

Tulsa Law Review

Volume 33
Issue 3 *Mineral Law Symposium*

Spring 1998

From The Editors

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Recommended Citation

From The Editors, 33 Tulsa L. J. xxi (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol33/iss3/14>

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FROM THE EDITORS . . .

We are proud to present the *Tulsa Law Journal* Mineral Law Symposium. This comprehensive issue would not be possible without the generous support and funding from the *Mineral Law Section of the Oklahoma Bar Association*. This relationship has proved very beneficial for our students and we hope it has been equally beneficial to the bar.

Special thanks also go to Marla E. Mansfield, Professor of Law and Professorial Fellow, NELPI, University of Tulsa College of Law for her guidance and assistance in reaching out to the excellent authors who contributed to this issue.

This year the *Tulsa Law Journal* invited the staff from the *Energy Law Journal* to participate in producing this issue. The results were truly synergistic and we hope that future "joint ventures" will be considered. The benefits of this arrangement are evident in this issue. We extend our thanks and a hearty "well done" to the staff of the *Energy Law Journal*, particularly: Jennifer Lokenvitz Schwitzer, Editor-in-Chief; Marc R. Stimpert, Executive Articles Editor; Travis T. Dunnington, Executive Notes & Comments Editor; Janet Gulbis, Ph.D., Joseph V. Geraci, and Connie K. Page, Articles Editors; Monica S. Ernst, Regional & Special Projects Coordinator; David J. Kreher, Notes & Comments Editor; and Staff, including Jennifer R. Chestnut, Cory L. Taylor, Harold G. Drain, Peter I. Trombley, Sarah E. McConnell, John E. Johnson, Patrick Orme, Brenda Carpenter, Tiffany Sherman McCready, Jason L. Wright, Carolyn Hunter-Tierney, Joseph R. Barwick, and Trenton E. Wright.

Our lead article, *Breaking Up Can Be Hard To Do: Partitioning Jointly Owned Oil and Gas and Other Mineral Interests*, was submitted by Dorothy J. Glancy, Professor of Law, Santa Clara University School of Law. Professor Glancy also serves as the reporter for the American Law Institute's Restatement (Third) of Property: Joint Ownership. Preparation of this article was generously funded by a research grant from the *Oil, Gas and Mineral Law Section of the State Bar of Texas*. Professor Glancy's well-written article explores "partition in one of its most complex applications, the many varieties of oil and gas and other mineral interests recognized under Texas law." Professor Glancy describes how a modern jurisdiction like Texas "struggles with applying the ancient property process known as partition in this particularly sophisticated and technical context." Her intriguing story looks at partitioning from the perspective of property lawyers as well as the perspective of mineral, oil and gas lawyers. "On one side, property lawyers often find Texas interests in minerals, oil and gas fiendishly complex and perplexing—almost as if the jointly owned property to be partitioned seems capable of fractionating into virtually infinite regression. On the other side, mineral, oil and gas lawyers sometimes encounter partition as an arcane and somewhat unpredictable ordeal." Professor Glancy's article details Texas' sensible approach to partitioning jointly owned oil and gas and other mineral property, keeping in mind the absolute right of a joint owner to partition. Professor Glancy explains that "partition provides an essential exit option for uncooperative joint owners who

would find themselves inextricably yoked together in joint ownership."

Robert L. Glicksman and George Cameron Coggins, Professors of Law at the University of Kansas, and authors of numerous books and articles, including the three volume treatise *PUBLIC NATURAL RESOURCES LAW*, contribute *Hardrock Minerals, Energy Minerals, and Other Resources on the Public Lands: The Evolution of Federal Natural Resources Law*. Their article traces the evolution of federal public land and resource law. The authors argue that "federal public natural resources law in 1998 is an unholy mess. First, there is just too damn much of it: an estimated 3,000 statutes, plus volumes of regulations, voluminous jurisprudence, agency manuals, arcane doctrines, and thousands of books and articles." Furthermore, they maintain that "Congress has ducked many important questions by enacting gobbledygook laws, such as the Multiple-Use, Sustained-Yield Act (MUSYA), which use all the right words to say virtually nothing." Professors Glicksman and Coggins write eloquently describing the ambiguousness and incomprehensibility of much public resources law. They further explain how this "unholy mess" evolved by describing the "cartographic chaos that characterizes land ownership patterns in the West and the resulting plethora of access difficulties, revolving-door relationships between resource industries, resource colleges, and federal resource agencies, the attitudinal perversities that manifest themselves in Western demagoguery, the proliferation of procedural requirements, and the ever-present fraud and abuse in the system." Their article is a treasure trove of cites and analysis of federal resources law and its evolution.

Joseph P. Tomain, Dean and Professor of Law, University of Cincinnati College of Law submits *Electricity Restructuring: A Case Study in Government Regulation*. Dean Tomain begins his article by providing a brief regulatory history of the electric industry. His article then explores the "life cycle of government regulation using the electricity industry as a case study." Dean Tomain demonstrates that "industries go through a cycle from competition through regulation and back to competition." Dean Tomain also describes the "new electricity industry" in light of the history of natural gas regulation. He discusses the Energy Policy Act of 1992, both wholesale and retail wheeling, qualifying facilities, Order No. 888, and California's famous "Blue Book." Dean Tomain discusses and raises additional questions concerning the problem stranded costs. He argues that the electric industry is going through its most exciting period and predicts changes akin to those experienced by broadcast television, cable, long distance and local telephone services, airlines, banking, and of course natural gas. Dean Tomain concludes that more market-based incentives and mechanisms will be substituted for government regulation, but that the restructuring of the electric industry will not go all the way to complete deregulation. Competition will, however, generate new products, firms, services, and perhaps even the "virtual utility" providing services without traditional capital utility assets.

Jason Aamodt, Research Fellow, the National Energy-Environment Law and Policy Institute (NELPI), the University of Tulsa College of Law, contributes *Naturally Occurring Radioactive Materials: Human Health*

and Regulation. Mr. Aamodt broadly addresses the NORM debate by discussing why different state's regulations vary and whether anything has been left out of the risk analysis. He argues that non-cancer human health effects have not been included in NORM regulation although they ought to be, and that various state regulations differ seemingly based on scientific foundations. Mr. Aamodt's thought-provoking article is helpful in understanding the science behind NORM and its health effects. The article describes the various problems attributed to NORM and explains the nature of radiation and the pathways for human exposure in order that the reader may make some sense of the plethora of NORM regulations. Mr. Aamodt then discusses both cancer and non-cancer health effects of NORM and using risk analysis, makes his case that low doses of radiation from NORM should be viewed from the regulator's perspective, as potentially substantial risks. Mr. Aamodt concludes that "because the potential effects of NORM are so widespread, and because the state regulation of NORM is not consistent," federal regulation is needed to deal with NORM problems.

Gene G. Boerner III offers *Roye Realty & Developing, Inc. v. Watson: Oklahoma Decides the Royalty Obligation on Take-or-Pay Settlements Using "Plain Terms" Analysis*. The answer to the question of whether royalty is due on take-or-pay settlements was both surprising and unsettling according to Mr. Boerner. Using strict methods of contract interpretation, the court rules that royalty is not due on take-or-pay settlements. The court reasoned that "production" meant actual and physical extraction of the mineral. Mr. Boerner argues that in departing from its own precedent, the court "confused the state of fundamental principles of Oklahoma oil and gas law." Mr. Boerner's article then discusses the two leading theories of lease interpretation relied on by courts in deciding whether royalty is due on take-or-pay settlements. In analyzing *Roye Realty*, Mr. Boerner attempts to harmonize this decision with Oklahoma precedent and with the theories relied upon by similar jurisdictions in deciding the same issue. Finally, Mr. Boerner argues that owners can prevail under the plain terms analysis adopted in *Roye Realty*, given certain favorable definitions of key lease terms.

Amy Callard contributes *Southern Ute Indian Tribe v. AMOCO Production Company: A Conflict Over What Killed the Canary*. Ms. Callard describes the properties of coal bed methane, its production, and the history of the various ownership interests involved in coal bed methane ("CBM") ownership disputes. Her casenote analyzes the case and both the district and appellate decisions. Although Ms. Callard argues that the court's decision was correct, she maintains that it does not go far enough. Ms. Callard states "[a] determination that the owner of the coal necessarily owns CBM is appropriate in this case, and would be much more responsive to the growing conflicts over CBM ownership." Ms. Callard concludes "[t]he court could have extended the basis for its determination to include the properties of CBM without going beyond the court's decision making authority."

Harold Glenn Drain submits *Union Pacific Fuels, Inc. v. FERC: The FERC's Ability to Abrogate Natural Gas Transportation Contracts*. His note analyzes the *Union Pacific* case in light of the influences the *Mobile-Sierra* and *Memphis Clause* doctrines have on drafting natural gas transportation contracts. Mr. Drain concludes that although the *Union Pacific* case was properly decided, "FERC's power should not be curtailed simply because parties fail to draft their contract to clearly reflect the intended allocation of risk."

In *Gerrity Oil & Gas Corp. v. Magness: Colorado's Furtive Shift Toward Accommodation in the Surface Use Debate*, John Erich Johnson concludes that although the court upheld the common law reasonable-use rule, it "took the appropriate steps towards the rights of property holders by allowing them to present rebuttable expert testimony as to reasonable alternatives available to the operator." His note also generally describes the law relating to severed mineral estates and the judicial, legislative and administrative attempts to accommodate the needs of the landowners while valuing the reasonable use of the mineral owner.

Laura Suzanne Farris contributes *Private Jails in Oklahoma: An Unconstitutional Delegation of Legislative Authority*. Ms. Farris' comment explores the explosive growth of the private prison industry in the United States despite warnings that private prisons may face constitutional and public policy roadblocks. Ms. Farris points out that no case law has addressed these issues although several are pending regarding the privatization of the Tulsa County Jail. Ms. Farris explains the non-delegation doctrine at the federal level and how it may impact prison privatization. She then examines Oklahoma's strong non-delegation doctrine and applies it to prison privatization. Finally, Ms. Farris discusses the various public policy concerns presented by this issue. Ms. Farris concludes that "because private jails and prisons violate Oklahoma's non-delegation doctrine and raise serious public policy concerns, the responsibility of detaining and/or incarcerating citizens should not be entrusted to corporate America."

Taiawagi Helton submits *Indian Reserved Water Rights in the Dual-System State of Oklahoma*. Mr. Helton claims "[t]he water wars that raged in the west have finally crossed Oklahoma's borders." In October 1997, the Choctaw Nation claimed 85% of Oklahoma's water rights and 90% of the state's surplus water pursuant to the reserved rights doctrine. According to the doctrine, when the federal government reserves land, it impliedly reserves or recognizes the right to sufficient water to fulfill the purpose of the reservation. Mr. Helton's comment explains state water systems and the federal reserved rights doctrine. Because the implementation of reserved rights in a dual-system has not been fully addressed, Mr. Helton submits an interesting proposal for the integration of the tribal and state water rights in Oklahoma.

J. Berton Fisher and William R. Keffer offer *Selection, Use and Management of Experts in Environmental Legal Practice* in our Practitioner's Guide. This article offers expert advice on building a team of experts for complex environmental claims. The authors offer concrete suggestions for using these technical experts and explain why following the detailed procedure

for using experts outlined in their paper is critical because of financial exposure and complexity of most environmental cases.

We also are reproducing Judge Sam Joyner's remarks made at the Oklahoma Bar Association Women in Law Conference. Judge Joyner's remarks are entitled *A Planetary Survey of Feminist Jurisprudence: If Men Are From Mars and Women Are From Venus, Where Do Lawyers Comes From?* Judge Joyner explores difficult issues regarding the differences between men and women and how they may be manifested in the practice of law. Judge Joyner's interest in these issues goes way back. While working on his master's thesis which dealt with the ethical training of students in law school, he posited that more humanities in law school would provide a more value conscious graduate. "Literature, poetry, even the visual arts, would produce a wisdom not found in the United States Code or in the Circuit case law." Feminist jurisprudence was one of several humane/humanistic avenues Judge Joyner found helpful in making values more central to legal education. Judge Joyner's remarks are very helpful in understanding and being sensitive to gender differences and pressures.

Last, but not least, we include *In Memoriam: Bernard Schwartz*, our Chapman Distinguished Professor of Law, who unexpectedly died December 23, 1997. We have reproduced selective tributes received from all over the world, as well as certain remarks made at his memorial service. May he rest in peace.

We would like to thank all of the editors and staff who made this issue possible. We also invite your comments on this or any other issue. You are invited to visit our web-site at www.utulsa.edu/law/tlj.

