



The Override

Every Landman Wants One!

Volume XII, Issue V

May, 2020



Presidents Message

Jessica Bradley, CPL
President
Warren E&P, Inc.

Before we turned the page on our calendars from December of 2019 to January of 2020, there was much talk of this idea of clarity: that 2020 would bring with it new, clearer vision. I revisited my January 2020 message, and that’s exactly what I wrote: “It’s time for new vision, new clarity, and new purpose in 2020. It’s time for 20/20 vision...”

Have you ever been driving somewhere for the first time, and when you are getting close to your end destination, you turn the music down to see better? In the last two months, we have come face to face with an opportunity. To silence the noise. To reset. And, to truly find that clarity.

So much noise has been quieted—the traffic, the school drop-off line, concert halls, stadiums, and the local shopping malls. Noise can lend to distraction or this ongoing “busyness,” the hamster wheel that we cannot seem to step off of.

When the noise is silenced for you, it’s amazing how much clearer you can see what’s actually important. I don’t know about you, but I find myself valuing time with my family just a little bit more. Being present for conversations and hanging on extra tight with each hug.

If nothing else, perhaps this season has recalibrated our value system. Reminded us of what to hold dear. Are you looking up or out? I have found such peace in knowing Who holds my tomorrows.

If you come out of this season unchanged, you’ve missed something. Anything is possible! I challenge you to continue reaching for greatness, to be a better version of you today than you were yesterday. Learn, grow, and achieve. When this is all said and done, you will come out on top.



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Meeting Luncheon Speakers

Both of our speakers come to us from Stoel Rives, LLP. They are not only presenting and speaking, but Stoel Rives is providing the hosting platform for our meeting. We are extremely grateful for their courtesy and generosity.



Michael N. Mills, Esq. is an experienced environmental lawyer who represents his clients in complex regulatory, compliance and litigation matters. His scientific background in environmental toxicology, as *Michael Mills* continued on page 2



Sarah Taylor, Esq. is an associate in Stoel Rives’ Environment, Land Use and Natural Resources group. She has broad experience counseling clients in permitting mines, development projects, and mitigation banks *Sarah Taylor* continued on page 2



Opinionated Corner

**Joe Munsey, RPL
Director**

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

Due to the Chinese Communist Party exporting its bat-virus around the world we are being held captive at the Homefront in Laguna Woods. Where is Batman or Batwoman when you need them the most? We would assume the bat phone is ringing off the hook there in the Bat Cave. As such, being tied up in a dark room without food or water we were unable to write our column. Best excuse I can come up with.

However, while we can still hustle the barrels of ink and printing press in an undisclosed hidden bunker, we would like to take this opportunity and express thanks to the following persons for making "The Override" a continuous success; i). The LAAPL executive board, ii.) Jessica Bradley, CPL, Chapter President, iii). The legal community who have provided the content for our Cases/Issues of the Month, iv). Allison Foster, and Cliff Moore, Retired, for their tireless efforts to provide editorial oversight; and v). Star of this award-winning publication, Randall Taylor, RPL, of Taylor Land Services.

Stay safe.

**JAMES C. KARO
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AAPL Director Report

**Randall Taylor, RPL
AAPL Director, Region VIII**

- The next Board of Director's Meeting will be held virtually from the headquarters of AAPL in Fort Worth, TX on June 17, 2020
- The AAPL 66th Annual Meeting will not be held in Huntington Beach, California on June 16-20. The uncertainty of travel restrictions and companies allowing employees to travel forced the Board of Directors to cancel the Huntington Beach venue. The AAPL Staff is negotiating the termination of our existing contracts and negotiating favorable contacts with Huntington Beach for the 2023 annual meeting.
- A virtual annual meeting will be held during the week of June 16-20. There will be no charge to AAPL members for this virtual annual meeting, but you will need to register. Stay tuned for more information.
- The Field Landman Seminar Committee has postponed the field landman seminars that were scheduled to be held in Midway, UT; Cheyenne, WY; Oklahoma City, OK; Corpus Christi, TX; Lansing, MI and Wichita, KS. The committee is working with the local associations to reschedule these seminars later in the year.
- Greta Zeimetz, PhD, and Amanda Johnson are working with AAPL's attorneys to update policies. They are preparing an Antitrust Policy and a Whistleblower Policy for the AAPL. They are also updating the AAPL Conflict of Interest Policy. Our Document Retention Policy has been approved by the AAPL Board of Directors. The proposed Antitrust Policy, Whistleblower Policy and updated Conflict of Interest Policy will be sent to the Bylaws and Policy Review Committee for its review. After approval, the Bylaws and Policy Review Committee will present to the ExCom for approval and then to the AAPL Board of Directors for a formal vote. Once approved by the AAPL Board of Directors, it is the recommendation of Greta and Amanda for the Landman Scholarship Trust and the Educational Foundation, Inc. to adopt these policies.
- The current AAPL membership is 15,552.

*Michael Mills
continued from page 1*

well as his contacts within California's state regulatory agencies, make him ideally suited to provide effective and practical solutions to environmental and regulatory challenges that his clients confront.

Mike is a former co-chair of the firm's Energy and Natural Resources Industry Group, and his deep connections within California's oil and gas industry span nearly two decades. Oil and gas clients appreciate Mike's experience navigating the challenging regulatory environment in which they operate, and Mike knows the major players and decision-makers in California's oil and gas industry. This unique repository of experience allows Mike to offer valuable business counsel to oil and gas companies in California.

Oil and gas operators, as well as mining companies, look to Mike to skillfully advise them on natural resources development issues, counsel them on federal and state hazardous waste cleanup matters, and help them successfully navigate property tax valuation disputes. When necessary to protect his clients' interests, Mike relies on his understanding of complex regulatory matters and his clients' businesses to defend them in environmental litigation, defeat citizen suit claims, and reduce or eliminate fines and penalties.

Sarah Taylor

continued from page 1 and has defended clients against Clean Water Act (CWA) violations. Sarah also assists clients with general land use matters, including rezoning and Planned Development applications.

Before joining Stoel Rives, Sarah was an associate with Mitchell Chadwick, LLP (2016–2019); an assistant water resources specialist with the San Diego County Water Authority (2015); a legal fellow (2015) and legal intern (2014) with the Natural Resources Defense Council; and an apprentice associate attorney with Glaser Weil Fink Howard Avchen & Shapiro (2014–2015).

THE OVERRIDE IS, AND HAS BEEN EDITED BY JOE MUNSEY, RPL AND PUBLISHED BY RANDALL TAYLOR, RPL, SINCE SEPTEMBER OF 2006.

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Chapter Board Meetings

Marcia Carlisle
The Termo Company
LAAPL Secretary

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

Call for 2020-2021 Annual Dues

We are currently accepting dues for 2020-2021!

Annual MEMBERSHIP DUES (\$40) must be paid by JULY 1, 2020 to appear in the 2020-2021 Membership Directory.

Dues can be paid online.

Go to: <http://www.laapl.com/onlinepayments/2020-20201-laapl-membership-renewal>

If not renewing online, please send your check and Membership Renewal Application to:

Allison Foster
LAAPL Membership Chair
P.O. Box 64578
Los Angeles, CA 90064
a.foster.land@gmail.com

Scheduled LAAPL Luncheon Topics and Dates

May 21, 2020

[Virtual Meeting]

Michael Mills, Esq. and Sarah Taylor, Esq., Stoel Rives LLP

“It’s 11 O’Clock. Do You Know Where Your Pipelines Are?”

Officer Elections

September 17, 2020

TBD

November 19, 2020

TBD

January 21, 2021

Joint Meeting with Los Angeles Basin Geological Society



Treasurer’s Report

Jason Downs, RPL
Treasurer
Land Representative
Chevron Pipe Line and Power Company

As of 3/11/2020, the LAAPL account showed a balance of

Deposits	\$23.47
Total Checks, Withdrawals, Transfers	\$99.03
Balance as of 5/6/2020	\$34,645.72

New Members and Transfers

Allison Foster
Membership Chair

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

New Members

None to Report

Transfers

None to Report

Changes

Allison S. Foster
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2020 West Coast Landmen’s Institution

The WCLI, a joint effort of the Los Angeles Association of Professional Landmen and Bakersfield Association of Professional Landmen, is still being planned to take place in San Diego for now - depending upon the State of California’s opinion to the contrary. The WCLI Committee, also considering the state of the oil business nationwide and here in California, may change the venue to Bakersfield; and if allowed, to be held at one of the major’s facilities.

Lawyers' Joke of the Month

Jack Quirk, Esq.
Bright and Brown

Tim decided to tie the knot with his longtime girlfriend. One evening, after the honeymoon, he was cleaning his golf shoes while his wife watched.

After a long period of silence, she said, "Honey, I've been thinking; now that we're married maybe it's time you quit golfing."

Seeing a horrified look spread across Tim's face, she asked, "Darling, what's wrong?"

"There for a minute you sounded a lot like my ex-wife."

"Ex wife!" she screamed, "I didn't know you were married before!"

"I wasn't!"



Our Honorable Guests

The only guest who made an appearance at March's luncheon was the Wuhan Corona Virus. We trust Mr. Wuhan Covid-19 experienced the cold shoulder treatment, including the lack of no eye contact. It was intentional.



Randall Taylor, RPL
Petroleum Landman

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Rick Peace, President

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2020-2021 Officers and Directors Ballot



2020-2021

OFFICERS and DIRECTORS

“Virtual” Meeting Date: May 21, 2020

Nominations Chairman Joe Munsey, RPL, presents the following candidates¹ for officers to serve from July 1st, 2020 - June 30th, 2021. **Additional nominees may be submitted to the Nominations Chairman at jmunsey@socalgas.com or by calling 949-361-8036 to be included on the final candidate’s list until May 21, 2020, which will be published in the May newsletter.** Officers will be elected by a vote of membership in “virtual” attendance on May 21, 2020. Nominations will also be accepted from the floor at the “virtual” May 20, 2020, regular meeting.

PRESIDENT²

Randall Taylor, RPL Taylor Land Service, Inc.

PAST PRESIDENT^{3 & 4}

Jessica Bradley, CPL Warren E&P, Inc.

CANDIDATES:

VICE PRESIDENT

Courtney Childress, RPL, The Mineral Advocate, LLC.

SECRETARY

Marcia Carlisle The Termo Company

TREASURER

Jason Downs, RPL Chevron Pipeline & Power

DIRECTORS - VOTE FOR TWO

Mike Flores Flores Strategies, Inc.

Ernest Guadiana, Esq. Elkins Kalt Weintraub Reuben Gartside LLP

Per the LAAPL Bylaws, I am an **Active Member** of the Association and eligible to vote in annual elections.

Write-in candidates **MUST** have given their prior consent for nomination.

¹Per Section 7(7)(a) prior to the regular meeting scheduled nearest to April 15th of each membership year, the membership will be provided with a list of the nominees for offices of Vice President, Secretary, Treasurer and the two (2) Directors.

²Per Section 7(3) the Vice President shall succeed to the office of the President after serving his or her term as Vice President and shall hold the office of President for the next twelve (12) months.

³Per Article 8 (2) the outgoing President shall serve as Past President.

⁴Per Article 8 (2) the outgoing President shall serve as a Director.

Happy 201st Birthday, Colonel Drake!

At the Core

A favorite slice of oil patch lore,
Deals with an apple – more precisely – the core.
Took food to the well, did drillers of yore,
And dined best they could on the drilling rig floor.

They'd show up for work with a lunch pail or sack,
And a Rome or Delicious or maybe a Mac -
For apples were tasty and easy to pack,
And they made a nice lunch or an afternoon snack.

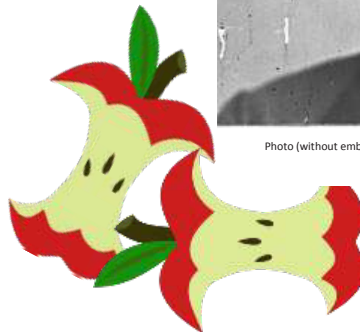
Each day after meals, over shoulder they'd fling,
The old apple core, and then early next spring,
When the snow melted and robins would sing,
New trees would sprout 'round the well in a ring.

When you're out in the woods, scouting old wells,
Climbing up hills and marching down dells,
Remember this bit of lore you've heard tell:
It's there in the circle where apple trees dwell.

- Kathy J. Flaherty, 2015
(More Oily Odes, in press)



Photo (without embellishments!) courtesy of PHMC, Drake Well Museum, Titusville, PA.



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Joe Anderson, R.I.P.

JOSEPH M. ANDERSON
AUGUST 30, 1957 - MARCH 27, 2020



Joe Anderson, 62, of Bakersfield passed away unexpectedly on March 27, 2020.

Joe was the President and owner of Anderson Land Services, Inc., initially working in the Oil and Gas industry but expanding into solar and wind services. Joe was a true professional and was well respected in the industry. Although never a member of LAAPL, he supported the Override Newsletter each year by purchasing a half-page ad every issue.

Joe was born August 30, 1957 in Wichita, Kansas, the second child of Thornton E. Anderson and Charmaine Anderson Stolz. Joe spent the majority of his youth in Wichita until the family moved to Aspen Colorado in 1974. Joe eventually made his way to California where he lived the majority of his life.

Joe was an avid history buff and recently fulfilled a “bucket list” trip of visiting the WW II European battlefield, beginning with the beaches of Normandy, following the path of the U.S. Army through France into the Ardennes, sight of the Battle of the Bulge. Along with his passion for military history, Joe loved the Rolling Stones, great foods and fine wines. Joe’s booming voice and laugh would dominate any conversation.

Joe is survived by his parents, Thornton E. Anderson of Wichita and Charmaine Stolz of Highlands Ranch, Colorado; brothers, Bill (Holly) Anderson of Wichita, Earl Anderson of Highlands Ranch, Colorado; sisters Amy Anderson of Denver, Colorado and Mary Anderson of Carbondale, Colorado. Additionally, Joe had 7 nieces and nephews and 4 great-nieces and nephews, of whom he took great delight in spoiling rotten at Christmas and birthdays.

Joe will be interred in Wichita, Kansas. Because of the current lock-downs, memorial services will be held at a later date.



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Case of the Month - Oil & Gas



CAPTURING IT IF YOU CAN: PENNSYLVANIA SUPREME COURT ADDRESSES THE INTERPLAY BETWEEN HYDRAULIC FRACTURING AND THE RULE OF CAPTURE

*By Anthony R. Holtzman, Esq., Partner & Jonathan R. Vaill, Esq., Associate
Law Firm of K & L Gates*

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The Pennsylvania Supreme Court has issued its long-awaited decision in a case testing whether the “rule of capture” applies in the age of hydraulic fracturing. The rule of capture is a long-standing component of Pennsylvania property law. In 1889, the Pennsylvania Supreme Court explained that, under the rule, “[p]ossession of the land...is not necessarily possession of the gas. If an adjoining...[land]owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his.”[1] Over 130 years later, on January 22, 2020, the same court concluded in *Briggs v. Southwestern Energy Production Company* that this rule controls even if, in “drilling his own land” and “tapping your gas,” a gas production company uses modern-day hydraulic fracturing techniques — as long as the company does not commit a trespass. In reaching this conclusion, the court turned aside the Pennsylvania Superior Court’s determination that, when hydraulic fracturing is used, the rule of capture does not apply. The Supreme Court’s decision establishes that, under Pennsylvania law, gas producers are not liable if they use hydraulic fracturing techniques in a way that “drains” gas from properties that they do not lease, as long as they do not physically invade those properties with underground fractures, fluids, or proppants. The court made it clear that the rule of capture applies in connection with artificial extraction techniques — including hydraulic fracturing — if there is no physical invasion of the unleased properties.

A. BACKGROUND AND THE SUPREME COURT’S DECISION

In *Briggs*, an oil and gas lease provided a gas producer with the oil and gas interests in a tract of land. In developing those interests, the producer conducted hydraulic fracturing operations within the shale formation in the tract. The producer did not hold an oil and gas lease on an adjacent tract of land. The owners of the adjacent tract sued the producer, alleging in their complaint that, in conducting the hydraulic fracturing operations, it had drained some of the gas from the shale formation in their tract and committed a trespass. They did not allege that the producer had physically invaded their land.

Relying on the rule of capture, a common pleas court issued a summary judgment in the gas producer’s favor. However, the Superior Court reversed that decision. In doing so, it rejected the rule of capture argument and suggested that, in hydraulic fracturing scenarios, the rule does not apply. The court posited, in this regard, that the rule is based on an assumption that “oil and gas originate in subsurface reservoirs or pools, and can migrate freely within the reservoir and across property lines, according to changes in pressure.”[2] The court reasoned that, by contrast, in order to recover gas from a shale formation, “the shale must be fractured through the process of hydraulic fracturing; only then may the natural gas contained in the shale move freely through the artificially created channels.”[3] The court also suggested that the owners of the adjacent tract had, in fact, alleged that the producer had physically invaded their land.

The Pennsylvania Supreme Court reversed the Superior Court’s decision. It pointed out, first, that “Plaintiffs did not assert...that [the producer] had effectuated a physical intrusion onto (or into) their property.”[4] The court explained that, nonetheless, the producer was not challenging the Superior Court’s suggestion to the contrary. Then, turning its attention to the rule of capture, the court rejected the Superior Court’s position that the rule applies only if “the defendant’s gas extraction methodology relies only on the natural drainage of oil or gas within a conventional pool or reservoir” and not if “those methods utilize some means of artificial stimulation to induce drainage.”[5] On this point, the court emphasized that, under its prior, binding decisions, the rule of capture applies even though “the driller uses further artificial means,” such as hydraulic fracturing techniques, “to enhance production from a source common to it and the plaintiff — so long as no physical invasion of the plaintiff’s land occurs.”[6] The court likewise rejected the notion that “drainage from under a plaintiff’s parcel can only occur if the driller first physically invades that property[.]”[7] Whether hydraulic fracturing operations can cause drainage in a “non-invasive” manner, the court explained, “is a factual question to be established through expert evidence.”[8]

The court ultimately remanded the case to the Superior Court. It reiterated that the gas producer had not challenged the “presupposition” that the adjacent owners’ subsurface property had been physically invaded “with hydraulic fracturing fluid and proppants” and, therefore, it instructed the Superior Court to determine “whether Plaintiffs may now proceed on a physical-invasion trespass cause of action[.]” [9]

B. HYDRAULIC FRACTURING RELATED SUBSURFACE TRESPASS CLAIMS IN THE FUTURE

The Supreme Court's Briggs decision establishes that, if gas producers use hydraulic fracturing techniques in a way that "drains" gas from properties that they do not lease, they are entitled to the benefit of the rule of capture, which shields them from liability for the drainage as long as they do not physically invade the unleased properties. Under Pennsylvania law, therefore, future claims that producers used hydraulic fracturing techniques to accomplish a subsurface trespass will likely focus primarily on the physical invasion issue. Plaintiffs will seek to demonstrate that the producers caused underground fractures, fluids, or proppants to invade the subsurface formations in their properties. They will therefore concentrate on factors like the location of the hydraulically fractured gas well (relative to their properties) and how, in particular, the hydraulic fracturing operations were conducted. The plaintiffs will bear the burden of proof and, as the Briggs court observed, the analysis will be a fact-intensive one, involving expert evidence. It is therefore unlikely that the claims will be resolved through preliminary objections or summary judgment practice, which may portend lengthy and complex litigation.

Mr. Holtzman can be reached at anthony.holtzman@klgates.com.

Mr. Vaitl can be reached at jon.vaitl@klgates.com.

NOTES

[1] Westmoreland & Cambria Nat. Gas Co. v. DeWitt, 18 A. 724, 725 (Pa. 1889).

[2] Briggs v. Southwestern Energy Prod. Co., 184 A.3d 153, 162 (Pa. Super. Ct. 2018).

[3] Id. (internal quotation omitted).

[4] Briggs v. Southwestern Energy Prod. Co., No. 63 MAP 2018, at *19 (Pa. Jan. 22, 2020) (emphasis added).

[5] Id. at *21.

[6] Id. at *22.

[7] Id. at *24.

[8] Id.

[9] Id. at *27. Along the way, the Supreme Court acknowledged the producer's argument that a "trespass should not be viewed as occurring miles beneath the surface of the earth." Id. at *25. However, because the producer had not identified that issue in its petition for allowance of appeal, the court declined to resolve it.

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Guest Article

AS THE UN HOLDS GLOBAL CLIMATE TALKS, CLIMATE CONSENSUS IS CRUMBLING

By Steve Goreham

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Ed. Note: Mr. Goreham is the Executive Director of the Climate Science Coalition of America, a non-political association of scientists, engineers, and citizens dedicated to informing Americans about the realities of climate science and energy economics.

The 24th Conference of the Parties (COP 24), a United Nations-led effort to fight global climate change, began on December 3 in Katowice, Poland. More than 15,000 attendees from 190 nations are expected to participate. But as delegates arrive at Katowice 2018, the global climate consensus is crumbling.

The UN Framework Convention on Climate Change has held annual conferences since COP 1 in Berlin, Germany in 1995, attempting to establish obligations on nations to reduce greenhouse gas emissions. Delegates and observers travel each year by carbon-emitting aircraft to exotic global locations, such as Bali, Geneva, and Nairobi, to haggle over the timing and amount of emissions reductions.

COP 3 in Kyoto, Japan in December 1997 was the first notable Conference of the Parties. COP3 adopted the Kyoto Protocol treaty, which obligated developed nations to reduce emissions 6 to 8 percent below 1990 levels. More than 190 nations adopted the Protocol, with the United States being the major exception.

COP 16 in Cancún, Mexico in December, 2010 established the “Green Climate Fund (GCF),” calling for \$100 billion per year to be contributed by developed nations to fund climate projects and programs in the developing nations. COP 16 also adopted the goal of limiting global temperature rise to 2° C warming over pre-industrial temperatures.

COP 21 in Paris adopted the Paris Climate Accords on December 12, 2015. The Paris Agreement was a non-binding agreement signed by 196 nations, pledging to reduce emissions from 2020 according to each nation’s own “nationally determined contributions.” The Paris Agreement reaffirmed commitments to the GCF and to limiting global temperature rise to “well below 2 degrees C.”

But as delegates arrived for this year’s conference in Katowice, it’s clear that efforts to fight climate change are in trouble. Almost all major nations are behind on their 2015 commitments to reduce emissions.

On June 1, 2017, US President Trump announced that the US would withdraw from the Paris Climate Accords. Subsequently, the US government slashed funding for UN climate efforts from \$1.7 billion in FY 2017 proposed by the Obama Administration to only \$160 million. Most of the cuts were from the amount proposed for the GCF.

Although established at COP 16 in 2010, funding for the Green Climate Fund has always been shaky. But the lure of \$100 billion in annual payments from wealthy to poor nations was a major reason for China, India, and other developing countries to support UN global warming efforts.

*Global Climate
continued on page 14*



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In 2014, contributors pledged \$10.3 billion to the GCF, with \$3 billion pledged by the Obama Administration. But only \$1 billion of the US pledge was delivered prior to the Trump Administration cuts. GCF projects today total less than \$5 billion in value. GCF Executive Director Howard Bamsey of Australia resigned after a meeting in July when no new projects were approved.

In addition to the collapse of the Green Climate Fund, rebellious citizens are forcing governments to scale back efforts to “fight” climate change in key nations. On August 24, Scott Morrison replaced Malcolm Turnbull as the new Prime Minister of Australia. Power outages and rising electricity prices from green energy policies played a key role in forcing the change of administration.

Former Prime Minister Tony Abbott, who led opposition efforts to change the government, called for Australia to abandon the Paris Accords in July. Threatened with trade sanctions, Prime Minister Scott Morrison announced in October that Australia would not leave the Paris Accords, but would no longer contribute to the GCF.

In Canada, Prime Minister Justin Trudeau continues to strongly support UN climate efforts, but his provincial governments are revolting. The provinces of Alberta, Ontario, Prince Edward Island, and Saskatchewan now oppose Trudeau’s carbon tax. In Ontario, where electricity prices have skyrocketed, Doug Ford was elected Premier in June. Ford immediately cancelled hundreds of renewable energy contracts and eliminated the \$14,000CN electric car subsidy.

Jair Bolsonaro, elected President of Brazil in October, declared in campaign speeches that he would pull his nation out of the Paris Climate Accords. After Bolsonaro’s election, France’s President Emmanuel Macron threatened not to sign the EU-Mercosur trade deal if Brazil withdrew from the Paris Agreement. Last week Bolsonaro stated that Brazil will remain in the agreement, but Brazil also withdrew its offer to host the 2019 COP 25 conference.

Last week, President Macron encountered a climate revolt in his own nation. More than 100,000 people took to the streets in Paris to protest his new fuel tax. Yellow-vested demonstrators clashed with police and scaled the Arc de Triomphe. Macron implemented the tax to reduce vehicle use to try to combat global warming.

Global climate efforts are crumbling. If the United Nations has its way, we may get to see the 50th Conference of the Parties. But on the other hand, citizens may force governments to stop foolish efforts to try to control global temperatures.

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Case of the Month - Right of Way

COVID-19 TAKINGS LAWSUIT FILED IN CALIFORNIA

*Benjamin Z. Rubin, Esq., Partner
Law Firm of Nossaman LLP*

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First reported by our good friends at inversecondemnation.com, a lawsuit has been filed in California alleging that the response by state and county agencies to the COVID-19 situation violates the state and federal Constitutions, and results in a partial or complete taking in violation of the Fifth Amendment to the U.S. Constitution. The named defendants include Governor Newsom, Attorney General Xavier Becerra, the State Public Health Officer, county Public Health Officers, and county representatives throughout Southern California. The [complaint](#) alleges:

- The “stay at home and shut down” orders unlawfully interfere with the federal constitutional right to travel;
- The orders violate plaintiffs’ substantive due process rights, because they deprive plaintiffs of their rights and liberties in lawfully operating their businesses;
- The orders violate plaintiffs’ procedural due process rights, because they were not provided with a constitutionally adequate hearing to present their case before being shut down;
- The orders violate the equal protection clause because they intentionally and arbitrarily categorize California businesses as “essential” or “non-essential,” and require those categorized as “non-essential” to shut down;
- The orders and enforcement thereof have caused both a complete and total regulatory and physical taking of plaintiffs’ property, or at least a partial taking without just compensation in violation of the Fifth Amendment’s takings clause;
- The orders violate plaintiffs’ right to liberty as guaranteed by the California Constitution; and
- The orders by Governor Newsom have commandeered plaintiffs’ “non-essential” businesses, requiring compensation under California Government Code section 8572.



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The lawsuit was filed in the United State District Court for the Central District of California. (Click [here](#) if you want to read about some of the significant hurdles associated with pursuing a takings claim based on government mandates surrounding COVID-19.) Given the breadth of the claims and the impact COVID-19 has had on the federal courts, it will be interesting to see how quickly this case moves forward, and the State’s response to being sued in federal court. Generally, the State or an arm of the State cannot be sued in federal court unless there is an express waiver of sovereign immunity or the plaintiff is simply pursuing injunctive relief (the Ex Parte Young exception to sovereign immunity). In this case, no express waiver of sovereign immunity is alleged, and while the Ex Parte Young exception could potentially be invoked with respect to many of plaintiffs’ claims, the courts have almost uniformly held that the Ex Parte Young exception does not apply to takings claims.



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It is possible that the plaintiffs intend to rely on the U.S. Supreme Court’s decision in *Knick v. Township of Scott* (2019) 139 S.Ct. 2162 to argue that sovereign immunity is no longer a viable defense to a Fifth Amendment takings claim against the State. (Click [here](#) to see our prior discussion of *Knick*.) In *Knick* the Supreme Court held that a property owner can bring a Fifth Amendment takings claim in federal court without first having to exhaust state judicial remedies. However, *Knick* did not contain any discussion of eliminating a state’s sovereign immunity, and at least two courts have expressly held that *Knick* did nothing to abrogate a state’s sovereign immunity in the takings context. (See *Williams v. Utah Dep’t of Corrections* (10th Cir. July 8, 2019) F.3d 1209; *Bear Crest Ltd. LLC v. Idaho* (D. Idaho July 17, 2019) 2019 U.S. Dist. LEXIS 120404.)

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Guest Article

KENTUCKY'S GREAT AMERICAN OIL WELL

*By Mr. Bruce A. Wells, Executive Director
American Oil and Gas Historical Society*

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March 11, 1829 – Boring for salt brine with a simple spring-pole device on a farm near Burkesville, Kentucky, Martin Beatty found oil at 171 feet deep. Disappointed, he searched elsewhere. Because oil from his well would be bottled and sold, some historians consider Beatty's discovery the earliest commercial oil well in North America.



*Drilled in 1829 about 250 miles north of Nashville, the Kentucky "salt well"
produced about 50,000 barrels of oil in three weeks*

Beatty, an experienced salt driller from Pennsylvania, had drilled brine wells to meet growing demand from settlers needing the dried salt to preserve food. He bored his wells by percussion drilling – raising and dropping a chisel from a sapling, an ancient technology for making hole.

According to historian Sheldon Baugh, prior to the Cumberland County oilfield discovery, Beatty first found oil in a McCreary County brine well in 1819. That well “provided very little of the useless stuff” and was soon forgotten. The historian described the scene of Beatty's oil well of March 11, 1829: On that day, well-driller Beatty bragged to bystanders “Today I'll drill her into salt or else to Hell.” When the gusher erupted, he apparently thought he'd succeeded in hitting “hell”! As the story goes “he ran off into the hills and didn't come back.”

A later newspaper account reported Beatty's well was neglected for years, “until it was discovered that the oil possessed valuable medicinal qualities.” Oil from Kentucky's Great American Oil Well eventually found its way to Pittsburgh, where Samuel Kier bottled and sold it as medicine. He would later refine kerosene from oil produced from the first commercial U.S. oil well.

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