Annual Oil and Gas Law Update

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IF IT AIN’T BROKE, ARKANSAS’ NEW MAJORITY WILL FIX IT ANYWAY

Administrative regulation of some industries is a necessary element of government. We live in a complex world. One industry which absolutely must be regulated is the oil and gas business, which has proven that it has the ability to absolutely implode\(^2\) if left unregulated. For that reason, oil and gas producing states regulate oil and gas production to prevent waste of hydrocarbon molecules and money spent producing those molecules, as well as protecting the correlative rights of the owners of those molecules. Over the last three-quarter century, producing states have accomplished that regulation through administrative agencies.\(^3\) That administrative regulation has proven advantages:

1. **Complexity of the Regulatory Problem.** Oil and gas exploration, production and associated processes are complicated, involving scientific concepts well beyond the understanding of most individuals. It only makes sense that any regulator of such a business should come staffed with the same variety of well-trained brains. If that kind of expertise exists elsewhere in government, it is by accident.

2. **Speed.** Unlike most of government, administrative agencies can be capable of acting and reacting to developments within their regulatory purview in real time, while it

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\(^1\)Member Daily & Woods, P.L.L.C., Fort Smith, AR

\(^2\)Via the common law Rule of Capture.

\(^3\)e. Arkansas Oil and Gas Commission, Texas Railroad Commission, Oklahoma Corporation Commission, etc.
3. **Specialization.** Our economy contains a pretty diverse array of businesses needing at least some regulation. Effective, efficient regulation of each of these requires some specialization. In other words, a good regulator of plumbers may not be so great at regulating obstetricians.

Despite the many good reasons why we have them, administrative agencies are not particularly popular, politically. After all, who wants his or her freedom restricted by a bunch of nameless, faceless, unelected bureaucrats? Well, I do, that is who. I do, because I have considered the alternatives. I do, because I know that the Arkansas Oil and Gas Commission, while not perfect, does a pretty darn good job. Regulation is a necessary evil. Such a specialized, technically competent administrative agency will do that job a whole lot better than that bunch we call the General Assembly. But not everyone agrees with me.\(^4\) They argue that rules, if we must have rules at all, should only come from people directly answerable to the electorate.

Administrative agencies are not listed as one of our three original branches of government, the executive, legislative and judicial. Rather, they are creatures of the legislature, somewhat loosely connected to the executive. The Oil and Gas Commission came about through as a result of Act No. 105 of 1939.\(^5\) That statute, as it has been amended, empowered the commission to enact reasonable rules, regulations

\(^4\)Which I have never understood.

and orders, so as to accomplish is many statutory purposes. The Commission is also subject to the Arkansas Administrative Procedures Act. That act requires all administrative agencies to:

(a)(1) Adopt as a rule a description of its organization, stating the general course and method of its operations, including the methods whereby the public may obtain information or make submissions or requests;

(2) Adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency;

(3) Make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions;

(4) Make available for public inspection all orders, decisions, and opinions.

(b) No agency rule, order, or decision shall be valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been filed and made available for public inspection as required in this subchapter. This provision shall not apply in favor of any person or party with actual knowledge of an agency rule, order, or decision.

So, administrative rules are not just permitted, they are required. It is easy to understand why agency rule-books are mandated. Some of us remember the 1970's, '80's and '90's, when practice before the Oil and Gas Commission required knowledge of its "unwritten rules," which, because they were unwritten, were sometime changed, ad hoc.

Whenever I think of those times, I see a vision of my old friend, dearly departed

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Dorsey Ryan, standing before this institute in 1986. Dorsey’s topic that day was “Practice and Procedure before the Arkansas Oil and Gas Commission,” about which he said:

For those of you who are not on the Commission’s mailing list, I have brought a small supply of the Commission’s written rules of procedure. If there aren’t enough to go around, it shouldn’t take long for those who get one to read it and give it to someone who didn’t. The written rules consist of a schedule of hearing dates (almost always the fourth Tuesday of each month), inform you that 10 copies of each application must be filed not later than 20 days in advance of the hearing, and that the applicant must furnish the Commission the names and addresses of interested parties, preferably in the form of mailing stickers. That more or less covers the subject of procedures of the Commission, at least insofar as they have been reduced to writing. I will now turn to the far more interesting unwritten rules of the Commission; some procedural, some substantive, and some that defy description.9

Mr. Ryan’s humorous and accurate description of the Commission’s rules and regulations of that time is no longer valid. Our current Commission staff has changed that. A major priority has been to complete and modernize the commission’s book of rules. Today’s Oil and Gas Commission’s rule book is a shining example of competent, comprehensive regulation of this complex industry.10 Still, that work will never completely finished, because the subject matter of the rules does not stand still. The rules must remain fluid to accommodate changes in the industry, as well as improved understanding of the world underground.

The rulemaking process is set out in the Arkansas Administrative Procedures

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10 See Thomas A. Daily, RULES DONE RIGHT–HOW ARKANSAS BROUGHT ITS OIL AND GAS LAW INTO A HORIZONTAL WORLD, Scheduled for publication in Ark. Law Rev. (Oil and Gas Law Symposium Issue (2012)).
Act:

Rules--Procedure for adoption

(a) Prior to the adoption, amendment, or repeal of a rule, the agency shall:

(1)(A)(i) Give at least thirty (30) days' notice of its intended action.

(ii) The thirty-day period shall begin on the first day of the publication of notice.

(B) The notice shall include:

(i) A statement of the terms or substance of the intended action or a description of the subjects and issues involved; and

(ii) The time, location, and manner in which an interested person may present his or her position on the intended action of the agency or on the issues related to the intended action of the agency.

(C) The notice shall be mailed to:

(i) A person specified by law; and

(ii) A person who has requested advance notice of rule-making proceedings.

(D) Unless otherwise provided by law, the notice shall be published:

(i) In a newspaper of general daily circulation for three (3) consecutive days and, when appropriate, in those trade, industry, or professional publications that the agency may select; and

(ii) By the Secretary of State on the Internet for thirty (30) days under § 25-15-218;

(2)(A) Afford all interested persons reasonable opportunity to submit written data, views, or arguments, orally or in writing.

(B) The agency shall grant an opportunity for an oral hearing if requested by twenty-five (25) persons, by a governmental subdivision or agency, or by an association having at least twenty-five (25) members.

(C) The agency shall fully consider all written and oral submissions respecting the proposed rule before finalizing the language of the
proposed rule and filing the proposed rule as required by subsection (e) of this section.

(D) If an interested person requests a statement of the reasons for and against the adoption of a rule before adoption or within thirty (30) days after adoption, the agency shall issue a concise statement of the principal reasons for and against its adoption, incorporating its reasons for overruling the considerations urged against its adoption.

(E) When rules are required by law to be made on the record after opportunity for an agency hearing, the provisions of that law shall apply in place of this subdivision (a)(2); and

(3) Consider the following factors:

(A) Whether the agency is required by statute to adopt the proposed rule, whether by a specific date, and whether the agency has discretion to promulgate rules;

(B) Other statutes relevant to the proposed rule and its alternatives;

(C) The specific nature and significance of the problem the agency addresses with the proposed rule including without limitation:

(i) The nature and degree of the risks the problem poses;

(ii) The priority of addressing those risks as opposed to other matters or activities within the agency's jurisdiction;

(iii) Whether the problem warrants new agency action; and

(iv) The countervailing risks that may be posed by alternative rules for the agency;

(D) Whether existing rules have created or contributed to the problem the agency is addressing with the proposed rule, and whether those rules could be amended or repealed to address the problem in whole or in part;

(E) Reasonable alternatives to the proposed rule including without limitation:

(i) Adopting no rule;

(ii) Amending or repealing existing rules; and
Other potential responses that could be taken instead of agency action;

(F) The financial impact of the proposed rule; and

(G) Any other factor relevant to the need for and alternatives to the proposed rule.

(b)(1) An agency shall not adopt, amend, or repeal a rule unless the rule is based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule.

(2) An agency shall adopt the least costly rule considered under this section, unless:

(A) The additional benefits of the more costly rule justify its additional cost;

(B) The agency explains its reason for adoption of the more costly rule in writing;

(C) The reason is based on the interests of public health, safety, or welfare; and

(D) The reason is within the scope of the agency's statutory authority.\textsuperscript{11}

The Administrative Procedures Act does permit an agency to somewhat speed the above process by adopting an “emergency rule,” after finding that ‘imminent peril to the public health, safety, or welfare or compliance with federal law requires adoption of a rule upon less than thirty (30) days’ notice and states in reasons for that finding.” However, an emergency rule may be effective for no longer than 120 days and may only be extended or renewed by a rule adopted under the more formal process.\textsuperscript{12}

Starting in 2007, legislation imposed another requirement upon administrative

\textsuperscript{11}Ark. Code Ann. § 25-15-204 (a) and (b).

regulators, the statement of economic impact. That requirement now resides in § 25-15-204 (e) and (f):

(e)(1)(A) An agency shall file with the Secretary of State, the Arkansas State Library, and the Bureau of Legislative Research a copy of each rule proposed by it and a financial impact statement for the proposed rule.

(B) A rule shall be filed in compliance with this section and with §§ 25-15-218 and 10-3-309.

(2) The Secretary of State shall keep a register of the rules open to public inspection, and it shall be a permanent register.

(3) If the purpose of a state agency rule is to implement a federal rule or regulation, the financial impact statement shall include:

(A) The cost to implement the federal rule or regulation; and

(B) The additional cost of the state rule.

(4)(A) If a financial impact statement reveals a new or increased cost or obligation of at least one hundred thousand dollars ($100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined, the agency shall file written findings at the time of filing the financial impact statement.

(B) The written findings shall be filed simultaneously with the financial impact statement and shall include without limitation:

(i) A statement of the rule's basis and purpose;

(ii) The problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;

(iii) A description of the factual evidence that:

(a) Justifies the agency's need for the proposed rule; and

(b) Describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;

(iv) A list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved.
by the proposed rule;

(v) A list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;

(vi)(a) A statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule.

(b) If existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and

(vii) An agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including without limitation whether:

(a) The rule is achieving the statutory objectives;

(b) The benefits of the rule continue to justify its costs; and

(c) The rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

(f)(1)(A) Each rule adopted by an agency is effective thirty (30) days after filing of the final rule with the Secretary of State unless a later date is specified by law or in the rule itself.

(B) A final rule shall not be filed until the thirty-day public comment period required under subdivision (a)(1)(A) of this section has expired.

(C)(i) After the expiration of the thirty-day public comment period and before the effective date of the rule, the agency promulgating the rule shall take appropriate measures to make the final rule known to the persons who may be affected by the rule.

(ii) Appropriate measures shall include without limitation posting the following information on the agency's website:

(a) The final rule;

(b) Copies of all written comments submitted to the agency regarding the rule;

(c) A summary of all written and oral comments submitted to the agency
regarding the rule and the agency’s response to those comments;

(d) A summary of the financial impact of the rule; and

(e) The proposed effective date of the final rule.

(2)(A)(i) However, an emergency rule may become effective immediately upon filing or at a stated time less than thirty (30) days after filing if the agency finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare.

(ii) The agency's finding, a brief statement of the reasons for the finding, and the financial impact statement shall be filed with the rule.

(B) The agency shall take appropriate measures to make emergency rules known to the persons who may be affected by the emergency rules.

Still another statute, codified outside of the Administrative Procedures Act, requires that each new rule or amendment to rule be submitted to the Arkansas Legislative Counsel for review\(^\text{13}\) or, when the Legislature was out-of-session, a legislative interim committee:

**Review of state agency rules, regulations, amendments, revisions, etc.**

(a)(1)(A) In the passage of this section, the General Assembly is aware of the significant number of laws which have been enacted granting to boards, commissions, departments, and administrative agencies of state government the authority to promulgate and enforce rules and regulations.

(B) The General Assembly is further aware that ample safeguards have not been established whereby the General Assembly may be informed of circumstances in which administrative rules and regulations do not conform to legislative intent.

(2) It is the purpose of this section to establish a method for continuing legislative review of such rules and regulations whereby the General Assembly at each legislative session may take remedial steps to correct

\(^{13}\)When the legislature was not in session, this submission was to an interim committee of legislators.
abuses of rulemaking authority or clarify legislative intent with respect to the rulemaking authority granted the administrative boards, commissions, departments, or agencies.

(b)(1)(A) Whenever a state agency finalizes the promulgation of a rule or regulation or a revision, amendment, or change in the regulation, a copy shall be filed with the Bureau of Legislative Research if the rule or regulation contains any changes from the initial filing of the rule or regulation.

(B) A state agency shall notify the Legislative Council of its intention to repeal any rule or regulation which is on file with the bureau.

(2) As used in this section, “state agency” means any office, board, commission, department, council, bureau, or other agency of state government having authority by statute enacted by the General Assembly to promulgate or enforce the administrative rules and regulations.

(c)(1) The research staff of the bureau shall study and review all current rules, or proposed rules, and all adopted amendments and revisions of rules by state agencies and shall report to the Legislative Council in regard to them.

(2) The Legislative Council shall act in an advisory capacity to the General Assembly with respect to administrative rules and procedures and shall report to the General Assembly at each regular session all administrative rules and regulations which the Legislative Council believes to be contrary to legislative intent or promulgated without legislative authority.

(d)(1)(A) The Legislative Council may selectively review possible, proposed, or adopted rules and regulations and prescribe appropriate Legislative Council procedures for that purpose.

(B) The Legislative Council may receive and investigate complaints from members of the public with respect to possible, proposed, or adopted rules and regulations and hold public proceedings on those complaints.

(2)(A) The Legislative Council may request a representative of an agency whose possible, proposed, or adopted rule or regulation is under examination to attend a Legislative Council meeting and answer relevant questions.

(B) The Legislative Council may also communicate to the agency its nonbinding comments on any possible, proposed, or adopted rule or regulation and request the agency to respond to them in writing.
(3)(A) The Legislative Council may recommend and refer the recommendation to the appropriate committee or committees of the General Assembly:

(i) Enactment of a statute to improve the operation of an agency; and

(ii) That a particular rule or regulation be superseded in whole or in part by statute.

(B) Subdivision (d)(3)(A) of this section does not preclude any committee of the General Assembly from reviewing a rule or regulation on its own motion or recommending that it be superseded in whole or in part by statute.

(4)(A)(i) If the Legislative Council considers all or any portion of a rule or regulation to be beyond the procedural or substantive authority delegated to the adopting agency, the Legislative Council may file notice of that with the agency issuing the rule or regulation in question.

(ii) The notice shall contain a concise statement detailing the precise reasons that the Legislative Council considers the rule or regulation, or portion thereof, to be beyond the procedural or substantive authority delegated to the agency.

(B) The Legislative Council shall maintain a permanent register open to public inspection of all notices.

(C)(i) Within thirty (30) calendar days after the filing of an objection by the Legislative Council to a rule or regulation, the issuing agency shall respond in writing to the Legislative Council.

(ii) After receipt of the response, the Legislative Council may withdraw or modify its findings.

(D) The failure of the Legislative Council to file a notice regarding a rule or regulation is not an implied legislative authorization of its procedural or substantive validity.

(5) The Legislative Council may make nonbinding recommendations to an agency that it adopt a rule or regulation.

(e)(1)(A) Before any rule or regulation of any state agency may be revised, promulgated, amended, or changed, a copy of the rule or amendment to existing rules and a financial impact statement shall be
filed with the bureau at least thirty (30) days before the expiration of the period for public comment on the rule pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq., or other acts pertaining to the rule-making authority of that agency.

(B) The scope of the financial impact statement shall be as provided under the Arkansas Administrative Procedure Act, § 25-15-201 et seq., and shall include without limitation the estimated cost of complying with the rule or regulation and the estimated cost for the agency to implement the rule or regulation.

(2) The bureau shall review the proposed revised or amended rule or regulation and, if it is believed that the rule or regulation is contrary to legislative intent, shall file a statement thereof with the Legislative Council.

(3) Filings under the Arkansas Administrative Procedure Act, § 25-15-201 et seq., and any comment on the proposed rule or regulation prepared by the bureau shall be submitted to the Legislative Council at the next regular meeting following its filing with the Legislative Council.

(f)(1) In addition, before any rule or regulation of any state agency may be revised, promulgated, amended, or changed, a copy of the rule or amendment to existing rules shall be filed with the interim committees of the General Assembly having responsibility for review of that agency under Acts 1977, No. 100.

(2) The filing shall be made at least thirty (30) days before the expiration of the period for public comment on the rule, pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq., or other acts pertaining to the rulemaking authority of the agency.

(g)(1) The Joint Budget Committee shall establish the Administrative Rule and Regulation Review Subcommittee.

(2)(A) The Administrative Rule and Regulation Review Subcommittee shall consist of twenty-two (22) members of the General Assembly.

(B)(i) Nine (9) members of the Administrative Rule and Regulation Review Subcommittee shall be appointed by the Senate Cochair of the Joint Budget Committee.

(ii) The Senate Cochair of the Joint Budget Committee shall designate one (1) of his or her appointees as Senate Cochair of the Administrative Rule and Regulation Review Subcommittee.
(C)(i) Nine (9) members of the Administrative Rule and Regulation Review Subcommittee shall be appointed by the House Cochair of the Joint Budget Committee.

(ii) The House Cochair of the Joint Budget Committee shall designate one (1) of his or her appointees as House Cochair of the Administrative Rule and Regulation Review Subcommittee.

(3) The cochairs and co-vice chairs of the Legislative Council shall be ex officio members of the Administrative Rule and Regulation Review Subcommittee.

(4)(A) The Administrative Rule and Regulation Review Subcommittee may meet only during a regular, fiscal, or extraordinary session of the General Assembly.

(B) The Administrative Rule and Regulation Review Subcommittee shall meet at the call of the cochairs of the Administrative Rule and Regulation Review Subcommittee.

(5)(A) During a regular, fiscal, or extraordinary session of the General Assembly, the Administrative Rule and Regulation Review Subcommittee may perform the functions assigned to the Legislative Council under this section.

(B) Actions taken by the Administrative Rule and Regulation Review Subcommittee under subdivision (g)(5)(A) of this section have the same effect as actions taken by the Legislative Council under this section.

(C) If the Administrative Rule and Regulation Review Subcommittee meets during a regular, fiscal, or extraordinary session of the General Assembly, the Administrative Rule and Regulation Review Subcommittee shall file a report of its actions with the Legislative Council as soon as practicable.

While the above legislatively imposed restrictions upon administrative rulemaking make the process of regulation more time-consuming and expensive, they are not without logic. The legislature created the agencies in the first place. It makes sense for the legislature to monitor what its creations are up to. An agency did not need legislative permission to make or change a rule, but the legislature needed to be
Informed. Then, should the legislature conclude that an agency’s rule was not appropriate, it had pretty strong powers of persuasion.

But wait! Here there is the news. We, the voters of this state just passed Amendment No. 92 to our state’s constitution creating a new Section 42 of the Constitution’s Article 5. The amendment is short and simple:

**Review and approval of administrative rules**

(a) The General Assembly may provide by law:

(1) For the review by a legislative committee of administrative rules promulgated by a state agency before the administrative rules become effective; and

(2) That administrative rules promulgated by a state agency shall not become effective until reviewed and approved by the legislative committee charged by law with the review of administrative rules under subdivision (a)(1) of this section.

(b) The review and approval by a legislative committee under subsection (a) of this section may occur during the interim or during a regular, special, or fiscal session of the General Assembly.

It looks like the Oil and Gas Commission will now need advance legislative approval of even the smallest, least controversial rule or rule change. The Amendment, all by itself, changed nothing. It simply empowered the Legislature to enact enabling legislation to define and appoint a legislative committee with power over all rules of administrative agencies, including the Oil and Gas Commission. That enabling legislation could still leave us with a workable system, or not.

So what will the enabling legislation look like? As of this moment, we don’t know. State Senator Jonathan Dismang, the original sponsor of Amendment 82 introduced a bill on the very first day of the current session. It is Senate Bill No. 2.
However, it is nothing but a bill title as it currently sits in the hopper. It is what we call a “shell bill,” a place-holder occupying a bill number until the sponsor is ready to publish the real proposal. Shell bills are not uncommon. Senator Dismain wants to control the timing of this legislative discussion. Meanwhile, it is hard to muster much opposition to a shell bill, since people first want to know what it is they are against.

Still, we can begin thinking what we want the legislature to do about Amendment 92. Here are some suggestions, in no particular order of importance:

1. The enabling legislation should set forth a timetable for legislative review. It should require the review committee to approve or disapprove a submitted proposed regulation within a relatively short time frame and provide that if the committee fails to approve or disapprove within that time frame, the regulation becomes effective. Without that, the committee could disable an agency by simply ignoring its proposals.

2. The enabling legislation should permit agencies to enact emergency regulations, as before, without waiting for the review process. Certainly, subsequent review might disapprove and thus terminate such emergency regulations, but emergencies happen and need to be dealt with as such.

3. The enabling legislation should construct the reviewing committee or committees in such a way that they contain legislators who understand what the agency submitting the regulation under review does. Amendment 92 does not restrict the Legislature’s option to a single committee. We could have specialized legislative committees for each type of agency whose regulation was involved in the review.

Just when you thought we were done, here is more!!! The last dance at the inaugural ball was hardly finished when he issued Executive Order No. 15-2, which now involves the Governor’s office in every new administrative regulation adoption or amendment. For your very own look at Executive Order No. 15-2, turn the page.

This could all work out fine, I guess, but I am worried that too much of this oversight may hamper the agency which I care about from doing its job. It looks as though we have fixed a problem which we never had. I can imagine problems in the fix.
PROCLAMATION

TO ALL TO WHOM THESE PRESENTS COME -- GREETINGS:

EXECUTIVE ORDER REQUIRING GOVERNOR REVIEW OF STATE AGENCY RULES AND REGULATIONS PRIOR TO SUBMISSION TO A LEGISLATIVE COMMITTEE OF THE GENERAL ASSEMBLY

WHEREAS: The increasing number, complexity and cost of government regulations impose a significant burden on businesses; and

WHEREAS: The agencies must ensure that rules and regulations promulgated by agencies do not unnecessarily create entry barriers, stifle entrepreneurial activity or curb innovation; and

WHEREAS: In the course of developing new rules and regulations and amending existing ones, it is important that agencies seek approval of the Governor; and

WHEREAS: It is the policy of this administration to prohibit unnecessary rules and regulations that burden businesses;

NOW, THEREFORE, I, ASA HUTCHINSON, acting under the authority vested in me as Governor of the State of Arkansas, do hereby order the following:

1. That all state offices, departments and agencies, unless granted an exemption by the Governor, shall submit all proposed new rules and regulations and amendments to existing rules and regulations to the Governor for approval.

2. That before submitting proposed rules or regulations for review by a legislative committee of the General Assembly, proposed rules and regulations must first be approved by the Governor.

3. That upon a determination by the Governor that a rule or regulation unnecessarily burdens businesses, that rule or regulation shall not be submitted to a legislative committee of the General Assembly nor shall the rule or regulation become effective.

This Executive Order shall become effective upon its signing, and shall remain in full force and effect until amended or rescinded by further executive orders.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Arkansas to be affixed at the Capitol in Little Rock on the 14th day of January, in the year of our Lord 2015.

ASA HUTCHINSON, GOVERNOR

MARK MARTIN, SECRETARY OF STATE
Meanwhile, very recently, another bill has been introduced into the Legislature dealing with administrative agencies. This one appears to make more sense than most. Senate Bill No 382, introduced by Senator Eddie Joe Williams seeks to tentatively reorganize Arkansas’ many duplicative administrative agencies into ten departments, each with a provisional department secretary appointed by the Governor. The secretaries’ first charge would be to study permanent reorganization of these agencies into similar departments and, hopefully eliminate the obvious waste from unnecessary duplication.

The Oil and Gas Commission would be provisionally become part of the Department of Natural Resources along with the Natural Resources Commission, the Water Well Commission, the Forestry Commission, the Geological Survey, the Division of Engineering, the HVACR Program of the Department of Health, the Marine Sanitation Program and the Federal Housing and Urban Development Community Development Block Grant program of the Arkansas Economic Development Commission.

Just reading a list of all of Arkansas’ boards, committee’s and agencies will exhaust you. You see, this very same cost-cutting Arkansas Legislature has managed to create, over the years, over 150 state boards and agencies, many of which you have never heard of, each of which has a budget of some sort.

I like the Oil and Gas Commission, just like it is. Still, I can see more sense in this proposal than most of what comes out of the Legislature these days. Also, even if Senate Bill No. 382 is enacted, it will only begin a study to determine whether
reorganization and/or consolidation of agencies would be a good idea. It is hard to be against studying.

Well, enough of that. Let's look at a couple of recent cases.

**Eighth Circuit Court Affirms District Court’s Denial of New Trial Over Jurors’ Outside-of-Record Discussion in Damage-From-Drilling Case**

Our constitutions, both federal and state, guarantee for us a right of trial by a jury of our peers, whatever “peer” means. Ponder this sad story. XTO Energy Inc. drilled a well near a road named “Bluebonnet Lane,” in White County, on land owned by one Todd Williams, whose next-door neighbor was Ruby Hiser. Todd was fine with the deal but Ruby was not pleased.

It seems Ruby’s house was falling down. In her suit she blamed XTO, claiming that XTO’s “drilling machinery and equipments [sic], has created mechanical vibrations which have caused near-destruction to [her] home...” Ms. Hiser went on to itemize, in detail that she suffered “foundation blocks cracked, block mortar destroyed, foundation rendered unstable and unlevel, separation of roofing, ceramic tile and mortar being cracked and loosed, separation of countertops, cracks in ceiling, broken bay window, door hinge bolts worked out, cracks in sheet rock, and constant vibrations being now evident and detectable to the human senses.” Indeed, as she continued, “Defendant’s drilling operations damaged the Plaintiff’s house, and destroyed it from the foundation to the trusses. This damage is constant, continuing and will ultimately lead to the total destruction of the Plaintiff's house.” Somehow she failed to allege she herself had been rendered sick, sore and lame, instead relying only upon her property damage claim. XTO removed the case to United States District Court.
It was beyond dispute that Ms. Hiser’s house was a wreck. XTO contended that was caused by its poor construction, not XTO’s well. The trial was laced with XTO’s objections to a near-complete lack of evidence connecting the Hiser home’s structural problems to XTO’s drilling.\textsuperscript{14} About all that Ms. Hiser’s expert was allowed to say was that the cracks in her house were “consistent” with vibrations. Apparently, that was her total case. In spite of that little technicality, XTO’s peers returned a verdict in favor of Ms. Hiser for $100,000 actual and $200,000 punitive damages.\textsuperscript{15}

XTO’s appeal was based upon a claim of juror misconduct. During its deliberations, the jury submitted this question to the district court: “Were they drilling only or were they also fracking?” That is a pretty strange question, considering that hydraulic fracturing was never mentioned, by anyone, during the trial. The court responded that the jury could only consider the evidence before it. Afterward, XTO submitted an affidavit from one juror swearing that the jury had indeed discussed “common knowledge” that fracking caused vibrations and earthquakes.

XTO moved for new a trial, based upon its contention that the “jury verdict was tainted by the consideration of extra-record evidence.” After a hearing, that motion was denied by the district court, which also denied XTO’s request to subpoena the juror who had allegedly instigated the “fracking” discussion but who did not respond to the court’s request for a voluntary interview. The district court concluded that XTO had not met its

\textsuperscript{14}Which were mostly overruled.

\textsuperscript{15}The $100,000 actual damages appears to just be a number plucked from space and my brain is incapable of understanding how to justify any punitive damages on what was, at best, a simple negligence claim.
burden to show that the jury’s apparent fracking discussion influenced the verdict. The appeals court affirmed, holding that the trial court’s ruling was not an abuse of discretion.

Is there a lesson here? Can anything be learned from this? How should a defendant defend against a theory of causation which the plaintiff never even presented at trial, but the jury may have considered, anyway?

There are no correct answers to those questions. The real problem is one we see far too often. A trial court apparently viewed its duty to be one of simply rolling the ball to the jury and getting out of the way.

This is exactly what starts some people demanding “tort reform.” Indeed, as of this writing, there are no less than ten House or Senate Joint Resolutions pending in Arkansas’ current legislative session dealing either with specific tort reform or seeking to transfer control of the state’s civil justice system from the Supreme Court to the Legislature. I am getting to the point where I do not blame those who champion such ideas of “reform,” though I have not seen many things that the Arkansas’ legislature made better. The point is this. If our system of trial by “peers” is going to survive a legislative revolt, judges must become better filters between the litigants and the jury. Too often they seem to abdicate that role. When judges just let the jury sort it out, *Hiser* is often what you get, and that is not good.16

16I acknowledge a bit of a disconnect here, since *Hiser* was a federal court case and the clear and present tort reformers are in the state legislature. Still, you get my point, don’t you. *Hiser* is a great example of why being a plaintiff in a jury case easily beats the lottery. And, if anything, we would expect less of that lottery business in federal court than in state court. I am sure that is the reason XTO removed *Hiser*, to begin with. Be careful what you wish for.
FEDERAL APPEALS COURT AFFIRMS SUMMARY JUDGMENT THAT A LESSEE MAY RELEASE AN OIL AND GAS LEASE AND THUS DISCHARGE ITS DRILLING OBLIGATION

First Tennessee Bank, Trustee, v. Pathfinder Exploration, LLC 17 affirmed a United States district court’s award of summary judgment to a lessee, Pathfinder, dismissing trustee’s claim that Pathfinder owed it liquidated damages for failing to perform its duty, under a provision of the lease, to drill five wells during the lease term. Pathfinder paid approximately $2.3 million dollars as up-front bonus for the leases which contained an express requirement that it drill a minimum of five wells on the leased lands. The lease provided for liquidated damages of $100,000 for each well not drilled.

When it realized the lease’s area was not prospective, Pathfinder executed and recorded a release of that lease. The lessor then sought $500,000 in liquidated damages for failure to drill any of the promised wells. Both the district court and Eighth Circuit Court of Appeals agreed that the lease’s Surrender Clause gave the lessee the unilateral ability to terminate the lease at any time, without further liability. The appeals court’s decision was based, largely, upon the decision the Arkansas Court of Appeals in a case with similar facts, Frein v. Windsor Weeping Mary, LP. 18 While the Arkansas Court of Appeals is only an intermediate appeals court, its decision in a case which the Eighth Circuit Court termed “not distinguishable” is the “best evidence of Arkansas Law” on the subject.

FEAR NOT. THE ARKANSAS GENERAL ASSEMBLY IS BUSY MAKING YOU SAFE

17 754 F.3d 489 (2014).
2015 is an odd number. We all know what that means. There is a giant tea party ongoing in Little Rock where our elected Senators and Representatives are competing to see which of them can champion the nuttiest piece of Obama-hating, gun-toting, gay-bashing, abortion-stopping wannabe law. The winning representative or Senator will capture the bi-annual award bestowed by a group of legislative insiders named the “Gang Of Over-Reacting, Fifth-wit Yokels,” who emerge each odd year to present the coveted “Goofy.” Right now, with most of the players still out on the course, we have a virtual tie in the clubhouse between House Bill No. 1077, sponsored by Representative Charlie Collins and Senate Bill No. 229, sponsored by Senator John Cooper. Representative Collins’ entry in the sweepstakes is titled: AN ACT CONCERNING THE POSSESSION OF A CONCEALED HANDGUN IN A UNIVERSITY, COLLEGE, OR COMMUNITY COLLEGE BUILDING; AND FOR OTHER PURPOSES. Its subject appears to be of much legislative concern, lately—guns, guns and guns. During the Legislature’s 2013 session, Collins earned the support of the gun lobby by championing a law permitting certain persons who had taken the quickie concealed weapons course, to pack their heat on college campuses. Fortunately, though, schools had the right to affirmatively opt out of that legislation. So far, every campus in the state has wisely, opted out.

Not to be deterred, Rep. Collins filed House Bill No. 1077 in the current session. The bill, if it was ever enacted, would remove the opt-out option and require educators to let their employees pack more to school than just lunch. That, according to Rep.

19Essentially, full time employees.
Collins, will stop those mindless school shootings going on out there.

Makes sense, right? He assures us that the mindless shooter will think twice before committing unspeakable violence at a place where he knows someone might be armed. To a few of us sceptics, that logic may be a bit flawed. If mindless shooters are truly mindless, they likely give little or no thought to who might shoot back.

Senator Cooper’s bill is harder to explain. The title is AN ACT TO PROTECT THE RIGHTS AND PRIVILEGES GRANTED UNDER THE UNITED STATES CONSTITUTION AND THE ARKANSAS CONSTITUTION; TO DECLARE AMERICAN LAWS FOR AMERICAN COURTS; AND FOR OTHER PURPOSES. It has to do with choice-of-law clauses in contracts. Read it for yourself:

(b) A court, arbitration, tribunal, or administrative agency ruling or decision violates the public policy of this state and is void and unenforceable if the court, arbitration, tribunal, or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on any foreign law, legal code, or system that does not grant the parties affected by the ruling or decision one (1) or more of the following fundamental liberties, rights, and privileges granted under the United States Constitution or the Arkansas Constitution:

(1) Due process;
(2) Equal protection;
(3) Freedom of religion;
(4) Freedom of speech;
(5) Freedom of the press;
6) Keep and bear arms;
7) Privacy; or
(8) Marriage, as defined by Arkansas Constitution, Amendment 83.20

Let’s play out a hypothetical. Senate Bill No. 229 becomes law, God forbid.

Then Bob, a citizen of Arkansas, makes a business contract with a British Company, Harrods of London. During contract negotiations Harrods’ lawyers succeed in inserting

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20Emphasis added.
a choice-of-law provision choosing the law of the United Kingdom. Bob was not overly worried. English law is, after all the mother of much of our law over here in the new world. When Bob breaches the agreement, Harrods sues and wins.

“But wait!!!, Queen’s X!!!,” shouts Bob’s lawyer. “The law of the United Kingdom does not guarantee ‘rights of Marriage, as defined by Arkansas Constitution, Amendment 83.’”2¹ That is correct. Same-gender unions are perfectly legal over there. So, is Harrods’ judgment against the defaulting Arkansas citizen void? Nope. Fooled you. “One (1) or more” does not mean “all”. Therefore, since UK law guarantees several of the items on Senator Cooper’s list, Harrods skates through by the skin of its due process. Come to think of it, there are not many places on earth that don’t guarantee at least one of the eight items on the Senator’s list. Even those repressive nations which deny its citizens the first seven would be all for number eight. What on earth is the point of this bill?

Well, at least neither of those bills are directly related to natural resources law and my job is to concentrate on those bills which are so related. As of this date, with the aforementioned legislation dealing with administrative agencies, only one filed bill meets that criteria and it is harmless. Senate Bill No. 2015, by Senator B. Pierce, would amend the Brine Conservation Act to permit the expansion of existing brine production units through brine expansion units. The result would be to append an new

2¹We all know that Amendment 83 defines “marriage” as a union between one (1) man and one (1) woman, both being primate human beings, and expressly prohibits any other marriage and forbids its recognition in this state, even if legally entered into elsewhere. Also, if we read the news, we also know that said Amendment 83 has been declared unconstitutional by one (1) Circuit Judge and one (1) United States District Court Judge, to date.
brine expansion unit to the existing unit with which it was geologically related and add the brine owners within the expansion unit to those entitled to statutory royalty during the time that the expansion unit either produced or injected brine. The bill also corrects the name of the federal pricing index used for annual escalation of the brine royalty from the United States Producer Price Index for Intermediate Materials, Supplies and Components\(^22\) to the United States Producer Price Index for Processed Goods for Intermediate Demand.\(^23\)

Another pending bill needs mention. House Bill No. 1158, by Representative Womack, has already cleared its House committee. It’s title is AN ACT TO AMEND ARKANSAS LAW CONCERNING THE RIGHT TO ENGAGE IN A LAWFUL OCCUPATION; TO STIMULATE JOB CREATION AND ECONOMIC DEVELOPMENT WHILE PRESERVING HEALTH AND SAFETY STANDARDS; AND FOR OTHER PURPOSES. Essentially, this bill guarantee that every person could engage in the occupation of his or her choice unless the state met its burden to prove, by “clear and convincing evidence” that the Government “has an important interest in protecting against present and recognizable harm to the public health or safety” and “the occupational regulation is the least restrictive means of furthering the important governmental interest.”

The Arkansas Bar Association officially opposes this bill, because of its concern that it may authorize an unqualified and unlicensed person to engage in law practice. I

\(^{22}\)Which no longer exists.

\(^{23}\)Which does exist, at least for now.
see the glass as half-full. I always wanted to be a brain surgeon.

It will be surprising if there are not more specifically natural resource related bills introduced before the session’s end. I cannot remember a legislative year without at least one bill designed to revert severed mineral interests to the surface owners. There is plenty of time for that. The session is still young.

Meanwhile, to fend off the boredom while waiting, we note a little gem now alive in Mississippi’s legislature. It is Mississippi Senate Bill No. 2316, titled: AN ACT TO CREATE THE MISSISSIPPI MINERAL RIGHTS REFORM ACT OF 2015; TO REQUIRE REGISTRATION OF SEVERED MINERAL INTERESTS IN THE OFFICE OF THE CHANCERY CLERK OF THE COUNTY IN WHICH THE MINERAL INTEREST IS LOCATED; TO PROVIDE FOR FORFEITURE TO THE STATE OF ANY SEVERED MINERAL INTEREST NOT SO REGISTERED; AND FOR RELATED PURPOSES.

If it becomes law, this bill will require each separate owner of each severed mineral interest in all of Mississippi to record a “verified statement, in triplicate, setting forth the owner’s address, interest in the minerals, and both (i) the legal description of the property upon or beneath which the interest exists, and (ii) the book and page number of the instrument by which the mineral interest is created or acquired. No statement may be recorded which contains mineral interests from more than one (1) governmental section unless the instrument by which the mineral interest is created or acquired includes mineral interests from more than one (1) governmental section.” Severed mineral owners will have until January 1, 2016 to get this done. Failure to comply will result in forfeiture of the interest in question to the State of Mississippi.
The bill is somewhat similar to severed mineral prescription bills which are filed in Arkansas' legislature nearly every session. However, those bills are usually designed to bestow the windfall of the forfeiture upon the lucky surface owner, above the previously severed interest, not the dreaded government.

In a perverse sort of way, I can see justice behind the Mississippi bill. First, assume it is somehow fair to deprive severed mineral owners of their property rights. In that case, why bestow those expropriated minerals to the unworthy surface owners when you can use them to balance the state's budget, thus do-gooding for each and every voting/taxpayer. It will likely not work, however. Those voters will probably never realize their windfall.

Alas, my deadline for submitting this article looms. I must close. Nevertheless, I will continue to monitor events and will report any new ones orally, if warranted.