Award Winning

The Override

Every Landman Wants One!

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LAAPL
LOS ANGELES ASSOCIATION OF PROFESSIONAL LANDMEN

Presidents Message

Sarah Downs
President
Southern California Gas Company

On Thursday, March 14th, LAAPL held its Annual Mickelson Golf Tournament. The tournament benefits the Pyles Boys Camp, an excellent organization that fosters young boys. Thank you to Jason Downs and Rich Maldonado for organizing and running the event, which raised a little over $1,400.00. Your service is much appreciated!

Congratulations are in order for our Newsletter Team; Joe Munsey, Randall Taylor, and Allison Foster who have been awarded the honor of "Best News Bulletin" of AAPL. Putting together a stellar newsletter is no small feat and our newsletter committee holds the bar high. Thank you, Joe, Randy, and Alliso

Last spring our past president, Rich Maldonado, discussed the forthcoming ruling of the Berkeley Ordinance. The Berkeley Ordinance required all new buildings be "all-electric" banning natural gas infrastructure in new buildings. The ordinance was challenged as being preempted by EPCA, which the Ninth Circuit found to be accurate. In short, the Ninth Circuit told Berkeley that it was the federal government's place (not local municipalities) to regulate appliance efficiency for natural gas appliances, and banning natural gas infrastructure interferes with federal regulation. According to www.localenergycodes.com, there are currently seventy-six counties and cities in California that have adopted some type of energy efficiency reach code. Many of the ordinances in Northern California banned natural gas infrastructure. Since the Berkeley ruling, those reach codes have been reevaluated and most if not all have been suspended to avoid litigation.

The Berkeley ruling does not however mean that cities and counties cannot adopt energy reach codes that focus on decarbonization and air pollution. Northern California has taken the lead with cities like San Luis Obispo, San Mateo,

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Inside This Issue:

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Meeting Luncheon Speaker

Strategic Communications & Stakeholder Engagement

Frank Rizzo is a Partner based in ERM's Walnut Creek, CA office, with over 20 years of experience in public affairs and strategic communications. Frank works with corporations and trade associations on many controversial issues, particularly in highly regulated industries. He is an expert on stakeholder engagement, grassroots mobilization, coalition building, social risk mitigation, and public involvement programs. Frank's work on capital project development has included community outreach and public education programs involving NEPA, FERC, CEQA, and many other state and local environmental regulations around the United States.

Opinionated Corner

Joe Munsey, RPL
Past President
Co-Newsletter Chair
Southern California Gas Company

Have you adjusted to the passage into Daylight Saving Time? No need to adapt if your body is not responding, we gain that hour back come fall.

From Art Berman's February 15, 2024 article at www.arberman.com, the CEO of TotalEnergies believes that the renewable transition will lead to higher—not lower—energy prices. That's a very different view from the popular belief that renewable energy prices are falling so fast that electric power will become ever-cheaper. Mr. CEO stated, "We think that fundamentally this energy transition will mean a higher price of energy." Further speaking, "I know that there is a theory which says renewables are cheaper, so it will be a lower price. We don't think so because a system where you [have] more renewable intermittency is less efficient . . . so we think it's an **interesting** [emphasis added] field to invest in."

When a person inserts "interesting" in a topic or discussion, that is code word for somn' else, or a caveat to be further discussed. Recall Mr. James R. Halloran's Point No. 1 of his "Immutable Principles of Energy" that **we** [emphasis added] desire seven qualities in our energy sources:

- ✓ Affordable (cheap),
- ✓ Abundant
- ✓ Reliable
- ✓ Pure
- ✓ Universally accessible
- ✓ Environmentally friendly
- ✓ Produced and delivered in a non-disruptive manner to our lifestyle (safe).

Let's clarify "we" – fully developed countries with vast amounts of disposable income to spend on monthly heating and cooling bills, gasoline and all sorts of energy sources to support a leisurely lifestyle.

Mr. Berman ended his column, "Everything has a price. The idea that we can reverse climate change and planetary overshoot without some trauma for society is just magical thinking."

But here's the "but" to refute Mr. Berman, often bantered about by current societal pontificators, wind and solar is abundant and free, thus, and therefore it's cheap to use, best of all, it burns clean. But here's the "but" to that thinking, oil and gas is free too, because it flat out did not cost anyone a red cent to make the stuff. But here comes the third "but," harnessing all sources of energy for the collective use has a price tag.

Well, that price tag has a gold lining for the land and legal professionals, trillions of dollars being spent and to be spent for all sources of energy bodes well for our professions. Now, that's magical thinking.

But here's the fourth and final "but." Most should remember the untimely demise of the goose who laid golden eggs. Therefore, reach forth your hands for a cache of those golden eggs before the goose who lays the golden eggs is no more.

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Santa Cruz, and San Jose adopting a single efficiency standard for all-electric and mixed fuel buildings utilizing "source energy" as a metric. These types of reach codes are considered "One Margin" codes and align with the California Energy Commission's 2022 building standards. One Margin codes, when applied, incentivize electrification and discourage natural gas infrastructure. The standard does not regulate the efficiency of an appliance and does not ban natural gas appliances.

The city of Los Altos Hills has taken it a step further, adopting a Zero NOx standard, which requires that all new buildings be "all-electric." The ordinance applies to combustion equipment, except for indoor cooking appliances, outdoor cooking, fireplaces, and pool/spa heaters for residential building projects. When questioned about EPCA Preemption during the adoption of the ordinance, the city responded that the town would be acting under police power as a general law city, which is a different regulatory structure than Berkeley, which they believe insulates them from EPCA.

While the cities and counties are gathering themselves together post-Berkeley, state and local agencies, like CARB, SCAQMD and BAAQMD are in the process of developing emissions standards that regulate appliances directly. There is still a question as to what these rules will look like and whether they are within the authority of each agency to promulgate. Luckily, each of the rule-makings in cities, counties, and local agencies allow for public comment and engagement.

As I said in September, we are in an energy transition, and while we may feel powerless or overwhelmed with every coming change, we still can engage. Take the first step and join us on March 21st as we delve into the process of cultivating stakeholder relationships during project development. Spring has sprung and what a great reminder that cultivating relationships takes work, but even the smallest planted seed yields results.

The Override is, and has been Edited by Joe Munsey, RPL and Published by Randall Taylor, RPL, since September of 2006.

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Chapter Board Meetings

Marcia Carlisle
The Termo Company
LAAPL Secretary

We encourage all members to attend our LAAPL Board Meetings which are typically held in the same room as the luncheon immediately after the meetings are adjourned.

The LAAPL Board of Directors and Committee Members did not hold a meeting after the joint luncheon with the Los Angeles Basin Geological Society in January 2024.

Scheduled LAAPL Luncheon Topics and Dates

March 21, 2024
Frank Rizzo
Environmental Resource Management
"Stakeholder Engagement"

May 16, 2024
MacKenzie E. Hunt, Esq.
Bright and Brown
"Sometimes Title Just Ain't Enough"
Officer Elections

September 19, 2024
TBD

September 2024
West Coast Landmen's Institute
September 25th – 27th, 2024
Zachari Dunes on Mandalay Beach
Channel Islands Harbor
Oxnard, CA

New Members and Transfers

Linda Barras
Membership Chair
Independent

Welcome! As a Los Angeles Association of Professional Landmen member, you serve to further the education and broaden the scope of the petroleum landman and to promote effective communication between its members, government, community and industry on energy-related issues.

New Members

None to Report

Transfers

None to Report

Corrections

Treasurer's Report

Jason Downs, CPL
Treasurer
Land Representative
Chevron Pipe Line and Power Company

As of 1/16/2024, the LAAPL account showed a balance of	30,711.66
Deposits	432.45
Total Checks, Withdrawals, Transfers	11.40
Balance as of 2/23/2024	**$31,132.71**

Early Bird Call for Dues

Jason Downs, RPL, Chapter Treasurer, will be calling for dues late Spring, which will be due by June 2024 for the 2024 – 2025 year. Cost: Still a mere bargain at $45.00.

Lighter Side of Life

We debut the Lighter Side of Life in lieu of the Lawyer's Joke of Month since the departure, for clarity, the retirement, of the well-known and eminent Jack Quirk, California oil and gas attorney extraordinaire.

Fiedler's Forecasting Rules, taken from Paul Dickson's "The Official Rules."

- ✓ Forecasting is very difficult, especially if it's about the future.
- ✓ The moment you forecast, you know you're going to be wrong; you just don't know when and in which direction.
- ✓ If you have to forecast, forecast often.
- ✓ Give them a number or give them a date if absolutely necessary, but never both at once.
- ✓ The herd instinct among forecasters makes sheep look like independent thinkers.
- ✓ When justifying a forecast, never underestimate the power of a platitude.
- ✓ If the facts don't conform to the theory, they must be disposed of.
- ✓ When you know nothing on the subject, base your conclusions on a carefully structured survey of 300 others who don't know the answer either.
- ✓ Economists and analysts state their growth projections precisely, to the nearest tenth of a percentage point, to prove they have a sense of humor.
- ✓ Forecasters know less and less about more and more, until they know nothing about everything.
- ✓ He who lives by the crystal ball soon learns to eat ground glass.
- ✓ Ask five economists and you'll get five different explanations (six if one went to Harvard).
- ✓ If a camel is a horse designed by a committee, then a consensus forecast is a camel's behind.
- ✓ An economist is a person who would marry Jennifer Lopez for her money.
- ✓ Once economists were asked, "if you're so smart, why ain't you rich?" Today they're asked, "Now that you've proved you ain't so smart, how come you got rich?"
- ✓ And the most important rule: If you're ever right, never let 'em forget it.

The 2024

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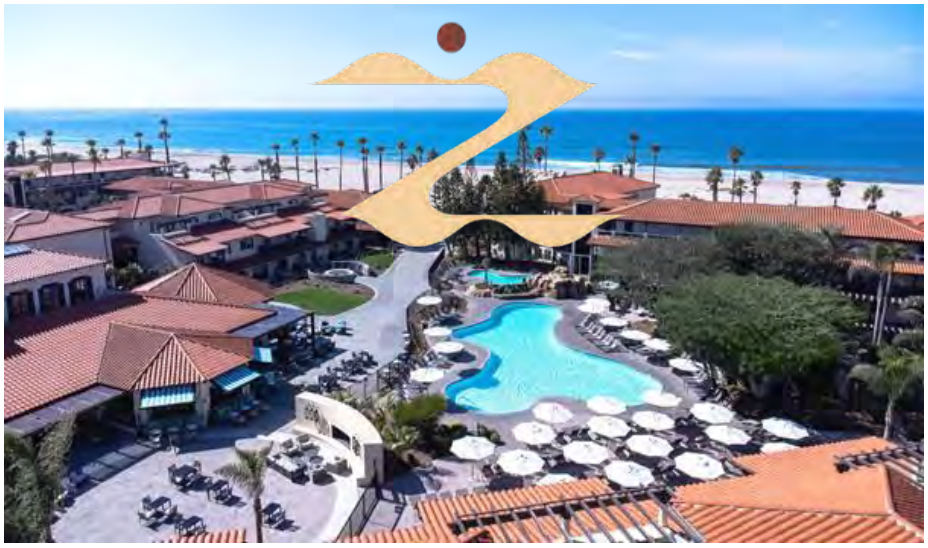

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WEDNESDAY – FRIDAY

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DETAILS TO FOLLOW

Powering The Profession

AAPL's Mission Statement

Our mission is to promote the highest standards and ethics of performance for all land professionals and to encourage sound stewardship of all energy and mineral resources.

AAPL Director Report
Quarterly Board Meeting
3/10/2024, Tulsa, OK

Name: Jason Downs, CPL
Company: Chevron Pipeline & Power
Email: jasondowns@chevron.com
Local Association Name: Los Angeles Association of Professional Landmen www.laapl.com

LAAPL

69 **Total Local Association Members**

36 **Total Active ("Land Professionals") AAPL Members within your Association**

Association projects/activities: SCHEDULED LAAPL LUNCHEON & EVENT DATES:

- **Mickelson Golf Classic Thursday, March 14th, 2024, at Black Gold CC in Yorba Linda, CA**
  - 2024 Mickelson Golf Classic Tickets in Yorba Linda, CA, United States (ticketleap.com)
- March 21st, 2024, Speaker Frank Rizzo, ERM, "Stakeholder Agreements", located at The Grand in Long Beach.
  - ONLINE PAYMENTS — Los Angeles Association of Professional Landmen (laapl.com)
- May 16st, 2024, Speaker MacKenzie Hunt, esq. Bright & Brown, "Sometimes Title Just Ain't Enough", located at The Grand in Long Beach.
  - ONLINE PAYMENTS — Los Angeles Association of Professional Landmen (laapl.com)

Association requests/concerns: N/A

Local news including business activity:

- Tight market for Independent Landman in the LA Basin with folks going renewable, utility, tech, or in-house roles with a small pool of Landmen available. Most contract landmen are working site specific projects and/or quasi-in-house roles. Broker rate $60-$125 an hour with seasoned Landmen charging a premium. Remainder of Landmen hold in-house positions. Seasoned Independents have recently received various full-time employment from Renewables, Utilities, Tech, and Upstream/Midstream Oil & Gas Companies.
- California Independent Petroleum Association www.cipa.org contact Sean Wallentine at sean@cipa.org for news and up to date information.
- Western States Petroleum Association www.wspa.org contact Kevin Slagle at kslagle@wspa.org
- www.laapl.com (Award winning Override Newsletter)
- www.bakersfieldlandmen.org
- www.conservation.ca.gov

Bylaws & Policy suggestions: N/A

Forgive Us Our Trespasses? Not if the BLM Has Anything to Say About It

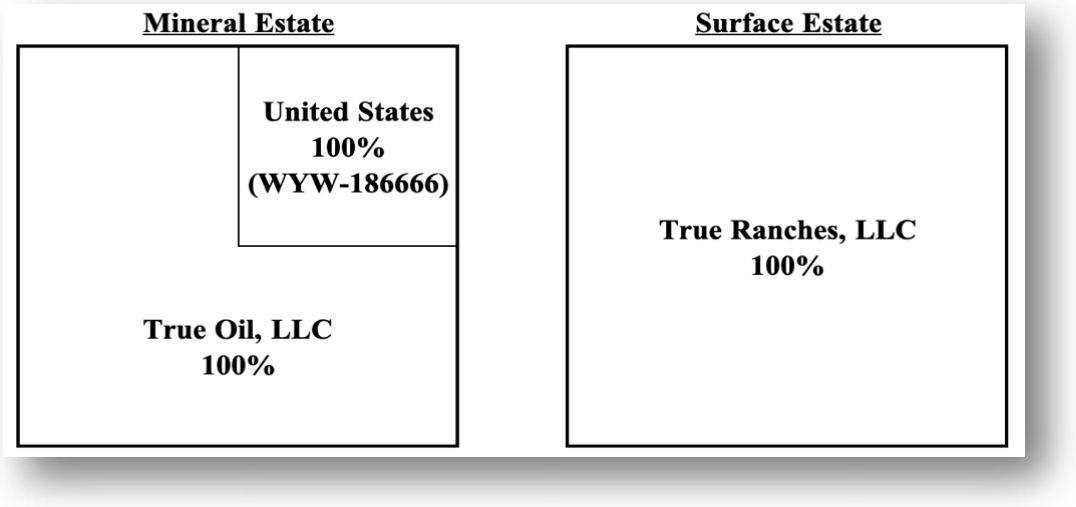
Brad Gibbs, Esq., Partner
Oliva Gibbs LLP

Oliva Gibbs serves oil and gas companies across the country from offices in Columbus, Houston, Lafayette, Midland, and Oklahoma City. We advise a wide range of clients — from Fortune 500, integrated oil and gas companies to private equity backed startups and mineral rights companies. Oliva Gibbs' attorneys are licensed in 13 states, including Arkansas, Colorado, Louisiana, Montana, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, West Virginia and Wyoming.

True Oil LLC v. BLM[1] is a recent opinion by the Wyoming Federal District Court, based on the appeal of an order out of the BLM Rawlins Field Office. At issue was whether a fee surface owner can grant a subsurface easement through federal minerals without BLM approval.[2] The district court found that the surface owner has the right to grant subsurface access, but the Bureau of Land Management ("BLM") can require a federal Application for Permit to Drill ("APD").

I. The Background

True Oil LLC ("True Oil") owns the minerals under the NW/4 and S/2 of Section 10-T12N-R65W in Laramie County, Wyoming. The federal government owns the minerals underlying the NE/4 of Section 10, subject to Federal Lease No. WYW-186666. True Ranches LLC ("True Ranches") owns the surface estate of Section 10.[3]



[1] 2023 U.S. Dist. LEXIS 221156 (D. Wyo. 2023).

[2] Note that the right to grant a subsurface easement through severed fee minerals is generally held by a surface owner. *See generally Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39 (Tex. 2017).

[3] *Id.* at 2.

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True Oil planned to drill several horizontal wells across Section 10, some of which were slated to traverse the NE/4. Due to delays in obtaining federal drilling permits and various pending environmental lawsuits,[4] True Oil decided it would drill through – but not perforate or complete within – the NE/4 of Section 10. True Oil took the position that as long as True Ranches granted permission, and no production was to take place on the NE/4, a state permit was adequate. In other words, no federal permit should be required. True Oil thus filed for an APD with the Wyoming Oil and Gas Conservation Commission (the "WOGCC") but did not file for an APD with the BLM. The BLM took the opposite stance, informing True Oil that absent a federal APD, it would not authorize True West's request to traverse WYW-186666.[5] Any attempt to drill through the NE/4 would result in the BLM pursuing civil and/or criminal penalties for trespass.[6]

II. Who Owns the Subsurface Rights?

The question presented to the district court was if a federal mineral estate has been severed from a fee surface estate, who holds the right to grant a subsurface easement? True Oil's argument that this right is held by the surface owner did not persuade the court because it "relie[d] on Texas cases that do not involve federal minerals."[7] The court instead pointed *sua sponte to* the Stock Raising Homestead Act of 1916 (the "SRHA"), [8] under which the original surface patent had been issued. The SRHA states that all patents issued thereunder "shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented . . ."[9] What remains unclear under the SRHA, is whether the United States only reserved the minerals (and the right to extract the minerals), or the subsurface geological formations themselves.[10]

The trial court first emphasized that the SRHA reserved "coal and minerals *in the lands* so entered and patented." Thus, it appears that Congress intended that only the minerals within the ground be reserved to the United States, not everything under the surface. If the United States had intended to retain the entire subsurface, the SRHA could have said so expressly.[11] Moreover, if the entire subsurface was reserved, there would be no need for the extensive body of caselaw that has emerged analyzing the meaning of "minerals" under the SRHA.[12] The SRHA thus reserved only the extractable minerals to the United States, not the entirety of the soil beneath its surface.

III. Can the BLM Require an APD?

The court next analyzed whether, if the surface owner also owns the subsurface matrix embracing the minerals, the BLM has the right to require an APD to traverse the subsurface. In finding such a requirement reasonable, the court first noted that under the SRHA Congress did not fully relinquish its ability to protect the United States' property interests below the surface.[13] Instead, Congress retained a robust ability to protect its mineral interests, including the ability to restrict subsurface activity by the surface owner. Moreover, the Property Clause of the U.S. Constitution gives Congress (and its regulatory delegatees) the right to regulate private property to protect its own.[14] Thus, it is well

[4] These lawsuits were pending in the U.S. District Court for the District of Montana and challenged a December 2017 oil and gas lease sale for failure to protect sage grouse habitats and other issues.

[5] *Id.* at 3-4.

[6] *Id.* at 5.

[7] *Id.* at 10. The court is presumably referring to *Lightning Oil Co. v. Anadarko E&P Onshore, LLC* and its progeny. 520 S.W.3d 39 (Tex. 2017).

[8] 43 U.S.C. §§ 291, *et seq.*

[9] 43 U.S.C. § 299.

[10] 2023 U.S. Dist. LEXIS 221156 at 12.

[11] *Id.* at 12-13.

[12] *Id.* at 13. *See, e.g., United States v. Union Pac. R.R. Co.*, 353 U.S. 112 (1957).

[13] 2023 U.S. Dist. LEXIS 221156 at 18.

[14] *Id.* at 19-20.

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within the BLM's authority to regulate subsurface activity, and such a requirement is not a complete prohibition on drilling activity. It merely provides the BLM a mechanism for monitoring activity and protecting the interests of the United States.

The court found that policy considerations support its decision because "[t]he federal government owns the mineral rights on 11 million acres of the nearly 12 million acres of split estate lands in Wyoming . . . If the surface owners on those 12 million acres could permit subsurface activity, without notice to the federal government, millions of acres of public resources could be endangered. Setting aside the risk of unpermitted extraction of federal minerals, the location and amount of traversing wells could jeopardize future extraction for those sites. The BLM needs notice and regulatory authority so it may protect the United States' interests and preserve minerals for future extraction."[15]

IV. Takeaway and Appeal

True Oil stands in contrast to the notion that a surface owner has the unfettered right to grant a subsurface easement as long as it does not unduly interfere with mineral extraction. It instead appears to carve out an exception for surface estates overlaying *federal* minerals. While the surface owner can consent to subsurface use, according to the trial court the BLM can require a permit to do so.

True Oil has potentially broad implications for everything from subsurface use agreements and easements to pore space ownership and carbon sequestration where federal minerals are involved. If the court's decision stands, it may mean that both a severed surface owner *and* the BLM will need to sign off on subsurface activity. This case was appealed on December 1, 2023 and is one to keep an eye on.

Mr. Gibbs can be contacted at bgibbs@oglawyers.com

[15] *Id.* at 23-24.

The Strip and Gore Doctrine – Who Really Owns the Oil and Gas Under Roads and Highways?

Robert J. Burnett, Esq., Director, Houston Harbaugh, P.C.

Houston Harbaugh is well known for its traditional strength in the fundamental areas of legal practice like business and corporate transactional law, litigation, estates and trusts, health care, employment and labor, ERISA, environmental, oil and gas, and intellectual property litigation and prosecution.

This commentary is offered for information purposes only and is not intended to provide legal advice or forming an attorney-client relationship.

Let's assume your grandfather owned 99 acres in Washington County. In 1955, he sells a small portion of the farm to the Commonwealth of Pennsylvania in order to facilitate the construction of new State Route 39. This acreage consists of a narrow strip of land 500 feet wide running in a north–south direction (the "Roadway Tract") through the farm. The 1955 Deed reserves the oil and gas underlying the twenty (20) acre Roadway Tract. Thereafter, State Route 39 is constructed and runs in a north-south direction through the farm, with the farm now on both sides of the road. Several years later in 1964, your grandfather sells the remaining farm acreage (*i.e.*, 79 acres) to Farmer Jones. The 1964 Deed does not reserve the oil and gas. In 2018, you are approached by a landman for Big Oil, Inc. to lease the Marcellus Shale formation under the Roadway Tract. You happily sign the lease and begin to receive production royalties two years later. Then, the royalties suddenly cease. Big Oil, Inc. contacts you and says there was a mistake: you do not own the oil and gas under the Roadway Tract. Although the 1955 Deed attempted to reserve the oil and gas, these rights were subsequently conveyed to Farmer Jones by virtue of the 1964 Deed. The representative from Big Oil, Inc. refers to something known as the "strip and gore" doctrine. You are angry, frustrated and confused – how did the 1964 Deed operate to convey the oil and gas under the Roadway Tract? As we have written before, confirming the ownership of oil and gas under streams and rivers can be complex and confusing. *See*, Pennsylvania Landowners May Not Own Oil and Gas Rights Under Rivers and Streams (April 2016). Questions regarding the ownership of the oil and gas under roads and streets can be equally challenging. And, peculiar rules, such as the "strip and gore" doctrine, can create additional frustration for landowners.

When tasked with interpreting a deed, the objective of the reviewing court is to ascertain the intent of the parties. One such method is the so-called "strip and gore" doctrine. The doctrine is often invoked to resolve questions as to the ownership of oil and gas underlying roads and highways. How does it work? It essentially creates a presumption against separate ownership of a narrow strip of land adjacent to a larger tract. The doctrine presumes that the grantor did not intend to retain title to the narrow strip of land (i.e., often a roadway) adjacent to the larger tract being conveyed to the grantee. In other words, if the subject property is bounded on the west by a roadway, and the deed specifically describes the western boundary of the subject property as being the road, a question arises as to whether the grantor intended to convey the oil and gas under the road along with the subject property or did he intend to retain the narrow strip underlying the road? If the doctrine is found to apply, title to both tracts (i.e. the adjacent tract and the road tract) are presumed to pass to the grantee. *See*, Crawford v. XTO Energy, No. 02-18-00217 (Tex App. – Fort Worth, 2019) ("[T]he strip and gore doctrine is used to aid in determining a grantor's intent – not as to the land described in the deed itself but as the adjoining land not referenced in the deed"); *See also*, Escondido Services v. VKM Holdings LP, 321 S.W. 3d 102 (Tex. App.- Eastland 2010) (the doctrine applies when the strip "ceases to be of benefit or importance to the grantor of the larger tract by the time of its conveyance"); Strayhorn v. Jones, 300 S.W. 2d 623 (Tex. 1957) (noting the doctrine applies only if the narrow strip of land is not specifically referenced or mentioned in the disputed deed).

It is well-established that when the legal description in a deed references a road or highway, the owner of the adjacent tract typically "owns" the subsurface to the middle of that roadway. *See*, Rahn v. Hess, 378 Pa. 264 (Pa. 1954)("….It is settled law in Pennsylvania that where the side of the street is called for as a boundary in a deed, the grantee takes title to the center of it…"). So, if a property is bounded on the west by a road, any conveyance of that property will typically include to the middle of the road. But what happens when the subject property to be conveyed is on *both sides* of the road? The centerline presumption set forth in Rahn does not apply because the road is not technically a boundary. And if the deed does not specifically reference the oil and gas underlying the road, a question arises as to whether those rights are being conveyed along with the larger adjacent tracts. Is that narrow strip (i.e. the roadway) being retained by the grantor? Enter the "strip and gore" doctrine.

As recently observed by the Texas Court of Appeals, the "strip and gore" doctrine is "highly policy driven" and its purpose is to discourage title disputes and litigation by "providing certainty in land titles". It does so by creating a rebuttable presumption that the grantor did not intend to retain a narrow strip of land in between the larger adjacent

Case - RoW
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tracts being sold to the grantee, especially when the narrow strip is of no practical value to the grantor. In order for the doctrine apply, however, the proponent must show that: i) the narrow strip is small in size and value in comparison to the conveyed tract and is "no longer of importance or value to the grantor", ii) the narrow strip was not included in the actual property description set forth in the subject deed and iii) no other language in the subject deed indicates that the grantor intended to reserve an interest in the narrow strip of land. *See*, Green v. Chesapeake Exploration LLC, No.02-17-00405 (Tex. App- Fort Worth 2018). The most challenging element is establishing whether the narrow strip is "no longer of importance or value to the grantor".

Prior to the advent of horizontal drilling and hydraulic fracturing, the ability to access and extract hydrocarbons from small, narrow and isolated strips of land was limited. As such, application of the doctrine made sense. But, that dynamic has changed now that the horizontal drilling is common and widespread. Such strips do have value as surface access is of less importance today. Nonetheless, Texas courts continue to apply the doctrine by requiring that the strip "ceased to be of benefit or importance to the grantor……by the time of the conveyance.". *See*, Escondido Services LLC v. VKM Holdings LP, 321 S.W. 3d 102 (Tex App- Eastland 2010). So, the focus of the inquiry is whether the strip had value at the time of the alleged conveyance- if that deed *pre-dates* horizontal drilling a strong argument can be made that the strip had little or no value at that time because no well could access the hydrocarbons underlying the strip. *See*, Crawford v, XTO Energy (applying the doctrine to a 1984 deed and observing that "[w]ithout the ability to access the Disputed Tract after conveying the adjoining lands, Ms. Crawford's interest was of little to no practical value….."); *See also*, Plainsman Trading Co. v. Crews, 2018 WL 6565790 (Tex 1995)("…..practically speaking, a mineral estate would be wholly worthless if the owner of the minerals could not enter upon the land in order to explore for and extract them").

Returning to our example, an argument could be made that when your grandfather conveyed the remaining farm acreage to Farmer Jones in 1964, he no longer had the ability to access the hydrocarbons underlying the Roadway Tract. Horizontal drilling had not been perfected and he no longer could drill a well from adjacent tracts. As such, under the "strip and gore" doctrine, a presumption arises that your grandfather did not intend to retain the Roadway Tract when he executed the 1964 Deed.

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CCS Permitting Roundup: EPA Grants Louisiana Permitting Primacy But Challenges Remain

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Alexis Boyd, Esq., Associate
John D. Geilman, Esq., Associate
Kevin A. Moscon, Esq., Associate
Kelly Rondinelli, Esq., Associate
Alyssa Sieja, Esq., Associate
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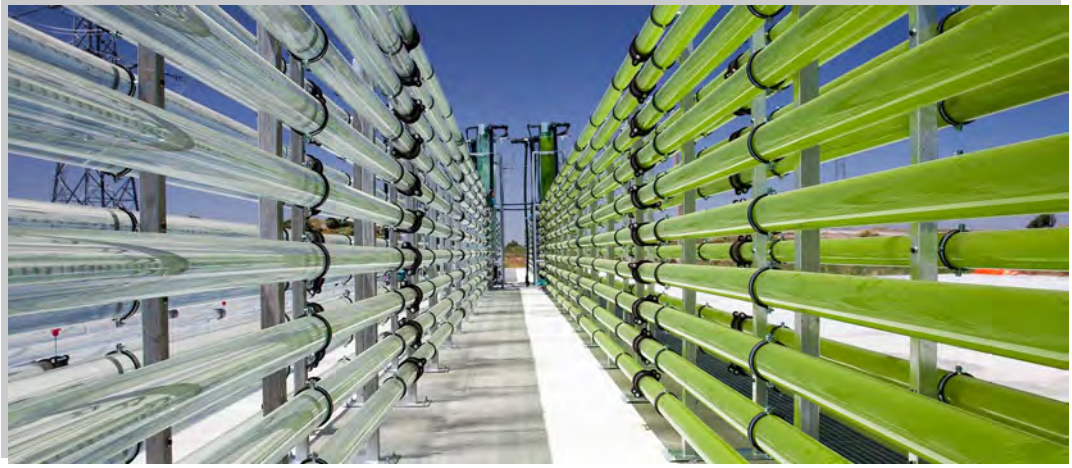
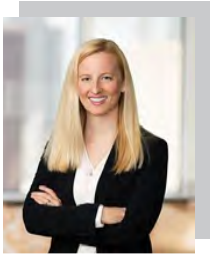


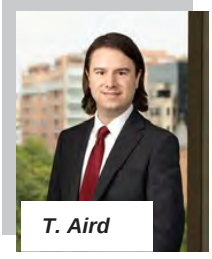
Ed. Note: This information is provided by Vinson & Elkins LLP for educational and informational purposes only and is not intended, nor should it be construed, as legal advice.

M. Dobbins

On December 28, 2023, the U.S. Environmental Protection Agency ("EPA") granted Louisiana primary enforcement authority ("primacy") under the federal Safe Drinking Water Act's ("SDWA") Underground Injection Control ("UIC") program to permit Class VI wells, which became effective on February 5, 2024. Class VI UIC wells are designed for the permanent geological sequestration of carbon dioxide and are integral to the carbon capture and sequestration industry's aim of mitigating climate change. The decision to grant Louisiana primacy has been long awaited as a vital step in speeding up Class VI permitting. However, as if administrative delays issuing Class VI permits at the federal level and the slow approval of state primacy were not enough, now certain environmental groups appear determined to further stymie progress. On February 22, 2024, the Deep South Center for Environmental Justice and other petitioners filed suit seeking to have the EPA's determination set aside and vacated under the Administrative Procedure Act ("APA"). Separately, across the country, a group of landowners have petitioned EPA's Environmental Appeals Board ("EAB") for further review of two Class VI Permits issued by EPA Region 5 at the beginning of this year in connection with a blue hydrogen and ammonia production facility in Indiana. See below for our analysis of these developments.

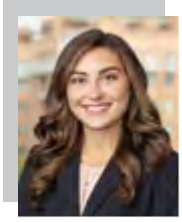


K. Rondinelli



T. Aird

The State of CCS Permitting Generally



A. Sieja

Currently, 42 Class VI applications remain pending with various EPA regions, many of them originally submitted in 2021. On the primacy front, Texas continues to move slowly towards primacy, with Arizona and West Virginia still in the "pre-application" phase of federal review. To date, EPA has only issued four

K. Moscon

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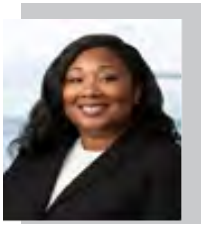
Class VI permits out of Region 5, although Region 9 published a draft Class VI permit for review last year. Two of those four Class VI permits took six years to obtain. The most recent Class VI permits approved by EPA Region 5 took approximately two and a half years to approve from the date a complete application was submitted — but there can be significant back-and-forth with the agency before a Class VI application is deemed complete. EPA has reportedly set an internal target of two years to review and approve a Class VI permit application; however, the agency's track record would suggest that even in the new "modern" area of CCS permitting, approximately three years may be a more reasonable estimate when EPA is the permitting authority to account for pre-application engagement and agency review.



A. Boyd

States continue to be much more nimble when it comes to processing Class VI permit applications. North Dakota has approved a Class VI permit in as few as four months, averaging closer to nine months. Wyoming issued three Class VI permits at the end of last year, though those took a little more than a year to approve. Still, these states have demonstrated the ability to process Class VI permit applications on a faster timeline than EPA, reinforcing the belief that approving Class VI primacy at the state level will help spur CCS projects, which represent a vital component of many companies' energy transition strategy. We have summarized select provisions (i.e., financial assurance, stakeholder notification, plugging and abandonment of oil and gas wells within area of review, groundwater monitoring, well integrity testing) of certain draft and final Class VI permits here.

J. Geilman

Louisiana's Primacy and Its Class VI UIC Well Program

Louisiana first submitted its application for primacy in early 2021, amending it in September 2021. Since that time, four public hearings occurred between 2021 and 2023, alongside EPA's review of over 45,000 public comments received.[1] The entire review saga spanned more than two and a half years. It took five years for North Dakota's primacy application to be approved. Wyoming's primacy application took only eight months for EPA to approve — but even the Wyoming and North Dakota timelines are misleading to a degree since a primacy application often involves years of pre-application work with the EPA. In any case, it remains too early to tell whether or not two and a half years represents a new "average" timeline for EPA to review and approve a state's primacy application. Still, Louisiana's primacy process sheds some light on key areas of focus for EPA in a UIC primacy review.

Louisiana made several changes to its existing laws and regulations relating to CCS in an attempt to speed up its primacy approval and make its own proposed program more consistent with federal requirements. For example, the state passed Act 378 in response to concerns from EPA regarding liability transfer, which revised the state's release of post-injection liability by placing responsibility on operators for fifty years (rather than ten) and imposing additional requirements for ongoing maintenance and integrity assurance. After the fifty-year period, liability only transfers to the state following the issuance of a certificate of completion. The fifty-year period is significantly longer than the other two states that also have primacy — Wyoming requires a minimum of twenty years and North Dakota only ten years.

Other requirements of Louisiana's Class VI UIC well program include:

- New permits for each individual Class VI UIC well — the state will not issue areawide permits that cover multiple wells for a given project;
- Prohibition of the sequestration of carbon dioxide in salt cavern formations;
- Additional monitoring, reporting, and verification requirements;
- No waivers with respect to injection depth requirements.

Perhaps most significantly, EPA included several environmental justice ("EJ") requirements, such as an EJ review process, as part of its Memorandum of Agreement between the agency and Louisiana. The EPA defines EJ as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." Of particular focus is the protection of historically "overburdened communities" — "minority, low-income, tribal or indigenous populations or geographic locations in the United States that potentially experience disproportionate environmental harms and risks." On December 9, 2022, and January 11, 2023, EPA sent letters to state governors

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supporting EJ for primacy applications and to incorporate EJ into their Class VI UIC programs. In keeping with this, Louisiana's primacy approval includes specific EJ provisions which, per EPA, "are now a clear benchmark for any state that seeks Class VI primacy in the future."[2] Requirements include:

- Consideration of EJ impacts in permitting determinations, such as environmental hazards, exposure pathways, and susceptible subpopulations;
- Enhanced public participation process, designed for inclusivity
- Incorporation of mitigation measures (e.g., monitoring, notification, installation of pollution controls) ensuring that Class VI UIC well projects do not increase the environmental impacts on overburdened communities.

Following the granting of primacy, Class VI UIC well applications will now be reviewed by the Louisiana Department of Natural Resources ("LDNR"), which will need to evaluate any applications in line with the state's regulations and EJ requirements. States seeking or intending to seek primacy may face pressure from the EPA to bolster long-term liability requirements and their approach to engaging with and assessing impacts to EJ communities in connection with CCS permitting decisions.

CCS-Related Legal Challenges

As noted above, a number of groups are now suing EPA over its decision to grant Louisiana's primacy authority. On February 20, 2024, the Deep South Center for Environmental Justice, Healthy Gulf, and Alliance for Affordable Energy filed a petition in the U.S. Court of Appeals for the Fifth Circuit seeking to vacate EPA's determination under the APA. Challenges such as this are well understood — upon a finding by the court that the contested agency action falls short of the APA's substantive or procedural requirements, the court "shall" set aside the unlawful agency action.[3]

Although the petitioners' initial court filing is sparse, a July 2023 comment letter provides additional insights into the groups' concerns. At a high level, the groups argue that some of the requirements of Louisiana's Class VI UIC well program are less stringent than federal requirements, that its application did not meet key requirements (e.g., demonstrating that the state has the sufficient expertise or staff to carry out the program), that the state has a "bad track record" with other well programs, and degradation of EJ concerns if the state has control over permitting. The petitioners likely face a high bar, given that the comments were overwhelmingly in favor of granting Louisiana primacy, and that the state took affirmative steps to address EPA's concerns.

The separate landowner suit filed with the EAB relates to two CCS permits for wells to be used in connection with a blue hydrogen and ammonia project. In addition to claims that the permits do not meet the requirements of the APA and the federal Safe Drinking Water Act ("SDWA"), the petitioners in this challenge also claim that EPA failed to comply with the National Environmental Policy Act ("NEPA"). EPA has long relied on the "functional equivalence doctrine" to claim that its permitting actions under the SDWA are exempt from NEPA because EPA's own requirements and those of the SDWA are functionally equivalent to NEPA. This view has been upheld by the U.S. Court of Appeals for the 8th Circuit and the EAB in various UIC challenges.[4]

Key Takeaways

EPA's granting of primacy to Louisiana is a major step for the growth of the carbon capture and sequestration industry within the state. At base level, with primacy comes the removal of a major bottleneck in the permitting process — the EPA itself — as oversight shifts from the federal to the state level. It is expected that Louisiana, through the LDNR, will act more efficiently than its federal counterpart, issuing permits with greater speed. Notwithstanding Louisiana's success, rapid development of carbon capture and sequestration projects could be halted by additional legal challenges from parties seeking to delay the emergence of this industry, especially those in oil and gas producing states which view the low-carbon industry as detrimental to further growth. While these challenges may ultimately be found to be weak on the merits, they still inject additional uncertainty and risk into the CCS permitting process.

[1] https://www.epa.gov/uic/primary-enforcement-authority-underground-injection-control-program-0#Louisiana
[2] Id.
[3] 5 U.S.C. § 706(2).

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[4] See Western Nebraska Resource Council v. EPA, 943 F.2d 867 (8th Cir. 1991); see also Memorandum from Sarah Barnham, to File, NEPA Functional Equivalence of UIC Permitting and Aquifer Exemptions under the SDWA for the Dewey Burdock Project (Oct. 3, 2020), available at https://downloads.regulations.gov/EPA-R08-OW-2019-0512-0226/attachment_263.pdf.

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LAAPL Education Report

March 2024 – June 2024

John R. "JR" Billeaud, RPL, Land Manager, CalNRG
Education Chair

In addition to the below-listed educational opportunities, LAAPL would like to make its members aware of an additional, no-cost educational opportunity. Oliva Gibbs LLP, an oil and gas law firm out of Houston, is currently hosting free educational events every month that are eligible for both AAPL CEU credits and CLE legal credits. We strongly encourage our members to take advantage of this opportunity!

OLIVA GIBBS LLP

Oliva Gibbs LLP 2024 Energy Education Series Program

Offered Twice Monthly (at no cost)

Click on the link for dates, times and topics. https://oglawyers.com/events

Program eligible for both AAPL Landman CEU credits and CLE legal credits.

March

Event	Dates	Location	Speakers	Credits	Cost
LAAPL March Educational Luncheon	March 21, 2024	The Grand, Long Beach, CA	Frank Rizzo, ERM Topic: Stakeholder Engagement	1 CEU	$35
AAPL RPL/CPL Certification Exam Review	March 27-29, 2024	Ft. Worth, TX	Various	RPL: 6 CEU & 1 Ethics CPL: 18 CEU & 1 Ethics	-AAPL Members: $500 -Non-AAPL Members: $600
Evolving Electricity	March 27, 2024	Live Webinar	Beth Garza	1 CEU	-AAPL Members: $55 -Non-AAPL Members: $95 -Students: Free

April

Event	Dates	Location	Speakers	Credits	Cost
A&D Considerations for Evolving Lower 48 Portfolios: Investment Responses, Refreshed Strategies, and a Path Ahead	April 3, 2024	Live Webinar	Robert Clarke	1 CEU	-AAPL Members: $55 -Non-AAPL Members: $95 -Students: Free

Educational Corner continued on page 21

2024 Appalachian Land Institute	April 4, 2024	Pittsburgh, PA	Various	10 CEU; 1 CEU Ethics	-AAPL Members: $365 -Non-AAPL Members: $525 -Students: Free
Complex Surface Agreements - Hydrogen Leasing (Part 1)	April 16, 2024	Live Webinar	Laura Bowen	1 CEU	-AAPL Members: $55 -Non-AAPL Members: $95 -Students: Free
2024 Mining and Land Resources Institute	April 17-18, 2024	Stateline, NV	Various	12 CEU	Early bird (until 3/17/24): -AAPL Members: $295 -Non-AAPL Members: $425 Reg. Price (after 3/17/24): -AAPL Members: $365 -Non-AAPL Members: $525
Field Landman Seminar	April 18, 2024	Edmond, OK	Matthew Allen and Jacob Charney	2 CEU	-AAPL Members: Free -Non-AAPL Members: $75 -Students: Free
AAPL RPL/CPL Certification Exam Review	April 24, 2024	Denver, CO	Various	RPL: 6 CEU & 1 Ethics CPL: 18 CEU & 1 Ethics	Early bird (until 4/10/24): -AAPL Members: $400 -Non-AAPL Members: $480 Reg. Price (after 4/10/24): -AAPL Members: $500 -Non-AAPL Members: $600

May

Event	Dates	Location	Speakers	Credits	Cost
Managing Your Lease When Production Ceases	May 1, 2024	Live Webinar	Robert 'Eli' Kiefaber, JD	1 CEU	-AAPL Members: Free -Non-AAPL Members: $95 -Students: Free
Field Landman Seminar	May 2, 2024	Lansing, MI	TBD	2 CEU	-AAPL Members: Free -Non-AAPL Members: $75 -Students: Free
Field Landman Seminar	May 3, 2024	Jackson, MS	TBD	2 CEU; 1 CEU Ethics	-AAPL Members: Free -Non-AAPL Members: $75 -Students: Free
Steering Clear of Legal Landmines - Lessons for Landmen	May 8, 2024	Live Webinar	Andrew Good and Joey Manning	1 CEU	-AAPL Members: $55 -Non-AAPL Members: $95 -Students: Free
AAPL RPL/CPL Certification Exam Review	May 15, 2024	Pittsburgh, PA	Various	RPL: 6 CEU & 1 Ethics CPL: 18 CEU & 1 Ethics	Early bird (until 4/30/24): -AAPL Members: $400 -Non-AAPL Members: $480 Reg. Price (after 4/30/24): -AAPL Members: $500 -Non-AAPL Members: $600
Due Diligence	May 21, 2024	Live Webinar	A. Frank Klam	5 CEUs	Early bird (until 5/7/24): -AAPL Members: $180 -Non-AAPL Members: $336 -Students: Free Reg. Price (after 5/7/24): -AAPL Members: $225 -Non-AAPL Members: $420 -Students: Free

Educational Corner
continued on page 22

Deduction of Post-Production Expenses	May 22, 2024	Live Webinar	Robert 'Eli' Kiefaber, JD	1 CEU	-AAPL Members: $55 -Non-AAPL Members: $95 -Students: Free
Complex Surface Agreements - Hydrogen Leasing (Part 2)	May 23, 2024	Live Webinar	Laura Bowen	1 CEU	-AAPL Members: $55 -Non-AAPL Members: $95 -Students: Free
Navigating the Crossroads: Evolving Surface Use Issues and Innovative Solutions	May 29, 2024	Live Webinar	Bradley Gibbs	1 CEU	-AAPL Members: $55 -Non-AAPL Members: $95 -Students: Free

June

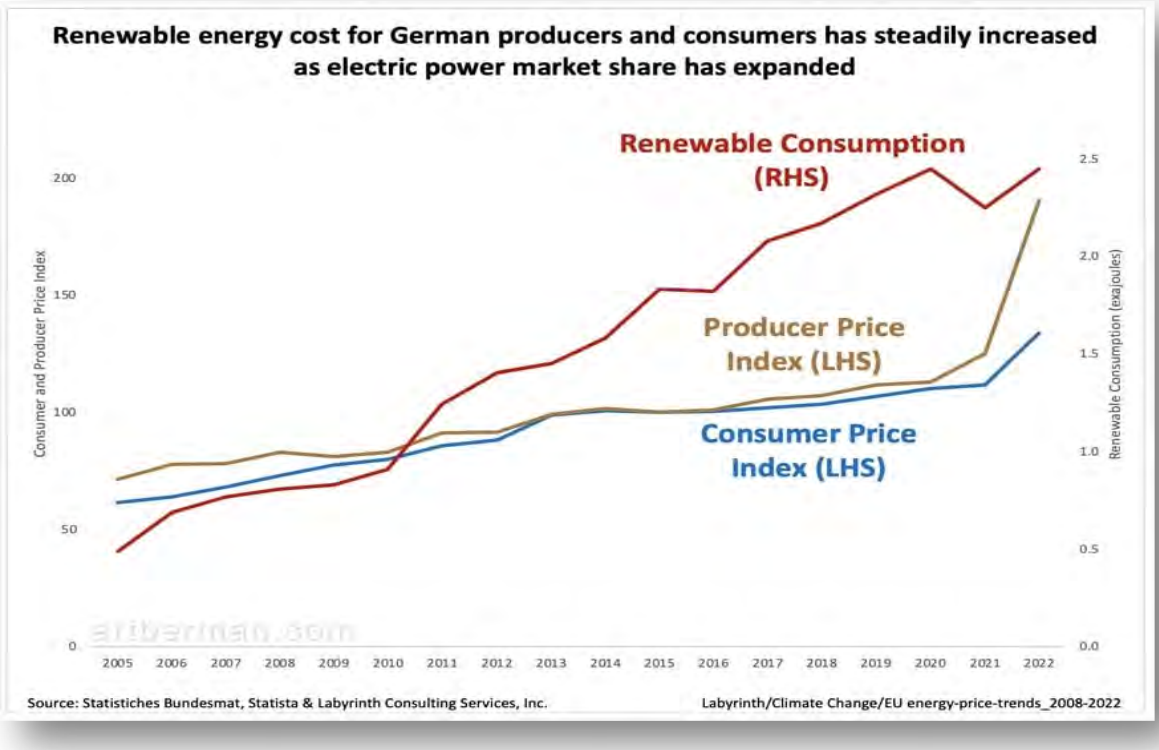
Event	Dates	Location	Speakers	Credits	Cost
AAPL's Code of Ethics and Standards of Practice V	June 5, 2024	Live Webinar	George R. Shultz, CPL	1 CEU	-AAPL Members: $55 -Non-AAPL Members: $95 -Students: Free
Understanding Petroleum Economics	June 11, 2024	Live Webinar	Dwayne Purvis	6 CEU; 1 CEU Ethics	Early bird (until 5/28/24): -AAPL Members: $220 -Non-AAPL Members: $376 -Students: Free Reg. Price (after 5/28/24): -AAPL Members: $275 -Non-AAPL Members: $470 -Students: Free
Solar Energy	June 19, 2024	Live Webinar	Eva Rice	1 CEU	-AAPL Members: $55 -Non-AAPL Members: $95 -Students: Free
2024 AAPL Annual Meeting	June 19-22, 2024	Boston, MA	Various	TBD	-AAPL Members: $825 -Non-AAPL Members: $1,025 -Students: $300

Educational Quote of the Month: ***"AN INVESTMENT IN KNOWLEDGE PAYS THE BEST INTEREST"*** *- Benjamin Franklin*

Interesting Charts

Provided to *The Override* by James R. Halloran who can reached by contacting him at jameshalloran8969@gmail.com. Mr. Halloran provides daily [almost] insight on the energy industry.

That's $1,142,000,000.00 [BILLION] Dollars annually funding the anti-fossil fuel industrial complex.



ESG Deception or Overreach – Understanding the Landscape of Greenwashing Litigation

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Andrew Good, Esq., Partner
Oliva Gibbs LLP

Oliva Gibbs serves oil and gas companies across the country from offices in Columbus, Houston, Lafayette, Midland, and Oklahoma City. We advise a wide range of clients — from Fortune 500, integrated oil and gas companies to private equity backed startups and mineral rights companies. Oliva Gibbs' attorneys are licensed in 13 states, including Arkansas, Colorado, Louisiana, Montana, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, West Virginia and Wyoming.

In addition to the risk of regulatory enforcement actions and penalties, the court system continues to be used as a battleground for climate issues through litigation against oil and gas ("O&G") companies.[1] "As of December 2022, there have been 2,180 climate-related cases filed in 65 jurisdictions, including international and regional courts, tribunals, quasi-judicial bodies, or other adjudicatory bodies, such as Special Procedures at the United Nations and arbitration tribunals."[2] These lawsuits have been brought by state and local governments, environmental groups, indigenous people, climate change protestors, citizen groups, and others that seek to hold energy companies liable for climate-related damages.[3] Some, however, view these as political tactics that intend to harm domestic energy production and use, thereby increasing energy costs.[4]

The first legal strategy relating to climate change was brought forth by the Global Warming Legal Action Project ("GWLAP") in 2001,[5] which included four goals: (1) develop and apply a tort law approach to global warming that will require green house gas emitters and fossil fuel companies to internalize the costs of their contributions to global warming; (2) serve as a forum for sharing strategy and ideas with attorneys nationwide and worldwide who are seeking to use legal action to promote progress on reducing global warming; (3) educate members of the bar and the public regarding the industry's potential liability for global warming injuries by participating in legal symposia, publication of articles and similar activities; and (4) understand additional legal work that will further the Civil Society Institute's mission of combating global warming and promoting clean energy solutions. Thereafter, the GWLAP joined attorney generals from multiple states to file an initial tort case against American Electric Power, which ultimately was appealed to the U.S. Supreme Court.[6] The Court, in an 8-0 decision, held that corporations cannot be sued for greenhouse gas emissions (GHGs) under federal common law, primarily because the Clean Air Act delegates the management of carbon dioxide and other GHG emissions to the Environmental Protection Agency (EPA).

Since such time, there has been a massive uptick in climate-related litigation as a result of environmental, social, and governance (collectively "ESG") issues having become a major focal point for a large number of politicians, public and private corporations, and citizens in general. These cases attempt to force liability through alignment to current

ESG Deception continued on page 25

laws and regulations, climate attribution science, public mobilization efforts, and broad allegations relating to alleged ESG deception efforts, which include "greencrowding," [7] "greenlighting," [8] "greenshifting," [9] "greenlabeling," [10] "greenrinsing," [11] or "greenhushing." [12] As such, there are more stringent and sophisticated ESG-related policies and regulations, along with an increased concentration on ESG practices and disclosures of information. With a wider pool of litigants, and more avenues for those litigants to pursue, O&G companies need to make sure they have consistent and compliant ESG-related knowledge and corresponding capabilities to defend against such claims, which can carry significant reputational, regulatory, and/or financial consequences.

One type of claim that has been gaining momentum involves allegations of "greenwashing," which is a term associated with the act of making false or misleading statements about products or ESG practices to appeal to consumer interest through (claimed) eco-friendly products and/or sustainable practices. The causes of action vary by state, but can include claims of public nuisance,[13] private nuisance,[14] trespass,[15] negligence,[16] strict liability,[17] civil conspiracy,[18] unjust enrichment,[19] unfair and deceptive practices,[20] and shareholder litigation.[21] These causes of action typically involve, amongst others, challenges against O&G companies' alleged misleading, misrepresented, and/or omitted disclosures about: (1) governmental or corporate commitments; (2) climate investments, financial risks, and corresponding harms; (3) efforts to downplay the effect of fossil fuel usage on climate change; (4) the effects of fossil fuel products to consumers; and/or (5) the level of investment in cleaner energy sources.[22]

While oil and gas companies have strategically attempted to either dismiss pending lawsuits in their early stages or sought to remove them to federal courts, plaintiffs have successfully discovered how to bring greenwashing lawsuits against O&G companies in their preferred forum (i.e. state courts) and survive dismissal. Additionally, the Federal Trade Commission has pursued greenwashing litigation against companies for purportedly deceptive environmental claims.[23] Similarly, the Securities and Exchange Commission ("SEC") launched its Enforcement Task Force focused on Climate and ESG issues in 2021, with the goal of developing initiatives to identify ESG-related misconduct and focusing initially on greenwashing actions or omissions. Thus, it is apparent that companies need to be increasingly prepared to face litigation and implement strategies to avoid or mitigate significant regulatory, reputational, and financial harms.

So, how can companies in the petrochemicals sector prepare for and/or mitigate risk against greenwashing claims or lawsuits? By taking a proactive approach and focusing on its principles, practices, governance, and disclosures concerning the eco-sustainability of its activities, products, and transactions. For example, O&G companies should:

- Fully understand that greenwashing is about false or misleading practices concerning ESG credentials, products, or practices, which carries significant regulatory, reputational, and financial risks.
- Stay up-to-date on ESG-related developments, including greenwashing, to ensure they can adapt to and comply with governmental policies, rules, and regulations.
- Evaluate their compliance with the most current FTC Green Guides.[24]
- Have internal policies and procedures that provide guidance on potential risks and mitigation associated with greenwashing, while accounting for current (and potentially future) legislation, rules, and regulations.
- Confirm that company practices, statements, and corporate documents match environmental claims/disclosures.
- Use accurate, logical, and verifiable representations or disclosures, including the explanation of evidence-based information and terms that are related to ESG issues or practices.
- Analyze whether their use of words, images, colors, or other descriptors can be considered an environmental claim.
- Examine external claims about company practices and products to confirm they are not misleading, but are justifiable and evidence based.
- Measure what ESG-related commitments and claims are achievable through timely planning and execution.
- Identify and cure any discrepancies between what is disclosed versus what is done in any ESG claim or disclosure.
- Use third parties to verify any ESG-related claims or disclosures, including having legal counsel review disclosures or ESG-related claims.
- Manage and retain all data necessary to defend against environmental claims.

- Use disclaimers, qualifications, or other explanations to mitigate the risk of inaccurate or misleading claims.
- Analyze and evaluate ESG-related compliance and due diligence obligations as required by law.

It is a good idea for all companies that are concerned about the possibility of greenwashing lawsuits to take a comprehensive look at their principles, practices, governance, and disclosures in comparison to the continuously developing statutes, regulations, and case law so that they can confirm there is evidentiary support for company ESG activities and statements. Remember, the best defenses to greenwashing claims will be found in a company's principles, practices, due diligence, and disclosures, along with the ESG-profile for its product, activity, or transaction.

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[1] http://climatecasechart.com/search/?fwp_filing_year=2020%2C2021%2C2022%2C2023

[2] https://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review

[3] http://climatecasechart.com/search/?fwp_filing_year=2020%2C2021%2C2022%2C2023

[4] Kirk Herbertson, "Oil Companies vs. Citizens: The Battle Begins Over Who Will Pay Climate Costs," EarthRights, March 21, 2018, https://earthrights. org/blog/oil-companies-vs-citizens-battle-begins-will-pay-climate-costs/.

[5] https://web.archive.org/web/20131117012507/http:/www.civilsocietyinstitute.org/global_warm_action.cfm

[6] *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410

[7] i.e. hiding in a group while moving at the speed of the slowest adopter of sustainability policies.

[8] i.e. when a company highlights a specific "green" feature of its products or activities.

[9] i.e. implying that the consumer is at fault and shifting the blame to the consumer.

[10] i.e. where marketing calls something sustainable or green, but that is ultimately misleading.

[11] i.e. when a company regularly changes its ESG targets or policies before they are achieved.

[12] i.e. when a company deliberately chooses to under-report/disclose or hide its ESG credentials from public view.

[13] i.e. an act or omission that interferes with the rights of the community or public generally. For example, a claim that defendants' production and promotion of fossil fuels contributed, and continues to contribute, to global warming-induced impacts and that these impacts create a public nuisance interfering with the rights of the communities represented.

[14] i.e. interferes with an individual's enjoyment of his/her property

[15] i.e. interferes with an individual's enjoyment of his property through a physical invasion of the property.

[16] i.e. OG companies owe a duty of care in relation to climate change, claiming that but for the emissions of said company, they would not have suffered the particular, measurable harm.

[17] i.e. hold companies liable for defective products and for failure to warn of the risks associated with their use, where instead of alleging fault they claim strict liability for flaws or errors in a product's design that render it inherently dangerous.

[18] i.e. plotting with another person to commit an unlawful act or to conspire to deprive a third party of a legal right.

[19] i.e. a doctrine that prohibits the unjust enrichment of one person at another's expense.

[20] i.e. engaging in deceptive marketing and promotion of products by, inter alia, disseminating misleading marketing materials and publications refuting the scientific knowledge generally accepted at that time, advancing pseudo-scientific theories of their own and developing public relations materials that prevented reasonable consumers from recognizing the risk that fossil fuels would cause climate change.

[21] i.e. typically arguing that (1) the lack of knowledge about climate risks undermines shareholders' ability to exercise their rights and/or that (2) the company's misleading use of knowledge has harmed their interests as shareholders.

[22] *See*: *City of New York v. Exxon Mobil Corp.*, which alleges oil and gas companies systematically and intentionally mislead consumers about their products' role in causing climate change; *Vermont v. Exxon Mobil Corp.*, which is a consumer protection lawsuit brought by the State of Vermont against fossil fuel companies alleging deceptive and unfair business practices in connection with the companies' sale of their products; *District of Columbia v. Exxon Mobil Corp.*, which alleges oil and gas companies violated Consumer Protection Procedures Act by misleading consumers about "the central role their products play in causing climate change;" *City of Hoboken v. Exxon Mobil Corp.*, which seeks to recover climate change-related damages allegedly resulting from the defendant energy companies' production of fossil fuels and concealment of fossil fuels' harms; *Delaware v. BP America, Inc.*, which seeks to hold the fossil fuel industry liable for the physical, environmental, social, and economic consequences of climate change in Delaware; *City & County of Honolulu v. Sunoco LP*, which seeks damages and other relief from fossil fuel companies for alleged conduct that the City and County of Honolulu contends actually and proximately caused climate change impacts; and *Rhode Island v. Shell Oil Products Co.*, which seeks to hold fossil fuel companies liable for causing climate change impacts that adversely affect Rhode Island and jeopardize State-owned or -operated facilities, real property, and other assets.

[23] See, *U.S. v. Walmart, Inc.*, No. 22-cv-965, Dkt. No. 3 (D.D.C. Apr. 8, 2022).

[24] https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pd

California Takes Next Step to Formally Impose Stricter Limits on RNG Projects Under the LCFS With Eventual Phaseout

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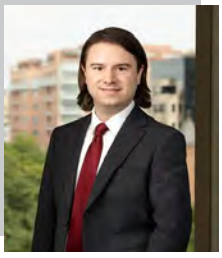
Mr. Dobbins

The California Air Resources Board ("CARB") reviews the state's Low Carbon Fuel Standard ("LCFS") program every five years as part of the broader scoping plan required under the California Global Warming Solutions Act. On December 19, 2023, CARB published proposed amendments to its LCFS program in response to changes called for by the 2022 Scoping Plan. Amongst other sweeping changes, CARB is specifically proposing to (i) phaseout LCFS crediting for renewable natural gas ("RNG") projects after 2040, (ii) impose new limits on RNG injected into the common carrier pipeline network that could severely restrict the eligibility of out-of-state projects to generate LCFS credits, and (iii) eventually phaseout avoided methane crediting for RNG projects. The public comment period for these proposed changes opened on January 5, 2024. These changes reflect CARB's view that the best use of RNG long-term will be in hard-to-electrify, non-transportation industrial sectors and are likely to have several long-term impacts on the market for RNG given how LCFS credits tend to drive the price for RNG. However, as explained below, the immediate effects on the RNG market are somewhat tempered by CARB's approach to phasing out RNG under the LCFS.

Ms. Rondinelli

California's LCFS Program

Enacted in 2007, the LCFS program is designed to encourage the use of cleaner, low-carbon transportation fuels in California, encourage the production of those fuels, and thereby reduce greenhouse gas ("GHG") emissions and decrease fossil fuel dependence in the state's transportation sector. Fuel producers, importers, and certain other parties in California are subject to the LCFS program. Parties that sell or offer for sale transportation fuels in California are required to meet annual carbon intensity reduction targets or buy LCFS credits to meet the standards. LCFS standards are based on the "carbon intensity" of gasoline and diesel fuel and their respective substitutes. Low carbon fuels below the carbon intensity benchmark generate credits, while fuels above the carbon intensity benchmark generate deficits. Credits and deficits are denominated in metric tons of GHG emissions (avoided or emitted based on the baseline and the corresponding reductions) and credits can be sold, banked, or used to satisfy a compliance obligation.



Mr. Aird

RNG has been a major success story under the LCFS, but it has saturated the California transportation sector's demand for compressed natural gas, with RNG providing 97% of the compressed natural gas dispensed as transportation fuel in California. According to *Bloomberg*, RNG production has increased 20-fold over the past 10 years, and RNG continues to increase its share of fuel used for natural gas powered vehicles. Currently, the LCFS regulations allow for RNG producers to generate LCFS credits if the RNG is injected into the common carrier natural gas pipeline system, and a corresponding volume of fuel is matched to compressed natural gas or liquified natural gas dispensed in California. This flexible approach (known as "book and claim accounting") has had national impacts in terms of supporting RNG growth and represented a practical approach given that biomethane molecules are indistinguishable from fossil-based natural gas. In addition, RNG producers have been able to benefit under the current LCFS rules for avoided methane crediting for the capture and reuse emissions that would otherwise be released to the

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atmosphere. This approach has allowed RNG producers and dairy farms, in particular, to benefit from lower, or even negative, carbon intensity scores and corresponding higher LCFS credit values.

Now, however, CARB has proposed a more restrictive approach based on its determination that zero-emission vehicles represent the best method for reducing GHG emissions from the transportation sector. According to CARB, given that natural gas also represents only 3% of transportation fuel demand in California, support for biomethane should shift to better incentivize other low carbon fuels and promote the use of RNG in non-transportation sector applications, such as its use as a feedstock for the production of renewable hydrogen. This approach seemingly ignores the role RNG could play with continued support from the LCFS for the displacement of other more carbon intensive fossil fuels besides compressed natural gas, such as the replacement of vehicles fueled by diesel, or the role it could play in charging electric vehicles.

Overview of the Proposed Changes to the LCFS Program

The December 2023 amendments to the LCFS program include the following:

- **New Carbon Intensity Benchmarks**: CARB proposes to increase the 2030 carbon intensity targets from 20% to 30%, including a one-time 5% reduction of the carbon intensity benchmark in 2025. These stricter requirements are largely in response to the perceived overproduction of certain fuels such as renewable biodiesel. The change in benchmark values will ultimately impact LCFS credit values for qualifying fuels under the LCFS.
- **Elimination of Intrastate Fossil Jet Fuel Exemption**: CARB proposes elimination of the existing exemption for intrastate fossil jet fuel from LCFS regulations beginning in 2028. This opens the door for LCFS credit prices to support increased production of sustainable aviation fuel.
- **Expansion of Zero Emission Vehicle Infrastructure Credit**: CARB proposes new credits for the construction of fast electric charging or hydrogen refueling infrastructure for zero-emission vehicles.
- **New Crop–Based Biofuels Criteria**: CARB proposes new tracking requirements for crop-based feedstocks used in biofuel production in order to counter potential deforestation effects and other adverse land use changes.
- **Crediting RNG Projects**: CARB proposes a number of changes to LCFS provisions related to RNG, largely in an attempt to phaseout its usage as a transportation fuel by 2040 in favor of other transportation fuels such as renewable hydrogen.

There are numerous other changes in CARB's proposal, including phasing out project-based crediting for petroleum projects by 2040, new requirements for hydrogen, and a requirement that direct-air-capture carbon capture and sequestration projects be located within the United States, amongst others. Notably, the proposed rules do not include a requirement that would have phased out LCFS crediting for crop-based fuels but seek instead to impose additional sustainability requirements for crop and forestry-based feedstocks.

Crediting Changes for RNG Projects – A Closer Look at the Proposed Changes

For projects that break ground after December 31, 2029, CARB's proposal would phaseout pathways for crediting biomethane/RNG used in vehicles after December 31, 2040, but RNG projects can continue to be certified or recertified for LCFS crediting through 2040. CARB proposes to define "break ground" as the "earthmoving and site preparations necessary for construction of the digestor system and supporting infrastructure that starts following approval of all necessary entitlements/permits for the project." After that date, any volumes of these fuels from these fuel pathways used in compressed natural gas vehicles would be reported with the same carbon intensity score as what CARB assigns to ultra-low sulfur diesel, meaning that after 2040, RNG use as a combustion transportation fuel would generate a deficit under the LCFS. CARB believes that the 2040 date will minimize RNG market disruption by providing more time to find offtakers for non-transportation fuel uses in an attempt to avoid stranding assets. While still unwelcome, some opponents of RNG were urging CARB to phaseout crediting for RNG under the LCFS by 2025. The December 2023 amendments to the LCFS program also contain two other significant restrictions related to crediting RNG projects prior to the phaseout: (1) new limitations on the current book and claim accounting approach and (2) the phaseout of "avoided methane" crediting.

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New Traceability Limits on Book-and-Claim Accounting

Currently, LCFS regulations allow for book-and-claim crediting (*i.e.*, indirect accounting) of RNG when the fuel is injected into the North American natural gas pipeline system. Consequently, the majority of these credits come from renewable natural gas injected into pipelines *outside* of California.[1] CARB is seeking to reverse this trend by requiring operators to demonstrate that RNG is carried through common carrier pipelines physically flowing *within* California or *toward an end use* in California. The proposed amendments further specify that such eligible pipelines must flow toward California at least 50% of the time on an annual basis. CARB states that this new requirement will reduce the state's overall methane emissions by displacing the existing fossil-based natural gas found within instate pipelines with RNG actually produced within California.

CARB incorporates the same test for determining pipeline flow as the one used by the State's Renewable Portfolio Standard ("RPS"). The test is set forth in the California RPS Eligibility Guidebook and generally requires a demonstration of the following:

1. Each segment of the pipeline on the delivery path from the point of injection to the point of receipt physically flows toward California at least 50 percent of the time on an annual basis.
2. If storage is used, then the pipeline must flow in the direction of the facility from the injection point to the storage point and from the storage point to the receipt point at the facility at least 50 percent of the time on an annual basis.
3. Contracts for the delivery (firm or interruptible) or storage of the gas with every pipeline or gas storage site operator transporting or storing the gas from the injection point to the final delivery point.

If finalized, the requirement to demonstrate deliverability for projects that break ground after January 1, 2030 for RNG take effect on January 1, 2041, and on January 1, 2046 for biomethane used as a feedstock for the production of hydrogen.

Avoided Methane Crediting Phaseout

Avoided methane crediting is a mechanism under the LCFS program whereby credits are awarded to methane producers who capture GHG emissions that would otherwise be released directly to the atmosphere. For example, dairy farms or biomass landfills that directly capture and reuse methane emissions are awarded credits which can be later invested in emissions technologies such as anaerobic digesters. For RNG projects that start construction after December 31, 2029, CARB is proposing that the LCFS program's avoided methane crediting will end in 2040, for RNG used as transportation fuel, and in 2045 when used as a feedstock to produce renewable hydrogen. For RNG projects certified prior to January 1, 2030, CARB may renew the crediting period for up to three consecutive 10-year periods. Accordingly, there is still a path for certain RNG projects to continue generating LCFS credits after the 2040 phaseout deadline proposed by CARB.

Takeaways

RNG may be a victim of its own success, as CARB no longer views RNG as playing a significant role in decreasing the carbon intensity of transportation fuels within the state. Nevertheless, these changes, whatever their intent, have the potential to disrupt the national RNG market given how the price of RNG is tied to the value of the LCFS credit. Washington and Oregon have similar programs to the existing LCFS requirements, but credit prices in those markets still lag behind the potential value the LCFS represents. The public comment period for the proposed amendments began on January 5, 2024, closes on February 20, 2024, and will be followed by a public hearing scheduled on March 21, 2024.

[1] California Air Resources Board, Public Hearing to Consider the Proposed Amendments to the Low Carbon Fuel Standard, Staff Report: Initial Statement of Reasons at 31 (January 2, 2024).

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Below are various oil and gas cases recited in his blog site [gabibikos.com] *At the Well Weekly* which may be of interest for your further inquiry.

Interesting

- **New Jersey Superior Court Upholds Approval of Permits for LNG Rail Facility on Delaware River**. The New Jersey Superior Court rejected challenges by the Delaware Riverkeeper to various permits for a new LNG railway loop facility built along the Delaware River in the state, holding that the state's DEP did not act arbitrarily, capriciously, or unreasonably in issuing those permits. *In re: Delaware River Partners*, --- A.3d ----, No. A-1897-21, 2023 WL 8069486 (N.J. Super. Ct. Nov. 21, 2023).

- **Texas Federal Court Says Statute of Frauds Renders Rig Contract Amendment Invalid**. A federal court in Texas held that the state's statute of fraud applies to render an amendment to a drilling rig contract invalid, holding that the gas well owner did not sign an amendment for a switch to a larger blow-out preventer and email exchanges purporting to authorize the switch and move forward with the project was insufficient to satisfy the signature requirement of the statute of frauds. *Frontier Drilling LLC v. XTO Energy, Inc*., --- F. Supp. 3d ----, No. 4:22-CV-02497, 2023 WL 8456139 (S.D. Tex. Dec. 5, 2023).

Headlines & Holdings – Appalachia

- **Ohio Court of Appeals Addresses Fixed vs. Floating Oil and Gas Royalties.** A court of appeals in Ohio held that grantor's conveyance of "one-half (1/2) part of his royalty Being 1/16 part of all the oil and gas in and under the … premises" conveyed a fixed fractional 1/16th royalty interest, not a floating interest, reasoning that (a) "the grantor conveyed 'the one half part of his [rather than 'any' or 'the'] royalty interest'"; (b) "there is no mention of a current oil and gas lease or a reference to future oil and gas leases on the property"; (c) the phrases "Being 1/16 part of all the oil and gas in and under the following described premises" is a "separate sentence in the granting clause to be given equal weight with the previous sentence."; and (d) "the two fractions can be harmonized without stripping the 1/2 fraction of any meaning." *Crum v. Mooney*, --- N.E.2d ----, No. 23 MO 0011, 2023 WL 8522658 (Ohio Ct. App. December 6, 2023).

- **Pennsylvania Superior Court Says Statute of Limitations Doesn't Kill Claims to Oil and Gas Rights.** A panel of the Superior Court held that the statute of limitations did not bar plaintiffs from seeking to quiet title in oil and gas rights sold at a tax sale because they challenged the tax deed as void ab initio on jurisdictional grounds and therefore the statute of limitations did not start running. *Lodge v. Hoyt*, --- A.3d ----, No. 1294 MDA 2022, 2023 WL 8234312 (Pa. Super. Nov. 28, 2023).

- **West Virginia Appellant Court Denies Mineral Interest Claim under Merger Doctrine**. A court of appeals in West Virginia held that the merger doctrine applied to extinguish a purported severed mineral interest after the mineral owner acquired the surface and subsurface and held them simultaneously. The court also held that a subsequent conveyance did not re-sever the mineral interest. *Wells v. Antero Resources Corp*., --- S.E.3d ----, No. 22-ICA-281, 2023 WL 7202562 (W. Va. Ct. App. Nov. 1, 2023).

- **West Virginia Appellate Court Addresses Mineral v. Royalty Interest.** A court of appeals in West Virginia held that a deed reserving a "one-sixteenth oil and gas mineral interest" is unambiguous and clearly reserves a one-sixteenth oil and gas mineral interest, rejecting the argument that according to the common understanding of such phrases in 1902 (the year of the conveyance) a one-sixteenth reservation really meant a one-half mineral interest. *Nicholson v. Severin POA Grp., LLC*, --- S.E.2d ----, No. 22-ICA-207, 2023 WL 7487311 (W. Va. Ct. App. Nov. 13, 2023).

Headlines & Holdings - Beyond Appalachia

- **Federal Court in Arkansas Denies Class Certification in Oil and Gas Dispute**. A federal court in Arkansas denied a motion to certify a class of plaintiffs claiming underpaid royalties, holding that a class action is unjustified because the six or so potential class plaintiffs failed to satisfy the numerosity requirement and whether or not the lessee shorted landowners their royalties is an individualized inquiry

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unfit for resolution by class action. *Bradley v. XTO Energy, Inc.*, --- F. Supp. 3d ----, No. 3:21-CV-00079-BSM, 2023 WL 6129487 (E.D. Ark. Sept. 19, 2023).

- **Colorado Supremes Deny Oil and Gas Lease Busting Bid for Temporary Cessation of Production**. The Supreme Court of Colorado held that an oil and gas lease did not expire under the cessation-of-production clause following a four-month break in production for necessary repairs to a third party's sales pipeline but declined to adopt a universal rule interpreting the term "production" as used in all oil and gas leases to mean a well "capable of production." *Boulder County Commissioners v. Crestone Peak Resources Operating LLC*, --- P.3d ----, No. 21SC477, 2023 WL 8010221 (Colo. Nov. 20, 2023).

- **Fifth Circuit Certifies Unique Question to Louisiana Supreme Court.** In a case involving statutory pooling, royalty payments, and post-production costs, the Fifth Circuit agreed to certify the question of whether the negotiorum gestio doctrine - in which a third party interferes in someone's business on their behalf but without consent – allows a unit operator to deduct transportation, marketing, and other post-production costs from revenues owed to owners (including unleased owners) within the statutory unit. The court reasoned that the Louisiana Supreme Court is better suited to resolve the question given the interplay between the state's relatively new conservation laws and its deeply rooted negotiorum gestio doctrine. *Johnson v. Chesapeake Louisiana, L.P.*, --- F.4th ----, No. 22-30302, 2023 WL 8183095 (5th Cir. Nov. 27, 2023).

- **Oklahoma Supremes Address Top-Lease, Washout, and Related Issues.** In a case pitting a top-lessee against a base-lessee and a washout of overriding royalties, the Supreme Court of Oklahoma held that there remained a question of whether the base lease expired for lack of production in paying quantities and, as to an associated overriding royalty interest, that interest may be extinguished by a surrender of the working interest from which the interest arises unless the surrender is the result of fraud or breach of a fiduciary relationship. *Oil Valley Petroleum v. Moore*, --- P.3d ----, No. 119810, 2023 WL 6119809 (Okla. September 19, 2023).

- **Oklahoma Federal Court Says Bureau of Indian Affairs Fell Short on NEPA Compliance for Oil and Gas Leases**. A federal court in Oklahoma concluded that the U.S. Bureau of Indian Affairs fell short on NEPA compliance while issuing oil and gas leases under a "finding of no significant impact," holding that the decision was arbitrary and capricious under the Administrative Procedure Act for lack of site-specific analyses. *Hayes Family Trust v. Halland*, --- F. Supp. 3d ----, No. 416CV00615JARCDL, 2023 WL 7360856 (N.D. Okla. Nov. 7, 2023).

- **North Dakota Federal Court Upholds County's Mineral Interest**. A federal court in North Dakota held that a county, rather than the United States, owned a 6 ¼ mineral interest underlying certain public lands, rejecting the government's argument that the county has no right to "public domain minerals" based on certain condemnation judgments because that phrase is found nowhere in any of the judgments or declarations of takings. *McKenzie County v. United States*, --- F. Supp. 3d ----, No. 1:16-CV-001, 2023 WL 8259291 (D.N.D. Nov. 29, 2023).

- **Texas Appeals Court Remands Subsurface Trespass Claims**. A court of appeals in Texas set aside a summary judgment and remanded for further proceedings to determine whether one well operator trespassed against another well operator based on subsurface saltwater migration. Iskandi*a Energy Operating, Inc. v. SWEPI LP*, --- S.W.3d ----, No. 08-22-00103-CV, 2023 WL 7168241 (Tex. App. Oct. 31, 2023).
- **Texas Appeals Court Addresses Consent-to-Assign Provision in Oil and Gas Lease**. A court of appeals in Texas held that an equity sale of a percentage interest in an oil and gas lease did not constitute a transfer of interest under an assignment provision that required consent from the lessor. *Nortex Minerals, L.P. v. Blackbeard Operating, LLC*, --- S.W.3d ----, No. 02-23-00027-CV, 2023 WL 7401052 (Tex. App. Nov. 9, 2023).

- **Wyoming Supremes Uphold State's Oil and Gas Production Tax Determinations**. The Wyoming Supreme Court held that the state properly increased the value of a well operator's production for certain tax years by moving the point of valuation not from the custody transfer meter near the wells but downstream of that location, rejecting the operator's contention that downstream field facilities were "processing facilities" as defined by state law, and those costs are deductible from severance and ad valorem taxes such that the proper point of measuring gas production for tax purposes should be at the custody transfer meters. *Chesapeake Operating, LLC v. Wyo. Dep't of Revenue*, --- P.3d ----, No. S-23-0036, 2023 WL 7318919 (Wyo. Nov. 7, 2023).