of their takings claim. When a suit primarily seeks monetary damages, a claimant cannot add a declaratory judgment claim to escape governmental immunity. A suit brought to control a governmental entity’s actions or to subject it to liability is not maintainable without statutory authorization, and for their declaratory judgment and injunction claims the plaintiffs could point to none.

FIFTH CIRCUIT UPHOLDS ARBITRATION AWARD UNDER FARMOUT AGREEMENT

Apache Bohai Corp. v. Texaco China BV, 480 F.3d 397 (5th Cir. 2007), decided Apache’s appeal of the district court’s entry of judgment on an arbitration award against it.

Texaco held production sharing contracts with the Chinese National Offshore Oil Corporation for the exploration, development, and production of oil in the Bohai Bay of China. To help meet its drilling commitments, Texaco entered into two farmout agreements with Apache Bohai's predecessor under which Apache agreed to assume Texaco's drilling commitments in return for 50% of future oil production. Each agreement specified that neither party would be liable to the other for consequential damages, that it would be governed by New York law, and that the parties would arbitrate any dispute arising out of the agreement. Apache withdrew from the agreements and declined to drill as it had agreed, giving Texaco little time to meet the drilling commitments and forcing it to renegotiate its production sharing agreements. Texaco initiated arbitration proceedings as provided in the farmout agreements, whereupon the arbitrator found that Apache had fundamentally breached its commitment in reckless disregard of Texaco's interests and awarded Texaco more than \$71 million, about \$20 million of which represented consequential damages for loss of part of its acreage. Apache appealed the district court's confirmation of the arbitration award, arguing that (1) the arbitrator exceeded his powers by vitiating the agreement's exculpatory clause and awarding consequential damages in the face of the parties' clear contrary intentions, and (2) the arbitrator manifestly disregarded New York law in his awards.

In awarding consequential damages despite the agreement's exculpatory clause, the arbitrator determined that enforcement of the exculpatory clause would violate public policy under New York law. Apache argued that the phrase "notwithstanding any other provision in this agreement" introducing the exculpatory clause meant that it should override the choice-of-law and the arbitration provisions of the agreement, so that the arbitrator had no jurisdiction to consider whether New York law would vitiate the exculpatory clause. *Id.* at 402. The court of appeals disagreed. There was no indication that the parties contemplated any judicial involvement in the contract. The very broad arbitration clause, it pointed out, covered "any dispute" arising from the agreement, including "any question regarding its . . . validity." *Id.* at 401. Given the requirement that limitations on an arbitrator's authority must be plain and unambiguous and that a court must resolve all doubts in favor of arbitration, it refused to read a clause that referred neither to arbitration nor any other method of dispute resolution as precluding arbitral jurisdiction to consider the validity of the clause.

Turning to Apache's claim that the arbitrator had manifestly disregarded the law, the court pointed out that judicial review of an arbitrator's award is extremely limited: The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator, and the award must have resulted in a significant injustice. The court analyzed each of several particulars in which Apache contended the award was manifestly in error. Although there may have been some uncertainty surrounding the legal standards and the arbitrator's application of them, all aspects of the award found at least some support in New York law, and Apache could not point to any clear rules ignored by the arbitrator.

UTAH — OIL & GAS

WILLIAM E. WARD
— REPORTER —

DIRECT EVIDENCE OF A POOL DEEMED PREREQUISITE TO UNITIZATION

In an order dated January 12, 2007, the Utah Board of Oil, Gas, and Mining (the Board) denied petitioner's (Petro-Hunt) request for the Wales Exploratory Unit located in Sanpete County, Utah. Findings of Fact, Conclusions of Law and Order, Docket No. 2006-015, Cause No. 176-04 (Order). Consisting of almost 21,000 acres, 96% of which was private lands, this request was the only one of its kind in Utah since 1978.

Petro-Hunt (and its partners) evidenced control of more than 96% of the acreage within the proposed unit and approval of more than 70% of the cost-bearing and non-cost bearing interests as required for compulsory unitization by Utah Code Ann. § 40-6-8(4). The unit would have included all depths and formations. In contention was whether the Board had the authority to form an exploratory unit on private lands, whether the Board would act as the authorized officer, and whether the unit would satisfy the purpose and intent of Utah's Oil and Gas Conservation Act (the Act).

Petro-Hunt presented seismic evidence of subsurface structures capable of trapping hydrocarbons, and analogized productive qualities of the Wales Exploratory Unit to the shallower Covenant Field 45 miles to the south. However, given the lack of actual drilling operations on the subject lands, Petro-Hunt conceded that there was no direct evidence of a pool and opined that there was a 20-30% probability hydrocarbons would be discovered. The Board found that there was not enough direct evidence of economic accumulations of hydrocarbons to determine that a pool exists beneath the proposed unit.

The Board then held that "the existence of a pool is a necessary prerequisite to unitization." Order at 9. Because Petro-Hunt could not demonstrate the existence of a pool, the Board also held that it could not show that the unit would further the purpose and intent of the Act. Specifically, it could not show that the proposed unit was "reasonably necessary" for the prevention of waste, increased ultimate recovery, and protection of correlative rights as required by Utah Code Ann. §§ 40-6-1 & 40-6-8(2)(a).

First, the Board found that Petro-Hunt's projected amount of drilling in the area that would occur without unitization—the maximum allowable—was not a realistic baseline for evidencing that the unit would be reasonably necessary to prevent waste and maintain pressure. Second, with regard to prevention of waste and increased recovery, the Board concluded that reservoir parameters derived from the Covenant field were "highly speculative" and "dependent upon unsupported assumptions." Order at 9. Third, the Board held that the proposed unit was not reasonably necessary to protect correlative rights. "[D]epending upon the terms of the individual leases, the participating areas established within the unit, and the operator's schedule of drilling operations, the interests of some owners may be tied up for extended periods of time without the benefit of any production being allocated to them." *Id.* at 10.

Additionally, the Board determined that Petro-Hunt could not estimate whether additional recovery of oil or gas would substantially exceed the additional costs in operating the lands as a unit as required by Utah Code Ann. § 40-6-8(2)(b) without first ascertaining that a common source of supply actually exists. As an example, the Board reasoned that a failure to find hydrocarbons in commercial quantities would certainly prevent additional recovery from exceeding the additional costs of unitization.

Because the Board held that it cannot authorize compulsory unitization without first finding that a common source of supply exists, the additional legal questions raised during the hearing were not reached by the Board. Most importantly, the Board did not clarify whether it even had the authority under the Act to approve an exploratory unit. The decision from the Board acknowledged that "there are significant policy arguments in favor of early unitization," but continued by stating the potential need for legislative action to clarify the role of the Board in regard to exploratory unitization. A copy of the order may be obtained from the Utah Department of Natural Resources. For further reading, see Owen L. Anderson & Ernest E. Smith, "Exploratory Unitization under the 2004 Model Oil and Gas Conservation Act: Leveling the Playing Field," 24 *J. Land Resources & Envtl. L.* 277-78 (2004).

2007 LEGISLATIVE SESSION REPORT

The 2007 Utah legislative session concluded on February 28, 2007. By enacting Senate Bill 18, the legislature created the Severance Tax and Infrastructure and Economic Diversification Account (STIEDA) and put \$20 million into a separate Severance Tax Holding Account. 2007 Utah Laws ch. 384 (2007). The new law provides that the earnings from the Severance Tax Holding Account will be deposited into the STIEDA. The concept is that the STIEDA would be used for future infrastructure and economic diversification investment projects under the direction of the legislature.

The original idea was to place a portion of the severance tax on oil and gas into the Severance Tax Holding Account. However, the proceeds may only be diverted into this account with an amendment to the Utah Constitution. The legislature therefore also passed a resolution directing that a measure be added to the ballot in the next general election to allow a portion of the severance tax proceeds to be deposited into the Severance Tax Holding Account.

AMENDMENT TO SITLA LEASE FORM

The Utah School and Institutional Trust Lands Administration (SITLA) has amended its form oil, gas, and hydrocarbon lease to provide for a 10-year primary term instead of the previous 5-year term. The rental rate was also increased from \$1.50 to \$2.00 per acre. These changes will apply to any lease issued on or after April 1, 2007.

CANADA — MINING

CHRISTOPHER G. BALDWIN
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SASKATCHEWAN QUEEN'S BENCH OPINES IN "FIRST IN LINE" CASE

In *Shore Gold Inc. v. Walker*, 2007 SKQB 90 (2007), Shore Gold applied for a declaration that it had the right to register a particular mining claim. However, the court held that the defendants, United Carina Resources Corp. and Consolidated Pine Channel Gold Corp., were entitled to the "first in line" position and therefore were entitled to register their claim.

The case involved an interesting set of circumstances. The Saskatchewan Ministry of Industry and Resources is responsible for recording mineral claims and issuing claim certificates. When mineral interests become available for disposition, the Minister gives notice of the date on which applications for claims in relation to those interests will be accepted. The Ministry accepts, processes, and records mineral claims in the order they are presented for filing.

It is an accepted local practice that parties who wish to file claims line up outside the front door of the registry office. In order to be first in line a party must be positioned immediately at the front door of the office. It is also accepted in the industry that, to retain a place in a claim line, a party must specifically occupy that place continuously without interruption 24 hours per day. In mid-May 2003, the Ministry gave notice that various mineral interests would be available for disposition and that claims would be accepted as of June 2, 2003. The defendants arranged for individuals to attend at the office from May 10. Shore's representatives arrived on May 28.

The defendant's representatives were moved from the front door after they were told their presence caused fire hazard and safety issues, but were assured they would be considered as being first in line. Shore's representatives, however, refused to move from the front door when they were told to do so for safety reasons. On June 2, one of Shore's representatives sat in a chair closest to the front door and was intimidated by one of the defendants. Another employee took her place and was pushed away by the defendants. The defendants also used force to prevent Shore from entering the office to register its claim. The defendant Walker was able to enter first and to register his claim.

The court held that the defendants were considered to be first in line and were entitled to register their claim. The court relied on the application of equity and fairness and concluded that it would be grossly unfair for Shore to suggest it was first in line when it ignored a lawful request to move away from the front door. Walker and the corporate defendants were therefore entitled to have the claims in their names recorded.

NEW FEDERAL GREENHOUSE GAS REGULATORY INITIATIVE

On April 26, 2007, the Honourable John Baird, Minister of the Environment, announced the federal government's climate

change plan entitled *Turning the Corner: An Action Plan to Reduce Greenhouse Gases and Air Pollution*. As set out in the plan, the federal government has committed to reducing Canada's total emissions of greenhouse gases, relative to 2006 levels, by 20% by 2020 and by 60% to 70% by 2050.

Under the 1997 Kyoto Protocol, Canada committed to a 6% cut in greenhouse emissions from 1990 levels by 2012. Minister Baird indicated that despite the mandatory reduction targets set out in the *Turning the Corner* plan, Canada will not meet its Kyoto deadline. To the consternation of environmentalists, the current approach focuses on intensity-based reductions, rather than absolute reductions of greenhouse gas emissions.

In addition to measures related to greenhouse gas emissions, the plan also addresses air pollutants generally. For air pollutants, the framework anticipates fixed emission caps that will enter into force between 2012 and 2015. Other components of the plan include the development of a mandatory fuel efficiency standard for motor vehicles and phasing-out of the use of incandescent light bulbs by 2012.

Existing facilities will be required to comply with emission-intensity greenhouse gas reduction targets for each sector that will come into force in 2010, based on an improvement of 6% each year from 2007 to 2010 (resulting in an enforceable reduction of 18% from 2006 industrial emission-intensity levels by 2010). From 2011 onwards, existing facilities will be required to comply with a 2% continuous emission-intensity annual improvement. New facilities (defined as those whose first year of operation is 2004 or later) will have a three-year grace period in order to allow the facilities to reach full production and to establish their initial emissions levels. Thereafter, they will be subject to 2% annual emission-intensity reduction targets through 2020.

Under the plan, firms will have several options to meet their greenhouse gas emission-intensity reduction targets, including: reducing emissions through abatement actions; contributions to a technology fund, designed to act as a means of promoting the development, deployment, and diffusion of technologies that reduce emissions of greenhouse gases across industry; participation in emissions trading; and use of a one-time recognition of early action for firms that took verifiable action between 1992 and 2006 to reduce their greenhouse gas emissions. (Credits for early action will represent a maximum reduction of 15 megatonnes of carbon dioxide across industry and precise eligibility criteria have not yet been developed.)

The federal government indicates that the regulatory framework for air pollutants, including targets, compliance mechanisms, and timeframe for the entry into force of the regulations, will be finalized by fall 2007. Publication of sector-specific and greenhouse gases regulations in the *Canada Gazette*, Part I, is expected in the spring of 2008. These regulations will be revised to incorporate air pollutant provisions at a later date (following normal regulatory procedures).

The primary federal statute that will provide authority for the new regulations will be the Canadian Environmental Protection

Act, 1999 (CEPA). Consultations are currently underway between the federal government and provinces and territories, industry sectors, and other stakeholders to discuss key elements of the regulations. Helpfully, provisions in CEPA provide for harmonization of federal and provincial regulations.

On March 3, 2007, the federal government published a notice in the *Canada Gazette*, Part 1, which details the requirement that facilities which exceed the 100kt CO₂ equivalent GHG emission threshold must report their 2007 GHG emissions on or before June 1, 2008. As per the *Canada Gazette* notice of July 15, 2006, data for the 2006 calendar year is due no later than June 1, 2007.

ALBERTA LEGISLATES GREENHOUSE GAS REDUCTIONS FOR LARGE INDUSTRY

On April 17, 2007 the Alberta legislature passed legislation to reduce greenhouse gas emission intensity from large industry. The Climate Change and Emissions Management Amendment Act and accompanying Specified Gas Emitters Regulation provide that, starting July 1, 2007, companies that emit more than 100,000 tonnes of greenhouse gases a year must reduce their emissions intensity by 12%.

The legislation, a portion of which came into force on April 20, 2007, outlines the options for meeting the target and details how companies can reduce emissions intensity, among other things. Compliance options include making operating improvements or purchasing Alberta-based offsets to apply against emissions totals.

Where reducing emissions intensity by 12% is not initially possible, large emitters will be required to contribute to a new government fund that will invest in technology to reduce greenhouse gas emissions. Spending from the technology fund will occur in the province, to support research into innovative climate change solutions and to develop infrastructure to reduce emissions. Effective July 1, 2007, for every tonne above the 12% target, large emitters will be required to pay \$15 per tonne to the technology fund. The legislation, which is not yet fully in force, is expected to apply to about 100 facilities, representing about 70% of Alberta's industrial emissions. Alberta instituted mandatory greenhouse gas reporting requirements for large industrial facilities in 2004.

In related news, the Province's Lieutenant Governor-in-Council approved Alberta's new Emissions Trading Regulation in February 2007. Enacted pursuant to environmental protection legislation, the Emissions Trading Regulation establishes a baseline and credit system (as opposed to a cap and trade system) and an Emissions Trading Registry for coal and gas-fired electricity producers (including cogeneration units). Generating unit operators with a maximum continuous rating of 25MW or more are required to establish an emissions trading account by designated deadlines. In addition to setting out a regime for emissions trading credits, the regulation also contains baseline calculations regarding certain specific substances and baseline emission rates for new generating units.

Upcoming Programs

53rd Annual Rocky Mountain Mineral Law Institute

July 19-21, 2007 ! Vancouver, British Columbia

Mineral Title Examination

September 13-14, 2007 ! Westminster, Colorado

Int'l Energy Law, Contracts & Negotiations: Upstream Issues

September 24-28, 2007 ! Houston, Texas

Int'l Energy Law, Contracts & Negotiations: Midstream Issues

October 1-5, 2007 ! Houston, Texas

Federal Oil & Gas Leasing Short Course

October 15-18, 2007 ! Westminster, Colorado

Oil & Gas Law Short Course

October 15-19, 2007 ! Westminster, Colorado

Air Quality Challenges Facing the Natural Resources Industry

November 1-2, 2007 ! Denver, Colorado

Oil and Gas Surface Use in the New West

February 7-8, 2008 ! Westminster, Colorado

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