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MONTHLY Bundle of Writes

NEWS AND EVENTS FOR IRWA CHAPTER 67

MAY 2024

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PRESIDENT'S MESSAGE

Matthew VanEck, MAI
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Dear IRWA Orange County Chapter 67 Members,

As our Chapter year nears its end, we've had a calendar packed with many successful events.

In March, our luncheon speaker was BJ Swanner, Senior Project Manager and Director with Monument. Mr. Swanner gave a presentation on "Big Projects, Big Data: Geographic Information Systems as a Critical Collaboration Tool for Design, Planning, and Right-of-Way Analysis for Major Infrastructure Projects." BJ provided detailed examples of the GIS technology used in many of our projects, which generated great questions from the attendees.

On May 10-11, President-Elect Jillian Leivas and I attended the Region 1 Forum and Networking Event, hosted by IRWA Las Vegas Chapter 44. At the meetings, we reconnected with our regional friends and received important information about the upcoming International Conference in Long Beach. The Region awarded our Chapter and members the following honors:

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- Young Professional of the Year: Jillian Leivas with Nossaman LLP
- Newsletter of the Year: Chapter 67 Newsletter (Chair Alyson Suh with Woodruff & Smart)

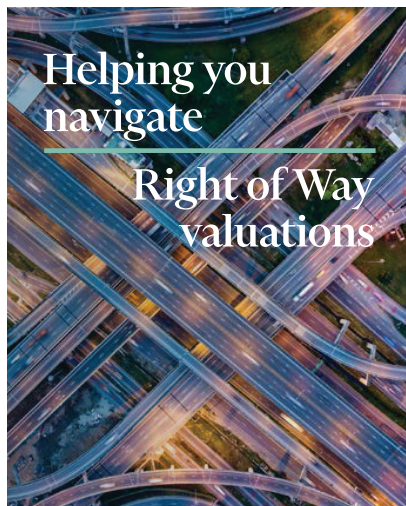
Congratulations to Jillian and Alyson!

At our May luncheon, Chapter 67 members Rick Friess, Nazani Temourian, and Brian English with Allen Matkins presented "Owner Attorneys' Perspectives on Getting Deals Done." Chapter member Maggie Quon with the Orange County Transportation Authority was presented with her SR/WA-TN plaque and pin. Well done, Maggie! We also elected the following 2024-2025 Chapter Officers:

- President: Jillian Friess Leivas
- President-Elect and International Director: Lara A. Boyko, JD, RWP-GN
- Secretary: Jacinto Munoz, MAI, SRA, AI-GRS, AI-RRS
- Treasurer: Dwayne Ozenne

Congratulations to our newly elected officers. The Chapter is in great hands.

Finally, our last lunch meeting of the 2023-2024 year will be held on June 11. Our guest speaker will be Selene Lawrence, Energy & Outreach Administrator for the City of Irvine's Environmental Programs Division. Jillian and I will also be attending the annual International Education Conference in Long Beach from June 23-26, where we will represent the Chapter at the annual board meeting. I am excited that I will get to see so many of our chapter members at conference in leadership positions, volunteering and presenting on various topics.



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Welcome back readers to the May edition of our newsletter. If you would like to contribute content to the newsletter, advertise, have questions or any ideas to improve the content, please contact us.

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UPCOMING EVENTS

June Monthly Luncheon

Tuesday June 11, 2024 12:00 p.m.

Speaker: Selene Lawrence, Energy & Outreach Administrator for the City of Irvine's Environmental Programs Division.

Topic: Planning for a Climate-Smart Future



Chapter 67 Is now on LinkedIn!

[Please join us. here.](#)



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JUNE LUNCHEON

Selene Lawrence

Energy & Outreach Administrator for the City of
Irvine's Environmental Programs Division

Planning for a Climate-Smart Future



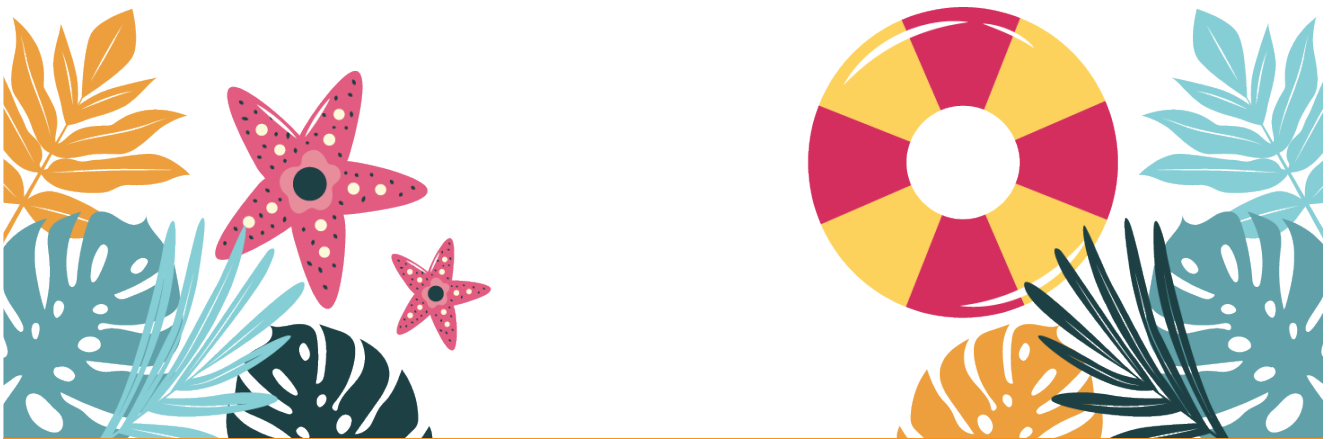
As Energy & Outreach Administrator for the City of Irvine's Environmental Programs Division, Selene is working to develop the City's first Climate Action & Adaptation Plan, as well as citywide policies and programs to achieve decarbonization across buildings, transportation and energy. Her career experience includes working as a Government Affairs liaison for the solar and recycling industries, as well as the New York City Department of City Planning, where she participated in a citywide inter-agency initiative to produce resiliency planning for New York City areas threatened by climate change, specifically sea-level rise. Her career has spanned the private, nonprofit and public sectors to achieve climate action and environmental conservation through policy, stakeholder engagement and community action.

Please Join Us

Tuesday, June 11, 2024 at 12:00 PM

Holiday Inn - Santa Ana/OC ARPT
2726 S Grand Ave, Santa Ana, CA 92705

[RSVP HERE](#)





EDUCATION

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For questions regarding IRWA education, whether it be information on a particular course, how to register, potential upcoming courses, or the credentialing program, please reach out to James.

IRWA's Virtual Classroom

[IRWA's virtual classes](#) let you engage in courses delivered in real-time from your desk., home or anywhere with an internet connection. Through an easy-to-use digital platform, IRWA instructors facilitate live interactive courses, creating a classroom experience in a virtual environment.



2024 EDUCATION CONFERENCE



The 2024 Conference Planning Committee is excited to welcome you to Long Beach, California, from June 23 to 26, 2024, for the 70th Annual International Education Conference! Plans are in motion to bring you a dynamic and educational event with some exciting additions.

Register by March 22, 2024 to secure the early rates. For more information on pricing and what's included each day at conference, check out the link below.

[REGISTER NOW!](#)

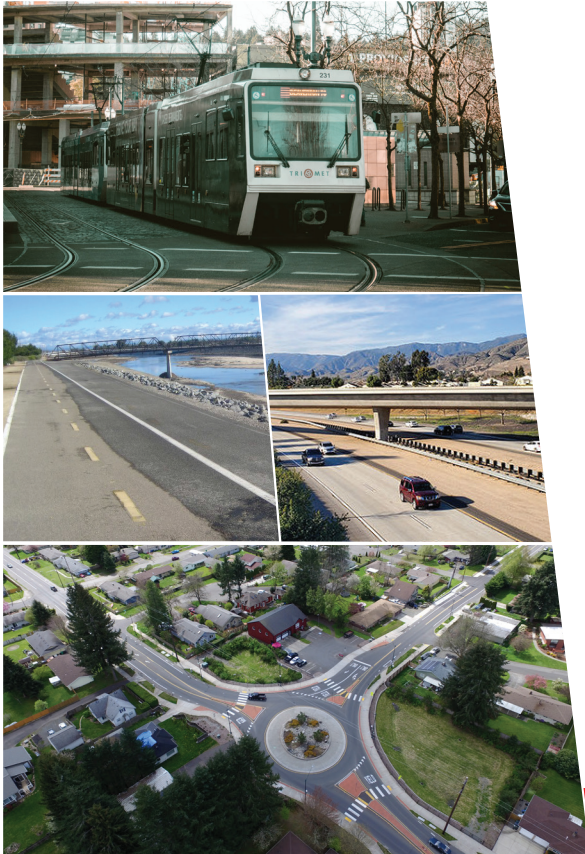


Volunteers Needed! **Calling all volunteers for the** **2024 Annual International Education Conference in Long Beach!**

The Conference Committee is in need of volunteers to assist with setup, breakdown, registration, hospitality, and other roles.

See the Link Below for Volunteer Registration

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ARTICLE



Beyond Lithium: an AI Test Case

*Christopher Taufatofua, Esq., Partner
Afzaal Abidi, Esq., Associate*

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This article was also co-authored by Ellen Swarbrick, Trainee Solicitor, Vinson & Elkins.

The accelerating rate of climate change and the consequent need to transition away from carbon-intensive sources of energy have led to a surge in investment into electric vehicles (EVs) and battery energy storage solutions (BESS). Lithium, an essential component in batteries used for both EVs and BESS, is already in great demand; and that demand is expected to skyrocket over the next five to ten years. However, this highly flammable material has become increasingly controversial, with the long-term negative environmental and social impacts of the lithium extraction process coming increasingly into focus. These factors, coupled with (i) the rate at which demand for lithium is expected to increase and (ii) the perceived over-reliance on China and a select few other countries for the supply of economically and strategically important minerals, including lithium and other rare earth minerals required for batteries, have led to a push for research and development into alternative materials for use in battery technologies.

To date, the search for alternative materials has not borne fruit. However, earlier this year Microsoft and the Pacific Northwest National

Laboratory were able to find alternative battery materials in a matter of hours using a combination of advanced artificial intelligence (AI) and high-performance computing (HPC), showing their potential to rapidly expedite the energy transition.

The Need for Alternatives

Lithium has a high electrochemical potential, making it a perfectly suited component for use in high energy density rechargeable batteries. As of 2023, demand for lithium-ion batteries across EVs and BESS rose by 53% year-on-year to reach 950 gigawatts per hour (GWh); and is expected to exceed 4,500 GWh by 2030. While BESS are expected to have a compound annual growth rate of 30%, the bulk of the rise in demand for lithium-ion batteries will be driven by the demands of the burgeoning EV industry.

As things currently stand, lithium supply makes up less than 50% of the projected demand for 2030. Theoretically, there are enough global lithium reserves to supply this projected demand. However, current mining and extraction processes cannot easily be scaled, and projects have uncertain lead times. For example, one method of lithium extraction involves brine being pumped to the surface and into evaporation ponds, where the liquid brine is left to evaporate to yield lithium. Such projects can take up to eight years to reach commercial production.

These forecasts indicate a significant supply gap, with this scarcity potentially making lithium-ion batteries an attractive investment opportunity. But production lags are far from the only challenge. The extraction of lithium has the potential to be carbon-intensive and environmentally harmful, with a significant proportion of lithium currently mined in regions where ethical mining practices have not yet been established.

Carbon-intensive and Unethical

Lithium extraction can take place through several processes. Traditional hard rock mining releases 15 tonnes of CO₂ for every tonne of lithium mined. Alternatively, extraction from underground reservoirs releases a slightly more conservative – but by no means environmentally friendly – five tonnes of CO₂ per tonne of lithium mined. However, this alternative process is significantly more water-intensive, using multiple millions of litres of water to extract the equivalent tonnage of lithium needed for just a single EV, not to mention the resulting groundwater contamination.

Indeed, in Asia's lithium capital – China's Yichun City – lithium production was forced to halt back in 2022 amid an investigation into the abnormal water quality of the Jin River. This followed a series of incidents in Tagong, China, where a toxic chemical leak from the Ganzizhou Rongda Lithium mine found its way into the Lichu River, resulting in masses of dead fish and farm animals, devastating the local ecosystem. Groundwater contamination has also meant the area is no longer suitable for agriculture, impacting the livelihood of the indigenous people in the surrounding areas.

The perceived over-reliance on China for the supply of economically and strategically important minerals such as lithium has seen western economies introduce legislation aimed at reclaiming control of critical raw material supply and manufacturing capacity. However, given the time needed to scale lithium extraction projects, it is highly unlikely that domestic production in western economies will be able to meet expected lithium demand in the coming years.

Consequently, there is a pressing need to find a commercially viable alternative to lithium that is sustainable and ethical.

New Potential Battery Material

The issues discussed above have led companies like Microsoft to try and find novel methods to source viable alternatives to lithium. Using an AI

model combined with HPC, Microsoft was able to take 32 million potential materials and narrow them down to 18 viable alternative combinations in just 80 hours. Factors that were filtered for included, amongst others, stability of chemical composition, energy density, availability, and cost.

From the candidates, scientists were able to develop a working prototype, with the entire end-to-end process taking less than nine months – a process that would take decades in a typical research laboratory. The alternative currently being evaluated uses a combination of sodium and lithium, reducing lithium content by 70% compared to typical lithium-ion batteries. It was previously thought lithium and sodium could not be used together.

Scientists have flagged that it is not the material discovered (which is yet to be proven at scale), but the speed of the discovery that represents the most significant breakthrough. Krysta Svore, who leads the Microsoft quantum computing team at Microsoft Research, stated that in order to reach net zero by 2050, “we need to really compress the next 250 years of chemistry material science into the next two decades”. Microsoft's groundbreaking use of AI and HPC represents a positive step toward achieving that goal.

Wider Application

While this article is focused on lithium, it will be interesting to see how AI and HPC are deployed to find alternatives to other materials and scarce metals/minerals. For example, 95% of solar PV modules use a material called polysilicon; as of 2021, 45% of polysilicon was being produced in the Uyghur region in China, where it has been linked to forced labour regimes. A number of alternatives to polysilicon are currently being assessed, and methods such as those used by Microsoft could help to quickly identify materials that are less carbon intensive, more commercially suitable, and reduce reliance on countries where there have been proven instances of forced labour practices in the supply chain.

A Shifting Landscape

As we have discussed, the rate at which demand for lithium is expected to increase over the next decade, the environmental and social impacts of the lithium extraction process, and the over-dependence on China for supply mean that Microsoft's employment of AI and HPC to identify a viable alternative to lithium represents a welcome breakthrough in innovation.

While the use of AI and HPC may expedite the search for alternatives to other economically and strategically important minerals critical to the energy transition, there may be other, unintended consequences. For example, the speed at which AI and HPC can analyse vast datasets and simulate an infinite number of scenarios at unimaginable speeds could see the maturity lifecycle of new energy transition technologies compress. Currently, inventions in the energy sector can take between two to three decades to reach mass market from inception. Use of AI and HPC to accelerate the rate of innovation may create a risk for developers, lenders and other project participants that their technology may be surpassed by the time they are able to effectively get it to market, as the rate of innovation outstrips the timeline for developing their project.

In harnessing the power of AI and HPC, Microsoft's breakthrough underscores the potential of these technologies to expedite innovations in the energy transition, though it also raises questions about the implications for project developers looking to get their technologies out to market.

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ARTICLE



Mr. Hopkins

The EPA's Methane Waste Emission Charge: A Tax by Any Other Name

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Ms. Snow

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The Environmental Protection Agency (EPA) has published a proposed rule to assess and collect billions of dollars in methane “waste emission charges” from the oil and gas sector. The proposal implements section 60113 of the Inflation Reduction Act of 2022 (“IRA”), which gives the EPA new powers to act as tax assessor, collector, and enforcer based on a scant four subsections of statutory language. Without more detailed congressional tax policy guidance, the EPA has been left to its own policy preferences in designing this new methane tax program. And it shows. Time and again, the proposed rule interprets the IRA in ways that maximize tax revenue, minimize tax exemptions, and shift oversight costs onto the taxpayer.

After summarizing below how the EPA plans to implement the methane tax, we set out our observations on the most thought-provoking aspects of the proposal, including some that might have significant legal deficiencies that would warrant filing a public comment by March 26, 2024.

Summary of the Proposed Rule

Applicability. The waste emission charge (“WEC”) is imposed on methane emissions at facilities that emit more than 25,000 metric tons of carbon dioxide equivalent (“CO₂e”), as reported in Subpart W of the EPA’s Greenhouse Gas Reporting Program, in: (1) the onshore and offshore production sector; (2) the onshore natural gas gathering and boosting, processing, transmission, and storage sector; and (3) the liquefied natural gas (“LNG”) storage, export, and import sector. Importantly, the Subpart W rules define a “facility” in the production and gathering and boosting sectors as the combination of all individual units under common ownership or control in a single hydrocarbon basin.



Mr. Dobbins



Mr. Silberman

Emission thresholds. The proposed rule assesses the WEC only on methane emissions that exceed an “emissions threshold,” which differs based on the type of facility being taxed. In plain terms, these emissions thresholds are congressionally approved methane emission rates that will incur no WEC. For example, production facilities are not taxed on emissions of up to 0.2 percent of the natural gas sent to sales, while gas processing, gathering and boosting, and LNG facilities are not taxed on emissions of up to 0.05 percent of natural gas sent to sale to or through the facility. In addition, facilities that flare associated gas are taxed more aggressively than facilities that sell the associated gas. For example, at a facility with a gas-oil ratio of 3.1 mscf/bbl, the emissions threshold for a 1,000 barrels per day of oil production would be 43 metric tons if the facility sells its gas, but only 4 metric tons if it does not. This means that the facility that does not sell its gas owes the WEC on 39 more metric tons than the facility that sells its gas — a difference in tax year 2024 of about \$35,000 per facility.



Mr. Tenpas



Mr. Traylor

Tax exemptions. In addition to the emission threshold, the rule defines three exemptions that can lower the assessed tax. The first is called the “regulatory compliance exemption,” and waives the tax at any individual facility that complies perfectly with the EPA’s recently amended New Source Performance Standards Subparts 0000b and 0000c. The second is relevant to facilities that do not send associated gas to sales and provides partial tax relief if the failure to sell the gas is attributable to a delay in permitting the gas sales infrastructure in the area. The third provides partial tax relief for abandoned and plugged wells.

Tax netting. The IRA allows emissions at a facility that are below the emissions threshold to offset emissions at another facility under common ownership or control that are above the emissions threshold.

The taxpayer. The “WEC obligated party” is the person who owns or operates the facility on December 31 of each reporting year, or the designated representative of a facility with multiple owners or operators. Importantly, limited partnership shareholders are not considered “owners” for purpose of identifying the taxpayer.

Things We Are Thinking About

While much of the proposed rule is driven by statutory directives (for example, the different emission thresholds for different facilities, and the scope of the tax exemptions), many aspects of the rule — some controversial — are creatures of the EPA rulemaking process. We believe that all these aspects merit a public comment, and some of them, if not corrected, could be challenged successfully on appeal.

What is a facility?

The IRA charges the WEC to the owner or operator of an “applicable facility” that emits more than 25,000 metric tons per year (“mtpy”) of CO₂e. The IRA defines an “applicable facility” to mean a facility within nine industry segments, as further defined by Subpart W. For facilities in the underground natural gas storage segment, for example, it is not hard to decide what the “facility” is — it is the single geographic facility that stores natural gas underground. But for “facilities” in the onshore petroleum and natural gas production and the gathering and boosting segments, the answer is not so clear.

That is because the EPA’s Subpart W rules have a special definition for “facilities” in these two industry segments. In those segments, the “facility” is defined to include all individual production (or gathering and boosting) assets in a single hydrocarbon basin. Otherwise, not many production (or gathering and boosting) facilities would have to report under Subpart W because few production facilities individually emit more than 25,000 mtpy CO₂e.

The problem with the proposed rule is that the IRA did not define “applicable facility” by reference to the Subpart W definitions of “facility.” It did so by reference to the Subpart W definition of the nine industry segments, none of which include the special “facility” definition for production, gathering, and boosting. Moreover, the IRA

drafters knew how to aggregate facilities if they wished — tax netting can be performed “within and across all applicable segments.” The proposed rule makes no apparent effort to address this statutory text and leaves open the question of whether the tax may be imposed at an individual production, gathering, or boosting asset that emits less than 25,000 mtpy CO₂e.

How does tax netting work (or not)?

The IRA expressly allows emissions at one facility that are below the emission threshold to offset emissions at another facility that are above the emission threshold. However, the proposed rule restricts netting by restricting netting “credits” only to “applicable facilities” (that is, facilities with more than 25,000 mtpy CO₂e). That means that facilities with very low methane emission rates (an outcome encouraged by the IRA) cannot create netting credits if they do not emit more than 25,000 mtpy CO₂e. Not only is this approach contrary to the plain statutory netting text, but it also discourages ongoing methane reduction projects at facilities with less than 25,000 mtpy CO₂e.

Is the regulatory compliance exemption real?

The IRA does not impose the WEC at facilities that are subject to NSPS Subparts 0000b or 0000c. This exemption has two conditions: (1) that the applicable 0000b or 0000c program is “in effect in all States with respect to the applicable facilities”; and (2) the facility must be in compliance with the methane emission requirements of the applicable NSPS. The EPA’s proposed rule takes such a narrow view of these conditions that the regulatory compliance exemption might never provide the intended tax relief. Here’s how.

First, the EPA decided to interpret the first condition to mean that every state must have an approved Subpart 0000c program before any facility in any state may claim the exemption. This interpretation appears to ignore the phrase “with respect to the applicable facilities” in the statute and might be unlawful. This interpretation also fails to reward states that submit approvable Subpart 0000c programs, because their oil and gas industry gets no tax benefit until the least timely state submits its program. On the other hand, the interpretation does not punish the late acting state — it collectively punishes all states. As a policy choice, the EPA’s interpretation is lamentable. As a legal matter, the EPA’s interpretation might be unlawful.

Second, the EPA interpreted the second condition to require “no deviations” at a facility during the reporting year, including no deviations with emission standards, work practice standards, and monitoring, reporting, reporting, and recordkeeping requirements. Considering that Subparts 0000b and 0000c impose a “no discernible emissions” standard for methane, a single wisp of methane detected using an optical gas imaging camera on one day out of the year will disqualify the facility from the regulatory compliance exemption.

Is the permitting delay exemption real?

The IRA provides partial relief from the aggressive taxation at production facilities that flare instead of selling natural gas if the taxpayer can demonstrate that the necessary gas gathering infrastructure permitting has been delayed. The EPA imposes four conditions of a showing of permitting delay, the most important of which is that the permit must have been delayed for between 30 and 42 months from the date the permitting agency deemed the permit application complete. What this condition means in practice is that the more aggressive tax will be owed for three or four years after a permit application has been filed in a situation that is outside the control of the producer. The EPA has requested — and surely should receive — public comments on whether these conditions are realistic.

How will this rule impact buying and selling taxed assets?

The proposed rule requires the owner of the “applicable facility” on December 31 of a reporting year to pay the WEC. The EPA acknowledges complexities in ownership structure and (to a lesser extent) the effect of mergers and acquisitions in the sector. The EPA’s proposed solution is that multiple owners may designate a representative to make tax filings and pay taxes. That is an adequate solution as far as the EPA is concerned, but it requires WEC owner agreements to be executed that clarify the responsibility for WEC payments. Particularly in a multi-owner situation, owners and operators must be aware of this new obligation to negotiate a designated representative agreement. And in the context of mergers and acquisitions, parties must take great care to assess and negotiate responsibility for the payment of taxes, in addition to considering the WEC impacts on the value of the asset.

ARTICLE



In Federal Takings, Kohl v. United States Was the GOAT!

By Jeremy Bagott, MAI, AI-GRS

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Ed. Note: Jeremy Bagott, MAI, AI-GRS, is an independent fee appraiser specializing in the valuation of real property rights for right-of-way clients in Southern and Central California. He is author of "The Compact Real Estate Appraiser" and "Guaconomics: Dipping a Chip into America's Besieged Party Bowl [gmail.us6.list-manage.com]."

VENTURA, Calif. (Aug. 18, 2023) – The outcome of Kohl v. United States seems predictable today, but only a decade after the end of the Civil War, matters involving States Rights were to be avoided at all costs.

The Fifth Amendment always contained the phrase "nor shall private property be taken for public use, without just compensation," but for the nation's first 100 years, the federal power of eminent domain was dormant for a property that wasn't in the District of Columbia. It was unclear whether the federal government could directly acquire a privately owned property through eminent domain if the property were located in a state.

That is, until the U.S. Supreme Court examined the matter in 1876 in Kohl v. United States. This landmark case is the greatest of all time – the GOAT – when it comes to settling federal eminent domain authority. While the petitioners protested that no act of Congress was used to determine the details of an acquisition, the high court ruled such legislation was unnecessary.

To modern observers, with the benefit of hindsight, the matter before the Waite Court may appear clear-cut. But it wasn't at the time. With the wounds of the Civil War still fresh, Congress steered clear of head-on collisions over States Rights. For federal condemnation of land, the respective state would have

to give authority for a proceeding and the appropriation would have to be made through state law and by the decision of state courts. Kohl v. United States changed all that. It established that the federal government could directly condemn land for its own uses.

Wrote Associate Justice William Strong for the majority: "The Fifth Amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?"

Another sticky subject Kohl addressed was whether the government could determine the value of a property in order to "justly compensate" the property owner. The majority ruled the property could be appraised by the government.

The condemnee in the Kohl case was the owner of a leasehold estate. In June 1873, U.S. Attorney for the Southern District of Ohio, Warner M. Bateman, filed a petition in the Hamilton County Probate Court to appropriate, under the right of eminent domain, the lot for a U.S. post office, custom house and other government buildings. The taking comprised 25 parcels on about 4 acres.

But the gimlet-eyed property owner, estate executrix Mary R. Kohl, noticed there was nothing in the action of the legislative branch of the federal government providing for the exercise of such power. It opened a Pandora's box that took the matter before the U.S. Supreme Court.

Strong, a Grant appointee, called the federal government's authority to appropriate property for public uses "essential to its independent existence and perpetuity." With that, the Supreme Court birthed the existence of federal condemnation authority in the states.

Writing the dissent was Associate Justice Stephen Johnson Field, an irascible Californian and Lincoln appointee who had served as alcalde of Marysville under Mexican rule and state assemblyman for Yuba County after statehood. He had been appointed chief justice of the California Supreme Court after his predecessor, Chief Justice David S. Terry, had killed U.S. Senator David Colbreth Broderick in a duel and left the state.

Field embraced a States Rights stance, pointing out, "The Federal courts have no inherent jurisdiction of a proceeding instituted for the condemnation of property, and I do not find any statute of Congress conferring upon them such authority."

Less than a year after Kohl, Strong was tapped to be one of the five justices to sit on the Electoral Commission convened to resolve the disputed electoral votes in the contentious U.S. presidential election of 1876. The commission awarded the disputed votes to Ohioan Rutherford B. Hayes.



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Maggie Quon



Chapter 67 would like to congratulate Maggie Quon for recently receiving her SR/WA designation. We had the honor of presenting her with her plaque and pin at our May luncheon. The Senior Right of Way Professional (SR/WA) designation is the highest credential attainable by the International Right of Way Association. Maggie completed a total of 208 credit units of IRWA courses. This requires a considerable amount of dedication, motivation, and perseverance and we would like to congratulate Maggie on a job well done!

Maggie is a Real Property Agent with the Orange County Transportation Authority and manages the right of way for highway and transit projects together with oversight for compliance with right of way acquisition and procedures. She received her Bachelor of Science degree from California State University at Fullerton.

Maggie was born in Hong Kong and currently resides in Brea with her husband, 15-month-old son Vince and dog Kaiba. In her spare time she enjoys making coffee runs and playing tennis.

Her favorite quote is "everything is meant to be" and her proudest accomplishment is being a mom. Maggie's last vacation was a fun trip to Texas.

Maggie first got involved with IRWA when she was an intern at OCTA and wanted to learn more about the right of way industry. Maggie is excited about staying active in IRWA to connect with other right of way professionals and to continue advancing her career. The next time you see Maggie, don't forget to congratulate her on her latest accomplishment!

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