



The Override

Every Landman Wants One!

Volume X, Issue X

November, 2017



Presidents Message

Sarah Bobbe, CPL
President

Signal Hill Petroleum, Inc.

Dear Members,

There is much to be thankful for as we approach the holiday season. It's starting to feel like Autumn in Southern California as the forecast dramatically swings from "a full day of sunshine" to "mostly sunny and pleasant". Oil prices are the highest they've been in two years and according to a new report published by recruitment firm NES Global Talent, industry is hiring again. You can read the report here <https://www.nesgt.com/blog/2017/10/nes-report-shows-signs-of-returning-confidence-in-the-oil-and-gas-market>. Despite all the chaos and turmoil in the world, there is reason to be optimistic.

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I'm embracing this moment in time by focusing on how to make the most out of the remaining days of 2017, both personally and professionally. Why wait until January 1 to reflect?

Thanks to California Resources Company ("CRC") for hosting the BAPL & LAAPL Joint THUMS Island Tour on November 4. The group was given a behind-the-scenes peak into the island operations. Our CRC tour guide shared the history of the islands and graciously answered all our questions. The islands were producing 148,000 barrels per day at their peak in the late 1960'S. Today it produces approximately 24,000 barrels per day and over a million barrels of produced water. As our guide told us, THUMS is basically a "water treatment plant which produces oil." I was surprised to learn how the drilling rig moves to different island locations on rails. I was not surprised to learn the islands were designed by prominent theme park architect, Joseph H. Linesch. I have always said they look like Disney Land

[Presidents Message continued on page 4](#)

Meeting Luncheon Speaker

"An Overview of Los Angeles Energy Issues and the Current Political Landscape"



Ruben Gonzalez is President of Gonzalez Strategic Affairs and also is currently Senior Advisor for Strategic Affairs for the Los Angeles Area Chamber of Commerce.

Previously, he served as Senior Vice President for Public Policy & Political Affairs for the Los Angeles Area Chamber of Commerce, which is the oldest and largest business association in Southern California. In this role he oversaw all public policy issue development and advocacy for the Chamber.

Mr. Gonzales was with Englander, Knabe & Allen, LA's top public affairs firm where he served multiple clients as a lobbyist and ran political and issue campaigns. His client portfolio at the

[Luncheon Speaker continued on page 4](#)



Opinionated Corner

**Joe Munsey, RPL
Director**

**Publications/Newsletter Co-Chair
Southern California Gas Company**

With this being the November issue of *The Override*, it means the last issue for this year. Ah - but it marks the beginning of the year's major holidays awaiting to be celebrated. Thanksgiving is at the doorstep ready to go into high gear and following close behind is Christmas and Hanukkah. Keeping with tradition, we alert you with the countdown figures for Hanukkah and Christmas. As of the date writing this column, you have 45 days left to complete the "naughty or nice list" and get everything purchased before the big day arrives; for those who celebrate Hanukkah, you have less time, a mere 31 days.

Halloween was not even around the corner and we nearly had the hell scared out of us if the BLM Sagebrush Focal Area had not been withdrawal on October 11th by the BLM. Had this land grab eventually been enacted, it would have affected 10,000,000 acres in Idaho, Montana, Nevada, Oregon, Utah and Wyoming. For those who work Sectional Lands, that equates to 15,625 Sections, or 434.0278 Townships. Puts it into better perspective when visualized through the lenses of Sections, Township and Range.

Forget it was a ploy to protect the greater sage-grouse and its habitat from hostile effects of the development of BLM minerals. Sure, that is the ruse, but lurking within the fog is a way to figure out how to eventually keep the public from enjoying open space with anything related to an internal combustible engine. Lithium battery powered vehicles [cars, trucks, dune buggies or motor scooters] would have

been lopped in with their gasoline power cousins; let us be clear about that matter. Anything with wheels piloted by humans is a "no go," regardless of the power source.

So what happened? According to Acting BLM Director Mike Nedd, "The proposal to withdraw 10 million acres to prevent 10,000 from potential mineral development was a complete overreach." Well, some common sense seems to have prevailed this time around.

In the 2017 Fall issue of *The Objective Standard*, Founder and Editor Craig Biddle, interviewed the renown pro fossil fuel writer and author of *The Moral Case for Fossil Fuels*, Alex Epstein, on his opinion of Al Gore's new movie, *An Inconvenient Sequel*. One of the take-aways from the interview was a statement from Mr. Epstein, "I think the Earth is imperfect and needs to be continually upgraded to be fit for human flourishing; they [Earth Worshippers] think the Earth is perfect and needs to be continually protected from human impact."

I'm thinking, setting aside 10,000 acres vs 10,000,000 acres seems reasonable and lines up in the spirit of Mr. Epstein's comment.

While on the subject about "set asides," a moment of time aside for thoughts or prayers for those who now must cope with the loss of friends and loved ones during the upcoming holidays because of the recent calamity that befell Sutherland Springs, TX, Las Vegas, and New York City; the same can be said for our troops here and abroad.

Enjoy your Thanksgiving and be grateful for this year's blessings. Bask in the joy of Christmas, or Hanukkah, and spread peace on earth towards all.

God Bless America!



LAAPL Bids Farewell to Its Immediate Past President

Past President John R. "JR" Billeaud, RPL will be leaving the California Oil Patch relocating to Dallas, TX where he has accepted a new job opportunity with Berry Petroleum. Prior to accepting this position with Berry Petroleum, JR held the position as Senior Landman at Sentinel Peak Resources.

JR exemplifies the professional landman, the least being willing to join a local landman chapter and plunge headlong into volunteering at the chapter level. JR stated in his announcement to the LAAPL Board Members, "I am very grateful to have been a part of the association and enjoyed my time serving on the Board with you all."

The LAAPL appreciates JR's dedication to the chapter and we wish him well at Berry Petroleum. Please offer him a well-deserved gratitude of thanks for his work here at LAAPL by contacting him, before he checks out on November 16th, at jbilleaud@sentinelpeakresources.com. You will miss the opportunity to do so at this current email address, as we expect he will not be attending the LAAPL luncheon.

LAAPL and LABGS Hold Annual Joint Luncheon

The Los Angeles Association of Professional Landmen and the Los Angeles Basin Geological Society will hold its joint luncheon in January 2018. Please note the date of the luncheon is the fourth Thursday of January and the location is at The Grand, at Willow Street Conference Center.



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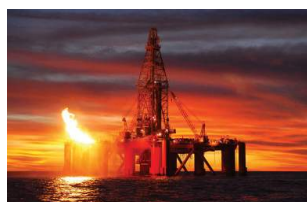
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Chapter Board Meetings

Brandi Decker
California Resources Corporation
LAAPL Secretary

The LAAPL Board of Directors and Committee Members held their regular meeting on Thursday, September 21, 2017 led by President Sarah Bobbe. The topics discussed at the meeting are as follows:

- Olman Valverde is applying for a new tax exemption for LAAPL with CA Secretary of State and Franchise Tax Board
- Jason Downs and John Billeaud were appointed to serve as the Golf Chairpersons
- Allison Foster was appointed to fill the Membership Chair position

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

Scheduled LAAPL Luncheon Topics and Dates

November 16, 2017

“An Overview of Los Angeles Energy Issues & the Current Political Landscape”

Ruben Gonzalez, President of Gonzalez Strategic Affairs

Currently Senior Advisor for Strategic Affairs for the Los Angeles Area Chamber of Commerce.

January 25, 2018

[4TH Thursday]

Annual Joint Meeting with Los Angeles Basin Geological Society

March 15, 2018

Thierry Montoya, Esq.
Law Firm of Alvarado Smith

May 17, 2018

E. Ryan Stephensen, Esq.,
Law Firm of Day Carter Murphy

Officer Elections

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Treasurer's Report

Rae Connet, Esq.
Treasurer
Independent

As of 8/1/2017, the LAAPL account showed a balance of

Deposits	3,975.00
Total Checks, Withdrawals, Transfers	2,000.00
Balance as of 8/31/2017	\$32,033.44
Merrill Lynch Money Account shows a total	TBD

There was not a current report submitted this month.

New Members and Transfers

Allison Foster
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 to Report

New Member Requests

None to Report

Transfers

None to Report

Corrections

None to Report



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Presidents Message
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from the shore and now I know, that was the idea.

This year's West Coast Land Institute ("WCLI") had a fantastic lineup of speakers covering a wide range of educational topics. A theme emerged on the second day which boiled down to one question - What are we doing as an industry to tell our side of the story? One of the answers to that question came from speaker Dave Quest with Energy In Depth. Quest spoke with the group about correcting activist misinformation and educating the public about oil and gas development. This is a good conversation to be having in a time where confusion and noise so often overshadow actual facts. Quest reminded us the average activist's ultimate goal is to keep natural resources in the ground. If you can get them to admit that, at least you are starting from an honest place. He shared some facts worth repeating:

- There are 539,000 barrels of oil produced in California per day
- All oil produced in California is used in California
- 38% of California's oil supply is produced in state (75% of that in Kern County)
- The other 62% of California's supply is tanked in from Alaska or foreign nations.

The options for replacing the 200 million barrels of California oil produced each year are not that appealing. We can a.) ship it in on tankers or oil rail cars or b.) ration driving in the state. If you are interested in learning more about what Energy In Depth is doing to get the message out, I encourage you to check out the website at <https://www.energyindepth.org/california/>.

One last thought from WCLI this year. AAPL Executive Vice President, Melanie Bell, updated the group on the organizations current initiatives and plans for the future. She mentioned a

nationwide Landman survey which was taken in 2016. The results are published in the Sept/Oct 2017 Landman Magazine. Bell got me thinking about a California specific Landman survey and how it could be used to garner insightful information to share with our state chapters. I will discuss with the Board and see if that is something which interests everyone.

Happy Holidays to you and yours.

Sincerely,

Sarah Bobbe, CPL

Luncheon Speaker
continued from page 1

firm included Motorola, Westfield, IBM, and many others across all business sectors.

In addition to this private sector experience, Gonzalez has made his mark in the public sector, serving as Deputy City Controller under LA City Controller Laura Chick, also held positions with the South Coast Air Quality Management District's Governing Board, California Transit Association, and prominent positions under former California Assemblyman Lou Correa and former Los Angeles City Councilwoman Ruth Galanter.

He received a Bachelor of Arts in philosophy and political science from Loyola Marymount University (LMU) where he served as student body president.



Randall Taylor, RPL
Petroleum Landman

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Our Honorable Guests

The Grinch stole the list of our guests who attended our September luncheon and thus our honorable visitors cannot be noted in this issue. While the new LAAPL Board did not seek to locate the May 2017 perpetrator who took off with the Guest List, there is much thought being seriously considered to offer a reward leading to the conviction of the perpetrator(s).

LAAPL President Appoints Membership Chair

Chapter President, Sarah Bobbe, CPL, accepted the resignation of Membership Chair Cambria Rivard, J.D., Land Negotiator, California Resource Corporation. Cambria held the Chair since the time of joining LAAPL and fulfilled her duties with exceptional service to the LAAPL Board and Chapter members. LAAPL appreciates Cambria's dedication to the chapter and we look forward to her continual involvement with the chapter.

Chapter President Bobbe appointed Allison Foster to fill the vacancy of the Membership Chair for the remainder of the 2017 – 2018 term. Allison is a long-time member of LAPPL; this is her debut serving as a Board Member. The LAAPL Board looks forward to working with Membership Chair Foster.

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Lawyers' Joke of the Month

**Jack Quirk, Esq.
Bright and Brown**

An old cowboy was riding his trusty horse followed by his faithful dog along an unfamiliar road. The cowboy was enjoying the new scenery, when he suddenly remembered dying, and realized the dog beside him had been dead for years, as had his horse. Confused, he wondered what was happening, and where the trail was leading them.

After a while, they came to a high, white stone wall that looked like fine marble. At the top of a long hill, it was broken by a tall arch topped by a golden letter "H" that glowed in the sunlight. Standing before it, he saw a magnificent gate in the arch that looked like mother-of-pearl, and the street that led to the gate looked like gold.

He rode toward the gate, and as he got closer, he saw a solitary figure at a desk to one side. Parched and tired out by his journey, the cowboy called out: "Excuse me, Podn'r, but where are we?"

"This, sir, is Heaven," came the indignant reply.

"Wow! Is there some water you can spare? the cowboy asked.

"Certainly, sir. Come right in, and I'll have some ice water brought up directly."

As the gate slowly swung open, the cowboy asked, "Can my partners come along? They are as tired and thirsty as me."

"I'm sorry, sir, but we don't allow pets."

The cowboy thought for a moment, then turned back to the road and continued riding, his dog trotting by his side.

After another long ride, at the top of another hill, he came to a dirt road leading through a ranch gate that looked as if it had never been closed. As he approached the gate, he saw another figure inside, leaning against a tree, eating an apple and reading a book.

"Excuse me," the cowboy called out, "Can you spare me a drink of water?"

"Sure, there's a pump right over there. Help yourself."

"How about my friends here?" he asked, gesturing toward the dog and his horse. "Of course! They must be thirsty, too. And they must be true friends to have come with you through the wilderness out there."

The trio went through the gate, and sure enough, there was an old-fashioned hand pump with buckets beside it. The cowboy filled a cup and the buckets with wonderfully cool water and took a long drink, as did his horse and dog. Weary, but relaxed, the cowboy wondered aloud, "What is this place?"

"Why, this is Heaven, sir."

"That's odd, the fella down the road said his place was Heaven, too."

"Oh, you mean the place with the glitzy, gold street and fake pearly gates? That's hell."

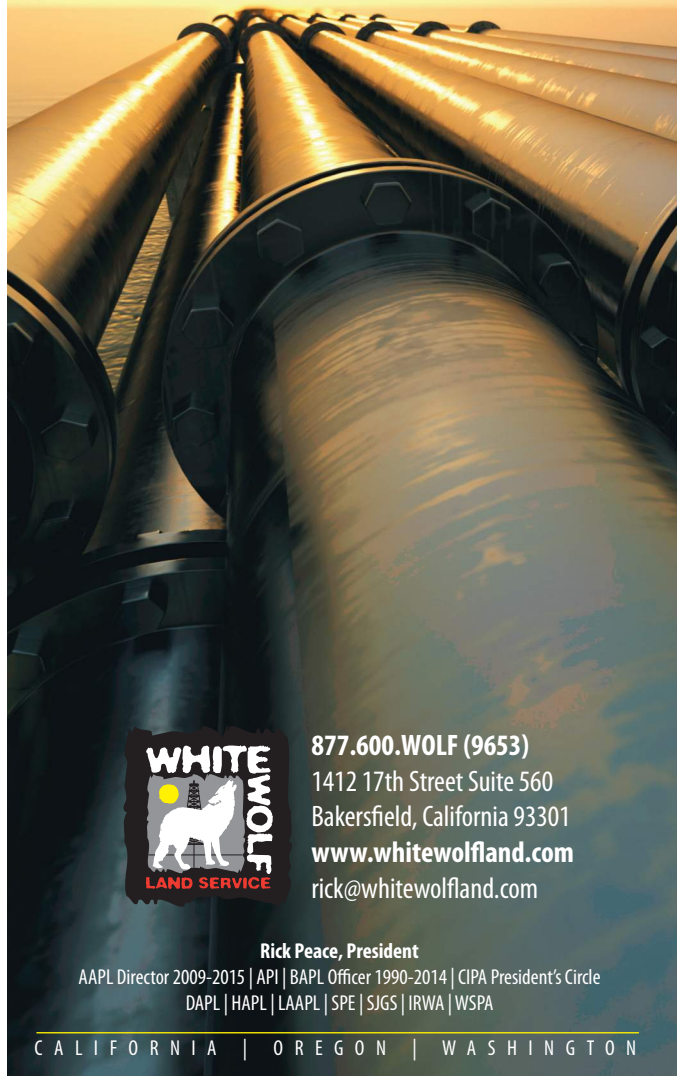
"Doesn't it make you angry when they use your name like that?"

"Oh, not at all. We're happy to have them screen out folks who would leave their best friends behind."



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LAAPL & BAPL Field Trip To Offshore THUMS Islands

Blake W. E. Barton
Signal Hill Petroleum, Inc.
Education Chair

Most people in Long Beach, California see those little islands a mile off the coast and have no idea what actually goes on behind the landscaping and sound walls. On Friday, November 4, 2017, California Resources Corporation (CRC) kindly gave BAPL and LAAPL a behind-the-scenes tour of their THUMS islands operations. CRC operates the offshore portion on the THUMS islands of the Wilmington Field, the fourth-largest oilfield in the United States. Constructed in the mid-1960s, the four artificial oil production islands were operated by THUMS: Texaco, Humble (now Exxon), Union Oil, Mobil, and Shell. They were purchased by Occidental Petroleum (now CRC) in the year 2000.

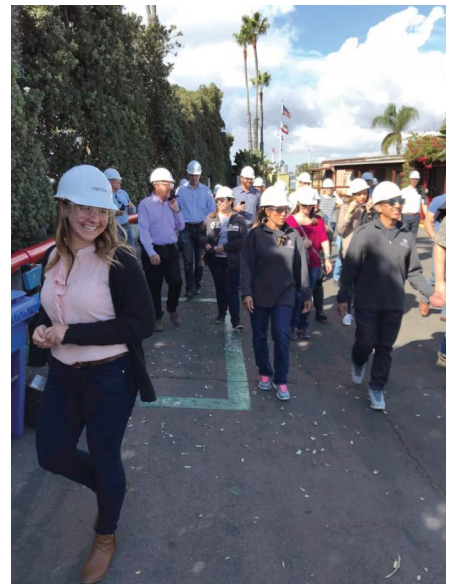
The day began at the THUMS Boat Landing at the Port of Long Beach, where we watched a brief mandatory safety video and received hard hats and safety glasses. Once we boarded the boat, we took a short, yet beautiful ride, to Island White. The hour long walking tour consisted of two supervisors who guided us throughout the island, giving us a detailed explanation of their operations. Most interestingly, the islands were designed to blend in with the surrounding coastal environment, which happened to be the same designers who worked on Disneyland's Tomorrowland. The drilling rigs and other above-ground equipment are camouflaged and sound-proofed with faux skyscraper skins and waterfalls, which provide an appealing appearance and help mask the sounds of drilling/pumping equipment. In some cases, the drilling rigs are even mounted on wheeled platforms so that they can be moved around to other locations on the islands. Despite the production that happens on the islands, they also provide shelter for a wide variety of marine life, such as herons, falcons, and even artificial reefs.

It was a thrilling opportunity to learn about the islands and the effort that went into the production functionality and the visual appeal. CRC is doing an excellent job at thriving as an oil producer while maintaining the legacy of the THUMS islands. Following are photographs taken by attendees and compiled herewith. Our thanks to our tour guides, Wayne Oliver and John Hill.



Field Trip
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Field Trip
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Educational Corner

Blake W. E. Barton
Signal Hill Petroleum, Inc.
Education Chair

Need continuous education credit? You can generally earn them by attending our luncheons based upon speaker and subject matter. Listed below are continuous educational courses available November 2017- January 2018

December 2017	
RMMLF Oil and Gas Joint Operations and the New AAPL Form Operating Agreement Date: December 5, 2017 – December 6, 2017 Where: Denver, CO Credits Approved: 13 CEU, 1 CEU Ethics Member Price: \$825.00	Joint Operating Agreements Seminar Date: December 12, 2017 Where: Shenandoah, TX Credits Approved: 7 CEU, 0 CEU Ethics Member Price: \$300.00
Working Interest/Net Revenue Interest Seminar Date: December 14, 2017 Where: Oklahoma City, OK Credits Approved: 6 CEU, 0 CEU Ethics Member Price: \$300.00	Surface Use and Access (Webinar Available) Date: December 15, 2017 Where: Fort Worth, TX Credits Approved: 5 CEU, 1 CEU Ethics Member Price: \$300.00 Member Webinar Price: \$250.00
January 2018	
Oil and Gas Land Review, CPL/RPL Exam Date: January 23-26, 2018 Where: Midland, TX Credits Approved: 18 CEU, 1 CEU Ethics Member Price: See AAPL Website for more details	

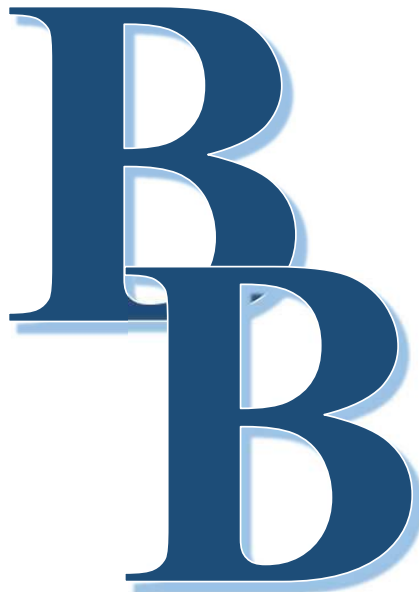
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Legislative Update



by Mike Flores
Flores Strategies, LLC

Across California

Proposed Pipeline Regulation Released by DOGGR

On September 22, the California Division of Oil, Gas and Geothermal Resources (“DOGGR”) issued a Notice of Proposed Rulemaking for its Pipeline Testing Regulations. The Notice announces that DOGGR proposes to adopt regulations for pipeline testing and safety, as required under Assembly Bill 1420.

Assembly Bill 1420 went into effect on January 1, 2016, and requires DOGGR to review, evaluate, and update, where appropriate, its existing regulations regarding all active gas pipelines that are 4 inches or less in diameter, are in sensitive areas, and are 10 years or older.

Among the proposed regulations, are adding requirements for an operators’ Pipeline Management Plans; such as including a list and maps of all pipelines that indicate which lines pass through sensitive areas, environmentally sensitive areas, urban areas, and designated waterways. This will be a significant expense for many operators due to the number of pipelines which have been installed over the years without the benefit of such detailed location maps.

Public comment on the Proposed Regulations ended November 10.

Republicans Raising Money for an Initiative to Repeal New Gas Tax Increase

A Republican led effort is working hard to repeal the gas tax and is going to spend “big money” to put an initiative on next year’s ballot.

*Legislative Update
continued on page 12*

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Legislative Update
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The gas hike, which went into effect on November 1, includes a 20-cent per gallon increase in diesel taxes, a 12-cent per gallon hike in gas taxes and a 5.75 percent increase in diesel sales taxes. Vehicle license fees will be raised an average \$38 per vehicle. Drivers will also face a new annual fee to be paid with their vehicle registration, ranging from \$25 to \$175, depending on the value of their vehicle. The taxes and fees will rise each year with inflation. The tax increase is expected to generate \$52B over the next 10 years for road and bridge repairs.

New Gas Tax Increase Put California Within One Cent of Highest Across USA

Currently, California has the sixth-highest gas tax rate in the nation at 59.87 cents per gallon, according to the American Petroleum Institute. The new gas tax will bring California within one cent of the highest gas taxes in the nation.

Pennsylvania takes the top spot, with a combined state and federal taxes totaling 77.70 cents per gallon. Washington has the second-highest rate at 67.80. Next on the list are Hawaii, New York and Indiana, all of which crack the '60s at 62.88 cents, 62.44 cents and 60.30 cents, respectively.

However, when the California excise tax increases fully take effect in July 2019 — going up to 47.3 cents per gallon — the combined gas tax in California will jump to an estimated 76.7 cents per gallon, assuming a 9-cent sales tax rate and the current 2-cent underground storage tank fee.

Ventura County Looking at Joint Renewable Energy Venture with LA County

Ventura County officials will explore teaming up with Los Angeles County in a venture to produce renewable energy and slow climate change, county supervisors decided last month.

Under state law, local governments can establish its own organizations to generate and distribute power. The intent is to boost the amount of power produced from renewable sources, such as wind and the sun.

The option was one of several the Ventura County Board of Supervisors weighed now that a joint government-run program with Santa Barbara and San Luis Obispo counties does not appear to be feasible.

Legislative Update
continued on page 14



Venoco, Inc. is an independent oil and natural gas company founded in 1992. Venoco is continually recognized for practices that exceed safety and environmental compliance, thanks to the hardworking and experienced employees.



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Legislative Update
continued from page 14

City of Carson Passes Tax On Oil Companies

Carson's Measure C, a new business-license tax on oil companies, collected an overwhelming 71.2 percent of the vote, with 20 of 29 precincts counted. The measure will introduce a new tax on oil producers that would collect one-quarter of 1 percent of their gross receipts.

According to the supporters of Measure C, new revenue is needed to maintain basic services such as street and infrastructure upgrades, City Hall staffing, and public safety.

Across the USA

Texas Oil Companies Added 30,000 Workers Since September 2016

Texas oil companies have hired about 30,000 workers in the past year, a sharp turnaround after laying off a third of the industry's statewide workforce during the oil bust that began in late 2014.

The number of Texas oil and gas workers reached more than 222,000 in September, up 16 percent from about 192,000 a year earlier, according to economist Karr Ingham in the latest Texas Petro Index. At the peak of the oil boom in 2014, Texas had more than 295,000 oil company jobs.

Boosted by job growth, modest increases in upstream activity and stable oil prices, the index, a measure of activity in the state's energy industry, rose for a 10th consecutive month in September, to 181.4 points, up 21.4 percent from September 2016.



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Case of the Month - Oil & Gas

COURT AGREES THAT FRACKING WASTE DISPOSED BY DEFENDANT ADJACENT TO PLAINTIFFS' PROPERTY LIKELY MIGRATED ACROSS PLAINTIFFS' PROPERTY LINE, RESULTING IN A TRESPASS

Robbie Hill, et al. v. Southwestern Energy Company

(Case No. 15-3458, 8th Cir. May 22, 2017)

By Thierry R. Montoya, Esq. Shareholder, AlvaradoSmith

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Plaintiffs Dale and Kari Stroud are two of the numerous plaintiffs who originally sued Southwestern Energy Co. (“Defendant”) in a class action manner, alleging several legal theories of which only trespass and unjust enrichment remain. Plaintiffs own property located adjacent to land leased by Southwestern Energy Co. (“Defendant”) which Defendant used to dispose of its fracking waste through a well. Plaintiffs’ alleged that based on the volume of disposed waste, the small volume under the leased area, the proximity of Plaintiffs’ property, and the assumed radial flow—that the fracking waste migrated into the subsurface of their property—resulting in trespass and unjust enrichment. Plaintiffs did not submit evidence of the contamination of their property, of drilling sampling, or of a computer model depicting the subsurface condition. Plaintiffs submitted expert testimony and the report of a retained expert who calculated the radial flow of the fracking waste. The district court ruled this expert opinion unreliable, and ordered phased discovery. Defendant then moved for summary judgment at the end of the initial phase, which the district court granted although holding that it “seems likely, considering all the circumstances, that the waste migrated under [Plaintiffs’ property] ...and that the remaining evidence adds up to a strong maybe.” Id., internal citations omitted. The Eighth Circuit reversed the lower court’s exclusion of Plaintiffs’ expert testimony and the granting of summary judgment to Defendant. The Eight Circuit held that Plaintiffs “. . .present[ed] evidence that could support a reasonable inference that the fracking waste migrated across their property line.” Id.

Background

Plaintiffs’ allegations rely on allegations that Defendant injected hydraulic fracturing waste fluids into the Campbell 09-17 #3-29 Salt Water Disposal Well (the “Campbell well”) that has migrated deep underground to the subsurface of Plaintiffs’ property. Based on the nature of these claims, the district court ordered that discovery in this lawsuit be phased: The first, and primary, issue for discovery was whether the waste fluid migrated to the subsurface strata of Plaintiffs’ real property. Neither party objected to the court’s phased approach to discovery. But, over the course of the litigation, several disputes arose about the scope of discovery that would be allowed in Phase 1, resulting in several hearings.

As part of its Phase 1 evidence, Plaintiffs’ offered the expert opinion of engineer Walter Dowdle. Regarding Mr. Dowdle’s expert opinion, the court found, “Dowdle’s expert opinion fails scrutiny under Federal Rule of Evidence 702.” Id. Regarding Defendant’s Motion for Summary Judgment, the district court granted it recognizing that a jury would have to speculate to return a verdict that a trespass did or did not occur and concluded that Plaintiffs had not proven that waste fluids actually migrated into the subsurface of their property.

*Case of the Month - O & G
continued on page 18*

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Court's Rationale

Plaintiffs alleged that the court abused its discretion by excluding their expert's report. Such evidence is admissible: if it is relevant—useful in deciding an ultimate issue of fact; the witness qualified to assist the finder of fact; and it is reliable or trustworthy in an evidentiary sense. *Id.* Mr. Dowdle is a registered engineer with degrees in petroleum engineering and over 35 years of consulting expertise in the oil and natural gas industry. He prepared a rough model that estimated how far injected fracking waste had spread from the Campbell well. “He used a simplistic equation to create a rough model, which he believed adequate ‘to determine the extent to which fluids injected into the [Campbell well] have reached within the subsurface disposal zone.’” *Id.* According to Defendant's expert, Mr. Dowdle's model failed to “adequately reflect the actual subsurface properties of the injection zone...[by ignoring].. reservoir heterogeneities and other important factors like permeability and gravity.” *Id.*

In response to Defendant's expert's criticisms, Mr. Dowdle created a second report explaining that his findings did not assume the input properties were constant or uniform, but were averages. He also stated that his assumptions were supported by Defendant's expert's isopach map of the disposal zone and by their responses to interrogatories.

The district court excluded Mr. Dowdle's report because it “assumed the answer to the fighting issue” by assuming radial flow, and was not based on sufficient facts or data. However, the Court held that despite the crudeness and imperfection of Mr. Dowdle's report, it was not so unreliable to warrant exclusion. “It still gives the trier of fact a rough idea of how far the fracking waste would spread under certain conditions...” and Mr. Dowdle was within his expertise to determine the issue for which he was retained—the estimate of the extent of fluid spread. *Id.*

The Court reviewed the grant of summary judgment *de novo*. The Court held that Plaintiffs raised a genuine issue of material fact, even without Mr. Dowdle's expert opinion, on the issue of whether the disposed of waste could have spread onto Plaintiffs' property.

Defendant's expert alleged that it was mathematically impossible for the spread of disposed waste from the Campbell well, based, in large part, on the alleged presence of sealing formations within the soil that would prevent the waste from leaving the vicinity of the well. However, Defendant's expert did not present sufficient evidence of the presence of such sealing formations. Defendant's expert's “...assertion that they might exist is insufficient to satisfy a moving party's initial burden to identify an ‘absence of genuine issue of material fact.’” *Id.* Despite the reasonable inferences of fluid migration, which the district court admitted as being a “maybe” possibility, it incorrectly determined that “a jury would be speculating to return a verdict that a trespass did or did not occur.” *Id.* While the evidence may be thin, it would suffice to enable a jury to draw a reasonable inference of fluid spread.

Conclusion

Plaintiffs presented evidence that could support a reasonable inference that the fracking waste migrated across their property line, thereby resulting in a trespass. Such evidence, albeit thin, could enable a jury to draw a reasonable inference that 7.6 million barrels of waste, poured into an area capable of holding no more than 1.1 million barrels, migrating then some 180 feet across the property line.

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Case of the Month - Right of Way

WHEN DOES 1 + 1 EQUAL 1?

Or what is the property unit that is looked to when assessing whether a land use restriction is tantamount to a taking of property?

*By Michael Rubin, Esq., Parter Rutan & Tucker, LLP
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*Case Report for Chapter 67, IRWA September 12, 2017 Luncheon Meeting
Murr v Wisconsin 137 S. Ct. 1933 (2017) – United States Supreme Court regulatory taking decision. -*

Why should Land Professionals Care about this case?

It is an unusual year when the United States Supreme Court renders a decision relevant to eminent domain practitioners. While most right of way professionals (as opposed to public entity planners and decision makers) are not involved with regulation of land use, right of way professionals need to be aware of major developments in takings law in order to talk the talk, to be part of the relevant conversation. Besides, you look clever when you make 1 + 1 equal 1.

Background Facts.

The property owners (Murrs) owned two adjacent 1.25 acre parcels on the St. Croix River in Wisconsin, a scenic river designated as a federally protected river area in 1972 under the Wild & Scenic Rivers Act. One (Lot F) was acquired in 1994 and the other (Lot E) was acquired in 1995. Wisconsin state and local regulations provided well before 1994 that if a person owns adjacent parcels along the riverfront, they can only be separately sold or developed if they each have more than 1 developable acre. Because of the terrain, the developable acreage on the total 2.5 acres was less than 1 acre, so the regulations precluded sale of one lot without the other, and precluded developing them as two separate lots, effectively merging the two parcels into one, absent a hardship exemption from the regulations. The Murrs desired to sell Lot E to raise funds to develop Lot F and sought, but were denied, a hardship exemption from the local entity. They sued alleging that but for the common ownership of both properties, the parcels could be separately sold or developed, and the regulations effectuated a “taking” of Lot E for which just compensation must be paid.

*Case of the Month - R of W
continued on page 21*

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For purposes of the summary judgment, the Court accepted the allegation that as an undevelopable separate lot, Lot E was worth only \$40,000. The Court also accepted that Lots E & F were reduced in value to a total of \$698,000 if treated as a single merged parcel, whereas the two parcels would be worth a total of \$771,000 if they were allowed to be two separate buildable parcels (as they would be if they were in separate ownership).

At the trial court, the Murrs argued that whether there was a taking or not had to be evaluated based upon the impacts of the regulations on Lot E alone, since Lot E was a distinct legal parcel under state law. The trial court disagreed and granted summary judgment to the State, holding that whether there was a taking must be evaluated based upon what state law considered to be the parcel, and since the parcels were treated as merged under state law, there could only be a taking if the merged parcel met the test for a taking (and it did not). This judgment was upheld by the State Court of Appeals leading to the review of the decision by the United States Supreme Court.

Issue & Analysis: In determining whether regulations have so great an impact on private property that they constitute a taking under the Fifth Amendment, what is the proper unit of property against which to assess the effect of the challenged governmental regulation?

While there was a time when it may have been felt that a taking of property only occurs when private property has been physically occupied by governmental action, the U.S. Supreme Court held in an opinion by Justice Holmes in *Pennsylvania Coal Co. v Mahon*, 260 U.S. 393 (1922) that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” 260 U.S., at 415. Over the years, the U.S. Supreme Court has developed two separate tests for when land use regulations effect a taking. As summarized in the Murr opinion (at pp 1942-43): “First, ‘with certain qualifications ... a regulation which ‘denies all economically beneficial or productive use of land’ will require compensation under the Takings clause’”. [citing *Palazzolo v Rhode Island* 533 U.S. 606, 617]. The second test was summarized as follows (at p. 1943):

Second, when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on “a complex of factors,” including (1) the economic impact of the regulation on the

Case of the Month - R of W
continued on page 22



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claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.

The first test is extremely hard to meet since loss of all economically beneficial use is required. The second test, often referred to as the “Penn Central” factors, after the U.S. Supreme Court case where it was first articulated, is highly factually, and arguably subjective, particularly in its reliance on the “expectations” of the owner. It requires an inquiry into what expectations are reasonable given all of the circumstances applicable to the owners, the property and the community.

Either of these tests require an assessment of the severity of the restrictions on the property in question. But the question never before answered was: what is the unit of property that is looked to in applying these tests? If one were to look at only Lot E, and note that it cannot be sold individually, or developed individually, and that its value dropped to \$40,000 with the restrictions, whereas it could be sold for \$398,000 as a separate developable lot, the argument for a taking is much stronger than if one were to look at the combined parcels as being the relevant unit of property to which the takings tests are applied.

The U.S. Supreme Court determined that the relevant unit in this case was the two lots together, but the Court rejected both the bright line rule proposed by the property owners (any distinct legal parcel must be viewed as a separate economic unit), and the bright line rule proposed by the State (accept all state regulations to define the parcel, including the challenged merger regulations). Instead, the Court stated (at page 1945):

[N]o single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition.

Applying this multi-layered test, the court determined that the property unit to scrutinize for taking analysis were the two lots together since (i) state law provided for a merger of the parcels, and this restriction pre-dated the ownership of the parcels, (ii) the physical terrain made it challenging to utilize the parcels separately and they were located in an environmentally protected area, and (iii) the value of the properties as merged lots was only 10% less than their combined values as separately developable lots.

Five Justices joined in the opinion by Justice Kennedy, while three dissented including Chief Justice Roberts and Justices Thomas and Alito (newest Justice Gorsuch did not participate). The dissenters pointed out that the test for a taking was a complex multi-factored analysis that included the distinct investment-backed expectations of the owner, and now a similar multi-factored test gauged to expectations of the owner has been created to determine the parcel unit. Seeing the use of the complex test for one prong of the takings analysis as enough complexity, they urged that the parcel unit always be the boundaries used for distinct parcels under state law (in which case 1 + 1 would continue to equal 2).

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Guest Article

UH, IS THAT YOUR BEDROOM IN MY YARD?

(How to Avoid Lawsuits Over Survey and Boundary Disputes)

By Chuck West, Esq., CCIM

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Originally Published August 2017 in the "WestLine News"

A new owner moves into the neighborhood. She has a surveyor check that her rear fence is accurately on the property line before she replaces the old fence with a new one. The surveyor has some bad news: the fence is not on the property line at all. In fact, the property line cuts through the swimming pool and a corner of the living room. How could this happen on an estate property with a large piece of land and a tennis court? It turns out that the property, located in Los Angeles, has a non-permitted pool and family room addition that were partially built in a city-owned 200' right-of-way. The buyer calls her attorney and sues the seller, agents, and title company.

If you think this is an isolated case, think again. Boundary disputes are a frequent cause of lawsuits, as are road rights-of-way and easement issues. Some states require that a property have a survey before the transaction closes; other states have no survey requirement.

In a recent case, the seller was asked by the buyer, "Can I add on to this one-level house to accommodate the needs of my ailing wife?" He said, "You have about 20' to expand here at the side yard until you get to the curb." It turned out that the corner property, with no sidewalks in an upscale neighborhood, had a 20' city right-of-way wrapping around the corner. The buyer had relied on the seller's representation due to his experience with the property. After the close, the buyer discovered he could not get a permit for an addition because of set-back requirements from the city right-of-way. The broker and agent claimed they knew nothing about the city right-of-way for sidewalks and greenbelt, although this brokerage had sold many homes in the area. The lesson: if you're going to offer guidance to buyers, you had better be familiar with city rights-of-way and rules on easements in the area.

Property owners cannot build structures in utility easements or easements allowing access by others. In one case, a buyer discovered the neighbor's property line ran through the home's living room. Does this mean the property owner has to remove the living room? Does the owner in the first example have to remove her swimming pool? It depends – on what the neighbor (or the City of Los Angeles in the first example) wants. Almost inevitably, these situations result in lawsuits.

What can be done to prevent this type of suit? Buyers should ask sellers if they have had a land survey, and if so, provide a copy to the buyer. If there is no survey available, buyers should be advised in writing to have a survey done.

Buyers have also sued because they later found out the land was smaller than they were told or could not be subdivided as they had expected. Lot size may be a factor in building department regulations regarding the size of house that can be built and setback requirements. What other homeowners have done in the area may not be a valid barometer as laws are changing and so is enforcement. Buyers of raw land should also have a survey to determine what they are allowed to do with the property. While land surveys can be quite expensive, depending on the size and topography of the land, they're not as expensive as the lawsuit that can result without one. ~ Barbara Nichols (*REALTOR®* Magazine)

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PHISHING SCAMS

*Chip Hoover, Independent
Website Chair*

I am sure I am not the only one that has seen a recent increase in the number of "Phishing Scams" passing through your personal email. For those of you who are not familiar with, or think that this might be the purchase of old bait for your next fishing adventures, it is not. The definition of Phishing is "the attempt to obtain sensitive information such as usernames, passwords, and credit card details (and, indirectly, money), often for malicious reasons, by disguising as a trustworthy entity in an electronic communication."

At first when I checked out these emails, I would chuckle, and even sometimes chuckle out loud (COL), at their feeble attempt to lure me into obviously fake pages with a URL that did not belong to the official website requesting this information. Although the front page looked "legit" with the same trademarks, and even included links below that directly connect you to the Contacts, FAQ and Customer Support of the legitimate website, that one simple link to "verify" account information was a Phishing Scam. If you inadvertently fall prey to these types of scams, and give sensitive information, such as a password, only to change it later to feel protected, you are not alone. That is the foothold they need to enter the advanced stages of their master plan. Before I continue, as technology advances so does the Googler. Google takes pride in the information they index on every website and provide to the world. This is the information they offer to any random person off the streets with a laptop and internet access. So, to think that this person on the other end is a hacker, like someone off of the Matrix, or has a College Degree in Phishing, think again. It could actually just be a neighbor kid down the street, or even just some random person from out of state, who would rather find ways to scam people out of money than put the effort out to work for a living. In these situations, knowledge is power. Here are a few tips I have collected to prevent falling prey to these scams:

- 1) Always take caution and be aware of the websites you are entering that request sensitive information. If you place your cursor on the suggested link, it should display the URL in the bottom left hand corner on most browsers. Look for any websites that may be shortened or have a different variation of a formal web address.
- 2) Always verify the actual sender of the email. If it is not from a legitimate website that you are familiar with, it is more than likely a scam. I have recently come across a situation known as "spear phishing." Spear phishing is where the script this person used, after already gaining access to the email password, actually makes it look like it came from that person's email. Thankfully the unusual request of \$3,000.00 to pay off a vendor balance, just didn't add up.
- 3) Read the email carefully for typos, words that are capitalized that shouldn't be, misspellings, and bad grammar. These are good indications that it may be a scam.
- 4) Never give out personal information, especially anything that is financially sensitive. When in doubt, you can always visit the official website and contact Customer Support in regard to the request.
- 5) Avoid downloading attachments and clicking on links from unknown senders that request sensitive information.

There are several other tips available online to protect yourself from these types of scams.

In addition, please keep in mind, there is no fool-proof way to avoid phishing scams. Keep up to date on any new scams out there, as they are always finding new ways to attack you and gain your personal information. Here is a fun, random fact - the iconic green code shown in the Matrix is nothing but a Japanese sushi recipe.

