Denver Law Review

Volume 70
Issue 4 *Tenth Circuit Surveys*

Article 15

January 2021

Lands and Natural Resources Survey

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LANDS AND NATURAL RESOURCES SURVEY

INTRODUCTION

Oil, gas and coal production drives the development of natural resources law in the Tenth Circuit. In *Doheny v. Wexpro Co.*,[1] the United States Court of Appeals for the Tenth Circuit ruled balancing in-kind is the preferred remedy for production imbalances on gas wells subject to joint operating agreements. In *Cheyenne-Arapaho Tribes of Okla. v. United States*,[2] The Tenth Circuit clarified the Secretary of the Interior's fiduciary duty to Indians in the approval of oil and gas leases. Both cases demonstrate that the court promotes mineral production when developing natural resources law. This Survey analyzes *Doheny* and concludes the court's decision wisely favors producers who deliver gas to the marketplace. The Survey also analyzes how the *Cheyenne-Arapaho Tribes* case will impact mineral leasing on Indian Lands. Finally, part III discusses standing doctrine as a procedural hurdle for parties objecting to exchanges of federal coal lands in the cases of *State ex rel. Sullivan v. Lujan*[3] and *Ash Creek Mining Co. v. Lujan*.[4]

I. OIL AND GAS

Gas Balancing Remedies in the Absence of a Balancing Agreement: *Doheny v. Wexpro Co.*[5]

A. *Background*

Gas balancing arises in the production and marketing of natural gas and is a generic term for a class of various remedies used to offset production imbalances. Multiple parties often have a right to a partial share of gas production from a single well, lease or unitized area.[6] These parties become co-lessees in the specified area. Gas imbalances occur when a mineral co-lessee sells gas from the co-owned lease while another co-lessee with a right to a share of the production does not sell. Simply stated, "an imbalance occurs if someone who has a right to a portion of that stream does not take that portion."[7]

Numerous factors cause gas imbalances. A natural gas pipeline company may refuse to purchase gas from one or more of the unit lessees due to failure of the gas market,[8] or may employ discriminatory

1. 974 F.2d 130 (10th Cir. 1992).
2. 966 F.2d 583 (10th Cir. 1992).
3. 969 F.2d 877 (10th Cir. 1992).
4. 969 F.2d 868 (10th Cir. 1992).
5. 974 F.2d 130 (10th Cir. 1992).
6. Patrick H. Martin, *The Gas Balancing Agreement: What, When, Why, and How*, 36 ROCKY MTN. MIN. L. INST. § 13.01, at 13-3 (1990).
7. *Id.* § 13.02, at 13-8.
8. Edel F. Blanks, III et al., *A Primer On Gas Balancing*, 37 LOY. L. REV. 831, 833 (1992).

purchase practices against certain unit operators.[9] A working interest owner may refuse to sell natural gas at current market value in hopes of negotiating a future higher price.[10] The pipeline company may experience mechanical and engineering difficulties that prevent or delay connection to the production facility.[11]

When a party sells more than his share of the production, he has "overproduced," while the non-selling party has "underproduced."[12] If the parties own gas in common, as in a cotenancy, they owe a duty to account to one another for sale of the common gas. The failure to fulfill the duty is a failure to account, not a gas imbalance.[13] Conversely, gas balancing necessarily presupposes both a right to a definite share of the gas and a failure to take the gas actually produced.[14] In essence, gas balancing is the process by which overproduced and underproduced parties balance their respective shares of ownership to the produced gas by adjusting their take of future gas or through cash payments.[15]

Gas balancing problems arise when parties to a joint operating agreement fail to take gas in proportion to their ownership interest. Often the joint operating agreement does not include a balancing agreement.[16] When a dispute arises from a production imbalance in the absence of a formal balancing agreement, parties must agree on an acceptable balancing method. Principal methods are balancing in-kind, cash balancing and combined in-kind and cash balancing.[17] In-kind balancing allows the underproduced party to take a share of the overproduced party's gas until the parties are balanced.[18] Cash balancing requires the overproduced party to pay the underproduced party periodically or upon depletion of the gas-bearing formation until the pro-

9. Eugene Kuntz, *Gas Balancing Rights and Remedies in the Absence of a Balancing Agreement*, 35 ROCKY MTN. MIN. L. INST. § 13-01, at 13-3 (1990).

10. Martin, *supra* note 6, § 13.02, at 13-8.

11. *Id.*

12. Blanks et al., *supra* note 8, at 833.

13. Martin, *supra* note 6, § 13.02, at 13-10.

> The "production imbalance" approach is to be distinguished from a "true cotenancy" approach and from a "capture" approach. These two latter approaches have been urged on the courts. The "true cotenancy" approach postulates an ownership right in every molecule of gas, and any sale of the gas stream inures to the benefit or detriment of every party with an ownership interest. Failure to account for the value realized by a selling party would be keeping money that belongs to others. Such an approach must reject the idea that any party has a right to take a share in kind because everyone shares an ownership right in each and every molecule.

Id. § 13.02, at 13-8 to 13-9.

14. *Id.* § 13.02, at 13-9.

15. 8 HOWARD R. WILLIAMS & CHARLES J. MEYERS, MANUAL OF OIL AND GAS TERMS 84 (1992).

16. Gas production often occurs under an A.A.P.L. Model Form Operating Agreement. However, most model joint operating agreements do not contain balancing agreement provisions, which leads to balancing disputes between overproduced and underproduced co-lessees. David E. Pierce, *Taking Gas In Kind Absent a Balancing Agreement*, *in* THE OIL AND GAS JOINT OPERATING AGREEMENT pt. 9, at 9-1 (Mineral Law Series No. 2, 1990).

17. Blanks et al., *supra* note 8, at 838.

18. *Id.*; Pogo Producing Co. v. Shell Offshore, Inc., 898 F.2d 1064, 1066-67 (5th Cir. 1990); Beren v. Harper Oil Co., 546 P.2d 1356, 1359 (Okla. Ct. App. 1975).

duction imbalance is remedied.[19] The payment amount is usually based on the price the overproducing party received.[20] Disputes are commonly complicated by actual market price and the price the underproduced party would have received had she sold her gas.[21] Finally, under combined in-kind and cash balancing, the underproduced party receives in-kind balancing until the reservoir is depleted, at which time the overproduced party must pay the outstanding balance in cash.[22]

The attention to gas balancing in secondary authorities disproportionately outweighs case law on the subject.[23] Few cases lend definition to the doctrine of gas balancing; however, courts tend to agree on basic issues. Generally, courts to address the issue agree balancing in-kind is the preferred balancing remedy.[24] However, the courts willingly impose cash balancing where equities suggest balancing in-kind would detriment one of the parties. This usually arises when the overproduced party depleted the gas reservoir beyond the capacity to remedy the imbalance in-kind or the underproduced party is unable to accept delivery of the gas.[25] Courts do not consider a current low market price as an equity requiring cash balancing for an underproduced party.[26]

B. *Tenth Circuit Opinion*

In *Doheny v. Wexpro Co.*,[27] the Tenth Circuit ruled that, unless conditions suggest otherwise, balancing in-kind is the preferred remedy to

19. *See, e.g.*, Kaiser-Francis Oil Co. v. Producer's Gas Co., 870 F.2d 563, 569 (10th Cir. 1989); WILLIAMS & MEYERS, *supra* note 15, at 85.

20. *Kaiser-Francis*, 870 F.2d at 569.

21. Blanks et al., *supra* note 8, at 838.

22. *Id.*

23. Martin, *supra* note 6, at 13-14 n.1 (citing numerous articles on gas balancing). *See also* 1 BRUCE M. KRAMER & PATRICK H. MARTIN, THE LAW OF POOLING AND UNITIZATION § 19.05, at 19-119 to 19-135 (3d ed. 1992) (gas balancing in the context of pooling and unitization); 6 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 951 (1992) (comprehensive background of pooling and unitization relevant to balancing remedies); Theodore R. Borrego, *Gas Balancing Agreements Selected Problems and Issues*, 40 INST. ON OIL & GAS L. & TAX'N 4-1 (1989) (analysis and model gas balancing agreement); Bert L. Campbell, *Gas Balancing Agreements*, *in* OIL AND GAS AGREEMENTS pt. 9 (Mineral Law Series 1983) (sample gas balancing agreement and commentary); Haywood H. Hillyer, *Problems in Producing and Selling, By Split or Single Stream, Gas Allocable to Diverse Working Interest Ownerships*, 16 INST. ON OIL & GAS L. & TAX'N 243, 263-66 (1965) (detailed discussion of balancing in-kind); David L. Motloch, *Form 6 Gas Balancing Agreement*, *in* THE OIL AND GAS JOINT OPERATING AGREEMENT pt. 10 (Mineral Law Series No. 2, 1990) (discussing provisions of model gas balancing agreement); Thomas W. Niebrugge, *Oil and Gas: Production Imbalance in Split Stream Gas WellsGetting Your Fair Share*, 30 OKLA. L. REV. 955 (1977) (practical suggestions regarding problems encountered in gas balancing); Ernest E. Smith, *Gas Marketing By Co-Owners: Disproportionate Sales, Gas Imbalances and Lessors' Claims to Royalty*, 39 BAYLOR L. REV. 365 (1987) (contemporary gas marketing realities cause sales out of proportion to ownership interest thereby requiring gas balancing); Claude Upchurch, *Split Stream Gas Sales and the Gas Storage and Balancing Agreement*, 24 ROCKY MTN. MIN. L. INST. 665 (1978) (multiple interest owners and increased production necessitate gas balancing).

24. *Pogo Producing Co.*, 898 F.2d at 1067; United Petroleum Exploration, Inc. v. Premier Resources, Ltd., 511 F. Supp. 127, 131 (W.D. Okla. 1980); *Beren*, 546 P.2d at 1359.

25. *See Pogo Producing*, 898 F.2d at 1067; *United Petroleum*, 511 F. Supp. at 131; *Beren*, 546 P.2d at 1360.

26. *Pogo Producing*, 898 F.2d at 1067.

27. 974 F.2d 130 (10th Cir. 1992).

correct gas production imbalances in the absence of a formal gas balancing agreement.[28] Plaintiff-appellant Doheny sought review of an adverse district court ruling granting summary judgment to the defendants. The Tenth Circuit affirmed the lower court on all counts.[29]

Doheny (among others) was an interest holder in oil and gas leases in Sweetwater, Wyoming, referred to as the Trail Unit. Defendants were Wexpro, the gas well operator; Questar Pipeline Company, owner of the pipeline connected to the well; and Celsius Energy Company, BHP Petroleum and Mountain Fuel Supply Company, all three divided interest owners.[30] In 1958, Doheny entered a unit operating agreement with defendants to produce gas at the Trail Unit.[31] In 1987, Doheny entered a gas purchase agreement with Questar Pipeline Company's predecessor that allowed annual renegotiation of the gas purchase price, or contract cancellation if the parties could not agree on the price. In the summer of 1989, Doheny and Questar terminated the contract after failing to renegotiate the price.[32] After ceasing production during the summer, Wexpro resumed production for the other Trail Unit owners in the fall of 1989. All other Trail Unit interest owners except Doheny had contracts to sell their gas. Wexpro kept daily production records detailing the extent of Doheny's underproduction and the other interest owners' overproduction.[33]

Questar informed Doheny it would transport the plaintiffs' gas if Doheny could locate another purchaser. Wexpro subsequently provided plaintiffs with a list of seven regional natural gas marketers. However, Doheny failed to sell his gas.[34] Doheny maintained the cost of transporting gas through Questar's pipeline rendered any sales to third parties economically infeasible.[35]

Doheny filed suit against Wexpro, Questar and the other interest owners in June, 1990, in United States District Court for the District of Wyoming.[36] The complaint stated he was entitled to cash balancing to remedy his underproduction in the Trail Unit based on his cotenancy relationship with the other interest owners and Wexpro's fiduciary duties as operator.[37] On summary judgment motions, the district court ruled the proper remedy was balancing in-kind as opposed to cash balancing.[38] The lower court further ruled that the unit operating agree-

28. *Id.* at 134.
29. *Id.* at 135.
30. *Id.* at 131-32. Plaintiffs' minority interest in the Trail Unit well constituted an 8.2831% interest. Defendants' working interests were, respectively: Celsius Energy Company, 3.5529%; BHP Petroleum, Inc., 46.12099%; and Mountain Fuel Supply Company, 42.04301%.
31. *Id.* at 132. See the definition of unit operating agreement, *infra* notes 73-76 and accompanying text.
32. *Doheny*, 974 F.2d at 132.
33. *Id.*
34. *Id.* at 132-33.
35. *Id.*
36. *Id.* at 132.
37. *Id.*
38. *Id.* at 132-33.

ment did not create a cotenancy relationship, and Wexpro did not owe a fiduciary duty to Doheny requiring the operator to obtain a balancing agreement upon termination of plaintiff's purchase contract.[39]

On appeal, the Tenth Circuit ruled that balancing in-kind is the preferred method of the oil and gas industry unless circumstances indicate otherwise.[40] The court stated conditions requiring cash balancing are depletion of the well by the overproducer and physical inability of the underproduced party to accept gas in-kind, neither of which were present in this factual situation.[41] While the court recognized Doheny's valid interest in obtaining a favorable price for his gas, the court ruled such market price considerations do not justify imposing cash balancing on the overproducers.[42]

The court noted several policy considerations favoring balancing in-kind over cash balancing. Underproduced parties may be forced to sell their gas at a price they deem unacceptable if cash balancing is "universally and automatically applied."[43] Additionally, if after the fact interest owners could elect cash balancing over balancing in-kind, such discretionary license would foster speculation. Producers would choose to "take in-kind in a rising price market and to take the cash in a declining market."[44]

Based on a several liability clause and language referring to the interest owners' separate shares of production in the unit operating agreement, the Tenth Circuit ruled the working interest of the Trail Unit owners was not a cotenancy.[45] The lack of a cotenancy relationship among the interest owners foreclosed the remedy of a cash accounting.[46]

Doheny argued unsuccessfully before the district court that Wexpro's contract obligations created a fiduciary duty requiring the operating company to shut down production at the Trail Unit well until a gas balancing agreement was acquired once Doheny terminated his purchase agreement with Questar.[47] The Tenth Circuit affirmed the lower court and stated that based on elementary contract principles, no such fiduciary duty arose on Wexpro's part unless specifically set forth in the operating agreement.[48] Accordingly, Wexpro did not breach the contract since the contract contained no specific provision requiring Wexpro to obtain a gas balancing agreement on behalf of Doheny.[49]

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39. *Id.*
40. *Id.* at 133 (citing Pogo Producing Co. v. Shell Offshore, Inc., 898 F.2d 1064, 1067 (5th Cir. 1990); United Petroleum Exploration, Inc. v. Premier Resources, Ltd., 511 F. Supp. 127, 131 (W.D. Okla. 1980); Beren v. Harper Oil Co., 546 P.2d 1356, 1359 (Okla. Ct. App. 1975)).
41. *Id.*
42. *Id.* (citing *Pogo Producing*, 898 F.2d at 1067).
43. *Id.*
44. *Id.* at 133-34.
45. *Id.* at 134.
46. *See supra* notes 13-14 and accompanying text.
47. *Doheny*, 974 F.2d at 134-35.
48. *Id.* at 135.
49. *Id.*

C. *Analysis*

The Tenth Circuit's decision in *Doheny* recognized that in the absence of a balancing agreement, an underproducer may not pursue the most favorable economic remedy to the detriment of other working interest owners. In a sense, underproduced parties must accept gas in-kind to balance production because they failed to negotiate a favorable purchase contract with a pipeline company or other third-party buyer. Cash balancing too often provides a windfall for the non-diligent underproducer.[50] Balancing in-kind awards underproduced interest owners exactly what they are due: gas.

Cash balancing is most equitable when the underproduced party bears little or no responsibility for the imbalance. An overproducer who depletes the reservoir of natural gas to the detriment of other interest owners is literally unable to remedy the imbalance in-kind. A cash payment immediately and efficiently balances the account and penalizes the overproducing party for drinking too deeply at the well. Underproduced parties who cannot accept gas in-kind should receive cash to balance their underproduction only if they bear little culpability for the imbalance.

As the Tenth Circuit demonstrated, courts should guard against the inequities poised in the shadows of gas balancing remedies. An underproduced party may request balancing in-kind in a rising market and cash balancing when the market price of natural gas falls.[51] The overproduced party will favor the opposite remedy. Courts should disfavor such predatory opportunistic approaches by either party to balancing remedies, but should defer in favor of the overproducer in order to encourage production.

Balancing in-kind rightly favors the overproducer. While circumstances exist in which an underproducer would favor balancing in-kind over cash, the diligent overproducer is accountable to other interest owners in gas, *not* market price. An overproducer forced to balance in cash as a matter of uniform principle bears the burden of market variations more than the underproducer. The overproducer's success in negotiating favorable purchase contracts or diligently seeking untapped markets is distributed among the less diligent, less guarded underproducers who have failed to successfully market their gas. Cash balancing encourages a group of interest owners to unfairly profit from the success of any one co-interest owner without risking their own gas in the vagaries of the marketplace.

As a central tenet, oil and gas law favors production. In allocating benefit among producers, courts favor the party delivering gas to the marketplace. If underproducers could obtain either remedy at their discretion, underproducers would ride the slipstream of the successful overproducer who sells his gas at a high market price, or conversely de-

50. *Id.* at 133-34.
51. *Id.*

mand gas in-kind for past imbalances in a market of climbing natural gas price. Setting forth balancing in-kind as the standard remedy for production imbalances places the risk of loss disproportionately on the underproducer and the opportunity for advantage on the overproducer in order to favor production.

Parties to joint operating agreements should include a gas balancing agreement. Expense and disputes arising in the absence of a formal balancing agreement are avoided through careful selection of gas balancing remedies at the onset of a joint operating agreement. Obviously, parties who understand the inherent advantages of various balancing methods may employ them to their respective benefit at the contract negotiation stage.[52]

II. INDIAN LAW[53]

Fiduciary Duty of the Secretary of the Interior: *Cheyenne-Arapaho Tribes of*

52. For an excellent account of the provisions in a model gas balancing agreement, see Motloch, *supra* note 23.

53. Cases decided by the Tenth Circuit in 1992 demonstrate that the court continues to develop Indian law. In addition to the *Cheyenne-Arapaho Tribes of Okla.* case which is the subject of this portion of this survey, the Tenth Circuit decided several other cases involving Indian law. However, these decisions are less significant since they involve well-settled areas of Indian law such as the immunity of Indians from state taxing authorities and the sovereign immunity of tribal businesses from litigation in federal courts.

The Tenth Circuit decided two cases concerning Indian immunity from state taxing authorities: Citizen Band Potawatomi Indian Tribe of Okla. v. Oklahoma Tax Comm'n, 969 F.2d 943 (10th Cir. 1992) (Indian tribe not immune from legal obligation to collect state tax on sales of cigarettes to non-tribal members on reservation; however, sovereign immunity bars federal court enforcement action) and; Sac & Fox Nation v. Oklahoma Tax Comm'n, 967 F.2d 1425 (10th Cir. 1992) (state tax authority could collect income tax from non-member employees of tribe but lacked authority to collect taxes from tribal members employed by tribe).

According to settled Indian law, tribes are immune from state tax authorities. *See generally* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (State of California may tax Indians on Tribal lands only if Congress consents); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) (State of Montana may not tax royalty interest of Indian tribe from mineral development on tribal lands); Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976) (State of Montana cigarette sales tax and personal property tax on automobiles invalid as applied to Indians on reservation); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) (State of Arizona lacked jurisdiction to tax income of Navajo Indians residing on the Navajo Reservation whose income was wholly derived from reservation sources); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 254-55 (1986) (overview of limitations on state taxing authorities regarding Indian tribes); JAY VINCENT WHITE, TAXING THOSE THEY FOUND HERE 33-52 (1972) (legal history of federal instrumentality doctrine prohibiting state taxation of lands held in trust); CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 96-99 (1987) (analysis of case law construing immunity of tribes from state taxation); Clydia J. Cuykendall, Recent Development, 49 WASH. L. REV. 191 (1973) (federal preemption of taxation analyzed in light of Indian sovereign immunity).

The Tenth Circuit also decided two cases that support the well-founded doctrine that Indian tribes enjoy sovereign immunity: Bank of Okla. v. Muscogee (Creek) Nation, 972 F.2d 1166 (10th Cir. 1992) (tribal sovereign immunity bars federal court interpleader action against tribal business); *Citizen Band*, 969 F.2d at 943 (tribal sovereign immunity bars enforcement in federal court of tribal obligation to collect state tax on sales of cigarettes to nontribal members on reservation).

It is a well-settled doctrine of Indian law that tribes enjoy sovereign immunity. *See generally* Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505 (1991) (Indian tribe immune from state taxes on cigarette sales on reservation);

Okla. v. United States[54]

A. *Background*

The Supreme Court first recognized the existence of a trust relationship between the federal government and Indian tribes in early decisions interpreting treaties.[55] The United States entered hundreds of treaties with tribes between 1787 and 1871 in which the tribes gave up land in exchange for promises from the government.[56] Generally, the treaties promised that the federal government would create permanent reservations for the tribes and protect and safeguard the health and well-being of the Indians.[57]

Chief Justice Marshall provided a conceptual basis for the trust between Indian tribes and the government by describing the relationship in guardian-ward terms. Indian tribes are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[58] Half a century later, the Court recognized that treaties with Indian tribes promised protection by the federal government and thereby created a formal fiduciary relationship.[59] The basis for the fiduciary relationship

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (State of Washington may tax sale of cigarettes to non-tribal members on reservation, but tribal sovereign immunity bars state taxation of sales to tribal members), *reh'g denied*, 448 U.S. 911 (1981); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (tribal sovereign immunity barred suit in federal court against Indian tribe by tribal member under Indian Civil Rights Act); Tillett v. Lujan, 931 F.2d 636 (10th Cir. 1991) (tribal sovereign immunity requires exhaustion of tribal court remedies before pursuit of suit against tribal member in federal court); Superior Oil Co. v. United States, 798 F.2d 1324 (10th Cir. 1986) (tribal sovereign immunity requires exhaustion of tribal court remedies before oil company may instigate suit against tribe in federal court); VINE DELORIA, JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY (1984) (excellent political and social history of tribal sovereign immunity); GEORGE S. GROSSMAN, THE SOVEREIGNTY OF AMERICAN INDIAN TRIBES: A MATTER OF LEGAL HISTORY (Matthew Stark ed., 1979) (concise summary of Indian sovereign immunity); Ralph W. Johnson & James M. Madden, *Sovereign Immunity in Indian Tribal Law*, 12 AM. INDIAN L. REV. 153 (1984) (detailed summary of statutory and case law regarding tribal sovereign immunity); Frederick J. Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME L. REV. 600 (1976) (arguing status of Indian tribes is based on federal preemption of state law, not true sovereign immunity); Steve E. Dietrich, Comment, *Tribal Businesses and the Uncertain Reach of Tribal Sovereign Immunity: A Statutory Solution*, 67 WASH. L. REV. 113 (1992) (statutory remedy proposed to alleviate problems sovereign immunity creates for commercial tribal ventures).

54. 966 F.2d 583 (10th Cir. 1992).

55. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

56. *See* COHEN, *supra* note 53, at 46-66.

57. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 38 (2d ed. 1992).

58. *Cherokee Nation*, 30 U.S. at 17.

59. These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

United States v. Kagama, 118 U.S. 375, 383-84 (1886)(upholding congressional power to confer federal jurisdiction over crimes committed on Indian reservations); *see also* United

is literally trust: the tribes trust the United States to fulfill its treaty obligations given in exchange for Indian lands.[60] While the general duties arising out of a treaty require the United States to meet the rigorous standards of a fiduciary,[61] treaty obligations lack specificity in areas of narrow subject matters such as natural resources development.

In addition to treaty-based fiduciary responsibilities, the Supreme Court has held the federal government acts as a fiduciary to Indians on statutory and regulatory grounds. Federal statutory law creates a fiduciary relationship in the same manner as a treaty. Express statutory language requires the United States to regulate, control or protect Indian natural resources and lands for tribal benefit and imposes specific duties and trust obligations on the federal government.[62] Where courts base fiduciary obligations on subject matters regulated by statutory schemes, the government must act with a high degree of care and responsibility.[63] The more pervasive and encompassing the federal agency regulation and control of Indian resources, the greater the trust responsibility.[64] Where a federal agency as trustee mismanages tribal resources and injures the tribe as beneficiary, the trust relationship necessarily permits

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States v. Sandoval, 231 U.S. 28 (1913)(recognizing that congressional legislation prohibiting alcohol on Indian reservation is validly based on government's guardianship over Indians).

60. For additional background on the trust relationship doctrine, see generally COHEN, *supra* note 53, at 169-73 (trustee/beneficiary aspects of "wardship" status of Indians); Nancy Carol Carter, *Race and Power Politics as Aspects of Federal Guardianship Over American Indians: Land Related Cases, 1887-1924*, 4 AM. INDIAN L. REV. 197 (1976) (survey of Indian lands cases over 50-year period recognizing federal fiduciary duty to tribes); Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) (congressional statutory intent mandates executive branch act as trustee to Indian tribes).

61. In 1942, in an action for breach of fiduciary duties arising from treaty obligations, the Supreme Court cited numerous prior decisions and described in moral terms the nature of the fiduciary relationship:

> In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy . . . it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

Although fiduciary obligations elude concise summary, fiduciaries must act selflessly in their wards' best interest, and give them the benefit of special knowledge, skill and expertise. Courts demand fiduciaries to act in good faith and avoid self-dealing and conflicts of interest. *See, e.g.*, Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 539-45 (1949)(well-written exposition of fiduciary principles applicable to range of relationships).

62. The Secretary of the Interior is authorized to manage timber sales, oil and gas development and mineral leasing on Indian lands. 25 U.S.C. §§ 391-416 (1988 & Supp. II 1991). *See* United States v. Mitchell, 463 U.S. 206 (1983)(statutes and regulations requiring the United States to manage Indian timber resources for tribal benefit creates common law trust that renders government liable in damages for breach of fiduciary duties).

63. *Mitchell*, 463 U.S. at 206; Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir. 1986)(en banc), *adopting in relevant part*, Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1563-73 (10th Cir. 1984)(Seymour, J., dissenting), *cert. denied*, 479 U.S. 970 (1986).

64. *See, e.g.*, *Mitchell*, 463 U.S. at 224-25; Navajo Tribe of Indians v. United States, 624 F.2d 981, 986 (Ct. Cl. 1980).

the tribe to sue the trustee agency for damages resulting from the breach of fiduciary obligations.[65]

Tribal entities aggrieved by agency action may sue under provisions of the Administrative Procedure Act (APA) to obtain injunctive or declaratory relief.[66] Generally, federal courts will set aside only that agency action that is arbitrary and capricious, or not in accordance with the law. Under principles of administrative law, an agency must consider relevant factors and consequences regarding its administrative decision and support the action with an administrative record that ventilates the major issues of policy and fact. Although courts defer to agencies upon judicial review, the administrative record must demonstrate the agency weighed the facts and alternatives and based its action on reasonable conclusions.[67]

B. *Tenth Circuit Opinion*

In *Cheyenne-Arapaho Tribes of Okla. v. United States*,[68] the Tenth Circuit recognized that fiduciary duties constrain the Secretary of the Interior's (Secretary) discretion to approve oil and gas leases on tribal lands. The court ruled that the Secretary breached his duties as a fiduciary when he failed to consider relevant factors, including current market and economic conditions, before approving communitization agreements.[69] The court reviewed the district court's summary judgment ruling overturning the Bureau of Indian Affairs' (BIA) 1981 decision. The BIA approved two communitization agreements unitizing oil and gas operations on two spacing units owned by the Cheyenne-Arapaho Tribes of Oklahoma (Tribe) in Custer County, Oklahoma.

Woods Petroleum Company and Reading and Bates Petroleum Company (Companies) owned a total of six oil and gas leases originally approved by the BIA on Tribal lands.[70] The lease terms included commence drilling clauses that extended the lease duration if drilling initiated before the leases expired on May 10, 1981.[71] The leases also included unit operating clauses that allowed the parties to communitize the gas field as one operating unit if adopted by a majority of the operat-

65. *See Mitchell*, 463 U.S. at 225 n.31.

66. 5 U.S.C. §§ 500-590 (1988 & Supp. III 1992). *See generally* PEVAR, *supra* note 57, at 320-22 (providing discussion of judicial review of administrative actions affecting Indians and tribal entities).

67. *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)(record maintained contemporaneous with agency decision-making necessary to survive judicial review when challenged); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977)(agency action arbitrary and capricious where administrative record failed to disclose secret and undocumented ex parte contacts between agency and those affected by agency action), *cert. denied*, 434 U.S. 829 (1977); United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977)(agency regulation void as arbitrary and capricious where data upon which regulation was based was not publicized and comments of interested parties who submitted contrary evidence went unaddressed in record by agency).

68. 966 F.2d 583 (10th Cir. 1992).

69. *Id.* at 589-90.

70. *Id.* at 584-85.

71. *Id.* at 585.

ing interests and approved by the Secretary.[72]

Under a communitization agreement, gas production anywhere on a gas field is deemed to occur on each lease within the communitized area.[73] Communitization is a synonym for unitization. This term denotes the joint operation of all or a portion of a petroleum reservoir subject to different ownership interests.[74] Unitization functions as a conservation measure by which few wells are drilled and operated in the unitized area in order to prevent waste, maintain reservoir pressures and best use secondary recovery techniques.[75] Unitization is often the only manner by which production from numerous tracts overlying a common reservoir is economically feasible.[76]

A communitization agreement in conjunction with the commence drilling clause would extend the duration of all the leases on the Tribe's lands if drilling commenced on any single lease within the communitized area despite the termination date.[77] Three weeks prior to the May 10, 1981, termination date, the Companies decided to communitize the leases and requested approval from the Tribe.[78] Tribal business representatives met with the Companies and local BIA officials and refused to approve the communitization agreements unless the leases were renegotiated to provide a $1,500 per acre lease bonus and a ten percent back-in working interest to the Tribe.[79] The Companies rejected renegotiations of the leases and threatened litigation unless the Tribe assented to the communitization agreements.[80] On the grounds that the agreements adequately protected the Tribe's limited interests, the United States Geological Survey recommended that the BIA approve the communitization agreements.[81] On May 8, 1981, just two days before the Companies' leasehold interests in the oil and gas field would expire, the

72. *Id.* A unit operating clause is the provision in a lease which permits the parties to enter a unit operating agreement. The latter is defined as "[a]n agreement or plan of development and operation for the recovery of oil and gas made subject thereto as a single consolidated unit without regard to separate ownership and for the allocation of costs and benefits on a basis as defined in the agreement or plan." WILLIAMS & MEYERS, *supra* note 15, at 1315.

73. *See, e.g.*, Kenai Oil & Gas, Inc. v. Dep't of the Interior, 671 F.2d 383, 384 (10th Cir. 1982). *See also* WILLIAMS & MEYERS, *supra* note 15, at 921-24.

74. WILLIAMS & MEYERS, *supra* note 15, at 1317-18.

75. *Id.*

76. *See, e.g.*, KRAMER & MARTIN, *supra* note 23, § 1.01, at 1-1 to 1-3.

77. *Cheyenne-Arapaho Tribes*, 966 F.2d at 585.

78. *Id.*

79. *Id.* A lease bonus is broadly defined as "the cash consideration paid by the lessee for the execution of an oil and gas lease by a landowner." WILLIAMS & MEYERS, *supra* note 15, at 114. The lease bonus acts as an incentive in unitization negotiations involving reluctant interest owners such as the Tribe. *See* Charles Nesbitt, *A Primer on Forced Pooling of Oil and Gas in Oklahoma*, 50 OKLA. B.J. 648, 650 (1979).

A back-in working interest may, like a lease bonus, induce reluctant owners to consent to unitization. A back-in working interest allows land-owners to regain a working interest in a well after it has been proven tobe successful. Accordingly, a back-in working interest can be significantly more lucrative than a lease bonus. A back-in working interest is often given as incentive to an operating owner affected by unitization. WILLIAMS & MEYERS, *supra* note 15, at 81.

80. *Cheyenne-Arapaho Tribes*, 966 F.2d at 585.

81. *Id.*

Acting Area Director of the Anadarko Office of the BIA approved the communitization agreements.[82]

The Tribe sought administrative review of the BIA action,[83] and ultimately filed action against the United States, the BIA and the Department of the Interior in the United States District Court for the Western District of Oklahoma. The complaint challenged the BIA's authority to approve the communitization agreements and extend the terms of the oil and gas leases.[84] The district court concluded the unit operation clause in the leases did not require consent from the Tribe in order to activate the communitization agreements. However, the court held the Acting Area Director of the BIA breached his fiduciary trust obligations to the Tribe under statutes regulating Department of Interior mineral leasing on Indian lands[85] by approving the communitization agreements without first examining prevailing market and economic conditions.[86] This breach of trust by the Secretary's representative rendered invalid the communitization agreements regarding the leases on which the Companies had not commenced drilling. The leases terminated upon expiration of their primary terms.[87]

The Tenth Circuit granted Woods Petroleum Company's petition for interlocutory appeal and the Tribe's petition for cross-appeal.[88] The court dismissed the Companies' claim that the Tribe's administrative appeal was time barred and pointed out that the administrative appeal was timely as the regulation at issue[89] required written notice to the Tribe of the BIA action.[90] Since the Tribe never received written notice of the BIA approval of the communitization agreements, the Tribe's right to appeal was never time barred.[91]

The Companies also maintained the district court considered irrelevant factors in concluding the Secretary was constrained by its fiduciary duty in the approval of the communitization agreements.[92] The Tenth Circuit disagreed and outlined the statutory and regulatory framework that mandates discretionary approval by the Secretary of communitization agreements of oil and gas leases on Indian lands.[93] The Mineral Leasing Act required the Secretary to promulgate rules and regulations

82. *Id.*

83. In sequence, the Deputy Assistant Secretary of the Department of the Interior and the BIA affirmed the Anadarko Area Director's approval of the communitization agreements. *Id.* at 586.

84. *Id.* Due to an insufficient record, the district court remanded the case to the Secretary, whose response to the Order of Remand provoked a round of summary judgment motions from the parties.

85. Mineral Leasing Act of 1938, 25 U.S.C. §§ 396(a)-(g) (1988)(statutory scheme setting forth Secretary's role in mineral leasing on Indian lands).

86. *Cheyenne-Arapaho Tribes*, 966 F.2d at 586.

87. *Id.*

88. *Id.* at 584.

89. 25 C.F.R. § 2.7(b) (1992)(right to appeal agency action or decision continues until agency gives written notice).

90. *Cheyenne-Arapaho Tribes*, 966 F.2d at 587.

91. *Id.*

92. *Id.* at 588.

93. *Id.*

regarding mineral leasing of Indian lands and directed that the Secretary in his discretion approve reasonable unit operating agreements.[94] These regulations required the Secretary's approval of cooperative agreements such as the communitization agreements.[95] The court held that despite the absence of express statutory or regulatory language, the Secretary acts as a fiduciary to the Indians, and "the United States' function as a trustee over Indian lands necessarily limits the Secretary's discretion to approve communitization agreements."[96] The court affirmed the principle that whenever the government controls Indian properties or monies, the United States acts as a fiduciary to the tribe.[97] Relying on the Mineral Leasing Act and Department of Interior regulations, which require Secretary approval of oil and gas leases and communitization agreements, the court stated that a fiduciary relationship arises between the Secretary and the Tribe because of the government's pervasive role in oil and gas leasing on Indian lands.[98]

The Secretary's discretion to approve oil and gas leases and communitization agreements is limited by fiduciary standards which necessarily include the duty to maximize lease revenues and safeguard the economic interests of the Tribe.[99] On administrative review, the Secretary's action must meet the demanding standards of a fiduciary, not just the minimal requirements of administrative review.[100] Applying these standards, the court held that when the BIA originally approved the communitization agreements, the Acting Area Director failed to consider relevant economic factors, including marketability and market value of the leases if renegotiated.[101] Affirming the district court's finding, the Tenth Circuit held the failure to consider economic conditions was arbitrary and capricious, an abuse of discretion and a breach of the Secretary's fiduciary duties to the Tribe.[102] Accordingly, the court ruled the communitization agreements approved by the BIA were invalid and

94. All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396 a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

Mineral Leasing Act, 25 U.S.C. § 396(d) (1988).

95. All such leases shall be subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, but no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected.

25 C.F.R. § 171.21(b) (1981)(repromulgated at 25 C.F.R. § 211.21(b) (1992)).

96. *Cheyenne-Arapaho Tribes*, 966 F.2d at 588.

97. *Id.* at 588 (citing Navajo Tribe of Indians v. United States, 624 F.2d 981 (1980)).

98. *Id.* (citing Mitchell v. United States, 463 U.S. 206, 225 (1983)).

99. *Id.* at 589.

100. *Id.* at 590-91 (citing Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1563 (10th Cir. 1984)(Seymour, J., concurring in part and dissenting in part), *dissenting opinion adopted as the majority opinion as modified*, 782 F.2d 855 (10th Cir. 1986)).

101. *Id.*

102. *Id.* at 591.

any leases upon which drilling had not commenced by May 10, 1981, terminated on that date.[103]

C. *Analysis*

The Tenth Circuit's decision in *Cheyenne-Arapaho Tribes* defines the role of the Secretary in mineral leasing on Indian Lands. As trustee, the Secretary must consider all factors in oil and gas leases relevant to the best interests of the beneficiary Tribe. After *Cheyenne-Arapaho Tribes*, failure to consider the Indians' economic interest in aggregate with social, environmental and conservation factors renders BIA action regarding mineral leasing both arbitrary and capricious on administrative review under the APA and a breach of fiduciary duty.[104]

The BIA may not solely consider the conservation interests inherent in any unitization agreement on Indian lands, but must examine whether unitization serves the Tribe's economic interests. If oil and gas lease values significantly rise, renegotiation of lease terms at higher rates better serves the Tribe. Despite conservation benefits realized through unitization of oil and gas fields, the Tenth Circuit decision demonstrates that economics may trump conservation concerns. Indians aggrieved by administrative action that constitutes a breach of the trust responsibility may obtain damages from the agency in addition to injunctive and declaratory relief under the APA. Based on the pervasive role of the Department of the Interior and the BIA in the regulation of mineral leasing on Indian lands, the fiduciary obligations of the Secretary are rigorous and demanding.[105]

The Tenth Circuit differentiated between the general trust responsibility arising from treaty obligations and the subject-specific fiduciary duties arising in the context of mineral leasing supervised by the Secretary under the Mineral Leasing Act and implementing regulations. Although treaty obligations create a general trust relationship between the United States and the Indians, obligations based on a statutory and regulatory framework demand that agencies meet the exacting standards of a fiduciary at every stage of agency participation.[106] After *Cheyenne-Arapaho Tribes*, agency officials administering mineral development and production on Indian lands held in trust must seriously consider the best interest of the Indians regarding the maximum revenue-producing use of the lands. As fiduciary, the Secretary should treat Tribal mineral development as an investment under the stewardship of the Department of the Interior. *Cheyenne-Arapaho Tribes* demonstrates a judicial willingness to force the Secretary as common-law fiduciary to justify the revenue produced by specific leases on Tribal mineral lands.

However, the fiduciary standard set forth in *Cheyenne-Arapaho Tribes* is ultimately no more rigorous than that demanded of all agencies under

103. *Id.*
104. *Id.*
105. *See supra* notes 59-61 and accompanying text.
106. *Cheyenne-Arapaho Tribes*, 966 F.2d at 591.

the APA and *Citizens to Preserve Overton Park, Inc. v. Volpe*.[107] Upon judicial review, the Secretary may satisfy the fiduciary standard by exhibiting an administrative record which simply considers the Tribe's economic interests. Such a record is sufficient to pass scrutiny under *Overton Park*. The Secretary simply failed to even consider the Tribe's economic best interest when the BIA reviewed the communitization agreements. Although the court framed the Secretary's obligations in substantive fiduciary terms, the net effect is, ultimately like all administrative exercises, procedural. The Secretary's actions would most likely have withstood legal challenge if the BIA had conducted an exercise in administrative record building that justified how the Tribe's economic best interests are served by renewing the communitization agreements.

In historical context, the United States has rarely met even the contractual treaty obligations promised Indian tribes.[108] Review of administrative action that requires the executive branch to act as a common-law fiduciary to the Indians or risk judicial censure appears to demand the United States to honor obligations long ignored and attempts to prospectively remedy an historic injustice of appalling proportions. The fiduciary obligations recognized in *Cheyenne-Arapaho Tribes* are, however, ultimately procedural. Challengers or defenders of BIA action regarding minerals development on Tribal lands should strategize as in any administrative action under the APA.

III. PUBLIC LANDS

Standing to Sue When Challenging Public Lands Exchanges: A Procedural Hurdle: *State ex rel. Sullivan v. Lujan*;[109] *Ash Creek Mining Co. v. Lujan*.[110]

A. *Background*

Article III, § 2, of the Constitution limits the judicial power of federal courts to the resolution of "cases" and "controversies."[111] Standing doctrine arises out of the case and controversy limitation on the scope of judicial authority and serves to ensure that the party seeking relief has established such a personal interest in the controversy as to "assure that concrete adverseness which sharpens the presentation of issues."[112] Reduced to the minimum, standing identifies disputes ap-

107. 401 U.S. 402 (1971).
108. *See* COHEN, *supra* note 53, at 46-66; PEVAR, *supra* note 57, at 38.
109. 969 F.2d 877 (10th Cir. 1992).
110. 969 F.2d 868 (10th Cir. 1992).
111. Article III, § 2, cl. 1 provides:
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;to all Cases affecting Ambassadors, other public Ministers and Consuls;to all cases of admiralty and maritime Jurisdiction;to Controversies to which the United States shall be a Party;to Controversies between two or more States;between a State and Citizens of another state;between Citizens of different States;between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

112. Flast v. Cohen, 392 U.S. 83, 94, 99 (1968). Chief Justice Warren explained in *Flast*:

propriate to judicial resolution.[113] Any party seeking relief in federal court must establish standing in order to challenge the action at issue in the lawsuit.[114] The Supreme Court recently demonstrated that litigants who ignore standing requirements do so at their peril.[115]

The Supreme Court set forth the constitutional essence of standing as three elements that a party seeking relief must establish: injury in fact, causation and redressability.[116] First, an injury in fact must be discrete, concrete, specific and actual or imminent.[117] A conjectural or hypothetical injury is insufficient to sustain standing.[118]

> [I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has "a personal stake in the outcome of the controversy," and whether the dispute touches upon "the legal relations of parties having adverse legal interests."

Id. at 101 (citations omitted).

113. *See, e.g.*, Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). Standing doctrine has engendered a vast array of commentary. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 78 (2d ed. 1988); 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531 (2d ed. 1984)(constitutional foundation of standing doctrine); Roger Beers, *Standing and Related Procedural Hurdles in Environmental Litigation*, 1 J. ENVTL. L. & LITIG. 65 (1986)(arguing that careful plaintiff selection and exhaustion of administrative remedies surmount standing difficulties encountered in environmental litigation); Kevin A. Coyle, *Standing of Third Parties To Challenge Administrative Agency Actions*, 76 CAL. L. REV. 1061 (1988)(causation element of standing doctrine should be abandoned in administrative actions on behalf of third parties); Robert Dugan, Comment, *Standing To Sue: A Commentary on Injury in Fact*, 22 CASE W. RES. L. REV. 256, 257 (1971)(maintaining injury in fact is the primary element of the tripartite standing test); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. L. REV. 1 (1992); Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985)(Supreme Court concern with separation of powers evinced in standing opinions furthers agenda of judicial activism); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68 (1984)(less confusing and obfuscated standing doctrine provides better access to federal courts for deserving claimants); Jonathan Poisner, *Environmental Values and Judicial Review After Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335 (1991); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983)(arguing standing is a central and indispensable tenet of the principle of separation of powers); Kurt S. Kusiak, Note, *Standing to Sue: A Brief Review of Current Standing Doctrine*, 71 B.U. L. REV. 667 (1991); Stu Stuller, Note, Lujan v. National Wildlife Federation, 62 U. COLO. L. REV. 933 (1991)(current standing doctrine requires environmental litigants to meet same standing requirements as other public interest litigants).

114. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982). The party seeking review in federal court bears the burden of demonstrating standing elements. *See* FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990); Warth v. Seldin, 422 U.S. 490, 508 (1975).

115. *See* Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992)(environmental group plaintiffs failed to establish that any of their members would be directly injured by federal funding of projects in other countries adverse to endangered species); Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990) (environmental group which challenged Bureau of Land Management land withdrawal program did not aver sufficient injury in fact to support standing under the APA where plaintiffs merely used lands in vicinity of mining activities).

116. Defenders of Wildlife, 112 S. Ct. at 2136.

117. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)(citing Los Angeles v. Lyons, 461 U.S. 95 (1983)).

118. Glover River Org. v. United States Dep't of Interior, 675 F.2d 251, 254 (10th Cir. 1982)(citing O'Shea v. Littleton, 414 U.S. 488, 494 (1974)).

The party seeking judicial relief must demonstrate a definite and recognizable injury to itself[119] to satisfy the injury in fact element of standing. Accordingly, the injury must affect the individual in a personal and particularized way.[120] Second, the injury must have a causal connection to the action challenged in the lawsuit.[121] Stated another way, the claimed injury must result from the defendant's actions, and not the result of "the independent action of some third party not before the court."[122] Third, redressability is the relation of the injury to the court's remedial and equitable powers. It must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[123] The plaintiff's requested relief must remedy the claimed injury.

When a party challenges government action or inaction in federal court, standing depends on whether the plaintiff is the object of the asserted action or inaction.[124] When the plaintiff is the direct object of the government action or inaction, both the causation and redressability elements of standing are usually satisfied.[125] However, when a party's claimed injury arises from the government's regulation or alleged unlawful regulation of another party, the causation and redressability elements of standing are more attenuated.[126] Challenging government action or inaction regarding a third party is therefore substantially more difficult to establish.[127]

B. *Tenth Circuit Opinions*

In two cases arising from an exchange of federal coal for a conservation easement in Grand Teton National Park, Wyoming, the Tenth Circuit ruled both the State of Wyoming and the Ash Creek Mining Company lacked standing to challenge the Secretary of the Department of the Interior's (Secretary) action. In both *State ex rel. Sullivan*[128] and *Ash Creek Mining Co.*,[129] the State of Wyoming (State) and Ash Creek Mining Company (Ash Creek) appealed the district court's ruling that the parties lacked standing to object to the Secretary's completed exchange of federally owned coal for the JY Ranch conservation easement.

Laurance S. Rockefeller owned the JY Ranch located within Grand Teton National Park, Wyoming. In 1985, Rockefeller negotiated with the Department of the Interior for the exchange of a conservation easement of 1106.49 acres within the ranch for 2560 acres of federally

119. *Id.* at 254.
120. Defenders of Wildlife, 112 S. Ct. at 2136 n.1.
121. Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41-42 (1976).
122. *Id.*
123. *Id.* at 38, 43.
124. Defenders of Wildlife, 112 S. Ct. at 2137.
125. *Id.*
126. *Id.*
127. *Id.* (citing Allen v. Wright, 468 U.S. 737, 758 (1984); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 44-45 (1976); Warth v. Seldin, 422 U.S. 490, 505 (1975)).
128. 969 F.2d 877 (10th Cir. 1992).
129. 969 F.2d 868 (10th Cir. 1992).

owned coal in Sheridan County, Wyoming.[130] In 1987, Rockefeller donated the conservation easement to a non-profit organization, the Sloan-Kettering Institute for Cancer Research (Institute).[131] The Bureau of Land Management (BLM) prepared an environmental assessment of the proposed exchange and concluded an environmental impact statement was unnecessary. Subsequently, the BLM published a notice in the Federal Register detailing the proposed exchange.[132] The State and Ash Creek filed protests to the exchange.[133] Ash Creek, a coal company owned by Public Service Company of Oklahoma, owned a 160-acre fee coal tract adjacent to portions of the Sheridan County coal offered in exchange and was the surface owner of roughly seventy acres overlying the federally owned coal.[134]

On May 11, 1990, the day after the Institute conveyed the conservation easement to the United States, the Department of the Interior dismissed the complaints filed by the State and Ash Creek.[135] The BLM then issued a patent to the Sheridan County coal to the Institute, which subsequently sold the rights to Reserve Coal Properties Company.[136]

Two months later, the State filed a four-count complaint in federal district court against the Secretary, the Department of Interior, Rockefeller, the Institute and Reserve Coal Properties Company.[137] The complaint sought judicial review of the Secretary's action and challenged its validity based on the Federal Land Policy Management Act (FLPMA)[138] and the Secretary's failure to act in the public interest, failure to ensure the parity of the value of the exchanged parcels and failure to follow BLM internal procedure. The final count challenged the Secretary's exchange under the National Environmental Policy Act (NEPA)[139] on the grounds of an inadequate environmental assessment and lack of environmental impact statement.[140] The State alleged the Secretary deprived the State of revenues because the exchange removed coal from the competitive leasing system, under which the Mineral Leasing Act (MLA)[141] entitles the state to recover royalty payments.[142]

On August 21, 1990, Ash Creek filed a complaint in federal district court against the same five parties seeking judicial review of the Secretary's action and requesting invalidation of the exchange.[143] The impetus of Ash Creek's complaint was an interest in acquiring the exchanged

130. *Id.* at 870; *Sullivan*, 969 F.2d at 879.
131. *Sullivan*, 969 F.2d at 879.
132. *Id.*
133. *Id.*; *Ash Creek*, 969 F.2d at 871.
134. *Ash Creek*, 969 F.2d at 871.
135. *Id.*
136. *Id.*
137. *Sullivan*, 969 F.2d at 879.
138. 43 U.S.C. §§ 1701-1784 (1988 & Supp. II 1991).
139. 42 U.S.C. §§ 4321-4370(c) (1988 & Supp. II 1991).
140. *Sullivan*, 969 F.2d at 879-80.
141. 30 U.S.C. §§ 181-287 (1988 & Supp. II 1991).
142. *Sullivan*, 969 F.2d at 880.
143. *Ash Creek*, 969 F.2d at 871.

federal coal through the competitive leasing process.[144] The Ash Creek complaint challenged the Secretary's action under FLPMA, NEPA, MLA and the Administrative Procedure Act (APA)[145].

All defendants successfully moved to dismiss both the State's and Ash Creek's complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[146] The district court noted in both cases that the State and Ash Creek lacked standing to challenge the exchange because the alleged injuries could not be redressed by any conceivable court remedy.[147] Rather, both claimants requested judicial reversal of the Secretary's exchange to dispose of the Sheridan County coal through the competitive leasing system. Ash Creek wished to acquire the coal[148] and the State of Wyoming desired the accompanying royalty revenues.[149] However, the district court noted that the Secretary has discretion with regard to decisions to dispose of the coal through the competitive leasing system. The possibility Ash Creek would acquire the coal was indefinite,[150] as was the potential of the lease producing royalty revenues for the State.[151] The lower court further noted that the State lacked standing under the NEPA claim because the State was not within the zone of interest protected by the statute.[152]

On appeal to the Tenth Circuit, Circuit Judge Ruggero J. Aldisert[153] wrote two nearly identical opinions affirming the district court and dismissing the State and Ash Creek on standing grounds. After deftly summarizing current standing doctrine,[154] Judge Aldisert criticized both parties for failing to present injuries redressable by judicial remedy.

Although the State asserted a colorable injury in fact regarding the deprivation of royalty revenues, the court stated the "case is a conjecture based on speculation that is bottomed on surmise. It ostensibly asserts public policy concerns, but on final analysis, the State's interest begins and ends with the royalties it expected to receive had the Secretary chosen to offer the coal for competitive leasing."[155] In an incredulous tone, Judge Aldisert worked through the logic of the State's

144. *Id.*

145. 5 U.S.C. §§ 500-590 (1988 & Supp. III 1991).

146. *Ash Creek*, 969 F.2d at 872.; *Sullivan*, 969 F.2d at 880. Rule 12(b)(6) states:

> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

FED. R. CIV. P. 12(b)(6).

147. *Ash Creek*, 969 F.2d at 872; *Sullivan*, 969 F.2d at 880.

148. *Ash Creek*, 969 F.2d at 871-72.

149. *Sullivan*, 969 F.2d at 880.

150. *Ash Creek*, 969 F.2d at 872.

151. *Sullivan*, 969 F.2d at 880.

152. *Id.*

153. Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation. *Id.* at 878.

154. *Ash Creek*, 969 F.2d at 874-75; *Sullivan*, 969 F.2d at 880-81.

155. *Sullivan*, 969 F.2d at 882.

argument, pausing to express disbelief at the sheer impossibility of a ruling favorable to the State that would redress the asserted injury of lost royalty revenues: "A favorable ruling in this case will not guarantee the State one nickel of coal leasing royalties from these lands."[156] The court pointed out the federal judiciary is powerless to order the Secretary to release federally owned coal through competitive leasing.[157] The court also dismissed the State's FLPMA claim regarding the Secretary's alleged failure to adequately consider the interests of state and local people on the grounds the State's complaint fell outside the zone of interests protected by FLPMA.[158]

Ash Creek fared no better. The court initially criticized the "vagueness and lack of focus in Ash Creek's opening brief"[159] and then analyzed Ash Creek's standing based on two injuries allegedly caused by the exchange: Ash Creek's lost opportunity to participate in competitive coal leasing; and hinderance of its surface ownership rights to lands overlying the exchanged coal.[160] Judge Aldisert dismissed Ash Creek's first asserted injury on the grounds the loss of the possibility of leasing the coal was an injury not redressable by judicial decision and that Ash Creek thereby lacked standing.[161] Ash Creek contended mining of the exchanged coal would adversely impact Ash Creek economically. Apparently the company had stockpiled a huge quantity of overburden on lands overlying the federal coal deposits exchanged for the conservation easement. Overburden is the waste product of the strip mining process. In essence, Ash Creek maintained that its surface ownership, adjacent coal mine and use of the tract at issue as a refuse pile for hundreds of thousands of cubic yards of overburden prevented the Secretary from leasing or exchanging the coal to any party besides Ash Creek.[162] In scalding language, the court ruled:

> To state this argument in these simple terms devoid of the obfuscation and confusion set forth in Ash Creek's written and oral arguments is to expose the futility, and fatality, of the argument. Ash Creek has not demonstrated a substantial nexus between the relief requested and the elimination of its injuries. No court can fashion an order redressing these alleged injuries because no court has the power to vest Ash Creek with mining rights to the exchanged coal lands or to prevent any other coal operator from possessing them.[163]

Accordingly, the Tenth Circuit affirmed the district court and held Ash Creek lacked standing to challenge the exchange of the coal for the conservation easement.[164]

156. *Id.*
157. *Id.*
158. *Id.* at 882-83.
159. *Ash Creek*, 969 F.2d at 873.
160. *Id.* at 873-74.
161. *Id.* at 874.
162. *Id.* at 876.
163. *Id.*
164. *Id.*

C. *Analysis*

After *Ash Creek* and *Sullivan*, parties claiming an injury from proposed or completed public lands exchanges must demonstrate with specificity all three elements of standing or risk denial of federal jurisdiction. As parties indirectly affected by the exchange of the coal for the conservation easement, Ash Creek and the State demonstrated Judge Scalia's maxim set forth in *Lujan v. Defenders of Wildlife*: "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily 'substantially more difficult' to establish."[165] *Ash Creek* and *Sullivan* demonstrate that "substantially more difficult" should read "nearly impossible."

Although both the State and Ash Creek were so aggrieved by the Secretary's action to pursue litigation in federal court, their injuries were ultimately peripheral to the challenged exchange. The Tenth Circuit focused almost exclusively on the consequences of a ruling favorable to the plaintiffs and held the attenuated chain of causation between the coal exchange and the claimant's alleged injuries prevented their direct and sure redressability.[166]

When establishing standing to invoke federal jurisdiction, parties must draft pleadings and frame the requested relief with care. An actual or perceived injury that may be relieved in some way, even favorably, by judicial remedy may not support standing.[167] Although court action may plausibly alleviate an aggrieved and injured party, the substance of standing supporting federal jurisdiction may dissolve for lack of causation or redressability. Rather, the alleged injury must be both directly caused by the defendant's action or inaction and capable of definite redress through court action. When causation of the injury in fact is traceable directly to the challenged action or inaction, in a singular and demonstrable cause and effect relationship, adequate redressability may exist. However, an injury in fact arising from a multilinked chain of cause and effect is nearly per se invalid to support federal jurisdiction. Causation and redressability are obverse aspects of injury in fact. Injury implies causation, which in turn bears on remedial benefit. Obviously, a judicial remedy directed to actions that have not caused the injury at issue can in no way alleviate that injury.[168]

CONCLUSION

In *Doheny*, the Tenth Circuit ruled balancing in-kind is the preferred remedy for production imbalances. The opinion comports with case law from other jurisdictions and factors a doctrine into oil and gas law that encourages parties to deliver gas to the marketplace. In *Cheyenne-Arapaho Tribes*, the Tenth Circuit recognized that the Secretary of the Interior

165. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2137 (1992)(quoting Allen v. Wright, 468 U.S. 737, 758 (1984)).

166. *Sullivan*, 969 F.2d at 882; *Ash Creek*, 969 F.2d at 876.

167. Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 43 (1976).

168. WRIGHT ET AL., *supra* note 114, § 3531.4.

must act as a fiduciary to Indians regarding mineral leasing on tribal lands held in trust. The government may satisfy its fiduciary obligations, however, by constructing a contemporaneous record that merely considers the Indians' economic best interest. Finally, as demonstrated in *Ash Creek Mining Co.* and *State ex rel. Sullivan*, the Tenth Circuit does not hesitate to invoke standing doctrine to deny federal jurisdiction to challengers indirectly harmed by Department of Interior public lands exchanges.

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