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# OIL & GAS E-REPORT


| | |
|---|---|
| 3 | OHIO SUPREME COURT FURTHER CLARIFIES 'REASONABLE DILIGENCE' STANDARD UNDER THE DORMANT MINERAL ACT |
| 5 | COLONIAL PIPELINE 2021 RANSOMWARE INCIDENT AND RESPONSES |
| 10 | PENNSYLVANIA APPELLATE COURT DISTINGUISHES BETWEEN A "RESERVATION" AND AN "EXCEPTION" IN DECIDING OIL AND GAS CASE |
| 13 | COLORADO CLARIFIES APPLICATION OF CENTERLINE PRESUMPTION TO MINERALS |
| 16 | NORTH DAKOTA LEASE WAS EFFECTIVE UPON DELIVERY TO GRANTEE DESPITE SIDE-AGREEMENT PROVIDING THAT THERE WAS AN OPTION TO LEASE |
| 20 | NORTH DAKOTA SUPREME COURT DECLARES UNCONSTITUTIONAL A STATUTE THAT WOULD HAVE ALLOWED COMPANIES TO USE SUBSURFACE PORE SPACES WITHOUT COMPENSATION TO LANDOWNERS |
| 23 | ORRI "ANTI-WASHOUT" PROVISION NOT BINDING ON LEASE ASSIGNEES |
| 25 | A LOCAL GOVERNMENT IN LOUISIANA SEEKS TO BLOCK CARBON CAPTURE AND STORAGE; PROSPECTIVE OPERATOR FIGHTS BACK |
| 28 | THIRD CIRCUIT REAFFIRMS NATURAL GAS ACT'S EXCLUSIVE-REVIEW FRAMEWORK |
| 30 | MISSISSIPPI SUPREME COURT HOLDS PLAINTIFF IN OILFIELD CONTAMINATION CASE NEED NOT EXHAUST ADMINISTRATIVE REMEDIES |



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## Ohio Supreme Court Further Clarifies 'Reasonable Diligence' Standard Under the Dormant Mineral Act

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On March 24, 2022, the Supreme Court of Ohio issued its decision in *Fonzi v. Brown* and *Fonzi v. Miller*, Slip Opinion No. 2022-Ohio-901, discussing the level of due diligence required of a surface owner to provide notice to a severed mineral interest owner in order to abandon said mineral interest under the Ohio Dormant Mineral Act (DMA). The court held that surface owners did not exercise reasonable due diligence when they failed to conduct a public record search in the county where the last known mineral interest holder resided, despite having knowledge of the same.

These cases concern two adjoining parcels of land located in Monroe County, Ohio. For both parcels, prior deeds within the chain of title identified that the severed mineral interest holder, being Elizabeth Henthorn Fonzi (Fonzi), resided in Finleyville, Washington County, Pennsylvania. The surface owners, being appellants Gary D. Brown, Allen B. Miller, M. Craig Miller, and Brenda Thomas, subsequently began the process to have the Fonzi mineral interests declared abandoned. In doing so, their attorney searched the Monroe County public records and conducted "limited Internet searches," but failed to uncover any information about Fonzi or any potential heirs to send notice by certified mail. Therefore, the surface owners published notices of intent to declare the Fonzi mineral interests abandoned in a Monroe County newspaper, and subsequently filed affidavits of abandonment. The Fonzi heirs then filed complaints in the Monroe County trial court for declaratory judgment, seeking to quiet title, alleging that the surface owners had failed to exercise reasonable due diligence in attempting to locate the holders of the Fonzi mineral interest.

The trial court granted summary judgment in favor of the surface owners in both cases, holding that the surface owners had made reasonable efforts to locate the potential Fonzi heirs. The Seventh District Court of Appeals reversed the trial court's decision in both cases, instead finding that the surface owners failed to conduct any search outside Monroe County when the surface owners knew that Fonzi lived in Washington County, Pennsylvania, at the time the reservations were made. On September 1, 2020, the Supreme Court of Ohio accepted this appeal.

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[1] *DISCLAIMER: These materials are public information and have been prepared solely for educational purposes. These materials reflect only the personal views of the authors and are not individualized legal advice. It is understood that each case is fact-specific, and that the appropriate solution in any case will vary. Therefore, these materials may or may not be relevant to any particular situation. Thus, the authors and Steptoe & Johnson PLLC cannot be bound either philosophically or as representatives of their various present and future clients to the comments expressed in these materials. The presentation of these materials does not establish any form of attorney-client relationship with the authors or Steptoe & Johnson PLLC. While every attempt was made to ensure that these materials are accurate, errors or omissions may be contained therein, for which any liability is disclaimed.*

In its discussion, the court relied upon its prior decision in *Gerrity v. Chervenak*, 162 Ohio St.3d 694 (2020), wherein it refused to adopt a bright-line rule and instead stated that the analysis of reasonable diligence should be conducted on a case-by-case basis. Here, the court stated, “[s]urface owners are not required to do the impossible . . . the issue is not whether the surface owner *could* have located all mineral-rights holders by exercising reasonable diligence. Instead, the question is whether the surface owner *did* exercise reasonable diligence.” The court placed the burden of proof on the surface owners to show that they were reasonably diligent in attempting to identify and locate the holders of the severed mineral interests. In placing the burden of proof on the surface owners, the court stated that O.R.C. 5301.56(E)(1) provides that the surface owner “shall” comply with the statutory notice requirements outlined therein, and therefore, “the reasonable-diligence standard is entirely within the hands of the surface owner.”

The court found that the surface owners did not exercise reasonable due diligence because they failed to search the public records of Washington County, Pennsylvania, and as a result, the surface owners’ attempts fell short compared to those attempts made in *Gerrity*. The Supreme Court of Ohio affirmed the appellate court’s decision.

# Colonial Pipeline 2021 Ransomware Incident and Responses

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## The Ransomware Attack

Colonial Pipeline is the largest refined products pipeline in the United States. The company transports more than 100 million gallons of fuel daily – nearly half of all fuel consumed along the eastern seaboard – through its operations from Houston, Texas to the ports of New York City.[1] Colonial Pipeline transports a wide variety of fuels, including diesel fuel, jet fuel, home heating oil, and regular and premium gasolines.[2] On Friday, May 7, 2021, an unknown group, later determined to be a group known as DarkSide, executed a ransomware attack on Colonial's operations.[3]

On the day of the attack, Colonial took several immediate actions. It took its digital systems offline to minimize and contain potential damages. It also contacted a host of federal authorities, including the FBI, FERC, PHMSA, the U.S. Department of Energy, and Homeland Security. It activated its incident response team and began releasing information to the public. Over the next few days, the FBI confirmed that ransomware was involved.[4] The FBI and the U.S. Cybersecurity & Infrastructure Security Agency ("CISA") issued a joint alert regarding DarkSide and its Ransomware-as-a-Service (Raas).[5] The alert provided information about the attack as well as providing resources for combatting ransomware, and urged Cybersecurity and Infrastructure "asset owners and operators to review the [listed] resources for best practices on strengthening cybersecurity posture."

## The Payment, Partial Recovery, and Russian Raids and Arrests

The surprise attack threatened to paralyze fuel availability to a large portion of the United States. By the evening of the first day of the attack, May 7, 2021, Colonial CEO Joseph Blount decided to pay the demanded ransom: 75 Bitcoins, at the time worth about $4.4 million.[6] Not knowing the severity or the extent of the damage to the nation's critical fuel infrastructure, Mr. Blount later said that although it was a difficult decision, "it was the right thing to do for the country."[7] During a later hearing to the U.S. Senate, Mr. Blount testified "the attack occurred using a legacy Virtual Private Network (VPN) system that did not have multifactor authentication in place."[8]

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[1] www.colpipe.com/about-us/our-company/system-map.
[2] www.colpipe.com/about-us/faqs.
[3] www.colpipe.com/safe-operations/cybersecurity-response.
[4] *Id.*
[5] www.cisa.gov/uscert/ncas/current-activity/2021/05/11/joint-cisa-fbi-cybersecurity-advisory-darkside-ransomware.
[6] www.wsj.com/articles/colonial-pipeline-ceo-tells-why-he-paid-hackers-a-4-4-million-ransom-11621435636.
[7] *Id.*
[8] www.reuters.com/business/colonial-pipeline-ceo-tells-senate-cyber-defenses-were-compromised-ahead-hack-2021-06-08/.

Within a single month, on June 7, 2021, the U.S. Department of Justice announced it had recovered 63.7 Bitcoins, about 85 percent of the ransom payment.[9] The DOJ made public a heavily redacted affidavit supporting the seizure warrant, and explaining how the DOJ examined the public Bitcoin ledger to trace the ransom payment.[10] As part of its investigation, the DOJ tracked and monitored similar sized Bitcoin payments with details that appeared relevant to the ransom payment, and determined that the 63.7 Bitcoins to be seized had not moved from a single account for about two weeks. Finally, the affidavit stated that the FBI had the private key for the Bitcoin wallet in question.[11]

Within a year, in January 2022, the Russian Federal Security Service ("FSB") arrested a person believed to be responsible for the attack.[12] The FSB conducted raids in Moscow, St. Petersburg, and other areas of Russia. The FSB made additional arrests and seized cash, cryptocurrency, and other physical assets including computers and luxury cars.[13] The United States and Russia do not have an extradition treaty, so any enforcement actions against those arrested will take place in Russia under Russian laws.

## House Committee on Homeland Security

Less than two weeks after the Colonial Pipeline attack, the House Committee on Homeland Security favorably reported various "bipartisan homeland security bills, including critical legislation to enhance pipeline security in light of the Colonial Pipeline ransomware attack."[14] These bills were largely successful in being passed:

- "The 'State and Local Cybersecurity Improvement Act' (H.R. 3138) was introduced by Congresswoman Yvette D. Clarke (D-NY). This bill seeks to authorize a new $500 million grant program to provide State and local, Tribal, and Territorial governments with dedicated funding to secure their networks from ransomware and other cyber attacks." Partially enacted on November 15, 2021 as part of the Infrastructure Investment and Jobs Act.[15]

- "The 'Cybersecurity Vulnerability Remediation Act' (H.R. 2980) was introduced by Congresswoman Sheila Jackson Lee (D-TX). This bill would authorize CISA to assist critical infrastructure owners and operators with mitigation strategies against the most critical, known

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[9] www.justice.gov/opa/pr/department-justice-seizes-23-million-cryptocurrency-paid-ransomware-extortionists-darkside.
[10] www.justice.gov/opa/press-release/file/1402056/download.
[11] *Id.*
[12] www.forbes.com/sites/zacharysmith/2022/01/14/russia-nabs-colonial-pipeline-hacker-in-raids-on-ransomware-ring-us-says/?sh=3c89628f6ee8.
[13] homeland.house.gov/news/press-releases/chairman-thompson-statement-on-colonial-pipeline-ransomware-attack-arrests; www.wsj.com/articles/russia-says-it-raided-prolific-ransomware-group-revil-with-arrests-seizures-11642179589.
[14] www.homeland.house.gov/news/legislation/homeland-security-committee-passes-slate-of-bipartisan-bills-including-pipeline-security-and-cybersecurity-legislation.
[15] www.govtrack.us/congress/bills/117/hr3138; www.govtrack.us/congress/bills/117/hr3684.

vulnerabilities." Mostly enacted on December 27, 2021 as part of the National Defense Authorization Act for Fiscal Year 2022.[16]

- "The 'CISA Cyber Exercise Act' (H.R. 3223) was introduced by Congresswoman Elissa Slotkin (D-MI). This bill establishes a National Cyber Exercise program within CISA to promote more regular testing and systemic assessments of preparedness and resilience to cyber attacks against critical infrastructure." Mostly enacted on December 27, 2021 as part of the National Defense Authorization Act for Fiscal Year 2022.[17]

- "The 'Domains Critical to Homeland Security Act' (H.R. 3264) was introduced by Ranking Member John Katko (R-NY). This bill authorizes DHS to conduct research and development into supply chain risks for critical domains of the United States economy and transmit the results to Congress." Enacted on December 27, 2021 as part of the National Defense Authorization Act for Fiscal Year 2022.[18]

- "The 'Pipeline Security Act' (H.R. 3243) was introduced by Congressman Emanuel Cleaver (D-MO). This bill will enhance the ability of TSA—the principal Federal entity responsible for pipeline security—to guard pipeline systems against cyberattacks, terrorist attacks, and other threats. This measure codifies TSA's Pipeline Security Section and clarifies TSA's statutory mandate to protect pipeline infrastructure." Not passed.[19]

## The Joint Cyber Defense Collaborative (JCDC)

In August 2021, several months after the Colonial Pipeline attack, Congress directed CISA to form the Joint Cyber Defense Collaborative ("JCDC"). The JCDC established partnerships between government and private sector entities to promote cybersecurity defenses.[20] In April 2022, the CISA announced "the expansion of the Joint Cyber Defense Collaborative (JCDC) to include Industrial Control Systems (ICS) experts—security vendors, integrators, and distributors—to further increase U.S. government focus on the cybersecurity and resilience of industrial control systems and operational technology (ICS/OT). Companies initially joining the JCDC-ICS effort include Bechtel, Claroty, Dragos, GE, Honeywell, Nozomi Networks, Schneider Electric, Schweitzer Engineering Laboratories, Siemens, and Xylem, as well as several JCDC Alliance partners."[21]

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[16] www.govtrack.us/congress/bills/117/hr2980.; www.govtrack.us/congress/bills/117/s1605.
[17] www.govtrack.us/congress/bills/117/hr3223.; www.govtrack.us/congress/bills/117/s1605.
[18] www.govtrack.us/congress/bills/117/hr3264.; www.govtrack.us/congress/bills/117/s1605.
[19] www.govtrack.us/congress/bills/117/hr3243.
[20] www.cisa.gov/jcdc.
[21] www.cisa.gov/news/2022/04/20/cisa-expands-joint-cyber-defense-collaborative-include-industrial-control-systems.

## Cyber Incident Reporting for Critical Infrastructure Act (CIRCIA) of 2022

In September 2021, Senator Gary Peters introduced the Cyber Incident Reporting Act of 2021.[22] The bill was partially enacted on March 15, 2022 as the Cyber Incident Reporting For Critical Infrastructure Act of 2022, part of the Consolidated Appropriations Act, 2022.[23] CISA released a statement on CIRCIA, explaining that, among other things, the Act required CISA "to develop and implement regulations requiring covered entities to report to CISA covered cyber incidents and ransom payments."[24]

CIRCIA requires a "covered entity that experiences a covered cyber incident shall report the covered cyber incident to the Agency not later than 72 hours after the covered entity reasonably believes that the covered cyber incident has occurred."[25] Further, a "covered entity that makes a ransom payment as the result of a ransomware attack against the covered entity shall report the payment to the Agency not later than 24 hours after the ransom payment has been made."[26] The Act defined "covered entities" as "an entity in a critical infrastructure sector, as defined in Presidential Policy Directive 21, that satisfies the definition established by the Director in the final rule issued pursuant to section 2242(b)."[27] In September 2022, CISA requested public comments related to CIRCIA in the Federal Register, some of which request input as to what entities should be included in the definition of a covered entity under CIRCIA.[28] The public notice period for such comments expired in November 2022, shortly before publication of this article.[29]

CIRCIA also requires supplemental reports and preservation of evidence of ransomware attacks.[30] The Act provides for voluntary reports of incidents not otherwise required to be reported.[31] Non-compliance may result in communications to the affected entity, subpoenas to obtain information, and civil actions against the affected entity in federal courts by the United States.[32] However, the Act does not provide for a private right of action.[33] The Act requires "an intergovernmental Cyber Incident Reporting Council, in consultation with the Director of the Office of Management and Budget, the Attorney General, the National Cyber Director, Sector Risk Management Agencies, and other appropriate Federal agencies, to coordinate, deconflict, and harmonize Federal incident reporting requirements, including those issued through regulations."[34] Finally, the Act requires any federal agency that receives a report of a cyber incident, including a ransomware attack, to

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[22] www.govtrack.us/congress/bills/117/s2875.
[23] www.govtrack.us/congress/bills/117/hr2471.
[24] www.cisa.gov/sites/default/files/publications/CIRCIA_07.21.2022_Factsheet_FINAL_508%20c.pdf.
[25] 6 U.S.C.A. § 681b (a)(1)(A).
[26] 6 U.S.C.A. § 681b (a)(2)(A).
[27] 6 U.S.C.A. § 681.
[28] 87 FR 55833; www.federalregister.gov/documents/2022/09/12/2022-19551/request-for-information-on-the-cyber-incident-reporting-for-critical-infrastructure-act-of-2022.
[29] *Id.*
[30] 6 U.S.C.A. § 681b (a)(3), (4).
[31] 6 U.S.C.A. § 681c.
[32] 6 U.S.C.A. § 681d.
[33] 6 U.S.C.A. § 674.
[34] 6 U.S.C.A. § 681f.

report that incident as soon as possible, but no later than 24 hours after receiving the report from the affected entity.[35]

## Summary

The attack on a major U.S. energy infrastructure system in May 2021 shocked the government and the energy industry. Certainly, plans were already in place for such an event, but the execution and damage from the attack led to even more planning and preparation for future attacks. The efforts continue today. Energy companies of all sizes have improved their security and planning, and the U.S. government continues to implement and fine-tune additional measures as described within this article. While these may not completely prevent a future attack, the industry is certainly in an improved posture as compared to prior to the Colonial Pipeline attack.

[35] 6 U.S.C.A. § 681g.

## Pennsylvania Appellate Court Distinguishes Between a "reservation" and an "exception" in Deciding Oil and Gas Case

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Ralph and Florence Hunnell own the surface estate of a 104-acre tract in West Bethlehem Township, Pennsylvania. *Hunnell v. Krawczewicz*, 2022 WL 4542006, 2022 Pa. Super. 166. In this litigation, they also claimed to be the owners of the oil and gas estate. Their claim to the oil and gas estate turned on interpretation of a 1924 deed. The following facts are undisputed.

- W.N. and Abbie Theakston owned the 104-acre tract in 1920, at which time they granted an oil and gas lease (the "Lease") to Manufacturers Light and Heat Company.
- In 1924, the Theakstons conveyed the property to Ernest Britko, using a deed (the "Deed") that "*excepted and reserved*" coal rights (emphasis added).
- In addition, the Deed provided, that "All the oil and gas within and underlying the . . . tract of land is also *reserved* together with such rights to drill or operate for same as are set forth in full in" the lease to Manufacturers Light and Heat (emphasis added).
- The Lease is no longer in effect.
- The heirs to W.N. and Abbie Theakston (the "Theakston Heirs") purported to sell oil and gas rights to EQT Production Company.

The Hunnells filed suit in 2011, seeking a declaratory judgment that they own the oil and gas estate in the 104-acre tract. EQT intervened to protect its interest. The Hunnells argued that the Deed's language regarding oil and gas is a "reservation." EQT asserted that the language is an "exception," not a reservation. After discovery, the parties filed motions for summary judgment. The trial court denied the Hunnells' motion and granted EQT's motion for summary judgment. The Hunnells appealed.

The Superior Court noted that "reservation" and "exception" have different meanings. "A reservation pertains to incorporeal things that do not exist at the time the conveyance is made." For example, if a person sells land, but retains an easement giving him the right to cross over the land, the seller has made a "reservation" of an incorporeal right that did not exist prior to the sale. Prior to the sale, the seller could cross the land, but he could do so as owner of the land, not as the owner of an easement. "An exception, on the other hand, retains in the grantor the title of the thing excepted." In other words, an exception holds back from the conveyance a portion of what already was owned by the grantor.

The Superior Court also noted, however, that lawyers and parties often use the terms "reservation" and "exception" interchangeably. The Court stressed that the term used by the parties is not necessarily controlling. Thus, "even if the term

'reservation' is used, if the thing or right reserved is [already] in existence, then the language in fact constitutes an exception," not a reservation.

The Superior Court also explained why the distinction between a reservation and an exception matters in this dispute:

> If there is a reservation, it ceases at the death of the grantor, because the thing reserved was not in existence at the time of granting and the thing reserved vests in the grantee. An exception, on the other hand, retains in the grantor the title of the thing excepted. Because the exception does not pass with the grant, it demises through the grantor's estate absent other provisions.

Further, as recognized by a prior decision of the Pennsylvania Supreme Court, *Silvis v. Peoples Natural Gas*, 126 A.2d 706 (Pa. 1956):

> If a particular clause be construed as an exception from the grant, no words of inheritance are necessary because title to the excepted part remains in the grantor and never passes to the grantee; but, if it be construed as a reservation, words of inheritance are necessary, otherwise the right ceases at the death of the grantor, because the grantor creates a reservation to himself of some new right or thing out of the property which he has granted, and which was not in existence at the time of the granting[.]

Based on the difference between a reservation and an exception, the Hunnells stated that, if the 1924 Deed contained a reservation of oil and gas rights, those rights were reunited with the surface estate after the deaths of W.N. and Abbie Theakston, given that the Deed contained no words of inheritance. Further, the Hunnells argued that the Deed plainly contained a reservation of oil and gas rights, not an exception of such rights, because the language of the Deed stated that oil and gas rights were "reserved."

The Superior Court rejected this argument, in part based on the fact that Pennsylvania courts have previously recognized that lawyers and parties in Pennsylvania often use "reservation" and "exception" interchangeably, even though the two words properly have different meanings. Indeed, the Pennsylvania Supreme Court has previously recognized that "[t]he technical distinction between an exception and a reservation is frequently disregarded in the ordinary use of the words, and, therefore, whether the language used, in any particular case, creates an exception or a reservation must be determined from the intention of the parties ascertained from the entire instrument." (quoting *Silvis v. Peoples Natural Gas*, 126 A.2d 706 (Pa. 1956)).

In addition, the Superior Court stated that, in the 1924 Deed, W.N. and Abbie Theakston "were not reserving to themselves any new rights but were merely

excepting from the terms of [the Deed] the oil and gas underlying the property, fee simple title to which was already theirs." Based on this reasoning, the Superior Court concluded that the Deed contained an exception of oil and gas rights, not a reservation of such rights. Therefore, the excepted oil and gas rights did not unite with the surface estate upon the deaths of W.N. and Abbie Theakston. Instead, those rights passed down to the Theakston Heirs. Accordingly, the Superior Court affirmed the trial court's rulings that denied the motion for summary judgment filed by the Hunnells and granted the motion for summary judgment filed by EQT, which had acquired oil and gas rights from the Theakston Heirs.

## Colorado Clarifies Application of Centerline Presumption to Minerals

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On September 15, 2022, the Colorado Court of Appeals published an opinion that answered a question of first impression: "Does the common law centerline presumption apply to convey the mineral interests beneath a dedicated right-of-way to the owners of abutting parcels?"[1] In short, the court held that, where all criteria for the application of the centerline presumption have been met, "it applies to all interests a grantor possesses in the property underlying a right-of-way, including mineral interests."[2]

The case of *Great Northern Properties, LLLP v. Extraction Oil & Gas, Inc.*[3] was an appeal of the district court's decision in a quiet title action that arose from the dedication of a right-of-way for a street in a subdivision by a developer to the City of Greeley, located in Weld County, Colorado. The developer first dedicated the street to the city, then conveyed two parcels of land abutting the street, whereafter the city accepted the dedication, and then the third and final parcel abutting the street was conveyed away. The deeds for the first two parcels contained metes and bounds descriptions which did not reference the street; the deed for the third parcel did reference the street in its metes and bounds description. None of the three deeds contained an exception or reservation of minerals underlying the street to the developer.

On January 2, 2019, more than forty years later, "the developer conveyed whatever interest it had in the minerals beneath [the] Street to [Great Northern]."[4] Great Northern then brought suit to quiet title to the minerals underlying the street. Extraction was the lessee under oil and gas leases from Great Northern and all abutting landowners; thus, Extraction had secured leases from all possible mineral owners and the outcome of the quiet title action only affected which parties were entitled to receive royalties under those leases. The district court held that the developer had conveyed the minerals to the centerline of the street when it conveyed the abutting parcels of land and therefore quieted title in the abutting landowners; Great Northern appealed.

The court explained that common law centerline presumption is a rule which states that "'a conveyance of land abutting a road or highway is presumed to carry title to the center of that roadway to the extent the grantor has an interest therein, unless a contrary intent appears on the face of the conveyance.'"[5] The question of whether the centerline presumption applies to minerals had not been

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[1] *Great Northern Properties, LLLP v. Extraction Oil & Gas, Inc.*, 2022 COA 110 ¶ 1 (Court of Appeals of Colorado, Division Four, Decided September 15, 2022). Great Northern Properties, LLLP is hereinafter referred to as "Great Northern" and Extraction Oil & Gas, Inc. is hereinafter referred to as "Extraction."
[2] *Id*. at ¶ 2.
[3] 2022 COA 110.
[4] *Id*. at ¶ 8.
[5] *Id*. at ¶ 14 (internal citations omitted).

expressly addressed by Colorado courts prior to the *Great Northern* case. The court relied upon well-settled property law principles in reaching its conclusion: "when the centerline presumption applies (that is, when all preconditions to its application are met . . .), it applies to *all interests* the grantor possesses in the property underlying the right-of-way, including mineral interests."[6]

Among the fundamental rules of property law relied upon by the court, in addition to the precedent establishing the above-quoted centerline presumption itself, were the following: (i) the presumption that a grantor intends to convey their entire interest unless they expressly except and reserve an interest, or specifically describe something less than the whole, in the conveyancing instrument; and the rules that (ii) a conveyance of land, without mineral reservation and absent a prior severance, conveys both the land itself and the minerals underlying it; and (iii) any severance of minerals from the surface must be accomplished by clear and distinct language. It further acknowledged that the application of the centerline presumption was in accord with public policy.

The court also outlined several preconditions which must be satisfied in order for the centerline presumption to apply. In summary, the court held that "the centerline presumption applies only when (1) the grantor conveys ownership of a parcel of land abutting a right-of-way; (2) at the time of the conveyance, the grantor owned the fee underlying the right-of-way; (3) the grantor conveys away all the property they own abutting the right-of-way; and (4) no contrary intent appears on the face of the conveyance."[7]

A fifth point that was distinguished by the court is that, for the centerline presumption to apply, the right-of-way must exist at the time of the conveyance.[8] Importantly, this does not mean that a dedicated right-of-way must be accepted by the governmental authority at the time of the conveyance of abutting lands; rather, as between the parties, the right-of-way would exist as of the moment it was intended to be created, *i.e.* as of the dedication from the dedicator to the governmental authority irrespective of when it was ultimately accepted. However, if, *e.g.*, a roadway was vacated prior to adjoining lands being conveyed away, such lands would not be considered to be about a road (as the road no longer existed), and therefore, the centerline presumption would not apply. The court additionally provided that, as is true for any quiet title action, "the person claiming title to property under the centerline presumption bears the burden to prove their ownership and must be able to trace title back to the owner of the fee underlying the right-of-way."[9]

Arguments put forth by Great Northern as to why the centerline presumption should not apply to minerals underlying a right-of-way include (a) it violates the principle that an unambiguous deed conveys only what is described therein and (b) statutory dedications operate to sever the mineral estate from the surface. The court rejected both of these arguments. As to the first, the court

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[6] *Id*. at ¶ 13.
[7] *Id*. at ¶ 24.
[8] *See id*. at ¶¶ 26, 31-34.
[9] *Id*. at ¶ 24.

recognized that parties' intentions must be determined from the four-corners of unambiguous deeds, but clarified that deeds "must be interpreted in the context of existing law."[10] According to existing law, "a silent deed conveying property abutting a right-of-way is not ambiguous" because it "passes the highest estate to the centerline to the right-of way,"[11] and "the highest estate includes both the surface and the unsevered mineral estate."[12]

As to the second, the court noted that dedications can occur by common law – whereby a property owner dedicates the property and then the governmental authority accepts such dedication – or by statute – whereby all streets designated for public use on a city or town map or plat are deemed public property.[13] Under common law dedication, the government acquires an easement to use the land described in the dedication, whereas under statutory dedication, the city or town acquires "such estate or interest as is reasonably necessary to enable it to utilize the surface and so much of the ground underneath as might be required for" ordinary use as a street.[14] According to Colorado law, the centerline presumption applies the same to common law and statutory dedications and neither scenario results in the creation of a mineral estate separate from the abutting parcels; rather, the minerals underlying dedicated roadways remain vested in the dedicator, with the government acquiring no interest therein.[15]

While the court found error in a particular aspect of the district court's ruling,[16] it affirmed the lower court's application of the centerline presumption to the conveyances at issue and held that, if all the preconditions discussed above are satisfied such that the centerline presumption applies, then the same applies to all interests of the grantor, including mineral interests.

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[10] *Id*. at ¶ 30.
[11] *Id*. (internal citations omitted).
[12] *Id*. at ¶ 17.
[13] *See id*. at ¶¶ 37-38; *see also* Colo. Rev. Stat. § 31-23-107.
[14] *Id*. (internal citations omitted).
[15] Note that the court discussed a different result in Wyoming, which has held that a statutory dedication does in fact create a separate mineral estate beneath the street to which the "presumed intent rule" (akin to the centerline presumption in Colorado) does not apply (see *Town of Moorcroft v. Lang*, 779 P.2d 1180 (Wyo. 1989)); however, the Colorado court found the dissenting opinions in such case to be "persuasive and more consistent with Colorado law than the majority's reasoning." *Id*. at ¶¶ 41-48.
[16] There were ultimately nine parcels of land which abutted the street at issue in this case. Great Northern named the owners of all nine parcels as defendants; however, several of those parties had defaulted or disclaimed any interest they may have owned and only two of the parties (each owning one of the abutting parcels) actually participated in the proceeding. The district court quieted title to the entire mineral estate in the two participating owners. The appellate court held that the district court should have quieted title only to the mineral interests owned by the two participating owners and dismissed the balance of the action (noting that "a court cannot quiet title in favor of a defaulting or disclaiming party, even where evidence presented by an appearing party supports the defaulting party's title interests"). The appellate court remanded the case to the district court to correct this issue. *See id*. at ¶¶ 52-56.

## North Dakota Lease Was Effective Upon Delivery to Grantee Despite Side-Agreement Providing That There Was an Option to Lease

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*Northern Oil & Gas, Inc. v. EOG Resources, Inc.*, 2022 WL 15138371 (N.D. Oct. 27, 2022) sorted priority of: (1) a lease delivered with a side-agreement saying there was an option to lease and (2) a lease obtained from later owners whose interest was granted after the first lease but before the option was exercised and before any mention of the first lease was filed of record.

### Facts

Based on dueling leases, EOG Resources, Inc. and Northern Oil & Gas, Inc. each claimed ownership of a mineral leasehold in Mountrail County, North Dakota.[1]

The first lease ("EOG Lease") was executed by the mineral owners, the Hansons, who mailed the lease together with a signed "Side Letter Agreement" (Side-Agreement) to a joint venture partner of Ritter, Laber and Associates, Inc.[2] Both documents were dated Jan. 20, 2006.[3] The Side Agreement gave Ritter an option to lease the minerals and required Ritter to release the Hansons of any further obligations if the option was not exercised.[4] It also stipulated that the EOG Lease would not be recorded until the option was exercised.[5] If it exercised the option, Ritter was to pay the agreed price per net acreage as determined by a title examination.[6] No terms provided the Hansons a right to rescind before the option expired.[7] The litigants agreed that the Hansons "intended title to transfer to Ritter if Ritter elected to exercise its option."[8] Ritter recorded a "Memorandum of Oil and Gas Lease Option" referencing the EOG Lease in May 2007.[9] In July 2007, Ritter recorded the EOG Lease and gave the Hansons written notice that it had "elected to exercise its option to lease."[10] The next month, the Hansons were paid about $37,000 for the EOG Lease.[11] In September 2007, Ritter assigned the EOG Lease to EOG; and, that assignment was recorded.[12]

The relevant title chain of the second lease ("Northern Lease") begins in April 2007, before anything regarding the EOG Lease was recorded, when the

[1] *Northern Oil & Gas, Inc. v. EOG Resources, Inc.*, 2022 WL 15138371 (N.D. Oct. 27, 2022) at *1.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.* at *3.
[6] *Id.*
[7] *Id.*
[8] *Id*. The Hansons did not recall details of the Ritter transaction or if they mailed a lease or an option to lease. *Id.*
[9] *Id.* at *1.
[10] *Id.*
[11] *Id.*
[12] *Id.*

Hansons executed a warranty deed to their son and daughter-in-law (the "Younger Hansons").[13] That deed included the minerals in question, was recorded, and reserved a 50% life estate in the minerals.[14] The Younger Hansons granted the Northern Lease to Ritter in December 2007.[15] The Northern Lease was "recorded in January 2008 and assigned to Northern in June 2008."[16]

Northern sued for a declaration of its ownership, an accounting for production, and attorney's fees.[17] After an agreed bifurcation to decide title, the trial court considered cross-motions for summary judgment and held for Northern because it concluded that the original transaction involving the EOG Lease was an option about which the Younger Hansons lacked notice when they took title.[18] A bench trial then resulted in an award of damages and attorney's fees to Northern.[19] EOG appealed; and, Northern cross-appealed.[20]

## Decision

The North Dakota Supreme Court first examined whether delivery of the EOG lease with the side-letter resulted in "an immediately effective lease," as EOG asserted, or an option that was unexercised when the warranty deed was given to the Younger Hansons, as Northern argued.[21] The Court had already observed that North Dakota considered an oil and gas lease to be an interest in real property and that "[a] lease of real property is both a contract and a conveyance of an interest in land."[22] By statute, "[a] transfer in writing is called a grant" and "takes effect . . . only upon delivery", which requires the grantor's intent to pass title and is a fact question to be "found from all the circumstances surrounding the transaction".[23] However, N.D.C.C. § 47-09-07 prohibits conditional delivery of a grant to a grantee and, the Court observed, requires that "a conditional delivery 'is necessarily absolute and the instrument takes effect thereupon, discharged of any condition on which the delivery was made.'"[24]

The Court began by discussing a similar case which had held, interpreting N.D.C.C. § 47-09-07, that "title to minerals transferred 'as of the date of manual delivery' . . . notwithstanding the conditions in the agreements."[25] Turning to the case before it, the Court commented that it "had long been the law in this jurisdiction

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[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at *1.
[21] *Id.* at *2.
[22] *Id.*
[23] *Id.*
[24] *Id.* at *3. The court noted that the statute codified "the common law rule prohibiting the effectiveness of a 'duly executed deed' from being conditioned on some requirement 'not expressed in the deed itself' absent fraud or mistake". *Id*. Other statutory provisions allowed delivery "in escrow to a third party subject to conditions" and allowed the grant itself to be conditional. *Id.*
[25] *Id*. (discussing and citing *Adams v.Little Missouri Minerals Assoc.,*143 N.W.2d 659 (N.D. 1966)).

that a conditional delivery of a grant to a grantee becomes absolute."[26] The Court noted that it was undisputed that the Hansons "intended title to transfer upon satisfaction of conditions" and held that "[u]nder N.D.C.C. § 47-09-007 and our longstanding case law, any conditions the Hansons agreed to or created outside of the four corners of the lease are void for purposes of delivery".[27] The Court elaborated further that "[e]ven if the Hansons intended to create an option, the grant (the EOG Lease) could not be delivered subject to conditions (an option)."[28] Instead, when a delivery of a grant is made with "intent that title should pass only if a condition is satisfied", the delivery is absolute and passes title as specified by the recitals in the instrument.[29]

Next, the Court considered the argument that there was a conditional grant, not a conditional delivery, because the "Side Letter Agreement is the 'principal document' in the transaction between Ritter and [the Hansons]" and the EOG lease was not properly considered "as a 'separate stand-alone document'".[30] Acknowledging the construction rule that "contracts executed together concerning the same subject matter may be read and construed together", the Court said that rule did not convert separate contracts into a single contract.[31] Instead, "[s]eparate contracts retain their separate identity."[32] Likewise, "extrinsic evidence, including other agreements" cannot "be used to alter the terms of an unambiguous oil and gas lease."[33]

Relying on two Texas decisions, Northern contended that a "condition precedent to the effectiveness of the lease" was created because "a sight draft included with the Side Letter Agreement was subject to approval of title."[34] The Court declined to follow the Texas decisions as it had previously rejected them based upon N.D.C.C. § 47-09-07.[35]

Finally, the Court rejected the argument that the EOG Lease itself created a conditional grant because the lease language was unconditional and contained no reference to the Side Agreement or sight draft.[36] While surrounding circumstances could be considered in determining if delivery happened, "neither those circumstances nor another agreement can be used to alter the unambiguous terms of the EOG Lease."[37]

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[26] *Id.* at * 4.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at *5 (Citing *Sun Explor. & Prod. Co, v, Benton,* 728 S.W.2d (Tex. 1987) and *Puckett v. Hoover,* 202 S.W.2d 209 (Tex. 1947).
[35] *Id.*
[36] *Id.*
[37] *Id.*

Since the EOG lease was effective before the Younger Hansons received their deed, the Court considered whether the fact that the EOG Lease was not recorded at the time of that deed rendered it ineffective against the Younger Hansons.[38] Unrecorded instruments, noted the Court, are valid as to their parties and those with notice of the instrument but void against a "subsequent good-faith purchaser for valuable consideration" who lacks notice.[39] Notice can be actual or constructive with constructive notice being demonstrated when a person has "actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact and . . . omits to make an inquiry with reasonable diligence".[40] Since the facts, including deposition testimony, established that the Younger Hansons had "knowledge of facts giving them at least constructive notice of the EOG Lease, their mineral interests were encumbered by the EOG lease when they executed the Northern Lease".[41] Accordingly, the EOG Lease, which was recorded before the Northern Lease, had priority; and, the Court ruled that the lower court erred in quieting title for Northern, vacated the attorney's fees award, rejected Northern' s cross-appeal that was predicated on lower court's incorrect title determination, and found it unnecessary to address other matters.[42]

## Conclusion

North Dakota considers a mineral lease effective on delivery to the grantee unless something in the lease itself qualifies its effectiveness.

[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* at * 6.
[42] *Id.*

## North Dakota Supreme Court Declares Unconstitutional a Statute That Would Have Allowed Companies to Use Subsurface Pore Spaces Without Compensation to Landowners

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The Northwest Landowners Association filed suit, challenging the constitutionality of North Dakota Senate Bill 2344 of 2019. *Northwest Landowners Association v. North Dakota*, 978 N.W.2d 679 (N.D. 2022). The Association argued that the surface owner owns subsurface pore spaces and that S.B. 2344 constitutes a taking of landowners' pore space rights because the legislation allows others to use and occupy those pore spaces without compensating the landowner.

Three portions of S.B. 2344 are most relevant. The first of these amended North Dakota Century Code § 38-08-25 to include a new subsection (5), which states:

> Notwithstanding any other provision of law, a person conducting unit operations for enhanced oil recovery, utilization of carbon dioxide for enhanced recovery of oil, gas, and other minerals, disposal operations, or any other operation authorized by the commission under this chapter may utilize subsurface geologic formations in the state for such operations or any other permissible purpose under this chapter. Any other provision of law may not be construed to entitle the owner of a subsurface geologic formation to prohibit or demand payment for the use of the subsurface geologic formation for unit operations for enhanced oil recovery, utilization of carbon dioxide for enhanced recovery of oil, gas, and other minerals, disposal operations, or any other operation conducted under this chapter. As used in this section, "subsurface geologic formation" means any cavity or void, whether natural or artificially created, in a subsurface sedimentary stratum.

The second relevant provision of S.B. 2344 amended N.D. Century Code § 38-11.1-03 to add a definition of "land" that expressly excludes "pore space." Section 38-11.1-03 is part of North Dakota's "Oil and Gas Production Damage Compensation" statute, which gives surface owners the right to compensation for "damages sustained by the surface owner and the surface owner's tenant, if any, for lost land value, lost use of and access to the surface owner's land, and lost value of improvements caused by drilling operations."[1] Finally, the third important portion of S.B. 2344 enacted N.D. Cent. Code § 47-31-09(1), which states: "Injection or migration of substances into pore space for disposal operations . . . by itself, does not constitute trespass, nuisance, or other tort."

[1] N.D. Cent. Code § 38-11.1-04.

The district court granted summary judgment in favor of the Association, holding that S.B. 2344 was unconstitutional under the Takings Clauses of both the federal and state constitutions. The district court held that the entirety of S.B. 2344 was invalid. The State appealed to the North Dakota Supreme Court, as did Continental Resources, Inc., which had intervened in support of S.B. 2344.

In analyzing the appeal, the North Dakota Supreme Court noted that one of the most important benefits of ownership of land is the right to exclude others. For this reason, a statute that authorizes someone to physically occupy a landowner's property, even temporarily, constitutes a taking. Further, under North Dakota law, the surface owner owns the pore spaces beneath his or her land,[2] but S.B. 2344 purports to authorize others to use the pore spaces without the surface owner's consent and without payment of compensation. In particular, S.B. 2344 had amended North Dakota Century Code § 38-08-25 to provide that "a person conducting . . . any . . . operation authorized by the [North Dakota Industrial Commission] may utilize subsurface geologic formations in the state," and that no provision of law could "be construed to entitle the owner of a subsurface geologic formation to prohibit or demand payment for the use of the subsurface geologic formation." Such uses could include injections for carbon capture and storage or disposal of wastewater. The North Dakota Supreme Court held that this portion of S.B. 2344 constitutes an unconstitutional taking. Therefore, this portion of S.B. 2344 is invalid.

The Court also analyzed the portion of S.B. 2344 that amends N.D. Century Code § 38-11.1-03. Under general common law principles, a mineral owner generally does not owe compensation to a surface owner if the mineral owner's activities cause damage to the land or interfere with the surface owner's use of the land, provided that the mineral owner does not negligently damage the land or use more of the land than is reasonably necessary to support mineral operations. North Dakota's "Oil and Gas Production Damage Compensation" statute gives the surface owner a statutory right to compensation. But S.B. 2344 purported to change this—in the context of a company's use of subsurface pore spaces—by amending § 38-11.1-03 to include a definition of "land" that expressly excludes "pore space." The North Dakota Supreme Court held that this constitutes an unconstitutional taking of the surface owner's pore space rights.

Finally, the Court stated that the tort of trespass has the purpose of protecting a surface owner's right to exclude others. Accordingly, the portion of S.B. 2344 that enacted North Dakota Century Code § 47-31-09(1) is an unconstitutional taking because the provision states that an "[i]njection or migration of substances into pore space for disposal operations . . . by itself, does not constitute trespass, nuisance, or other tort."

The Court held that the parts of S.B. 2344 that the Court identified as being unconstitutional were invalid. However, the Court held that the district court erred

[2] The Court cited *Mosser v. Denbury Res., Inc.*, 921 N.W.2d 406 (N.D. 2017).

by issuing a judgment invalidating the entirety of S.B. 2344. The North Dakota Supreme Court held that the portions of S.B. 2344 that the Court held are unconstitutional are severable from the other portions of S.B. 2344.

The State of North Dakota argued that the district court erred by holding that pore spaces have value as a matter of law and by granting summary judgment without allowing the State to conduct discovery on the value of pore space rights. The Court rejected this argument. The Court noted that pore spaces have several uses. Thus, the district court did not err in holding that pore spaces have value as a matter of law. The Court acknowledged that the defendants disagreed with the Association regarding the value of the pore spaces, but the Court reasoned that, as long as the pore spaces had value, the actual value did not matter to the Association's facial challenge to S.B. 2344.

The Court also rejected Continental's argument that the district court erred by considering the Association's facial challenge to S.B. 2344. Continental argued that certain portions of S.B. 2344 were constitutional. For example, the portion of S.B. 2344 authorizing the use of carbon dioxide for enhanced oil recovery was not unconstitutional. Thus, argued Continental, the Association should be required to bring an "as-applied" challenge to S.B. 2344, rather than a facial challenge. The North Dakota Supreme Court disagreed, concluding that the portions of S.B. 2344 that the Court held were invalid were properly subject to a facial challenge.

## ORRI “Anti-Washout” Provision Not Binding on Lease Assignees

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In *Marquette ORRI Holdings, LLC v. Ascent Resources-Utica, LLC*, Ohio’s Seventh District Court of Appeals, in a case of first impression, addressed whether assignees of a leasehold interest were bound by the extension and renewal clause included in a prior assignment of an overriding royalty interest in the assigned lease.[1] The court held they were not.

The facts of the case are straightforward: Marquette Exploration assigned overriding royalty interests in oil and gas leases it had previously acquired to an affiliate, Marquette ORRI Holdings. Those assignments contained an “anti-washout” provision commonly referred to as an “extension and renewal” clause stating:

> The overriding royalty interest hereby assigned in a Lease shall be applicable and attach to all extensions, modifications, ratifications, amendments, renewals, top leases and/or new leases of such lease covering all or any portion of the lands and interests which are included in such lease as of the Effective Date, taken, contracted for or acquired by Assignor or an Affiliate of Assignor while such lease is in effect or within a period of two (2) years after the expiration or termination of such lease [*which later was amended to only one year*].

The Marquette entities sought to bind the overriding royalty interests to future assignees of the leases by including the following language in the override assignments:

> The terms and conditions of this Assignment shall constitute covenants running with the lands and shall be binding upon and inure to the benefit of the parties hereto and their heirs, devisees, representatives, successors, and assigns . . . and all references herein to Assignor and Assignee shall be deemed to include their respective heirs, devisees, representatives, successors and assigns . . . , whether or not so expressed.

The oil and gas leases were subsequently assigned to a number of producers (Producers), but terminated when their primary terms expired. Within a year of their expiration, Producers took new leases from the mineral owners and successfully began development activities on the properties. They did not, however, pay on the overriding royalty interests, believing that they had expired when the underlying leases had expired. The holders of the overriding royalty interests sued, and the trial court—on summary judgment—found that the interests expired when the original leases expired, as did any obligation under the extension

[1] 2022-Ohio-3786 (Oct. 19, 2022).

and renewal clause contained in the override assignments. On appeal, the Seventh District agreed.

According to the court, "the question here is whether [the Producers] are bound by the terms of the expired Marquette Leases, **specifically the extension and renewal clause**, to which they were not parties." (Emphasis added.) The answer is no. And the reason, according to the court, "is that [the Producers] were not parties to the leases that contained the above clauses. In this case, there was no privity of contract." As further explanation, the court stated, "Here [the Producers] were not parties to the original leases **or the overriding royalty interest assignments**. **And [Producers] never assumed these obligations**. Moreover . . . the overriding royalty interests could not be extended or renewed once the leases expired. After the leases expired, the associated overriding royalty interests also expired." (Emphasis added.) Thus, the court appears to have reasoned that because the Producers were not parties to the override assignments, and never assumed its obligations, they were not bound by its terms even when they were assigned the leases to which the overriding royalty interests applied.

The owners of the overriding royalties appealed this decision to the Ohio Supreme Court on November 9, 2022.[2] We will monitor the appeal and update you on the outcome.

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[2] See Case No. 22-1381.

# A Local Government in Louisiana Seeks to Block Carbon Capture and Storage; Prospective Operator Fights Back

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In an action reminiscent of the attempts by some local governments to block the use of hydraulic fracturing several years ago, two parishes[1] in Louisiana have enacted ordinances designed to place moratoria on any carbon capture and storage projects within their borders.

## Background—The State Grants Pore Space Leases

The State of Louisiana, through its State Mineral and Energy Board, has granted four leases granting the lessee the right to use pore spaces beneath certain state-owned lands for carbon capture and storage (CCS).[2] One of the leases was granted to Air Products Blue Energy, LLC in October 2022. This lease covers a large area, including some areas beneath Lake Maurepas in Livingston Parish. Air Products plans to make hydrogen from natural gas in a reaction that creates carbon dioxide as a by-product, and plans to capture the carbon dioxide and inject it into the subsurface for permanent sequestration. It is common to use the term "blue hydrogen" to refer to hydrogen that is made from natural gas in a process that is paired with carbon capture and storage. This is the apparent inspiration for the name "Air Products Blue Energy, LLC."

Many residents of Livingston Parish have expressed opposition to Air Products' proposed CCS project. The opponents have expressed various fears, including fears expressed by commercial fisherman that the storage of carbon dioxide in the subsurface or the preliminary work that is proposed in advance constructing a CCS facility might harm the productivity of Lake Maurepas for crabs and shrimp. Citizens in other parishes that contain areas covered by the leases granted by the State also have voiced opposition.

## Parish Councils Adopt Moratoria

On September 8, 2022, the Livingston Parish Council voted unanimously to enact Livingston Parish Ordinance No. 22-45, which imposes a one-year moratorium on the construction or operation of Class VI injection wells. Under the Safe Drinking Water Act's underground injection control (UIC) regulations, "Class VI" is the category of wells used for injecting carbon dioxide for permanent storage. The Council asserted that the 1-year moratorium would allow time for the Council to study the issue of CCS wells.

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[1] In Louisiana, the main sub-state units of government are called "parishes," rather than "counties."
[2] The leases are styled as "operating agreements." Under certain circumstances, the State Mineral and Energy Board can grant leases through direct negotiation, rather than through a bidding process. The leases granted through direct negotiations are called "operating agreements." *See* La. Rev. Stat. 30:209. Copies of the agreements are available at: http://www.dnr.louisiana.gov/index.cfm/page/168.

On October 13, 2022, the Livingston Parish Council voted, by a 5-to-2 margin, to adopt Livingston Parish Ordinance No. 22-49. It places a one-year moratorium on the construction or operation of Class V injection wells. Under the Safe Drinking Water Act's UIC regulations, "Class V" is a category that includes various types of wells, including monitoring wells or any other wells that do not fit under Classes I, II, III, IV, or VI. Air Products had planned on drilling Class V monitoring wells in order to study the subsurface geology in the area leased from the State for CCS. This would be part of Air Products' work in advance of actually constructing a CCS facility, and could be important for evaluating the safety of Air Products' plans.

The ordinance that the Parish Council adopted on October 13, 2022 also places a one-year moratorium on conducting any seismic surveys. Seismic surveys involve the use of sound waves to map subsurface structures. Air Products had obtained seismic permits from the State of Louisiana and had planned to use seismic surveys to study the subsurface geology of the area it leased from the State. The information obtained from seismic studies could assist Air Products in planning its proposed CCS project.

The council for nearby St. Helena Parish has adopted a moratorium on CCS projects, though no CCS project is yet scheduled for that parish.

## Lawsuit Challenging Livingston Parish Moratorium

Air Products Blue Energy responded by filing suit in the United States District Court for the Middle District of Louisiana on October 18, 2022. The suit is styled *Air Products Blue Energy, LLC v. Livingston Parish Government*, 3:22-cv-809. The case is assigned to Judge Shelly D. Dick. The assigned Magistrate Judge is Richard L. Bourgeois, Jr. In the suit, Air Products challenges Livingston Parish Ordinance No. 22-49, which places a 1-year moratorium on any Class V monitoring wells and seismic surveys. Air Products contends that the ordinance is preempted by both federal and state law.

Air Products seeks: (1) a declaratory judgment that the ordinance is preempted, to the extent it put a one-year moratorium on seismic surveys; (2) an injunction barring enforcement of the one-year moratorium on seismic surveys; (3) a declaratory judgment that the one-year moratorium on Class V wells is preempted; and (4) an injunction barring enforcement of the moratorium on Class V wells.

In support of its suit, Air Products notes that: the State of Louisiana granted a lease to Air Products for CCS and the area where Air Products intends to construct Class V wells and conduct seismic surveys are state-owned area; the Safe Drinking Water Act is a federal law that, together with its regulations, provides for a comprehensive regulation of subsurface injections, including injections using Class V wells; the Environmental Protection Agency has granted the State of Louisiana "primacy" to administer the Safe Drinking Water Act's Class V well regulations within the State, and Louisiana has its own injection well regulations; the State of Louisiana has exclusive authority to grant permits for seismic surveys on state-owned land,

and the State of Louisiana had granted a permit to Air Products to conduct a seismic survey.

As of the writing of this article, Livingston Parish had not yet filed an answer or other responsive pleading.

## Third Circuit Reaffirms Natural Gas Act's Exclusive-Review Framework

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The Third Circuit recently reaffirmed the Natural Gas Act's ("NGA") exclusive-review framework for adjudicating claims. In *Adorers of the Blood of Christ v. Transcontinental Gas Pipe Line Co. (Adorers II)*, No. 21-2898, 2022 WL 16754137 (3d Cir. Nov. 8, 2022), the Third Circuit affirmed the dismissal of a religious group's attempt to stop the construction of an interstate gas pipeline. The Third Circuit did so because the group failed to present their claims to the Federal Energy Regulatory Commission ("FERC") at any time during the years-long administrative proceedings, as prescribed by Congress under the NGA. More importantly, however, the Third Circuit concluded that aggrieved parties may not bring a Religious Freedom and Restoration Act ("RFRA") claim in federal district court to do an end run around the administrative process set forth in the NGA.

### Underlying Facts

The circumstances leading to the dispute date back to 2014. That year, Transcontinental Gas Pipe Line Company ("Transco") notified the Adorers of the Blood of Christ ("Adorers") that it was in the early stages of designing a new interstate gas pipeline. Part of that planned pipeline crossed the Adorers' property. But the Adorers informed Transco that the pipeline's proposed crossing would violate their religious beliefs. The Adorers also refused to entertain any offer by Transco to purchase a right-of-way through their property. As a result, Transco filed a formal application with FERC to obtain a certificate of public convenience and necessity.[1]

During the next thirty months, FERC published numerous notices, solicited public comments, and hosted open meetings as part of the pipeline approval process (as required under the NGA and FERC regulations). The Adorers, however, did not provide any comments to FERC, nor did they attend any meetings. FERC even contacted the Adorers directly but did not receive any response. The final pipeline route unsurprisingly crossed the Adorers' property, and Transco filed a complaint seeking rights-of-way in the Adorers' property necessary to build and operate the pipeline.

The district court granted Transco the requested rights-of-way, but the Adorers filed a lawsuit claiming that FERC and Transco violated their rights under RFRA: *Adorers I*.[2] They also sought an injunction permanently enjoining Transco from completing the pipeline. According to the Adorers, RFRA provided them with the right to raise a claim or defense for "appropriate relief" in federal court rather than proceed before FERC. The district court and the Third Circuit disagreed.

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[1] *See* 15 U.S.C. § 717f(c).
[2] *See Adorers of the Blood of Christ v. FERC (Adorers I)*, 897 F.3d 187 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1169 (2019).

The Third Circuit agreed with the district court that RFRA did not allow the Adorers to circumvent the NGA's procedures for challenging a FERC order. Moreover, because the Adorers had failed to seek FERC rehearing, the district court could not hear the Adorers' claims.

Not to be dissuaded, however, the Adorers filed a second, nearly identical lawsuit after Transco completed the pipeline: *Adorers II*. Naming Transco as the only defendant, the Adorers' second lawsuit argued that Transco's operation of the pipeline violated RFRA because it caused a substantial burden on the Adorers' "religious exercise."[3] Transco subsequently filed a motion to dismiss the Adorers' complaint for lack of subject matter jurisdiction, which the district court granted. According to the district court, the Adorers lacked jurisdiction to bring their claim because they did not participate in the administrative process set forth in the NGA.[4]

On appeal, the Third Circuit concluded that the district court did not err in concluding that it lacked subject matter jurisdiction. The Third Circuit found that the Adorers' RFRA claim was "an impermissible collateral attack" on Transco's FERC certificate.[5] Indeed, the Adorers' claim "could and should have been raised before FERC" under the NGA's review scheme.[6] For that reason, the Third Circuit reaffirmed Congress' decision to channel all such claims through the NGA's exclusive review framework. Through that framework, RFRA claims may be properly adjudicated.[7]

## Conclusion

The Third Circuit's *Adorers II* decision reaffirms that the NGA is the exclusive remedy for matters related to the construction of interstate natural gas pipelines. It also reaffirms that before an allegedly aggrieved party may petition an appropriate court of appeals for review of a FERC order, the aggrieved party must first seek rehearing before FERC. Moreover, an aggrieved party's failure to participate in that administrative process bars that party from later obtaining judicial review. Finally, an aggrieved party cannot allege a RFRA violation to assert their claim in federal district court rather than before FERC.

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[3] *See* 42 U.S.C. § 2000bb-1(c) (noting that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government").
[4] *Adorers II*, No. CV 20-5627, 2021 WL 4477677, at *4 (E.D. Pa. Sept. 30, 2021).
[5] *Adorers II*, 2022 WL 16754137, at *9.
[6] *Id.*
[7] *Id.* (noting that "there is no question that FERC can adjudicate RFRA claims . . ." (citation omitted)).

## Mississippi Supreme Court Holds Plaintiff in Oilfield Contamination Case Need Not Exhaust Administrative Remedies

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In *Tiger Production Co., LLC v. Pace*, members of the Pace family own a 103-acre tract of land in Wayne County, Mississippi. They filed suit in 2018 against Tiger Production Company, LLC and others (collectively, "Tiger Production") in state court, seeking compensatory and punitive damages.[1]

The Paces alleged that Tiger Production constructed a saltwater disposal line across their land without their consent, that the line had leaked, leading to contamination and the deaths of some of their cattle. The Paces also alleged that Tiger Production constructed a waste reserve pit on their land and that the presence of the pit interfered with their cattle business, resulting in a loss of income. The Paces' complaint sought relief on various legal theories, including negligence, trespass, and nuisance. Tiger Production filed a motion to dismiss based on the Paces' failure to exhaust administrative remedies before the Mississippi Oil & Gas Board. The lower court denied the motion. The Mississippi Supreme Court granted Tiger Production's motion for an interlocutory appeal.

On appeal, Tiger Production relied on *Chevron U.S.A. Inc. v. Smith*, a 2002 decision of the Mississippi Supreme Court.[2] In that case, landowners sought relief for alleged contamination arising from oil and gas production activities. A jury awarded the plaintiffs over $2.3 million, but the Mississippi Supreme Court reversed. The Court held in that case that surface owners seeking a cleanup of oilfield contamination must first exhaust administrative remedies before the Mississippi Oil & Gas Board. The Court reasoned in *Smith* that the Board has jurisdiction over oilfield cleanups, that the Board can require a cleanup that provides an adequate remedy, that a court cannot require a successful plaintiff to spend a damages award on decontaminating the property, and that "citizens of this state are better served by having an expert regulatory agency enforce the environmental statutes."[3] For these reasons, the *Smith* Court reversed the lower court's judgment and dismissed the plaintiffs' claims without prejudice for failure to exhaust administrative remedies.

In opposing Tiger Production's appeal, the Paces relied on *Petro Harvester Oil & Gas Co., LLC v. Baucum*,[4] a case that the Mississippi Supreme Court decided in 2021, after the Court granted Tiger Production's request for an interlocutory appeal. In *Baucum*, the plaintiffs, alleged that the defendants had dumped oilfield wastes on their land, and that this dumping had damaged the land and caused personal injuries to one of the plaintiffs. The plaintiffs based their claims on trespass, nuisance, and negligence. In support of their negligence claim, the

[1] *Tiger Production Co., LLC v. Pace*, --- So. 3d --- (Miss. 2022), 2022 WL 11555295.
[2] *See Chevron U.S.A. Inc. v. Smith*, 844 So. 2d 1145 (Miss. 2002)
[3] *Chevron U.S.A. Inc. v. Smith*, 844 So. 2d 1145, 1148 (Miss. 2002).
[4] *Petro Harvester Oil & Gas Co., LLC v. Baucum*, 323 So. 3d 1041 (Miss. 2021)

plaintiffs alleged that the defendants' conduct was negligent per se because they had violated Mississippi's oil and gas regulations.

The defendants moved to dismiss in *Baucum*, arguing that the plaintiffs had failed to exhaust their administrative remedies. The lower court issued a stay of the litigation. Later, the plaintiffs amended their complaint to omit any negligence *per se* claims. The court then lifted the stay as to the personal injury action, but kept the stay in place as to the property damage claim. The Mississippi Supreme Court allowed an interlocutory appeal by both the plaintiffs and defendants, with the defendants appealing the lifting of the stay as to the personal injury claim and the plaintiffs appealing the court's refusal to lift the stay as to the property damage claim.

The Court in *Baucum* noted that the Mississippi Oil & Gas Board can require a company to comply with the state's oil and gas laws, and that the Board can require a company to remediate any contamination that the company causes by a breach of the state's oil and gas laws. But the plaintiffs had dismissed their negligence *per se* claims and were no longer basing their claim on any alleged violation of the state's oil and gas laws. For this reason, the Board could not require a remediation. Further, the Board has no jurisdiction to award monetary damages for property damages or personal injury. Thus, the Board could not provide an adequate remedy for the plaintiffs' claims.

Further, because the *Baucum* plaintiffs were not basing their claim on alleged violation of oil and gas laws, the Board's special expertise was not required. In addition, the Court noted that the plaintiffs had not granted an oil and gas lease or a surface lease, had not entered a unit agreement, and had not consented to oil and gas activity on their land. Thus, the plaintiffs had done nothing to voluntarily consent to the Board's jurisdiction. For all these reasons, the Court held that the *Baucum* plaintiffs were not required to exhaust administrative remedies before pursuing their property damage or personal injury claims.

In *Tiger Production Co., LLC v. Pace*, the Court concluded that the Paces' case was similar to *Baucum* for three reasons. First, the Court explained that the Paces did not base their claims on an allegation that Tiger Production was violating Mississippi's oil and gas laws. Thus, it was not clear that the Mississippi Oil & Gas Board could order a remediation. Further, the Board could not award damages. Thus, it could not compensate the Paces for their alleged business losses or lost cattle.

Second, because the plaintiffs' claims were not based on allegations that the defendants had violated oil and gas laws, the Board's special expertise was not required. Finally, although Tiger Production alleged that the Paces had entered an oil and gas lease, the company never put a copy of the lease into the record. Thus, Tiger Production failed to show that the plaintiffs had done anything to subject themselves to the jurisdiction of the Board. For these reasons, the Court held that the Paces need not exhaust administrative remedies before pursuing their claims in court.

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