ENERGY,
NATURAL RESOURCES, AND
ENVIRONMENTAL LAW SECTION

UTAH STATE BAR

ANNUAL UPDATE LUNCHEON

UTAH STATE BAR

May 29, 2008

2008 Annual Update Luncheon

Energy, Natural Resources, and
Environmental Law Section
Of the Utah State Bar

May 29, 2008

PROGRAM

Introduction	**Steven J. Christiansen,** ***Parr Waddoups Brown Gee & Loveless*** **ENREL Section Chair**
Energy Law Update	**Brian W. Burnett,** ***Callister Nebeker & McCullough*** **Energy Law Committee Chair**
Environmental Law Update	**Lindsay Ford,** ***Parsons Behle & Latimer*** **Environmental Law Committee Chair**
Mining Law Update	**Richard R. Hall, Stoel Rives, LLP** **Mining Law Committee Chair**
Native American Law Update	**Alexander Skibine,** ***University of Utah S.J. Quinney Law School*** **Native American Law Committee Chair**
Oil & Gas Law Update	**Michael S. Johnson,** ***Utah Attorney General's Office*** **Oil & Gas Law Committee Chair**
Public Lands Law Update	**Shawn T. Welch,** ***Holme Roberts & Owen*** **Public Lands Law Committee Chair**
Water Law Update	**L. Ward Wagstaff,** ***Utah Attorney General's Office*** **Water Law Committee Chair**

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UTAH STATE BAR
ENERGY, NATURAL RESOURCES AND ENVIRONMENTAL LAW SECTION

ENERGY COMMITTEE

SELECTED DEVELOPMENTS 2007-2008

Brian W. Burnett, Chairman
Energy Committee

I. NOTABLE JUDICIAL DECISIONS

A. Wholesale Electricity Anti-Trust Cases I & II, 55, Cal. Rptr. 3d 253 (Cal. Ct. App. 2007). This is one example of the cases which are still pending regarding the California energy crisis. The plaintiffs, certain public entities and retail purchasers of electricity, sued the defendant generators, sellers, and traders of electricity in the wholesale market, asserting claims for damages and injunctive relief by reason of alleged anticompetitive activities and unfair competition in the wholesale electricity market in violation of California antitrust laws (the Cartwright Act) and in violation of California's unfair competition law. The defendants asked the court to dismiss the claims based upon federal preemption and the filed rate doctrine. The trial court sustained the demurrer to the plaintiffs' claims.

After engaging in a detailed review of prior court decisions addressing similar issues, the court concluded that "FERC has been provided with sufficient regulatory authority such that federal preemption principles must be applied …" to the antitrust and unfair competition claims presented in this case. With regard to the application of the filed rate doctrine, the court found that "the allegations of the master complaint amount to requests for penalties for alleged anticompetitive conduct by defendants, and these potentially would interfere with FERC supervision of market-based rates and any enforcement activities allowed under FERC procedures." The appellate court affirmed the trial court's judgment of dismissal.

B. Utah Chapter of the Sierra Club v. Utah Air Quality Board, 148 P.3d 960 (Utah 2006). On October 12, 2004, the Executive Secretary of the Utah Air Quality Board ("Board") issued an Approval Order to Sevier Power Company authorizing it to construct a 270-megawatt coal-fired power plant in Sevier County, Utah. The Sierra Club filed a Request for Agency Action with the Board. The Board denied the Sierra Club's Petition to Intervene on the basis of standing.

The Utah Supreme Court, Id., held that the Board erred by denying standing to the Sierra Club. In accordance with the Administrative Procedures Act, the Supreme Court also held that the Board's decision substantially prejudiced the Sierra Club in denying it the opportunity to challenge the Executive Secretary's Order or to

defend its interest. The Supreme Court reversed and remanded this matter to the Board with instructions to allow the Sierra Club to intervene in the proceedings.

After over a year of proceedings before the Board which involved the Sierra Club, the Board issued its Findings of Fact, Conclusions of Law and Final Order on January 9, 2008, finding that the Executive Secretary did comply with state statutes and rules of the Board in issuing the Approval Order to Sevier Power Company to construct and operate a coal-fired electric generating facility near Sigurd in Sevier County, Utah.

The Sierra Club has appealed this decision to the Utah Court of Appeals Case No. 20080113 and the parties are briefing the issues.

C. Desert Power, LP v. Public Service Com'n, 173 P.3d 218 (Utah 2007).

Desert Power petitioned the court for review of an order issued by the Public Service Commission ("PSC"). In that order, the PSC determined that Desert Power could not be excused from performing its contractual obligations pursuant to a force majeure clause.

In 2004, in an effort to become a "qualifying facility" under state and federal law, Desert Power began an expansion of their power plant located near Rowley, Utah. This expansion was designed to convert the company's simple cycle power plant into a combined-cycle cogeneration facility. In late September of that year, Desert Power entered into an agreement to sell power from the expanded plant to PacifiCorp who agreed to transmit the power over its system. The agreement contained many conditions including a force majeure clause. This clause stated that both Desert Power and PacifiCorp could be excused from any performance that was affected by the event of Force Majeure[1].

In order to connect with the PacifiCorp transmission system, Desert Power was required to provide PacifiCorp with information regarding its expansion. It became apparent that PacifiCorp would need to expand its interconnection capacity. This expansion would require new parts that were not originally contemplated by the parties, and these parts would require several months to arrive. Pursuant to this information, Desert Power notified PacifiCorp that it intended to invoke the force majeure provision of the agreement. Desert Power claimed that the decision to redesign the transmission system and the ensuing delays constituted an event of force majeure. Both partied attempted to settle this dispute. When those attempts failed, Desert Power petitioned the PSC to resolve the dispute and find that a force majeure event had occurred.

At the hearing, PacifiCorp presented evidence that Desert Power's own actions created delays in the project. This evidence was convincing enough for the PSC to rule that no event of force majeure had occurred. The PSC determined that the

[1] An event of force majeure was defined as "any cause beyond the reasonable control of Desert Power or PacifiCorp that, despite the exercise of due diligence, such party is unable to prevent or overcome." *Id* at 219.

delays in the project were due to miscalculations by both parties and that such miscalculations do not constitute an event of force majeure.

Desert Power took issue with the PSC's decision. Specifically, Desert Power took exception to the PSC's interpretation of the force majeure clause. Desert Power did not, however, take issue with the PSC's findings of fact. Desert Power petitioned the PSC for reconsideration. That petition was denied and Desert Power sought review in the Utah Court of Appeals.

The Court of Appeals affirmed the PSC's decision holding that even under Desert Power's interpretation of the force majeure clause; Desert Power was not entitled to any relief.

II. LEGISLATION

A. Federal Energy Independence and Security Act of 2007.

On December 19, 2007, President Bush signed the Energy Independence and Security Act of 2007 ("2007 Energy Act"). To many observers the most significant achievement of the 2007 Energy Act lies in the area of transportation, specifically, mandating both a very substantial increase in the nation's automobile fuel-efficiency standards and a very large increase in the volume of automotive renewable fuels to be produced by refiners.

Beginning 2011, the National Highway Traffic Safety Administration annually will increase the national corporate average fleet efficiency ("CAFE") standards for cars and light trucks culminating in a standard of 36 miles per gallon by 2020. Proponents of the new CAFE standards believe they will save 1.1 million barrels of oil per day by 2020 and eliminate 192 million metric tons of greenhouse gas emissions, the equivalent of taking 28 million cars off the road.

The 2007 Energy Act aspires to expand the supply of renewable transportation fuels enormously by raising the renewable fuels mandate imposed on refiners and importers of transportation fuels to 36 billion gallons by 2022. Recognizing the many practical limitations of expecting corn-based ethanol to achieve much more than it already contributes to the renewable fuel supply (less than 10 million gallons), the Act incentivizes the development of advanced bio-fuels such as cellulosic ethanol made from saw grass, wood chips, and other substances by requiring that 21 billion of the 36 billion gallon renewable fuels mandate come from such advanced bio-fuels. Republicans and Democrats could not agree on a renewable portfolio standard and therefore the 2007 Energy Act has no renewable portfolio requirements whatsoever.

B. Utah – HB 198 – State Agency Energy Efficiency

In an effort to reduce energy consumption by the various agencies in the state of Utah, the 2008 Utah Legislature passed HB 198. This bill requires the Legislature, subject to future budget constraints, to retain energy savings in a state

agency's appropriation. This bill also creates a revolving loan fund. This fund is designed to lend monies to state agencies to finance energy efficiency measures.

C. Utah – SB 202 – Energy Resource and Carbon Reduction Initiative

In 2008, Utah Senate Bill 202 was enacted. This bill requires that, beginning in 2025, 20% of an electrical corporation's or municipal electric utility's adjusted retail electric sales come from renewable energy resources, if cost effective. The State of Utah will issue a renewable energy certificate for the electrical generation. This certificate may be bought, sold, traded or otherwise transferred by a municipal electric utility. This bill also requires municipal electric utilities and electrical corporations to submit plans and reports outlining their progress in acquiring qualifying electricity, and it requires state agencies to make rules concerning carbon capture a geological storage of captured carbon emissions.

III. REGULATION

A. Federal Energy Regulatory Commission ("FERC")

1. On April 30, 2008, FERC issued a letter to Symbiotics, LLC relating to the Hook Canyon Pump Storage Project on Bear Lake, Utah. FERC stated that it was holding Symbiotics' Integrated Licensing Process for this project in abeyance effective immediately. FERC took this action because it had received a letter from the Utah Division of State Parks and Recreation stating that Utah would not negotiate an easement for Symbiotics' pump storage project. FERC also noted that Section 21 of the Federal Power Act does not allow for the use of eminent domain to be used to acquire lands or other property which are owned by a state or a political subdivision thereof within a public park, recreation area, or wildlife refuge established under state or local law.

2. On April 17, 2008, FERC adopted a new policy that allows Master Limited Partnerships (MLPs) to be included in rate of return proxy groups for determining rates for services provided by interstate natural gas and oil pipelines. Regarding this policy, Commissioner Kelliher stated "Trends in the natural gas industry mandated that we change our traditional approach of requiring that the proxy group be composed of corporations owning pipelines that constitute a high proportion of their business. Fewer gas pipeline corporations now meet that standard. And because no oil corporations are available for use in the oil pipeline proxy group, today's policy statement will bring clarity to the process for determining the appropriate MLPs for that group of pipelines." The new policy contains the following major provisions:

a. There should be no cap on the level of distributions included in the current Discounted Cash Flow (DCF) methodology;

b. Forecasts published by the Institutional Brokers Estimate System should remain the basis for the short-term growth in the DCF calculation;

c. There should be an adjustment to the long-term growth rate used to calculate the equity cost of capital for an MLP; and

d. There should be no modification to the current respective two-thirds and one-third weightings of the short- and long-term growth factors.

3. The Lake Powell Pipeline is a proposed pipeline that will cover 158 miles and bring 70,000 acre feet of water from Lake Powell to Washington County, Utah. In addition to Washington County, the proposed pipeline will bring 10,000 acre feet to Kane County and 20,000 acre feet to Iron County, Utah. The pipeline is expected to cost in excess of $494 million current U.S. dollars. To help offset this cost it has been proposed that the pipeline be used to create and market energy. This energy would be produced as the water drops 2,700 feet from the high point on the alignment to Sand Hollow Reservoir, and it would be captured by hydroelectric generating facilities.

   In March of this year, the State of Utah filed a Pre-Application Document and a Notice of Intent to file an application with FERC. It is estimated that the FERC licensing and review and the BLM permitting will not be complete until 2012 and construction is expected to begin in 2016.

B. <u>Public Service Commission of Utah</u>

1. In Docket No. 07-057-13, the Public Service Commission of Utah ("Commission") issued an Order on Test Period on February 14, 2008, finding that the appropriate test period to be used for the purposes of determining rates for Questar Gas Company it is the calendar year of 2008. The Commission reiterated the factors it utilizes in determining the appropriate test year including the general level of inflation; changes in utility's investment, revenues or expenses; changes in utility services; availability and accuracy of data to the parties; ability to synchronize the utility's investment, revenues and expenses; whether the utility is in a cost increasing or cost declining status; incentives to efficient management and operation; and length of time the new rates are expected to be in effect.

2. Milford Wind Corridor, LLC ("Milford Wind") filed an application with the Commission in Docket No. 08-2490-01 requesting Certificates of Convenience and Necessity or in the alternative a decision from the Commission that the project does not need the certificates. The Milford Wind project is located in Beaver and Millard Counties, Utah, and will generate approximately 300-megawatts of power from a mix of wind turbines ranging from 1.5 to 2.5 megawatts each. The project includes a

proposed 345 kV alternating current transmission line to the existing substation at the Intermountain Power Project ("IPP") in Delta, Utah.

C. Florida Public Service Commission

On June 5, 2007, the Florida Public Service Commission ("Commission") rejected a proposal by Florida Power & Light to build a $5.7 billion 960-megawatt coal-fired power plant near Everglades National Park. The 4-0 vote by the Commission reportedly marks the first time global warming has ever played a role in a Commission decision and the first time in 15 years that the Commission has rejected a new power plant. The Commission's decision was motivated by its belief that not building the plant would save customers huge costs, including the future costs of cutting greenhouse gas emissions. The decision could be an indication of the Commission's approach to five other proposals for a new coal-fired power plants that are pending. Florida's governor has also signed three executive orders directing cuts in Florida's greenhouse gas emissions and increases in energy efficiency and renewable sources of energy.

D. Northeast Regional Greenhouse Gas Initiative

Northeast Regional Greenhouse Gas Initiative ("RGGI"), the multi-state cooperative effort created in 2006 aimed at reducing greenhouse gas emissions in the Northeast from coal-fired power plants, has announced that it will hold its first regional auction of carbon dioxide emissions allowances on September 10, 2008, with a second auction scheduled for December 17, 2008. The announcement of the auction date and establishment of the terms for the auction are key milestones for RGGI.

RGGI is made up of ten northeast and mid-Atlantic states. The goal of RGGI is to cut CO_2 emissions from power plants by 10 percent by 2019, though the RGGI system may be expanded beyond emissions from power plants in the future. Under the plan, the 10 participating states have agreed to stabilize carbon dioxide emissions from power plants from 2009 to 2014 and then reduce emissions by 2.5 percent per year during the next four years. Compliance with the initiative will begin in January 2009. RGGI's initial total budget for carbon dioxide emission for the 10 states in 188 million tons per year.

The first cap and trade rules under RGGI were announced in the fall of 2007, when the states of Massachusetts and Maine issued draft regulations that provided detail on implementing the program in those states. The regulations set threshold limits for plants that would be subject to the rules, established emissions allowances and emissions reduction schedules, provided credits for early reductions of emissions and created the rules under which offset projects would be accepted for emissions credits. RGGI is currently the only mandatory carbon trading program in the United States.

E. Western Regional Climate Action Initiative

Last year, governors from six the western states of Utah[2], Washington, Oregon, California, Arizona and New Mexico signed the Western Regional Climate Action Initiative ("WRCAI") with the goal of reducing greenhouse gas emissions. WRCAI requires each participating state to set regional greenhouse gas emissions reduction goals within six months.[3] Within a year after the reduction goals are set, the agreement requires each state to create a market based reduction strategy such as a cap and trade system. To facilitate this process, the WRCAI created a multi-state registry that will track reduction progress.[4] The Commissioners that are charged with creating this market system are seeking public input and will be in Salt Lake on May 21st. For more information visit http://www.westernclimateinitiative.org/.

IV. MISCELLANEOUS DEVELOPMENTS

A. Governor's Energy Advisory Council. This council meets to consider issues and recommend policies for the Governor's Energy Policy through Dianne Nielson, Governor Huntsman's Energy Advisor.

B. Governor's Blue Ribbon Advisory Council on Climate Change. This committee met to consider the science, economics, and policy around climate change in a forum that considers industry, environment, and community. The Council's recommendations can be viewed via their final report at: www.deq.utah.gov/BRAC_Climate/final_report.htm.

V. WEBSITES

A. Public Service Commission of Utah: http://www.psc.utah.gov

B. Federal Energy Regulatory Commission: http://www.ferc.gov

C. U.S. Department of Energy: http://www.oe.energy.gov

D. Utah Governor Jon Huntsman's Energy Policy: http://www.energy.utah.gov

E. Utah Geological Survey: http://www.geology.utah.gov

F. Utah Department of Environmental Quality: http://www.deq.utah.gov

G. Lake Powell Pipeline Information: http://www.lakepowellpipeline.org/

H. Regional Green House Gas Emissions: http://www.rggi.org

[2] Governor Huntsman of Utah did not sign the initiative until several months after the other governors.
[3] Michael Lufkin and Brad Marten, Marten Law Group, *Climate change policy continues to evolve in west with regional emissions trading system*, http://www.martenlaw.com/news/?20070228-ghg-emissions-system/
[4] *Id.*

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ENVIRONMENTAL LAW COMMITTEE

SELECTED DEVELOPMENTS 2007-2008

Lindsay Ford, Chairman
Environmental Law Committee
Assisted by Liz Mellem
Parsons Behle & Latimer

I. NOTABLE JUDICIAL DECISIONS[1]

A. United States Supreme Court

1. United States v. Atlantic Research Corp., 127 S. Ct. 2331 (June 11, 2007) – **CERCLA/Implied Right of Contribution Under § 107**

An owner of a facility that retrofitted rocket motors for the United States brought an action against the United States under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for partial reimbursement of costs incurred in an environmental cleanup.

Justice Thomas delivered the opinion of the unanimous Court, holding that § 107(a) of CERCLA does provide potentially responsible parties (PRPs) with a cause of action to recover costs from other PRPs, thus resolving an issue left open in Cooper Industries v. Aviall Services, Inc., 543 U.S. 157 (2004) (holding that a private party could seek contribution from other liable parties only after having been sued under § 106 or § 107(a)). This narrower interpretation of § 113(f) caused several Courts of Appeals to reconsider whether PRPs have rights under § 107(a)(4)(B), an issue the Court declined to address in Aviall.

In the instant case, the Court did address the unresolved issue and reasoned that when the statute is read as a whole, subparagraph (B) of § 107(a)(4) provides a cause of action to anyone except the United States, a State, or an Indian tribe—the persons listed in subparagraph (A). Therefore, subparagraph (B) allows cost-recovery actions by any private party, including PRPs. The Court further clarified that its interpretation of the statute will not create friction between §§ 107(a) and 113(f) because the remedies available in each section complement each other by

[1] The federal case law appearing on this list was selected because of its relevance to the state of Utah. Accordingly, it does not comprehensively detail case law from other jurisdictions or address all environmental cases out of courts with jurisdiction over Utah.

providing causes of action to persons in different procedural circumstances.

2. National Association of Homebuilders v. Defenders of Wildlife, 127 S.Ct. 2518 (June 25, 2007) – **ESA/NPDES Authorizations**

Several public interest groups, including intervenor National Association of Homebuilders, brought separate actions challenging the Environmental Protection Agency's (EPA) decision to transfer permitting power that it possessed for the State of Arizona under the National Pollutant Discharge Elimination System (NPDES) to officials of that state. On consolidation of the actions, the Ninth Circuit Court of Appeals found that the EPA had based its decision on inconsistent legal positions, and thus acted arbitrarily and capriciously by failing to properly consult with the U.S. Fish and Wildlife Service. Additionally, the court found that the Endangered Species Act (ESA) gave the EPA both the power and duty to determine whether transfer of its permitting power would jeopardize a threatened or endangered species.

The United States Supreme Court reversed and remanded the decision of the Ninth Circuit. Justice Alito delivered the majority opinion, holding that the EPA's authorization of Arizona's NPDES program was not arbitrary and capricious because Federal courts ordinarily are empowered to review only an agency's *final* action, and the fact that a local agency representative's preliminary determination is later overruled at a higher agency level does not render the decisionmaking process arbitrary and capricious. According to the ruling, the EPA was not required to consider endangered species impacts provided Arizona met all the criteria for program delegation.

The decision is significant because it could be broadly interpreted with respect to other nondiscretionary federal actions, i.e., limiting the scope of any corresponding ESA implications.

Four justices dissented.

B. Tenth Circuit Court of Appeals

1. Burlington Northern and Santa Fe Railway Co. v. Grant, 505 F.3d 1013, (10th Cir. (Okla.) Sept. 24, 2007 – **RCRA**

Burlington Northern and Santa Fe Railway Co. (BNSF) filed suit against an adjacent landowner under the Resource Conservation and Recovery Act (RCRA) and state law to recover damages caused by purported migration of tar-like material (TLM) and to obtain injunctive relief. The TLM was a waste product of the refinery process that had been employed while the site was an oil refinery. The district court granted summary judgment in favor of Grant, finding that BNSF failed to create

any fact issue on the imminent and substantial endangerment element of its RCRA claim.

The Tenth Circuit reversed the district court's grant of summary judgment holding that the district court had interpreted too narrowly the imminent and substantial endangerment prong of the RCRA. The court held that "imminency" requires only a risk of threatened harm, not proof that harm will occur immediately.

2. Citizen's Committee to Save Our Canyons v. Krueger, 513 F.3d 1169 (10th Cir. (Utah) Jan. 15, 2008) – **NFMA/Special Use Permit**

Two non-profit organizations, Citizen's Committee to Save Our Canyons and Utah Environmental Congress, brought action challenging the decision of the United States Forest Service to issue a special permit to Wasatch Powderbird Guides (WPG) to conduct helicopter skiing operations in two national forests. The plaintiffs argued that the decision to issue the permit violated the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA).

The Tenth Circuit Court of Appeals affirmed the district court's decision to uphold the Forest Service permit. The court held that the issuance of the permit did not violate the NFMA's directive that permits be consistent with forest plans because the Forest Service properly considered how particular options would affect the range of recreational opportunities available in the forests and balanced interests in a way it believed promoted forest uses, thus promoting a variety of recreational opportunities that are in line with the forest plans' goals. Moreover, the court held that the permit did not violate the NEPA because the Forest Service's environmental impact statement fully disclosed and considered the impact of its decision to issue a special use permit to WPG. In particular, the court noted that the "NEPA process in this case, including extensive public comment, considered a variety of options and yielded a number of reasonable restrictions on WPG's operations to minimize conflict among forest users."

C. Ninth Circuit Court of Appeals

1. Friends of Pinto Creek v. E.P.A, 504 F.3d 1007 (9th Cir. (AZ) Oct. 4, 2007) – **Clean Water Act (Section 303(d))**

The Environmental Protection Agency (EPA) issued a National Pollutant Discharge Elimination System (NPDES) permit for a new discharge of dissolved copper into a CWA section 303(d) impaired water body. Several environmental groups challenged the issuance of the permit, and the EPA's Environmental Appeals Board denied that review. Petitioners filed for review of that denial in the Court of Appeals.

The court found that the EPA had violated 40 C.F.R. section 122.4(i), and should not have issued the NPDES permit since the discharge of copper would "cause or contribute" to a violation of state water quality standards. The court disagreed with the EPA's interpretation of the regulation and found the plain meaning of the regulation does not allow a permit to be issued to a new source where a Total Maximum Daily Load (TMDL) has been issued, unless there is sufficient load allocation remaining to allow the discharge, and existing dischargers are on compliance schedules designed to bring that impaired segment into compliance with applicable water quality standards. However, the court rejected the petitioner's argument that the water body had to be restored before a permit could be issued.

While this decision does not directly affect Utah, it does suggest that an NPDES permit cannot be issued for discharge into an impaired water body unless all other existing dischargers are on compliance schedules.

2. San Francisco Baykeeper v. Cargill Salt Division, 481 F.3d 700 (9th Cir. March 8, 2007) – **Clean Water Act/Rapanos Jurisdiction Test**

An environmental organization brought a citizen suit under the Clean Water Act (CWA) against a salt producer for discharging pollutants into a non-navigable intrastate pond. The plaintiffs sought to have the pond qualified as a "water of the United States," pursuant to the CWA, by seeking to have the court extend the United State Supreme Court's decision in Rapanos v. United States, 126 S.Ct. 2208 (June 19, 2006), which imported coverage for "wetlands" that are isolated, or adjacent to non-navigable tributaries of a navigable waterway.

The Ninth Circuit Court of Appeals rejected the argument, thus refusing to extend the Supreme Court's application beyond "wetlands." Moreover, the Ninth Circuit held that, even if it were to conduct an analysis under Justice Kennedy's "significant nexus" test articulated in his concurrence in Rapanos, the pond in question would not satisfy the standards set forth in that case.

D. District of Columbia Circuit Court of Appeals

1. New Jersey v. E.P.A., 517 F.3d 574 (D.C. Cir. Feb. 8, 2008) – **Clean Air Act**

The state of New Jersey and others petitioned for review of the Environmental Protection Agency (EPA) rules regarding the emission of hazardous air pollutants (HAP) from coal and oil fired electric utility steam generating units (EGUs). Two final rules were at issue. The first rule removes coal- and oil-fired EGUs from the list of sources whose

emissions are regulated under section 112 of the Clean Air Act (CAA), 42 U.S.C. § 7412. The second rule sets performance standards pursuant to section 111, 42 U.S.C. § 7411, for new coal-fired EGUs and establishes total mercury emission limits for States and certain tribal areas, along with a voluntary cap-and-trade program for new and existing coal-fired EGUs.

The court vacated both rules, holding that the Delisting Rule was unlawful because it was contrary to the plain text and structure of section 112. The court clarified that the EPA's removal of these EGUs from the section 112 list violated the CAA because section 112(c)(9) requires the EPA to make specific findings before removing a source listed under that section. The EPA had conceded that it never made such findings when deciding to remove the EGUs. Thus, as to the second rule, the court concluded that because coal-fired EGUs are listed as sources under section 112, regulation under section 111 is prohibited.

II. UTAH LEGISLATION

A. Climate Change Incentives

1. H.B. 106 **CLEAN AIR AND EFFICIENT VEHICLE TAX INCENTIVES**

This bill provides a tax credit for new vehicles meeting air quality and fuel economy standards, eliminates the clean fuel certificate, and imposes a fuel tax on compressed natural gas for vehicles. In particular, this bill provides a tax credit of $750 for a new vehicle meeting air quality and fuel economy standards and eliminates a provision excluding hybrid electric-gasoline vehicles from the tax credit. Additionally, the bill reduces the tax credit available for vehicles fueled by compressed natural gas to the lesser of $2,500 or 35% of the vehicle's purchase price and imposes a fuel tax on the purchase of compressed natural gas for vehicles. The effective date of this bill is January 1, 2009.

2. S.B. 135 **EXTENDING THE SALES AND USE TAX EXEMPTION FOR POLLUTION CONTROL FACILITIES**

This bill extends the sales and use tax exemption for a pollution control facility. Specifically, the bill removes the date restrictions previously included for the tax exemption and instead makes the exemption permanent.

B. Energy Efficient Measures

1. S.B. 202 **ENERGY RESOURCE AND CARBON EMISSION REDUCTION INITIATIVE**

This bill provides that an electrical corporation or municipal electric utility maintain a percentage of electricity sold in the form of renewable energy resources. In particular, this bill sets a target that 20% of an electrical

corporation's or municipal electric utility's adjusted retail electric sales beginning in the year 2025 come from qualifying electricity, including renewable energy resources, if cost effective. The bill also provides for the issuance and recognition of a Renewable Energy Certificate (REC) for certain electrical generation and actions by an energy user. Furthermore, the bill requires plans and reports concerning an electrical corporation's or municipal electric utility's progress in acquiring qualifying electricity and requires certain state agencies to make rules concerning carbon capture and geological storage of captured carbon emissions.

2. H.B. 198 **STATE AGENCY ENERGY EFFICIENCY**

This bill enacts and amends provisions relating to state agency energy efficiency. Particularly, the bill: requires the Legislature, subject to future budget constraints, to retain energy savings in a state agency's appropriation in order to fund and implement new energy efficient measures. The bill also creates a revolving loan fund to lend monies to state agencies to finance energy efficiency measures.

C. Water Quality

1. H.B. 40 **SAFE DRINKING WATER REVISIONS**

This bill requires a county to adopt an ordinance to protect a source of drinking water. Specifically, this bill: requires a first or second class county to adopt an ordinance to protect a groundwater source of public drinking water and authorizes a municipality located in a first or second class county to adopt an ordinance to protect a groundwater source of public drinking water. Additionally, this bill allows a city ordinance to supercede another county or municipal ordinance in certain circumstances and allows a county or municipality to change a zoning designation in an industrial protection area in certain circumstances. This bill also requires the Drinking Water Board to: (1) provide guidelines and technical resources to a county or municipality; and (2) report to the Legislature.

2. H.B. 222 **WATER QUALITY BOARD AMENDMENTS**

This bill amends provisions relating to water quality. It authorizes the Water Quality Board to: issue an operating permit; and delegate authority to issue an operating permit to a local health department. Specifically, this bill grants the Water Quality Board greater oversight over lagoons to issue "aquifer protection permits" to non-discharging wastewater treatment facilities like municipalities that operate lagoons. The bill also adds a representative from the local health departments to the Water Quality Board. New rules regarding this legislation are expected to be promulgated this year.

III. <u>FEDERAL AND UTAH RULEMAKING</u>

A. Standards of Performance for Petroleum Refineries

On April 1, 2008, the Environmental Protection Agency issued final amendments to the current Standards of Performance for Petroleum Refineries. In doing so, the Agency declined to promulgate performance standards for Green House Gases (GHG), including CO_2 and CH_4, from petroleum refineries. The EPA noted that it did not have enough time during this rulemaking period to propose and publicize new performance standards for GHG. Specifically, the Agency acknowledged that the nature of GHG emissions renders them readily distinguishable from other air pollutants and that such differences warrant proceeding initially through a more deliberate process than in this source category-specific rulemaking.

The EPA further stated that because of the complexity of regulating GHG emissions, it is intended that an advanced notice of proposed rulemaking (ANPR) will be issued that explores and seeks public comment on the many dense interconnections between the relevant sections of the Clean Air Act, including section 111, and lays the foundation for a comprehensive path forward with respect to regulation of all GHG.

Source: http://www.epa.gov/ttn/oarpg/new.html

B. National Ambient Air Quality Standards for Ozone

On March 12, 2008, the Environmental Protection Agency (EPA) announced the most stringent 8-hour standard ever for ozone, revising the standards for the first time in more than a decade. The new primary 8-hour standard is 0.075 parts per million (ppm) and the new secondary standard is set at a form and level identical to the primary standard. The previous primary and secondary standards were identical 8-hour standards, set at 0.08 ppm. Because ozone is measured out to three decimal places, the standard effectively became 0.084 ppm: areas with ozone levels as high as 0.084 ppm were considered as meeting the 0.08 ppm standard, because of rounding.

Utah counties affected by the reduction of the standard are: Salt Lake, Davis, Weber, Utah, Box Elder, and Tooele.

*Sources:*www.epa.gov/groundlevelozone/actions.html; http://www.deq.utah.gov/whats_new.htm

C. Energy Efficiency Fund

Rule R638-3. Energy Efficiency Fund. The purpose of this rule is to conduct the responsibilities assigned to the Board of the Utah Geological Survey (UGS) and the State Energy Program (SEP) in managing the Energy Efficiency Fund and implementing the associated loan program established in Section 53A-20c-102. This rule establishes requirements for eligibility for loans from the Energy Efficiency Fund; procedures for accepting, evaluating, and prioritizing applications for loans; and the terms and conditions for loans.

Source: http://www.rules.utah.gov/publicat/code/r638/r638-003.htm

D. Water Reuse Project Permits

On November 1, 2007, two rules were adopted to implement the requirements of H.B. 38 (WATER REUSE REQUIREMENTS) of the 2006 general legislative session. Rule R317-13:

Approvals and Permits for a Water Reuse Project establishes administrative requirements for water reuse projects, including application and approval procedures. Rule R317-14: Approval in Change in Point of Discharge of POTW adds administrative procedures for considering changes in the point of discharge from a publicly owned wastewater treatment plant.

*Sources:*http://www.rules.utah.gov/publicat/code/r317/r317-013.htm; http://www.rules.utah.gov/publicat/code/r317/r317-014.htm

IV. NOTABLE PENDING MATTERS

A. In re Desert Power Elec. Cooperative, PSD Appeal No. 07-03 (Envtl. Appeals Bd., filed October 1, 2007) – Clean Air Act

In the wake of Massachusetts v. U.S., this matter is one of several direct challenges to coal-fired power plants seeking Prevention of Significant Deterioration permits which are now before the EPA's Environmental Appeals Board (EAB). This specific Petition for Review involves a plant in Utah, while two others involve plants in Illinois. The petitioners challenge the EPA's granting the permits on the grounds that the EPA did not include a best available control technology for carbon dioxide. The main legal issue is whether carbon dioxide is "subject to regulation" post-Massachusetts v. U.S. when it is an "air pollutant" under the CAA, but there are not yet actual regulations governing carbon dioxide emissions.

Source: http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Active+Dockets?OpenView

B. Clean Water Act Definition of "Waters of the United States"

On June 5, 2007, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers issued immediately effective agency guidance regarding Clean Water Act (CWA) jurisdiction following the U.S. Supreme Court's decision in the consolidated cases Rapanos v. United States and Carabell v. United States ("Rapanos"). The agencies issued this guidance to ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions being conducted under the CWA are consistent with the Rapanos decision and provide effective protection for public health and the environment. Additionally, the guidance is being released to ensure nationwide predictability, reliability, and consistency in identifying wetlands, streams and rivers subject to the Clean Water Act (CWA). The EPA/Corps guidance reflects the agencies' intent to provide maximum protection for the Nation's aquatic resources under the CWA as interpreted by the Supreme Court in Rapanos.

Comments about this guidance were due by December 5, 2007; however, the agencies accepted public comments until January 20, 2008 for the reason that the guidance appeared to create more questions than it answered. Revisions to the guidance are anticipated in the near future.

Source: http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html

C. Great Salt Lake Water Quality

The Department of Environmental Quality's Division of Water Quality has been working with a stakeholder committee to establish numeric water quality standards for the Great Salt Lake. The lake is currently subject to narrative standards. The initial focus has been on selenium. Public concern over the potential of adding more selenium to the Lake as the result of the South West Jordan Valley groundwater cleanup project brought a renewed focus on the need for numeric standards. As a result, a numeric water quality standard for selenium is expected to be issued in 2008 for the Great Salt Lake.

Source: http://www.deq.utah.gov/Issues/GSL_WQSC/index.htm

D. Water Quality Standards (WQS) Workgroup

The WQS Workgroup assists the Department of Environmental Quality's Division of Water Quality in developing a formal protocol for the triennial review process and provides input during the development of changes to the water quality standards as part of this review process. The rulemaking process for revising water quality standards is expected to be initiated in 2008. Of the variety of issues addressed, two noteworthy areas in which rules are anticipated to be promulgated soon are: classification of the Great Salt Lake and clarification of anti-degradation standards.

Source: http://www.waterquality.utah.gov/WQS/index.htm#wqs

UTAH STATE BAR
ENERGY, NATURAL RESOURCES AND ENVIRONMENTAL SECTION

MINING LAW COMMITTEE

SELECTED DEVELOPMENTS 2007-2008

Richard R. Hall, Chairman
Mining Law Committee

I. JUDICIAL DEVELOPMENTS

A. United States Supreme Court

1. No significant decisions in the past year.

B. United States Court of Appeals

1. *National Mining Association v. Kempthorne,* 512 F.3d 702 (D.C. 2008).

National Mining Association ("NMA") filed suit challenging a rule promulgated by the Secretary of Interior interpreting the phrase "valid existing rights" in SMCRA to foreclose surface mining operations in sensitive areas. The district court granted the government summary judgment, and NMA appealed to the Court of Appeals. The Court of Appeals affirmed the district court's decision, finding the rule reasonably interpreted SMCRA, was not a taking without just compensation, was not arbitrary and capricious and did not violate procedural due process.

2. *New West Materials, LLC v. Interior Board of Land Appeals et al.,* 2007 WL 446729 (4th Cir. 2007).

Plaintiff extraction company filed an action against the IBLA and BLM challenging the agency's trespass determination. The district court granted summary judgment in favor of the government. The central question before the Court of Appeals was whether sand and gravel are included in the reservation of "oil, gas and all other mineral deposits" contained in a land patent issued pursuant to the Small Tract Act ("STA")(43 U.S.C. § 682a (1970)). The Court of Appeals ruled in the government's favor, holding that the government's reservation of "oil, gas, and all other mineral deposits" in a land patent issued pursuant to the STA included sand and gravel.

C. United States District Courts

1. *Utah Marblehead v. Kempthorne,* 2007 WL 1020822 (D.D.C.).

In this decision, the D.C. District Court reaffirmed the Interior Board of Land Appeal's ("IBLA") position that a postmark affixed by a private meter stamping machine does not constitute a "bona fide delivery service" for purposes of providing evidence of when annual mining claim maintenance fees are mailed.

BLM regulations provide for a maintenance fee to be timely filed if it is received within 15 days of the filing deadline and is postmarked by a "bona fide delivery service" on or prior to the deadline. 43 C.F.R. § 3833.0-5(m) (2001) (currently at 43 C.F.R. § 3830.24). Utah Marblehead claimed that it postmarked its package containing maintenance fees with a private postal meter and delivered that package to the United States Post Service ("USPS") before the filing deadline. The package was returned to Utah Marblehead with no markings indicating USPS handled the package. Utah Marblehead then mailed the package via overnight delivery such that BLM received the maintenance fees fifteen days after the filing deadline.

IBLA concluded that because the overnight package was postmarked after the filing deadline, and the private postal meter stamp was not a postmark by a bona fide delivery service, the maintenance fees were not timely filed and as such 96 of Utah Marblehead's mining claims were null and void by operation of law. IBLA determined that a bona fide delivery service is one that is independent of the claimant and for which the date of filing can be verified. Therefore, because Utah Marblehead had exclusive control over the private postal meter, it did not constitute a bona fide delivery service. The D.C. District Court noted two prior instances where IBLA held that a postmark affixed by a private postal meter machine did not constitute delivery by a bona fide delivery service, (*Paul Tobeler,* 131 IBLA at 248, *Jon Roalf* 169 IBLA 48) and upheld IBLA's decision.

Thus, any submission of maintenance fees near a filing deadline should be done via a delivery service that the submitter does not have control over (i.e. USPS, overnight delivery service, etc.). So long as the submitter does not have control, that service's markings on the fee package would provide sufficient evidence to BLM that the fees were mailed on time. Otherwise, where the submitter has control over the postage marking date, the BLM may not accept the validity of the post-mark.

2. *Copar Pumice Co. Inc. v. Bosworth,* 502 F.Supp. 2d 1200 (D.N.M. 2007).

The District Court of New Mexico affirmed the Forest Service's position that the common use of an uncommon variety of pumice (locatable pumice) converts that pumice into a common mineral.

Copar mined pumice from a locatable pumice claim and sold some of the pumice for common variety purposes. The Forest Service challenged the locatability of Copar's pumice claim on the basis that the pumice taken from the claim was no longer being used as an uncommon variety. Copar asserted that a mine's initial classification established the pumice's locatability and that the pumice's eventual use was inconsequential to the mineral's classification. The Forest Service disagreed with Copar and asserted that all of the extracted pumice must be used in the stonewash industry (i.e. an uncommon purpose) and that a mineral's classification as locatable is not fixed but could change if the locatability requirements are not met.

In upholding the Forest Service's position, the District Court noted that the plain language of Forest Service regulations involving the disposal of mineral materials (36 C.F.R. § 228.41 in Subpart C) focused on the use of the minerals to either include or exclude the mineral from location. The Court also noted that the regulations supported the Forest Service's position that the locatability of a mineral is not a fixed characteristic but could change with that mineral's use.

As such, the Court upheld the Forest Service's position that Copar was in violation of federal mining laws for failing to sell all the locatable pumice to the stonewash industry.

II. ADMINISTRATIVE DECISIONS

A. Federal Decisions

1. *Decker Coal*, 172 IBLA 1 (July 17, 2007).

Decker Coal appealed a decision from Mineral Material Management ("MMS") determining that coal sales contracts between Decker and its affiliated entities did not qualify as arm's-length contracts and that Minerals Revenue Management correctly determined that the appropriate royalty value, under benchmark four (iv) of 30 C.F.R. § 206.257(c)(2), is the price Decker received for the coal under its own supply contract with Commonwealth Edison. The IBLA found that a contract for sale of coal from one affiliate to another, when affiliates are under common control and do not have opposing economic interests, is not arm's-length. MMS may accept non arm's-length contract prices when the lessee demonstrates independent indicia establishing that the contract price is one fairly derived from the marketplace.

2. *J.R. Simplot*, 173 IBLA 129 (November 30, 2007).

J.R. Simplot appealed a decision by the State Director of the Idaho State Office, Bureau of Land Management, overruling objections to a readjusted phosphate lease. The IBLA stated that in challenging a provision of a readjusted phosphate lease under the Mineral Lease Act of 1920, the burden is upon the appellant to demonstrate that the challenged provisions are unreasonable or otherwise arbitrary, capricious, or an abuse of discretion. Specifically, the IBLA found that where a readjusted lease term imposes strict or no-fault liability on a lessee, without regard to its culpability and responsibility or the Department's fault, culpability, or responsibility, such a readjusted lease term is unreasonable under the Mineral Leasing Act.

3. *Natural Minerals Processing Co.*, 173 IBLA 278 (January 16, 2008).

The IBLA determined that under 43 C.F.R. § 3809.101, consideration of a mining plan of operations may be suspended pending mining claim validity examination where the materials to be extracted may be common variety minerals.

4. *Joe R. Young,* 171 IBLA 142 (February 27, 2007).

IBLA agreed with BLM that if BLM's Master Title Plat noted that the land on which a mining claim is located was removed from mineral entry, such claim is void regardless if the notation was made in error.

In *Young,* official BLM records noted that based on State of Alaska selection, the land that encompassed Young's claim was withdrawn from location. In discussions with a State of Alaska Department of Natural Resources employee, Young determined that the land on which the mining claim was situated was still owned by the United States, not Alaska. Despite the notation error, IBLA affirmed BLM's decision that the claim was void due to the notation. In determining the claim to be void, IBLA noted prior IBLA decisions which also determined that if

public land records were noted to show that a parcel was not open to entry under public land laws, that parcel is not available for entry until the notation is removed, regardless if the notation was erroneous. A footnote to the IBLA decision explained the rationale for such rule as being "founded on a concept of providing fair notice to the general public of the availability of public domain lands" so that any party checking public land records can rely on a notation that lands are not available and that no other party will be able to make a claim on those lands.

5. *Ferrell Anderson,* 171 IBLA 289 (May 25, 2007).

In part of this decision, IBLA affirmed BLM's authority to require an applicant for an extension of a notice-level mining operation to either provide a copy of state water discharge permit or documentation that such permit was not required. IBLA relied on a number of BLM surface management regulations (43 C.F.R. § 3809 et seq.) to determine that BLM was required to prevent "unnecessary or undue degradation of public lands." Also in reliance on the surface management regulations, IBLA determined that complying with state water quality standards was included in such prevention action and that BLM was also authorized to require evidence that unnecessary or undue degradation of public lands would not occur. As such, the applicant was required to provide BLM either a copy of her state water discharge permit or state documentation that such permit was not necessary.

6. *Petrol Energy, Inc.,* 172 IBLA 186 (August 29, 2007).

BLM will terminate a lease for non-payment of rental. The appellant argued that BLM failed to notify the lessee in a timely fashion (failing to provide timely notice so that it could submit a Class II request for reinstatement within 15 months). The IBLA affirmed BLM's decision. The decision stated that "while we may express regret or even dismay that neither MMS nor BLM identified this situation in a timely manner, as averred by Petro Energy, Congress simply does not allow reinstatement where the filing of the petition occurs more than 15 months after termination."

7. *Clark County v. Nevada pacific Company,* 172 IBLA 316 (September 27, 2007).

IBLA affirmed an administrative judge's ruling that one cannot rely on geologic inference to perfect a pre-1955 discovery of a sand and gravel deposit when there is only one exposure of the mineral.

To satisfy the discovery of a sand and gravel placer claim located on or before July 23, 1955, it must be shown, among other things, that the sand and gravel was exposed prior to that date and that the extent of the deposit is such that it would be profitable to extract it. Geologic inference is an accepted method to establish the extent of deposit after the mineral is exposed. However, indications of the mineral's presence must be high and relatively constant before one can rely on geologic inference to support the mineral's existence beyond the area of the physical exposure. In Nevada Pacific's situation, only .5 acres of a 160 acre claim was excavated in 1955. As such, IBLA determined that due to the lack of excavation, trenching, or testing on the remaining 159.5 acres, there was insufficient data to determine the quality and quantity of the mineral deposit. Nevada Pacific could not rely on geologic inference to establish the extent of the deposit because

expert testimony had consistently stated that the nature of sand and gravel deposits is highly variable. Thus, IBLA concluded that unless there are multiple exposures of sand and gravel showing that sand and gravel was present in relatively high and consistent concentrations throughout the claim, Nevada Pacific cannot rely on geologic inference. In arriving at its decision, IBLA concluded that, given the highly variable nature of sand and gravel deposits, a systematic exploration of all the dimensions of the particular property is necessary to determine that quality and quantity of the sand and gravel present.

8. *Nathan C. Cook,* IBLA 2007-139 (November 14, 2007).

BLM will declare a mining claim forfeited for failure to pay a $125 claim maintenance fee on time. Appellant argued that IBLA should stay BLM's decision because claimant timely filed a small miner waiver request by hand with BLM. IBLA dismissed claim because BLM has no record of the waiver request. IBLA says it presumes that federal employees have performed their jobs correctly and that the waiver request was not lost. With no waiver request, the law establishing the maintenance requirement requires claims to be forfeited.

III. LEGISLATIVE DEVELOPMENTS

A. Federal Developments

1. H.R. 2764 (Interior Appropriations Bill).

On December 26, 2007, President Bush signed into law the 2007 Interior appropriations bill (HR 2764). The following are some of the final fiscal appropriations for several federal programs: BLM Management: appropriates $867 mullion to BLM management of lands and resources (a $5 million increase from previous year); National Forests: appropriates $1.493 billion for the National Forest System (a $47 million increase from the previous year); Payment-in-lieu of Taxes: appropriates $232.5 million (an $ 11.5 million decrease from the previous year); Forest Service Forest Products: appropriates $327.6 million for forest products in the National Forest System, which funds timber sales (a $17.6 million increase from the previous year); Office of Surface Mining Reclamation and Enforcement: provides $170.4 million for the Office of Surface Mining Reclamation and Enforcement (which is $2.1 million above the Administration's request, but $124.2 million decrease from the previous year); and Land and Water Conservation Fund: appropriates $ 9.081 million (a $9.081 million increase from the previous year).

2. Proposed Legislation

a. The U.S. Senate is considering the House's approved changes to the Mining Law of 1872 - H.R. 2262 (Hardrock Mining and Reclamation Act of 2007).

On November 1, 2007, the United States House of Representatives passed H.R. 2262 with a vote of 244 in favor, 166 against, and 22 abstaining. Sponsored by Representative Nick Rahall (D-WV), H.R. 2262 would substantially change the Mining Law of 1872. H.R. 2262 went to the United States Senate and on November 5, 2007, H.R. 2262 was referred by the Senate to its Committee on Energy and Natural Resources (chaired by Jeff Bingaman (D-NM) with Pete

Domenici (R-NM) as the ranking member). On January 24, and March 12, 2008, the Senate Committee held hearings on H.R. 2262. Of note, a Senate Committee press release from January states that Domenici believes the Senate should start with a clean slate. Domenici stated during the January hearing that he believes reform should address three items only: replacement of patenting with a more modern form of secure tenure, imposition of a prospective and profits-based royalty, and establishment of an abandoned locatable mine reclamation fund to clean up sites that threaten the environment and public safety. In a press statement about the March hearing, Senator Domenici stated that reclamation of abandoned mines presents the most significant opportunity to improve the environment and that successful legislation must be narrowly focused on addressing the most serious problems so as not to punish the mining industry.

The following are H.R. 2262's notable provisions:

- H.R. 2262 would apply to all pre-existing claims or millsites for which a plan of operations had not been approved. H.R. 2262 would also apply to claims and millsites used for processing all minerals on federal land, regardless if the mineral is locatable or not. Minor modifications to existing plans of operations can be made under old rules.

- The patent moratorium would become permanent.

- A royalty would be required on all existing and new claims.

- 4% of gross income on existing operations for which commercial production and an operation's permit has been approved.

- 8% of gross income on all other claims.

- Operator must comply with H.R. 2262's royalty record keeping provisions or would forfeit claims.

- 25% penalty for underreporting of royalty.

- Claim holder, operator, or any person who controls claim are joint and severally liable for paying the production royalty.

- Record keeping requirements would be mandatory. All parties, not just the operator, would be required to maintain paperwork showing a trail of the locatable mineral (i.e. list of parties include those who are transporting and selling products deriving from locatable minerals).

- Certain Lands would be withdrawn from location: wilderness study areas and roadless areas under the 2001 roadless rule; allows tribes, states, counties to petition government to withdraw lands from exploration. Petition must be granted unless it can be demonstrated that it is against national interest.

- Permitting requirements would be established (i.e. would require a permit for exploration and operation).

- Would establish requirements for temporary cessation of work.

- Would require transfers/assignments of permits to be approved by the Secretary, and the transferee cannot be in violation of any Federal/State environmental law for a mine or processing facility or lease transfer is void.

- Would establish reclamation requirements (i.e. must submit a reclamation plan with the application for a permit).

- Financial assurances requirements would be established.

- Two new funds funded by royalty payments would be established: 1) reclamation fund, and 2) mitigation fund for communities that are impacted by mineral activities.

- Inspections by the federal government would be required.

- A citizen suit provision would be added. This provision provides for "any person" to bring an action on "his or her behalf" without requiring that person to have any particular interest or injury. Despite H.R 2262's broad grant of standing to "any person," it is unclear if the citizen suit provision is intended to allow a non-profit or other type of organization to bring an action under this section (i.e. the Sierra Club).

- A whistleblower provision would be added (i.e. third party can request an inspection by the federal government and would remain anonymous).

- Criminal/civil penalties for violations would be established.

B. Utah Developments

1. Coal Mine Safety Act (S.B. 224).

The Act, which was signed into law by Governor Huntsman on May 5, 2008, modifies provisions related to mines and mining activities to enact the Coal Mine Safety Act. The Act creates the Utah Office of Coal Mine Safety and the Mine Safety Technical Advisory Council. Among other things, the Act addresses the reporting of safety conditions in coal mines, requires annual reports on safety by the Labor Commission office, and council, and provides for the commission by rule to require certification and recertification of other coal mine occupations including the certification of a new coal miner.

IV. ADMINISTRATIVE DEVELOPMENTS

A. Federal Developments

1. Mine Rescue Team Rules (30 C.F.R. Parts 49 and 75, 73 Fed. Reg. 7636)(February 8, 2008).

The U.S. Department of Labor's Mine Safety and Health Administration ("MSHA") issued the final rule that revises existing standards for mine rescue teams for underground coal mines. The final rule implements Section 4 of the Mine Improvement and New Emergency Response Act of 2006 to improve overall mine rescue capability, mine emergency response time and mine rescue team effectiveness. It also calls for increased quantity and quality of mine rescue team training.

2. Adjustment of Cost Recovery Fees (BLM)(43 C.F.R. Parts 3000, 3100, 3150, 3200, 3500, 3580, 3600, 3730, 3810, and 3830).

The Bureau of Land Management ("BLM") issued a new rule on September 5, 2007, that would increase fees paid by hard rock mining, oil and gas, coal, and geothermal companies. The fees went into effect October 1, 2007. A previous fee update occurred in 2005. For hard rock mining companies the rule would increase mineral patent adjudication for more than 10 claims from $2,520 to $2,690. For less than 10 claims the fees will increase from $1,260 to $1,345. Some have suggested that the fees should be dropped until patents are allowed in the future, allowing the BLM to consider cost recovery fees at that time. However, the BLM has stated that it has established the fees relating to mineral patent applications so that they will be in place if Congress chooses to lift the current moratorium on issuing mineral patents. A number of other mining related fees were raised anywhere from $5 to $l0. A fullbreak down of all fee increases is available at http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/lease_fees.html.

B. Utah Developments

1. Report to Utah Legislature: A Performance Audit of Utah's Coal Regulatory Project (December 2007).

The report found that management overseeing the coal regulatory program was lacking good management practices in a couple key governing areas. Management had not developed adequate policies and procedures for the coal program and was not satisfactorily monitoring the performance of the coal program. Further, management's permitting practices were not consistent with the intent of state statutes and administrative rules, as clarified by the Board of Oil, Gas and Mining.

V. APPOINTMENTS

A. James Caswell, appointed as Director of the Bureau of Land Management.

Former head of the State of Idaho's Office of Species Conservation, James Caswell was confirmed by the U.S. Senate on August 3, 2007. The Idaho Office of Species Conservation was established in 2000 to focus on endangered species issues in Idaho and coordinate State and

Federal efforts to manage endangered species in the State. Caswell was with BLM for thirty three years prior to working with the Office of Species Conservation. While with BLM, Caswell worked with the Bonneville Power Administration and the Forest Service as forest supervisor of the Clearwater and Targhee National Forests, deputy forest supervisor at Boise National Forest, and acting deputy regional forester in Missoula, Montana.

B. Brent Wahlquist appointed as Director of the Office of Surface Mining.

Brent Wahlquist, Acting Director of the Office of Surface Mining ("OSM") was confirmed to be Director of OSM by the U.S. Senate on August 3, 2007. While with OSM, Wahlquist served as the regional director of the Appalachian Region, regional director of the Mid-Continent Region, regional director of the Western Region, and assistant director in Washington D.C.

C. Abigail Kimbell appointed to Chief of the U.S. Forest Service.

On January 12, 2007, Mike Johanna, the Secretary of Agriculture, appointed Abigail Kimbell as Chief of the Forest Service to replace Chief Dale Bosworth. Kimbell has held numerous positions with the Forest Service including Region 1 Forester, Associate Deputy Chief for the National Forest System, and Forest Supervisory of the Pike and San Isabel National Forests, and the Comanche and Cimarron National Grasslands.

D. Randall B. Luthi appointed Director of the Minerals Management Service.

On July 23, 2007, Randall Luthi was appointed Director of the Mineral Management Service, replacing R.M. "Johnnie" Burton. Luthi a former speaker of the Wyoming State House of Representatives, is a rancher and attorney in private practice from Freedom, Wyoming. Previously he served in both the Department of the Interior and at the National Oceanic and Atmospheric Administration ("NOAA"). Luthi is a partner in the Luthi and Voyles law firm in Thayne, Wyoming. He also manages a cattle ranch in western Wyoming. He was first elected to the Wyoming House of Representatives in I995, serving as speaker in 2005 and 2006. He served in Washington in career positions as Senior Counselor for Environmental Regulations in NOAA's Office of General Counsel from 1990 to 1993, and as an attorney in the Department of the Interior Office of the Solicitor from 1986 to 1990.

VI. REFERENCE MATERIALS

A. Rocky Mountain Mineral Law Foundation, Mineral Law Newsletter. State Publications

B. http://www.doi.gov. Department of Interior materials and links to the websites of agencies within DOI. Utah Mining Association website

C. http://www.msha.gov. Mine Safety and Health Administration materials.

D. http://www.le.utah.gov. Utah legislative materials.

E. http://www.dogm.nr.state.ut.us. Utah Division of Oil, Gas & Mining materials.

F. http://www.nma.org. National Mining Association materials, including its weekly newsletter *Mining Week*.

G. http://www.utahmining.org. Utah Mining Association materials, including its monthly newsletter *Mining Fax*.

H. http://www.publiclandsnews.com. Electronic version of *Public Land News* (password required).

UPDATE OF IMPORTANT CASES, LEGISLATION, AND REGULATORY DECISIONS CONCERNING INDIAN AFFAIRS FOR 2007-2008.
(Alex Skibine)

PART I: FEDERAL UPDATE

1. U.S. Supreme Court: Cert granted.

Plains Commerce Bank v. Long Family Land and Cattle Co: 491 F.3d 878. Does a tribal court have jurisdiction under the first Montana exception over a law suit where a corporation owned by reservation Indians is suing a non-Indian Bank with whom it was doing business on the reservation..

Carcieri v. Kempthorne: 497 F.3d 15. Can the Secretary of the Interior put land in trust pursuant to the 1934 Indian Reorganization Act for a tribe (the Narragansett Indian Tribe of Connecticut) that was not recognized as an Indian tribe as of 1934?.

2. Federal circuit courts:

Natural resources:

South Dakota v. U.S, 487 F.3d 548 (Court rejected a non-delegation challenge and held that Secretary of Interior can constitutionally take land in trust for tribes pursuant to the Indian Reorganization Act of 1934)

Navajo Nation v. U.S. of Forest Service, 479 F.3d 1024 (plan providing for expansion of ski resort and allowing making of artificial snow from sewer effluent held in violation of Tribes' constitutional Free Exercise Right. En banc review granted, decision pending.)

Navajo Nation v. U.S: 501 F.3d 1327 (After losing the first round at the US Supreme Court, the Navajo Nation on remand was able to invoke additional statutes and regulations so as to make a case for a breach of trust under the Tucker Act. (The initial complaint had only relied on the 1938 Indian Mineral Leasing Act).

Northern Cheyenne Tribe v. Norton; 503 F.3d 836 (Allowed BLM proposed plan for development of coal Gas methane in the Powder River Basin in Montana and Wyoming to proceed. (Did not rule on the tribe's cultural

resources claims because an additional EIS would have to be completed before such resources could be impacted.)

Access Fund v. U.S. Dept. Of Agriculture: 499 F.3d 1036 (Department ban on climbing at Cave Rock a site on the shore of Lake Tahoe with religious significance to the Washoe Tribe did not violate the Establishment Clause).

Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d 18 (tribal members have standing to challenge a lease signed by the Tribe and approved by the BIA for the construction of a liquefied gas terminal on the reservation in Maine).

United States v. Vasquez Ramos: 2008 WL 962092 (Prosecution of Native Americans who were not members of federally recognized Indian tribes and who possessed feathers and talons of eagles without a permit, and therefore in violation of the Bald and Golden Eagle Protection Act, did not violate the Religious Freedom Restoration Act.

U.S. v. Lowry, 512 F.3d 1194 (9th Cir. 2008)(Indians occupying Forest service land claiming individual aboriginal title had the burden of proving such title as an affirmative defense. They failed to do so.)

Fidelity Exploration Co. V. U.S: 506 F.3d 1182 (Statute of limitations expired on a suit brought by an oil and gas Co. with leases from the state Montana, to quiet title to the bed of the Tongue River where the U.S. had a colorable claim to the submerged riverbed on behalf of the Northern Cheyenne tribe.

Federal laws of general application:

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San Manuel Bingo v. NLRB. 475 F.3d 1306. The NLRB decision to extend provisions of the NLRA to a tribal gaming enterprise was upheld).

State/tribal Jurisdiction:

Prairie Band of Potawatomi v. Wagnon: 476 F.3d 818 (State of Kansas has to recognize tribal license plates of tribes located in Kansas on equal protection grounds.)

Ford Motor Co. v. Todecheene: 488 F.3d 1215(Tribal court did not plainly lack jurisdiction over a product liability law suit filed by a tribal member against Ford Motor Co. when her vehicle rolled over on a reservation road:

remanded for exhaustion of tribal court remedies.)

Nord v. Kelly: 2008 WL 900138 (The tribal court of the Red Lake Band of Chippewa Indians in Minnesota did not have jurisdiction over a non-Indian driver of a semi truck who was being sued by a tribal member over an auto accident that occurred on a state highway within the Indian reservation..)

In Re Matter of Sonoma County Fire Chief's application fo an inspection v. Dry Creek Rancheria Band of Pomo Indians, 2007 WL 1073859.(State had no jurisdiction to impose fire codes on Indian casino within the reservation.)

States and Tribes sovereign immunity from suit:

Osage Nation v. Oklahoma Tax Commission, 2007 WL 4553668 (Tribe can sue members of the state tax commission under doctrine of Ex Parte Young in an attempt to enjoin the assessment of income tax on tribal members employed by the tribe and residing on the alleged reservation. The ultimate issue in this case is whether the Osage Indian reservation still exists)

Burlington Northern v. Vaughn, 509 F.3d 1085 (Relying on *Ex Parte Young*, the court held that the Railroad could sue Hualapai Tribal officials seeking declaratory and injunctive relief against their efforts to collect the tribe's possessory interest tax against the railroad for its use of its right-of-way through the reservation.

Miner Electric v. Muscogee Creek Nation, 505 F.3d 1007 (Non-Indians argued that Tribe lacked jurisdiction to enter a civil forfeiture order against their SUV where drugs were found while they were visiting an Indian casino. They also argued that the forfeiture was a denial of their constitutional rights and a violation of the Indian Civil Rights Act. The court held that the federal district court did not have jurisdiction and should have granted the Tribe's motion to dismiss on sovereign immunity grounds.)

Wisconsin v. Ho-Chunk, 512 F.3d 921 (Tribal sovereign Immunity was abrogated in state's action to enjoin tribe's gaming with respect to its alleged refusal to submit to binding arbitration. Federal court also had jurisdiction over the state's claim that it did negotiate in good faith with the tribe as mandated under federal law.

Gaming:

United States v. Texas: 497 F.3d 491(Upheld state challenge to the Secretary of the Interior's power to issue Class III gaming procedures)

Kansas v. Kempthorne, 516 F.3d 833 (U.S. has sovereign Immunity for land acquired for the purpose of tribal gaming under the Quiet Title Act). See also related decision at 492 F.3d 460.

Other:

United States v. Smiskin, 487 F.3d 1260 (U.S. could not prosecute Yakima tribal members under the Contraband Cigarette Trafficking Act because reliance on certain state laws violated the Indians' right to travel under the Yakama Treaty of 1855.)

3. Federal District Courts:

General

Oneida Tribe of Wisconsin v. Village of Hobart, 2008 WL 821767. The district court held that the Village, a state entity, had jurisdiction to charge assessment and condemn land within the Oneida Indian reservation that had been recently purchased and was held in fee by the Oneida Indian tribe.

Indian Educators v. Kempthorne, 2008 WL 857444 (Indian preference extended to any programs primarily serving Indians within the Department of the Interior even if not within the Bureau of Indian Affairs).

Cobell v. Kempthorne, 532 F. Supp. 2d 37 (January 2008) (The court concluded that the Department of Interior did not and could not provide the plaintiffs with an accurate historical accounting of all trust funds received and disbursed by the Department. Scheduled a further hearing to determine how to wrap up this litigation.

Cano v.Cocopah Indian Tribe, 2007 WL 2164555 (The ADEA held to apply to Indian tribes).

Environmental/natural resources:

Freemanville Water System v. Poarch Band of Creek Indians, 2008 WL 80644 (Tribe had sovereignty in a suit to prevent tribe from constructing a water treatment distribution facility system on tribal land and to deliver water to non-contiguous tribal land.

`Miccosukee Tribe of Florida v. U.S., 528 F. Supp. 2d 1317 (U.S. Fish and Wildlife service did not violate the Endangered Species Act when it issued a Biological Opinion in a plan to restrict the flow of water to certain marshes.)

Miccosukee Tribe of Florida v. U.S. Army Corps of Eng., 509 F. Supp 2d 1288, Army Corps held not to have been in violation of NEPA or the ESA when it issued its final supplemental environmental impact statement (FSEIS) concerning the impact of congressionally authorized water control project on the seaside sparrows.

4. Federal Regulations:

Regulations implementing the Indian Tribal Energy Development and Self Determination Act of 2005, 25 U.S.C. 3501-3504, were published on March 20, 2008 at 73 FR 12808, 25 C.F.R. Part 224.

PART II: UTAH UPDATE:

1: JUDICIAL:

A: Federal court decisions:

McArthur v. San Juan County, 497 F.3d 1057 (Tribal court did not have jurisdiction over an employment dispute involving tribal members and a non-Indian Health clinic located on the Navajo reservation.) Petition for Cert to the US Supreme Court was denied.

Ohugo Gavdadeh Devia v. NRC, 492 F.3d 421 (D.C. Cir. 2007). Tribal members challenged the decision of the NRC to grant PFS a license to operate the facility. Dismissed on ripeness grounds

Reber v. Steele, 2008 WL 444545 (Federal District Court held that Reber was not

entitled to relief under 28 USC 2254 because the decision of the Utah Supreme Court listed above was not contrary to, or involved an unreasonable application of, clearly established federal law.)

Ute Indian Tribe v. Ute Distribution Corporation, 2007 WL 1231499, (Counterclaim dismissed on the grounds of tribal sovereign immunity).

B: Utah State Court decisions:

Pelt v. Utah, 2008 WL 723740: Navajo Trust Fund accounting: Federal District court held that: (1) Utah only has to account for funds actually received from the federal government. (2) Applicable trust standard is the reasonable prudent investor. (3) Trust Accounting Duties only extend to keeping track of money until it is spent. Therefore, accounting duties do not extend to money after it was given or loaned to the Utah Navajo Development Corporation or Utah Navajo Industries.

State of Utah v. Reber, 171 P.3d 406 (2007): defendant was convicted of hunting without a license and claimed he did not need one because he was a tribal member. The Court held that he was not a tribal member. (US Supreme Court denied Cert)..

2: LEGISLATION/REGULATIONS:

A: Federal regulatory action:

: : Skull Valley Nuclear repository: Upon reconsideration, Interior denied the lease and the right of way permit over the newly created wilderness area. In July 2007, the Tribe filed for judicial review

B: Utah Legislation : The following Bills were enacted into law in 2008:

1. H.C.R. 4: Concurrent resolution encouraging Congressional action to designate a new recipient of Royalties from Navajo Reservation Lands in Utah.

2. H.B. 352: Amendments related to monies derived from Navajo Nation Reservation Lands in Utah. The Bill modifies provisions related to the Navajo trust Fund and the Navajo Revitalization Fund Act tro provide for a transition until Congress designate a new Recipient of Utah Navajo Royalties.

3. S.B. 235: Human Remains Amendments: Amends the statute under which human remains found on non-federal lands within the state of Utah can be repatriated to the tribe culturally affiliated with such remains.

4. S.B. 110: Foreign Business and Tribal Law: The Bill provides that tribal corporations created under tribal law shall be treated as foreign business entities authorized to transact business in the State.

UTAH STATE BAR
ENERGY, NATURAL RESOURCES AND ENVIRONMENTAL LAW SECTION

OIL & GAS COMMITTEE

SELECTED DEVELOPMENTS 2007-2008

Michael S. Johnson, Chair
Utah Attorney General's Office

I. JUDICIAL DECISIONS

Arkansas.

El Paso Production Co. v. Blanchard, No. 06-1107, 2007 WL 4260972 (Ark. Dec. 6, 2007), was a trespass case involving the seismic exploration activities of El Paso's predecessor, Sonat, upon lands where Blanchard was both the surface owner and owned a one-half mineral interest. The lower court's holding that El Paso had trespassed was affirmed based upon a regulation of the Arkansas Oil and Gas Commission requiring surface owner permission prior to entry for seismic testing. Since the time of this decision, the AOGC has materially changed its regulation, which now requires mere notice to the owner. Because the regulation change moots this issue for further litigation, the case would appear unimportant, except to the parties. However, in its opinion, the court strongly implies that each severed mineral owner has a common law right to conduct seismic operations as part of that owner's right of ingress and egress and, additionally, that a standard oil and gas lease authorizes the lessee to conduct such operations whether or not the lease contains express language authorizing "seismic" or "geophysical" operations.

Louisiana.

The interpretation of Louisiana's so called "risk-fee" statute, LSA section 30:10,113, was at issue in *Gulf Explorer, LLC v. Clayton Williams Energy, Inc.*, 964 So.2d 1042 (La. App. 1 Cir. 2007). In this case, a unit operator sent a "risk fee" notice to a non-operator working interest owner, who elected not to participate in the risk and expense of the proposed unit well. The operator drilled and completed the well at its sole risk and expense, and although the well produced, it did not reach payout. According to the statue, when a non-operating working interest owner elects not to participate in the risk and the expense of a unit well, the operator is entitled to recover out of production allocable to the tract belonging to the nonparticipating owner such tract's allocated share of actual reasonable expenses incurred in drilling, testing, completing, equipping, and operating the well, together with a risk charge in the amount of 100% of a tract's allocated share of the cost of drilling, testing and completing the well. The nonparticipating owner argued that even though it was not entitled to receive its share of production proceeds, the operator was still required to pay its lessor and overriding

royalty owners from first production. The court disagreed, concluding that the statute allows the operator to recoup its costs out of production attributable to the tract owned by the nonparticipating owner, and that the nonparticipating owner was required to pay its lessor and overriding royalty owners in the interim, even though it was not entitled to receive any proceeds from the unit operator.

Oklahoma.

In *Chesapeake Operating, Inc. v. Loomis*, 164 P.3d 274 (Okla. Civ. App. 2007), Chesapeake appealed the report of the appraisers in a suit under the Oklahoma Surface Damages Act (OKLA. STAT. tit. 52 §§ 318.2-320.1 (2003)). Chesapeake contended that the majority appraisers' report erred in awarding damages for the diminution in the value of the surface owner's "remaining property" resulting from the placement of a well on the property. Chesapeake urged that the method for determining surface damages had been modified as a result of the *Williams Natural Gas Co. v. Perkins*, 952 P.2d 483, 486 (Okla. Civ. App. 1998) decision. The court rejected that argument. Finally, the court rejected Chesapeake's objection to the allowance of $1,750 in additional damages for the parking of vehicles on lands other than the drill site. See also, *Bays Exploration, Inc. v. Jones*, 172 P.3d 217 (Okla. Civ. App. 2007) for additional rulings under the Surface Damages Act.

Utah.

In *Sullivan v. Utah Board of Oil, Gas and Mining*, 2008 UT 30, the Utah Supreme Court affirmed a decision by the Board to deny the Petitioner's Request for Agency Action concerning a claim for unpaid royalties. The Board had declined to set a hearing on the Petitioner's claims in favor of allowing him to instead litigate those claims in an already-pending district court case concerning the same dispute. Petitioner appealed the Board's decision on the grounds that the Board, among other alleged errors, should have ordered respondent Kerr-McGee Oil and Gas Onshore, LLC to deposit the disputed funds into escrow pending resolution of Petitioner's claims. The Court agreed with the Board that the relevant statute (Utah Code Ann. §40-6-9) did not authorize the Board to grant injunctive relief requiring the deposit of disputed funds into escrow in cases where an operator has failed to establish an escrow account as required by statute. *Id.* at ¶20. Instead, the Court recognized that the Board is authorized by statute only to award interest as a substitute for escrow interest as the remedy for an operator's failure to escrow suspended proceeds. The Court also held that Petitioner was not prejudiced by the Board's decision not to set a hearing on his claim under U.C.A. §40-6-9(7)(b) that a 25% penalty should be imposed for KMG's alleged suspending of payments "without reasonable justification." The Court stated it saw "nothing in the relevant statute that would prevent Sullivan from again requesting agency action [to seek the 25% penalty] once the underlying contractual dispute is resolved in state court." *Id.* at ¶16.

Because many of Petitioner's arguments concerning alleged Board error were disposed of on the grounds that they had not been raised below, the *Sullivan* case does not establish a great deal of new law concerning claims to unpaid royalties under U.C.A. §40-6-9. The case does, however, clarify (1) the nature of the remedies the Board may

award for an operator's failure to establish an escrow account, and (2) the ability of a petitioner to file a second request for a Board hearing on the issue of potential penalties if the petitioner is initially denied such a hearing and subsequently obtains a favorable ruling on his or her underlying royalty claims in state court.

Wyoming.

In consolidated appeals brought by a number of taxpayers, the Wyoming Supreme Court considered the controversial issue of whether royalties and production taxes should be included as direct production costs in the direct cost ratio of the severance tax proportionate profits valuation method for producer-processed gas. *See* WYO.STAT.ANN. §39-14-203(b)(vi)(D) (2007). While the Wyoming Department of Revenue and State Board of Equalization had determined that royalties and production taxes should be included in the direct cost ratio, the court ruled that royalties and production taxes were not direct costs of producing and should therefore be excluded from the ratio. *RME Petroleum Co. v. Wyoming Dep't of Revenue*, 150 P.3d 673 (Wyo. 2007).

II. ADMINISTRATIVE DECISIONS

Colorado.

A Colorado Water Court ruled in *Vance v. Simpson*, Case No. 2005CW63, slip op. (Dist. Ct., Water Div. No. 7 July 2, 2007), that the State Engineer must regulate coalbed methane (CBM) wells that generate produced water, a decision that was contrary to the state engineer's long-standing policy of not regulating such wells. The case was brought by ranchers owning senior water rights in the San Juan River basin, who claimed that they are impacted by CBM production. The Water Court concluded that diversion of groundwater necessary for CBM extraction is a "beneficial use" of water under Colorado law, and ruled that the state engineer cannot allow the diversion of tributary ground water associated with CBM production without a water well permit and, where applicable, a court-approved plan to replace out-of-priority depletions. A stay was granted pending a decision by the Colorado Supreme Court in the appeal of this case.

Utah.

In re the Request for Agency Action of Petro-Hunt, LLC, for an Order Establishing the Wales Exploratory Unit, Utah Board of Oil, Gas and Mining, Docket No. 2006-015, Cause No. 176-04 ("Petro-Hunt"). In this matter, the Board rejected the petition of Petro-Hunt, LLC for an order creating a compulsory exploratory unit encompassing all formations in 21,047.01 acres of private land in Sanpete County, Utah. The area lies forty-five miles north of Wolverine's Covenant Field federal exploratory unit on the central Utah Overthrust belt (hinge-line) near Sigurd, Utah. Petro-Hunt argued that Utah's existing unitization statutes, *see* U.C.A. §§40-6-7 and 8, authorized compulsory reservoir-wide unitization for exploration purposes. Petro- Hunt owned or controlled through oil and gas leases 96% of the mineral interests sought to be unitized.

The Board noted that Utah's existing unitization statutes require proof of the existence of a reservoir, and found under the facts of the case that Petro-Hunt had not met this burden. *See* Petro-Hunt, Findings of Fact, Conclusions of Law and Order at ¶¶4-13 at 4-6. First, there was no direct evidence of production from wells drilled on or near the subject lands. Second, the asserted existence of a reservoir was based in part upon the assumption that the subject lands shared a host of reservoir characteristics with fields located forty-five miles or more away. The Board found those fields to be too geographically remote to serve as reliable analogs. Although the Board conceded that geologic inferences could in appropriate cases support a finding of the existence of a reservoir, it ultimately found that the evidence presented was too sparse and was based upon too many assumptions to support such a finding in the matter before it. The Board further noted that the evidence presented focused mainly on the primary target of the Navajo Sandstone formation, and therefore did not support the petition's request for compulsory unitization of "all formations" and all depths. *Id.* at ¶¶10 at 5-6.

The case is significant because Petro-Hunt's request raised previously untested questions concerning whether Utah's existing unitization statutes are sufficiently broad to allow for compulsory exploratory unitization. Petro-Hunt's request had been opposed on grounds that the existing statutes provide only for pressure maintenance and enhanced and secondary recovery units, and do not authorize the formation of compulsory exploratory units. Because the Board found that Petro-Hunt had not met its burden of proving the existence of a reservoir, and had failed to make other showings required for unitization not discussed in this note, it did not ultimately need to resolve the question of whether the existing statute authorized the creation of compulsory exploratory units. The Board did note, however, that the existing unitization statute, given its particular requirements, was an "ill fit" to kind of exploratory unit requested by Petro-Hunt. *Id.* at ¶24 at 10.

Utah has to date not adopted the 2004 amendments to the Interstate Oil & Gas Commission model form Oil and Gas Conservation Act that would provide an express exploratory unitization provision to remove any doubt about the Board's authority to create the kind of unit sought by Petro-Hunt. *See* INTERSTATE OIL AND GAS COMPACT COMM., 2004 MODEL OIL AND GAS CONSERVATION ACT (2004), http://www.iogcc.state.ok.us/docs/ModelAct-Dec2004.pdf. The Board noted in its ruling that such an amendment or other revision to the statute should be explored in light of the significant policy arguments favoring early unitization and in light of the failure of Utah's existing statute to set forth clear and workable standards for the creation of exploratory units. *See* Petro-Hunt Findings of Fact, Conclusions of Law and Order at ¶27 at 11-12.

In the Matter of the Request for Agency Action of Elizabeth B. Koch v. Quinex Energy Corporation, Utah Board of Oil, Gas and Mining, Docket No. 2007-019 , Cause No. 139-80 ("Koch"). In this matter, the Board applied the one-year statute of limitations set forth in U.C.A. §40-6-12(2) to bar a claim for unpaid royalties brought pursuant to U.C.A. §40-6-9. Section 12(2), which was enacted as part of the original oil and gas conservation statute adopted in the 1950s, establishes a one-year limitations period for all violations of the "chapter" within which that provision is found (Chapter 6 of Title 40). The petitioner argued that because the royalty payment provision it relied upon (Section 9

of Chapter 6) was added in a subsequent amendment to Chapter 6, and was not found within the relevant "chapter" of the original Act when the statute of limitations provision was enacted, that the limitations period was never intended to apply to Section 9. While the Board found this suggestion plausible, it concluded that the statute of limitations provision's use of the term "chapter" was unambiguous and must be applied as written. Koch, Findings of Fact, Conclusions of Law and Order at ¶13 at 5. The Board's decision in Koch is consistent with its earlier pronouncement on this question in In re Fawcett, Docket No. 98-017, Cause No. 189-04. While the Board concluded that claims for unpaid royalties under Section 9 are subject to the one-year statute of limitations, it indicated in announcing its ruling that it would study the potential need for an amendment to the statute to provide for a longer limitations period.

III. LEGISLATIVE DEVELOPMENTS

Colorado.

In 2007, the Colorado legislature restructured the Colorado Oil and Gas Conservation Commission (COGCC) and modified that agency's legislative mandate. *See* H.B. 1341, 66th Gen. Assem., 1st Reg. Sess. (Colo. 2007) (amending COLO. REV. STAT. §34-60-102 through 129 (2007)). The Oil and Gas Conservation Act (Conservation Act) now provides for "responsible, balanced" development of oil and gas "including protection of the environment and wildlife resources" and the prevention of waste "consistent with the protection of public health, safety, and welfare . . . ." *Id.* (amending COLO. REV. STAT. § 34-60-102 (2007)). While COGCC membership was increased from seven to nine, oil and gas industry representation on COGCC was decreased from five to three members. Members now include the Director of the DNR and the Director of the Colorado Department of Public Health and Environment. *Id.* (amending COLO. REV. STAT. § 34-60-104 (2007)). Another bill modified the Conservation Act to require COGCC to plan and manage oil and gas operations in a manner that balances development with wildlife conservation. H.B. 1298, 66th Gen. Assem., 1st Reg. Sess. (Colo. 2007) (amending COLO. REV. STAT. § 34-60-102 through 129 (2007)). COGCC is required to establish a procedure for consultation with the Wildlife Commission and Division of Wildlife on decision-making that impacts wildlife resources, and to promulgate rules by July 1, 2008, to establish standards for minimizing adverse impacts of oil and gas operations on wildlife resources and to ensure proper reclamation of wildlife habitat following such operations. The legislature also required COGCC to promulgate rules establishing standards for wellhead oil and gas measurement and reporting in order to ensure that production is reported accurately. H.B. 1180, 66th Gen. Assem., 1st Reg. Sess. (Colo. 2007) (amending COLO. REV. STAT. §§ 34-60-106(11), 34-60-118.5 (2006)).

In addition, the Colorado legislature enacted a bill intended to codify the doctrine of "reasonable accommodation" previously adopted by the Colorado Supreme Court in the *Gerrity* decision. H.B. 1252, 66th Gen. Assem., 1st Reg. Sess. (Colo. 2007) (referencing *Gerrity Oil & Gas Corp. v. Magness,* 946 P.2d 913 (Colo. 1997)). This bill added a section to the Conservation Act requiring operators to conduct oil and gas operations in a manner that accommodates the surface owner by "'minimizing intrusion

upon and damage to the surface' of the land." *Id.* (codified at COLO. REV. STAT. § 34-60-127 (2007)). That phrase is defined to mean "selecting alternative locations for wells, roads, pipelines, or production facilities, or employing alternative means of operation, that prevent, reduce, or mitigate the impacts of the oil and gas operations on the surface, where such alternatives are technologically sound, economically practicable, and reasonably available to the operator." *Id.* The bill recognizes the operator's right of reasonable use of the surface, and does not alter or preclude surface use agreements that release the operator from liability for use of the surface. If an operator fails to meet the required standard of conduct, the surface owner may seek compensatory damages or equitable relief.

Montana.

Amendments to Montana's Surface Owner Damage and Disruption Compensation Act (SODDCA), MONT. CODE ANN. §§ 82-10-501 - 82-10-511 (2007), apply to drilling activities involving surface disturbance (*i.e.* construction of access roads and well pads) commenced on or after October 1, 2007. The primary changes are: (1) notice of drilling operations must be provided to the record title surface owner and any purchaser under contract for deed no more than 180 days and no fewer than twenty days before any surface-disturbing activity; (2) the amendments clarify that the notice requirements do not apply to activities in anticipation of drilling operations that do not disturb the surface, but surveyors must give notice pursuant to Montana Code Annotated section 70-16-111 (at least fifteen days, unless waived by the surface owner); (3) together with the drilling notice, the Operator must provide the surface owner a photocopy of SODDCA and a copy of the Montana Environmental Quality Council's brochure entitled A Guide to Split Estates in Oil and Gas Development (MONTANA ENVTL. QUALITY COUNCIL, A GUIDE TO SPLIT ESTATES IN OIL AND GAS DEVELOPMENT (2007), http://leg.mt.gov/content/publications/lepo/hb790brochure06.pdf). A new penalty provision subjects operators to potential civil fines or criminal penalties for failure to comply with the notice requirements of SODDCA.

New Mexico.

In 2007 the New Mexico Legislature enacted the Surface Owners Protection Act (SOPA), N.M. STAT. ANN. §§ 70-12-1 - 17-12-10 (2007), the effective date of which was July 1, 2007. The Act changes longstanding New Mexico case law providing that an oil and gas operator has the right to use such portion of the surface of land as is reasonably necessary for oil and gas operations and generally need not compensate the surface owner for such operations, so long as the operations are not negligently conducted, unreasonable, or excessive, subject to a duty to reasonably accommodate surface use by the surface owner. Certain of the key provisions of the SOPA are summarized below.

The SOPA applies to oil and gas operations conducted on "private fee surface land" (not defined) owned by a "surface owner," defined as a person who holds legal or equitable title, as shown in the records of the county clerk, to the surface of the real property on which the operator has the legal right to conduct oil and gas operations.

The SOPA also applies to situations in which a surface lessee incurs damages to leasehold improvements as a result of oil and gas operations. The heart of the SOPA is section 4, which requires an oil and gas operator to compensate the surface owner for damages sustained by the surface owner for loss of agricultural production and income, lost land value, lost use of and lost access to the surface owner's land, and lost value of improvements caused by oil and gas operations. Such compensation payments only cover land affected by oil and gas operations. Section 4 also requires the operator to reclaim all the surface affected by the operator's oil and gas operations.

Section 5 of the SOPA requires that notice be given to the surface owner five days prior to entering the land for activities that do not disturb the surface and thirty days prior to oil and gas operations being conducted. It further requires that the thirty-day notice be accompanied by a copy of the SOPA and a proposed surface use and compensation agreement.

If the parties fail to enter into a surface agreement within thirty days after the surface owner's receipt of the thirty day notice, section 6 of the SOPA permits the operator to enter the land and conduct oil and gas operations without a surface agreement in place, provided that the operator first satisfies one of two requirements relating to the posting of a bond, letter of credit, or other financial security for the payment of the surface damages. Under section 7, if there is no surface agreement in place and the operator enters the land and conducts oil and gas operations, the surface owner may file suit to collect any amounts to which the surface owner is entitled under section 4, as well as treble damages under some circumstances.

Wyoming.

Wyoming legislators considered several bills addressing the rights of property owners and mineral lessees, and the procedure for condemnation of real property interests. Ultimately, the legislature passed a bill making major revisions to the Wyoming Eminent Domain Act. WYO. STAT. ANN. §§ 1-26-501 - 1-26-516 (2007). The revisions addressed reclamation and restoration requirements, defined the good faith negotiations required before eminent domain can be exercised, established a mediation and arbitration process between landowners and mineral lessees, and set a method for establishing the fair market value of condemned property.

The legislature amended Wyoming's statute governing oil and gas secondary recovery units. The amendment allows revisions to unit boundaries upon consent of owners of 80% of the unit production. WYO. STAT. ANN. § 30-5-110(h) (2007). Before the change, the statute required consent of all owners.

The legislature also authorized an interim study regarding CBM issues, including CBM development, the use of water and watershed permitting.

IV. ADMINISTRATIVE DEVELOPMENTS.

Arkansas.

The Arkansas Oil and Gas Commission revised various rules and regulations to, among other things, deal with issues raised by Arkansas' current gas drilling boom

(particularly horizontal gas wells in the Fayetteville Shale Formation). ARKANSAS OIL AND GAS COMM., RULES AND REGULATIONS (2008), http://www.aogc.state.ar.us/OnlineData/Forms/Rules%20and%20Regulations.pdf. Several regulations were amended in 2007. The most important of these amendments involve the AOGC's General Rules B-40 and B-43. As amended, General Rule B-40 substantially expands the authority of the AOGC's director to, administratively without a hearing, approve requests for exceptional drilling locations for all gas wells except horizontal wells, encroaching upon offsetting units. *Id.* at 36. A hearing is still required, however, if an interested party files a timely written objection.

Colorado.

Following enactment of the bills restructuring Colorado Oil and Gas Conservation Commission (discussed above), the entire membership of COGCC was replaced by Commissioners largely inexperienced in the oil and gas industry. The long-time director of COGCC resigned, and the current Acting Director is the Assistant Director of Energy and Minerals of the Department of Resources. The rulemaking mandated by House Bills 1341 and 1298, 66th Gen. Assem., 2nd Reg. Sess. (Colo. 2008), is underway, and it is expected that, when final, the new rules will fundamentally alter the permitting and regulatory process at COGCC.

Utah.

As stated in its rulings in the Petro-Hunt and Koch matters discussed above, the Utah Board of Oil, Gas and Mining plans this year to study whether legislative changes should be pursued which would (1) adopt the provisions of the 2004 Model Act as they pertain to compulsory exploratory units, and (2) alter the one-year statute of limitations as it applies to claims for unpaid royalties brought under Utah Code Ann. §40-6-9.

Oil and gas production in Utah increased in 2007 as compared to 2006 and the Division of Oil, Gas and Mining ("DOGM") again issued a near record number of drilling permits (APDs). For a summary of the DOGM's activity in 2007 and a discussion of general oil and gas development trends within the state, see *Year in Review 2007 – Utah Oil & Gas Program* (attached).

West Virginia.

Several operators of horizontal CBM wells and the West Virginia Department of Environmental Protection (WVDEP) entered into a Memorandum of Agreement on November 1, 2007. Memorandum of Agreement between the West Virginia Dep't of Envtl. Prot. and CDX Gas, LLC and CNX Gas Co. and Dominion Exploration and Prod., Inc. and New River Energy, and Penn Vir. Oil and Gas (Nov. 1, 2007). By this agreement, the WVDEP will study the impact that horizontal drilling may have on drinking water wells. The WVDEP will study CBM wells permitted between November 1, 2007, and October 31, 2008. As a result of this study, the WVDEP will make a decision as to whether the current regulatory scheme is adequate to protect drinking water sources located near horizontal CBM wells or if additional regulation is needed.

Wyoming.

The Wyoming Oil and Gas Conservation Commission considered a number of major amendments to its rules including, among other changes: (1) a new definition of the term "spud," which triggers the WOGCC's notification requirements; (2) expanded approval and sundry requirements for acidizing, cleaning-out, flushing, fracturing, and stimulating wells; (3) limited renewals of drilling permits; and (4) new rules governing surface commingling of production from multiple wells. OIL AND GAS CONSERVATION COMM., PROPOSED WOGCC RULES (2007).

Source for majority of summary: Environment, Energy and Resources Law: 2007 The Year in Review, published by the American Bar Association's Section of Environment, Energy, and Resources.

Year in Review 2007

Utah Oil & Gas Program

Presented to the Board of Oil, Gas and Mining
February 2008

Overview:

The calendar year 2007 proved to be another extremely busy one for oil and gas in Utah. The Division again broke records in response to the high industry activity level. Product demand continued to grow and so did Utah's production. Utah's oil and gas industry continued to do their part in supplying oil and natural gas to the nation.

The state of Utah is currently ranked 12th in the country in crude oil production and 10th in natural gas production (not including Federal Offshore production areas). In 2007, there were approximately 7,500 producing wells in Utah, up 17% from 2006 and up 48% from 2003. Oil production during January thru September totaled 14,608,914 barrels, up about 9% from the same time period in 2006 and up 46% from 5 years ago. Natural gas production was also up about 12% from a year ago (January thru September) and 35% from 2003 with a volume of 291,557,613 mcf (thousand cubic feet). Total year-end production for 2007 is being estimated at about 19,500,000 barrels of oil and 406,500,000 mcf of natural gas. This would make 2007 the highest oil producing year in Utah since 1997 and the highest natural gas producing year on record.

Further development of waterfloods in the Monument Butte-Pariette Bench area, drilling at Brundage Canyon and surrounding area, west-Altamont/Cedar Rim area showed renewed interest, and others added to the state's oil output. Interest continued in the hingeline play in south central Utah. Deep gas drilling continued in the Natural Buttes area and throughout the Uinta Basin, with Mesozoic Formations continuing to be deserving targets southward in the east and west Tavaputs areas. Many of these wells are targeting the deeper Mesa Verde, Mancos, and Dakota formations in addition to the Wasatch formation. These deeper targets are also being developed in the heretofore primarily oil producing area of Wonsits Valley south of Vernal. The Book Cliffs area on the borders of Uintah and Grand counties and Duchesne and Carbon counties has seen a resurgence in deep gas plays in part due to the high gas prices and accrual of 3D seismic information.

Step-out, Infill and Horizontal Oil Well Developments are occurring in the Uinta Basin. Successful step-out wells drilled outside the Brundage Canyon core development area south of Duchesne will ensure continued resource development in the area. Infill drilling in this area as well as areas such as Red Wash, Wonsits Valley, Monument Butte and even the old Gusher Field southwest of Vernal also bring great promise of continued economic development especially in light of the current high oil price. Advancements in directional drilling technology are allowing companies in these areas to drill

horizontally into thin, low permeability formations that were previously uneconomic and also under rivers or in rugged terrain where it may not be possible or acceptable otherwise.

High drilling activity is of course followed by increased Division workload in record keeping, compliance and all the other aspects of our program that follow as our well inventory increases. Both oil and gas production in the state has steadily risen since 2003. From 2005 to 2007, over 5000 permits to drill have been issued in Utah. That is double the amount of permits issued the preceding three years. With the current high oil and gas prices, that trend is expected to continue. The production sales value of crude oil and natural gas in Utah for 2007 is expected to reach nearly $2.7 billion, an increase of 40% since 2004.

Administration:

Several staff changes occurred during the year. Harold Black long time oil and gas auditor retired. Randy Thackeray was hired as our new lead oil and gas auditor coming to us with both Tax Commission and industry experience. Jean Sweet was hired as our oil and gas executive secretary. She came to us from Human Resources but also has extensive secretarial experience. Major efforts continued in data management and public outreach.

Permitting:

2007 was another big year for oil and gas permitting. 2007 ranked third (2006 - #1, 2005 - #2) for APD approvals and first in the number of well spuds. Permits were issued for drilling, waste disposal facilities, underground injection wells and seismic operations. Many additions/modifications were issued for existing facilities. Our permitting staff continues to coordinate with other State, Federal and local agencies as necessary.

Drilling permits issued: 1,553
UIC permits issued: 23 Conversion approvals 12 Final permits
Permits to construct disposal facilities: 19
Permits to operate disposal facilities: 17
Disposal Pits closed and reclaimed: 1
Seismic permits: 10 permits issued (7 in hingeline play)
3 - 3Ds for 349 square miles
7 - 2Ds for 423 linear miles

Inspection:

A total of 7401 well/site inspections were conducted. There were 222 compliance issues recorded in 2007. One company was responsible for 126 of the total compliance issues involving a total of 21 wells. The majority of the remaining 96 issues have been resolved. Staff also provided oversight for several ongoing contamination cleanup operations at gas plants, compressor sites, or other major spill sites. A breakdown of inspections is as follows:

Audit 113
Casing and cement operations 74
Complaint 11
Compliance verification 240
Drilling 579
Emergency Response 14
Final Restoration/Bond Release 276
MIT's 55
Plugging 382
Presite 428
Production/Environmental (general inspections) 5,059
Workover/Recompletion 119
Seismic 51

Total 7,401

Enforcement:

One of the main objectives of the enforcement program, established in 2004, has been to work with operators that do not respond favorably to the annual SI/TA notice and own wells in violation of R649-3-36 the shut-in well rule. The Division has succeeded in bringing 67 wells, owned by 2 such operators, into compliance with the SI-TA rule. These wells would have cost the Division approximately $14,325,628.00 to plug and abandon. There are 8 more operators that have not willingly complied with the annual notice SI-TA. These operators own a combined total of 92 wells that are projected to cost $17,110,619.00 to plug and abandon. The total number of wells removed from the problem wells/operator list in 2007 was 36, 16 in 2006, 9 in 2005, and from 2001 to 2004 was 4.

During 2007 Division field inspectors wrote 147 NOV's in the field, 76 of these are yet to be resolved. Therefore only 49% of the violations written by the field inspectors are being addressed in the same year that they are being issued. 47 NOV's were issued for late reporting, 16 of which will carry over to 2008 as unresolved.

Data Management:

The Oil and Gas Information Services group continued its efforts to keep up with industry during 2007. Despite a drop in permits to drill, other activity increased to record levels. The number of wells spudded (drilling commenced) in Utah increased 5% from the previous year to a record level of 1,119 wells. The count of producing wells is 8% higher than a year ago. Oil production is up 9% and natural gas production is up 12%.

New Oil & Gas Website

A new design of the Oil and Gas Program's website was introduced to the public in October. The goal for this work was to upgrade the appearance of the site, to transition to more up-to-date software, to improve the site's

organization, and to enhance some of the existing features. The new website has been well received by users.

Scanned Well Files

Making more information available to the public in a timely manner continues to be a high priority. All well file scanning has now been transferred to Utah Correctional Industries at the Utah State Prison. This enterprise has met with great results, allowing most incoming well documents to be scanned and available to the public on the division's website within 3 or 4 days of receipt, all done at a very inexpensive price. Approximately 24,000 well files have been scanned with new documents being added daily. All non-confidential files can be viewed by the public on the web.

Scanned Well Logs

The Oil and Gas Program continues to work with TGS Geological Products and Services (formerly A2D Technologies) and the Utah Geological Survey to scan well logs and make them available to the public via the DOGM web site. The scanning of older logs is almost complete. There are now 42,300 log images available.

EPermitting

Work is progressing nicely on a new electronic system that allows oil and gas operators to file for drilling permits through the internet. A few test companies have now successfully submitted permits via ePermit. Programming is moving into final phases in the development of internal work systems that allow Division employees to process permits, track their progress, and return problems and approvals to operators. This system will ultimately reduce the workload for operators and Division employees while speeding up the approval process. During the coming year, work will commence to enhance the system to handle the processing of sundry reports and well completion reports.

Auditing & Bonding:

The auditing and bonding activity for the calendar year 2007 accomplished the following:

9 Production/Disposition audits
9 Field Inspection Reviews
2 Water Disposal Disposition Audits
1 Gas Plant Audit
3 Production/Disposition Audits were in-process
1 Gas Plant Audit was in process
Monthly and quarterly system edits were in current to the extent possible given reporting delays
19 new bonds which included 5 new disposal facilities
22 bonds released including 1 disposal facility
3 operator bonds replaced

Engineering:

Orphan Well Program

A contract was issued in 2007 to plug 3 wells in the Uinta Basin. One of the wells was a leaking oil well in Duchesne County. This leaking well (circa 1953) was reentered and plugged from a depth of 1600' to surface. The project was completed on October 23, 2007. Cost of this project was approximately $244,000.00.

Two more wells were plugged in 2007 under project # 2008-01. These were two shallow holes (<50' in depth) in the Crescent Junction area of Grand County. This project was completed on November 28, 2007 at a cost of approximately $700.00.

SI/TA Program

The 2007 SI/TA program brought 74 of the 289 State or Fee wells in long term SI/TA status (>1 yr SI/TA) into compliance with R649-3-36. The operator either: provided integrity information (18 wells), plugged the wells (34 wells) or returned the wells to production (22 wells). 229 of the 289 wells were carryovers from previous years meaning 60 new wells were added to the list in 2007. The numbers are a bit deceiving as the Division is currently working to bring one operator into compliance that had 82 of the 289 State or Fee SI/TA wells on the list. This operator successfully removed 28 of their wells from the list. In addition, the Division is working on getting updated plans, information and subsequent reports from several other operators.

Fields Review

The engineering staff reviews field designation at the end of each calendar year. The last review, conducted as the result of drilling activity in 2006 was completed in June of 2007. The drilling of 109 productive wells outside of active Field boundaries in 2006, led to the expansion of 26 existing Fields, reactivation of 2 Fields (Agency Draw Field and the Lightning Draw SE Field) and the creation of 1 new Field (Lake Canyon Field). The 2007 field review is underway and should be completed by the end of March 2008.

Work Over Tax Credits

In 2007, the engineering staff reviewed 254 WO tax credits. Of these 254 tax credits, 207 were approved. The total of the approved submitted expenses was $25,747,656.17. This is not the actual amount of the tax credit, just the amount of the qualifying costs of qualifying work of the workovers. Operators are allowed to take 20% of the qualifying work up to a maximum of $30,000/year for each well. The majority of the workover tax credit applications were received for workovers done in Natural Buttes Field (66), followed by Monument Butte Field (30), Brundage Canyon Field (27) and Bluebell Field (26).

Sundries, APD's and Miscellaneous

The Engineering group processed hundreds of sundry notices and other miscellaneous requests such as wildcat well determination, flaring approvals, plugging requests, drilling program changes, recompletions and commingling applications. Also provided engineering review of State and Fee APD's.

Public Outreach:

Public outreach by the Oil & Gas program continues. Work continues with National Energy Foundation and others to develop an education program for schools. The Oil and Gas **Think Energy** education initiative with Trust Lands Administration, UPA and the NEF has seen good progress in the last year with the formation of a Central Steering Committee, in February, teacher training classes in early June, and an Energy Super Tour in late June. Teacher training had 25 attendees that are associated with Utah school districts, and the Super Tour attracted about 55 educators from various educational and industry disciplines.

The Uinta Basin Oil & Gas Collaborative Group continues to meet quarterly in Vernal with high participation from agencies, industry and others.

Board Support:

Oil and gas staff provided support and recommendations to the Board. It was a fairly busy year for Board matters including some controversial ones.

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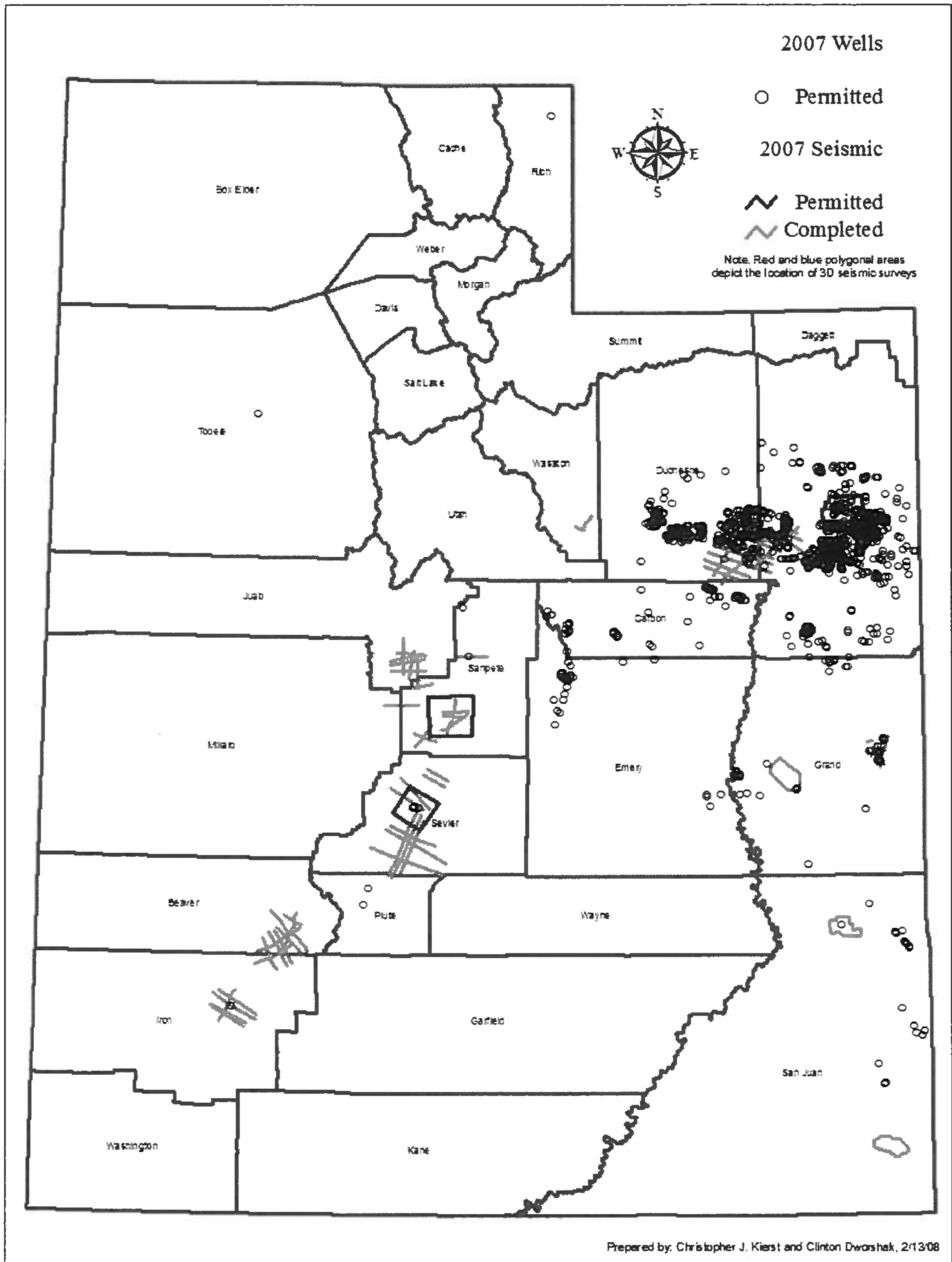


2007 Wells
Permitted
2007 Seismic
Permitted
Completed
Note. Red and blue polygonal areas depict the location of 3D seismic surveys
N
W
E
S
Box Elder
Cache
Rich
Weber
Morgan
Davis
Summit
Salt Lake
Tooele
Wasatch
Utah
Juab
Carbon
Sanpete
Millard
Emery
Grand
Sevier
Beaver
Piute
Wayne
Iron
Garfield
San Juan
Washington
Kane
Prepared by: Christopher J. Kierst and Clinton Dworshak, 2/13/08

PUBLIC LANDS COMMITTEE
Shawn T. Welch, Chairman
Holme Roberts & Owen, LLP

Selected Public Lands Legal Developments 2007 – 2008

I. NOTABLE JUDICIAL DECISIONS

A. United States Supreme Court

Wilkie v. Robbins, 127 S. Ct. 2588 (2007). Harvey Frank Robbins purchased a ranch in Wyoming without notice of an unrecorded easement previously granted to the Bureau of Land Management ("BLM"). Mr. Robbins subsequently denied access to the BLM. Mr. Robbins' complaint alleged that in retaliation for excluding the BLM from his ranch, several BLM employee's engaged in a pattern of harassing and abusive conduct to extort a new easement crossing his ranch. This harassment allegedly included verbal threats, administrative cancellation of grazing rights, filing baseless criminal charges, and harassing ranch guests.

Mr. Robbins' suit was dismissed by the district court on grounds of qualified immunity, but the Tenth Circuit reversed and reinstated the action. The United States Supreme Court granted review.

The Supreme Court reversed the Tenth Circuit and held that Mr. Robbins could not pursue a private right of action to recover damages against BLM employees under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), nor could he pursue a claim against the BLM employees in their individual capacities under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (2000 ed. and Supp. IV). As to Mr. Robbins' Bivens claim, the court declined to create a new cause of action against government employees whose actions, while perhaps improperly motivated, were each subject to a legal process, appeal and full consideration on their merits. The court found that Mr. Robbins' legal rights were protected by existing administrative and judicial processes. As stated by the court, Mr. Robbins' challenge "is not to the object the Government seeks to achieve, and for the most part his argument is not that the means the Government used were necessarily illegitimate; rather, he says that defendants simply demanded too much and went too far." 127 S. Ct. at 2601.

In dismissing Mr. Robbins' RICO claim, the court found that the alleged illegal predicate act, a violation of the Hobbs Act (prohibiting extortion under color of official act) did not exist. The "Hobbs Act does not apply when the National Government [as opposed to government officers] is the intended beneficiary of the allegedly extortionate acts." 127 S. Ct. at 2605. Therefore, "it is not reasonable to assume that the Hobbs Act (let alone RICO) was intended to expose all federal employees, whether in the Bureau of Land Management, the Internal Revenue Service, the Office of the Comptroller of the Currency (OCC), or any other agency, to extortion charges whenever they stretch in trying to enforce Government property claims." 127 S. Ct. at 2607. The court noted that the fear of RICO claims, with treble damages and an award of attorneys'

fees, "could well take the starch out of regulators who are supposed to bargain and press demands vigorously on behalf of the Government and the public." Id.

Justices Ginsburg and Stevens filed a partial concurrence, but dissented on grounds that Mr. Robbins should be allowed to pursue his Bivens claim, as the Fifth Amendment "must be read to forbid government action calculated to acquire private property coercively and cost-free, and measures taken in retaliation for the owner's resistance to uncompensated taking." 127 S. Ct. 2618.

B. Federal Appellate Court Cases

Northern Cheyenne v. Norton, 503 F.3d 836 (9th Cir. 2007). The Northern Cheyenne Tribe sued the Secretary of Interior claiming that the Department of Interior ("DOI") and its agencies failed to comply with the National Environmental Policy Act ("NEPA") in developing an environmental impact statement ("EIS") analyzing the environmental impacts of coal bed methane development in the Powder River Basin. The Tribe challenged the EIS on several grounds, including DOI's failure to analyze an alternative requiring phased development of coal bed methane. 503 F.3d at 840. The district court agreed that DOI should have analyzed a phased development alternative and remanded to the agency to prepare a supplemental EIS studying the omitted alternative of phased development.

However, in its remand decision the district court entered a partial injunction against DOI's decision, and allowed some development to proceed during preparation of a supplemental EIS. 503 F.3d at 841. The Tribe appealed, claiming that prior NEPA case law required the entire EIS to be set aside to ensure a full and complete analysis of all alternatives. Prior Ninth Circuit case law generally required enjoining and setting aside the entire decision, often stated as "wiping the slate clean", to ensure full consideration of all of the alternatives, thus ensuring the NEPA process was not subject to a preordained conclusion.

On appeal the Ninth Circuit upheld the district court's partial injunction, noting that injunctive relief is equitable in nature. 503 F.3d at 842. Under general equitable principles, the court may fashion its injunctive relief to balance the equities. 503 F.3d at 843. The Ninth Circuit noted that the terms of the partial injunction appropriately balanced the equities, would limit development to an effectively phased development nature during preparation of the supplemental EIS, and that there is no absolute rule that an injunction for a NEPA violation must prohibit all activity. 503 F.3d at 844 n.30.

Sierra Club v Bosworth, 510 F.3d 1016 (9th Cir. 2007). Following numerous destructive forest fires and in response to President Bush's Healthy Forests Initiative, the Forest Service decided to categorically exclude fuel reduction projects (projects serving to remove dry, combustible material from Forest Service lands) from the requirements of NEPA review. The Sierra Club and others sued the Forest Service claiming that the decision to categorically exclude fuel reduction projects from NEPA review was a federal action that itself required a NEPA EIS. The district court granted summary judgment to the Forest Service, finding that an EIS was not required for the fuels reduction categorical exclusion ("Fuels CE").

On appeal, the Ninth Circuit reversed and ordered the district court to issue an injunction prohibiting the Forest Service from implementing the Fuels CE until it completed an adequate NEPA analysis of the environmental impacts. The Ninth Circuit held that the Forest Service failed to assess the environmental "significance of the hazardous fuels reduction categorical exclusion" and failed to show a reasoned basis for its decision to categorically exclude fuel reduction projects from NEPA analysis. 510 F.3d at 1018.

San Juan County v. United States, 503 F.3d 1163 (10th Cir. 2007). San Juan County, Utah, sued the United States under the Quiet Title Act, 28 U.S.C. § 2409a ("QTA") to quiet title to ownership of the Salt Creek road in Canyonlands National Park. The Southern Utah Wilderness Alliance and other conservation groups (collectively, "SUWA") moved to appear in the case as intervenor-defendants. The district court denied intervention, and SUWA appealed. A three-judge panel of the Tenth Circuit reversed the district court (2-1), finding that SUWA should be allowed to intervene as of right under Fed. R. Civ. P. 24(a). The Tenth Circuit granted *en banc* review "to resolve difficult issues concerning intervention under Fed. R. Civ. P. 24." 503 F.3d 1167. Thirteen judges sitting *en banc* issued a heavily divided opinion that ultimately denied intervention.

As an initial matter, the court held that applicants for intervention need not establish their own standing to intervene in an ongoing case. Noting a split among the circuit courts of appeal, the Tenth Circuit joined the majority view that a party does not have to establish its own standing to appear in a case or controversy of which there is already federal court jurisdiction. The majority further held that the QTA's limited waiver of the United States' sovereign immunity would not be violated by intervention by non-title claimants in this QTA action. 503 F.3d at 1167.

Seven of the thirteen judges held that SUWA met three of the four requirements for intervention under Rule 24(a) (timeliness of seeking intervention, an interest relating to the specific property or transaction at issue, and the potential for the practical impairment of that interest). As to the fourth requirement for intervention (whether an existing party adequately represents the proposed intervenor's interest), the court held that SUWA had not "overcome the presumption that the Federal Defendants would adequately represent its interest." 503 F.3d 1208. The court further held that the district court had not abused its discretion in denying permissive intervention under Rule 24(b). 503 F.3d 1207.

Greenlee County, Arizona, v. United States, 487 F.3d 871 (Fed. Cir. 2007). This case involves the continuing western controversy regarding payment in lieu of taxes ("PILT"). PILT payments were established by act of Congress primarily to compensate local governments in the western states for the loss of property tax revenues that cannot be assessed against public lands. Greenlee County, Arizona, sued the United States in the Court of Federal Claims under the Tucker Act, to recover for years of underpayments. The district court granted the United States' motion to dismiss for failure to state a claim.

The Federal Circuit upheld the dismissal. Although conceding that the PILT formula for allocation of payments confirmed that Greenlee County should have been paid significant PILT payments, and that the United States had a statutory obligation to make these payments, the court held that the United States cannot be held monetarily liable for payments that are not actually

appropriated by Congress. The court concluded that the United States' "liability under PILT" is limited to the "amount appropriated by Congress." 487 F.3d at 878. Accordingly, the court upheld dismissal for failure to state a claim upon which relief may be granted.

State of Utah v. Norton, 2006 U.S. Dist. LEXIS 73480 (D. Utah 2006), appeal docketed as No. 06-4240 (10th. Cir. 2006). As reported in prior ENREL Public Lands updates, the Tenth Circuit currently has under consideration a challenge to the 2003 wilderness settlement between the State of Utah and the Department of Interior. Oral argument was presented October 2007, and all are awaiting decision at the time of this publication.

C. Utah Federal District Court Cases

Kane County, et al., v. Kempthorne, 495 F. Supp. 2d 1143 (D. Utah 2007), appeals docketed as nos. 07-4207 and 08-4018. Kane County, Utah, Garfield County, Utah (collectively, the "Counties"), and the Kane County Water Conservancy District (the "Water District") sued DOI to set aside the transportation and water management portions of the Final Plan ("Plan") for the Management of the Grand Staircase-Escalante National Monument ("Monument"). The Counties claimed that the transportation management decisions in the Plan impaired their governmental interests in managing, maintaining, and directing travel on county roads within the Monument. 495 F. Supp. 2d at 1147. The Water District claimed that the Plan's prohibition of diversion of water from the lands within the Monument unlawfully impaired its appropriated water rights within the Monument. 495 F. Supp. 2d at 1148.

In response to the complaint, DOI moved to dismiss on grounds that the Counties lack standing and that no relief may be granted because the DOI does not have a duty to identify unproven county road rights-of-way existing under R.S. 2477 (a now repealed statute granting public highway rights-of-way prior to October 21, 1976), or otherwise, in preparing land management plans, and that the Water District's claims were not ripe because DOI had not finally denied any diversion of the Water District's water from the Monument. 495 F. Supp. 2d at 1148. Several intervenor-defendant conservation groups similarly moved to dismiss the case.

Stating that the claims in the case presented a "question of sequence" (495 F. Supp. 2d at 1148), the district court granted the motion to dismiss. As to the Counties' transportation claims, the court held that since the BLM had not finalized an acknowledgement of the Counties' road claims, the Counties lacked standing to claim an injury in fact to their transportation management interests. Moreover, since the Plan committed to be subject to any county public highway right-of-way, the Plan did not impair any demonstrated interest.

The district court further held that since the Water District had not been finally denied the diversion of its water from the Monument, the Water District's claims failed for lack of ripeness. 495 F. Supp. 2d 1161. The Counties' and Water District's appeal is being briefed at the time of this publication.

II. UTAH PUBLIC LANDS LEGISLATION

Washington County Growth and Conservation Act of 2008. S. 2834 (Bennett). After failing to garner enough votes to carry in the last session of Congress, this revised bill was introduced on April 9, 2008. Key provisions of the bill would designate 264,000 acres of land in Washington County as wilderness under the Wilderness Act of 1964, an increase of 44,000 acres from the last bill. If enacted, approximately 9,000 acres of public lands in Washington County would be sold into private ownership and 932 acres of public lands would be designated for rights-of-way for reservoir sites. The bill would also designate 140,000 acres of land as national conservation areas and 166 miles of the Virgin River and its tributaries as Wild and Scenic Rivers. Representative Matheson intends to introduce a companion bill in the House in May.

America's Redrock Wilderness Act. H.R. 1919 (Hinchey), S. 1170 (Durbin). Introduced in April 2007, America's Redrock Wilderness Act would designate roughly 9.4 million acres of federal land in Utah as wilderness under the Wilderness Act of 1964. The proposed 9.4 million acres are comprised of current Wilderness Study Areas, Wilderness Inventory Areas, and Citizen Proposed Wilderness areas. First introduced in 1989, then including 5.7 million acres of public land, a version of this bill has been introduced in each succeeding Congress. These bills have 155 cosponsors in the House and 19 cosponsors in the Senate.

III. ADMINISTRATIVE ACTIONS

A. Regulatory Actions

Energy Transport Corridors. Section 368 of the Energy Policy Act of 2005 directed the Secretary of the Interior, Secretary of Agriculture, Secretary of Defense, and Secretary of Commerce, in consultation with the Federal Energy Regulatory Commission, 11 western States, tribal and local governments, industry, and interested persons to consult and designate corridors for oil, gas, and hydrogen pipelines, electricity transmission lines, and related facilities. The express purpose of Section 368 is to formally designate utility corridors that will be incorporated in applicable land use plans and subject to streamlined permitting procedures in future proposals to use these corridors. On November 8, 2007, the Draft Programmatic Environmental Impact Statement ("DPEIS") supporting these corridors was released for public comment. The DPEIS and corridor maps are available at http://www.corridoreis.anl.gov/. As to be expected given the mix of parties consulted, there is a lot of heated debate regarding the lands crossed by the proposed corridors that include more than 6,000 linear miles. The public comment period closed on February 14, 2008 and it is uncertain when the record of decision will issue.

Forest Service Planning. On April 21, 2008, the Forest Service published its latest National Forest System Land Management Planning rule. *See* 73 Fed. Reg. 21468 (April 21, 2008). The legal saga and conflicting court decisions affecting prior rules issued since 2000 has been widely documented and the Forest Service expressly acknowledges this new rule was the result of a 2007 nationwide injunction entered by the United States District Court for the Northern District of California against the most recent (2005) rule. *See* Citizens for Better Forestry v. USDA, 481 F. Supp. 2d 1059 (N.D. Cal. 2007).

As represented by the Forest Service, the new rule expands the role of public input by establishing "a process to dialogue with the public" and expressly does not authorize any specific

on-the-ground activities. A lawsuit has already been filed in the Northern District of California, styled Citizens for Better Forestry, et al., v USDA, Case No. 08-cv-1927, challenging this 2008 rule.

B. Utah Public Lands Planning

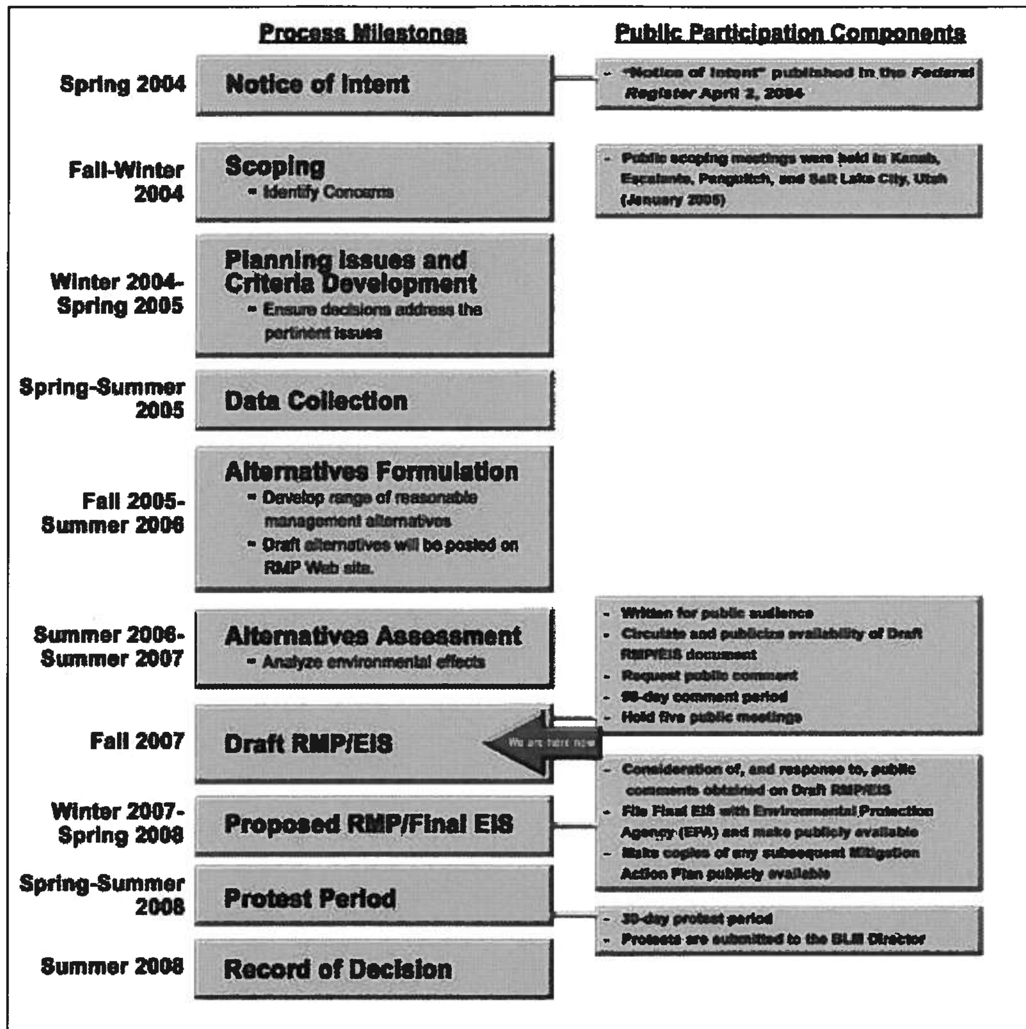
Six of Utah's eleven BLM field offices continue to prepare new resource management plans ("RMP's"), including the Kanab Field Office, the Moab Field Office, the Monticello Field Office, the Price Field Office, the Richfield Field Office, and the Vernal Field Office. The BLM has announced the intent to finalize these RMP's as soon as possible, perhaps during 2008.

U.S. DEPARTMENT OF THE INTERIOR **BUREAU OF LAND MANAGEMENT**
Utah

Schedule

Planning
Draft RMP/EIS
Background Documents
Schedule
Get Involved
News Releases & Bulletins
Planning Process
Photos
General Information

Resource Management Plan/Environmental Impact Statement Schedule



U.S. DEPARTMENT OF THE INTERIOR **BUREAU OF LAND MANAGEMENT**
Monticello Field Office

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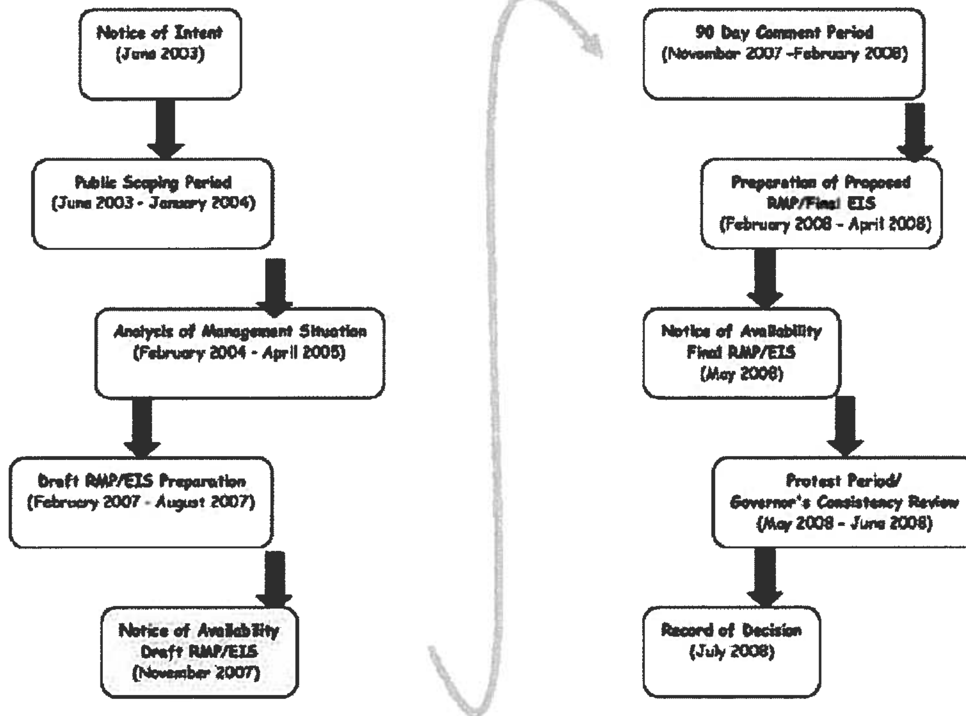
RMP Maps
Wilderness Characteristics

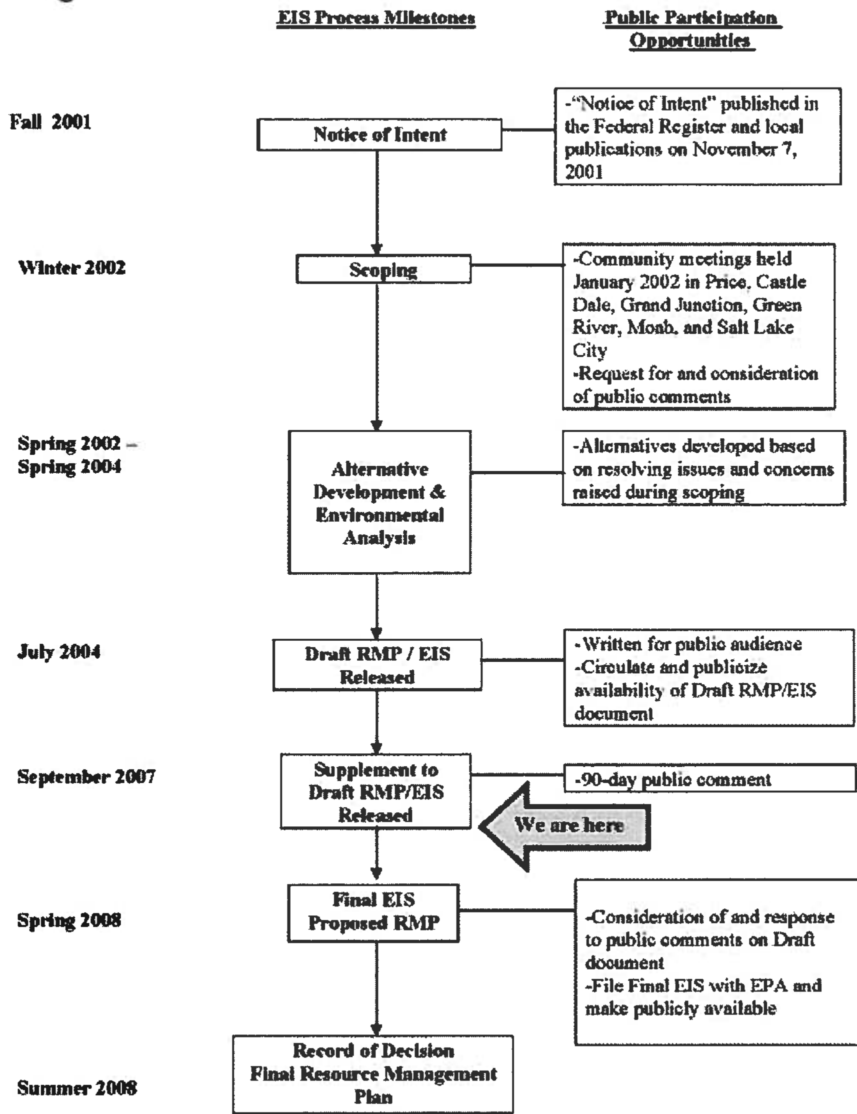
Monticello RMP Revision Key Dates



U.S. DEPARTMENT OF THE INTERIOR **BUREAU OF LAND MANAGEMENT**
Utah

General Schedule

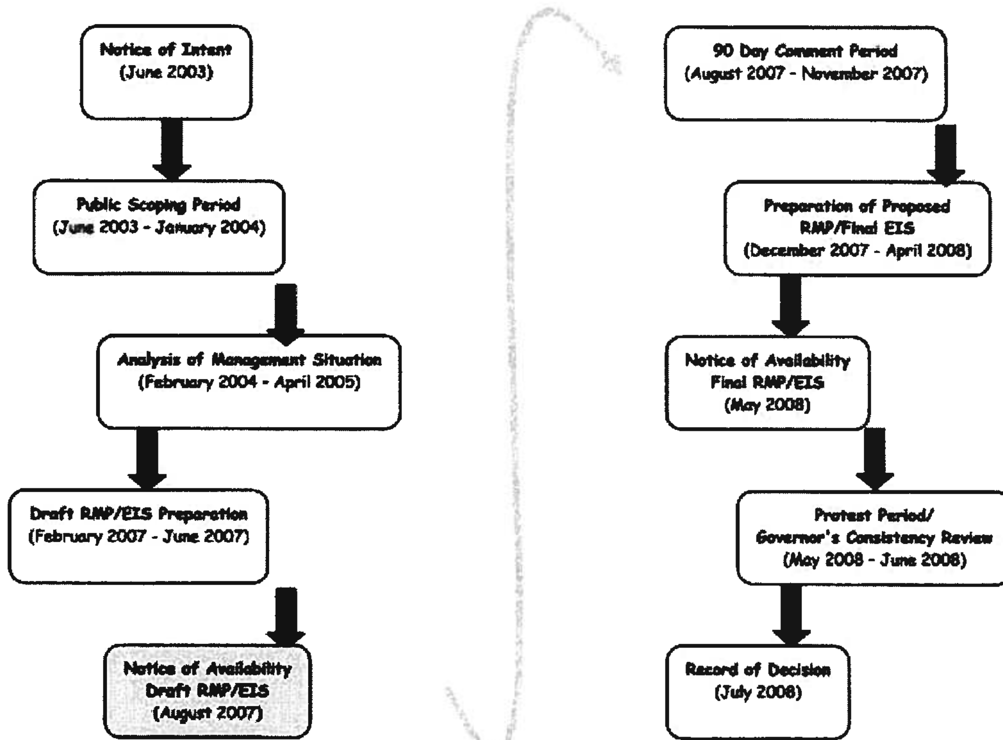
Resource Management Plan
- Documents and Bulletins
- Draft EIS
- Contact Information
- Price RMP Schedule
- BLM Planning Process
- Area Photo Tour
- Links
- FAQs



Vernal RMP / EIS Process and Public Participation Components

	EIS Process Milestones	Public Participation Opportunities
Fall 2001	Notice of Intent	-"Notice of Intent" published in the Federal Register and local publications on November 7, 2001
Winter 2002	Scoping	-Community meetings held January 2002 in Price, Castle Dale, Grand Junction, Green River, Moab, and Salt Lake City -Request for and consideration of public comments
Spring 2002 – Spring 2004	Alternative Development & Environmental Analysis	-Alternatives developed based on resolving issues and concerns raised during scoping
July 2004	Draft RMP / EIS Released	-Written for public audience -Circulate and publicize availability of Draft RMP/EIS document
September 2007	Supplement to Draft RMP/EIS Released (We are here)	-90-day public comment
Spring 2008	Final EIS Proposed RMP	-Consideration of and response to public comments on Draft document -File Final EIS with EPA and make publicly available
Summer 2008	Record of Decision Final Resource Management Plan	

Moab RMP Revision Key Dates



U.S. DEPARTMENT OF THE INTERIOR **BUREAU OF LAND MANAGEMENT**
Utah

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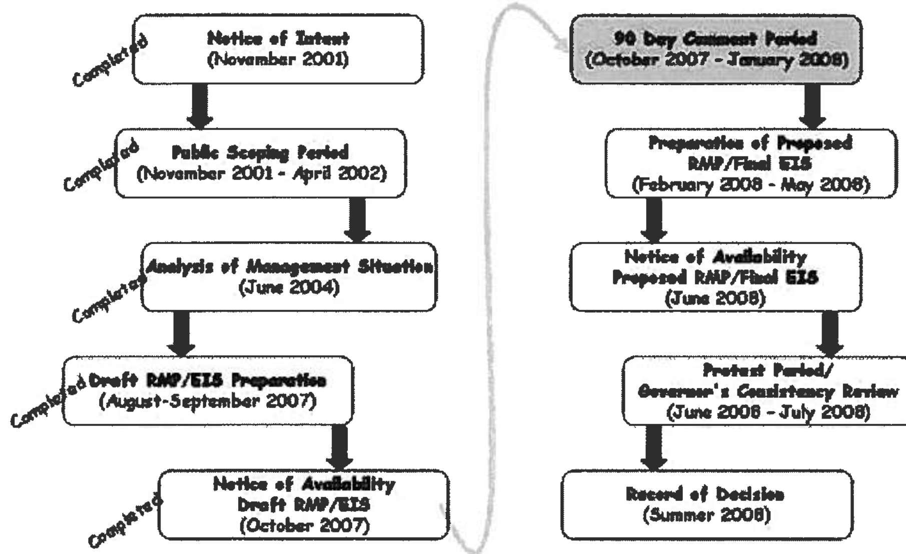
Richfield RMP Revision Key Dates



U.S. DEPARTMENT OF THE INTERIOR **BUREAU OF LAND MANAGEMENT**
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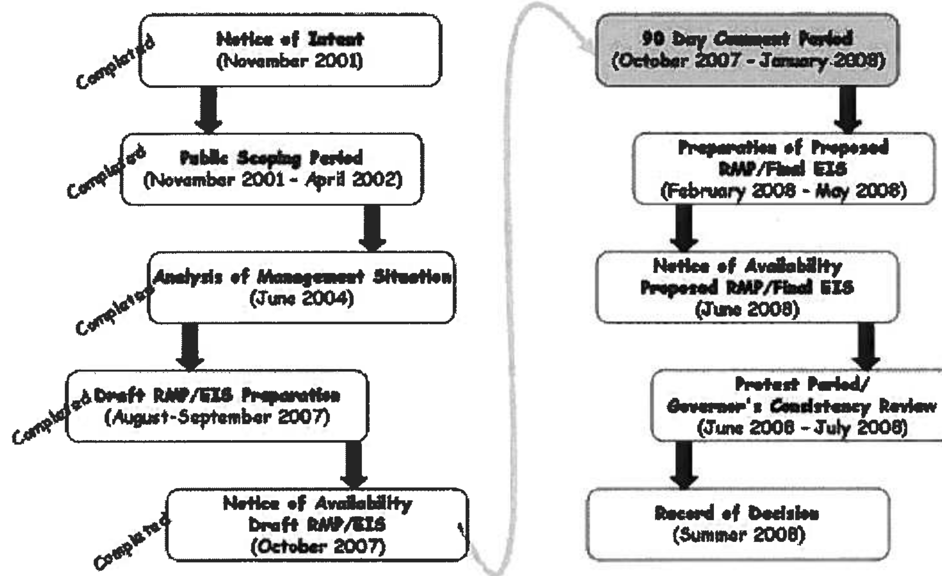

UTAH STATE BAR ENREL SECTION
WATER LAW COMMITTEE
L. Ward Wagstaff

I 2008 UTAH JUDICIAL DEVELOPMENTS

Roosevelt City v. Olds, No. 2:07CV443TC (D. Utah Jan 8, 2008).

In *Roosevelt City v. Olds*, the United States District Court for the District of Utah held that removal to federal court of a de novo review of a State Engineer administrative decision is improper. Roosevelt City filed a change application to add points of diversions to a municipal water right, including diversion from a different well field. A large number of water users protested the change application, including the United States Department of Interior, Bureau of Indian Affairs (BIA) and the Ute Indian Tribe. The State Engineer rejected the change application, and Roosevelt City filed suit in state district court for de novo review of the State Engineer's administrative decision. Roosevelt City served the complaint on all the parties to the administrative procedure, including the BIA and the Ute Tribe. The BIA and the Ute Tribe then removed the suit to federal district court and filed motions to dismiss the suit, alleging that the United States had not waived sovereign immunity. The State Engineer filed a motion, in which Roosevelt City joined, to remand the case to state district court. The federal district court held that the case did not qualify for removal under the federal statute, 28 U.S.C. section 1442, because the complaint filed by Roosevelt City did not allege any wrongdoing on the part of any federal agency or officer. The court noted that by removing the case to federal court and seeking dismissal for lack of waiver of sovereign immunity, the United States and the Ute Tribe could deprive other parties of the opportunity for review of the State Engineer's administrative decisions. The court also noted that the United States and the Ute Tribe were not required to participate in the de novo review to protect their water rights, because at any time they could bring a private action to enforce the priority of their water rights against interference by Roosevelt City. The United States district court remanded the case to the state district court for further proceedings.

Western Water, LLC. v. Olds, 2008 UT 18, __ P.3d __ , 2008 WL 465540

In *Western Water, LLC, v. Olds*, the Utah Supreme Court held that the State Engineer cannot consider a new application submitted as a request for reconsideration of a State Engineer decision in an informal adjudicative proceeding. Western Water, LLC, filed three applications in 1999 and 2001 (collectively "Original Application") to cover up to 288,107 acre-feet and appropriate 86,000 acre-feet of water in the Utah Lake and Jordan River drainage. The water would be salvaged and recovered from conservation and from flows that otherwise would go to the Great Salt Lake through the Jordan River. The plan included extensive pipelines, pumping stations, reservoirs, and recharge wells to make the water available for new and existing development in Utah and Salt Lake Counties.

Numerous persons protested the Original Application. The State Engineer held hearings and eventually rejected the application. Western Water filed a request for reconsideration and included as part of that request a description of a "revised and reduced" application (Revised Application). The State Engineer did not respond to the request for reconsideration, in effect denying the request. Western Water filed suit in district court, seeking de novo review of the denial of the Revised Application in the request for reconsideration, but not seeking review of the rejection of the Original Application. The district court dismissed the complaint on summary judgment, holding that Western Water had failed to exhaust its administrative remedies. On appeal, the Utah Supreme Court upheld the district court ruling, holding that the Revised Application differed significantly from the Original Application and was therefore a new application. Western Water had not exhausted its administrative remedies because the State Engineer cannot "reconsider" a new application. "[A] request for reconsideration is not the proper time to raise new arguments or new issues or to present new applications for appropriation." An applicant may not use a request for reconsideration to circumvent the appropriation process. In addition, the Revised Application was not in the proper form and did not include the necessary information to qualify as an application to appropriate.

The Court also addressed two additional issues. First, the Court upheld the district court's award of attorney fees. Second, the Court discussed but did not rule on the constitutionality of the "two year rule," Utah Code Ann. section 73-3-15, which provides that the district court may dismiss an action to review State Engineer decisions from an informal adjudicative proceeding if the action is not prosecuted to final judgment within two years, or three years if the district court decision is appealed. The Court recommended legislative action to address concerns that the statute could infringe on the inherent power of the courts to control their own scheduling and that the statute could deprive a litigant of due process.

Penta Creeks, LLC v. Olds, 2008 UT 25, 2008 WL 746608

In *Penta Creeks, LLC v. Olds*, the Utah Supreme Court held that in a general adjudication of water rights, the list of names and addresses filed with the respective district court is the proper mailing list for notices and proposed determinations, rather than the names and addresses from the State Engineer's data base. In 1972 and 1973, the State Engineer published the proposed determinations of water rights for the Price River drainage and served them on the water right claimants. The attorney for Kaiser Steel Corporation filed a timely objection to the proposed determination in 1973, but did not verify the objection on oath. In 1996 Penta Creeks acquired the Kaiser Steel water rights through a bankruptcy proceeding. Penta Creeks did not update its address with the State Engineer's Office, but a quit-claim deed with a "return to" address was submitted and that address was entered into the water right data base. In 2000, the Attorney General's Office filed a response to the 1973 objection and served it on Penta Creeks' counsel. In 2003, the State Engineer's Office published the First Addendum to the proposed determination, and mailed a copy to the address from the quit-claim deed. In 2005, the Attorney General's Office sent a letter to Penta Creeks' new counsel proposing a stipulated resolution to the 1973 objection, and included a copy of the First Addendum. Penta Creeks asserted it had not received the First Addendum because it had been mailed to the wrong address and filed an objection to the First Addendum. The State Engineer

sought dismissal of the 1973 objection on grounds it was not verified on oath and dismissal of the objection to the First Addendum on grounds it was late. The trial court dismissed the objections, and Penta Creeks appealed. The Utah Supreme Court held that Utah Code Ann. section 73-4-11(2) requires an objection to be verified on oath, even if an attorney signs the objection. The Court suggested that the defect could be cured by a retroactive extension if Penta Creeks can show it had due cause. The Court then held that the proper source of names and addresses for mailing notices or proposed determinations is not the State Engineer's data base, but the list of names and addresses that the State Engineer files with the district court at the outset of the general adjudication. The Court remanded the case to the trial court to determine whether the service of the First Addendum to Penta Creeks was proper when compared with the district court list, and whether Penta Creeks could show excusable neglect or good cause to obtain a retroactive extension of time for filing the objection.

II 2008 UTAH LEGISLATIVE DEVELOPMENTS

H.B. 40 Safe Drinking Water Revisions

H.B. 40 requires counties to adopt ordinances to protect drinking water sources by May 3, 2010. Municipalities may also adopt ground water source protection ordinances. The Drinking Water Board is to submit a report to the legislature by November 30, 2010.

H.B. 42 Water Right Application for Electrical Cooperative

H.B. 42 classifies wholesale electrical cooperatives as public agencies, qualifying them for extensions of time beyond 50 years to submit proof of appropriation if they can show the water or the electricity will be needed to meet reasonable future requirements of the public.

H.B. 51 Water Right Forfeiture Protection

H.B. 51 changes the forfeiture period from five to seven years; requires a court action before a water right can be declared forfeited; clarifies that water adjudged to be forfeited for non-use is used first, to satisfy existing water rights, and second, for new appropriations; limits the circumstances when forfeiture for non-use applies; eliminates some information previously required on a non-use application; allows a shareholder in a water company to file a non-use application; and exempts the reasonable future water requirements of public water suppliers from forfeiture for non-use.

H.B. 117 Instream Flow to Protect Trout Habitat

H.B. 117 moves the instream flow provisions to a new statute, section 73-3-30. It allows a fishing group to file a fixed time change application to protect or restore habitat for three specific species of native trout. If the change is based on shares of stock in a water company, the water company must approve the change. The fixed time change applications may be at least one year long up to a maximum of ten years.

H.B. 143 Administration of Interstate Water

H.B. 143 authorizes the State Engineer, with approval from the Department of Natural Resources and the Governor, to enter agreements with other states to regulate and administer interstate surface waters not otherwise subject to an interstate compact. It also authorizes the State Engineer to coordinate with the other state to implement the agreement.

H.B. 203 Judicial Review of State Engineer's Decision

H.B. 203 changes the requirements for joining parties to a judicial review of a State Engineer's decision. A person who files a petition for review of a State Engineer's decision shall name the State Engineer as a respondent; if the petitioner protested the application, the petitioner must name the applicant as a respondent. The petitioner must provide written notice to each person who filed a protest, and the persons receiving the written notice must petition to intervene in order to participate in the de novo review. The petitioner is not required to name other respondents or identify all parties to the adjudicative proceeding. H.B. 203 also clarifies that the Utah Supreme Court has jurisdiction to review a State Engineer's order resulting from a formal adjudicative proceeding.

H.B. 208 Livestock Watering Rights

H.B. 208 provides that only a beneficial user may acquire a livestock water right on federal public lands. On or after May 5, 2008, only the beneficial user (person owning the grazing permit) may acquire a water right for watering livestock on public (federal) land. The State Engineer may not approve a change application for a livestock watering right without consent of the beneficial user. H.B. 208 creates a "livestock water use certificate" that the State Engineer issues to the beneficial user. When a person ceases to be a beneficial user, the livestock watering right or certificate transfers to the Department of Agriculture and Food, which can then sever the water right from the allotment and sell it to someone who demonstrates the ability to divert and use the water for livestock, with proceeds deposited into the Rangeland Improvement Fund.

H.B. 222 Water Quality Board Amendments

H.B. 222 adds a representative of a local health department to the Water Quality Board. It authorizes the Water Quality Board to issue operating permits for treatment facilities and to delegate the permitting authority to local health departments.

S.B. 170 Board of Water Resources Amendments

S.B. 170 authorizes the Board of Water Resources to include flood control projects among the projects it can fund or construct. It allows the Board of Water Resources to accept a bond from private sponsors in lieu of or in addition to taking title to the project and the water right.

S.B. 228 Regulation of Wells

S.B. 228 extends State Engineer's enforcement authority to well drilling. It authorizes the State Engineer to levy fines, which are retained as dedicated credits.

Bills that did not pass but are assigned for interim study:

S.B. 85 would establish a Water Rights Board to oversee the policies and decisions of the State Engineer. S.B. 269 would require the Office of Property Rights Ombudsman to provide information concerning water rights and water right proceedings to water right owners who own a water right of fifty acre-feet or less. S.B. 279 would prohibit a municipality from requiring the transfer of a water right as a condition for approval of an annexation petition, and would limit the circumstances under which a municipality can require a land use applicant to transfer a water right.