Award Winning

The Override

Every Landman Wants One!

Volume VIII , Issue I | September, 2013

Los Angeles Association of Professional Landmen

Presidents Message

Paul Langland, Esq.
President

"If we were all the same, it would be a pretty boring world," is what I tell my daughters all the time when we see someone that is different or conveying a less than mainstream view. I repeat this often to make them understand we live in a very complex and dynamic world, a world that takes more than 26 characters or a snapchat to understand. We all bring different views, experiences, knowledge and intelligence to the world we live in. For those of us in the energy business, especially here in California, this is particularly true.

Right now, we have got a great opportunity to continue to explore and produce much needed energy for the state and region, and to generate new jobs and revenue. It will take all of our efforts to gain access to these resources. Those efforts can be as easy as talking about our industry to friends/

strangers, neighbors and associates to joining various industry and business groups (AAPL, WSPA Associates, Young Professionals in Energy, Energy Nation, and chamber and civic organizations) to ensure intelligent and factual conversations regarding energy production, transportation, refining and marketing.

My career path from being the "Kansas hayseed" working as a landman for ARCO out of law school to the "big oil flack" for ARCO/BP and ConocoPhillips, and now back to my roots as a landman, has given me wonderful experiences and knowledge about the full breathe of our industry. It has shown me our industry (upstream, downstream, midstream and new stream) is one of the safest and most technologically advanced industries around with dedicated, honest and hardworking employees.

We are an industry that is its own worst enemy when it comes to PR events. We have a habit of generational incidents (Union Platform A, Exxon Valdes, BP's Texas City Refinery fire, BP's DeepWater Horizon spill and now the fracking issue) which incites our staunchest opponents to offer half truths and outright lies, which clouds the vision for most of the rest of the populace.

It is our job as land professionals to know how our industry works and be able to communicate the true facts to stakeholders. This is our time to show these stakeholders we can produce oil

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Inside This Issue:

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Meeting Luncheon Speaker

Eric Campbell, LA Seismic

Eric Campbell has been in and out of the oil business since 1974. Eric has had the luxury of working across the country, 33 states including Alaska and California. Eric started seeing the potential of the new technology of the "Node" as a game changer while it was being developed by a company he had worked for in the 80's.

Opinionated Corner

Joseph D. Munsey, RPL
Southern California Gas Company
Publication/Newsletter Co-chair

Paraphrasing a quote from the upper echelon of the LAAPL's board, where they breathe rarified air, "if it ain't broke, why fix it" was the theme adopted to avoid the dreadful ordeal of replacing the current Committee Chairs. Thus informed of the board's edict on our status as one of the Co-chairs of the Publication/Newsletter Committee we will dutifully carry on; as I drag Randall Taylor, RPL, the other erstwhile Co-chair, along for the ride.

We trust everyone had a full summer of work and play. We were informed the Michelson Golf Tournament was a blow out at Malibu; the 31st West Coast Landmen's Institute held in San Diego was its largest seminar to date. Great summer, great golfing, great WCLI – such news bodes well for rest of the year in my books.

To continue the tradition of this column, and never one to let the Progressive buffoons off the hook when they are weaving and dodging from their own duplicity, we found yet another ditty to expose. It comes from the *National Review's* April 8th, 2003, issue, in its Books, Art and Manners section. Vincent J. Cannato took a stab at a recent book written by Jeffrey Frank and published by Simon and Schuster, *Ike and Dick: Portrait of a Strange Political Marriage.*

To begin with, which no doubt will bring angst to some and amusement to others, Mr. Frank mentions how the good General [President Ike] gave the vice president more responsibilities and duties than any previous person holding the office of vice president. Here's the kicker, for all subsequent vice presidents since, according to Historian Irwin Gellman, "Nixon deserves the title of the first modern vice president." Well Al and Joe, it seems you are merely following in the footsteps of your nemesis. Conservatives are howling with laughter and the Progressives cower in contempt.

Now we turn the spotlight on, which is what journalists did to Nixon after the Republican convention. Rumors circulated about the Veep having had an $18,000 political slush fund at his disposal donated by wealthy Republicans. That was a lot of dough back in the 1950's.

In response, General Ike required a full accounting of the matter and nearly 50 legal types and accountants went to work; they subsequently found nothing amiss.

Turning the focus onto Mr. Eisenhower's opponent, the "sainted" Senator from Illinois, Adlai Stevenson, the journalists looked into his slush fund, which had less transparency, revealed the Senator was supplementing state employees' salaries with those funds. Mr. Stevenson's running mate, John Sparkman, somehow found a way to put his wife on the good Senator's payroll. Sorry to have dimmed the glow over Adlai if in fact he happened to be one of your favorites.

Well, I guess the primordial cesspool of Illinois politics probably has much in common with what show up as politics in the great state of Louisiana. Their governors both follow the same path, run for election, win, govern dirty and then on to a much deserved vacation at that exclusive country club run and managed by the Feds, known as the Big House Inn.

To be fair to the writer of the aforementioned column in the *National Review*, his review of the book, Ike and Dick…. had to do with the relationship between Nixon and Eisenhower and was not specifically about Senator Stevenson's slush fund [payroll account]. Being ever vigilante to point out the charlatans of the "Fairness Doctrine" it is crucial to expose these matters when the opportunity arises.

To explain how we do seismic Los Angeles style, we have Eric Campbell of LA Seismic speaking at our upcoming luncheon at the Long Beach Petroleum Club.

I shall see you at the Petroleum Club, once again beaming with delight as one of the appointed Co-chairs of the Publications/Newsletter Committee.

LAAPL Chapter Officers for 2013-2014

At our May luncheon, the LAAPL members voted in for office:

Office	Elected Candidate
President	Paul Langland, Esq. Independent
Vice President	Jason Downs, RPL BreitBurn Co. LLP
Secretary	Cliff Moore Independent
Treasurer	Sarah Sanchez-Downs, RPL Downchez Energy, Inc.
Director	Randall Taylor, RPL Taylor Land Services, Inc.
Director	Joseph D. Munsey, RPL Southern California Gas Company
Past President	L. Rae Connet, Esq., Managing Partner, PetroLand Services[2]

[2]Per Article 8 (2) the outgoing President shall serve as Past President.

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Legislative Chairs
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Golf Chair
Diane Ripley
Kirste Ripley Public Relations
562-883-3001

Nominations Chain
Scott Manning, CPL
Breitburn Managemt Company LLC
213-225-5900

Scheduled LAAPL Luncheon Topics and Dates

September 19th

Eric Campbell
LA Seismic
"Urban Seismic, LA Basin"

November 21st

Jeffrey "Jed" Springer, Esq.
Demetriou, Del Guercio, Springer & Francis, LLP
"Gauging the Truthfulness of an Individual"

January 23th

[4TH Thursday]
Annual Joint Meeting with
Los Angeles Basin Geological Society

March 20th

TBD

May 15th

David A. Ossentjuk, Esq.
Ossentjuk & Botti
"Arbitration Issues"

Officer Elections

2013 WCLI A Smashing Success

This year's West Coast Landmen's Institute was held on September 4th, 5th and 6th at the fabulous San Diego Marriott Marquis Marina – what a venue. To match the surroundings we had superlative topics with unbeatable professionals making their presentations. The dining experience was first class.

This year our attendance topped last year's, which means this was the best attended WCLI in history with about 168+- land professionals attending. Yet, we could have gone over the top as we noted many of the "regulars" were not present. Ah…but there is next year for those who were not able to attend.

We congratulate the WCLI Committee for their efforts in putting on grand seminar.

Treasurer's Report

As of 9/17/2013, the LAAPL account showed a balance of	$20,739.94
Deposits	$15,206.70
Total Checks, Withdrawals, Transfers	$11,415.53
Balance as of 4/30/2009	**$16,948.77**
Merrill Lynch Money Account shows a total	$11,096.90

Our Honorable Guests

May's luncheon topic brought out several guests to the Long Beach Petroleum Club. Our guests of honor who attended:

- Jim Mansdorfer, SoCalGas
- Maya Grasse, LBBS Law Firm

President Appoints New LAAPL Membership Chair

Chapter President Paul Langland appointed **Cambria Henderson**, Land Negotiator, OXY USA Inc., as the LAAPL's Membership Chair for the 2013 – 2014 term. We certainly appreciate Cambria's eagerness to join the chapter and take on a chair.

Jason Downs, RPL, of BreitBurn Company LLC has served as Membership Chair for many years. Jason's indefatigable efforts and fulfilling his duties is greatly appreciated.

We look forward to Cambria keeping the LAAPL informed of all things membership. Please welcome Cambria to the LAAPL.

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Presidents Message cont. from page 1

and gas from the urban environment safely with little to no impacts to the surrounding neighborhoods. These developments will produce numerous benefits such as jobs, new revenues to cities and the state, royalty payments to the underlying mineral interest owners, and of course, energy independence.

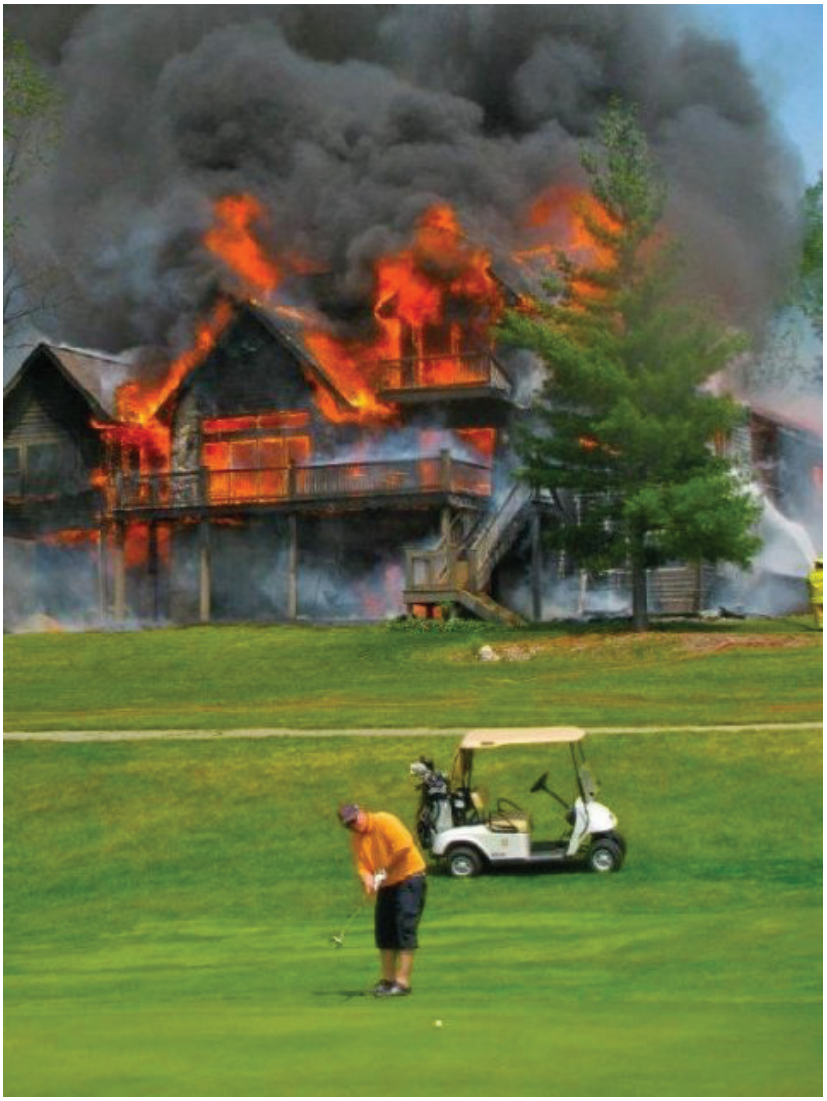
We need to see urban projects, like Domiguez Hills, Baldwin Hills, Whittier and Hermosa Beach, be successful in order to show our stakeholders that urban drilling and production can co-exist with the Southern California lifestyle and neighborhoods. If we do not, we will not be able to develop and redevelop the treasure that lies under the LA Basin…black gold, Texas tea.

I look forward to working for LAAPL this year. My goals are simple, continue educating our membership on land issues, being a mentor for our younger associates (or those who want to be young:), and having fun (maybe a holiday party this year?).

Best regards to you and yours,

Paul

Lawyers' Joke of the Month



It was later reported that his wife got out safely, and that he did indeed birdie the hole.... he says the divorce isn't going to be that bad, now that there's no house involved!...

New Members and Transfers

Jason Downs, RPL
Downchez Energy, Inc.
Membership Chair

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

New Members

None

Transfers

Sarah Duffy
Landman
Wolcott, LLC
729 Bookcliff Ave
Grand Junction, CO 81501

To:
Sarah Duffy
Land Manager
Signal Hill Petroleum, Inc.
2633 Cherry Ave.
Signal Hill, CA 90755
sarahduffy@shpi.et

Adrienne Wiggins
Land Technician
Petroland Services
1303 Inglewood Ave., Suite 105
Hawthorne, CA 90250

To:
Adrienne Wiggins
Landman
Signal Hill Petroleum, Inc.
Awiggins@shpi.net
(562) 326-5252
Cell: (432) 889-6596

Jeff Martinez
Independent Landman
Pacific Energy Group
11666 Montana Ave. #211,
Los Angeles, CA 90049

To:
Jeff Martinez
Vice President
Petroland Services
jmartinez@petrolandservice.com
13030 Inglewood Ave. #105
Hawthorne, CA 90250

New Member Requests

Mike Charbonnet
MWC Resources, Inc.

Val K. Hatley
Percheron Field Services

Cambria Henderson
Oxy USA, Inc.

James Dihn Pham
JD Energy Solutions, LLC

Sharon Sanchez
Downchez Energy, Inc.

Ian Williamson
Independent Landman

Welcome Back

Joe Peterson
Spectrum Land Services

Job Search

Energy Search Associates
www.energysearchassociates.com

We are currently seeking a Land Manager or Land VP for a startup Operator located in Santa Maria (near the Arroyo Grande/Nipomo area). The company currently has $160mm funding from a well-established Oil and Gas family. The company will be operating in the Monterrey Shale and already has some producing property in the area.

Requirements and Duties include:

- Bachelor's Degree, preferably in Land Management
- Primarily current In-House experience is preferred
- Prefer Extensive California experience that includes permitting
- Prefer experience including building a land department, budgeting and everything that goes with building a team
- JOA/Farm Ins, Farm outs/ AMI/Pooling/ experience with negotiating oil and gas leases, various land related agreements (Surface Use & Right-of-Way Agreements)
- A&D experience preferred
- Experience with Vendor MSA's and oil and gas marketing a plus
- Strong technically, good attitude and work ethic

I am happy to share additional details with anyone who is potentially interested and qualified. I can be reached at clark@energysearchassociates.com or 972.628.6432.

Guest Article

How the Energy Industry Should Respond to HBO's Thoroughly Refuted 'Gasland II'

By Alex Epstein

On July 8, Gasland, Part II came out to much fanfare. The movie's thesis is that the oil and gas industry is, through hydraulic fracturing and political manipulation, destroying our planet-especially our drinking water. Numerous specific companies are cast as villains, such as Cabot Energy, Devon Energy and Range Resources. And, not surprisingly, the media has given the film, and filmmaker Josh Fox, loads of positive coverage-even though the movie has been thoroughly refuted. What can the industry do to respond effectively?

In my experience, a lot. As an energy philosopher who routinely argues on college campuses for the big-picture benefits of fossil fuels, I know firsthand that it's possible to inoculate Americans against anti-energy propaganda. But it requires a radically different approach than most in the oil and gas industry are used to.

Here are six tactics that my organization, Center for Industrial Progress, and our clients use.

1. Be Proactive

Have you heard the classic story about Napoleon who, when asked what he, as the greatest general of all time, would do in response to a seemingly impossible situation? Napoleon's response was: As the greatest general of all time, I wouldn't have gotten there in the first place.

While there is much the oil and gas industry can do to counter Gasland now, its job would have been 10 times easier had it properly educated the public about shale energy technology-aka "fracking"-before publicity-seeking individuals like Fox got their hands on it.

Importantly, people will listen to the true story of fracking; it is utterly inspiring and fascinating. A band of renegade oil and gas executives, engineers, and rig-workers developed a technology that could transform worthless rock into wondrously abundant and affordable energy–enough to improve the lives of every single American. Fracking gives some states the cheapest electricity in the world, a boon to our manufacturing. It gives us the oil and gas that run our farms, warm our homes and fuel our fun.

2. Be Positive

The industry, particularly through excellent research groups like Energy in Depth, has done an outstanding job of debunking, claim by claim, Gasland and other anti-fracking materials. But too much focus on debunking is counterproductive because it puts you on the defensive.

Imagine the best case scenario of a debunking campaign; your audience agrees that everything Fox has said so far is false. Where does that get you? Effectively, it gets you to neutral, to zero. But if you are doing something incredibly good, you should "argue to 100"-tell a positive, inspiring story that incorporates your challenges (see the next point) and takes the moral high ground. In any debate, the side with the moral high ground wins.

To be sure, the industry puts out a lot of seemingly positive content, but too often that content is either too abstract (point 6) or has nothing to do with the core of your industry—the production of oil and gas. The common practice of overblowing your community service efforts and "alternative energy" initiatives accomplishes nothing except making you seem guilty and evasive. It implies that being and oil and gas company isn't honorable in and of itself—as does the common practice by Exxon, Shell, and Chevron of not even mentioning the word "oil" on their homepages!

Taking the high ground means being positive and proud about the core of your industry—the use of human ingenuity to produce the cheap, plentiful, reliable energy that fuels human progress. (And, as my book Fossil Fuels Improve the Planet explains, you can and should take the high ground on environmental issues.)

3. Be Open

It is absolutely essential that you tell the full story of the health and safety challenges you face; because you haven't done so effectively, Gasland has told it (falsely) for you. Part of being open is making clear that every energy project faces health and safety challenges-certainly solar and wind do. Here's an example of this kind of argument, from a recent Forbes article I wrote on Gasland II:

Gasland II continued on page 7

Gasland II continued from page 6

Here's the truth about groundwater. Every technology uses raw materials that must be mined from the ground–any time we drill or mine or dig underground, whether to drill for oil or to mine for the materials in solar panels, groundwater can be compromised. Of all the things you can do underground, fracking is the least likely to impact groundwater, because it takes place thousands of feet away from groundwater. As President Obama's former EPA Administrator Lisa Jackson acknowledged, there is no "proven case where the fracking process itself has affected water. . . ."

If something goes wrong at a fracked oil or gas well, it almost certainly has nothing to do with fracking.

By being open about your challenges, you gain credibility and you can make people admire how well you triumph over those challenges.

4. Be Illuminating

The iconic image of Gasland is a water spigot on fire. If the industry had told the proper story of fracking and groundwater, every American would know that flammable water is a common natural phenomenon; people have been lighting water on fire as long as they've been digging wells, and thus flammable water in Gasland proves nothing except Josh Fox's duplicity.

But by not educating the public on all aspects of the fracking process, the industry has allowed "fracking" to be a vague, ominous practice-instead of a clear, fascinating technique.

5. Be Offended

If you tell your story correctly and openly, you have every right to be offended on behalf of all your workers and customers. It's very hard for Josh Fox to attack the industry if it's presented as a collection of individuals choosing to live their lives a certain way. Ditto for consumers; treat them as individuals making choices that this power-luster is trying to oppose. You want to produce reliable, low-priced electricity for the businesses in your city; Fox says no, they'll have to live on the energy of the 13th century. Your customers want to afford air-conditioning so they can spend summers in comfort, and Josh Fox, who has never produced a kilowatt-hour of energy, is saying they can't use the energy that works.

If you tell your story and are offended, the public will be offended, too. If you don't think the public can embrace the energy industry, go to the I Love Fossil Fuels Facebook page. Or note that one of the most popular books of the 20th century was Atlas Shrugged, Ayn Rand's tribute to the industrialists who hold up our world.

6. Be Concrete

The vast majority of "positive" material from the industry contains endless job and economic statistics. These are valuable only if they are understood to represent real, concrete, individual lives.

Talk about what your industry does for individuals-what your employees do, why they do it and how they flourish-and how every kilowatt-hour of energy you produce is an opportunity for someone to live a better life. A couple examples of how to do this are here and here.

Gasland, Part II should be a wake-up call for the industry to tell a proactive, positive, open, illuminating, personal and concrete story. Four years ago, this kind of story could have stopped the Gasland phenomenon before it started-today it can start to reverse it.

Alex Epstein, an energy philosopher, debater and communications consultant, is Founder and President of the Center for Industrial Progress and author of Fossil Fuels Improve the Planet. Mr. Epstein can be at alex@industrialprogress.net.

Guest Article

Sempra U.S. Gas & Power and Consolidated Edison Development Announce Solar Partnership

Reprinted from GasLines©
With Permission of Southern California Gas Company
May 21, 2013

Sempra U.S. Gas & Power has announced an agreement to partner with Consolidated Edison Development (ConEdison Development) in two of its solar power facilities, the 150-megawatt (MW) Copper Mountain Solar 2 plant near Las Vegas and the 150-MW Mesquite Solar 1 power plant near Phoenix.

Soaring solar: An aerial view of Mesquite Solar 1 near Phoenix, Ariz., which powers nearly 56,000 homes.

Under the sales agreement, each company will own a 50-percent interest in the two solar facilities, which are among the largest photovoltaic plants in the U.S.

Sempra U.S. Gas & Power will continue to provide operations and maintenance services to both plants. The terms of the sale were not disclosed.

A Strategic Partnership

"This strategic partnership bolsters Sempra U.S. Gas & Power's ongoing plan to improve its financial returns, deconsolidate debt and redeploy the proceeds from the transaction into new renewable growth projects," says Kevin Sagara, vice president of Renewables and Corporate Development for Sempra U.S. Gas & Power. "We look forward to partnering with Consolidated Edison Development to continue operating world-class solar facilities that supply clean, emission-free electricity to our customers, and to capitalize on our shared view of near-term growth opportunities."

World-class Solar Snapshot

Construction on Mesquite Solar 1, located in Arlington, Ariz., began in 2011. Power from the facility has been sold to Pacific Gas & Electric under a 20-year contract. Mesquite Solar 1 generates enough clean electricity for about 56,000 homes. The project created 528 local construction jobs at the peak of construction and 10 long-term positions.

In September 2011, the U.S. Department of Energy's Loan Program Office awarded Mesquite Solar 1 a $337 million loan guarantee that enabled it to build this innovative photovoltaic plant, one of the largest in the U.S. The agreement is subject to approvals from the U.S. Department of Energy and regulatory agencies. Those approvals are anticipated in the second half of 2013.

Phase 1 of Copper Mountain Solar 2 is complete and is currently generating 92 MW of clean solar power. When the second phase is fully constructed, expected in 2015, the project's total operating capacity will be 150 MW. Power from the facility has been sold to Pacific Gas & Electric under a 25-year contract. [SN]

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Case of the Month - Oil & Gas

Division Orders: What You Need to Know

John McFarland, Esq.
Law Firm of Graves Dougherty Hearon & Moody
Austin, Texas

Mr. McFarland is a shareholder at Graves, Dougherty, Hearon & Moody in Austin, Texas specializing in representation of landowners and mineral owners in oil and gas matters in Texas.

Other than the oil and gas lease itself, the division order is undoubtedly the most common legal instrument mineral owners are asked to sign. Mineral owners should know the purpose of a division order, what rights and obligations it imposes on them, and the division order's relation to the oil and gas lease.

First, I should say that the law and practice regarding division orders varies from state to state. I practice in Texas, so what follows relates only to the use of division orders in Texas.

Historically, there has been much controversy and litigation in Texas about division orders and their effect. As a result, in 1991 the Legislature passed a statute governing the use of division orders. The statute was amended in 1995, 1997 and 1999. It is now Chapter 91, subchapter J of the Texas Natural Resources Code, commonly called the Division Order Statute. So the law applicable to division orders in Texas is the court-made law plus the division order statute.

The main purpose of a division order is to protect the payor of the proceeds of production from double liability. The company issuing the division order is requiring the royalty owner to (1) verify that the royalty owner's decimal interest set out on the division order is correct and (2) agree that the company can make payments based on that decimal interest until notified by the royalty owner that the ownership has been changed. By the division order, the royalty owner indemnifies the payor against liability to third parties who claim to own the interest being paid to the royalty owner.

To understand division orders, it is helpful to understand how exploration companies handle royalty payments. When a company decides it wants to drill a well in a particular area, it first hires landmen who investigate the mineral title to the tracts in the area where the well will be drilled and identify the mineral owners of those tracts. The company or its landmen then contact those mineral owners and negotiate oil and gas leases covering their interests. Depending on the complexity of the mineral title, there may be dozens or even hundreds of mineral owners from whom oil and gas leases must be obtained. The company may want to acquire leases in a large area around its proposed drillsite, in order to lock up the minerals in that general area so that additional wells can be drilled if the exploratory well is successful.

After the company has acquired the oil and gas leases in the area it wants to exploit, it picks its initial drillsite and then engages an oil and gas attorney to examine the title to the drillsite tract. The attorney reviews all of the documents gathered by the landmen involving the mineral title to the drillsite tract and then gives an opinion, called a drilling title opinion, to the company. The purpose of the drilling title opinion is to assure the company that it owns oil and gas leases covering 100% of the mineral estate in the drillsite tract. If the drillsite consists of a pooled unit encompassing two or more smaller tracts, the drilling title opinion may cover all of the tracts in the proposed pooled unit. Where the well to be drilled is a horizontal well, the drilling title opinion should cover at least all of the tracts that will be penetrated by the well bore. If the attorney discovers an unleased interest or finds defects in the mineral title that raise questions about the mineral ownership, the company will engage landman to "cure" these title defects prior to the drilling of the well.

Once the drilling title opinion is complete and shows that the company has the drillsite 100% leased, the company drills its well. If it is successful and placed into production, then the company engages an attorney (who may or may not be the same attorney as the one who did the drilling title opinion) to prepare a division order title opinion. The purpose of this second opinion is to tell the company how to pay the royalty owners, based on the record title ownership of the minerals and the oil and gas leases covering the well or pooled unit. The division order title opinion will list each owner of an interest in production and that owner's decimal interest in production, all of which must add up to 100%. Again, if there are issues regarding the correct ownership of any person, the opinion will discuss those issues and what needs to be done to "cure" the problem. Those issues are listed as "requirements" in the opinion. Where there are requirements, those owners affected by the requirements will not be paid until the requirements are cured. Remember that a title opinion is just that -- an opinion. It is prepared by attorneys skilled in examining titles, but it may be wrong. First, it is based only on the documents provided to the attorney for review. The attorney may not have seen documents that affect the title, or the attorney may have missed provisions in the documents that affect the title.

Division Orders continued on page 11

Division Orders continued from page 10

Based on the division order title opinion, the company then prepares a division order for each owner entitled to payment on production from the well and sends it to the owner. The company personnel who deal with division orders are called division order analysts. When you call a company asking about your royalty payments, you are usually speaking to a division order analyst. Often, the royalty owner's receipt of a division order is the first indication to the royalty owner that a well has been completed and is producing. Depending on the complexity of the title, there may be a significant time between the completion of the well and the issuance of division orders - sometimes several months.

Problems arose concerning the use of division orders because companies began using them for something other than their original purpose. Many division orders contained provisions specifying how the oil or gas would be valued for purposes of paying royalties and what deductions could be made from royalty owners' payments. These division-order provisions often conflicted with the terms of the oil and gas leases under which the royalties were being paid. So litigation inevitably resulted. Courts were confronted with how to characterize and enforce signed division orders that conflicted with the terms of the leases.

In Texas, courts have held that division orders are executed without consideration, but that they are an enforceable agreement until they are revoked. **A division order can be revoked at any time by either party,** after which it has no further effect. So, if a division order provides that royalties shall be paid based on the net proceeds from sale of the production, less all post-production costs incurred by the lessee prior to sale, then the lessee is entitled to pay on that basis as long as the division order is in effect, even if the lease required the lessee to value the production in another way.

The miss-use of division orders led to the Texas Legislature's passage of the division order statute. Like most legislation, the statute is a compromise. It gives the companies the right to require execution of a division order, but only if the division order does not seek to modify the lease. The statute provides that "Any provision of a division order ... which is in contradiction with any provision of an oil and gas lease is invalid to the extent of the contradiction." But it also provides that "A division order may be used to clarify royalty entitlement terms in the oil and gas lease."

The statute then has an odd provision: "With respect to oil and/or gas sold in the field where produced or at a gathering point in the immediate vicinity, the terms 'market value,' 'market price,' 'prevailing price in the field,' or other such language, when used as a basis of valuation in the oil and gas lease, shall be defined as the amount realized at the mouth of the well by the seller of such production in an arm's-length transaction." Texas Natural Resources Code Section 91.403 (h) and (i). When the statute was passed, there had been a lot of litigation about the meaning of the term "market value" when used in the royalty clause of a lease, and lobbyists for the producing companies got this provision added to the statute to try to reduce their exposure to

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liability for royalty payments under leases requiring them to pay based on "market value." It is hard for me to understand how the Legislature could dictate what the parties intended in a private contract, but that is apparently what they tried to do. I am not aware of any case dealing with this provision of the statute.

The division order statute says that, if a company uses a division order that meets the requirements of the statute, it can refuse to pay the royalty owner until the royalty owner has signed the division order. The statute also adopted an "approved form" of division order - but only for oil royalties. If the payor uses the statutory division order form, it can be sure that it has no liability for failing to pay royalties if the royalty owner refuses to sign it.

The statute also:

makes clear that a payor of royalties has no obligation to pay if there is a title question about ownership of the royalty; and

provides that royalties must be paid within a certain number of days after production occurs, and sets a statutory rate for interest that must be paid on late royalty payments - 2% above the "Fed Funds" rate.

Producers and purchasers who pay royalties today generally use division order forms that attempt to comply with the division order statute. The National Association of Division Order Analysts has adopted a form of division order that some companies use. But some companies still sometimes try to use division orders to alter the terms of the lease.

So, what should a royalty owner do when he/she receives a division order? First, the owner should determine whether the royalty decimal shown on the division order is correct. Sometimes this is a simple matter, but often it is not, especially where pooled units are involved. When companies send out division orders, they make no attempt to explain how the decimal for payment was arrived at, so the royalty owner may have to call the company to find out how the decimal was calculated. Royalty owners should not be bashful about making such calls. Don't sign a division order until you know and agree with how the decimal was calculated and are satisfied that the lease is still in effect. It is sometimes hard to get to the right person with the company who can explain it. Usually, the division order or the accompanying letter has a number to call, or the company may have a royalty owner hotline that can be found on its website.

Second, read and understand the language in the division order. If you don't understand or don't agree with something, don't be bashful about asking questions or making changes. Most companies will take a division order with changes that don't alter its basic purposes.

Third, I recommend that royalty owners always add language to a division order as follows:

THIS INSTRUMENT DOES NOT MODIFY OR AMEND THE TERMS OF ANY OIL AND GAS LEASE. ALL ROYALTIES DUE AND PAYABLE UNDER ANY OIL AND GAS LEASE SHALL BE CALCULATED AND PAID AS PROVIDED IN THE LEASE. THIS DIVISION ORDER IS EXECUTED WITHOUT CONSIDERATION AND MAY BE REVOKED AT ANY TIME.

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Case of the Month - Right of Way

Sometimes A Taking Is Not Really 'Taking'

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The background facts of a recent Federal Circuit opinion, *TrinCo Investment Co. v. United States,* No. 2012-5130 (July 18, 2013), seem deceptively simple: the government removes $6.6 million of timber from private property without paying just compensation. It doesn't ask permission; it simply walks onto the property and takes it. The property owner sues, claiming the fairly obvious taking. Pretty simple, and the government admits that it in fact took the $6.6 million in timber.

But then something surprising happens. The Court of Federal Claims dismisses the case, finding that no taking had occurred.

Read on to learn about the doctrine of "necessity" and why what seems to be an obvious taking may not in fact be actionable.

The Underlying Facts and the Court of Federal Claims

In June 2008, the "Iron Complex" fire roars out of control in the Shasta-Trinity National Forest. Before it is finally contained In September, more than 100,000 acres will burn. Firefighters battled the blaze using helicopters, bulldozers and dozens of fire engines.

In addition to battling the fire on the fire lines, the government commences efforts to eliminate fuel for the fire in areas in which the fire could spread. Among the areas intentionally burned are 1,782 acres of private timberland. The main fire never reaches the area, but the government's fire destroys $6.6 million of privately owned timber.

The owners sue, claiming the destruction of their timber constitutes a taking, but the government disagrees, claiming its conduct is protected under the doctrine of "necessity."

The Court of Federal Claims agrees with the government, granting a motion to dismiss the case, and the owners appeal to the Federal Circuit.

The "Necessity" Doctrine

What seems initially to be an easy takings claims is complicated by the "necessity" doctrine. This doctrine is succinctly explained by the Supreme Court in its 1952 decision in United States v. Caltex, 344 U.S. 149:

> [C]ommon law ha[s] long recognized that in times of imminent peril — such as when fire threatened a whole community — the sovereign could, with immunity, destroy the property of a few that the property of the many and the lives of many more could be saved.

On the one hand, it is easy to see the justification for such a rule — after all, would anyone really want the government to let a life-threatening fire burn rather than risking liability for its efforts to stop it? On the other hand, one can pretty easily understand how the "few" who paid the price to save the "many" might feel unfairly burdened by the government's efforts.

Regardless of how one feels about the doctrine, it's pretty well established, and the Court of Federal Claims applied it to protect the government's actions in TrinCo.

The Decision in the Federal Circuit

Having analyzed — and accepted — the "necessity" doctrine, the Federal Circuit did not simply accept the lower court's decision. Rather, the court dug a bit deeper, concluding that the doctrine had historically been narrowly construed, protecting government conduct only where "there is an imminent danger and an actual emergency giving rise to actual necessity."

The Federal Circuit refused to broaden the reach of the doctrine. In reversing the lower court, the Federal Circuit did not hold that the government's conduct qualified as a taking. Rather, the court remanded the case for further proceedings to determine whether the requisite "imminent danger" and "actual emergency" in fact existed.

Time will tell how the case will play out, but the Federal Circuit highlighted a few key facts in reaching its decision: (1) when the decision was made to burn plaintiffs' property, only 2 percent of the national forest was on fire; and (2) no showing had been made that the same preventative measures might have been taken by the government's burning of its own property (i.e., other portions of the national forest), rather than plaintiffs' property. The court's concluding sentence may foreshadow what happens next:

> It would be a remarkable thing if the Government is allowed to take a private citizen's property without compensation if it could just as easily solve the problem by taking its own.

While the *TrinCo* case does not present facts encountered all too often, it is good to keep in mind that in some cases, even what appears on its face to be an obvious taking may in fact be something else.

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Guest Article

BLM's Fracking Rule - A Solution Vainly Searching For A Problem

David Blackmon, Contributor - " I write about public policy issues affecting the oil and gas industry"
Forbes Magazine

"Obama's Proposed Fracking Rule Would Lead to Dirty Energy"

That was the headline for this post at the Energy Collective by Amy Mall, Senior Policy Analyst for the anti-development group, Natural Resources Defense Council (NRDC). The outlash towards the Administration and the BLM's proposed regulation governing well completions and fracking operations from NRDC was quite predictable, and it was replicated by a raft of similarly-oriented conflict groups whose fundraising efforts rely on the perpetuation of never-ending crisis, real or imagined.

At the same time, the oil and natural gas industry's comments related to the proposed regulation as the comment period closed last Thursday also expressed a high level of discontent, not just with the higher costs the new rules would bring to everyone, but also the apparent lack of a legitimate basis for BLM to pursue the regulation in the first place.

Joint industry comments filed by the Independent Petroleum Association of America (IPAA) and the Western Energy Alliance (WEA) on behalf of themselves and 46 additional state and national oil and gas industry trade associations came quickly to the crux of the matter:

"Sixteen months into the rulemaking process, BLM remains unable to provide a supportable reason to impose its additional layer of regulations on top of those laws States already enforce. For the high cost this rule will impose on the industry – $345 million per year – what benefit will the public receive? For the disincentive this rule will create to invest in federal and tribal oil and gas leases, to whom will the tribes and the taxpayers turn for the lost leasing and royalty revenue? BLM has been unable to answer these questions. BLM should recognize that states are already regulating hydraulic fracturing admirably. The only imperative to adopt this rule is an arbitrary desire "to do something"."

The American Petroleum Institute (API), citing a study it had commissioned, estimated the annual cost of the rule to be somewhere between $30 million and $2.7 billion, a large gap that signified prevailing uncertainties about how the regulations would be applied once they become final. Wyoming Governor Matt Mead urged Interior Secretary Sally Jewell to reject the proposed regulation, pointing out that his state, like every other oil and gas producing state, already regulates the processes covered by the proposed rule for all wells drilled within its borders. "Wyoming has led the nation in regulating hydraulic fracturing, and the BLM should allow us to continue that leadership," Governor Mead said.

For itself, the BLM estimated the cost of the regulation at between $12 million and $20 million per year, and was unable to quantify any benefit that would accrue as a result of its imposition of the new regulation. Thus, at the end of the day, BLM appears to have created a proposed regulation that no one likes, provides no tangible benefit, and duplicates already-existing state-level regulations.

Lovely.

The joint industry comments hit the nail on the head when they point out that the main reason for implementing this rule is an "arbitrary desire 'to do something'". In other words, the main reason BLM has pursued this regulation is political in nature, which is inevitably a problematic motivation for regulation of any industry. As API spokesman Erik Milito pointed out, "There is still no clear benefit to imposing additional federal rules on top of state environmental stewardship." It's a very good point.

For example, the BLM rule contains a whole suite of provisions designed to regulate how wells are completed, including new requirements related to casing and cementing. Can the BLM point to a rash of casing or cement job failures on federal lands, or significant failures in state oversight of well completions as a justification for the provisions? If it can, it doesn't do so in the preamble to its proposed rule, nor has any representative of the Administration done so in any public statements. The reason for that, of course, is that no such justifications exist.

The proposed rule also would implement a requirement that oil and gas operators disclose the chemical and other contents in the fluids they use to conduct hydraulic fracturing operations on federal lands. Again, pretty much every state with any significant federal lands in their borders already have their own laws and/or regulations containing similar requirements for

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all wells drilled within their borders – including those on federal lands – requirements that are already working quite well. So what is the driving need for the federal government to now come in and increase everyone's costs and add time delays with a duplicate set of reporting requirements?

The reality, of course, is that no such driving need exists. The whole "disclosure" issue was a fake controversy to begin with. There never has been any overwhelming outcry from real landowners demanding to know what is in fracking fluids. The issue was invented out of whole cloth by fracktivist groups in the Barnett Shale who convinced a handful of landowners to complain at public hearings. But most landowners have real jobs and occupations, and have neither the time nor the inclination to coordinate efforts with professional protesters.

But because a compliant news media reported on the issue as if there were some great groundswell of concern from real landowners, the states that are home to significant oil and gas development have taken it upon themselves to deal with the matter, and they have done so quite effectively at this point. As a result, there is no real justification for any federal agency – the BLM or otherwise – to be pursuing a duplicative and costly regulatory regime at the federal level.

And yet, here it is.

At the end of the day, BLM's proposed regulation is a solution desperately in search of a problem, a problem which it has found itself painfully unable to quantify or really to even identify. In its overwhelming institutional need "to do something", the BLM proposes to impose a rule that has, by its own admission, no quantifiable benefit and that will only serve to impose new costs on producers and consumers of oil and natural gas from federal lands.

This article is available online at: http://www.forbes.com/sites/davidblackmon/2013/08/26/blms-fracking-rule-a-solutionvainly-searching-for-a-problem/

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