Institute for ENERGY LAW
THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

# OIL & GAS E-REPORT



ISSUE 1 MARCH 2025

# Editorial Board



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# Fifth Circuit Decides Louisiana Oilfield Anti-Indemnity Act Case

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In *Willis v. Barry Graham Oil Service, L.L.C.*, 122 F.4th 149 (5th Cir. 2024), the U.S. Fifth Circuit Court of Appeals held that a third party contractor can rely on the *Marcel* exception to the Louisiana Oilfield Anti-Indemnity Act (LOAIA) even if the contractor itself did not pay a *Marcel* premium, provided that the principal paid a *Marcel* premium to cover the contractor.

## Background

Barry Graham Oil Service, L.L.C. operates vessels in the Gulf of Mexico to service offshore oil and gas activities. Kilgore Marine Services, L.L.C. entered a Brokerage Agreement with Barry Graham to market Barry Graham's services. Kilgore then entered a Master Time Charter Agreement with Fieldwood Energy, L.L.C. to provide Fieldwood with vessel services for its "VR 261A" fixed platform in federal waters in the Gulf. Fieldwood also entered a Master Services Contract with Shamrock Management, L.L.C. for Shamrock to provide contract services on the platform.

Joe Willis, a Shamrock employee working on the platform, was injured while on the platform, helping guide a crane that was accepting deliveries from a Barry Graham vessel. Willis sued Barry Graham for his injuries. Barry Graham filed a third party claim against Shamrock and Aspen, which was one of Shamrock's insurers, seeking a contractual indemnity, defense, and insurance coverage. Barry Graham asserted that, the combination of the Brokerage Agreement, the Master Time Charter Agreement, and the Master Services Contract obligated Shamrock and Aspen to provide the indemnity, defense, and insurance coverage that Barry Graham sought in its third party complaint.

Section 13(f)(i) of the Master Services Contract required Shamrock, as "Contractor," to "indemnify, protect, defend, and hold harmless such other Third Party Contractor(s) (and any such Third Party Contractor Group) from and against any and all claims for (1) the injury, illness or death of any member of the Contractor Group." Under the Masters Services Contract, Shamrock and its employee, Willis, are part of the "Contractor Group." In addition, section 13(f)(ii) requires the Contractor to support its indemnity obligations by acquiring insurance "for the benefit of such Third Party Contractors(s) (and any such Third Party Contractor Group)." Further, under definitions contained in Section 13(a)(v) of the Master Services Contract, Kilgore qualifies as a "Third Party Contractor" and, critically, Barry Graham qualifies as part of a "Third Party Contractor Group."

The Fifth Circuit concluded that, under the terms of the Master Services Contract, Shamrock owed an indemnity to Barry Graham, and Aspen owed insurance coverage (that had been acquired by Shamrock) to Barry Graham. An important question became whether those obligations were enforceable under the Louisiana Oilfield Anti-Indemnity Act, found at Louisiana Revised Statute 9:2780.

## Law

The dispute was governed by the Outer Continental Shelf Lands Act because the dispute arose on an artificial structure attached to the seabed in federal waters of the continental shelf, and because federal maritime law did not apply by its own force. In private disputes that are governed by OCSLA, the law of the nearest state—in this case, Louisiana—applies as surrogate federal law as long as it is not inconsistent with federal law. Courts have repeatedly held that the LOAIA is not inconsistent with federal law. Therefore, it can apply in OCSLA disputes.

Under the LOAIA, contractual indemnities generally are unenforceable to the extent that they require the indemnitor to provide an indemnity, defense, or insurance to another party to protect that party against liability for personal injury or death claims that arise in oilfield operations. However, a jurisprudentially recognized exception is the *Marcel* exception. It provides that a contractual requirement for insurance is required if it requires a party to acquire insurance protection for a second party, but the second party pays any portion of the premium that is attributable to the coverage extended to that second party.

## Application to This Case

The dispute centered on whether Aspen's insurance coverage—that covered Barry Graham by the terms of the policy—would be rendered unenforceable by the LOAIA. The LOAIA can render insurance coverage unenforceable when a contract requires a party to acquire coverage to protect a second party against liability for personal injuries or deaths in the oilfield. However, under the *Marcel* exception, if the second party that would be entitled to coverage under the contracts has paid the portion of the premium attributable to covering that second party, the LOAIA does not render the coverage unenforceable.

Here, Barry Graham had not paid any portion of the premium. However, Fieldwood had paid the portion of Shamrock's premium attributable to providing coverage for Shamrock's protection of Barry Graham. Neither the United States Fifth Circuit nor the Louisiana Supreme Court has addressed whether the *Marcel* exception can apply when a third party contract such as Barry Graham does not pay the "*Marcel* premium," but the principal—here, Fieldwood—has done so. The Fifth Circuit concluded that, in such situations, the *Marcel* exception does apply. The court reasoned that the primary concern of LOAIA is to make sure that the party obligated to provide insurance, such as Shamrock, does not bear the cost. When a principal such as Fieldwood pays for the additional coverage, the logic of the *Marcel* exception applies and the purpose of the LOAIA is not subverted. Thus, the LOAIA did not preclude enforcement of the insurance obligations owed to Barry Graham by Shamrock and Aspen.

## Fact Issues Precluded Summary Judgment in Lease Maintenance Dispute

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In *J. Calhoun One, L.L.C. v. Jeems Bayou Production Corp.*, 2024 WL 5150456 (La. App. 2nd Cir.), the plaintiffs own land in DeSoto Parish that was included in a mineral lease granted in 1982. The plaintiffs sued several defendants in 2011, seeking a judgment recognizing that the lease had terminated. The plaintiffs' land includes about eighty acres in Section 35, Township 13 North, Range 13 West, DeSoto Parish, Louisiana (the "Section 35 Tract"), and about eighty acres in Section 36 (the "Section 36 Tract").

Paragraph 20 of the mineral lease states:

> This lease shall terminate at the end of the primary term, or within 60 days following cessation of drilling operation of [sic] such operations are commenced before the end of the primary term and thereafter contined [sic] as provided hereinabove, as to any acreage covered hereby that is not assigned to an oil well or wells on the leased premises, or included in any gas unit formed hereunder capable of producing gas in paying quantities.

The court characterized this provision as "contain[ing] a Pugh clause." The Section 35 Tract was included in a voluntary unit declared in 1985. The Section 36 Tract was included in a drilling unit created by the Office of Conservation in 1984.

The defendants filed a peremptory exception of prescription, arguing that the plaintiffs' claim was a personal action that was subject to ten-year liberative prescription and that the plaintiffs had not filed suit within ten years of an alleged breach of lease. The plaintiffs opposed the exception by arguing that they were not suing for a breach of the lease. Rather, they were arguing that the lease had terminated by its own terms. The district court denied the exception and the Louisiana Second Circuit affirmed, agreeing with the plaintiffs' characterization of their claims.

The plaintiffs filed a motion for partial summary judgment that the lease had terminated as to both the Section 35 Tract and the Section 36 Tract. The district court granted the motion.

On appeal, the Second Circuit first addressed the Section 35 Tract. The plaintiffs argued that the lease had terminated as to the Section 35 Tract because the lessee did not commence drilling activities before the end of the primary term. The defendants disputed that, offering evidence that they had begun work clearing the drill site before the end of the primary term. The defendants stated that this site work qualified as drilling operations under Louisiana jurisprudence, and that they had eventually drilled a productive unit well. Further, the defendants offered evidence that they had paused their work because of rain, and then held off on restarting work because of the lessors' request that they hold off until the land had dried. The district court granted the plaintiffs' motion, but the Second Circuit reversed. The Second Circuit stated that the defendants' evidence created a genuine issue of material fact regarding when drilling operations began, and this precluded summary judgment as to the Section 35 Tract.

The Second Circuit then addressed the Section 36 Tract. The plaintiffs asserted that the lease had terminated as to the Section 36 Tract because it was undisputed that there had been three months-long gaps in production. The defendants presented evidence that they timely began reworking the wells in Section 36 after they ceased production and that these reworking operations restored production. The defendants argued that this was sufficient to maintain the lease. The Second Circuit reversed the district court's grant of partial summary judgment in favor of the plaintiffs, holding that an issue of material fact existed regarding the reworking operations, and this precluded summary judgment as to the Section 36 Tract.

## Subsequent Purchaser Doctrine Bars Some Claims, but Others Survive

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In *Levert v. Union Texas International Corp.*, 2024 WL 5199152 (La. App. 1st Cir.), the "ARCO Defendants" were companies whose predecessor had acquired a lease in 1981 that authorized use of certain land in West Baton Rouge Parish for injection disposal of produced water. The predecessor conducted operations pursuant to the lease until 1987, when it assigned the lease to another company. Levert LLC acquired an ownership interest in the land several years after that, in 1998.

Levert LLC and other plaintiffs filed legacy litigation claims (oilfield contamination claim)[1] against the ARCO Defendants in state court in West Baton Rouge Parish, alleging that the defendants' oilfield operations had resulted in spills or leaks that contaminated the property. The plaintiffs' petition purported to base the claims on several different legal theories.

The ARCO defendants filed a motion for summary judgment, seeking dismissal of all Levert LLC's claims based on the subsequent-purchaser doctrine. Under this doctrine, if a person sells property that was damaged prior to the sale, any claim against any third persons who are responsible for that damage belong to the person who owned the property at the time it was damaged (presumably, the seller), rather than the purchaser of the property, unless the seller assigns the damages claims to the purchaser.[2]

In *Levert*, the First Circuit affirmed the dismissal of the plaintiff's claim for damages that allegedly occurred prior to the Levert LLC's acquisition of the property at issue. The First Circuit reasoned that those claims were barred by the subsequent purchaser doctrine. However, the First Circuit reversed the dismissal as to claims for damages that allegedly occurred after Levert LLC acquired its ownership interest in the property. Neither the ARCO Defendants nor their predecessor conducted any operations after Levert LLC acquired its interest in the property. Further, they had not held any interest in the 1981 lease after Levert LLC acquired its interest. However, if a party to a lease (or other contract) assigns its

[1] The Louisiana Supreme Court has explained that, in Louisiana, oilfield contamination lawsuits often are called "legacy litigation" because they typically arise from operations conducted many decades ago that left an unwanted "legacy" of actual or alleged contamination. *See Marin v. Exxon Mobil Corporation*, 48 So. 3d 234, 238, n.1 (La. 2010) (citing Loulan Pitre, Jr., *"Legacy Litigation" and Act 312 of 2006*, 20 Tul. Envt. L.J. 347, 348 (Summer 2007)).

[2] This doctrine was announced by the Louisiana Supreme Court in *Eagle Pipe and Supply, Inc, v. Amerada Hess Corp.*, 79 So. 3d 246 (La. 2011). The doctrine follows from the fact that a damages claim is considered a personal action, rather than a real action.

interest under the lease to a third person, the assignor remains solidarily liable[3] with the assignee for all obligations under the lease, absent a release by the counterparty to the lease.[4] Here, the lessor had not released, the ARCO Defendants or their predecessor, so they remained liable for any breaches of the lease, even if those breaches occurred after the predecessor no longer held an interest under the lease.

As for the damages that occurred prior to Levert LLC's acquisition of its interest in the property, Levert LLC argued that it could assert a claim, notwithstanding the subsequent purchaser doctrine, because the lease contained a third party beneficiary provision—often called a *stipulation pour autrui* under the civil law, and that Levert was a third party beneficiary of the lessee's obligation to avoid causing undue damage to the property. The Louisiana First Circuit rejected Levert LLC's argument that the lease stipulated a benefit for third parties.

[3] Louisiana's concept of "solidary liability" is similar to the common law's concept of joint and several liability. *Touchard v. Williams*, 617 So. 2d 885, 889-90 (La. 1993).
[4] La. Civ. Code art. 1821.

## Federal District Court Strikes Class Allegations in North Dakota Royalties Dispute

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In *Hystad Ceynar Minerals, LLC v. XTO Energy, Inc.*, 2025 WL 522550 (D. N.D.), Hystad Ceynar Minerals, LLC (Hystad) sued XTO Energy, Inc. (XTO) in early 2023 in state court, asserting a claim on behalf of itself and similarly situated royalty owners. XTO removed the case to federal court based on diversity jurisdiction. In October 2024, XTO filed a motion to strike Hystad's class allegations.

### Background

Hystad alleged that it owns oil and gas royalty interests in North Dakota, and that XTO made untimely payments of royalties that it owed to Hystad and royalty owners for oil and gas production from XTO's wells. Further, alleged Hystad, XTO failed to pay the 18% interest on untimely payments as required by N.D.C.C. § 47-16-39.1 in certain situations. That statute provides in part:

> If the operator under an oil and gas lease fails to pay oil or gas royalties to the mineral owner or the mineral owner's assignee within one hundred fifty days after oil or gas produced under the lease is marketed and cancellation of the lease is not sought or if the operator fails to pay oil or gas royalties to an unleased mineral interest owner within one hundred fifty days after oil or gas production is marketed from the unleased mineral interest owner's mineral interest, the operator thereafter shall pay interest on the unpaid royalties, without the requirement that the mineral owner or the mineral owner's assignee request the payment of interest, at the rate of eighteen percent per annum until paid.[1]

Hystad proposed that it represent a class that, but for certain exceptions, would be defined as:

> All persons and entities owning mineral interests in North Dakota wells operated by XTO who, at any time since November 8, 2016, have: (1) received one or more royalty payments or other mineral interest payments from XTO on a date which was more than one

[1] The first paragraph of N.D.C.C. § 47-16-39.1 states that the statute "does not apply if mineral owners or their assignees elect to take their proportionate share of production in kind, in the event of a dispute of title existing that would affect distribution of royalty payments, or if a mineral owner cannot be located after reasonable inquiry by the operator; however, the operator shall make royalty payments to those mineral owners whose title and ownership interest is not in dispute."

The second paragraph of the statute states that N.D.C.C. § 47-16-39.1 "does not apply to obligations to pay oil and gas royalties under an oil and gas lease on minerals owned or managed by the board of university and school lands."

> hundred fifty days after the oil or gas produced by XTO from a North Dakota well subject to the mineral owner's interest was marketed; and (2) as to any such payment, XTO did not pay the eighteen percent per annum interest required under N.D.C.C. § 47-16-39.1.

The exceptions that Hystad proposed to the class definition were designed to correspond to the exceptions that N.D.C.C. § 47-16-39.1 provides to is imposition of an 18% interest requirement.[2]

## The Court's Analysis

The district court noted that, in federal court, class actions are governed by Federal Rule of Civil Procedure 23. Rule 23(a) establishes certain requirements for a class action, including a "typicality" requirement. Specifically, "the claims or defenses" of the proposed class representatives must be "typical of the claims or defenses of the class" members. Courts have held that, when a common legal theory would apply to all claims, some factual variation between claims does not prevent the typicality requirement from being satisfied, but if individualized factual inquiry will be necessary to determine whether a violation of class members' rights have been violated, the existence of a common legal theory is not sufficient to satisfy the typicality requirement.

The court stated that individualized inquiry would be necessary to determine whether a member of the proposed class owns an interest to which N.D.C.C. § 47-16-39.1 applies. Further, individualized inquiry would be necessary regarding the date oil or gas attributable to a class member's interest was marketed, when payment was made to the class member, and whether one of the exceptions to N.D.C.C. § 47-16-39.1 applied. For this reason, the court concluded that the typicality requirement was not met. Further, the court noted that it had reached the same conclusion in three "substantively similar" and relatively recent cases.[3]

Further, Hystad sought to assert a class action under Rule 23(b)(3). Under Rule 23(b)(3), a class action may be maintained if Rule 23(a) is satisfied *and* "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Thus, Rule 23(b)(3) establishes a "predominance" requirement, which

[2] Hystad's proposed class definition stated: "Excluded from the Class are: (1) XTO; (2) the United States of America; (3) persons who own mineral interests only in wells operated by XTO in North Dakota which are managed by the board of university and school lands; (4) persons who have been members of the board of university and school lands at any time since November 8, 2016; (5) mineral owners who elected to take their proportionate share of production from an XTO operated well in kind; (6) mineral owners who did not receive royalties from XTO because such mineral owners could not be located after reasonable inquiry; (7) mineral owners to whom XTO furnished with written notice of a title dispute pursuant to N.D.C.C. § 47-16-39.4, and whose payments were suspended as a result of such title dispute; and (8) overriding royalty interests and working interests."

[3] The court cited *Hystad Ceynar Mins., LLC v. Whiting Oil & Gas Corp.*, 2023 WL 3467461 (D. N.D. May 15, 2023), *Colton v. Lime Rock Res. GP V, L.P.*, 2024 WL 1637480 (D. N.D. Apr. 16, 2024), and *Penman & Adelante Oil & Gas, LLC v. Hess Bakken Invs. II, LLC*, 2024 WL 3792011 (D. N.D. Aug. 13, 2024).

the court described as involving a qualitative analysis, rather than a quantitative analysis. For the same reasons that the court concluded that Hystad's proposed class action failed to satisfy the typicality requirement, the court reasoned that the proposed class action failed to satisfy Rule 23(b)(3)'s predominance requirement. And again, the court noted that in three recent cases it reached a similar conclusion.[4]

For these reasons, the court granted XTO's motion to strike Hystad's class allegations.

[4] The court cited the same three cases as are listed in the immediate prior footnote.

## Ohio Appellate Court Holds That NPRI on Production from "Future Wells Drilled On Premises" Is Not Limited to Wells With Surface Location on the Property

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Recently, in *Min. Dev., Inc. v. SWN Prod. (Ohio), LLC*, 2025-Ohio-395, Ohio's Seventh District Court of Appeals was tasked with interpreting the reservation of a non-participating royalty interest (NPRI) "from future wells drilled on these premises." And in particular, the court was asked to determine whether the NPRI reservation applied to only those wells with a surface location on the lands burdened by the NPRI or, alternatively, whether it applied also to wells that traversed the subsurface of the burdened lands.

As background, in 1918, John Steiding conveyed 82 acres in Monroe County, Ohio (Property), "reserving therefrom all the oil and gas now or hereafter produced from the wells are already drilled and 1/16 of oil and gas or 1/2 of the Royalty from future wells drilled on the premises" (Steiding Royalty). The Appellee is the successor-in-interest to the Steiding Royalty. In 1996, the Appellant acquired the Property and other lands. In 2012, the Appellant entered into an oil and gas lease covering the Property and other lands owned by the Appellant (2012 Lease), which included a pooling and unitization clause. Portions of the lease were pooled within two units, each containing two horizontal wells drilled from the same well site located on the surface of neighboring lands not covered by the 2012 Lease. Three of the four horizontal wells were drilled beneath the Property. Despite claiming it was entitled to 1/2 of the oil and gas royalty, Appellee was paid only 1/16 of the 20% royalty interest payable under the 2012 Lease.

In 2023, the Appellee filed a lawsuit against the Appellant and the lessees seeking, among other things, to quiet title to the Steiding Royalty and obtain a declaratory judgment vesting a 1/2 floating royalty interest in the Appellee. The Appellant filed a counterclaim seeking to quiet title to its interest in the Property and obtain a declaratory judgment that the Steiding Royalty did not include royalties from wells drilled on the surface of lands other than the Property, regardless of whether the horizontal portion of the well traversed the subsurface of the Property. In response, the Appellee argued all four wells were located "on" the Property under the plain language of the reservation and pointed, in part, to the effects of the pooling and unitization clause in the 2012 Lease. After competing motions for summary judgment were filed, the trial court granted summary judgment in favor of the Appellee. The trial court interpreted the Steiding Royalty to be a 1/2 floating royalty interest and rejected the Appellant's argument that Appellee was entitled to zero royalties because no wellbore had been drilled on the surface of the Property. Appellant filed a timely appeal.

On appeal, the court rejected the Appellant's argument that the language "from future wells drilled on these premises" would plainly not apply to a well with a wellbore located "on" the surface of a different premises. The court of appeals found that the word "on" can encompass more than "the top surface of [something]," citing multiple definitions of the word “on” as well as a 1927 case where the Supreme Court of Ohio used a similar phrase (i.e., “on the land of another”) in the context of underground entry into a property. *Brady v. Stafford*, 115 Ohio St. 67. Alternatively, the Appellant argued that extrinsic evidence shows the deed did not intend to cover such wells as horizontal well technology did not exist at the time of the reservation. This argument too was rejected, as the court of appeals found the fact that only vertical wells were in use at the time of the reservation did not give the word “on” special meaning or suggest that the grantor was *not* reserving the royalty interest for all production from the land, including the subsurface. In fact, the court of appeals concluded that the unreasonable construction would be to read the phrase “wells drilled on the premises” as *only* including a well that originated from a wellbore commencing on the surface of the premises. The court of appeals pointed out that, under such a construction, landowners could enter into a pooling agreement and retain 100% of the royalty payments by causing all surface activities to occur outside their lands.

Finally, the court of appeals held the Steiding Royalty applies to the fourth well, even though it does not traverse the subsurface of the Property. In support of its holding, the court of appeals pointed to the pooling clause in the 2012 Lease in which the Appellant agreed that wells in the unit would be deemed to be wells on the Property even if the wells were not located on the Property. The Appellant argued that the 2012 Lease was not relevant to the interpretation of 1918 reservation, but the court of appeals found that the 2012 Lease provided evidence of what Appellant agreed would be considered a well drilled on the Property. Additionally, and while not at issue in this case, the court of appeals observed that the states are split on whether a NPRI owner must consent to or ratify a pooling and unitization clause in a lease executed by the landowner with the executive right. However, the court of appeals held that, under either theory, the NPRI is not excluded from royalties where the landowner signs a lease under which pooling and unitization thereafter occurs causing horizontal wells to be drilled through part of the unit, even if the horizontal well does not run through the property burdened by the NPRI.

# Double or Nothing: Texas Supreme Court Clarifies Effect of Double Payment Under Lease Savings Clause

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In a per curiam decision in *Scout Energy Mgmt., LLC, et al. v. Taylor Props.*, No. 23-1014, 2024 Tex. LEXIS 1169 (Dec. 31, 2024), the Supreme Court of Texas addressed whether a lessee's payments pursuant to a savings clause in oil and gas leases over two successive months secured two years of constructive production. The savings clause of the oil and gas leases provided that "[W]here gas from a well producing gas only is not sold or used, Lessee may pay as royalty $50.00 per well per year, and upon such payment it will be considered that gas is being produced within the meaning of [the habendum clause] . . . ."

The lessor claimed that a notation on the second payment reset the period of constructive production under the savings clause such that the leases were continued for only a one-year period from the date of the second payment. When the successor lessee attempted to issue another payment under the savings clause, the lessor sued for trespass and requested a declaration that the leases had terminated. The trial court found the savings clause ambiguous but nonetheless ruled in the lessee's favor that each payment served as constructive production for a one-year period and the leases had not terminated.

The court of appeals construed the savings clause as unambiguous but agreed with the trial court's analysis of the savings clause—each payment entitled the lessee to a full year of constructive production, and payments for future years could be made without cutting short the period secured by a prior payment. However, the court of appeals held that the leases terminated one year from the date of the second payment because a notation on the second issued payment secured constructive production for a new 12-month period designated by the payment.

In reversing the court of appeals' decision, the Texas Supreme Court did not regard the notation on the second savings clause payment as evidencing an intent by the parties to modify or amend the savings clause. The notations on the payments were too vague to be considered a lease modification that reset the deadline for future payments, and to construe the second payment in such a manner would penalize the lessee for what the Texas Supreme Court regarded as sufficient payment for two years of constructive production under the leases. As a

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result, the Texas Supreme Court reversed the court of appeals' judgment and reinstated the trial court's take-nothing judgment.

# Texas Supreme Court Decides NPRI Dispute Involving Ratification and Stipulation Arguments

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In *ConocoPhillips Company v. Hahn*, 2024 WL 5249570 (Tex. 2024), the Texas Supreme Court resolved a dispute relating to a fixed, non-participating royalty interest (NPRI). In resolving the dispute, the Court addressed arguments that the NPRI was converted from fixed to floating either by the NPRI owner's ratification of a mineral lease or by a stipulation regarding the interest. The Court held that ratification of the lease did not convert the NPRI, but that the stipulation did.

## Background

Kenneth Hahn and his brother owned the surface estate of an approximately 74-acre tract as co-tenants. Hahn, his brother, and two other siblings each owned an undivided one-fourth interest in the severed mineral estate for the tract. In 2002, Hahn and his brother recorded two partition deeds that resulted in Kenneth owning "Tract A," which was about 37 acres, and his brother owning "Tract B," which also was about 37 acres.

Later in 2002, Kenneth executed a deed conveying Tract A to William and Lucille Gips, but reserving for Kenneth a non-participating royalty interest that the appellate court interpreted as a fixed, one-eighth NPRI (this interpretation was not challenged when the case went to the Texas Supreme Court, so the Court accepted that interpretation) that had a fifteen year term.

In 2010, the Gipses granted an oil, gas, and mineral lease (the "Gips Lease") to ConocoPhillips covering Tract A for a one-fourth royalty. The Gips Lease contained a pooling clause that authorized ConocoPhillips to commit the lease to a pooled unit. The pooling clause required ConocoPhillips to obtain a ratification of the lease from "all holders of outstanding royalty, if any."

In early 2011, Hahn and the Gipses executed a document styled "Ratification of Oil, Gas and Mineral Lease." The agreement stated in part:

> NOW, THEREFORE, in consideration of the premises and other valuable consideration, the receipt of which is hereby acknowledged, I, Kenneth Hahn, do hereby ADOPT, RATIFY, and CONFIRM the Lease in all of its terms and provisions, and do hereby LEASE, GRANT, DEMISE and LET unto [ConocoPhillips], its successors and assigns, subject to and in accordance with all of the terms and provisions of the Lease as fully and completely as if I had originally been named as Lessor in the Lease and had executed, acknowledged and delivered the same. And I do hereby agree and declare that the Lease in all of its terms and provisions

> are binding on me and is a valid and subsisting oil, gas and mineral lease.

In late 2011, Hahn and the Gipses signed a "Stipulation of Interest." It stated that the parties "wish to stipulate for the record the respective royalty interest owned by Kenneth Hahn in and to the Subject Lands." The Stipulation stated in part:

> for and in consideration of the premises, and other valuable considerations, the receipt and sufficiency of which are hereby acknowledged, each of the undersigned does hereby acknowledge, stipulate and agree that it was the intent of the parties in the deed from Kenneth Hahn to William Paul Gips and Lucille Fay Gips, recorded in Volume 121, Page 625, Official Public Records, DeWitt County, Texas, that the interest reserved was a one-eighth (1/8) "of royalty" for a term of 15 years from June 9, 2003.

Later, after ConocoPhillips established production, the parties disputed whether Hahn was entitled to an NPRI equal to a fixed one-eighth of production or a floating one-eighth of whatever lease royalty the Gipses were entitled to receive. After significant lower court proceedings, including two appeals, the case was heard by the Texas Supreme Court.

At the Texas Supreme Court, ConocoPhillips argued that Hahn's ratification of the Gips Lease had converted his NPRI from a fixed royalty to a floating royalty. The Texas Supreme Court disagreed. The Court explained that, when an NPRI owner ratifies a mineral lease, that NPRI owner becomes bound by a provision of the lease that can apply to the NRPI interest. For example, an NPRI interest can be pooled. Thus, because Hahn ratified the Gips Lease, he would be bound by the Lease's pooling clause. However, a mineral lease has no effect on a fixed NPRI that existed prior to the lease. Thus, Hahn's interest was a fixed, one-eighth share of production that was not affected by the Gips Lease.

The Court then considered the Stipulation. The critical language of the Stipulation provided that Hahn's reserved interest "as a one-eighth (1/8) 'of royalty' for a term of 15 years." Thus, Hahn stipulated that his NPRI was an "of royalty," which would seem to indicate his royalty was a floating one-eighth of the lease royalty payable under the Gips Lease, not a fixed one-eighth of total production. The appellate court concluded that this stipulation did not convert Hahn's royalty from a fixed royalty to a floating royalty because there was no ambiguity in Hahn's original reservation of the fixed royalty.

But the Texas Supreme Court, citing *Concho Resources, Inc. v. Ellison*, 627 S.W.3d 226 (Tex. 2021), held that property owners' agreements or stipulations regarding their respective rights, when such agreements or stipulations are supported by consideration, can be enforced against the parties even if the parties' agreement or stipulation does not resolve some ambiguous contract or deed. The

Court rejected the appellate court's conclusion that had concluded that *Concho Resources*, which involved a boundary dispute, should only apply if there was an ambiguity to be resolved. The Texas Supreme Court stated that such a limitation on the effect of stipulations would discourage parties from settling their differences regarding property interests because parties would not know whether the settlement was enforceable until a court decided whether the settlement was resolving an ambiguity.

Here, when Hahn signed the Stipulation that his reserved NPRI was a one-eighth "of royalty" NPRI, as opposed to being a one-eighth of production NPRI, the Stipulation converted his NPRI to a floating NPRI for one-eighth of the lease royalty.

# EPA Issues Final Rule to Grant Primacy to West Virginia for Class VI Wells

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On January 17, 2025, the U.S. Environmental Protection Agency (EPA) issued a final rule under the Safe Drinking Water Act (SDWA)[1] to grant primacy to West Viriginia for Class VI wells.[2] Class VI wells are injection wells used for the disposal of $CO_2$ (carbon dioxide) in carbon capture and storage (CCS).[3] The final rule had not yet been published by the time Donald Trump was inaugurated on January 20, 2025, but new EPA Administrator Lee M. Zeldin signed the final rule on February 18, 2025, signifying the Trump administration's intent to follow through on publishing the final rule in the Federal Register. The grant of primacy will be effective thirty days after the rule is published in the Federal Register.[4]

## Background

Congress enacted the Safe Drinking Water Act ("SWDA") in 1974 "to assure that water supply systems serving the public meet minimum national standards for protection of public health."[5] The SDWA protects drinking water systems in several ways. Part C of the SDWA seeks to protect underground sources of drinking water ("USDW") by directing the EPA to develop regulations for State underground injection control ("UIC") regulations, including "minimum requirements for effective programs to prevent underground injection which endangers drinking water sources."[6]

Federal regulations promulgated to implement the SDWA establish six classes of injection wells and provide regulations for each class.[7] The original

[1] The Safe Drinking Water Act is found at 42 U.S.C. §§ 300f *et seq.*
[2] A pre-publication of the final rule is available here: https://www.epa.gov/system/files/documents/2025-01/prepublication-12000-02-ow_frn_wv-uic-class-vi_final_20250117_admin-002.pdf.
[3] 40 C.F.R. § 144.6(f).
[4] See pre-publication draft of final rule, available at: https://www.epa.gov/system/files/documents/2025-01/prepublication-12000-02-ow_frn_wv-uic-class-vi_final_20250117_admin-002.pdf.
[5] H.R. Rep. No. 93-1185 (1974).
[6] 42 U.S.C. § 300h(a)-(b).
[7] 40 C.F.R. § 144.6.

federal UIC regulations recognized five classes of wells—Classes I though V[8]—but Class VI was added in 2010 to regulate wells used to inject carbon dioxide for CCS.[9]

## Primacy

Part C of the SDWA[10] provides two processes for States to seek primary enforcement authority—commonly called "primacy"—to implement and enforce the SDWA within their respective borders. When primacy for UIC regulations is granted, it is granted on a class-by-class basis. Thus, a state can receive primacy for one or more classes of injection wells, without receiving primacy for all classes. Indeed, a majority of states have primacy for some classes of injection wells, without having primacy for all classes.

Section 1422 of the SDWA (42 U.S.C. § 300h-1) provides the first process by which a state may obtain primacy for a class of wells. Under this process, a state can obtain primacy for a particular class of wells by demonstrating to the EPA that the state has implemented UIC rules for that class of wells that meet the federal regulatory standard for protecting USDWs. This Section 1422 process can be used to obtain primacy for any class of UIC wells. Pursuant to Section 1422, West Virginia obtained primacy for Class I, III, IV, and V wells in 1983.[11]

The second process for obtaining primacy is found in Section 1425 of the SDWA (42 U.S.C. § 300h-4). Section 1425 provides an alternative process that can be used to obtain primacy for Class II wells, though a state can use the Section 1422 process to obtain primacy for Class II wells if the state wishes. The alternative Section 1425 process cannot be used to obtain primacy for any class of UIC wells other than Class II. In 1982, at the time West Virginia was obtaining primacy for Classes I, III, IV, and V pursuant to Section 1422, the State obtained primacy for Class II wells pursuant to Section 1425.[12]

Of course, West Virginia did not obtain primacy for Class VI wells in 1983, at the time that it obtained primacy for Classes I through V, because Class VI was not created until 2010.[13]

[8] Class I wells are wells used to inject wastes "beneath the lowermost formation containing, within one-quarter mile of the well bore, an underground source of drinking water." 40 C.F.R. § 144.6(a). Class II wells are wells in which fluids are injected for disposal of produced water and certain wastewater associated with oil and gas production, "enhanced recovery of oil or natural gas," or for storage of liquid hydrocarbons. 40 C.F.R. § 144.6(b). Class III wells are wells associated with certain mining activities, such as solution mining. 40 C.F.R. § 144.6(c). Class IV wells are wells used for injection of wastes into a formation that contains an underground source of drinking water within one-quarter mile of the well. 40 C.F.R. § 144.6(d). Class IV wells were banned in 1984. Class V wells are injection wells that do not fit into any other category of injection well. 40 C.F.R. § 144.6(e).

[9] 75 Fed. Reg. 77230 (Dec. 10, 2010).

[10] Part C of the SDWA is found at 42 U.S.C. §§ 300h *et seq.*

[11] See 48 Fed. Reg. 55127 (Dec. 9, 1983).

[12] 48 Fed. Reg. 55127 (Dec. 9, 1983).

[13] 75 Fed. Reg. 77230 (Dec. 10, 2010). The federal regulations specific to Class VI wells are found at 40 C.F.R. §§ 146.81 through 146.95.

## West Virginia's Primacy Application

In 2022, West Virginia enacted H.B. 4491, which amends certain existing statutes and adds new statutes to govern carbon capture and storage.[14] The statutes are found at West Virginia Code Chapter 22 (Environmental Resources), Article 11A (Carbon Dioxide Sequestration).[15]

On May 1, 2024, West Virginia submitted its Class VI primacy application to the EPA. The application included various components required for a Class VI application. In West Virginia's case, these included a description of the State's Class VI UIC program, copies of all applicable rules and all forms, a statement from the Attorney General regarding authority to submit the application, a summary of West Virginia's public participation activities, an amendment to the memorandum of agreement between West Virginia and EPA's Region 3 office regarding West Virginia's UIC program, an interagency memorandum of agreement between the West Virginia Department of Environmental Protection and the West Virginia Geological and Economic Survey, and an interagency agreement between the WVDEP and the West Virginia Department of Health.

The EPA conducted a comprehensive technical and legal evaluation of West Virginia's Class VI application. On November 27, 2024, EPA published a proposed rule to grant primacy to West Virginia.[16] The period for public comment ended on December 30, 2024.

## EPA Grants Primacy

On January 17, 2024, just three days before the end of the Biden administration, the EPA issued a final rule granting primacy to West Virginia for Class VI wells, with the grant of authority to be effective thirty days after the rule is published in the Federal Register. The final rule states that "the EPA is approving West Virginia's application because the EPA has determined that the application meets all applicable requirements for approval … and the State is capable of administering a Class VI program in a manner consistent with the terms and purposes of SDWA and applicable UIC regulations." The final rule grants the West Virginia Department of Environmental Protection the authority to oversee the State's Class VI UIC program, except on Indian lands. The EPA will remain the permitting authority as to Indian lands.

New EPA Administrator Lee M. Zeldin signed the final rule on February 18, 2025, signifying the new administration's intent to follow through on publishing the rule in the Federal Register. The rule will be effective thirty days after it is published in the Federal Register.

[14] Information on H.B. 4491 of 2022 appears on the West Virginia legislature's website at: https://legiscan.com/WV/bill/HB4491/2022.
[15] West Virginia Code §§ 22-11A-1 through 22-11A-9.
[16] 89 Fed. Reg. 93538 (Nov. 27, 2024).

Supporters of primacy have expressed hope that state regulators will be able to process Class VI applications more quickly than the federal government has. The EPA has stated a goal of processing Class VI permit applications in 24 months, but there has been a backlog of applications and the EPA does not appear to be meeting its goal of processing applications within 24 months.

## Wyoming Court Holds That COPAS Time Limit for Adjustments Applied

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In *Chesapeake Exploration, LLC v. Morton Production Co.*, 2025 WL 352648 (Wyo. 2025), the Wyoming Supreme Court heard a dispute regarding whether the 1985 COPAS Form's 24-month deadline for adjustments to billings applied when the operator sought to adjust a past billing based on an adjustment to a non-operating party's working interest. The Court held that the twenty-four-month deadline applied.

### Background

In 2008, Chesapeake Exploration, LLC and Morton Production Company, LLC entered a joint operating agreement to develop certain oil and gas leases in Converse County, Wyoming. Chesapeake was designated as operator and Morton was a non-operator working interest owner under the agreement. Later, the contract area was unitized, and in 2010 both Chesapeake and Morton executed a United Operating Agreement (UOA). Morton agreed to participate in a unit well that Chesapeake subsequently drilled, and the well began producing.

Morton paid its participation interest share of joint interest billings and received its share of proceeds from production. Chesapeake initially designated Morton as having a 5.712364% working interest, but upward in 2012 when some entities elected not to participate in the unit. In 2013, when the size of the drilling block was reduced, Chesapeake adjusted Morton's ownership downward to 1.244638%—presumably, a disproportionate share of Morton's working interest was in the area that was taken out of the drilling block—and reimbursed Morton more than $550,000 because Morton had paid past billings based on a 6.613912% interest.

In 2017, Chesapeake adjusted Morton's participating interest to 6.304085% (the court stated that the record did not explain why this adjustment occurred). After doing so, Chesapeake sent Morton an invoice for its increased share of costs, and in 2018, Chesapeake issued a demand that Morton owed $695,000 in outstanding costs associated with Morton's adjusted working interest. Morton objected, relying on language in the 1985 COPAS Form. After Morton declined to pay, Chesapeake suspended production payments to Morton. Morton sued, asserting claims for breach of the parties' operating agreement and breach of the Wyoming Royalty Payment Act (Wyo. Stat. § 30-5-301 *et seq.*), which can require an operator to pay 18% interest on non-payments or untimely payments in certain circumstances.

## 1985 COPAS Form

The Council of Petroleum Accounting Societies (COPAS) publishes accounting procedures that parties can adopt as attachments to joint operating agreements (JOAs). These COPAS forms provide more detail about various accounting issues than is contained in the body of most JOAs. Paragraph I(4) of the 1985 COPAS form generally imposes a two-year time limit on parties—either the operator or a non-operator—from requesting an adjustment of any past bill. This provision states:

> Payment of any such bills shall not prejudice the right of any Non-Operator to protest or question the correctness thereof provided, however, all bills and statements rendered to Non-Operators by Operator during any calendar year shall conclusively be presumed to be true and correct after twenty-four (24) months following the end of any such calendar year, unless within the said twenty-four (24) month period a Non-Operator takes written exception thereto and makes claim on Operator for adjustment. No adjustment favorable to Operator shall be made unless it is made within the same prescribed period. The provisions of this paragraph shall not prevent adjustments resulting from a physical inventory of Controllable Material as provided for in Section V.

Chesapeake contended that the 24-month time limit for requesting adjustments to bills does not apply to adjustments based on a change in a party's working interest or participation interest. In support of this argument, Chesapeake offered materials showing that the 1995 COPAS Form and the 2005 COPAS Form expressly provided that adjustments based on changes to working interest fractions were not subject to the 24-month time limit. Chesapeake offered these as extrinsic evidence of the meaning of the 24-month limit in paragraph I(4) of the 1985 COPAS Form, which Chesapeake contended was ambiguous. Chesapeake also noted that the unit operating agreement did not place any time limit on adjustments to working interest fractions.

The court, however, concluded that paragraph I(4) of the 1985 COPAS Form is unambiguous and that the 24-month limit on seeking adjustments to past billings applies even if the adjustment to past billings is premised on a change in a party's working interest. Thus, extrinsic evidence was inappropriate. Further, the court noted that the unit operating agreement provided that costs would be borne by parties, based on their participation interest, "determined as of the time the Costs are incurred." The court reasoned that Chesapeake's argument was inconsistent with this language in the unit operating agreement. Accordingly, Chesapeake could not require Morton to pay an increased share of the older billings.

As for Morton's WPRA claim, Chesapeake argued that it was not liable under the WPRA because there had been a genuine dispute regarding whether Chesapeake owed additional production payments to Morton. The court, however, noted that the WPRA requires an operator to place disputed funds in escrow, and

Chesapeake had not done so.  Therefore, Chesapeake was liable for 18% interest on the production payments to which Morton was entitled, but which Chesapeake had withheld after Morton refused to pay the additional amount for past billings.

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# OIL & GAS E-REPORT

Issue 1 March 2025