



# OIL & GAS E-REPORT

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## It's the Judgment, Not the Gist: Returning To Fundamentals of *In Rem* Versus *In Personam* Lawsuits

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### Executive Summary

In a May 2026 decision, the Court held that Texas had subject matter jurisdiction to order a defendant to fulfill its contractual obligation to transfer West Virginia mineral interests. *Braxton Minerals III, LLC, v. Robert Scott Bauer and Braxton Minerals II, LLC*, No. 24-0438, 2026 WL 1354753 (Tex. May 15, 2026) (hereinafter *BMIII*). This clarity of law provides comfort that oil and gas companies can adjudicate their mineral interest claims based on Texas law in Texas, even if those claims ask a question of title of non-Texas interests.

While bright-line legal rules might be rare, it is no surprise that something called the “gist rule” did not withstand the scrutiny of the Texas Supreme Court. Some courts of appeals had been applying this rule to determine whether a lawsuit was *in personam* or *in rem*, and, as a result, whether Texas had subject matter jurisdiction over certain lawsuits involving foreign real property, such as mineral interests. As the name suggests, the courts looked at the “gist” of the lawsuit, but in *BMIII*, the Texas Supreme Court explicitly disapproved of the gist rule and refocused courts on the centuries-old distinction between *in personam* and *in rem*. When the judgment acts on parties, it is *in personam*, even if that ordered judgment affects foreign property interest rights. The clarification of this distinction results in Texas maintaining subject matter jurisdiction over claims involving foreign realty that are anything other than a naked claim of title. Combined with the specialized business courts, Texas has just emphasized its status as *the* place to do business.

### A Party Fails to Convey West Virginia Mineral Interests; The Court of Appeals Says Texas Does Not Have Jurisdiction To Order the Conveyance

The deals in this case are between a variety of entities which buy and sell mineral rights across the United States.<sup>1</sup> Braxton Minerals II (“BM2”) formed Braxton Minerals III (“BM3”) with Enerquest, which owned 75% of BM3.<sup>2</sup> At BM3’s formation, Enerquest contributed funds to BM3 and, in return, BM2 transferred mineral rights it owned to BM3.<sup>3</sup> Subsequent similar transactions occurred—Enerquest providing funds for BM2 to transfer mineral rights to BM3—two of which led to the present litigation.<sup>4</sup>

In the challenged transactions, nineteen of the thirty relevant deeds incorrectly reflected BM2, not BM3, as the grantee, resulting in royalty payments to

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<sup>1</sup> *BMIII*, slip op. at 2.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.*

BM2, not BM3.<sup>5</sup> BM3 sued, and the trial court granted summary judgment in favor of BM3, ordering that BM2 and its agent perform the contractual obligations: to convey the disputed mineral rights and related royalties, and to reform the nineteen deeds.<sup>6</sup> The court also declared that BM3 was the rightful owner of the royalty interests and enjoined BM2 and its agent from transferring, selling, or otherwise disposing of the relevant deeds and royalties.<sup>7</sup> The court awarded BM3 damages, attorneys' fees, and costs.<sup>8</sup>

BM2 and its agent appealed, and the court of appeals dismissed for want of jurisdiction because the mineral rights at issue are in West Virginia.<sup>9</sup> The court applied the "gist" rule: "If the gist or gravamen of a claim involves adjudication of title to foreign real property interests, the Texas court lacks subject matter jurisdiction."<sup>10</sup> The court did not reach the nonjurisdictional issues.<sup>11</sup>

Because BM2 raised the issue of subject matter jurisdiction but failed to adequately brief the issue, the court of appeals reviewed the record and conducted its de novo review without the benefit of the parties' briefing.<sup>12</sup> The court primarily relied on a factually analogous case from its sister court of appeals to determine that the gist of the allegations related to real property ownership.<sup>13</sup> The court looked to the relief requested: BM3 wanted specific performance of its contract, which would result in correction of deeds and for improperly paid royalties.<sup>14</sup> In the court of appeals' view, because this was a request for declaratory relief saying who owned the property, BM3 was asking for the court to change the ownership of the property.<sup>15</sup>

BM3 petitioned the Texas Supreme Court for review, arguing that the "gist" rule went against precedent and "obscures the true jurisdictional line of demarcation."<sup>16</sup> The Court granted the petition, reversed the court of appeals' holding, and remanded back to that court for consideration of the remaining issues.<sup>17</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Bauer v. Braxton Minerals III, LLC*, 689 S.W.3d 633, 637 (Tex. App.—Fort Worth 2024), rev'd and remanded, *BMIII*, No. 24-0438, 2026 WL 1354753.

<sup>11</sup> *Id.* at 642.

<sup>12</sup> *Id.* at 636-37.

<sup>13</sup> *Id.* at 638-39 (citing *Danish Leasegroup, Inc. v. York Oil & Gas Mgmt., Inc.*, 362 S.W.3d 220 (Tex. App.—Dallas 2012, no pet.), disapproved of by *BMIII*, No. 24-0438, 2026 WL 1354753).

<sup>14</sup> *Id.* at 639.

<sup>15</sup> *Id.* at 640-42.

<sup>16</sup> *BMIII*, slip op. at 5.

<sup>17</sup> *Id.* at 24.

## The Texas Supreme Court Provides a Clear Rule To Distinguish *In Personam* and *In Rem* Suits

This case, and others like it, “turn[] on the classical distinction between suits *in personam* and suits *in rem*.”<sup>18</sup> In flashbacks to 1L civil procedure, the Texas Supreme Court reminds us that *in personam* suits are those “[i]nvolving or determining the personal rights and obligations of the parties” and only binds the parties and those in privity.<sup>19</sup> On the other hand, *in rem* suits are rare in the modern world, and an *in rem* judgment “affects the interests of all persons in the world in the thing.”<sup>20</sup>

The Court begins its discussion of the distinction by noting that these categories “were already in the bloodstream of the body of English law” adopted by early Texans.<sup>21</sup> Starting with the 1750 English case, *Penn v. Lord Baltimore*, (1750) 27 Eng. Rep. 1132; 1 Ves. Sen. 444 (LC), the Court traced the history of the distinction and the impact on American law.<sup>22</sup> The critical U.S. Supreme Court case of *Massie v. Watts*, 10 U.S. 148 (1810), established that out-of-state courts did not have jurisdiction over “naked questions of title” but did when the original action is based on liability between parties.<sup>23</sup> This was true even if the question of title was an “essential” piece of the case.<sup>24</sup>

Texas embraced this basic distinction, which still endures over two centuries later. In *Holt v. Guerguin*, 163 S.W. 10 (1914), the Court held that Texas had jurisdiction to compel a defendant to cancel a Mexican deed “because such a judgment could be made effective through the coercion of the defendant.”<sup>25</sup> But Texas could not itself have the deed annulled or established in Mexico.<sup>26</sup> Likewise, a foreign state had jurisdiction to issue an order directing conveyance of Texas realty.<sup>27</sup> In *McElreath*, Oklahoma issued a divorce decree that awarded the ex-wife property in Texas.<sup>28</sup> The Texas Supreme Court saw no jurisdictional issue with the order and directed the trial court to render judgment in compliance with the Oklahoma order and the parties’ stipulations.<sup>29</sup>

From these cases, a clear rule emerged:

[W]hen the plaintiff requests a judgment that will bind the defendant to his legal obligation to convey property—rather than a judgment that will vest title in the plaintiff of the judgment’s own

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<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.* at 6 (quoting *In Personam*, BLACK’S LAW DICTIONARY (12th ed. 2024)).

<sup>20</sup> *Id.* (citation omitted).

<sup>21</sup> *Id.* at 7.

<sup>22</sup> *Id.* at 7.

<sup>23</sup> *Id.* at 8 (citing *Massie*, 10 U.S. at 158).

<sup>24</sup> *Id.* at 8-9.

<sup>25</sup> *Id.* at 12 (citing *Holt*, 163 S.W. at 12).

<sup>26</sup> *Id.* (citing *Holt*, 163 S.W. at 12).

<sup>27</sup> *Id.* (citing *McElreath v. McElreath*, 345 S.W.2d 722, 726-27, 733 (1961)).

<sup>28</sup> *McElreath*, 345 S.W.2d at 723.

<sup>29</sup> *Id.* at 734.

force—the suit is *in personam*, and the out-of-state location of the property is no bar to jurisdiction.<sup>30</sup>

Affirming this rule, the Court explicitly disapproved of the “gist” or “gravamen” rule and related decisions.<sup>31</sup> *In rem* jurisdiction is exercised only when the court’s “mere force of [] decree” alters title.<sup>32</sup> But compelling a defendant to convey property or pay royalties under a contract does not convert an *in personam* action to an *in rem* action simply because it involves determining the proper ownership of foreign lands.<sup>33</sup> This rule is fully aligned with federal precedent and sister-state law.<sup>34</sup>

This rule does not change the requirement to look at the totality of a lawsuit, but instead of looking to the gist, courts must still look to the nature of the judgment.<sup>35</sup> Ordering parties to convey foreign property binds only those parties (*in personam*) and is within Texas’s jurisdiction.<sup>36</sup> This is true even when the court must answer the question of who owns the property.<sup>37</sup> What Texas cannot do is definitively establish ownership of foreign land.<sup>38</sup>

### **Texas Has Jurisdiction To Order BM2 To Transfer Mineral Interest Rights**

Applying the proper rule in this case, the Court found it clear that the four remedies enforced obligations on the defendants—*i.e.*, operating *in personam*—and that the court had jurisdiction.<sup>39</sup> First and second, specific performance of a contract is quintessentially *in personam*.<sup>40</sup> Third, an injunction is only binding on the parties.<sup>41</sup> Fourth, the declaratory judgment only operated on the parties, as did the order to reform the deeds, it did not actually change the ownership on an existing instrument.<sup>42</sup> Accordingly, the Court reversed the court of appeals’ judgment.<sup>43</sup> The Court remanded to the court of appeals to consider the nonjurisdictional issues presented.<sup>44</sup>

### **The Rule Makes It Clear That Oil and Gas Businesses Can Protect Their Interests in Texas, Even If Those Interests Are Foreign**

Although this case is in the oil and gas context, the clarity provided by the articulation of the *in personam* versus *in rem* distinction will certainly be relied on to demonstrate that Texas has subject matter jurisdiction. The disapproval of the gist

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<sup>30</sup> *Id.* at 13 (citation omitted).

<sup>31</sup> *Id.* at 15.

<sup>32</sup> *Id.* at 17 (quoting *Corbett v. Nutt*, 77 U.S. 464, 475 (1870)).

<sup>33</sup> *Id.* at 17.

<sup>34</sup> *Id.* at 14-15.

<sup>35</sup> *Id.* at 17.

<sup>36</sup> *Id.* at 18.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 19.

<sup>39</sup> *Id.* at 19-20.

<sup>40</sup> *Id.* at 20.

<sup>41</sup> *Id.* at 21.

<sup>42</sup> *Id.* at 22.

<sup>43</sup> *Id.* at 24.

<sup>44</sup> *Id.*

rule reduces subjectiveness from jurisdictional determinations and brings the court of appeals back in line with Texas and federal precedent. Further, it will not be possible to artfully plead in an attempt to transform a breach-of-contract claim into an *in rem* action to elude Texas's jurisdiction. *In rem* actions, already rare, will likely become even rarer and limited to truly "naked questions of title," such as actions to quiet title.

For oil and gas, *BMIII* provides clarity that foreign mineral interest matters can be litigated in Texas provided that the relief requested is not a naked question of title. Practitioners should ensure that pleadings link the requested relief to an obligation of the *party*, sounding in contract or otherwise. The ability to litigate in Texas will provide obvious efficiency when litigating contracts or other obligations that apply to properties across a range of locations. For example, had the gist rule survived, if a party failed to transfer mineral interests across several states, the plaintiff would be required to litigate in each individual state to compel the breaching party to perform.

Clarity in the law only enhances Texas's attractiveness to businesses, including oil and gas business. In *BMIII*, the Texas Supreme Court provided significant clarity on the broad *in personam* jurisdiction Texas courts hold to hear disputes—even when those disputes may involve foreign property. Combined with the specialized business courts, Texas is *the* place to conduct business.

## Texas Supreme Court Says That NPRI in Question Bears Its Share of Post-Production Costs

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In *Fasken Oil and Ranch, Ltd. v. Puig*, 2026 WL 969268 (Tex. 2026), the parties disputed whether a “free of cost” royalty is based on the value of gas at the wellhead or at the downstream point of sale.

### Background

In 1960, the Puigs’ predecessor in interest sold land in Webb County, reserving a nonparticipating royalty interest (“NPRI”). The reservation in the deed transferring ownership of the land stated (emphasis added):

There is *SAVED, EXCEPTED AND RESERVED*, in favor of the undersigned, B. A. Puig, Jr., out of the above described property, an undivided one-sixteenth (1/16) of all the oil, gas and other minerals, except coal, in, to and under or that may be produced from the above described acreage, to be paid or delivered to Grantor, B. A. Puig, Jr., as his own property *free of cost* forever. Said interest hereby reserved is Non-Participating Royalty . . .

Fasken Oil and Ranch, Ltd. operates oil and gas wells on the land. After producing gas, the company treats, processes, and transports the gas prior to selling it. Fasken historically, calculated the royalties that it paid based on the work back method. That is, Fasken subtracted post-production costs, such as costs for treatment, processing, and transport from the sales price to obtain an estimate of the value at the well, then calculated the royalties to be paid as a fraction of that value.

In 2021, the Puigs challenged Fasken’s use of the workback method. They sued Fasken, asserting that the NPRI should be calculated based on the sales price obtained by Fasken after treating, processing, and transporting the gas. In support of their argument, they noted that the 1960 deed states that the NPRI is to be delivered “free of costs.” They asserted that this provision prohibits Fasken from deducting post-production costs incurred in treating, processing, and transporting the gas. The trial court granted summary judgment in favor of the Puigs and the appellate court affirmed. The Texas Supreme Court then granted Fasken’s petition for review.

### Texas Supreme Court’s Analysis

The Texas Supreme Court stated that NPRIs typically are based on the value of oil or gas at the wellhead, prior to treatment or transport. Further, when a sale occurs downstream, after treatment and transport, an accepted way of estimating the value of the oil or gas at the wellhead is to subtract postproduction costs incurred by the operator from the downstream sales price. The Court then

noted that it has “recognized two primary ways parties may free a royalty interest from the postproduction costs it usually bears.” One is by drafting the royalty clause in a deed or lease so that it sets a valuation point downstream from the well. The second is to draft the royalty clause so that it explicitly provides that some or all postproduction costs must be added to the “royalty base.” The Court stated, “[t]his deed does neither.”

The Court then discussed the “valuation point.” The Court noted that the only geographic location specified in the deed is in the language that the NPRI was reserved on minerals “produced from the above described acreage.” The Court stated that parties can specify a different valuation point, but “absent contrary language, a royalty in minerals ‘produced’ and nothing more is a royalty valued at the well.” Further, the deed contained no language requiring that any post-production costs be added to the market value the minerals would have at the well.

The Court contrasted the 1960 deed’s language with royalty provisions that provide for a royalty based on the “amount realized” or “proceeds” or “gross value received” or on “point-of-sale proceeds.” The Court explained that the deed’s phrase “free of costs” does not change this because “free of costs” means free of production costs, not free of post-production costs. Further, the word “forever” refers to the temporal duration of the NPRI. It does not mean that the “free of costs” designation follows the minerals downstream of the well, thereby encompassing post-production costs.

The Court stated that the 1960 deed’s provision allowing the NPRI owner to take in-kind further supports the Court’s conclusion. Because it provides for in-kind delivery of gas at the well, thus prior to transport and presumably without the treatment and processing that occurs at a location other than the well. The Court’s conclusion regarding how the royalty is to be calculated when the NPRI owner takes his royalty payment in cash, rather than in-kind, results in the royalty owner receiving the same value whether the royalty is taken in money or in-kind.

## Supreme Court Addresses Application of Contractual Indemnities in Workplace Incidents

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In March 2026, the Texas Supreme Court issued its opinion in *S&B Engineers & Constructors, Ltd. v. Scallon Controls, Inc.*, 69 Tex. Sup. Ct. J. 348, 2026 WL 705762 (2026) addressing whether a voluntary settlement of personal injury claims from a workplace accident at a refinery extinguished the proportional indemnification provisions in the contracts between Sunoco, S&B Design, and Scallon. The Texas Supreme Court concluded that the voluntary settlement did not extinguish those rights and remanded the case back to the State District Court.

In *S&B Engineers & Constructors, Ltd.*, Sunoco hired S&B to design and install a safety system in its South Texas refinery and S&B subcontracted to Scallon to supply the fire suppression system as part of its work for Sunoco.<sup>2</sup> In the fire suppression system, there was a failsafe module encoded that upon the system losing power would release a fire suppressant.<sup>3</sup> The parties disputed whether Scallon was instructed to disengage the fire suppression failsafe feature.<sup>4</sup>

In January 2015 there was a brief and sudden loss of power at the Sunoco refinery while the employees for another contractor were working on top of high scaffolding in the refinery.<sup>5</sup> Due to the power lapse, the failsafe module for the fire suppression system engaged and the workers fell while trying to escape from the fire suppressant.<sup>6</sup> The injured workers then filed suit against both S&B and Sunoco for their injuries. S&B and Sunoco subsequently brought third party claims against Scallon in part to enforce the indemnity agreement.<sup>7</sup>

After years of litigation, S&B and Sunoco settled the injured workers claims.<sup>8</sup> The settlement between S&B, Sunoco, and the injured workers did not include any mention of Scallon.<sup>9</sup> After the settlement between S&B, Sunoco, and the injured workers, the key issue remaining before the Court became the enforcement of the indemnity agreements in the purchase agreement for the fire suppression system and the subcontract for services related to the fire suppression

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<sup>1</sup> Kat Statman is a Shareholder in the GableGotwals Houston, Texas office.

<sup>2</sup> *Id.* at \*2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

system.<sup>10</sup> Both contracts include indemnities, but the parties and the Court focused on the following indemnity language:

To the maximum extent permitted by applicable law, [Scallon] shall defend, indemnify and hold harmless S&B, and its affiliated companies, subsidiaries and clients from and against any and all loss, damage, claim, suit, liability, strict liability, product liability, judgment and expense (including attorney's fees and others costs of litigation) and any fines, penalties and assessments, arising out of (A) damage to or loss of property or (B) bodily injury, disease or death to persons other than employees of [Scallon], its agents or subcontractors resulting from or in connection with the execution of this purchase order to the extent of [Scallon]'s negligence or willful misconduct. In case of comparative, concurrent and/or contributing negligence, fault or strict liability of [Scallon] or [S&B], whether through its employees and/or representatives, [Scallon]'s duty to indemnify and hold harmless referred to in the previous sentence shall be [Scallon]'s allocable share of comparative, concurrent and/or contributing negligence, fault or strict liability.<sup>11</sup>

S&B and Zurich (as subrogee of Sunoco) sought to enforce this provision against Scallon and sought recovery of Scallon's proportional share of the settlement that S&B and Zurich paid to the injured workers in the underlying litigation.<sup>12</sup>

The parties filed cross motions for summary judgment, which the District Court granted in favor of Scallon. On appeal, the Beaumont Court of Appeals agreed with the District Court and concluded that:

[T]he express-negligence doctrine barred S&B from recovering under a theory of indemnification; the record could not support a contribution claim; and Zurich's claims were time-barred because it entered the litigation long after the underlying tort claims' limitations period had run.<sup>13</sup>

On review by the Texas Supreme Court, the Supreme Court stated that the key question before them is "whether S&B and Zurich [as subrogee of Sunoco] may ask a factfinder to allocate any portion of the settlement amount to Scallon's negligence,

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (citing 716 S.W.3d 590, 608-11 (Tex. App. -Beaumont 2024)).

or whether as the court of appeals and Scallon contend, it covered only their own as a matter of law.”<sup>14</sup>

As the Supreme Court noted, the issue relies on two different sets of legal issues, the first as to whether the settling party under either statutory or common law has contribution rights when an alleged joint tortfeasor does not participate in the settlement but also whether there are other avenues, such as contractual indemnitees that are freely negotiated between parties that would separately create indemnification rights for a settling party to recover amounts from joint tortfeasors that did not participate in the settlement.<sup>15</sup>

As the Supreme Court discussed, typically, under Texas law that a settling defendant has no right to contribution from a non-settling party under either statutory or common law.<sup>16</sup> However, “*Jinkins’s* holding does not extend beyond the common-law and statutory contexts it addressed. Proportional or comparative indemnification by contractual agreement differs fundamentally from common-law and statutory schemes **for the basic reason that the parties bargained for and agreed to it.**”<sup>17</sup>

In coming to this conclusion, the Court noted the key difference between simply bringing a contribution claim against a non-settling joint tortfeasor as was presented in *Jinkins* because in *Jinkins*, for at least in part public policy reasons, the Court did not want to allow a defendant to in essence purchase an injured Party’s claims.<sup>18</sup> However, in the latter situation, where a pre-negotiated indemnification agreement exists, the parties separately and previously had already agreed to this arrangement and created a contractual right. As the Court specifically noted “Freedom of contract allows parties to bargain for mutually agreeable terms *and allocate risks* as they see fit.”<sup>19</sup>

Fundamental to the Supreme Court’s decision was the principle that parties are entitled to contract and shift risk as they see fit under Texas law.<sup>20</sup> Therefore, because parties can freely contract for comparative indemnity under Texas law, the only limitation becomes limits to indemnification under either statutory or the common law.<sup>21</sup> As the Court pointed out,

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See *Beech Aircraft Corp. v. Jinkins*, 739 S.W.2d 19, 21-22 (Tex. 1987).

<sup>17</sup> *Id.* at \*3 (citing *Jinkins*) (emphasis added).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (quoting *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 912 (Tex. 2007) (quotation marks removed)).

<sup>20</sup> *Id.*

<sup>21</sup> See *id.* (citing *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705, 708-09 (Tex. 1987); *Yowell v. Granite Operating Co.*, 620 S.W.3d 335, 353 (Tex. 2020); *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 284 (Tex. 1998)).

Indeed, Scallon agreed to broadly indemnify S&B and Sunoco for “any and all loss, damage, claim, suit, liability, [and] strict liability,” among other things, if allocable to its own negligence. This language encompasses settlements (and not just final judgments) at least as much as in other cases decided by this Court in which settlement established a legal responsibility to pay under an indemnity contract.<sup>22</sup>

The only limitation to be applied in this instance was the express negligence doctrine (and the specific contractual agreement).<sup>23</sup>

Since parties are free to contract for imposing comparative indemnity under Texas law, the Texas Supreme Court expressly held “that *Jinkins* plays no role in the analysis, and that the settlement does not automatically extinguish contractual indemnification rights.”<sup>24</sup>

From here the Court then went on to address whether the express negligence doctrine precluded enforcement of the indemnification provision, finding specifically that it did not.<sup>25</sup> In a straightforward analysis, the Supreme Court noted that the indemnification does not require Scallon to indemnify S&B or Sunoco for their own negligence and in fact it specifically disclaims such a requirement.<sup>26</sup> For this reason it does not fall afoul of the requirements under *Ethyl Corp. v Daniel Construction Co.*<sup>27</sup>

Based upon the above conclusions, the Supreme Court remanded the case back to the District Court to conduct the proceedings admonishing the lower courts in the process “the very fact that the parties have agreed in advance to an indemnification relationship represents a contractual obligation that the courts must stand ready to enforce, regardless of their views of the wisdom of the obligation itself.”<sup>28</sup>

The Texas Supreme Court’s holding provides clear insight into the interplay between limitations on seeking contribution from non-settling joint tortfeasors when those same joint tortfeasors are also indemnitors under a valid and binding indemnification agreement. Additionally, the opinion provides a clear road map as to what issues parties should be prepared to present in such post-settlement

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<sup>22</sup> *Id.* (citing *In re Ill. Nat’l Ins. Co.*, 685 S.W.3d 826, 840 (Tex. 2024); *In re Farmers Tex County Mut. Ins. Co.*, 621 S.W.3d 261, 270 (Tex. 2021)).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at \*5.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (citing *Ethyl Corp.* generally).

<sup>28</sup> *Id.* at \*6.

litigation, specifically evidence that the settlement was made in good faith and for a reasonable amount to discharge the potential liability.<sup>29</sup>

In addition to addressing the interplay between when a joint tortfeasor may be contractually obligated to indemnify the settling defendant, the Supreme Court also reiterated when the statute of limitations for such claims starts to run, when the indemnitee's liability becomes fixed and certain.

Finally, the court of appeals erred in deeming Zurich's claim untimely. Parties have four years to bring claims arising from written contracts and breach of warranty. . . . Indemnity claims begin to run when "the indemnitee's liability becomes fixed and certain" through settlement or judgment. . . . Zurich intervened to take Sunoco's claim nearly seven years after the accident, but less than three years after the settlement made Sunoco's liability fixed and certain. Zurich's claim is not time barred.<sup>30</sup>

This final issue on statutes of limitations and accrual of claims, is important to remember in this context, while limitations may have run as it pertains to an injured Plaintiff or Plaintiffs' original claims, the accrual (in the same fact pattern as was presented to the Texas Supreme Court) for contribution under a valid indemnification clause does not accrue at the time of the original injury but at the time of the settlement or such other time as the damages become fixed.

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<sup>29</sup> See *id.* at \*6 (citing *Fireman's Fund Insurance Co. v. Commercial Standard Insurance Co.*, 490 S.W.2d 818, 824 (Tex. 1972)).

<sup>30</sup> *Id.* at \*7 (citing Tex. Bus. Com. Code § 2.725(a); *PPG Indus., Inc. v. JMB/Hou. Ctrs. Partners Ltd. P'Ship*, 146 S.W.3d 79, 92 (Tex. 2004); *Noble Energy, Inc. v. ConocoPhillips Co.*, 532 S.W.3d 771, 778 (Tex. 2017)).

## Texas Supreme Court Concludes *Van Dyke* Presumption is Rebutted by Language in Deed

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In *Clifton v. Johnson*, 2026 WL 705763 (Tex. 2026), the Texas Supreme Court held that the *Van Dyke* presumption was rebutted by language in a deed. The Court also suggested that the presumed-grant doctrine would lead to the same result under the facts of the case.

### Background

In 1951, three individuals executed a “Royalty Deed” that conveyed “an undivided one-one hundred and twenty-eighth (1/128) interest in and to all of the oil, gas and other minerals in and under” certain described tracts of land in Reeves County, Texas. In addition, the deed stated:

It is understood and herein stipulated that said land is under oil and gas leases providing for a royalty of 1/8 of the oil and certain royalties or rentals for gas and other minerals and that Grantees herein shall received [sic] one-sixteenth (1/16) of the royalties provided for in said lease insofar as the same cover the above described land, but Grantees shall have no interest in or be entitled to nor be entitled to receive any part of any rentals paid under said leases, nor shall the Grantees have any interest in any bonus money received by the Grantors, their heirs or assigns, in any future lease or leases given on said land or any part thereof, and it shall not be necessary for the Grantees to join any such subsequent lease or leases so made; that Grantees shall only receive under such subsequent lease or leases a 1/128 (1/16 of the usual 1/8 royalty) part of all of the oil, gas and other minerals taken and saved under such lease or leases and Grantees shall receive same out of the royalty provided for in such lease or leases.

Thus, granting clause referred to a “1/128” royalty, while one of the other clauses referred to a royalty of “1/128 (1/16 of the usual 1/8 royalty)” in a later portion of the deed.

For nearly seven decades, lessees paid the grantees and their successors a fixed 1/128th royalty. In 2020, however, a successor to the original grantees sued the Cliftons, who were successors to the grantors, seeking a declaratory judgment that the deed provided for a floating, 1/16th royalty. The trial court granted the Cliftons’ motion for summary judgment and denied the motion for summary judgment filed by Johnson, one of the plaintiffs. Johnson appealed and the appellate court reversed, relying on the presumption created in *Van Dyke v. Navigator Group*, 668 S.W.3d 353 (Tex. 2023), that, when a deed describes a royalty with a double-fraction that is expressed as a particular fraction of “1/8”—such as “1/16

of the usual  $1/8$ ,” the “ $1/8$ ” refers to the grantor’s entire right to royalty payments. The Texas Supreme Court granted the Cliftons petition for review.

### **Texas Supreme Court’s Analysis of the Double Fraction Issue**

The Texas Supreme Court noted that *Van Dyke* creates a presumption that, when a nonparticipating royalty interest is described as a fraction of “ $1/8$ ,” a court should “begin” with a rebuttable presumption that “ $1/8$ ” refers to the entire right to receive royalty payments. *Van Dyke* explains that this presumption is based on the reality that, particularly in older documents, it was common to use “ $1/8$ ” as a term of art to refer to the entire mineral estate. This practice arose for at least two reasons. First, there was a near universal practice in oil and gas leases of setting the lessor’s royalty at one-eighth. Indeed, this was so common that many people believed that lessors’ royalties would always be one-eighth, and some people even believed that lessors’ royalties could only be one-eighth. Thus, if someone holding the entire mineral estate intended to transfer half of his right to receive royalties, that would necessarily mean that the grantee would receive royalty equal to one-half of  $1/8$  or one-sixteenth of production.

Second, many people have a misconception regarding the nature of a mineral lessor’s interest. When a lease provides for a one-eighth lessor’s royalty, the lessor has the right to a one-eighth royalty and a right of reverter in the entire mineral estate. But many people had a misconception that the lessor held one-eighth of the mineral estate and that the lessee held the other seven-eighths. And, because the lessor held only one-eighth of the mineral estate, the lessor could only convey a fraction (or the entirety) of that one-eighth interest. This also contributed to the practice of referring to a transfer of some fraction of “ $1/8$ .”

But the Court noted in *Clifton v. Johnson* that *Van Dyke* had emphasized that the presumption that “ $1/8$ ” referred to the grantor’s entire interest is rebuttable if language in the deed suggests that “ $1/8$ ” was intended as a numerical fraction, not as a stand-in term of art for the grantor’s entire mineral interest. Further, the 1951 deed contained language rebutting the *Van Dyke* presumption. First, the granting clause stated that the deed was granting a “ $1/128$ ” royalty. There is no reference to “ $1/8$ ” and no double fraction there. Further, the clause that did use a double fraction also referred to “ $1/128$ ,” and only used the double fraction—“ $1/16$  of the usual  $1/8$ ”—in a parenthetical. This was sufficient to indicate that the parties intended to convey a fixed  $1/128$  royalty, not a floating  $1/16$  of future lease royalties.

### **Court’s Discussion of the Presumed Grant Doctrine**

The Cliftons had argued that, even if the courts rejected their argument regarding whether the 1951 deed created a fixed or floating royalty, they should prevail pursuant to the presumed grant doctrine. The appellate court had declined to consider that argument because the Cliftons had not raised it at the trial court level. However, subsequent to the trial court’s decision, the Texas Supreme Court had clarified the contours of the presumed grant doctrine in *Van Dyke*. Further, under the pre-*Van Dyke* jurisprudence prevailing rule in the appellate court district

in which Johnson's claim had been pending, the factual circumstances of the case would not have supported application of the presumed-grant doctrine, but the *Van Dyke* clarification changed that. Therefore, the appellate court had erred by refusing to consider the presumed-grant argument or at least remand the case to the trial court for consideration of the argument.

The Texas Supreme Court went on to explain the presumed-grant doctrine, which it compared to adverse possession. To prevail on a claim based on the presumed-grant doctrine, a party must show three things: "(1) a long-asserted and open claim, adverse to that of the apparent owner; (2) nonclaim by the apparent owner; and (3) acquiescence by the apparent owner in the adverse claim." Here, the undisputed facts showed that royalties had been paid for nearly 70 years on a fixed 1/128 basis. This qualified as a "long-asserted and open claim" that the deed established a 1/128 fixed royalty, rather than a floating royalty equal to 1/16 of future lease royalties. The owners of the NPRI had not asserted a claim for underpayment for years and thus had acquiesced in an interpretation that the 1951 deed established a fixed 1/128 royalty.

Thus, in this case, the presumed-grant doctrine would lead to the same result as the Court reached in considering the meaning of the deed. The Court noted, however, that in some cases, the presumed-grant doctrine would lead to a different result, and when the presumed-grant doctrine clearly leads to a particular result, a court may be able to avoid deciding whether the deed contains language sufficient to rebut the *Van Dyke* presumption.

## Louisiana Supreme Court Rejects Appealability of Partial Summary Judgment Finding a Party Legally Responsible for Environmental Damage in Oilfield Remediation Suit

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In *WMH Farms, LLC v. Apache Corporation (of Delaware), et al.*, the trial court granted a plaintiff landowner’s motion for summary judgment, finding that environmental damage existed on the plaintiff’s property for which defendant, JP Oil, was legally responsible.<sup>1</sup> JP Oil appealed, and over the plaintiff’s objection, the Third Circuit found the appeal procedurally proper and reversed the trial court’s judgment. The Louisiana Supreme Court then granted the plaintiff’s writ application to address whether such a partial summary judgment in a remediation action under La. R.S. 30:29 (“Act 312”) is immediately appealable. In a per curiam opinion, the Court held it was not. Instead, the only available avenue for interlocutory appellate review of a summary judgment finding the existence of environmental damage and a legally responsible party is via a timely supervisory writ application.

Act 312 establishes procedures for evaluating claims for environmental damage to immovable property, including the implementation of a plan to remediate such environmental damage (if found). Pursuant to Act 312, once environmental damage and a legally responsible party are found, the parties must submit proposed evaluation and/or remediation plans to the Department of Conservation and Energy (the “Department”). The Department is then charged with determining whether a proposed plan satisfies all statutory requirements. If the Department approves a plan, it must be filed with the court for consideration. Act 312 expressly provides: “Any judgment adopting a plan of evaluation or remediation . . . and ordering the party or parties . . . found legally responsible by the court to deposit funds from the implementation thereof into the registry of the court pursuant to this Section shall be considered a final judgment pursuant to the Code of Civil Procedure Article 2081 et seq., for purposes of appeal.”<sup>2</sup>

Appellate jurisdiction extends only to final judgments. In this case, because the summary judgment resolved only some of the issues between the parties (i.e., that environmental damage existed and that defendant, JP Oil, was legally responsible), the Court held that it was only a partial final judgment. Partial final judgments are immediately appealable only if authorized by Louisiana Code of Civil Procedure art. 1915(A) (which did not apply) or at the time, if the judgment was certified under Louisiana Code of Civil Procedure art. 1915(B) (which it was not).

Thus, the Court found that the Third Circuit lacked appellate jurisdiction, and the only avenue for interlocutory appellate review of a judgment finding

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<sup>1</sup> *WMH Farms, LLC v. Apache Corp.*, 2026-00223 (La. 5/19/26).

<sup>2</sup> La. R.S. 30:29(C)(6)(a).

environmental damage and a legally responsible party is through a timely filed application for supervisory review.

## Coming Full Circle: DOI to Combine BOEM and BSEE into New Agency, the Marine Minerals Administration

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On April 3, 2026, the U.S. Department of the Interior (DOI) announced its plan to combine and absorb the functions of the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) into a single new federal agency called the Marine Minerals Administration (MMA). DOI's stated goal is to create a more streamlined, integrated approach to managing offshore energy development, including both conventional oil and gas and newly emerging energy resources, such as critical minerals.

According to DOI, consolidating BOEM and BSEE within a single agency will improve regulatory coordination, efficiencies and effectiveness while reducing redundancies across leasing, permitting, inspections, and environmental oversight. DOI also emphasized that the consolidation will maintain all existing regulatory protections and rigorous safety standards.

The roles of BOEM, BSEE, and the Office of Natural Resources Revenue (ONRR) were previously housed within a single federal agency, the Minerals Management Service (MMS), for nearly 30 years. In 2010, following the Deepwater Horizon oil spill and reports of unethical management issues, MMS was reorganized into the current three separate agencies, each with defined and distinct missions:

1. leasing and resource management of the Outer Continental Shelf (OCS) (became the mission of BOEM),
2. safety and environmental oversight and enforcement (became the mission of BSEE), and
3. revenue collection (became the mission of ONRR).

While the three-agency reorganization has remained in place for 16 years, DOI's announcement means one agency will now oversee the missions of OCS leasing and resource management and safety and environmental oversight and enforcement, with the final mission of revenue collection remaining with ONRR.

Although proposed under President Trump's requested fiscal year 2027 budget (also released on April 3, 2026), the unification of BOEM and BSEE into MMA is in its preliminary phase with internal alignment activities to soon begin. Stakeholders in offshore resources should stay tuned for more updates.

## U.S. Supreme Court Allows Federal Officer Removal of Louisiana Coastal Damage Suit Against Oil and Gas Companies

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In *Chevron USA Inc. v. Plaquemines Parish, Louisiana*, No. 24-813, 608 U.S. \_\_\_\_, 146 S. Ct. 1052 (Apr. 17, 2026), the United States Supreme Court vacated a Fifth Circuit decision that had denied removal of a Louisiana coastal-damage suit to federal court under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). The Court held that the parish’s suit, which targeted Chevron’s World War II-era crude oil production in Plaquemines Parish, “relates to” Chevron’s wartime aviation gasoline (“avgas”) refining for the U.S. military and therefore satisfies the statutory “for or relating to” requirement. Justice Thomas delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Sotomayor, Kagan, Gorsuch, Kavanaugh, and Barrett. Justice Jackson filed an opinion concurring in the judgment. Justice Alito took no part in the decision.

### Background

The federal officer removal statute permits a federal officer, or a private party “acting under” such an officer, to remove a state-court suit “for or relating to any act under color of such office.”<sup>1</sup> The “or relating to” language was added by the Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2(b), 125 Stat. 545. Before that amendment, the statute authorized removal of suits brought “for” an act under color of federal office, language the Court had interpreted to require a “causal connection between the charged conduct and asserted official authority.”<sup>2</sup>

In 1978, Louisiana enacted the State and Local Coastal Resources Management Act, La. Rev. Stat. Ann. § 49:214.21 *et seq.* (the “Act”), which prohibits certain uses of the state’s coastal zone, including oil production, without a permit, but exempts uses “legally commenced or established” before 1980. Beginning in 2013, Plaquemines Parish and other coastal parishes filed 42 suits in Louisiana state court against oil and gas companies under the Act, alleging that the defendants’ historical operations were illegally commenced and therefore fell outside the pre-1980 exemption. An expert report filed by the parish in one of the suits made clear that the parishes intended to challenge certain defendants’ crude oil production during World War II, including Chevron’s operations in the Delacroix Island and Delta Duck Club fields. The report alleged, among other things, that Chevron used earthen pits rather than steel tanks, employed vertical-drilling methods, and dredged canals in lieu of constructing roads.

Chevron removed the suit to federal court, asserting that the parish’s claims “relate[d] to” its contractual duties to refine crude oil into avgas for the military during World War II. Chevron’s predecessor, the Texas Company, had contracted with the

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<sup>1</sup> 28 U.S.C. § 1442(a)(1).

<sup>2</sup> *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999).

federal government, through the Defense Supplies Corporation and under the supervision of the Petroleum Administration for War (“PAW”), to quadruple its avgas refining capacity. The PAW allocated crude oil to specific refiners, identified the Delta Duck Club field as a “Critical Field Essential to the War Program” because it produced a preferential kind of crude oil for refining avgas, and issued regulations requiring production methods (including vertical drilling) designed to maximize crude-oil output.

The federal district court remanded the suit to state court, and the Fifth Circuit affirmed.<sup>3</sup> The Fifth Circuit agreed that Chevron had “acted under” a federal officer in performing its avgas refining contract but concluded that the parish’s suit, which targeted upstream crude oil production rather than refining, was not “for or relating to” those federal duties because the refining contract did not specify how Chevron was to obtain crude oil. Judge Oldham dissented, reasoning that crude oil was “indispensable” to avgas production and that its production therefore necessarily related to Chevron’s performance of the federal refining contract.

While the federal-court venue dispute was pending, a Plaquemines Parish state-court jury returned a \$745 million verdict against Chevron in April 2025 in the same case, finding the company liable for decades of coastal damage attributable to its predecessor’s operations.

## The Supreme Court’s Decision

The Supreme Court vacated the Fifth Circuit’s judgment and remanded for further proceedings. The Court began with the ordinary meaning of “relating to,” a phrase the Court described as sweeping broadly and as requiring only a connection that is not “tenuous, remote, or peripheral.” Drawing on its precedents in other statutory contexts, the Court explained that one thing can “relate to” another even if the connection is “indirect,” even if the relating conduct was “not specifically designed to affect” the other, and even without a “strict causal relationship.” Accordingly, a removing defendant under § 1442(a)(1) “need not show that his federal duties specifically required or strictly caused the challenged conduct.”

Applying that standard, the Court held that Chevron’s case “fits comfortably within the ordinary meaning of a suit ‘relating to’ the performance of federal duties.” The Court emphasized that much of the crude oil Chevron produced in the Delta Duck Club field was used for its own avgas refining, and that the very production methods alleged to have caused coastal damage (vertical drilling, canals rather than roads, and earthen pits) were the methods that maximized wartime crude-oil output and complied with PAW directives, including the directive to preserve steel. In the wartime context, the Court explained, Chevron “needed to produce more crude oil as quickly as possible to facilitate more avgas refining, including its own.”

The Court rejected each of the Fifth Circuit’s two principal rationales. First, the absence of a contractual provision specifying how Chevron should obtain crude oil did not defeat removal, because the “relating to” requirement does not demand

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<sup>3</sup> *Plaquemines Parish v. BP America Production Co.*, 103 F.4th 324 (5th Cir. 2024).

that the federal duties “specifically invited” the challenged conduct. Second, the PAW’s role in allocating crude oil to refineries did not sever the relation between production and refining, because, as illustrated by *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), an act can relate to its consequences even when the causal chain includes actions by intermediaries.

The Court also rejected Louisiana’s alternative argument that § 1442(a)(1) requires the defendant to have been “acting under” a federal officer with respect to the specific acts challenged in the suit. That reading, the Court concluded, would conflate the statute’s separate “acting under” and “for or relating to” elements and leave the latter without independent function. The Court assumed, without deciding, that Chevron had “acted under” a federal officer in performing its refining contract, because no party disputed the point.

Justice Jackson, concurring in the judgment, agreed that Chevron satisfied the removal requirements but disagreed with the majority’s interpretation of “relating to.” Drawing on the statutory and legislative history of the 2011 amendment, particularly the House Report’s description of the change as a “conforming amendment” addressed to the removability of pre-suit discovery proceedings, Justice Jackson would have retained the pre-2011 causal-nexus test, under which a federal directive must be a but-for cause of the challenged conduct, though it need not specifically direct that conduct. Justice Jackson concluded that Chevron met that standard on the facts presented because Chevron produced its Louisiana crude “at least in part, to meet the demands of its federal contracts.”

## Implications

The decision is a significant procedural development for the Louisiana coastal-damage litigation, in which approximately 42 parish suits remain pending against oil and gas defendants. The Plaquemines Parish \$745 million state-court judgment is expected to be vacated on remand and the underlying claims relitigated in federal court. The reach of the ruling beyond the *Chevron* case itself is contested: lead plaintiffs’ counsel has publicly stated that only approximately 11 of the 42 suits (those in which the same defendant both produced crude oil and refined avgas under federal contract) involve the wartime-refining nexus the Court found dispositive. Whether the remaining “production-only” cases satisfy the “relating to” requirement is likely to be a principal issue on remand and in the parallel proceedings. More broadly, the decision confirms that federal officer removal under § 1442(a)(1) is available where a private party’s conduct has a plausible, non-tenuous connection to the performance of federal duties under government direction or contract, even where the specific challenged acts were not themselves directly commanded by the government, though Justice Jackson’s separate writing leaves open the possibility that the precise contours of “relating to” may be revisited in a future case.

# Endangered Species Committee Issues Order Exempting Gulf Oil and Gas Activities from Endangered Species Act Requirements

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On March 31, 2026, for the first time in the 53 years since the Endangered Species Act (“ESA”) became law, the Endangered Species Committee (the “ESC” or “Committee”) unanimously voted to exempt Gulf of America (“GOA”) Oil and Gas Activities from various ESA requirements. Effective immediately, the ESC Order provides that federal agencies tasked with implementing and regulating oil and gas activities in the GOA are no longer required to comply with the procedural consultation and substantive “jeopardy” and “adverse modification” mandates of section 7(a)(2) of the ESA. Further, any action that would ordinarily be considered a “take” are no longer prohibited under the ESA. The ESC Order aims to strengthen the national security of the United States by reducing ongoing and anticipated ESA litigation, with the hopes that the increased regulatory certainty will lead to an increase in offshore oil and gas exploration and development in the GOA.

## The ESA and the ESC

The ESA, which was enacted in 1973, provides protections for endangered and threatened species by prohibiting certain activities that result in “jeopardy” to endangered species. In 1978, the ESA was amended to provide a process for obtaining an exemption to the “jeopardy” prohibition.<sup>1</sup> The ESA, as amended, tasks the ESC with determining whether to grant an exemption.<sup>2</sup> The ESC consists of seven individuals: 1) the Secretary of the U.S. Department of the Interior, 2) the Secretary of the U.S. Department of Agriculture, 3) the Secretary of the U.S. Army, 4) the Chairman of the Council of Economic Advisors, 5) the Administrator of the U.S. Environmental Protection Agency, 6) the Administrator of the National Oceanic and Atmospheric Administration, and 7) representative(s) from the affected state(s) whom are appointed by the President.<sup>3</sup> Pursuant to section 7(j) of the ESA, the ESC has special authority and “shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.”<sup>4</sup>

## Committee Meeting Backdrop

The Rice’s whale and thousands of other marine species call the GOA home. Accordingly, during the federal offshore oil and gas leasing process, the ESA requires the Bureau of Ocean Energy Management (“BOEM”) and the Bureau of Safety and Environmental Enforcement (“BSEE”)—two U.S. Department of Interior sub-agencies charged with regulating offshore oil and gas—to formally consult with

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<sup>1</sup> See 16 U.S.C. § 1536.

<sup>2</sup> 16 U.S.C. § 1536(e)(1)-(2); 16 U.S.C. § 1536(h).

<sup>3</sup> 16 U.S.C. § 1536(e)(3).

<sup>4</sup> 16 U.S.C. § 1536(j).

the National Marine Fishery Service (“NMFS”) and the Fish and Wildlife Service (“FWS”) and ask for guidance on how to comply with ESA substantive mandates while promoting offshore oil and gas development. This formal consultation process results in the issuance of consultation decisions, ESA guidance, and most importantly, a biological opinion that may include a “jeopardy” finding and reasonable and prudent alternatives to avoid jeopardy and allow the project to move forward. This aspect of the federal offshore leasing process has been consistently challenged by environmental non-governmental organizations (“NGOs”).

Regardless of whether the lawsuits challenge individual lease sales or entire National OCS Oil and Gas Programs, NGO attempts to block offshore oil and gas development routinely include challenges to the sufficiency and legality of the resulting biological opinions and consultation decisions. *Sierra Club v. NMFS*, *Center for Biological Diversity v. Burgum* and *Healthy Gulf v. Burgum* are recent examples of ESA-litigation initiated by environmental NGOs. These lawsuits specifically challenge the sufficiency and legality of the NMFS’s 2025 biological opinion, the FWS’s 2018 and 2025 Consultation Decisions, and other ESA consultation decisions that impose stringent conditions and mitigation measures to prevent impacts on several species, including the Rice’s whale.

On January 26, 2026, the U.S. Department of the Interior (“DOI”), currently led by Secretary Doug Burgum, notified the U.S. Department of Defense (also known as the U.S. Department of War) of the ongoing ESA litigation and DOI’s view of the impacts on offshore oil and gas exploration, development, and production in the GOA. Several months later, by letter dated March 13, 2026, Secretary of Defense Pete Hegseth responded and shared his national security findings, which included, but were not limited to the following:

1. 15% of U.S. crude oil and about 1.7% of U.S. dry natural gas comes from the GOA;
2. Application of the ESA and recent litigation over its application threaten oil and gas development throughout the GOA;
3. The biological opinions and incidental take statements, prepared respectively by the NMFS and the FWS, have been repeatedly challenged in litigation over the past several years and continue to be challenged in multiple ongoing cases;
4. The ESA litigation is diverting federal resources away from approving, managing, and regulating oil and gas activities in the GOA and creating uncertainty and instability, which is chilling the development of oil and gas resources in the GOA;
5. The United States’s ability to extract oil from the GOA is a matter of national security; and
6. Given the critical role that oil and gas from the GOA play in the United States’s national security, an exemption from ESA requirements is necessary.

Based on these national security findings, Defense Secretary Hegseth concluded that, pursuant to section 7(h) of the ESA, the national security of the United States requires the ESC to exempt the proposed actions reviewed in the 2025 biological opinion and the FWS consultation decisions from the ESA.

### **March 31, 2026 Committee Meeting and ESC Order**

At Defense Secretary Hegseth's request, Interior Secretary Burgum, as Chairman of the ESC, convened the ESC on March 31, 2026, for a Committee Meeting. The Committee Meeting, which was made publicly available, marked the fourth ever meeting of the ESC and the first time the ESC convened due to matters of national security. During the meeting, the ESC addressed the Secretary of Defense's national security findings, unanimously voted to exempt "Gulf of America Oil and Gas Activities" from the ESA requirements, and issued an order effectuating said exemption effective immediately. Pursuant to the ESC Order, the term "Gulf of America Oil and Gas Activities" includes "both the oil and gas exploration, development, and production activities, as well as the avoidance or minimization measures described in the agency action analyzed in NMFS's 2025 biological opinion and in FWS's 2018 and 2025 consultation decisions." Additionally, the ESC Order provides that any action that would be considered a "take" under the ESA shall not be prohibited.

### **Impact of the ESC Order**

Effective immediately, BOEM and BSEE will no longer be required to consult other federal agencies, such as the NMFS and FWS, about ESA compliance when undertaking oil and gas activities in the GOA. Several notable uncertainties remain following the ESC Order. For example, it is uncertain whether the ESC Order will stand. Shortly after the ESC Order was issued, several NGOs, including Earthjustice, the Center for Biological Diversity, Oceana, Turtle Island Restoration Network, and the Natural Resources Defense Council, filed suit arguing that the ESC Order sidesteps environmental protections put in place by Congress and concentrates power within the executive branch. Additionally, it is not clear whether the ESA exemption will have any effect on the Marine Mammal Protection Act ("MMPA"), which is a separate but related statute that includes prohibitions like those included in the ESA. Unlike the ESA, the MMPA does not include an exemption process.

## Ohio Supreme Court Holds that Temporary Suspension of Injection Disposal Operations Was Not a Taking

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After two earthquakes were recorded near saltwater injection wells operated by AWMS Water Solutions, L.L.C. (“AWMS”), the Ohio Department of Natural Resources (“ODNR”) issued an order that required temporary suspension of injections at those wells. AWMS filed suit, seeking a judgment that the order constituted a taking of property. In *State ex rel. AWMS Water Solutions, L.L.C. v. Mertz*, 2026 WL 1161052 (Ohio 2026), the Ohio Supreme Court issued a judgment reversing the lower court’s ruling and holding that ODNR’s order did not constitute a taking.

### Background

In December 2011, AWMS leased 5.2 acres in Trumbull County to construct and operate a commercial injection disposal well facility. Shortly thereafter, AWMS applied for permits to drill and operate two saltwater injection wells. The day after AWMS filed its permit applications, a 2.7 magnitude earthquake was recorded within a mile of an existing injection well that was located about seven miles from the land leased by AWMS. About a week later, a larger earthquake was recorded near the same well. In addition, four other earthquakes of magnitude 2.2 or larger had been recorded. The Governor then imposed a moratorium on certain injection well activities. This delayed the issuance of injection permits to AWMS, but AWMS obtained permits to drill two injection wells in July 2013.

At the time AWMS applied for its permits, it had only invested \$100,000 in development of its leased site. Eventually, however, AWMS spent about \$5.6 million drilling and equipping two injection disposal wells. The company raised much of the money from investors, to whom AWMS issued a confidential offering memorandum that included discussion of various risks. One of the identified risks was the possibility that injection disposal operations would induce seismic activity and that regulators might then order a suspension or cessation of injections.

AWMS drilled two injection wells—Well #1 and Well #2—and began commercial operations in May and June 2014. In late July 2014, a 1.7-magnitude earthquake was recorded near the wells. Later, a 2.1-magnitude earthquake was recorded in the area. After the second earthquake, the ODNR Division of Oil and Gas Resources (the “Division”) ordered AWMS to suspend operations, after concluding that AWMS’s operations caused the earthquakes. The Division eventually concluded that the operation of Well #1 had not contributed to the seismic activity, so the Division allowed AWMS to resume injections using that well in September 2014. The Division did not allow Well #2 to go back into operation until September 2021.

## ***AWMS I***

AWMS appealed the suspension of operations at Well #2 to the Ohio Oil and Gas Commission. In August 2015, the Commission denied AWMS's appeal.

AWMS then filed suit, asserting that ODNR's order suspending operations at Well #2 was a taking. The court of appeals granted summary judgment in the State's favor, concluding that the order was not a taking. In *AWMS I*, the Ohio Supreme Court reversed, holding that AWMS's leasehold interest was a property right and that there was a genuine issue of material fact regarding whether the suspension had the effect of depriving AWMS of all economically viable use of its leasehold. If the order had denied AWMS of all economically viable use, that would be a factor weighing in favor of finding a taking (though it would not be a conclusive factor).

## **Termination of the Suspension**

In May 2021—subsequent to the Ohio Supreme Court's decision in *AWMS I*, but before a lower court re-heard the case on remand—the Division issued an order that allowed AWMS to begin injection operations at Well #2 again, though with additional conditions and restrictions. Because AWMS objected to some of the additional restrictions contained in the Division's order, AWMS appealed the order to the Ohio Oil and Gas Commission, but the Commission upheld the order as issued. AWMS then appealed the Commission's decision, but the court upheld that decision, and hence the order, on grounds that AWMS's appeal of the Commission's decision was not timely.

## ***AWMS II***

On remand from *AWMS I*, the appellate court dismissed AWMS's claim, holding that AWMS's leasehold rights were not a property interest. The Ohio Supreme Court reversed, holding that the leasehold qualified as a property interest. The Ohio Supreme Court reversed again, instructing the appellate court to analyze whether the order suspending injections had constituted a total or partial taking.

## ***AWMS III***

On remand from *AWMS II*, the appellate court concluded in a 2-to-1 decision that the order suspending injections did not constitute a total taking, but that it did constitute a partial taking. Both sides appealed to the Ohio Supreme Court, with AWMS asserting that the appellate court erred by not finding a total taking and the ODNR asserting that the appellate court erred by finding that there had been any taking.

The Ohio Supreme Court quickly concluded that there had not been a total taking. The court then considered whether the suspension of operations had constituted a partial taking. The Ohio Supreme Court analyzed this under the U.S. Supreme Court's *Penn Central* three-factor balancing test that considers: (1) the economic impact of the regulation, (2) the extent to which the regulation interfered

with distinct investment-backed expectations, and (3) the character of the government action.

Quoting other cases, the court stated, that the “investment-backed expectations” factor “is designed to account for property owners’ expectation that the regulatory regime in existence at the time of their acquisition will remain in place, and that new, more restrictive legislation or regulations will not be adopted.” The court elaborated, stating that:

This factor has three subfactors that guide the inquiry: “(1) whether the plaintiff operated in a ‘highly regulated industry;’ (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have ‘reasonably anticipated’ the possibility of such regulation in light of the ‘regulatory environment’ at the time of purchase.”

The court concluded that the first subfactor weighed against AWMS because injection disposal operations are highly regulated. The second subfactor also weighed against AWMS because AWMS was aware of induced seismicity risk before it made its investment. Indeed, AWMS had stipulated that, before it acquired its lease, it “was aware that saltwater injection wells may have triggered induced seismicity in Ohio and elsewhere.” Finally, the court concluded that the third subfactor also weighed against AWMS because the company was aware of the possibility of the type of regulation that it was complaining about. The court noted that, while raising money, AWMS had warned investors about the possibility of regulatory action. AWMS acquired the lease before issuing the warning, but the warning could be circumstantial evidence that AWMS knew of the possibility of such regulations before it acquired the lease. Further, AWMS issued the warning at a time when the company had not yet invested very much in the leasehold. Thus, each of the three subfactors, and hence the first factor itself, weighed against AWMS.

The second factor, the extent to which the order interfered with “distinct investment-backed expectations,” also weighed against AWMS. The appellate court concluded that this factor weighed against AWMS based on testimony of ODNR’s expert, who asserted that AWMS could still obtain value from Well #2 by drilling it deeper or plugging it back to a shallower formation than the one into which AWMS had been injecting. AWMS pointed to contrary testimony from its expert witness, but the Ohio Supreme Court accepted the appellate court’s evaluation of the credibility of the witnesses.

Finally, the Ohio Supreme Court considered the third factor, the character of the governmental action. The court stated that it was undisputed that the intent of the order was to protect public safety. The earthquakes that had prompted the order had not caused damage, but important infrastructure was located in the vicinity of AWMS’s injection wells, and ODNR was not unreasonable in suspending

injections before the occurrence of an earthquake of sufficient magnitude to cause damage.

Therefore, all three *Penn Central* factors weighed against finding a partial taking. The Ohio Supreme Court therefore reversed the appellate court and dismissed AWMS's action.

## Ohio Appellate Court Holds Lease Acreage Limitations Do Not Prohibit Statutory Unitization

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On March 16, 2026, Ohio's Fifth District Court of Appeals held in *Chervenak Family Trust v. Ascent Resources – Utica, LLC*, 2026-Ohio-886 (5th Dist.) that an acreage limitation in an oil and gas lease's consolidation clause did not prohibit the lessee from seeking a statutory unitization order for a larger unit under R.C. 1509.28. The decision provides useful guidance for Ohio operators developing acreage burdened by older leases that impose acreage limitations on voluntary consolidation.

The dispute involved a 1972 oil and gas lease covering 115 acres in Guernsey County, Ohio. The lease granted the lessee the right "to consolidate the leased premises with other lands to form an oil and gas development unit of not more than one hundred sixty (160) acres." Ascent applied to the Chief of the Division of Oil and Gas Resources Management to include portions of the leased property in three statutory units under R.C. 1509.28, each exceeding 160 acres. After the Chief issued the unitization orders, the lessor sued, alleging that the lease prohibited including the lease in any unit exceeding 160 acres. The trial court granted summary judgment in favor of Ascent, finding that the lease addressed only voluntary unitization and did not prohibit including the lease in statutory units larger than 160 acres.

The Fifth District affirmed. It rejected the lessor's argument that the consolidation clause limited all forms of development. Instead, the court found that the acreage limitation pertained only to voluntary unitization. By contrast, the lease was silent regarding the state's police power to order statutory unitization under R.C. 1509.28 and therefore did not prohibit Ascent from seeking a statutory order for a unit exceeding 160 acres.

Notably, the Fifth District distanced itself from its earlier decision in *Am. Energy - Utica, LLC v. Fuller*, 2018-Ohio-3250 (5th Dist.). In *Fuller*, the lease's unitization clause was crossed out and replaced with a handwritten notation that read "UNITIZATION BY WRITTEN AGREEMENT ONLY!" *Fuller* held that R.C. 1509.28 permitted statutory unitization despite the handwritten provision, but proceeding without the lessor's written permission retroactively impaired the lease in violation of Section 28, Article II of the Ohio Constitution. The *Chervenak* court observed that *Fuller* rested on "a potentially faulty legal basis" because the lease in *Fuller*, like the lease before it, was executed *after* the effective date of R.C. 1509.28. The court therefore acknowledged that *Fuller's* retroactivity analysis was factually incorrect. The court also distinguished *Fuller's* handwritten limitation, which it found could be construed to limit all forms of unitization, from the common form of consolidation clause at issue here.

The lessor has appealed the Fifth District's decision to the Supreme Court of Ohio, Appeal No. 2026-0495. A decision on whether the Court will accept the appeal is expected in the summer of 2026.

## Utah Surface Owner Protection Act

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This article summarizes the main requirements placed on oil and gas owners and/or operators under the Utah Surface Owner Protection Act.

In Utah, when surface real property and the corresponding oil and gas interests under that surface are owned or possessed by different parties, the Utah Surface Owner Protection Act and the regulations promulgated thereunder, codified at Utah Code §§ 40-6-20 and -21 and Utah Admin. Code R649-3-38 and other rules referenced therein (collectively, the Act), govern the interactions between the parties. The Act codifies the accommodation doctrine, which recognizes the need for each party to reasonably accommodate the use of the land by the other party. As stated in the Rules, it is the intent of the Utah Board of Oil, Gas and Mining (UBOGM) and Utah Division of Oil, Gas and Mining (UDOGM) to “encourage owners or operators and surface land owners to enter into surface use agreements.”

The legislation was enacted in 2012 and is specific to oil and gas operations. The Act generally requires that oil and gas operations be conducted in a manner that prevents unreasonable loss of a surface land owner’s crops on surface land, unreasonable loss of value of existing improvements owned by a surface land owner on surface land, and unreasonable permanent damage to surface land.

The Act defines “owner” as a person who has the right to drill into and produce from a reservoir and appropriate the oil and gas produced for that person and for others; defines “operator” as a person who has been designated by the owners or the UBOGM to operate a well or unit; and defines “surface land owner” as a person who owns, in fee simple absolute, any or part of the surface land as shown by the records of the county where the surface land is located. The term expressly excludes the surface land owner’s lessee, renter, tenant, or other contractually related person.

For purposes of this article, (i) the term “lands” refers to surface land; (ii) the term “owner/operator” refers to both an owner and an operator, and (iii) the term “surface owner” refers to a surface land owner, each as defined in the Act.

### General Requirements for Operations

The Act states that an owner/operator may enter onto lands under which the owner/operator holds rights to conduct oil and gas operations and use it (i) to the extent reasonably necessary to conduct oil and gas operations, and (ii) consistent with allowing the surface owner the greatest possible use of the lands, provided that such surface owner’s use does not interfere with the owner/operator’s oil and gas operations.

Except as is reasonably necessary to conduct oil and gas operations, an owner/operator must mitigate the effects of accessing the lands; minimize interference with the surface owner's use of the lands; and compensate the surface owner for unreasonable loss of crops on the lands, unreasonable loss of value to existing improvements on the lands owned by the surface owner, and unreasonable permanent damage to the lands.

An owner/operator must make a reasonable effort to establish a surface use agreement with the surface owner concerning the lands included in a well site prior to the commencement of drilling a new well, reentering an abandoned well, or assuming operatorship of existing wells.

In the course of complying with the Act, an owner/operator is not required to obtain location or spacing exceptions from UDOGM or UBOGM, nor are they required to utilize directional or horizontal drilling techniques that are not technologically feasible, economically practicable, or reasonably available.

### **Surface Use Bond**

If an owner/operator cannot agree to a written surface use agreement with a surface owner after good-faith negotiations, the owner/operator must furnish to UDOGM, via UDOGM Form 4S, a surface use bond prior to approval of the related application for permit to drill. Such bond may be in the form of either a cash account or a certificate of deposit.

#### *Amount; Other Requirements*

The surface use bond is to be in the amount of \$6,000 per well site on the lands and is payable to UDOGM for the use and benefit of the surface owner.

The surface use bond is to be conditioned on the performance by the owner/operator of its duty to protect the surface owner against unreasonable loss of crops on the lands, unreasonable loss of value of existing improvements, and unreasonable permanent damage to the lands.

A surface use bond does not apply to lands where the surface owner is a party to or a successor of a party to either (i) a lease of the underlying privately owned oil and gas; (ii) a surface use agreement applicable to the surface owner's lands; or (iii) a contract, waiver, or release addressing an owner/operator's use of the surface owner's lands.

#### *Release*

The surface use bond is to remain in effect until released by UDOGM.

The Act requires UDOGM to release a surface bond after it receives sufficient information that either (i) a surface use agreement or other contractual agreement has been reached, (ii) final resolution of the judicial appeal process for

an action for unreasonable damages has occurred and the damages have been paid, or (iii) plugging and abandonment of the applicable well(s) is completed.

### **Related Submissions to UDOGM**

Upon application to UDOGM to drill a new well, reenter an abandoned well, or assume operatorship of existing wells and prior to approval of such actions by UDOGM, the owner/operator must submit an affidavit to UDOGM stating whether appropriate surface use agreements have been established with and approved by the surface owner(s) of the well site(s). Upon request by UDOGM, the owner/operator must submit a copy of the established surface use agreement(s) to UDOGM.

The owner/operator must notify UDOGM if an established surface use agreement is modified or terminated by the parties involved, and if a surface use agreement is terminated without a new agreement having been established, UDOGM will establish minimum well site reclamation requirements.

Separate from the Act, UBOGM has promulgated rules for surface access and operations by seismic contractors, although discussion of the same is beyond the scope of this article.

### **Mediation**

The Act expressly provides that nonbinding mediation may be requested by a surface owner and/or an owner/operator by providing written notice to the other party if (i) both parties are unable to agree on the amount of damages for unreasonable crop loss on the lands, unreasonable loss of value to existing improvements owned by the surface owner on the lands, or unreasonable permanent damage to the lands, and (ii) the dispute relates to an application for a permit to drill submitted by that owner/operator.

UDOGM and Utah Department of Agriculture and Food are required to maintain a list of mediators qualified to mediate these disputes. Any mediation under the Act does not prevent or delay an owner/operator from conducting oil and gas operations in accordance with applicable law.

## OPINION: *Lighthiser*. The *Juliana* Limitations Against Frivolous Climate Litigation Hold

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On June 2, 2026, the Ninth Circuit issued its decision in *Lighthiser v. Trump*, No. 25-6714, affirming the Montana district court’s dismissal of the latest climate suit by the advocacy group Our Children’s Trust (“OCT”). In an unpublished memorandum, the panel (Owens, VanDyke, and Sung, JJ.) held that twenty-two youth plaintiffs lacked Article III standing to challenge the administration’s executive orders on energy. The panel faithfully applied limitations the Ninth Circuit had established in *Juliana*, which dismissed a previous climate case brought by this same group, *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), and implicitly rejected improper fact-finding on the merits by the district court. The decision is sound, and an encouraging sign that the judicial bias in favor of climate change activism did not prevent at least one federal appeals panel from dismissing baseless climate claims despite the presence of sympathetic plaintiffs.

### Background: Our Children’s Trust and the *Juliana* Lineage

OCT, an Oregon-based nonprofit, has spent more than a decade pressing youth-led constitutional climate suits built on novel theories—most prominently a claimed substantive due process right to a stable climate system. Its best-known federal effort, *Juliana*, sought a court-supervised plan compelling the federal government to phase out fossil-fuel authorizations and draw down national emissions. In 2020 the Ninth Circuit ordered *Juliana* dismissed, holding that the requested relief was neither substantially likely to redress the plaintiffs’ injuries nor within the power of an Article III court to award. At the state level, by contrast, OCT secured a landmark win in *Held v. State of Montana*, in which the Montana Supreme Court recognized a state-constitutional right to a clean and healthful environment encompassing a stable climate.

*Lighthiser* followed the federal playbook. Filed in May 2025 on behalf of twenty-two children and young adults from Montana, Oregon, Hawai‘i, California, and Florida—several of them former *Juliana* or *Held* plaintiffs—the suit challenged three executive orders: Executive Order 14154 (“Unleashing American Energy”), Executive Order 14156 (“Declaring a National Energy Emergency”), and Executive Order 14261 (“Reinvigorating America’s Beautiful Clean Coal Industry”). Those orders, *inter alia*, direct federal agencies to expand domestic energy production, expedite permitting, and pause certain Inflation Reduction Act subsidies.

The plaintiffs alleged the orders would increase greenhouse-gas emissions and worsen climate-related harms to their health, recreation, and property. They asserted six claims: substantive due process violations of asserted rights to life and to liberty (the latter grounded in a state public-trust theory); three *ultra vires* claims, directed at the EPA’s implementation of the orders, at the “termination” of the National Climate Assessment, and at the purported “wholesale suppression of climate science”; and a Fifth Amendment “state-created danger” claim. For relief, the plaintiffs sought a permanent injunction barring implementation of the orders, a permanent injunction compelling rescission of every agency directive already issued implementing them, and declaratory relief that the orders and all implementing actions are unlawful and invalid.

### The District Court Proceedings

The federal defendants moved to dismiss for lack of standing and, in the alternative, for failure to state a claim. Nineteen states plus Guam intervened and likewise moved to dismiss. The plaintiffs moved for a preliminary injunction.

Rather than resolving the motions on the pleadings, the district court treated the Rule 12(b)(1) standing challenge as a *factual* attack on jurisdiction. This choice is permissible in the abstract but here raised issues. The court held a two-day evidentiary hearing at which the plaintiffs presented five fact witnesses—youth who alleged their lives had been harmed by climate change—and five experts, including climate scientists and former White House advisor John Podesta.

The hearing thus functioned as a biased and one-sided presentation of the Plaintiffs’ case on the merits. Their witnesses testified without deposition, discovery, or any other meaningful opportunity to explore or test the truth or strength of their contentions. Their experts testified without any of the gatekeeping provided by Federal Rule of Evidence 702. The only challenge to the plaintiffs’ case was the cross-examination defense counsel could muster on the fly.

Despite the lack of safeguards, the trial court permitted the plaintiffs’ witnesses to testify. It relied on their testimony to rule in the plaintiffs’ favor on multiple issues of fact, and ultimately to find their complaint satisfied the injury-in-fact and causation elements of standing.<sup>1</sup> It dismissed based on redressability, finding the requested injunctions would require it to police agency actions and “wind back” the regulatory clock to January 19, 2025—“to create environmental policy” in ways “beyond the power of an Article III court.”<sup>2</sup>

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<sup>1</sup> (Ruling of 10/15/25, Doc. 111).

<sup>2</sup> *Id.* at p. 27.

Nonetheless, the court used its findings on injury-in-fact and causation to issue a 30+ page ruling, much of which was essentially an advisory opinion on the merits. It made numerous statements endorsing the plaintiffs' allegations on climate change, its causes, and harms and then concluded that, if the Ninth Circuit reversed its dismissal, "the undersigned [judge] welcomes the return of this case to decide it on the merits."<sup>3</sup> These statements were improper and unnecessarily undermine public (and party) trust in the neutrality of the judiciary.

## Appeal and Decision

Reviewing *de novo*, the Ninth Circuit affirmed—on broader grounds than the trial court, and without endorsing the trial court's factual narrative. The panel held that the plaintiffs had not plausibly alleged injuries "caused by the challenged" orders: the complaint traced their harms to future discretionary agency actions that the court held were "too speculative to support Article III standing."<sup>4</sup> That holding rejected the very causal link the district court had credited after its hearing, thus rejecting, and at least implicitly overruling, its fact-finding to the contrary.

The panel also held this relief—of injunctions against the executive orders—was non-redressable, finding that the efficacy prong "mirror[ed]" its traceability defect and that granting them was beyond the court's Article III power, as enjoining the orders and unwinding their implementation to date would place "one federal district court in charge of executive branch energy policy" with no "judicially manageable standards," in addition to circumventing the Administrative Procedure Act and Clean Air Act review channels prescribed by Congress.

## Conclusion

*Lighthiser* confirms that *Juliana's* redressability and separation-of-powers limits are not confined to demands for a court-supervised "remedial plan." Recasting a bid to redirect national energy policy as a "traditional prohibitory injunction" against various executive orders did not avoid those limits. Indeed, the panel's traceability analysis arguably strengthens this protection by giving defendants in these cases an earlier off-ramp, as the chain of causation from a high-level directive to a particular plaintiff's injury will rarely satisfy plausibility pleading standards.

The decision is sound and an admirable application of neutral judicial principles, but drawbacks remain. The hearing was a public relations bonanza for the plaintiffs, an incentive to bring frivolous claims that should not be encouraged. In addition, the panel only implicitly rejected the trial court's fact-finding; it did not actually vacate the trial court decision. OTC and its allies have seized on this to

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<sup>3</sup> *Id.* at p. 31.

<sup>4</sup> *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 383 (2024).

issue misleading press releases claiming the reversal was only on procedural grounds and did not disturb the substance of the trial court's ruling adjudicating the science of climate change, so that science is now settled. This is nonsense, but a predictable result of the trial court's improper advisory opinion in favor of the plaintiffs and the panel's failure to vacate it.

## FERC's PJM Co-Location Order: A Turning Point for AI Data Center Power Strategy

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On December 18, 2025, the Federal Energy Regulatory Commission (FERC) issued an order (Order) finding that the tariff administered by grid operator PJM Interconnection (PJM) is unjust and unreasonable as applied to generators serving co-located loads, including large AI data centers. Acting under Section 206 of the Federal Power Act, FERC directed PJM to revise its tariff on an accelerated schedule to establish clear, enforceable rules for these arrangements while preserving reliability and cost-causation principles.

At the center of the Order is a recognition that legacy interconnection assumptions no longer reflect how large, data-driven infrastructure is being developed. FERC confirmed that new generators co-located with large loads may seek interconnection based on their actual net injections to the grid rather than full nameplate capacity. The Order illustrates this with a straightforward example: A 1,000-megawatt generator paired with a 900-megawatt data center may reserve most of its output to serve on-site load and request interconnection rights for only the remaining 100 megawatts. Studying the project at that net injection level can significantly reduce transmission upgrades, compress development timelines, and improve cost certainty.

FERC did not stop at conceptual guidance. It directed PJM to operationalize this framework through explicit tariff pathways and imposed unusually short compliance deadlines, including near-term filings addressing interconnection below nameplate capacity, provisional interconnection service, and related tools intended to accelerate the integration of new generation. In practical terms, FERC is signaling that ad hoc solutions are no longer sufficient and that co-located generation serving large loads must be accommodated transparently and expeditiously within the wholesale market.

The Order also squarely addresses jurisdictional concerns raised by commenters. FERC rejected arguments that co-located generation creates a regulatory gap where retail sales to a data center coexist with wholesale sales to PJM. FERC reaffirmed its authority over generator interconnection and wholesale market participation, while preserving state authority over retail sales, franchise rights, and distribution facilities. For developers, the message is clear: These projects fall within an established federal framework, but state laws remain a gating consideration that must be addressed early and deliberately.

For AI data center developers, e.g., engineering, procurement, and construction firms and land developers, the implications are immediate. Pairing new generation with new load is no longer a workaround at the margins of the tariff. It is a planning model FERC expects system operators to support. Projects that integrate power planning early, align interconnection requests with actual system use, and

coordinate proactively with utilities and regulators will be best positioned to move quickly as PJM implements this new framework.

Although the Order applies directly to PJM, its reasoning is unlikely to remain isolated. Other organized markets facing similar large-load pressures will be forced to confront the same questions about interconnection assumptions, upgrade obligations, and development timelines. In that sense, this decision is best understood as an early indicator of how regulators intend to respond as data center-driven infrastructure becomes a defining feature of the power system.



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# OIL & GAS E-REPORT

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Issue 2

June 2026