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FEDERAL — MINING

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PATRICIA J. WINMILL  
— REPORTER —

**OSM WINS VALID EXISTING RIGHTS DISPUTE**

The Office of Surface Mining (OSM) has won the latest round in its 25-year dispute with the National Mining Association (NMA) over the meaning of “valid existing rights” (VER) under section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). A recent decision by the D.C. Circuit upholds OSM’s definition of VER as a reasonable interpretation of the statutory phrase. *National Mining Association v. Kempthorne*, No. Civ. 06-5199, 2008 WL 123836 (D.C. Cir. 2008).

Section 522(e) of SMCRA, 30 U.S.C. § 1272(e)(1)-(5), prohibits surface coal mining operations on certain categories of land, subject, however, to VER. Congress did not define VER in SMCRA, and industry and OSM have engaged in a two and a half decade dispute over the meaning of the term. The dispute involved several rulemakings and judicial challenges.

The history of the dispute is outlined in the lower court’s decision addressing the issue. *National Mining Association v. Scarlett*, No. Civ.A.00-283(RWR), 2006 WL 1194224 (D.D.C. 2006).

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FEDERAL — OIL & GAS

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GREGORY R. DANIELSON  
— REPORTER —

**NINTH CIRCUIT AFFIRMS ORDER FOR PARTIAL INJUNCTIVE RELIEF**

The Northern Cheyenne Tribe and the Northern Plains Resource Council (NPRC) appealed an order of the U.S. District Court for the District of Montana (district court) that partially enjoined the development of coalbed methane (CBM) in the Powder River Resource Area. In *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836 (9th Cir. 2007), the Ninth Circuit affirmed the district court order and held that the district court did not abuse its discretion in issuing a partial injunction as it provides an equitable resolution consistent with the purposes of the National Environmental Policy Act (NEPA).

NPRC and the Northern Cheyenne Tribe challenged the Bureau of Land Management’s (BLM) approval of the 2003 Final Statewide Oil and Gas Environmental Impact Statement (Statewide EIS) and proposed amendments to the Resource Management Plan. In consolidated cases known as *Northern Plains Resource Council v. Bureau of Land Management*, Civ. Nos. 03-69, 03-78 (D. Mont. Feb. 25, 2005), the district court held that the

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ENVIRONMENTAL ISSUES

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STEVEN E. MARLIN  
— REPORTER —

**NINTH CIRCUIT UPHOLDS CLEAN WATER ACT 404 PERMIT FOR PROPOSED ALASKA MINE PROJECT**

In *Bering Strait Citizens for Responsible Resource Development v. United States Army Corps of Engineers*, 511 F.3d 1011 (9th Cir. 2008), the Ninth Circuit rejected challenges brought under the Federal Water Pollution Control Act (Clean Water Act) and the National Environmental Policy Act (NEPA) to a permit issued by the U.S. Army Corps of Engineers (Corps) for discharging dredged material in association with a proposed open-pit gold mine project near Nome, Alaska. Alaska Gold Company’s Rock Creek Mine Project will consist of two open-pit gold mines, the Rock Creek Mine/Mill and the Big Hurrah Mine, in separate locations consisting of open pit mines, a gold recovery plant, a tailings

storage facility, ore stockpiles, a gold ore crushing and processing plant, and storage and maintenance facilities. Both mines will be located on sites where debris, rock stockpiles, and tailings from historical mining activities at the sites cover wetlands and divert Big Hurrah Creek from its natural path.

The Corps issued a permit for the Rock Creek Project under section 404 of the Clean Water Act, 33 U.S.C. § 1344, which authorizes discharges of dredged or fill material into navigable waters of the United States. Construction and operation of the mines, tailings storage facilities, rock stockpiles, roads, and other facilities will result in permanent destruction of over 345 acres of existing wetlands, most of which are located at the Rock Creek

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 FEDERAL — MINING
 

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OSM's first definition of the term equated VER with having both a pre-SMCRA property right and all necessary permits to mine prior to SMCRA's effective date. This "all permits" standard was struck down by the D.C. district court in 1980. *In re Permanent Surface Mining Regulation Litigation*, 14 Env't Rep. Cas. (BNA) 1083 (D.D.C. Feb. 26, 1980). In 1983, OSM again attempted to define the term under a "takings" standard in which VER would be found to exist if application of the section 522(e) prohibition would effect a taking and entitle the owner to compensation under the Fifth Amendment. The rule was struck down as failing to comply with the agency's notice and comment rulemaking obligations. *In re Permanent Surface Mining Regulation Litigation*, 22 Env't Rep. Cas. (BNA) 1557 (D.D.C. Mar. 1, 1985). 2006 WL 1194224, at \*2.

OSM attempted rulemaking definitions in 1988 and in 1991, neither of which led to a final rule. The agency's effort to define VER was further stymied during the 1990s, because Congress enacted moratoria precluding rulemaking on the subject. *Id.* In 1999, the agency finally adopted the so-called "good faith/all permits" standard. Under this standard, VER was defined as having, as of the effective date of the mining prohibition, a valid pre-SMCRA property right giving the holder the right to mine; and either (1) having acquired, or having made a good faith effort to acquire, all of the necessary permits to mine prior to that date; or (2) demonstrating that the land is adjacent to a mining operation that was in existence on the effective date and is needed to ensure the economic viability of the operation. 2008 WL 123836, at \*3.

NMA challenged the 1999 rule, arguing that VER must be equated with a valid pre-SMCRA property right to mine, with no requirement that the VER claimant show that it had made an effort to obtain the required permits (known as the "ownership and authority standard"). As the lower court had done, the D.C. Circuit concluded that, because the statutory term was ambiguous and Congress had not expressed its intent on the issue, it would apply *Chevron* deference to the agency's interpretation of the statutory term. *Id.* at \*3-5. NMA argued that because five different administrations had adopted different views of the VER standard, the agency's current interpretation is entitled to less deference because the agency's position changed over time. The court dismissed this standard agency interpretation argument out of hand. The court reasoned that where Congress has used a term with so many "plausible interpretations," it has delegated to the administering agency broad discretion to make reasonable policy adjustments from time to time. *Id.* at \*3. Accordingly, the court deferred to OSM's interpretation of the statute it was charged with administering, and concluded that the "good faith/all permits" interpretation of VER was a permissible construction of the statute.

**COAL LEASE MODIFICATION NOT PRECLUDED BY THIRD PARTY'S EXPLORATION LICENSE APPLICATION OR PREVIOUS, UNSUCCESSFUL, PROPOSAL TO DEVELOP THE LAND**

Under the Mineral Leasing Act (the MLA), land valuable for coal is typically leased on a competitive basis. The statute pro-

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 MINERAL LAW NEWSLETTER
 

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**Oil and Gas** - John S. Lowe  
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vides an exception allowing land adjacent to an existing lease to be added to the lease through a lease modification, without competitive bidding, under certain circumstances. BLM can issue a

lease modification if the modification is in the interest of the United States, would not displace a competitive interest in the land, and would not include lands or deposits that can be developed as part of another potential or existing operation. 30 U.S.C. § 203(a)(2). IBLA recently considered whether a third party's exploration license application reflected sufficient competitive interest to preclude a lease modification and whether BLM can rely on a previous, unsuccessful mining plan to conclude that the land can be developed from a different operation. In *CAM-Colorado LLC*, 173 IBLA 188 (2007), GFS(MIN) 4(2008), IBLA answered both questions in the negative.

CAM based its request for lease modification on the grounds that in order to develop its deposit, it was necessary to provide rail access to property, the cost of which required the addition of significantly more reserves than were contained in its three leases. Shortly after the application for lease modification was filed, a third party applied for an exploration license that included the lease modification area. The area had also been included in a separate operation's mine plan in the 1980s, but that operation had failed. BLM concluded that it could not grant the lease modification application, because the existence of the exploration license application demonstrated that there was competitive interest in the area, and the prior proposal to mine the deposit indicated that the deposit could be developed from a different operation.

IBLA disagreed with BLM's conclusions. First, it noted that to preclude a lease modification, the competitive interest in the area must be "substantial and genuine, and not merely speculative or casual." 173 IBLA at 194 (quoting *Malcolm N. McKinnon*, 23 IBLA 1, 8 (1975), GFS(MIN) 1(1976)). Reasoning that an application for an exploration license shows only an interest in exploring the land, not developing it, IBLA concluded that the application standing alone did not establish a competitive interest in the land.

Addressing the issue of the prior proposal to mine the deposit through a different operation, IBLA outlined the history of that proposal, noting that the lessee withdrew its mining plans in 1988 because market conditions made it no longer feasible to conduct mining. IBLA concluded that absent evidence that the market conditions had changed in the interim, a withdrawn, failed mining plan was not sufficient evidence that the land could be developed from another operation. 173 IBLA at 199. Nonetheless, because BLM has discretion to decide whether a lease modification should issue, even when there is no competitive interest in the area and the area cannot be mined from any other operations, IBLA remanded the matter to BLM so that it could exercise that discretion.

#### **IMPOSITION OF STRICT LIABILITY IS NOT A REASONABLE PHOSPHATE LEASE READJUSTMENT**

In *J.R. Simplot Co.*, 173 IBLA 129 (2007), GFS(MIN) 2(2008), IBLA ruled that BLM may not impose a readjusted phosphate lease term that creates strict liability for lessees under the Mineral Leasing Act (the MLA). The readjustment provisions of the MLA

provide that leases issued under the Act are to be for a term of 20 years and so long thereafter as the lessee is in compliance with the lease terms, but at the end of each 20-year period the lease is subject to "such reasonable readjustment" of its terms and conditions as the Secretary of the Interior requires. 43 U.S.C. § 212. In readjusting *J.R. Simplot's* phosphate lease, BLM inserted an indemnification clause, which provided that: "Lessee shall indemnify and hold harmless the United States from any and all claims arising out of the lessee's activities and operations under this lease." 173 IBLA at 132. On several previous occasions, the IBLA had questioned the use of similar indemnity language in lease readjustments, concerned that it could be construed as imposing strict liability on mineral lessees. In the prior cases, BLM disavowed that such was its intent, and the IBLA was not required to consider whether requiring a lessee to agree to a strict liability standard was a "reasonable" readjustment term. In *J.R. Simplot*, however, BLM admitted that the indemnity language did impose a strict liability standard on the lessee and argued that it could impose such condition under its broad readjustment authority. The IBLA disagreed, holding that it was not reasonable to impose strict liability upon a lessee in a lease readjustment.

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## F E D E R A L — O I L & G A S

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Statewide EIS failed to analyze an appropriate range of alternatives for development of CBM as required by NEPA. BLM failed to consider a "phased development" alternative that would consider a lesser degree of development than full field development. Based on BLM's recommended terms, the district court granted a partial injunction that prohibited coalbed methane development on 93% of the resource area until BLM completed a revised environmental impact statement, but permitted development on 7% of the resource area subject to a prior site-specific review. NPRC and the Northern Cheyenne Tribe appealed arguing that the district court was obligated to enjoin all CBM development. The Ninth Circuit stayed all coalbed methane development pending resolution of the appeal.

The Ninth Circuit reviewed the scope of the injunction based on an abuse of discretion standard. The Ninth Circuit held that a NEPA violation is subject to traditional standards in equity for injunctive relief and does not require an automatic blanket injunction against all development. The court found that the district court's decision to issue a partial injunction, balancing the equities rather than automatic full injunction, was within the court's discretion. The Ninth Circuit noted that the district court had found that the environmental impact statement basically complied with NEPA except for its failure to consider phased development. The partial injunction, therefore, permitted what the appellants claimed to seek: phased development rather than full field development. In addition, no irreparable harm would result because a drilling

**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.**

permit cannot issue without site-specific environmental assessment.

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## ENVIRONMENTAL ISSUES

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Mine. However, the permit requires implementation of measures to mitigate environmental damage caused by this project and by historical mining operations, including removal of rock stockpiles from existing wetlands, removal of tailings from creeks and floodplains and restoration of natural creek flows, reclamation of wetlands disturbed by earlier water management systems, and conversion of mining pits to lakes. These mitigation measures are expected to result in reclamation of 106 acres of previously impacted wetlands and creation of 70 acres of new wetlands, for a total net loss of over 170 wetland acreage.

Alaska Gold Company applied for the 404 permit in May 2006, and during the public notice and comment period, the Corps received comments from the Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (FWS), state and local agencies, and numerous private groups and individuals. The Corps issued the permit in August 2006, and the plaintiffs filed an action challenging the permit in U.S. district court. The Corps subsequently withdrew the permit and issued a revised Permit Evaluation and Decision Document which adopted many of the comments and permit conditions from EPA and FWS and included an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI). The Corps reissued the permit in March 2007 and the plaintiffs filed a second action challenging the permit. The district court ultimately dismissed the action, finding that the Corps properly considered the relevant factors under the Clean Water Act and NEPA in issuing the permit, and this appeal ensued. The Ninth Circuit concluded that the Corps' decisions and issuance of the permit were not arbitrary and capricious or contrary to law.

The primary basis of the plaintiffs' challenge under the Clean Water Act was that the Corps failed to adequately consider practicable alternatives to the proposed discharge of fill material for the Rock Creek Project. EPA's 404 permit guidelines prohibit a discharge of dredged material into navigable waters if there is a practicable alternative to the proposed discharge that has less adverse impact on the aquatic system, as long as the alternative does not have other significant environmental consequences. 40 C.F.R. § 230.10(a). A practicable alternative is one that is available and capable of being conducted taking into consideration cost, existing technology, and logistics in light of the overall project purposes. *Id.*

The Ninth Circuit observed that the Corps had extensively reviewed data and considered 24 different alternatives to the Rock Creek Project design, including analysis of different locations and designs of the proposed mine pits, facilities, and roads. The Corps ultimately rejected these other alternatives as impracticable because the nearby uplands were too steep to support relocation of some or all of the facilities there, and because the alternate designs would have required destruction of higher value wetlands or expansion of the project footprint, or were too costly. The Ninth Circuit concluded that the Corps' review of the feasibility of the

numerous alternatives and its conclusion that the proposed design was the best alternative were reasonable and acceptable under the Clean Water Act. The Corps also properly gave considerable weight to the significant economic benefits that the project will have on the local economy in Nome, in comparison to the impacts of the project on wetland resources.

Next, the court determined that the Corps thoroughly and rationally considered a variety of ecological impacts of the project and reasonably determined that any such impacts would be localized or of short duration. Specifically, the Corps determined that the wetlands that would be destroyed by the Rock Creek Project were common habitat in Alaska and the Nome region, meaning the project would have no impact on the larger ecosystem beyond the project site. Finally, the court disagreed that the mitigation requirements imposed under the permit were inadequate to satisfy section 404 of the Clean Water Act. The court observed that the Corps implemented many of EPA's conditions in the permit and adequately explained why others were rejected, and held that the Corps' reliance on measures put into place after issuance of the permit was appropriate. In addition, while the mitigation measures do not prevent a net loss of wetlands because there is no one-for-one functional replacement of wetland acreage, the fact that a high percentage of land in Alaska is wetland makes one-for-one replacement impracticable. As a result, minimization of impacts by reduction of project footprints, co-location of facilities, and location of projects to lower value wetlands are the mitigation measures employed in many circumstances in Alaska. Accordingly, the court found that the Corps' selection of the particular mitigation measures for the Rock Creek Project was not unreasonable.

The court also rejected the NEPA-based challenges to the 404 permit, finding the Corps' EA adequate and deferring to the Corps' determination in the EA that an Environmental Impact Statement (EIS) was unnecessary. The court first concluded that the Corps adequately considered the cumulative impacts of the project on the environment, pointing out that the Corps' conclusion that the mitigation measures Alaska Gold Company is required to implement to reclaim historical mining conditions at the sites will leave portions of the watersheds in a more natural state than currently exists. The court also found that the Corps' consideration of the 24 different alternatives for the project design was sufficient to satisfy the requirement under NEPA that project alternatives be given a "hard look." 40 C.F.R. § 1508.9.

Finally, the court upheld the Corps' conclusion in the EA that an EIS was not required. The court found that the EA could properly rely on mitigation plans to justify the Corps' determination not to issue an EIS, and that the Corps adequately considered data on the impacts of the project on air quality, water quality, and biological resources to support its issuance of a FONSI instead of an EIS.

The Rock Creek Project is taking place in a unique environment and will incorporate measures under the 404 permit that reclaim conditions from historic mining that impacted wetlands. In this case, the court conducted its own detailed examination of the Corps' analysis and decisions as to the benefits and impacts of the project, and concluded that the Corps' decisions were reasonable under the Clean Water Act and NEPA. The court upheld the

404 permit because it found on balance that the project will contribute to the Nome region economy, it will result in mitigation of degraded conditions caused by historic mining activities, and it will have no significant detrimental effect on the environment in the area.

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CONGRESS /  
FEDERAL AGENCIES  
GENERAL

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ROBERT C. MATHES  
KATHLEEN C. SCHRODER  
— REPORTERS —

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**FISH AND WILDLIFE SERVICE WILL REVISIT DECISIONS  
UNDER THE ENDANGERED SPECIES ACT**

Congressional pressure and a recent federal court decision have persuaded the U.S. Fish and Wildlife Service (FWS) to revisit nine decisions regarding petitions to list species or identify critical habitat under the Endangered Species Act (ESA). In July 2007, the FWS announced that it would review eight ESA decisions that may have been inappropriately influenced by Deputy Assistant Secretary of the Interior Julie MacDonald. In a November 23, 2007, letter to the Chairman of the House Committee on Natural Resources, the FWS announced that it had completed an internal review and would revisit eight decisions under the ESA. The decisions included the 90-day finding for the white-tailed prairie dog, Canada lynx final critical habitat, Preble's Meadow jumping mouse proposed listing, Preble's Meadow jumping mouse critical habitat designation, Hawaiian picture-wing flies critical habitat designation, Arroyo toad critical habitat designation, and the California red-legged frog critical habitat designation. The FWS is expected to reopen public comment on the proposed petitions in the upcoming months.

The FWS previously determined that listing the greater sage-grouse was not warranted. 70 Fed. Reg. 2244 (Jan. 12, 2005). On December 4, 2007, the U.S. District Court for the District of Idaho reversed and remanded the agency's finding on the grounds that it was arbitrary and capricious and not based on sound science. The court was particularly critical of Deputy Assistant Secretary Julie MacDonald's role in the agency review and the agency's failure to document its findings. *See Western Watersheds Project v. United States Forest Service*, No. CV-06-277-E-BLW, 2007 WL 4287476 (D. Idaho Dec. 4, 2007). The FWS will likely reopen the comment period for the greater sage-grouse petition in March 2008.

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CONGRESS /  
FEDERAL AGENCIES  
OIL & GAS

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ROBERT C. MATHES  
— REPORTER —

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**APPROPRIATIONS ACT CONTAINS SEVERAL PROVISIONS  
IMPACTING OIL AND GAS OPERATIONS**

On December 26, 2007, the President signed the 2008 Consolidated Appropriations Act (2008 Act), an omnibus spending bill for fiscal year 2008. Pub. L. No. 110-161, 121 Stat. 1844 (2008). The 2008 Act contains numerous provisions that will significantly impact oil and gas operations. First, the 2008 Act requires the Bureau of Land Management (BLM) to collect a \$4,000 application fee for every new Application for Permit to Drill (APD) filed with the agency after December 27, 2007. 121 Stat. at 2098. The 2008 Act provides that the fees will be used to reduce the cost the BLM incurs in processing APDs, but the fees will not be returned to the actual offices where the permits are filed. On December 27, 2007, the BLM issued Instruction Memorandum No. 2008-043 which provides that the BLM will begin collecting the fee immediately and sets forth interim procedures for the payment and collection of the fee.

Second, the 2008 Act requires the Secretary of the Interior to deduct 2% of the amounts payable to each state under section 35(b) of the Mineral Leasing Act, 30 U.S.C. § 191(b), and pay those monies instead to the federal treasury. 121 Stat. at 2108. Section 35(b) of the Mineral Leasing Act previously required 50% of the monies from bonuses, royalties, and rentals from oil and gas leases to be paid to the state in which the lands are located. The 2008 Act, thus, reduces the revenue the states receive from federal oil and gas leases from 50% to 48%. Several prominent Senators in the west have already indicated their intent to remove this provision from future appropriation acts.

Finally, in Div. F., Title IV of the 2008 Act, Congress prohibited the BLM from using any appropriations to prepare or publish final regulations regarding a commercial leasing program for oil resources on public lands or to conduct an oil shale lease sale. 121 Stat. at 2152. In the Energy Policy Act of 2005 (2005 Act), Congress had previously directed the BLM to prepare a programmatic environmental impact statement for a commercial leasing program for oil shale and tar sands within 18 months after the passage of the 2005 Act, and to issue regulations for a commercial oil shale leasing program within an additional 6 months after the preparation of the programmatic environmental impact statement (EIS). *See Energy Policy Act of 2005*, Pub. L. No. 109-58, § 369, 119 Stat. 594, 728 (2005). The BLM issued a Draft EIS for the Programmatic Oil Shale Leasing and Development Program on December 21, 2007. 72 Fed. Reg. 72,751 (Dec. 21, 2007). The draft EIS covers lands in Colorado, Utah, and Wyoming. Comments on the draft EIS are due in March 2008.

## MINERALS MANAGEMENT SERVICE AMENDS REGULATION FOR INDIAN OIL VALUATION

On December 17, 2007, the Minerals Management Service (MMS) announced a final rule amending its regulations at 30 C.F.R. part 206 regarding valuation, for royalty purposes, of oil produced from Indian leases. 72 Fed. Reg. 71,231 (Dec. 17, 2007). The revised Indian Oil Valuation Rule is intended to bring certainty to the valuation of oil produced from Indian lands. The rule includes technical corrections to the 1988 Oil Valuation Rule, 53 Fed. Reg. 1184 (Jan. 15, 1988). The final rule eliminates reliance on posted oil prices, and addresses the unique terms of Indian tribal and allotted leases. Because of the unique concerns associated with the major portion price provision in Indian tribal and allotted leases, the MMS also elected to convene a negotiated rulemaking committee that will make recommendations regarding the major portion price provisions in Indian tribal leases. MMS is requesting interested parties to nominate representatives for membership on the negotiated rulemaking committee. The rules became effective February 1, 2008. 72 Fed. Reg. 71,231 (Dec. 17, 2007).

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## CALIFORNIA — MINING

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PENNY ALEXANDER-KELLEY  
DONOVAN COLLIER  
— REPORTERS —

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## STATE LEGISLATURE CONTINUES TO CONSIDER SB 68 AMENDING THE SURFACE MINING AND RECLAMATION ACT

In 2007, Senate Bill (SB) 68 was introduced to amend the Surface Mining and Reclamation Act of 1975 (SMARA). Cal. Pub. Res. Code §§ 2710-2797. The bill would improve the permitting and protection of aggregate resources, but with implications for hard rock mining. The bill was held over to resolve issues with builders and local governments, but further consideration is expected in 2008.

As drafted, SB 68 would modify the definition of “idle” mine status. Under current law, “idle” means to curtail for a period of one year or more surface mining operations by more than 90% of the operation’s previous maximum annual mineral production, with the intent to resume those surface mining operations at a future date. The proposed amendment would change the 90% requirement to a curtailment for a period of one year or more of surface mining operations as defined by SMARA, with the intent of resuming in the future. “Surface mining operations” are defined in section 2735 as

all, or any part of, the process involved in the mining of minerals on mined lands by removing overburden and mining directly from the mineral deposits, open-pit mining of minerals naturally exposed, mining by the auger method, dredging and quarrying, or surface work incident to an underground mine. Surface mining operations shall include, but are not limited to: (a) Inplace distillation or retorting or leaching. (b) The production or disposal of mining waste. (c) Prospecting and exploratory activities.

Cal. Pub. Res. Code § 2735.

The proposed legislation would also revise the appeal process under which a mining operator can allege that a local lead agency has failed to act, or has acted in violation of SMARA, in approving or failing to approve a reclamation plan or financial assurances, or has denied an application for a permit for surface mining operations in an area of statewide or regional significance.

## STATE MINING AND GEOLOGY BOARD CONSIDERS AMENDED SURFACE MINING AND RECLAMATION ACT (SMARA) REGULATIONS AFFECTING VESTED MINING RIGHTS

In December 2007, the State Mining and Geology Board (SMGB) proposed new regulations to determine vested mining rights in those areas of the state where the SMGB is the lead agency. The proposed new regulations are in direct response to the decision in *Calvert v. Yuba County*, 145 Cal. App. 4th 613 (2006).

In *Calvert*, the court held that determinations of pre-SMARA vested rights are adjudicative rather than ministerial actions when they implicate the diminishing asset doctrine. In that case, Western Aggregates applied to the county for a determination of its pre-SMARA vested rights pursuant to Cal. Pub. Res. Code § 2776, to conduct surface mining operations on the Yuba goldfields. Without notice to adjacent landowners or to the public, and without a hearing, the county determined that Western had obtained vested rights to 3,430 acres, expanding the operation from its present 1,200-acre size. Subsequently, William Calvert, an adjacent landowner, sued the county to set aside the vested rights determination.

The court held that where an entity “claims a vested right pursuant to SMARA to conduct a surface mining operation that is subject to the diminishing asset doctrine, that claim must be determined in a public adjudicatory hearing that meets procedural due process requirements of reasonable notice and an opportunity to be heard.” 145 Cal. App. 4th at 617. The court found that the county’s determination violated the procedural due process requirements under the U.S. Constitution because it denied affected landowners reasonable notice and an opportunity to be heard. Since the surface mining operation implicated the diminishing asset doctrine, the mining company had to show that the area it desired to excavate was clearly intended to be excavated at the time the permit requirement became effective. The determination was adjudicative, not ministerial, because it encompassed resolution of factual issues.

The proposed new SMARA regulations provide in part that:

[a]ny person claiming a vested right to conduct surface mining operations in a jurisdiction where the State Mining and Geology Board (the Board) is lead agency pursuant to section 2774.4 of the Public Resources Code must establish such claim in a public proceeding under this article. In such a proceeding the Claimant shall assume the burden of proof.

Proposed 14 Cal. Code of Regs. § 3506.1.

The proposed new regulations define a “vested right” as the right to conduct a legal nonconforming use of real property if that right existed lawfully before a zoning or other land use restriction became effective and the use is not in conformity with the restriction when it continues

thereafter. A vested mining right, in the surface mining context, may include but shall not be limited to: the area of mine operations, the depth of mine operations, the nature of mining activity, the nature of material extracted, and the quantity of material available for extraction.

*Id.* § 3506.4.

In direct response to the *Calvert* decision and along with other procedural requirements, the proposed regulations set forth the process to provide for a public hearing to be held prior to the SMGB making a vested rights determination; and the vested rights claimant, the original SMARA lead agency, and the public have an opportunity to participate. A vested rights determination by the SMGB shall “constitute acknowledgement that the specific surface mining operations . . . [do] not require a permit under Public Resources Code section 2770 provided that no substantial change may be made in such mining operations.” Proposed 14 Cal. Code of Regs. § 3506.16. The proposed regulations do not define “substantial change.”

The comment period on the proposed vested rights regulations ended on December 24, 2007, and the regulations were adopted by the SMGB on February 14, 2008.

#### STATE MINING AND GEOLOGY BOARD APPROVES MINERAL DESIGNATION PRIORITY LIST

The Surface Mining and Reclamation Act (SMARA) authorizes the State Office of Planning and Research to identify portions of areas in the state that are subject to urban expansion or other land uses that would preclude mineral extraction. Cal. Pub. Res. Code § 2761. Once these lands are designated, local lead agencies, cities, and counties reviewing their land use plans can use the mineral designation information in order to ensure and protect a 50-year supply of local aggregate sources. The mineral designation priority list, which follows the California Geological Survey schedule for mineral classification in the state, was approved by the State Mining and Geology Board (SMGB) on February 14, 2008. It includes 18 mineral land classification projects taking place from September 2007 through 2010, of which five projects are already underway.

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## OKLAHOMA — OIL & GAS

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JAMES C. T. HARDWICK  
— REPORTER —

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#### AD VALOREM TAX ASSESSMENTS FOR GATHERING LINES

Generally, in Oklahoma, ad valorem taxes are assessed by the county tax assessor of each county based on the values that assessor determines. However, for certain classes of entities meeting the definition of “public service corporation” for purposes of ad valorem taxation, Okla. Stat. tit. 68, § 2808, assessment is under the jurisdiction of the State Board of Equalization. Historically, assessment by the State Board of Equalization results in an ad valorem tax bill as much as twice the amount it would have been if the assessment had been made by the county assessor. Thus, when possible, entities have sought to avoid so-called “central assessment,” preferring local assessment.

Under section 2808, public service corporations for ad valorem tax purposes include entities authorized “to exercise the right of eminent domain [or having the right] to use or occupy any . . . public highway . . . in a manner not permitted to the general public.” Okla. Stat. tit. 52, §§ 10 & 27 authorize gas pipelines to construct and maintain their lines across public highways. Previously, in an unpublished opinion, *Texaco Exploration & Producing, Inc. v. State Board of Equalization*, No. 85,256 (Okla. Ct. of Civ. Appeals 1996), the court determined that a gas gathering system operated by Texaco in connection with its gas processing plant did not result in Texaco becoming a public service corporation for ad valorem tax purposes, even though its lines crossed public rights-of-way because Texaco did not transport gas for others, did not exercise the right of eminent domain, and Texaco’s occupancy of public rights-of-way was not pursuant to a statutorily granted authority but under permits negotiated with the state or the county. Subsequently, however, in *Dobson Fiber Co. v. State Board of Equalization*, 2001 OK CIV APP 85, 27 P.3d 1029 (2001), the court concluded that Dobson, an owner of fiber optic cables crossing public highways in several Oklahoma counties, was a public service corporation for ad valorem tax purposes, rejecting Dobson’s argument that it did not use or occupy any public highway “in a manner not permitted to the general public,” holding that it was the “actual *authorized use or occupancy* of public ways in some commercial service” that triggers public service corporation status.

In *Chesapeake Energy Marketing, Inc. v. State Board of Equalization*, 2007 OK CIV APP 79, 167 P.3d 446 (2007), Chesapeake Energy Marketing, Inc. (CEMI) sought a declaratory judgment that the State Board’s attempt to centrally assess and levy ad valorem taxes on CEMI’s gas gathering lines and equipment as a public service corporation were in excess of its authority. Historically, CEMI had been locally assessed. However, in May 2004, the Oklahoma Tax Commission directed CEMI to render its property for central assessment as a public service corporation. CEMI responded that its function was only to connect wells operated by its parent for delivery of gas to pipeline purchasers, that it had never used the power of eminent domain to occupy a public highway, but it laid its lines under public highways pursuant to road crossing permits available to the general public. In 2003, however, CEMI had purchased Enco Gas Gathering which historically had been centrally assessed. The State asserted that, as a consequence of acquiring the property of Enco, CEMI was now subject to central assessment.

The court in *Chesapeake* did not reach the merits of the case based upon an analysis of section 2808. Instead, it noted that, as a result of the *Texaco* decision, the legislature had created a task force to study whether gas gatherers should be locally or centrally assessed. In connection therewith, the legislature imposed a moratorium on changes in the treatment of gas gathering assets, providing that effective January 1, 2003, there were to be no changes in the determination of whether a gas gathering system was to be locally or centrally assessed. That moratorium remains in effect. As for the effect of the acquisition by CEMI of Enco, the court reasoned that status for ad valorem tax purposes is based upon the classification of the owner and not of the owner’s property. When CEMI acquired Enco, Enco ceased to exist, with CEMI the surviving entity. Thus, it is CEMI’s status quo that must be preserved

under the moratorium, and the State's attempt to reclassify CEMI to public service corporation status was in violation of that moratorium, notwithstanding the acquisition of assets that were previously subject to central assessment.

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## SOUTH DAKOTA — MINING

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**MAX MAIN**  
— REPORTER —

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### PROPOSED LEGISLATION LIMITS CONFIDENTIALITY OF MINERAL EXPLORATION DATA

Legislation has been introduced that would limit the confidentiality of pre-July 1, 1982, mineral exploration data. Senate Bill 162 provides that the pre-July 1, 1982, data will continue to be confidential for a period of six months following the effective date of the bill, unless the person who filed the data with the state requests that the confidentiality period be extended by up to five years. If passed, the effective date of the bill would be July 1, 2008, so the six-month confidentiality period would expire January 1, 2009. Provisions in current and prior laws required written release of the mineral exploration data by the operator that filed the data. Senate Bill 162 was introduced because it is becoming increasingly difficult to locate those operators. The bill passed overwhelmingly in the Senate and is now being considered by the House. See the bill at <http://legis.state.sd.us>.

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## TEXAS — OIL & GAS

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**WILLIAM B. BURFORD**  
— REPORTER —

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### REJECTION OF CLASS CERTIFICATION OF GAS ROYALTY OWNERS MOSTLY UPHELD

The Texas Supreme Court in *Bowden v. Phillips Petroleum Co.*, No. 03-0824, 51 *Tex. S. Ct. J.* 472, 2008 WL 400395 (Tex. Feb. 15, 2008), over three years after hearing oral argument, decided the appeal by plaintiff gas royalty owners of the court of appeals' reversal of their class certifications.

The royalty owners had brought a class action against Phillips, their common lessee under various forms of oil and gas lease, as well as several Phillips affiliates, alleging underpayment of gas royalty as a result of Phillips's self-dealing through sales to its marketing affiliates. After the trial court's initial class certifications were reversed, on remand it certified three subclasses of royalty owners under leases to Phillips in specified geographic areas to proceed with the class action:

**Subclass 1:** Those whose leases called for royalty to be based on proceeds or amount realized, from which Phillips sold gas to Phillips Gas Marketing Co. for marketing or resale.

**Subclass 2:** Those whose royalty was paid pursuant to a common form of Gas Royalty Agreement.

**Subclass 3:** Those whose leases provided for payment of royalty on either amount realized/proceeds or market value, from

which Phillips sold or transferred gas production to GPM Gas Corp.

The court of appeals reversed all three class certifications on the bases that the plaintiffs' representatives were inadequate representatives of the class and that individual issues would predominate over common ones. *Phillips Petroleum Co. v. Bowden*, 108 S.W.3d 385 (Tex. App.—Houston 2003). The supreme court granted the royalty owners' petition for review.

The supreme court disagreed with the court of appeals' holding that the class representatives' abandonment of certain claims in order to achieve commonality of claims within the class impermissibly split the class and rendered them inadequate class representatives. The supreme court acknowledged that abandoned claims of class members arising from the same transactions as those asserted in the class action could become precluded by res judicata. It held nonetheless that this did not make the class representatives per se inadequate. Instead, the trial court on remand should consider the representatives' choice of claims to pursue or abandon as one relevant factor in evaluating the requirements for class certification such as typicality, superiority, and adequacy of representation. In doing so, the supreme court went on, the trial court should venture beyond the pleadings to "understand the claims, defenses, relevant facts, and applicable law in order to make a meaningful determination of the certification issues." 2008 WL 400395, at \*5 (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)).

The court was not so kind to the royalty owners when it turned to particular analysis of the respective class certifications. First addressing Subclass 1, including only royalty owners whose leases required Phillips to calculate royalty as a percentage of proceeds, the court noted that the royalty owners argued that there was a single common question for Subclass 1: whether Phillips failed to reasonably market the gas. Specifically, they maintained that Phillips failed to act as a prudent operator when it sold gas to its affiliate at a lower price than it could have achieved by selling to a third party and thus paid lower royalties than it would have paid on sales to a non-affiliate. The supreme court did not altogether agree with the court of appeals that the plaintiffs could not meet the commonality requirement for class certification because some leases contained express marketing covenants while others did not. Although there is no implied duty to market under a lease with an express marketing covenant, it was not clear from the record that any express marketing clause would require different conduct from the duty in the implied covenant to market. For reasons different from those given by the court of appeals, however, the supreme court held that Subclass 1 had not met the requirement of showing that common issues would predominate over individual ones. The task for the jury, regardless of whether the lessee has an express or implied marketing duty, would be to determine the price a reasonably prudent operator would have received at the wellhead. The variations in well locations, quality of production, and field regulations, among other factors, would require the jury to conduct a well-by-well analysis, defeating predominance unless the class offered evidence that the gas price at the wells could be evaluated classwide. Although the royalty owners could show that Phillips's marketing affiliate obtained higher prices on resale than it paid for the gas at the wellhead, the higher prices included the cost of gathering and other post-production costs that

would not be incurred in sales at the wellhead. The royalty owners had not produced classwide evidence that would account for variations in post-production charges between each particular well and point of delivery. Because those individual issues would predominate over common issues at trial, the trial court had abused its discretion in certifying the class.

The royalties payable to Subclass 2 were calculated pursuant to Gas Royalty Agreements, all of which required payment of a percentage of the weighted average price per m.c.f. received by the lessee and its subsidiaries from the sale of natural gas and its components in the same area, without deduction for any cost of transportation or purification incurred or received by the lessee. The royalty owners objected to Phillips's payment of royalty only on sales of dry gas after removal of liquids and not on the proceeds from the sale of the liquid component, and its failure to account for the varying heat (Btu) content of the gas. The court of appeals held that Subclass 2 failed to meet the requirement of showing the predominance of class issues because the trial court had implicitly found that the royalty agreements were ambiguous on the manner of valuing natural gas production. The jury would have to hear evidence to decide the intentions of thousand of individual royalty owners, the court of appeals had reasoned, in order to determine whether there had been a meeting of the minds on the proper formula for calculating gas royalty. The supreme court disagreed that the gas royalty agreements were ambiguous. They clearly evidenced the parties' intent to base royalty on the value of the natural gas before separation. Thus, they may be construed classwide for royalty owners who executed substantially identical agreements.

The Subclass 2 royalty owners' success in achieving affirmation of their class certification may be to less avail on remand than they had hoped. The court went on to note that the royalty owners were incorrect insofar as they suggested that their royalty should be based on the average of prices received by Phillips for its separate sales of dry gas and liquids. Although the gas royalty agreements stated that amounts received by Phillips for gas transportation and purification were not to be deducted from sales prices used in royalty calculation, they did not state that similar premiums received by Phillips for any voluntary processing it might undertake could not be deducted. In other words, the agreements did not evidence the intent to give the royalty owners the benefit of the value added by processing. Moreover, the royalty owners' argument that the royalty formula should account for Btu content found no support in the language of the agreements.

The supreme court finally agreed with the court of appeals' holding that individual issues would predominate over class issues involving Subclass 3. Phillips sold all of the gas produced under the Subclass 3 leases to its affiliate GPM under "percentage of proceeds" contracts, under which Phillips was entitled to receive a percentage of the proceeds GPM realized on resale of processed gas. The typical split of 80% of resale proceeds to Phillips and 20% to GPM, or other similar percentages, the royalty owners alleged, represented an unreasonable and fraudulent post-production fee for GPM. There is no "duty to manage and administer the lease as a reasonably prudent operator" that might apply in the same way both to leases with "proceeds" royalty clauses and to those with "market value" royalty clauses, as the royalty owners urged, distinct from the duty to market as a reasonably prudent operator.

*Id.* at \*15. The royalty owners' proposition, at its core, was nothing more than that Phillips had failed to diligently market the gas and obtain a higher price. Because Subclass 3 involved leases calling for royalty to be calculated based both on proceeds and on market value, the class failed to meet the commonality requirement for class certification by including both types of leases. Finally, the royalty owners had failed to explain how a reasonable processing fee could be proven classwide, even for proceeds leases only. A factual analysis of the circumstances surrounding each contract would be necessary to ascertain whether the production fee was reasonable or whether Phillips breached any duties owed.

#### **FINDINGS OF FRAUD IN RESERVE ESTIMATES UPHELD FOR MATURE FIELD, REVERSED FOR NEW ONE**

The Texas Supreme Court in *Arkoma Basin Exploration Co. v. FMF Associates 1990-A, Ltd.*, 51 *Tex. Sup. Ct. J.* 342, No. 03-1066, 2008 WL 204503 (Tex. Jan. 25, 2008), decided Arkoma's appeal of a judgment in favor of several Virginia limited partnerships. The judgment was based on the jury's finding of fraud in Arkoma's inflated estimates of future oil and gas production from Oklahoma prospects in which the partnerships had invested based on those estimates.

The plaintiff partnerships were required to establish fraud by clear and convincing evidence under Virginia law, which the parties agreed applied. The mere expression of an opinion is not fraud, according to the Virginia courts, nor can a fraud claim be predicated on unfulfilled promises or statements as to future events. Arkoma maintained that its reserve estimates were just opinions about future events and thus not actionable. However, in some circumstances, the court observed, Virginia law allows fraud claims based on what might otherwise appear to be opinions, for example where a realtor expressed his opinion that there was no termite damage when he had a contrary report in hand, and statements about future events may constitute fraud in some circumstances. The nature of the statement, the parties' relative knowledge, and all the surrounding circumstances may be taken into account in deciding whether a statement that appears to be an opinion or a statement about future events may be fraud.

Arkoma's estimates could not be treated the same, the court held, because their nature and the circumstances surrounding them were very different. Those for two of the partnerships, FMF Associates 1988-B and FMF Lazare, concerned the Wilburton Field, a mature field for which there was much historical data from which future production from projected infill wells could be estimated fairly accurately. Although experts testified that reserve estimates in this area could not reasonably vary by more than 10% or 15%, there was clear and convincing evidence that Arkoma's estimates assumed infill wells would last far longer and yield two or three times the production that nearby existing wells had ever produced. On that basis, the court upheld the fraud judgment in favor of the partnerships that had invested in the Wilburton Field.

The reserve estimates for the other six partnerships, by contrast, concerned interests in the South Panola Field, a new field in which there had been little drilling or production. No one knew how much wells in this area might eventually produce, and the plaintiffs' own expert characterized drilling there as "definitely high" risk. Viewing all the surrounding circumstances, there was

no clear and convincing evidence that Arkoma's estimates of South Panola Field reserves should be treated as statements of fact rather than of opinion.

Thus, under Virginia law as interpreted by the Texas Supreme Court, whether an opinion may be the basis of a fraud claim does not depend on whether it was made in good faith. An honest statement is never actionable whether it is an opinion or not, but the fact/opinion distinction focuses on reliance rather than scienter. If circumstances show that a statement should be treated as a mere opinion, it is unreasonable to rely on the estimate as a statement of fact even if it was a lie. The result here is that even if Arkoma knowingly concocted false reserve estimates to induce the partnerships to invest, as the jury apparently believed it had for both fields, the inherent uncertainty of any estimates for the South Panola Field precluded liability for those.

#### LIMITATIONS BARS SUIT FOR CANCELLATION OF EASEMENT

In 1998, Mobil Chemical Company, a predecessor of Exxon Mobil Chemical Company, procured a right-of-way deed that included a map showing a pipeline crossing three tracts of land but with text describing its easement as crossing only one of the three tracts. An amended easement granted three months later, for temporary operational access, described the original easement as crossing all three tracts. Robert Ford bought the three tracts two days after the amendment, and, another four months later, Ford granted Mobil Chemical another amendment, in return for \$20,000, relocating the pipeline's route across all three tracts. Five years after that amendment, Ford sued Exxon Mobil Chemical Company for cancellation of the easement, alleging fraud in that Mobil Chemical had falsely represented that the original easement crossed all three tracts. In *Ford v. Exxon Mobil Chemical Co.*, 235 S.W.3d 615 (Tex. 2007) (per curiam), the court held the suit barred by the four-year statute of limitations against fraud claims.

The parties agreed that the claim had to be brought within four years of when the fraud should have been discovered by reasonable diligence but disagreed on when Ford was on notice of the original deed's contents. Because Ford's fraud claim stemmed entirely from a discrepancy among recorded instruments in the chain of title to his servient estate, a discrepancy he admitted he learned simply by reading them, there was an irrebuttable presumption that he was on notice of them. Ford's fraud claim was therefore barred. Moreover, the court of appeals was incorrect to have nevertheless ordered Exxon Mobil's easement cancelled on the basis that no statute of limitations applied to Ford's equitable action to quiet title. An equitable action to remove a cloud on title is not subject to limitations, the court observed, if a deed is void or has expired by its own terms. The same is not true when a deed is merely voidable, however, and deeds obtained by fraud are voidable rather than void, and remain in effect until set aside.

#### TRIAL COURT'S JUDGMENT EXCEEDED TERMS OF SETTLEMENT AGREEMENT

*Lesikar v. EOG Resources, Inc.*, 236 S.W.3d 457 (Tex. App.—Amarillo 2007, no pet.), arose from a suit by Harriet Lesikar, in which she sought to have EOG acknowledge the extent of a mineral interest she had inherited and pay money due her for gas production. After the suit was filed, the parties entered into an ex-

remely brief agreement purporting to settle the matter, in which EOG agreed to pay \$22,500.00 "in full and final settlement of any and all claims or allegations brought or which could have been brought by . . . Lesikar regarding the leases made the basis of her lawsuit," and to convey Lesikar a specified additional interest. *Id.* at 458. Lesikar would dismiss her suit, and, finally, the parties would "execute the necessary documentation, such as stipulation of interest, releases, etc., in order to finalize the dispute." *Id.*

Lesikar and EOG both filed motions for summary judgment to enforce the settlement agreement. The trial court granted EOG's, ordering EOG to pay the \$22,500.00 into the registry of the court "in full and final settlement of any and all claims or allegations brought or which could have been brought by . . . Lesikar regarding the leases" and to transfer Lesikar the agreed additional interests, to become effective on Lesikar's execution of "a. [s]tipulation of interest; b. COPAS or other documentation indicating an agreed lease overhead charge; and c. [o]ther necessary documents finalizing the parties' dispute." *Id.* Lesikar appealed on the basis that the court's order exceeded the scope of the parties' agreement. The court of appeals agreed and reversed the summary judgment.

The short opinion concludes by holding that the trial court had erred in its requirement that Lesikar sign a "COPAS or other document indicating an agreed lease overhead charge," since the settlement agreement made no mention of an overhead charge, and there was no proof that such a document was necessary to finalize the dispute. *Id.* at 459-60. This was probably sufficient for the court's reversal, but it is puzzling that the bulk of the opinion is earlier given to a discussion of why the settlement agreement did not, as EOG is said to have believed, resolve all claims of Lesikar, both those existing and those to accrue in the future. EOG was not insulated from suits regarding overcharges or misconduct occurring after the settlement agreement was executed, the court purported to hold, and "to the extent the trial court held otherwise, it erred." *Id.* at 459. It seems an exceedingly strained reading of the trial court's judgment that it might purport to have any effect on causes of action not yet accrued. Why EOG's alleged erroneous belief might make the judgment itself erroneous is most unclear.

#### OWNER OF CONDEMNED PIPELINE EASEMENT MAY LEASE TO ANOTHER COMMON CARRIER

In *SouthTex 66 Pipeline Co. v. Spoor*, 238 S.W.3d 538 (Tex. App.—Houston [14th Dist.] 2007, pet. filed), the court reversed a summary judgment declaring that SouthTex's lease of a pipeline from WestTex Pipeline Co. was invalid and that SouthTex was therefore trespassing on the Spoor's land by using it.

WestTex had acquired the easement for a 12-inch pipeline by condemnation pursuant to an order authorizing WestTex and its successors and assigns to use the pipeline and any replacement as a common carrier pipeline transporting crude oil and refined petroleum products. After discontinuing its use of the pipeline several years later, WestTex leased the pipeline to SouthTex for a renewable five-year term. The Spoor sued SouthTex, alleging trespass and arguing that rights to a condemned easement cannot be leased and that SouthTex was not a common carrier.

Pipeline easements are generally assignable in Texas, the court noted, and it found nothing in the record to make the easement in question here not assignable. In fact, WestTex's condemnation order specifically contemplated use of the pipeline by its successors and assigns. The Spoors contended that rights acquired through condemnation cannot be "assigned" through a lease, but only through an "assignment." Citing *Black's Law Dictionary*, the court observed that a lease is a conveyance of a possessor's right to use and occupy property and that a conveyance is the same as a transfer or assignment. 238 S.W.3d at 548. The fact that the rights assigned concerned a condemned pipeline easement and were transferred by a lease, it held, did not make the conveyance ineffective.

The only summary judgment evidence submitted by the Spoors in support of their claim that SouthTex was not a common carrier was an impermissible affidavit of their attorney, disallowed because a party's attorney cannot also be a witness. They therefore had nothing to rebut SouthTex's own evidence that it was in fact a common carrier.

#### **EXPIRED ASSIGNMENT HELD NOT EXTENDED FOR TERM OF OPERATING AGREEMENT BETWEEN ASSIGNOR AND ASSIGNEE**

The court in *EOG Resources, Inc. v. Killam Oil Co.*, 239 S.W.3d 293 (Tex. App.—San Antonio 2007, pet. denied), affirmed a summary judgment in favor of Killam that its assignments to an EOG predecessor pursuant to a 1974 farmout agreement had expired.

Predecessors of EOG acquired two different farmout agreements from Killam, one in 1974 and another, for deeper horizons, in 1978. Killam reacquired or retained working interests in both the shallow and the deep horizons, and in 1983 EOG and Killam executed a letter agreement in which they agreed that their joint interests in both depths would be covered by the same existing operating agreement. The letter agreement included an amended Exhibit A to the operating agreement, setting forth the interests of EOG and Killam in the respective depths.

The 1974 farmout agreement and the assignments made pursuant to it provided that the assignments to EOG would remain in effect only as long as EOG continued to produce oil or gas in commercial quantities. The wells producing from the depths involved in the 1974 farmout ceased producing in 1994. Killam asserted that the assignments of those depths had thus expired, triggering the operating agreement's provisions for failure of title and reducing EOG's interests under the operating agreement. EOG argued that it remained entitled to production from the horizons covered by the 1974 farmout as long as the operating agreement remained in effect.

The EOG-Killam operating agreement appears to have been a typical form. It provided that all oil and gas from the contract area would be owned by the parties in the interests shown in Exhibit A during its term. Article IV.B of the agreement, governing loss of title, provided that should any oil and gas interest or lease be lost through failure of title, which loss resulted in a reduction of interest from that shown in Exhibit A, the agreement would remain in force as to the remaining interests, but the interest of the party whose lease or interest was affected by the title failure would be reduced on an acreage basis by the amount of the interest lost.

EOG argued that the failure of title provisions should be interpreted as applying to failures of title in favor of a third party outside the operating agreement, not to title failures in favor of a party to the agreement. The court disagreed. The operating agreement's provisions, it said, spoke in terms of a title failure's consequences to the parties without reference to third parties, and to accept EOG's interpretation would be to rewrite the agreement. A failure of title in favor of anyone, whether a party to the operating agreement or a third party, would result in reduction of the interest of the party whose title failed. Nothing in the 1983 letter agreement indicated that the parties intended to waive their right to enforce the operating agreement's title failure provisions; its only purpose was to join the operations in the deeper and shallower zones.

One of the assignments made under the 1974 farmout provided that if any rights failed to be continued in force and effect, the assignment would terminate except as to 640 acres surrounding each well producing or capable of producing. EOG sought to show that although no wells were actually producing between 1994 and 1998, they were nevertheless capable of producing so as to maintain the assignment in effect. In support EOG had tendered the affidavit of one Scott, who opined that there were wells on the lease that had encountered zones capable of producing as of 1994. Disagreeing with EOG that the meaning of "capable of production" may change depending on the context, the court held that under Texas law EOG would have to raise a fact issue whether any well could have produced in paying quantities if turned "on," without additional equipment or repair, which the Scott affidavit was insufficient to do.

#### **MINERAL DEED HELD VOID FOR LACK OF VALID LEGAL DESCRIPTION**

*Ray v. Elder*, No. 12-06-00141-CV, 2007 WL 1532704 (Tex. App.—Tyler May 29, 2007, pet. denied) (unreported), is the latest of several recent cases highlighting the importance of sufficient legal descriptions in mineral conveyances. Here the court affirmed the trial court's summary judgment for the plaintiff beneficiaries of the estate of Almore Kennedy Elder, who had executed a purported mineral deed to Vernon D. Ray, the defendant.

The deed from Elder to Ray, dated March 4, 1994, but not filed for record until over a year later, stated that it conveyed 100% of Elder's minerals in land in Rusk County, Texas, "to wit: Division of interest on page 4 attached hereto and made a part hereof." *Id.* at \*1. Three pages of an "Exhibit A," describing 24 tracts of land by metes and bounds, were attached to the recorded deed. The body of the deed made no reference to an "Exhibit A," and there was no attachment to the deed identified as "page 4." On June 17, 1999, Ray filed for record a certified copy of the deed, as originally recorded, with two additional pages attached. The first was marked "Exhibit A. Page 4" and entitled "Division of Interest," and the second contained metes and bounds descriptions of three tracts in Rusk County. The "Division of Interest" on "Page 4" was a schedule in tabular form, reproduced as an appendix to the opinion, listing some 15 entries, each including a decimal fraction (most followed by RI or ORI), and a unit or well name. Several at the beginning of the listing included what appeared to be a survey name, abstract number, and acreage figure. Others were listed only by well or property name, the name of an oil company, and a reference to Rusk County, Texas.

The court first noted that any conveyance of real property must sufficiently describe the land to be conveyed, containing at least enough of a “nucleus” of a description to reasonably enable a party familiar with the locality to identify the premises, or it is void under the statute of frauds. It then turned to an analysis of the deed and found it wanting under this standard even if it were assumed that the original deed, as Ray alleged, included the two additional pages that were not originally attached to it as recorded.

The court first held that the descriptions on the three pages attached to the originally recorded deed could not be considered. It is not uncommon, it observed, for a property description to be included in an exhibit attached to a deed and incorporated into the deed by reference, and the language used to incorporate the exhibit is not important provided the deed plainly refers to the exhibit. The granting clause in the Elder-Ray deed, however, described only “page 4” as being attached without any reference to an Exhibit A. The remaining three pages of Exhibit A therefore could not be considered part of the deed in the court’s determination of the adequacy of the description.

The “Page 4” descriptions attached to the rerecorded deed did not include enough information to identify the land intended to be conveyed with reasonable certainty. Only one of the first seven descriptions (which contained more information than others and included an abstract and/or survey number) included the county in which the named property was located, and it identified Gregg County, not Rusk County, as stated in the deed’s granting clause. The abstract numbers alone, without an adequate description of the land owned by the grantor within the abstracts, were insufficient to identify the land with reasonable certainty. (It would have been helpful for the court to have provided some explanation of why the descriptions that included the name or abstract number of a survey could not be construed as meaning the entire survey, so that the grantor conveyed whatever she owned in any part of it.) The last eight descriptions, containing only the well or unit name, an oil company name, and the county, provided nothing making it possible to locate the properties within the county. Because the descriptions on page 4 did not provide a means for identifying the land referred to in the deed’s granting clause with reasonable certainty, the descriptions were insufficient to pass title.

The court’s opinion fails to explain its decision adequately in at least one respect. Before dealing with the specific tabular “page 4” descriptions, it addressed Ray’s argument that page 4 also included a general grant, contained in one sentence appearing above the property listings: “This grant does so includes. [sic] all of the lands owned by Grantor.” 2007 WL 1532704, at \*4. The court acknowledged that a deed purporting to convey all lands owned by the grantor in the state or in a named county is a sufficient description to effect a conveyance, but pointed out that this sentence did not purport to convey all of the lands owned by the grantor in Texas or in a named county. Thus, the court said, the description was insufficient to effect a conveyance. If the court intended to say that a blanket description of all lands owned by a grantor wheresoever, in Texas and elsewhere, cannot be effective, it certainly is incorrect. The court might discern a reason that a brief sentence such as the one here does not sufficiently express that intent, particularly given the attempted inclusion of specific descriptions, but its apparent holding that a general description must at least be limited to all land in the state is unsupported.

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## UTAH — MINING

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MICHAEL N. THATCHER  
— REPORTER —

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### UTAH MINE SAFETY COMMISSION DELIVERS REPORT TO GOVERNOR AND UTAH LEGISLATURE

On August 6, 2007, the Crandall Canyon Mine in Emery County, Utah, collapsed, burying six coal miners. Another collapse occurred 10 days later during the rescue operations, killing three rescue workers and injuring 10 others. In reaction to these disasters, Utah Governor John M. Huntsman, Jr., created the Utah Mine Safety Commission (UMSC). *See* Executive Order dated Aug. 27, 2007. The UMSC’s mission was, among other things, to critically assess the State of Utah’s role in the area of mine safety, inspection, accident prevention, and accident response. *Id.* Upon completion of the assessment, the UMSC was charged with recommending policy changes, including legislative proposals, with respect to the state’s role in mine safety. *Id.*

The UMSC Report was made available on January 23, 2008. *See* <http://minesafetycommission.utah.gov/press/UMSC%20Report%20Final.pdf>. It made 45 recommendations in areas spanning safety oversight, technical matters and research proposals, education and training, testing and certification, and emergency response. Recommendations with potential legal significance include UMSC’s proposal to create a new division of the Utah Labor Commission called the Office of Coal Mine Safety (OCMS). UMSC Report, at 50. OCMS officials, through partnership with the federal Mine Health and Safety Administration (MSHA), would participate and monitor MSHA’s inspection and plan approval program. *Id.* Under the proposal, OCMS would have access to MSHA inspection reports and plans, which OCMS would use to determine how the State of Utah can “enhance safety for Utah miners and fulfill MSHA’s safety preference for ‘additional pairs of eyes.’ ” *Id.* One goal of the collaboration between OCMS and MSHA would be to determine the feasibility of implementing a state inspection program. Other proposals include the creation of a coal mine safety ombudsman alert system. *Id.* at 51. OCMS would provide a mechanism, using a variety of communications systems, to allow any person to report safety concerns involving Utah’s mines. *Id.* OCMS’s ombudsman would then investigate the matter and determine whether further action is necessary, including notifying MSHA and coal operators of the safety concerns. *Id.*

The UMSC Report is currently under review by the Governor’s office and the Utah legislature. To date, no executive proposals have surfaced and no draft legislation has been proposed concerning UMSC’s recommendations.

### ADMINISTRATIVE MINE PERMIT APPEALS REQUIRE FORMAL EVIDENTIARY HEARINGS

In an order dated August 9, 2007, the Utah Board of Oil, Gas and Mining (the Board) denied a request by the Southern Utah Wilderness Alliance (SUWA) to limit the scope of evidence to be considered by the Board in an appeal concerning the Utah Division of Oil, Gas and Mining’s (DOG M) grant of a mining permit

for the Lila Canyon Mine Extension in Carbon and Emery Counties. Order, Docket No. 2007-015, Cause No. C/007/013-LCE07 (Order). Administrative proceedings regarding the Lila Canyon Mine Extension (of the Horse Canyon mine) have been ongoing since 1998, and the permit received approval on May 2, 2007. A summary of the administrative history can be accessed at <http://168.179.220.114/idev/coalmines/minelistdetail.php?C0070013>.

The issue presented to the Board was whether its review of a coal mine permitting decision should be limited to the informal record compiled by DOGM as the basis for issuing the Lila Canyon mine permit, or whether the Board may receive additional evidence, including the examination of witnesses, at a formal evidentiary hearing. In earlier proceedings involving the Lila Canyon permit, the Board had declared that it would hear an appeal "in an appellate tribunal capacity with review limited to the Administrative Record as certified by [DOGM]." SUWA argued that this pronouncement effectively established the "law of the case," such that the Board could only deviate from this ruling upon a showing of exceptional circumstances. The Board, citing *Salt Lake Citizens Congress v. Mountain States Telephone & Telegraph Co.*, 846 P.2d 1245 (Utah 1992), rejected this argument, and held that the doctrine of the law of the case has questionable applicability in the administrative context and, even if the doctrine does apply, an administrative body can deviate from its own prior rulings as long as it has a reasonable basis for doing so.

The Board then examined the Utah Coal Mining & Reclamation Act (Utah Code Ann. §§ 40-10-1 to -31, the Utah Oil and Gas Conservation Act (§§ 40-6-1 to -19.), the Utah Administrative Procedures Act (§§ 63-46b-0.5 to -23), and the Board's procedural rules, and concluded that the Board "in conducting a hearing pursuant to Utah Code Ann. § 40-10-14(3), does not limit its review to an informal record developed before [DOGM], but rather conducts a formal evidentiary hearing in which evidence is taken and an adequate record is developed for purposes of judicial appellate review." The Board's earlier ruling limiting review to the informal record was found to conflict with the statutes and rules governing the Board's conduct, and thus the ruling could not have established any binding law of the case. Also, because the Board's governing statutes and rules clearly require a formal adjudicative hearing involving the taking of evidence, a "reasonable basis" is established for deviating from its prior rulings. Importantly, the Board observed that no support exists in Utah law for the proposition that "the Board must assume the role of an appellate court, and strictly limit its review to an informal agency record, when it reviews a coal mine permitting decision."

The Board, in a subsequent order dated September 5, 2007, again involving the Lila Canyon permit, authorized broad methods of discovery, including the use of depositions, interrogatories, requests for admissions, and production of documents. Discovery requests, however, would be regulated by the Board under its discretionary power pursuant to Utah R. of Civ. Proc. 26(b)(1) and Utah Admin. Code R641-108-900. Parties may seek relief from the Board "in response to discovery requests perceived to be irrelevant, unduly burdensome, or otherwise objectionable" under *Bennion v. Utah State Board of Oil, Gas & Mining*, 675 P.2d 1135, 1144 (Utah 1983).

#### **BOARD OF OIL, GAS AND MINING CLARIFIES LEGAL STANDARD IN MOTIONS FOR TEMPORARY RELIEF**

In an order dated December 21, 2007, the Utah Board of Oil, Gas and Mining (the Board) denied the Southern Utah Wilderness Alliance's (SUWA) Motion for Stay of Mining Activities involving the construction of roads and surface facilities at the Lila Canyon mine. Order, Docket No. 2007-015, Cause No. C/007/013-LCE07 (Order). The Board was presented with the issue of the appropriate standard for granting injunctive relief. Under Utah Admin. Code R645-300-212.200 to .230, the Board may grant "such temporary relief as it deems appropriate" if the petitioner demonstrates a "substantial likelihood" of prevailing on the merits. SUWA argued that the Board should also consider the standard set forth in Rule 65A of the Utah R. Civ. Proc., which requires showing a substantial likelihood of prevailing on the merits, *or* a showing that "the case presents serious issues on the merits which should be the subject of further litigation." The administrative rules reflect the standard provided by the federal Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1276(c), which Utah adopted in the Coal Mining and Reclamation Act (Coal Act), Utah Code Ann. § 40-10-14(4). The Board rejected SUWA's argument, citing *Virginia Surface Mining & Reclamation Ass'n, Inc. v. Andrus*, 604 F.2d 312, 315-16 (4th Cir. 1979), which held that SMCRA standards for injunctive relief are controlling over those standards applicable in private civil litigation.

The Board then elaborated on the factors it would consider in petitions for temporary relief, as the Coal Act "grants the Board wide discretion to consider other factors . . . viewed as bearing on the appropriateness of injunctive relief beyond the 'substantial likelihood' showing" pursuant to Utah Code Ann. § 40-10-14(4). Such factors include an analysis of the "nature and balances of harms" such that temporary relief would rarely be appropriate in cases where the "injunction would do more harm than good." Accordingly, the Board rejected SUWA's contention that contrary evidence presented by other parties should not be considered by the Board in determining whether SUWA has met the substantial likelihood showing. Instead, in determining whether to grant temporary relief, "the Board will consider the evidence and arguments of SUWA as well as the evidence and arguments of [other parties]." After applying this test to the facts of the case, the Board denied SUWA's request for temporary relief and construction on the mine was allowed to proceed.

#### **UTAH LEGISLATIVE AUDITOR GENERAL RELEASES PERFORMANCE AUDIT OF UTAH'S COAL REGULATORY PROGRAM**

In December 2007, the Office of the Utah Legislative Auditor General (Auditor) released an audit of the Utah Division of Oil, Gas and Mining's (DOGM) coal regulatory program to the Utah legislature. A Performance Audit of Utah's Coal Regulatory Program, Number 2007-15 (Audit Report). The Audit Report identified several deficiencies in DOGM's administrative of the program which have led to "inconsistent regulatory practices" and "inefficient management" practices. Audit Report, at i. Among those items of legal significance, Chapter III of the Audit Report questioned whether DOGM was properly distinguishing between surface and underground coal mining when defining the "permit area" for coal mines. The Auditor observed that each of Utah's 13 active coal

mines operate underground, but that the permit areas for the mines extend over acreage more suitable to surface mining operations. In the Auditor's opinion, because the area disturbed by underground coal mining is much less than the area disturbed by surface mining, the permit area (or the so-called "disturbed area") should reflect as much. *Id.* at 50. According to the Audit Report, recognizing this difference would better reflect the intent of DOGM's own rules, and would make Utah's permitting practice consistent with other coal producing states. It would also likely reduce the level of bonding and reclamation requirements for Utah coal mines.

DOGM Director John R. Baza responded to the Audit Report in a letter dated December 4, 2007. Baza remarked that DOGM plans to "press forward to evaluate each of the recommendations and begin incorporating them into the Coal Program's processes and procedures."

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## CANADA — MINING

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CHRISTOPHER G. BALDWIN  
CHRISTINE KOWBEL  
— REPORTERS —

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### YUKON SUPREME COURT CONSIDERS THE DUTY TO CONSULT ON SETTLED TREATY LANDS

Canadian case law continues to refine the principles of the duty to consult and accommodate Aboriginal peoples, and the May 2007 decision of the Yukon Supreme Court in *Little Salmon/Carmacks First Nation v. The Government of Yukon (Minister of Energy, Mines and Resources)*, 2007 YKSC 28, considers the extent of its application to recently settled treaty lands in the Yukon.

The *Little Salmon* decision involved a challenge of a land disposition of 65 hectares for agricultural purposes made by the Director of the Agriculture Branch, Department of Energy, Mines and Resources for the Yukon Government which the First Nation argued was located in its traditional territory and in the area of one of its member's traplines. The Director gave notice of the proposed land disposition and gave all interested parties, including the First Nation, the opportunity to provide information and comments. The land in question was Crown land within the boundaries of the Little Salmon/Carmacks First Nation Final Agreement, a comprehensive land claim agreement with the Government of the Yukon and the federal government finalized in 1997 (the Final Agreement). Despite the existence of the Final Agreement and notice provided, the First Nation sought to have the Director's decision set aside on the basis that the Crown had failed to comply with its common law duty to consult and accommodate. The Yukon Supreme Court concluded that the duty to consult and accommodate is an "implied term of every treaty," historical or modern day, and held that in the circumstances the Yukon Government failed to comply with the duty. The Yukon Government has appealed this decision to the Yukon Court of Appeal. The appeal is expected to be heard in June 2008.

### FEDERAL COURT CASTS UNCERTAINTY ON FEDERAL ENVIRONMENTAL ASSESSMENT PROCESS

On September 25, 2007, a Federal Court trial judge in *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans)*, 2007 FC 955, allowed an application by MiningWatch Canada challenging the legality of decisions/actions taken by the Department of Fisheries and Oceans (DFO) and Natural Resources Canada in conducting the environmental assessment of a proposed copper and gold mining project in northwestern British Columbia. The court made this ruling despite the relatively recent ruling in the so-called *TrueNorth* case, in which the Federal Court of Appeal upheld the validity of federal authorities using their discretionary authority under the Canadian Environmental Assessment Act (CEAA) to scope an oil sands project down into those components that fell within federal jurisdiction and that required federal authorization. See *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries & Oceans)*, 2004 FC 1265.

The Federal Court trial judge ruled that in this case, the scoping of that mining project to those components within federal jurisdiction and requiring federal authorization was not valid. The court issued a declaration that the DFO had correctly determined in the initial tracking decision that the project would require a comprehensive study level review based on the proposed ore production capacity threshold under the Comprehensive Study List Regulations, and that in later re-scoping the project the responsible authorities acted beyond the ambit of their statutory powers. The court further declared that the responsible authorities were under a legal duty to ensure public consultation with respect to the proposed scope of the project, the factors proposed to be considered in its assessment, the proposed scope of those factors, and the ability of a comprehensive study to address issues relating to the project.

The Federal Court trial judge set aside the screening decision and ruled that the federal authorities were required to go back and conduct a comprehensive study of the project under the Comprehensive Study List Regulations before issuing federal permits and authorizations. The decision has resulted in uncertainty for federal authorities respecting the scoping and environmental assessment of mining and other major projects. The decision is under appeal to the Federal Court of Appeal, and it is expected that a date for hearing the appeal will be set this year.

### ABORIGINAL TITLE DECLARATION DISMISSED, FOR NOW: WILLIAM V. BRITISH COLUMBIA

On November 21, 2007, the Supreme Court of British Columbia released its decision in *William v. British Columbia*, 2007 BCSC 1700. The decision dealt with a claim brought by Chief Roger William of the Xeni Gwet'in First Nation, on behalf of the Xeni Gwet'in First Nation and the Tsilhqot'in Nation. Initially, the Tsilhqot'in's claim, against the province and a number of forest companies, was brought to stop timber harvesting in their traditional territory (located in the Cariboo/Chilcotin region of British Columbia). The proceedings evolved over time, so that the issues before the court focused on the Tsilhqot'in's claim of aboriginal title and rights in a portion of their traditional territory (referenced as the Claim Area). The trial took over five years to complete, occupying 339 days of court time. Vickers J. declined to make any

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declaration granting the Tsilhqot'in aboriginal title over the Claim Area, but went on at length to provide his non-binding opinion that the evidence put before him proved aboriginal title to a significant portion of the Claim Area (amounting to approximately 200,000 hectares, slightly less than half of the Claim Area). Vickers J. did grant a declaration that the Tsilhqot'in had aboriginal rights to hunt and trap birds and animals in the Claim Area; to capture wild horses in the Claim Area; and to trade skins and pelts from the Claim Area. Vickers J. further decided that these aboriginal rights had been unjustifiably infringed by forest harvesting

activities authorized by the province. However, Vickers J. declined to award any damages for this infringement on the basis that the Tsilhqot'in's claim for damages had been framed as compensation for infringement of aboriginal *title*, not aboriginal *rights*.

The Tsilhqot'in Nation does not have aboriginal title to any land yet. No declaration has been made and, given the significance of the decision, it is likely to be appealed, despite the fact that Vickers J. devotes a significant portion of his reasons for judgment to urging the parties to engage in the process of reconciliation outside the courtroom.

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