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OIL'S WELL THAT ENDS WELL—AN APPLICATION FOR A NEW MEXICO-TEXAS TRANSBOUNDARY WELL AND ITS IMPLICATIONS

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Oil and gas frequently cross jurisdictional lines—such as those between counties or states—creating a complex commingling of state, local, and private interests left to the states to resolve independently through statutes and regulations. Historically, the federal government's regulation of oil and gas was limited to leasing operations on federal and Indian lands, interstate transmission related to commerce, natural gas rates, emergencies related to war, imports, oil pricing, regulation of antitrust issues, allocation of manufacturing, and federal taxation. States retain all other powers, such as policing and imposition of taxes. State administrative processes only address local issues, while multi-state correlative rights raise jurisdictional issues. The Compacts Clause, Article I, Section 10, Clause 3, of the U.S. Constitution, is one solution to creating uniform processes and remedies for interstate oil and gas extraction. However, a compact between states alters the type of judicial relief available and may not be in either state's best interest. This Note follows an application for an interstate horizontal well between New Mexico and Texas and considers the implications of a proposed agreement between the states. Without some federal solution, interstate agreements will remain a cumbersome administrative process that will create a patchwork of oil and gas regulations that are difficult to administer or navigate. The novel challenges posed by the newly approved transboundary well also provide an opportunity for New Mexico and Texas to lead the nation in developing a new phase in oil and gas regulation.

INTRODUCTION

As humans continue to consume oil and gas, resource demand makes evermore unconventional means of extraction financially viable. For example, shale

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oil found in the Permian Basin can now be extracted economically through drilling horizontal wells.¹ At the same time that the oil and gas industry is pushing the boundaries of economics and technology, oil and gas extraction is also raising new legal questions as undeveloped properties become scarce. The Permian Basin oil field straddles the border between New Mexico and Texas.² When a horizontal well crosses state lines like this, what state interests conflict? How can each state protect its interests as controversies arise?

A precedent-making application to drill in the Permian Basin from New Mexico into Texas recently came before the New Mexico Oil Conservation Commission (“NMOCC”)³ to test those questions.⁴ In April of 2021, Titus Oil & Gas Productions, LLC, (“Titus”) sought approval for a horizontal well in the Wolfcamp oil and gas formation of the Permian Basin that crosses state lines, from Lea County, New Mexico, to Loving County, Texas.⁵ Each state has potentially competing interests, and federal questions arise as the issue of the allocation of interstate natural resources resides at the core of Titus’s application. Further, under the Compacts Clause—Article I, Section 10, Clause 3 of the United States Constitution—any agreement made between two states raises the question of whether it requires congressional approval.⁶ The jurisdictional issues raised by an agreement between New Mexico and Texas also create an opportunity for the states to develop novel solutions to sharing of transboundary resources.

Agreements or compacts between states are common in other contexts, such as interstate water resources.⁷ Several states have formed a general compact related to oil and gas conservation.⁸ However, the forthcoming agreement between New Mexico and Texas is the first to govern oil and gas interstate extraction. This Note provides a history of the development of oil and gas conservation regulations as context for an analysis of what form of federal involvement, if any, is in the best interest of either New Mexico or Texas.

1. U.S. ENERGY INFO. ADMIN., PERMIAN BASIN WOLFCAMP SHALE PLAY GEOLOGY REVIEW 4 (2018), https://www.eia.gov/maps/pdf/PermianBasin_Wolfcamp_EIARReport_Oct2018.pdf. Horizontal drilling is sometimes necessary to efficiently extract oil and gas, for example, from shale oil deposits. Shale sometimes has oil and gas permeated through its substrate such that drilling at an angle provides more physical contact to extract the most resources. Horizontal drills are often used in conjunction with hydraulic fracturing to increase pressure, which in turn increases production. NANCY SAINT-PAUL, 1 SUMMERS OIL & GAS § 1.5 (3d ed. 2015).

2. See PERMIAN BASIN WOLFCAMP SHALE PLAY GEOLOGY REVIEW, *supra* note 1, at 4.

3. Generally, the state agencies and boards are referred to by initials without the state, i.e., OCC or RRC. Here, the acronym includes the state for each agency for clarity of jurisdiction.

4. Application of Titus Oil & Gas Prod., LLC, for Approval of Prod. Allocation, Lea County, N.M., No. 21872 (Oil Conservation Comm’n Apr. 6, 2021), <https://ocdimage.emnrd.nm.gov/imaging/CaseFileView.aspx?CaseNo=21872> [hereinafter Titus Application, No. 21872].

5. *Id.*

6. U.S. CONST. art. I, § 10, cl. 3.

7. See *e.g.*, Arizona v. California, 373 U.S. 546 (1963); Texas v. New Mexico, 462 U.S. 554, 564 (1983); Texas v. New Mexico, 482 U.S. 124, 124 (1987).

8. *History*, INTERSTATE OIL & GAS COMPACT COMM’N, <https://iogcc.ok.gov/history> (last visited Apr. 9, 2022) (detailing the formation of a multistate compact among six states to establish non-binding standards in oil and gas).

The background provided in Part I gives context to the subsequent analysis. This Part first covers a brief history of oil and gas regulation, followed by an overview of New Mexico state law, Texas state law, and federal law. Finally, this Part gives the history of the application recently submitted by Titus and approved by NMOCC, including the many issues encountered throughout the approval process.

Part II provides a multi-step analysis to frame the issue of interstate horizontal wells. First, Part II looks at New Mexico's interests in the regulation and production of oil and gas, including budgetary impact and environmental regulations, and compares New Mexico's interests to correlative interests in Texas. Then, a Compacts Clause analysis in this Part determines whether a New Mexico-Texas agreement related to Titus's application would trigger the Compacts Clause. Finally, Part II analyzes original jurisdiction of the United States Supreme Court and how judicial remedies differ when controversies arise under the Compacts Clause.

In Part III, this Note elucidates the implications from the historical background, the potential precedent set by the approval of Titus's application and following agreement, and each point drawn from the analysis below. The issue of interstate horizontal drilling raises novel questions, and a new chapter in the history of federal and state regulation of oil and gas may best help states navigate the complex issue of transboundary resource regulation. In conclusion, Part IV recommends that New Mexico not solely rely on the Compacts Clause to prescribe the resolution to controversies. Instead, some combination of multi-state cooperation and federal regulation should be enacted that addresses issues arising from interstate oil and gas extraction. Albeit a slower timeline, this democratic process serves to better protect the interests of states and their natural resources.

I. BACKGROUND

For the purposes of the following discussion, it is important to understand how state and federal regulation originated with regard to oil and gas extraction in the United States. This understanding provides context for the current state statutes governing oil and gas extraction and reveals why there is a dearth of federal regulation except where federal supremacy specifically applies, such as the regulation of imports. Following the historical background, a survey provides a comprehensive understanding of the relevant state and federal law at play in this Note, including New Mexico and Texas state regulations, as well as applicable constitutional law. Finally, those regulations and laws can then be applied to the focus of this Note: the status of the Titus application.

A. History

Early in the history of oil and gas regulation, the issue of whether regulation should reside with the states or the federal government was unresolved.⁹ In response, President Calvin Coolidge established a Federal Oil Conservation Board in 1924 to consider public welfare issues related to oil and gas conservation.¹⁰ In a 1926

9. See CONSERVATION OF OIL & GAS A LEGAL HISTORY, 1948, at 681–82 (Blakely M. Murphy ed., 1949).

10. EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS, § 65.2 (1992).

hearing, the board concluded that regulation of oil and gas should be left to the states.¹¹ The board reasoned that states should control regulation because oil and gas production occurred within a state's borders.¹² Under pressure from "the industry's universal opposition [to federal regulation],"¹³ the board concluded that the federal government should only assert its authority when states fail to or are unable to regulate oil and gas within their borders.¹⁴ At the time of this decision, horizontal wells were not technically or economically feasible.¹⁵ Considering the issue at hand in the Titus application, perhaps now is the time to reconsider opposition to federal regulation or find an alternative multi-state solution.

Economic influences of the Great Depression and an increase in oil production destabilized prices.¹⁶ Largely left to their own devices to regulate the oil and gas industry, states were quick to react. By 1931, Arkansas, California, Kansas, Louisiana, Oklahoma, Texas, and Wyoming formed the Oil States Advisory Committee to address concerns that the oil and gas industry could collapse without interstate cooperation.¹⁷ In 1935, California, Kansas, New Mexico, Oklahoma, and Texas formed the Interstate Oil and Gas Compact Commission ("IOGCC") and ratified the Interstate Compact to Conserve Oil and Gas.¹⁸ Currently, the IOGCC has 31 member states, plus international affiliates, and their compact has routinely received congressional approval since its inception.¹⁹ The IOGCC is not a governing body, and the compact itself does not regulate.²⁰ Instead, its purpose is to set minimum standards, determine best practices, and urge member states to develop statutes that meet those best practices for oil and gas conservation.²¹

11. *Id.* (with the change of administration, the board became defunct in 1933); *see also* CONSERVATION OF OIL & GAS: A LEGAL HISTORY, 1948, *supra* note 9 at 682–84. At the 1926 hearing, attendees considered the potential output of current reserves. Fed. Oil Conservation Bd. Hearing (May 27, 1926) (transcript). Representatives for the oil producers emphasized that conservation of oil would happen naturally through consumer demand and pricing, stating that "the consumer [needs to] be allowed the unhampered use of his right of suffrage." *Id.* (statement of Leod D. Becker, Am. Oil Burner Ass'n of N.Y.) (equating consumption and price selection with voting). In contrast, a representative from a state oil regulatory board discussed the success of the oil regulatory program in Minnesota, specifically mentioning the efficiency in collecting tax revenue, the lucrative tax revenue, and the positive response to the program from consumers and producers alike. *Id.* (statement of Hjalmar Nilsson, Chief Oil Inspector for the State of Minn.). Mr. Nilsson then argued that the program's success should show that uniform laws across all states would have even greater benefits. *Id.* ("The question of tests and specifications . . . if made universal, in itself would save the country more money in one year than decent oil inspection would cost in twenty years.").

12. Northcutt Ely, OIL CONSERVATION THROUGH INTERSTATE AGREEMENT 16 (U.S. Gov't Printing Off., 1933).

13. *Id.* at 17.

14. *Id.* at 16.

15. *See* SAINT-PAUL, *supra* note 1, § 1.5.

16. KUNTZ, *supra* note 10, § 65.2.

17. *Id.*

18. KUNTZ, *supra* note 10, §§ 65.2–65.3 (early in its inception, the IOGCC was sometimes called Interstate Compact Commission or Interstate Oil Compact Commission); Interstate Oil & Gas Compact Comm'n, <https://iogcc.ok.gov/> (last visited Apr. 9, 2022).

19. Interstate Oil & Gas Compact Comm'n, <https://iogcc.ok.gov/>.

20. KUNTZ, *supra* note 10, § 65.1.

21. *Id.* § 65.3.

While little federal regulation exists that governs oil and gas, there are times when Congress has exerted federal control, or the courts have recognized an issue that requires federal supremacy.²² Federal regulation of oil and gas is generally limited to nine discreet areas: leasing and operations on federal or Indian lands, the transmission of oil and gas related to interstate commerce, regulation of rates, emergency war powers, imports, antitrust regulation, allocation of products, and imposition of federal taxes.²³ Finally, where exploration or production of oil and gas impacts the environment, federal environmental laws may also apply.²⁴

The current framework for oil and gas regulation is thus state regulation in conjunction with an interstate agreement on the general principles and guidelines for oil and gas conservation, with federal law superseding only when necessary. This framework seemed to work efficiently. Each state kept extraction clearly within its borders until recently. In fact, the Titus application marks the first time an interstate well is officially permitted by the states on both sides of the state line.²⁵ With this new type of permitted well, the current oil and gas regulatory framework may not best protect state interests or even be constitutionally allowed.

B. Applicable law

State oil and gas conservation laws preserve resources by preventing inefficient use or production of oil and gas resources.²⁶ The primary goals are to protect the public's interest in future use of resources, including stabilizing markets for economic benefit.²⁷ State statutes and regulations govern conservation of oil and gas reserves through structural tools such as standardizing spacing between drilling units—"unitization"—and rationing production—"prorating."²⁸ These tools give all owners with a correlative interest in a common oil and gas supply an equal opportunity to share in that resource.²⁹

Where multiple property interests in the mineral rights arise, state statutes provide rules for combining multiple interests in a "pool."³⁰ Pooling is necessary to meet the minimum requirements for drilling unit size that states set as part of their unitization regulations.³¹ Consensual pooling occurs when multiple parties agree

22. *Id.* § 66.1.

23. *Id.*

24. *Id.* See also Transcript of Oil Conservation Comm'n Hearing Oct. 14, 2021, Titus Application, No. 21872 (Nov. 8, 2021), https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/20211108/21744_11_08_2021_11_41_46.pdf [hereinafter Oct. Transcript].

25. Transcript of Hearing at 14, Oil & Gas Docket No. OG-21-00006089 (Tex. R.R. Comm'n Apr. 13, 2021) [hereinafter TXRRC Hearing] (noting that TXRRC had previously approved wells that crossed state lines from Texas into New Mexico, but this particular application is the first time that the proposed well would produce on both side of the state line).

26. SAINT-PAUL, *supra* note 1, § 4.1.

27. *Id.*

28. *Id.*

29. *Id.*

30. PATRICK H. MARTIN & BRUCE M. KRAMER, 6 WILLIAMS & MEYERS, OIL and GAS LAW, § 905.1 (LexisNexis Mathew Bender 2019).

31. SAINT-PAUL, *supra* note 1, § 5.1 (pooling is a necessary part of oil conservation to control the volume of resources extracted from a single source).

through contract how the royalty interests will be divided.³² However, not everyone wants horizontal drilling, which can include fracking, to occur on their property. Forced pooling occurs when, through statute, the state orders the owner of a particular mineral interest to join a drilling unit.³³ Each state has its own statutes to determine when a state can impose forced pooling.³⁴ However, there is no determinative answer as to which jurisdiction's statutes would determine forced pooling when pooling occurs across state lines.³⁵

Most oil and gas producing states, including New Mexico and Texas, have regulations that prorate extraction from a common supply where unlimited production would otherwise deplete the resource and impact correlative rights.³⁶ For example, a single well could pump more oil or gas than the market demands and do so before others with correlative rights have an opportunity to extract the same resource. Waste occurs when the extraction of a resource exceeds demand. Proration regulates extraction to minimize waste, and subsequently protect correlative rights. Both New Mexico and Texas laws prohibit the waste of oil and gas resources³⁷ and similarly define waste as underground and surface production that exceeds reasonable market demand.³⁸ Texas goes further to include production that exceeds the capacity of transportation or market facilities as "waste."³⁹

The New Mexico Oil and Gas Act aims to conserve oil and gas natural resources by proscribing production and sales.⁴⁰ It delegates the authority to regulate oil and gas to the New Mexico Oil Conservation Commission, which the New Mexico Oil Conservation Division ("NMOCD") administrates under the New Mexico Energy, Minerals, and Natural Resources Department.⁴¹ While the NMOCD administers New Mexico's oil and gas conservation regulations, for example, through an application process for new wells, only the New Mexico Attorney General has the authority to bring an action that would assess fines.⁴² This split in authority over regulation and enforcement adds another layer of complexity should a controversy arise from an interstate well.⁴³

32. See MARTIN & KRAMER, *supra* note 30, § 905.1.

33. *Id.*

34. See N.M. STAT. ANN. § 70-2-17 (1977); TEX. NAT. RES. CODE ANN. § 102.011 (West 1977).

35. Cross-jurisdiction forced pooling is a novel issue that is beyond the scope of this Note. See generally Gary D. Libecap and James L. Smith, *Regulatory Remedies to the Common Pool: The Limits to Field Unitization*, 22 THE ENERGY J. 1 (2001).

36. SAINT-PAUL, *supra* note 1, § 7.1. Integral to the concept of oil and gas conservation, proration apportions production of a drilling unit by the share of a mineral interest in relation to the overall size of the reserve or resource. *Id.*

37. See N.M. STAT. ANN. § 70-2-2 (1953); NAT. RES. § 85.046 (West 1995).

38. See N.M. STAT. ANN. § 70-2-3 (1965); NAT. RES. § 85.046.

39. NAT. RES. § 85.046.

40. See N.M. STAT. ANN. §§ 70-1-1 to -13-5 (1925, as amended through 2019).

41. *Id.* § 70-2-17 (1977).

42. See *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 206 P.3d 135, 137 (N.M. 2009).

43. To add further complexity, the Joint Powers Agreement Act gives New Mexico agencies the power to form contracts with agencies from other states. However, agreements made under this Act require approval from the Secretary of the Department of Finance and Administration. N.M. STAT. ANN. § 11-1-3 (1983). ("[I]f authorized by their legislative or other governing bodies, two or more public

In Texas, the Natural Resources Code has comprehensive legislation regulating extraction, production, transportation, and use of oil and gas.⁴⁴ The 1919 Oil and Gas Conservation Law initially delegated regulatory authority of oil and gas production to the Railroad Commission of Texas (“TXRRC”), and it retains that authority today.⁴⁵ The TXRRC charges the Oil and Gas Division with administering the regulation of oil and gas exploration, production, and transportation.⁴⁶

Both states are currently working on a memorandum of understanding to reconcile the individual state’s regulatory requirements and other state-specific issues. An agreement between two states raises a federal issue. Known as the Compacts Clause, Article I, Section 10, Clause 3 of the Federal Constitution requires consent from the United States Congress to formalize an agreement or compact between two states.⁴⁷ Agreements related to interstate rivers are a modern example of the implementation of the Compacts Clause.⁴⁸ In one of its early Compacts Clause cases, the Supreme Court narrowed the application of the Clause to subject matter that has a national interest,⁴⁹ such as transboundary fluid resources like a river.

The Supreme Court recently addressed national interest in the Compacts Clause in *Texas v. New Mexico*.⁵⁰ The case related to Texas’s claim that New Mexico and Colorado violated the Rio Grande Compact by siphoning water from the Rio Grande River at more than the agreed-upon rates.⁵¹ Ratified in the 1930s, the Rio Grande Compact is a compact between Colorado, New Mexico, and Texas to deliver a specified amount of water at the states’ borders.⁵² The agreement is key to the United States’ obligations to Mexico as part of a 1906 treaty.⁵³ In the 2018 opinion, the Court used a factor-based analysis specific to these facts, discussed in detail below,⁵⁴ to determine whether national interest was substantial enough to give the United States authority under the Compacts Clause.⁵⁵

agencies by agreement may jointly exercise any power common to the contracting parties, even though one or more of the contracting parties may be located outside this state.”). Determining whether NMOCC has the authority to negotiate an agreement is an open question beyond the scope of this Note. Oil Conservation Div. Prehearing Statement at 5, Titus Application, No. 21872 (Sept. 22, 2021), https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/20210922/21872_09_22_2021_02_38_21.pdf [hereinafter OCD Prehearing Statement].

44. See NAT. RES. §§ 85.001–93.073.

45. *History of the Railroad Commission of Texas*, TEX. R.R. COMM’N, <https://www.rrc.texas.gov/about-us/rrc-history/> (last visited Apr. 9, 2022).

46. *Oil & Gas*, TEX. R.R. COMM’N, <https://www.rrc.texas.gov/oil-and-gas/> (last visited Apr. 9, 2022).

47. U.S. CONST. art. I, § 10, cl. 3.

48. *Texas v. New Mexico*, 482 U.S. 124, 124 (1987).

49. *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893).

50. See *Texas v. New Mexico*, 583 U.S. ___, 138 S. Ct. 954, 960 (2018).

51. *Id.* at 957.

52. *Id.*

53. *Id.*

54. See *infra* Part II.B.

55. *Texas v. New Mexico*, 138 S. Ct. at 960 (using case-specific factors: (1) entanglement with other contracts; (2) potential for the United States to be implicated in a controversy arising from the agreement; (3) treaty obligations; and (4) history of federal involvement in related actions). This type of litigation is rare. Indeed, Compacts Clause cases are rare, as evidenced by the few and far between cases used to determine precedent. Since this decision, a case has not come along that would test how the factor analysis could apply with different facts.

Should an agreement between states rise to the level of a compact of national interest under the Compacts Clause, then it is binding, as any other contract.⁵⁶ Whether an agreement is binding like any other contract has implications for available remedies should a controversy arise.⁵⁷ Ultimately, in the event of a controversy between states in an interstate compact, the Supreme Court has jurisdiction.⁵⁸ Congress also has the power to enforce agreements that it consents to under the Compacts Clause, either through statute or the establishment of a judicial remedy.⁵⁹ Each of these pathways to remedy has different implications for outcomes, such that New Mexico and Texas interests may be better protected by proactively creating a regulatory environment that uses a combination of both interstate compacts and federal regulation. For example, what happens if a controversy arises from environmental remediation at the wellbore in New Mexico and needs to be adjudicated? The analysis below shows that the outcome could hinge on whether the case is in court under the Compacts Clause, where the court determination rests on breach of contract, whether the case came to the court as a violation of statute or constitutional right, or where the court would look beyond breach of contract to statutory and constitutional analysis. The Titus application for a transboundary well is a novel event that provides an opportunity to shape how such controversies will be addressed in the future.

C. The application

As mentioned above, the process to begin drilling in New Mexico starts with an application to the New Mexico Oil Conservation Division.⁶⁰ Titus Oil & Gas Productions, LLC, submitted an application on April 6, 2021, to the NMOCD to drill a horizontal well with a wellhead⁶¹ in Lea County, New Mexico, and with a wellbore⁶² that ends in Loving County, Texas.⁶³ The underlying leasehold is owned entirely by two parties: Titus, which owns the New Mexico interest in its entirety, and Oxy USA, Inc. (“Oxy”), which owns the whole of the interest in Texas.⁶⁴ While

56. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

57. *See infra* Part II.B.

58. U.S. CONST. art. III, § 2, cl. 1. *See also* *Hinderlander v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938); *Delaware River Joint Toll Bridge Comm’n v. Colburn*, 310 U.S. 419, 427 (1940). In controversies internal to a state, the case or application does not escalate to judicial review unless all administrative remedies are exhausted. *SAINT-PAUL*, *supra* note 1, §4.16. Further, the federal courts have abstained from extending jurisdiction over controversies unless required for the protection of federal rights. *Robert-Gay Energy Enterprises, Inc. v. State Corp. Comm’n of Kansas*, 753 F.2d 857, 860 (10th Cir. 1985).

59. *Virginia v. West Virginia*, 246 U.S. 565, 566 (1918). (The Supreme Court also acknowledges that as part of the plenary power to enforce the contract, Congress would naturally have the power to legislate new judicial remedies.)

60. *See* N.M. STAT. ANN. § 70-2-17 (1977).

61. A wellhead is the point of penetration with equipment.

62. A wellbore is the drilled cavity of a well.

63. Titus Application, No. 21872, *supra* note 4.

64. *See* Supplemental Exhibits at 9, Titus Application, No. 21872 (June 16, 2021), https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafe/cf/20210616/21872_06_16_2021_07_57_59.pdf.

some drilling previously occurred from Texas into New Mexico,⁶⁵ the proposed well from Titus is distinct in that it will have producible perforations (a hole in the well to connect it to the resource being extracted) in both New Mexico and Texas and a bottom wellbore placed in Texas.⁶⁶ The NMOCC and the TXRRC are the governing boards that regulate gas and oil production in the respective states. Because the proposed well crosses state lines, both states have jurisdiction over the well.⁶⁷

To commence drilling, Titus must first gain approval from both the NMOCC and TXRRC board, which seems simple enough. Both states have approved thousands of applications in the past, but this is the first time an applicant in either state sought approval for crossing state lines.⁶⁸ Each state has its statutes to regulate the extraction of oil and gas, which creates potential tension with a shared well where the states' regulations diverge.⁶⁹ Potential issues that arose during the NMOCD and NMOCC hearings included allocation of royalties, reporting procedures, financial assurances, permitting, survey of environmental issues, notice, inspection requirements, and plugging and abandonment standards.⁷⁰

The NMOCD is a division under the NMOCC, and it serves as the first review board for applications.⁷¹ The Titus Application followed general procedure and started with review under NMOCD before being transferred to NMOCC for final approval.⁷² In initial proceedings, the NMOCD and TXRRC separately concluded that they each required some formal agreement between the boards.⁷³ However, neither agency determined conclusive next steps to form an agreement. These early hearings were tentative in their conclusions because both agencies agreed that the process was precedent-setting.⁷⁴ The NMOCD decided to escalate the final decision

65. TXRRC Hearing, *supra* note 25, at 14.

66. *Id.* at 8.

67. Titus Application, No. 21872, *supra* note 4.

68. Further, research produced no public record of other states formally addressing similar interstate oil and gas wells.

69. See N.M. STAT. ANN. §§ 70-1-1 to -13-5 (1925, as amended through 2019); TEX. NAT. RES. CODE ANN. §§ 85.001–.389 (1977, as amended through 2011).

70. Transcript of Oil Conservation Div. Hearing June 17, 2021, Titus Application, No. 21872 (July 21, 2021), https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/20210721/21872_07_21_2021_02_55_48.pdf [hereinafter June Transcript]. Hearings are a standard part of seeking approval in the application process.

71. See ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT, <https://www.emnrd.nm.gov/ocd/>.

72. See June Transcript, *supra* note 70.

73. *Id.* at 69; TXRRC Hearing, *supra* note 25, at 9. All parties recognized the difficulty in reconciling the differences in each state's regulations but could not determine whether an agreement was needed before proceeding with an approval of the application. Mr. Eric Ames, Assistant General Counsel to New Mexico Energy, Minerals & Natural Resources Department, sums up the conversation from the first NMOCC hearing for approving the application, "I'm not going to comment on chickens and eggs here. I can just state for the record that at this point in time [New Mexico Oil Conservation Division] believes that [a memorandum of understanding] will be required in order to move forward." June Transcript, *supra* note 70, at 64. See also TXRRC Hearing, *supra* note 25, at 28 ("Well, that would seem to create something of a chicken and egg problem." (Johnson, J.) "Well, that's exactly how we've described it, sir." (George Neal for Titus)).

74. June Transcript, *supra* note 70; TXRRC Hearing, *supra* note 25, at 28.

to the NMOCC to negotiate an agreement between the states.⁷⁵ On July 9, 2021, Titus and Oxy entered into a joint operating agreement.⁷⁶ Upon receiving notice that Titus and Oxy signed the agreement, the Texas hearing examiner recommended that the TXRRC approve the application.⁷⁷ The TXRRC stated an intention to approve the application without a formal agreement, expecting that the two agencies could then develop a memorandum of understanding between New Mexico and Texas to establish a precedent for future wells.⁷⁸ Across state lines, in a status conference on July 15, 2021, the hearing examiner determined that the best next step would be for the counsel for Titus to draft suggested language for an agreement.⁷⁹ Titus's counsel then proceeded to draft an agreement based on discussions with both the NMOCD and TXRRC.⁸⁰

The NMOCD formally referred Titus's application to the NMOCC on September 3, 2021.⁸¹ The New Mexico State Land Office⁸² ("NMSLO") filed a prehearing statement in tentative support of Titus's application, making sure to note the NMSLO's specific priorities for any agreement.⁸³ On September 22, 2021, and

75. June Transcript, *supra* note 70.

76. Supplemental Exhibit A-9, Titus Application, No. 21872 (July 9, 2021), https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafe/cf/20210709/21872_07_09_2021_03_15_55.pdf. A joint operating agreement is a contract to share or collaborate between two entities with mineral interests and operates like any other contract.

77. Applicant's Status Rep. and Request for Ord. of Approval or Referral to Comm'n at 2, Titus Application, No. 21872 (Aug. 19, 2021), https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafe/cf/20210819/21872_08_19_2021_06_55_20.pdf [hereinafter Status Report]. The TXRRC application received final approval on or about August 24, 2021. Applicant's Prehearing Statement at 6, Titus Application, No. 21872 (Sept. 22, 2021), https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafe/cf/20210922/21872_09_22_2021_08_31_45.pdf.

78. Status Report, *supra* note 77, at 2.

79. Transcript of Oil Conservation Div. July 15, 2021 at 6, Titus Application, No. 21872 (Sept. 13, 2021), https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/20210913/21872_09_13_2021_11_42_31.pdf.

80. Status Report, *supra* note 77, at 2.

81. Order No. R-21831, Titus Application, No. 21872 (Sept. 3, 2021), https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafe/ho/20210903/r-21831_09_03_2021_01_59_56.pdf.

82. NMSLO manages state land, including the leasing of state-owned mineral interests. NEW MEXICO STATE LAND OFFICE, <https://www.nmstatelands.org/divisions/oil-gas-and-minerals/about-oil-and-gas/>. NMSLO is an interested party in the Titus application because the State of New Mexico owns part of the mineral rights of the proposed well and NMSLO leases those rights to Titus. Through the lease, NMSLO may also collect royalties due to the state. *See* Applicant's filings and exhibits previously filed with the Division Part 1 of 2 at 11, Titus Application, No. 21872 (Sept. 16, 2021), https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/20210916/21872_09_16_2021_04_37_55.pdf; Applicant's Response to Oil Conservation Div.'s Prehearing Statement at 4, Titus Application, No. 21872 (Sept. 27, 2021), https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafe/cf/20210927/21872_09_27_2021_01_53_51.pdf.

83. OCD Prehearing Statement, *supra* note 43, at 2-3 (requesting that a memorandum of understanding address allocation method, reporting of production and revenue, financial assurances such as bonds, permitting, environmental issue and compliance, notice to stakeholders, inspection, plugging, giving New Mexico jurisdiction for all controversies, and abandonment).

after referring the application to the NMOCC, the NMOCD submitted a prehearing statement opposing Titus's application, noting the uncertainty of jurisdiction should controversies arise and the substantial impact this precedent-setting application could have for future wells.⁸⁴

This proposed well is the first of many. In a prehearing statement for final approval, Titus noted that it hopes to establish a precedent for substantial cross-border development in the area with more than forty similar wells planned.⁸⁵ Titus's plan to develop the region paves the way for other companies to develop New Mexico with similar interstate horizontal wells. In essence, Titus is hoping that this application will set a precedent for future planned wells that cross state lines.⁸⁶ Texas and the TXRRC are also hoping that this application and subsequent agreement will set precedent, as the allocation of production that New Mexico generally follows favors Texas. That method of allocation is currently the method proposed in the interstate agreement discussions.⁸⁷

On September 9, 2021, NMOCC approved the application shortly after the TXRRC approved the related application for the Texas portion of the well.⁸⁸ NMOCC's approval for production from the well is contingent on both agencies reaching a memorandum of understanding. Titus may begin production from the well once NMOCD (acting on behalf of NMOCC) and TXRRC reach an agreement.⁸⁹ Each board concluded that drilling could proceed with the understanding that a formal agreement between states is forthcoming, but they have not reached an agreement at the time of publication for this Note.⁹⁰

84. *Id.* at 1-2 (noting Titus has plans for at least forty similar wells depending on the success of this application).

85. *Id.* Indeed, Titus is already acting on its plan for additional wells. On December 14, 2021, Titus filed an application for approval of a second well, very similar to the first application, in the adjacent Bone Spring formation. Application of Titus Oil & Gas Prod., LLC, for Approval of Prod. Allocation, Lea County, N.M., No. 22473, 1-2 (Oil Conservation Comm'n Dec. 14, 2021), <https://ocdimage.emnrd.nm.gov/imaging/CaseFileView.aspx?CaseNo=22473>.

86. OCD Prehearing Statement, *supra* note 43, at 1-2.

87. TXRRC Hearing, *supra* note 25, at 32-33 (Mr. George Neale, an attorney representing Titus Oil & Gas Productions, LLC, in its TXRRC application, noted that New Mexico allocates production based on surface acreage while Texas usually uses complete lateral footage to determine revenue allocation, and surface acreage allocation favors Texas in this instance.). *See infra* Part II.A.

88. Order No. R-21831-A, Titus Application, No. 21872 (filed Oct. 15, 2021), https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafe/ho/20211015/r-21831-a_10_15_2021_09_33_55.pdf (noting that the approval of the application is not intended to set any precedent); Final Order, Oil & Gas Docket No. OG-21-00006089 (Tex. R.R. Comm'n Aug. 25, 2021) [hereinafter TXRRC Final Order]. *See also* Application of Titus Oil & Gas Prod., LLC, for Approval of Prod. Allocation, Lea County, N.M., No. 21872 (Oil Conservation Comm'n Sept. 28, 2021) (special meeting minutes) (finalizing the vote for approval, then signing the final order No. R-21831-A at their regular meeting of Oct. 14, 2021).

89. Oct. Transcript, *supra* note 24, at 39-40.

90. Order No. R-21831-A, *supra* note 88.; TXRRC Final Order, *supra* note 88. *See also* Transcript of Oil Conservation Comm'n Hearing Apr. 14, 2022, Titus Application, No. 21872 (forthcoming May 2022) [hereinafter April Hearing] (providing an update on the memorandum of understanding that is being carefully written and considered by both NMOCD and TXRRC, so finalization is forthcoming).

II. ANALYSIS

Interstate agreements related to natural resources raise state and federal issues because each state has its own statutory framework and interests that may or may not be competing. Additionally, the national government has an interest in the use and conservation of natural resources.⁹¹ The analysis is in three parts to cover the scope of various interests and to provide a constitutional analysis should a controversy arise. First, determining the interests of both New Mexico and Texas will show which issues are most likely to raise controversies in the future.⁹² Second, determining the legal status of an interstate memorandum requires an analysis of the state and federal interests under the Compacts Clause of the U.S. Constitution. Third, whether the Supreme Court examines an issue under original jurisdiction can affect the scope of relief the Court may grant when a controversy arises. This analysis will help elucidate the issues arising from a transboundary oil well application and the subsequent agreement between New Mexico and Texas.

A. New Mexico's oil and gas interests differ from those of Texas when forming an interstate production agreement.

What interests does the state of New Mexico have that might conflict with Texas in regulating oil and gas extraction? Would these interests still be protected if the states do not make an agreement? First, this analysis provides an overview of oil and gas interests in both New Mexico and Texas. Then, the analysis focuses on a single interest relevant to each state: revenue income from oil and gas production and sales.

At the latest status update of the Titus application and proposed memorandum of understanding, NMOCD clarified that its overarching concerns are the management of New Mexico resources and that potential conflicts could arise from significant differences in the regulatory structure between NMOCC and TXRRC.⁹³ Specific issues that NMOCD identified are appropriate proration, oversight of downhole factors such as wellbore integrity, site inspections, apportionment of waste and how gas is vented and flared, and other unforeseeable transboundary resource issues.⁹⁴ The NMOCD also aims to have a structure in place so that new issues do not need to be addressed in an ad hoc manner.⁹⁵

The New Mexico Oil and Gas Act ("Act") enumerates New Mexico's interests in regulating oil and gas. The primary purpose of the Act is to conserve oil

91. This analysis is limited to states as parties and does not include analysis should a controversy arise between a private party and one of the states. Therefore, issues such as the Contracts Clause or Eleventh Amendment are beyond the scope of this analysis.

92. Joint Powers Agreement Act requires that any agreement be approved by the Department of Finance and Administration. N.M. STAT. ANN. § 11-1-3 (1983).

93. April Hearing, *supra* note 90.

94. *Id.*

95. *Id.* Other issues, such as the assignment of an American Petroleum Institute identifying number, have already been resolved by applying two numbers to the well, one to each state's portion of the well. *Id.*

and gas through the prevention of waste.⁹⁶ The Act identifies correlative rights of individual ownership interests in a shared reservoir and provides for well spacing and production limits to prevent economic loss from drilling excessive wells or loss from drilling too few wells.⁹⁷ The Act also regulates the refining and sale of oil and gas, and outlines how each point of transformation or transaction creates an opportunity for taxation.⁹⁸ Additionally, the Act protects the property interests of surface owners by requiring an operator to reimburse a surface owner for any loss of value or access to their property.⁹⁹ Finally, the Act protects New Mexico's environmental interests by regulating water used to extract oil and gas pursuant to the New Mexico Water Quality Act.¹⁰⁰

Texas has similar interests set out in its Natural Resources Code ("Code").¹⁰¹ Like the New Mexico Oil and Gas Act, the primary purpose of the Code is to prevent the waste of oil and gas resources.¹⁰² To protect the property interests of all royalty owners, the code ties limits on production to market demand, known as "allowable."¹⁰³ The code explicitly recognizes and protects the interests of the public as consumers of gasoline and oil-derived products.¹⁰⁴

Three categories of interest emerge from looking at both the New Mexico and Texas statutes: state, individual, and business interests. State interests include environmental conservation, such as water quality, and economic concerns, such as tax revenue. Additionally, state interests include concerns for the general welfare of its people. At the same time, both individual and business interests include property interests of surface owners, lessors, and lessees, plus the freedom to contract.

Even where statutory language overlaps between New Mexico and Texas, the application of the law is reliant on state-specific case law. Differences arise from the way each state calculates unitization and pooling or damages assessment.¹⁰⁵ A brief examination of oil and gas taxes in both states will illustrate how an imbalance of a single issue can give rise to a controversy between the states. Revenue from oil and gas taxes varies by state and fluctuates each year based on the market. Both New Mexico and Texas tax oil and gas at the point of production and severance, i.e., upon extraction from the well and at each point of sale or severance of an interest.¹⁰⁶

96. N.M. STAT. ANN. § 70-2-2 (1953). NMSLO also enumerates important New Mexico interests that it wants to see included in an agreement between New Mexico and Texas—allocation method, reporting of production and revenue, financial assurances such as bonds, permitting, environmental issues and compliance, notice to stakeholders, inspection, plugging, giving New Mexico jurisdiction for all controversies, and abandonment. OCD Prehearing Statement, *supra* note 43, at 2-3.

97. N.M. STAT. ANN. § 70-2-17 (1977).

98. *Id.* § 70-2-22 (1977).

99. *Id.* § 70-12-4 (2007).

100. *Id.* § 70-13-4 (2019) (requiring permits under the New Mexico Water Quality Act, N.M. STAT. ANN. § 74-6-1 to -6B-14 (1967, as amended through 2019)).

101. TEX. NAT. RES. CODE ANN. §§ 85.001–.389 (West 1977, as amended through 2011).

102. *Id.* § 85.046 (West 2005).

103. *Id.* § 85.054 (West 2005).

104. *Id.* § 85.056 (West 1977).

105. A survey of every statutory and case difference is beyond the scope of this Note.

106. See N.M. STAT. ANN. § 7-32-4 (1981) (relating to production *ad valorem* tax, i.e., property tax); *Id.* § 7-29-4 (2005) (relating to severance tax); TEX. TAX CODE ANN. §§ 201.001–.404 (West 1981, as

However, the tax rates, valuation of the production or property, and exemptions all vary by state. Further, Texas does not impose additional taxes, but New Mexico levies an additional 3.015 percent tax to fund education directly.¹⁰⁷

The difference in New Mexico's and Texas's budgets compounds the impact of variance in tax revenue. Importantly, New Mexico depends more on its oil and gas revenue than does Texas. On average, oil and gas revenue in New Mexico generates \$1.4 billion towards the state's General Fund and an additional \$500 million to \$600 million towards capital outlay projects each year.¹⁰⁸ This revenue accounts for a substantial amount of New Mexico's annual budget. In fact, it is approximately twenty-five percent of New Mexico's General Fund in a given year.¹⁰⁹ In contrast, Texas expects to generate \$10 billion in revenue from its oil and gas production taxes for 2022-2023, amounting to only 8.9 percent of the state's total expected revenue for 2022-2023.¹¹⁰ Texas's two-year expectation in oil and gas revenue equates to more than twice the expected revenue for New Mexico in the same period. While Texas is generating twice as much oil and gas revenue as New Mexico, that oil and gas revenue is only making up about nine percent of Texas's total expected revenue, or less than half of portion of oil and gas in New Mexico's expected total income. To put it another way, Texas brings in twice as much oil and gas revenue as New Mexico and only relies on it half as much. While Texas does generate more revenue from oil and gas taxes, New Mexico depends more on that same type of income to meet its annual budgetary needs.

Additionally, an issue that is already in tension is the production allocation for distributing revenue of the wells. The allocation necessarily affects the amount of taxable production in each state. New Mexico's allocation calculation uses the area of the surface rights to distribute extracted oil and gas, whereas Texas generally

amended through 2019) (relating to gas production tax); *Id.* §§ 202.001–.354 (West 1981, as amended through 2021) (relating to oil production tax); *Id.* §§ 201.051-.060 (relating to severance tax on gas produced). Note *ad valorem* taxes can be imposed at the county level, allowing for double taxation if a well crosses jurisdiction even within a state. However, that level of granularity is left for another paper.

107. N.M. STAT. ANN. § 7-31-4 (2005).

108. LEGIS. FIN. COMM., FINANCE FACTS: OIL AND NATURAL GAS REVENUE (2021) https://www.nmlegis.gov/Entity/LFC/Documents/Finance_Facts/finance%20facts%20oil%20and%20gas%20revenue.pdf. See also LEGIS. FIN. COMM., FINANCE FACTS: THE GENERAL FUND (2021) https://www.nmlegis.gov/Entity/LFC/Documents/Finance_Facts/finance%20facts%20GF.pdf; LEGIS. FIN. COMM., FISCAL STRUCTURE OF NEW MEXICO, https://www.nmlegis.gov/Publications/New_Mexico_State_Government/the_fiscal_structure_of_new_mexico.pdf.

109. See FINANCE FACTS: OIL AND NATURAL GAS REVENUE, *supra* note 105. See also FINANCE FACTS: THE GENERAL FUND, *supra* note 105; FISCAL STRUCTURE OF NEW MEXICO, *supra* note 105.

110. GLENN HEGAR, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, 87TH TEXAS LEGISLATURE, BIENNIAL REVENUE ESTIMATE, 2022-2023 at 12 (Jan. 11, 2021), <https://comptroller.texas.gov/transparency/reports/biennial-revenue-estimate/2022-23/>. The 8.9 percent of total revenue is typical and does not significantly deviate from previous years. See GLENN HEGAR, TEX. COMPTROLLER OF PUB. ACCTS., BIENNIAL REVENUE ESTIMATE 2020-2021: A CLOSER LOOK (Jan. 7, 2019), <https://comptroller.texas.gov/transparency/reports/biennial-revenue-estimate/2020-21/> (expected oil and gas revenue was 8.9 percent of the total revenue expected for 2020-2021); GLENN HEGAR, TEX. COMPTROLLER OF PUB. ACCTS., BIENNIAL REVENUE ESTIMATE 2018-2019: A CLOSER LOOK (Jan. 9, 2017), <https://comptroller.texas.gov/transparency/reports/biennial-revenue-estimate/2018-19/> (expected oil and gas revenue was 6 percent of the total revenue expected for 2018-2020).

uses the lateral length of the drill hole to calculate production allotment.¹¹¹ The surface acreage allocation of the current proposed well is more favorable to Texas than a calculation based on lateral footage because of the non-standard shape of the surface property lines on the Texas side of the border.¹¹² A reduced allocation of production for New Mexico logically means reduced tax revenue. Titus expects its well to produce approximately \$50 million in oil.¹¹³ A single well with an estimated \$1 million in tax revenue for New Mexico would have a negligible impact on its budget.¹¹⁴ However, multiplying this amount across forty wells or more would have a much more substantial impact on New Mexico's potential tax revenue.¹¹⁵ New Mexico and Texas are currently negotiating how they plan to allocate production, and this calculation could become precedent.

Now that this Note has covered a non-exhaustive list of each state's interests and highlighted the particular issue of allocation, the next question follows—is each state's best interest served by an agreement? The answer depends on the analysis of the federal questions raised in forming interstate agreements.

B. An interstate oil and gas production agreement between New Mexico and Texas likely triggers the Compacts Clause.

Would a memorandum of understanding between New Mexico and Texas trigger the Compacts Clause? Under Article I, Section 10, Clause 3 of the U.S. Constitution, whenever two states form an agreement, the agreement requires congressional approval.¹¹⁶ The Supreme Court has held that the term “agreement” is interpreted broadly and can even include a verbal agreement, much like any contract between private parties.¹¹⁷ However, the Court has also held that not all subject matters require congressional approval.¹¹⁸ In narrowing the application of the Compacts Clause, the Supreme Court considers factors such as: is there “any

111. N.M. STAT. ANN. § 70-12-16 (1985); TXRRC Hearing, *supra* note 25, at 32-33.

112. TXRRC Hearing, *supra* note 25, at 32-33.

113. Brief in Support of Application at 4, Titus Application, No. 21872 (Sept. 2, 2021), https://ocdimage.emnr.nm.gov/Imaging/FileStore/santafe/cf/20210902/21872_09_02_2021_08_52_31.pdf.

114. *Id.*

115. Property lines on the Texas side of the expected well area are consistently at an angle to the state line, while property lines on the New Mexico side are at right angles. The non-uniformity of the Texas property lines compared to the New Mexico property lines will continue to be an issue along this border. Supplemental Exhibits, *supra* note 64, at 15-17.

116. U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”).

117. *Holmes v. Jennison*, 39 U.S. 540, 572 (1840) (“[W]e give to the word ‘agreement’ its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.”).

118. *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893).

infringement on the rights of the national government” or would an agreement between two states “affect injuriously the interests of others.”¹¹⁹

Additionally, the Supreme Court may consider when “distinctively federal interests” allow the United States to participate in a Compacts Clause suit.¹²⁰ This consideration was fleshed out in *Texas v. New Mexico*, when the Court addressed whether the United States has the power to intervene in an agreement between New Mexico, Colorado, and Texas related to the Rio Grande.¹²¹ The Court used language from the Compacts Clause to determine that the United States can insert itself into a controversy between parties of the agreement when there is “any infringement on the rights of the national government” or the controversy “affect[s] injuriously the interests of others.”¹²² The four case-specific factors the Court relied on are whether: (1) other contracts are intertwined with the compact in question; (2) the United States is integral to the compact because a state could sue the United States for interfering with its downstream operations on the river; (3) the United States has treaty obligations with Mexico related to the Rio Grande; and (4) the United States previously asserted the Compacts Clause in a similar action with the current parties and the parties did not object.¹²³ The Supreme Court concluded that the United States had a substantial interest in the Rio Grande Compact based on these four factors.¹²⁴

The implication of the *Texas v. New Mexico* ruling is that judicial relief for controversies arising from a compact are limited to the terms of the contract¹²⁵ and the Supreme Court can use the Compacts Clause to insert the United States as a third party into a controversy between the states.¹²⁶ With a compact that affects federal interests, the Supreme Court has unique subject matter jurisdiction over the agreement as an arbiter of the rules of the contract. Acting in this constitutionally made role, the Supreme Court had the authority to determine that the United States could insert itself as an interested party to the agreement because of the significant federal interests involved. With the United States as a party to the agreement, its interests are coequally considered along with those of the other parties within the contract’s four corners. When reviewing an agreement for breach, the Supreme Court does not undergo any additional standard of review to determine the constitutionality

119. *Texas v. New Mexico*, 583 U.S. ___, 138 S. Ct. 954, 958 (2018) (quoting *Florida v. Georgia*, 58 U.S. 478, 499 (1855); J. Story, *Commentaries on the Constitution of the United States* § 1397, p. 272 (1833)); see also *Virginia v. Tennessee*, 148 U.S. at 519.

120. *Texas v. New Mexico*, 138 S. Ct. at 958. The Court reasons that congressional approval of a compact does not necessarily mean that the United States can insert itself as party in a suit related to the compact. Nothing in the opinion limits the United States to only inserting itself into controversies arising from formalized compacts under the Compacts Clause. The reasoning and factor analysis also create the possibility that the United States can insert itself anytime it has sufficient interest in a controversy related to an agreement between states. The one issue that the Court specifically did not address is whether the United States can initiate a cause of action related to a compact.

121. *Id.*

122. *Id.* (quoting *Florida v. Georgia*, 58 U.S. 478, 499 (1855); J. Story, *Commentaries on the Constitution of the United States* § 1397, at 272 (1833)); see also *Virginia v. Tennessee*, 148 U.S. at 519.

123. *Texas v. New Mexico*, 138 S. Ct. at 959-60.

124. *Id.* at 960.

125. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (“[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its expressed terms.”).

126. *Texas v. New Mexico*, 138 S. Ct. at 960.

of contract terms. Therefore, states do not necessarily have the same right to a remedy that they would expect when bringing a non-contractual controversy to the courts, and those rights can compete with those of the United States.¹²⁷

Controversies between states involving contracts and compacts may be rare, but the consequences can be significant when they arise. For this reason, New Mexico and Texas should be careful when entering an agreement around natural resources. The following factor analysis will determine whether a New Mexico-Texas agreement related to the Titus application could rise to the level of a compact under the Compacts Clause.¹²⁸ The factors set out in *Texas v. New Mexico* are case-specific but rely on the interests of individual parties, interests of non-party states, and national interests. Therefore, these general principles can be applied to the facts at hand in the Titus application to determine case-specific factors.

Here, New Mexico and Texas are in the midst of negotiating a memorandum of understanding related to specific horizontal wells that cross state lines.¹²⁹ The memorandum requires a Compacts Clause analysis because a memorandum of understanding fits within the broad definition of agreement or compact and the agreement is between two states.¹³⁰ *Texas v. New Mexico* provides a framework for fact specific Compacts Clause analysis that is useful here.¹³¹ Using an approach similar to *Texas v. New Mexico*,¹³² this Note identifies five factors specific to the Titus application and resulting agreement to consider whether the Compacts Clause may be triggered: (1) state-specific interests of New Mexico and Texas; (2) impact that an agreement may have on other sovereignties; (3) federal involvement in the regulation of oil and gas; (4) whether precedent is set by other related compacts; and (5) the United States' interests in oil and gas that crosses state lines. The first three factors—state-specific interests, interests of other sovereigns, and historical absence of federal regulation—indicate that the subject matter of the agreement is locally focused such that the Compacts Clause would not be triggered. However, the last two factors—precedent of prior compacts and national interest in oil and gas resources—indicate a substantial federal interest that may implicate the Compacts Clause such that the United States might insert itself into controversies arising from the forthcoming agreement between New Mexico and Texas.

First, in favor of the argument that the memorandum of understanding only implicates local interest such that the Compacts Clause would not be triggered,¹³³ New Mexico and Texas have differing local interests that could give rise to interstate controversies, but these interests are state-specific. For example, New Mexico

127. For example, the United States has a strong interest to uphold its treaty obligations with Mexico that may come into conflict with a state's interest in the Rio Grande Compact. *Id.* at 957.

128. *Id.* at 958 (“[W]e have sometimes permitted the federal government to participate in compact suits to defend ‘distinctively federal interests’ that a normal litigant might not be permitted to pursue in traditional litigation.”).

129. Oct. Transcript, *supra* note 24.

130. *Texas v. New Mexico*, 138 S. Ct. at 960.

131. *See id.* *Texas v. New Mexico* does not indicate whether any one factor is weighted more than the others, and so here, the analysis treats the Titus application factors equally.

132. *See id.* at 960 (using the case-specific factors as guidelines for what may be relevant in determining if an agreement meets the standard of a compact).

133. *See supra* Part II.A.

specifically enumerates rights to surface owners should any damages occur related to extraction,¹³⁴ whereas Texas does not specifically provide for damages to the surface.¹³⁵ Each state provides protection for correlative rights among several property owners, but the states are slightly different in how they protect those rights.¹³⁶ Waste of oil and gas is a central concern to both states, but the exact limits they set vary by state.¹³⁷ While these differences and others do exist, an agreement between New Mexico and Texas could identify and clarify how the states would resolve the differences. In fact, NMOCC, TXRRC, and other interested parties are having these conversations now as they work out the details of a memorandum of understanding. Further, these differences relate to state interests and do not implicate the interests of other sovereigns. As noted above, even the apparent difference in taxation and reliance on revenue is a state-specific issue that does not rise to a national concern. This factor alone should not trigger the Compacts Clause.

Second, in favor of local interest, no other states have a current interest in the oil and gas extraction at the proposed wells in the Permian Basin. The forthcoming memorandum does not implicate any other state or international interests.¹³⁸ The Wolfcamp oil and gas formation in question is within the Permian Basin.¹³⁹ The Permian Basin is wholly within the state borders of New Mexico and Texas¹⁴⁰ and does not extend across the international border with Mexico.¹⁴¹ Therefore, other state or sovereign interests are not at issue in the Wolfcamp formation, nor will those interests be at issue so long as the agreement only applies to reserves in the Permian Basin.

Third, in favor of local interest, the regulation of oil and gas is left to the states except in limited circumstances. The federal regulation of oil and gas currently only applies to instances where federal interests are enumerated in the constitution or when Congress passes a law. These laws passed by Congress relate to the transmission of oil and gas in interstate commerce, regulation of rates, emergency war powers, imports, allocation of products, imposition of federal taxes, leasing and operations on federal or Indian lands, antitrust regulation,¹⁴² and applicable federal environmental laws.¹⁴³ There is currently no congressional law or enumerated power in the Constitution that implicates oil and gas regulation across state lines.

The last two factors in this five-factor analysis favor the use of the Compacts Clause. The fourth factor is that previous compacts have set precedent that the United States has an interest in interstate oil and gas compacts. Specifically, Congress consented to that compact that established the Interstate Oil and Gas Compact Commission, involving over thirty states and sovereignties, as discussed

134. N.M. STAT. ANN. § 70-12-4 (2007).

135. TEX. NAT. RES. CODE ANN. §§ 85.001–.389 (West 1977, as amended through 2011).

136. N.M. STAT. ANN. § 70-2-17 (1977); NAT. RES. § 85.054 (West 2005).

137. N.M. STAT. ANN. § 70-2-2 (1953); NAT. RES. § 85.046 (West 2005).

138. PERMIAN BASIN WOLFCAMP SHALE PLAY GEOLOGY REVIEW, *supra* note 5, at 4.

139. *Id.*

140. *Id.*

141. *Id.*

142. KUNTZ, *supra* note 10, § 66.1.

143. *Id.* § 66.1 (Supp. 2021).

above.¹⁴⁴ New Mexico and Texas are signatories to the IOGCC, so an agreement related to an interstate well may raise concerns that affect the IOGCC. Plus, congressional consent for the IOGCC is now technically United States' law and sets precedent for congressional involvement in oil and gas agreements between states.¹⁴⁵ This factor alone might not be sufficient to implicate the Compacts Clause, however, the final factor in this analysis may tip the scales.

Fifth, the United States has an interest in oil and gas that crosses state lines. Drilling interstate wells implicates the Commerce Clause of the U.S. Constitution, which gives Congress authority to regulate such situations.¹⁴⁶ Congress could pass a law regulating transboundary oil and gas regardless of whether a compact is made. While the Compacts Clause is mandatory and the Commerce Clause is permissive, the following Commerce Clause analysis shows that Congress has a strong interest in interstate extraction of oil and gas.

The Supreme Court case *United States v. Lopez* identifies three categories where Congress may exercise its commerce power: (1) channels of interstate commerce; (2) instrumentalities of or "persons or things in" interstate commerce; and (3) and activities that "substantially affect[] interstate commerce."¹⁴⁷ If a product is sold or released into "the interstate stream of business," that is sufficient to give Congress power to regulate it.¹⁴⁸ If Congress may exert its commerce powers, then the courts can only strike down the resulting legislation if it fails the test for rational basis.¹⁴⁹

Here, oil and gas fall into the second category—an instrumentality of commerce—because they are ubiquitous in interstate commerce. Not only does the matter in question show that extraction is an interstate issue, but oil and gas are products continuously sold across state lines such that they are not local commercial products.¹⁵⁰ Interstate extraction and sales are sufficient to show that oil and gas are in the stream of interstate commerce such that Congress may exert its commerce powers. Further, a potential statute could be written to be narrowly tailored to apply to specific interstate circumstances.¹⁵¹ Accordingly, Congress has the authority to regulate interstate extraction of oil and gas because of the United States' interest in transboundary oil and gas, and this factor should be a consideration in the Compacts Clause analysis.

144. Interstate Oil & Gas Compact Comm'n, <https://iogcc.ok.gov/> (last visited Apr. 9, 2022). See *supra* Part I.A.

145. See *Cuyler v. Adams*, 449 U.S. 433, 438 (1981).

146. U.S. CONST. art. I, § 8, cl. 3 ("[The Congress shall have Power [t]o . . . regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.").

147. *United States v. Lopez*, 514 U.S. 549, 558-559 (1995).

148. *Reno v. Condon*, 528 U.S. 141, 148 (2000) (holding that even something as intangible as motor vehicle information is a thing in interstate commerce because it is used by multiple private and public entities).

149. *Hodel v. Indiana*, 452 U.S. 314, 323-324 (1981) (The court need only determine "whether Congress could rationally conclude that the regulated activity affects interstate commerce.").

150. See KUNTZ, *supra* note 10, § 66.1 (noting that federal regulations already exist related to interstate transmission of oil and gas).

151. The commandeering prohibitions under the Tenth Amendment of the U.S. Constitution are outside the scope of this analysis.

The five factors outlined above—(1) state-specific interests; (2) no implication of interests of other sovereigns; (3) limited federal involvement in the regulation of oil and gas; (4) precedent set by prior compacts; and (5) the United States' interest in interstate oil and gas—do not clearly indicate whether an agreement between New Mexico and Texas would trigger the Compacts Clause such that the United States could insert itself as a party to the agreement. However, the final two factors, related to prior precedential compacts and national interest, favor the United States having the power to insert itself as a party to the agreement and triggering the Compacts Clause. As New Mexico and Texas carefully construct a memorandum to carefully set precedent for future wells between New Mexico and Texas,¹⁵² a strong possibility exists that a compelling national interest would still be present. Any agreement related to the interstate extraction of oil and gas between New Mexico and Texas runs the risk of unintentionally triggering the Compacts Clause.

C. The Supreme Court has exclusive original jurisdiction over any controversies arising from an interstate production agreement between New Mexico and Texas.

Whether or not the Supreme Court considers an agreement to be a compact, the Court retains jurisdiction over any controversies that arise between two states, either through original jurisdiction under the U.S. Constitution or as arbiter of a compact between states.¹⁵³ However, the way a case gets to the Court prescribes the standards applied and potential remedy given.¹⁵⁴ Exercising its original jurisdiction, the Court reviews a case using constitutional analysis and *stare decisis*.¹⁵⁵ When the Court considers an issue that arises out of a compact, it reviews the controversy through what was agreed upon in the four corners of the agreement.¹⁵⁶ The following analysis first determines whether the Court's original jurisdiction applies; then shows what standards would apply whether or not the agreement is a compact.

If a controversy arises between states, the Supreme Court is the original and exclusive forum to try the case.¹⁵⁷ However, exercising its original jurisdiction powers is discretionary, to be determined by the Court on a case-by-case basis.¹⁵⁸ The Court takes into consideration “the seriousness and dignity of the claim” as well as “the availability of another forum where there is jurisdiction over the named

152. See April Hearing, *supra* note 90.

153. See *Cuyler v. Adams*, 449 U.S. 433, 441 (1981); U.S. CONST. art. I, § 10, cl. 3; see also *Texas v. New Mexico*, 462 U.S. 554, 555 (1983) (holding that the “Court’s original jurisdiction to resolve controversies between two States extends to a suit by one State to enforce its compact with another State or to declare rights under a compact”). Therefore, controversies arising between states in general or controversies arising from a compact both reach the Supreme Court through original jurisdiction. For clarity, this Note only refers to non-compact controversies as rising to the Court through original jurisdiction.

154. *Texas v. New Mexico*, 462 U.S. at 564.

155. U.S. CONST. art. III, § 1; *Kansas v. Colorado*, 206 U.S. 46, 96-97 (1907); *Patterson v. McLean Credit Union*, 491 U.S. 164, 164 (1989).

156. *Texas v. New Mexico*, 462 U.S. at 564.

157. U.S. CONST. art. I, § 10, cl. 3; 28 U.S.C. § 1251(a) (1978).

158. *Texas v. New Mexico*, 462 U.S. at 570.

parties, where the issues tendered may be litigated, and where appropriate relief may be had.”¹⁵⁹

Based on these considerations, the Supreme Court should exercise its original jurisdiction if an issue arises between New Mexico and Texas related to interstate horizontal wells. The Court generally accepts that where water rights between states are at issue, it will exert its original jurisdiction.¹⁶⁰ Here, like interstate waters (a resource the Court has frequently adjudicated¹⁶¹), oil and gas are vital, fluid natural resources shared across state borders. The Court should treat these analogous resources similarly and exercise its original jurisdiction.¹⁶² Further, there is not another forum that could hear issues that arise from interstate wells. Therefore, the Court’s original jurisdiction is appropriate because the subject matter is of substantial national interest and no other forum can adjudicate the cause of action.

The Supreme Court also has jurisdiction over controversies arising from interstate compacts because congressional consent federalizes the issue. In *Cuyler v. Adams*, the Court determined that “congressional consent transforms an interstate compact within this Clause into a law of the United States.”¹⁶³ When a contract becomes federal law, the parties are bound to the four corners of the contract.¹⁶⁴ This limitation narrows the scope of judicial relief to that expressed in the contract.¹⁶⁵ As noted above,¹⁶⁶ an agreement between New Mexico and Texas related to interstate horizontal drilling likely implicates the Compacts Clause. Therefore, should New Mexico and Texas form such an agreement, any judicial remedy would likely be based solely on the terms of the agreement.

In conclusion, the Supreme Court is the appropriate forum for controversies arising between the New Mexico-Texas horizontal wells, as the agreement likely triggers the Compacts Clause. The agreement is a binding contract that federal courts would review solely for any breach of contract. If New Mexico and Texas do not proceed with an agreement, or the agreement is not deemed a compact under the Compacts Clause, then federal courts would assess any controversies arising from

159. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972).

160. *Arizona v. California*, 373 U.S. 546, 564 (1963) (“[T]his Court does have a serious responsibility to adjudicate cases where there are actual, existing controversies over how interstate streams should be apportioned among States.”).

161. More recently, the Court reaffirmed its original jurisdiction in controversies between states while hearing a matter of first impression related to transboundary aquifers. *State of Mississippi v. Tennessee*, 592 U.S. ___, 142 S. Ct. 31, 37 (2021). Interestingly, the Court applied the doctrine of “equitable apportionment” to transboundary underground water for the first time, whereas in the past the court only applied the doctrine to flowing transboundary resources, i.e., rivers. *Id.* The Court noted that an exception to applying the doctrine would be if there was some compact or agreement between states. *Id.* While an issue arising from transboundary oil and gas would be a matter of first impression, this case may provide a guide as to how the courts would treat future issues in oil and gas.

162. Water rights and oil and gas extraction are not entirely analogous because both are regulated differently, water rights are generally acquired differently than mineral rights, and water is primarily for public use while oil and gas extraction is largely performed by private actors. *See generally id.* However, these differences do not affect the analysis here and its implications.

163. *Cuyler v. Adams*, 449 U.S. 433, 438 (1981). The Court also discusses when implied congressional consent applies to an agreement, but that is an issue for another paper.

164. *See Texas v. New Mexico*, 462 U.S. 554 (1983).

165. *Id.*

166. *See supra* Part II.B.

the interstate horizontal wells using a constitutional and case law analysis. Each scenario has different implications for protecting each state's interests.

III. IMPLICATIONS

As discussed above,¹⁶⁷ New Mexico has a strong reliance on oil and gas to meet its budgetary requirements. The hearings and documents around Titus's application show that allocation of production, or yield from the well, would favor Texas if the states use the proposed surface acreage allocation. Since taxes are directly related to production, the allocation from the proposed well will directly affect New Mexico's revenue from the well.¹⁶⁸ All parties, NMOCD, TXRRC, and Titus hope that this application and agreement will set a precedent because Titus plans to drill approximately forty similar wells. Setting precedent helps New Mexico and Titus because it would ease the administrative process and simplify the application process for future wells. As currently proposed, setting precedent benefits Texas because the allocation of production by surface acreage favors Texas.¹⁶⁹ By setting this precedent now, Texas will likely make more revenue from nearby subsequent wells.

In an implied acknowledgment that setting precedent is risky, the NMOCC held that the order approving the application should not be considered precedent.¹⁷⁰ However, suppose the application and forthcoming agreement do not set precedent. In that case, each subsequent application for similar wells will have to go through a similar process to create an agreement for each well. Drafting and then policing a separate agreement for each well is administratively cumbersome and impractical. Additionally, with each subsequent application and agreement process, the drafting process would likely rely more and more on previous iterations of an agreement. Therefore, over time, a single agreement is likely to arise that essentially sets precedent on how to address interstate horizontal wells between New Mexico and Texas.

While seemingly incidental, the question of whether the current application and forthcoming agreement will set precedent is incredibly important, as such an agreement would likely trigger the Compacts Clause. If an agreement between two states becomes federal law, as it would under the Compacts Clause, New Mexico's or Texas's best interest may not be served. As shown above, controversies that arise between New Mexico and Texas would be heard by the Supreme Court, either under original jurisdiction set out in Article I of the U.S. Constitution or as the arbiter of a compact between states.

How a controversy reaches the Supreme Court affects the standards applied and judicial remedies available. For example, suppose New Mexico brings a cause of action based on production allocation that is in a compact. In that case, the Court only reviews the issue based on whether a breach of contract occurred. Any remedy would be limited to the terms set out in the agreement. Should the same issue be

167. See *supra* Part II.A.

168. At a minimum, New Mexico should reevaluate how production will be allocated to ensure that its best interest is served.

169. See TXRRC Hearing, *supra* note 25, at 32-33.

170. Determining when precedent is set is a question for another paper.

brought to the Supreme Court under an original jurisdiction claim, the Court can review whether New Mexico's rights were violated and what remedy would be fair and just. The interests of the states, businesses, and individuals are complex, and binding such interests to the four corners of a contract might not work out in favor of New Mexico because the judicial remedy for any controversies would be limited to what the agreement states.¹⁷¹

The issue of production allocation is not hypothetical but an example of a current issue that is proposed. Further, production allocation is but an example of how careful each state needs to be in writing any agreement. For an agreement to protect each state's interest, the parties must craft it carefully. Undoubtedly, those individuals and departments drafting the agreement understand the weight of New Mexico's interests and the care needed in crafting an agreement with Texas. However, not all issues are foreseeable, and the forthcoming agreement runs the risk of confining New Mexico and Texas to terms and remedies related to a novel issue: interstate horizontal drilling.

If the two states continue on their planned course of agreement, the issue becomes whether the agreement forms a compact and what relief parties may seek. However, whether to form a compact between New Mexico and Texas does not need to be a binary resolution. History provides alternatives that would protect New Mexico's and Texas's interests: some form or combination of multi-state interstate agreement and federal regulation.

As economic incentives make interstate horizontal drilling viable and appealing, more agreements and controversies between states may arise. Additionally, the issue of whether to federally regulate such wells becomes increasingly relevant. Having agreements in place among several states will ease administrative processes as interstate applications for oil and gas extraction increase. Hopefully, this efficiency and clarity can reduce the number of controversies that will inevitably arise from correlative rights over natural resources. Federal legislation that regulates interstate oil and gas extraction would make this process more democratic and responsive to issues as they arise. There are at least two non-exclusive pathways to such regulation.

First, the International Oil and Gas Compact Commission still exists, with thirty plus members, and can be a powerful resource for regulating interstate oil and gas extraction. The IOGCC's current mission is to "champion[] the conservation and efficient recovery of domestic oil and natural gas resources while protecting health, safety and the environment."¹⁷² Originally, the IOGCC formed to develop universal regulations and minimum standards. Among its stated goals was to respond to

171. This Note could end here and conclude that New Mexico's and Texas's interests would be best protected without any formal agreement. However, both agencies have expended effort in carefully crafting an agreement to foresee issues and create a structure for resolving controversies. See April Hearing, *supra* note 90. Consistency in the administration and regulation of transboundary wells creates administrative efficiency and ease in operational management. *Id.* Additionally, proactively creating a structure to address future issues gives New Mexico and Texas the opportunity to lead the nation in managing transboundary oil and gas.

172. Interstate Oil & Gas Compact Comm'n, <https://iogcc.ok.gov/vision-mission-values> (last visited Apr. 9, 2022).

emerging issues.¹⁷³ The commission has the expertise, interstate cooperation, and the historical mandate to address oil and gas conservation issues between oil-producing states.

The IOGCC could update its compact to include minimum standards for interstate wells and provide recommended federal regulations to Congress. Further, the IOGCC can be a central resource to create a model compact to help states develop their own agreements for interstate oil and gas extraction. As long-time members, and based on their newly gained experience, New Mexico and Texas would be leaders in the development of new standards and a model compact. This interstate cooperation and shared learning would streamline the process of writing multi-state agreements, ensuring efficiencies in developing compacts while responding to specific state regulations.

Second, Congress retains the authority to make legislation related to policing compacts recognized under the Compacts Clause.¹⁷⁴ Over time, other issues have arisen, such as environmental protection or transmission of oil and gas through interstate pipelines, that Congress recognized required federal laws to regulate. As the IOGCC takes an active role as a resource for states to develop their own interstate compacts, it will gain insight into what issues consistently arise that would best be addressed through legislation. Guidance from the IOGCC could bolster, and hopefully expedite, the support for any proposed federal legislation. Additionally, enacted legislation supersedes any contradictory term of a compact consented to by Congress. Meaning that, should Congress deem an agreement between New Mexico and Texas a formal compact, any terms of the agreement could later be overturned through enactment of federal legislation that is responsive to issues that affect several states.

CONCLUSION

An interstate horizontal well between New Mexico and Texas is a novel issue that gives both states the opportunity to be leaders in a new phase in oil and gas regulation. The full impact of the states' interests and potential problems are still unknown. This Note lays out potential legal matters that the states may encounter as they proceed down the path of an interstate agreement. Any such agreement would likely trigger the Compacts Clause and restrict any controversies and remedies to the terms of the contract.

New Mexico and Texas can protect their own interests through strong leadership by actively working with the IOGCC and member states to develop standards and a model compact. Federal regulation of interstate horizontal wells may become more necessary as the issue of interstate drilling becomes prevalent, and this can be done through legislation informed by New Mexico and Texas's experience in developing the first interstate agreement for transboundary oil and gas extraction. Federal legislation related to interstate horizontal wells would mark a new phase in the history of oil and gas regulation. However, there is precedent for expanding federal authority to regulate oil and gas, and New Mexico, Texas, and the IOGCC

173. *Id.*

174. As shown in earlier analysis, Congress also likely has the authority under the Commerce Clause to legislate on issues related to interstate horizontal wells. *See Virginia v. West Virginia*, *supra* note 59.

are well positioned to shape that legislation. Enacting federal legislation that all states must adhere to but can be amended by vote is more democratic than relying on a single compact arbitrated by the Supreme Court. In the absence of doing nothing, which although impractical may actually be the best way to preserve each state's interests, enacted federal legislation informed by experience gives both states a democratic voice in how to resolve controversies with its neighbor.

As this Note comes to a close and is prepared for publication, Titus moves ahead with its plan for more wells. At NMOCC's most recent hearing, the commission approved Titus's application for a second transboundary well.¹⁷⁵ What was once a novel issue will soon become mundane. New Mexico and Texas have a rare moment to shape how transboundary oil and gas extraction is regulated and adjudicated.

175. April Hearing, *supra* note 90.