the presence of a discharge. Such an amendment would comport with the CWA's expansive purpose of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a)(1).

Mrs. Finley is an attorney in the Division of Congressional and Legislative Affairs, U.S. Fish and Wildlife Service. The views expressed here are Mrs. Finley's alone, and do not necessarily reflect the views of the U.S. Fish and Wildlife Service. She may be contacted at Shawn_Finley@fws.gov.

Buying Mineral Property Subject to an Area of Mutual Interest Clause

Jean Feriancek

A mining company or oil and gas company conducting acquisition due diligence may discover that the seller entered into an agreement containing an area of mutual interest (AMI) clause. An AMI clause is a provision in a purchase and sale agreement, exploration agreement, operating agreement, or other agreement relating to mining or oil and gas properties that governs the rights of the parties to acquire interests in mineral leases, oil and gas leases, or other mineral rights within a specified geographic area. In some cases, the buyer may not discover until after the acquisition has been completed that the seller was party to an agreement containing an AMI clause. Unless the buyer's due diligence is thorough, this may happen even if the buyer searches title in the county records to the mineral property or leases being purchased because the type of agreements that contain AMI clauses generally are not recorded. Instead, the recorded deed or lease assignment to the buyer or in its chain of title may state that it is given "subject to" a particular purchase and sale agreement or other agreement but contain no information as to the provisions contained in that referenced agreement. Whether a mining company or oil and gas company buyer knows about the AMI clause before the deal closes or finds out about it afterward, one key question is whether it is subject to obligations created by the AMI clause.

There is no standard form of AMI clause used in mining or oil and gas agreements. Thus, if a buyer is subject to an AMI clause, its obligations depend upon the provisions of the particular agreement. For example, the AMI clause may provide that if a party to the agreement acquires an interest in mineral rights (or oil and gas rights) within the geographic area identified in the clause, it must offer the other party the right to elect to participate pro rata in such an acquisition at cost. Under another variation of an AMI clause, if the buyer acquires any interest in mineral rights (or oil and gas rights) within the specified geographic area, it must assign a royalty to the other party. By its terms, an AMI clause may remain in effect for a period ranging from a few months to many years. Further, while the obligations created by some AMI clauses are limited to additional interests acquired in the land that is the subject of the agreement containing that clause, most AMI clauses create obligations affecting other lands that are near or surround the land that is the subject of the agreement containing the AMI clause. The amount of acreage in an AMI can vary widely.

Mere assignment to a buyer of oil and gas leases, mining leases, or other interests that are subject to an AMI clause will not necessarily impose the obligations created by the AMI clause on that buyer. Rather, unless the buyer specifically assumes obligations associated with the AMI, whether those obligations are imposed on the buyer depends upon whether the obligations are deemed to be covenants that run with the land (and thus are binding on assignees of the original parties) or covenants that are personal to the original parties to the agreement. Because there are not many cases on the issue of whether a buyer is subject to an AMI clause, examining two cases at the opposite ends of the spectrum is useful in analyzing what factors are important in determining if a buyer likely will be bound by an AMI clause in an agreement entered into by the seller.

In *Westland Oil Development Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903 (Tex. 1982), the Texas Supreme Court found that an AMI clause was a covenant that ran with the land and was binding on subsequent buyers of oil and gas leases, who apparently did not know it existed when they acquired an interest in the leases. The assignment of the leases to the buyers provided that it was subject to an operating agreement, and that operating agreement referenced a letter agreement and stated that in the event of conflict the terms of the letter agreement would control. The referenced letter agreement, which related to acquisition of a farmout agreement from Mobil Oil Corporation, required a cash payment and assignment to the selling party of a one-sixteenth overriding royalty interest, one-thirty-seconds of the working interest obtained from Mobil, and a production payment of $150,000 out of production from the test well. It also contained an AMI clause providing that if any of the parties or their assigns acquired any additional leasehold interests affecting the lands covered by said farmout agreement, or any additional interests from Mobil under "lands in the area of the farmout acreage," such shall be subject to the terms and provisions of the letter agreement. The Texas court ruled that, as a matter of law, the buyers had constructive notice of the existence of the AMI clause as a result of the reference in their assignment to the operating agreement and the provisions of the operating agreement. It also held that, insofar as the AMI clause referred to the lands affected by the Mobil farmout, the description of the property was legally sufficient. However, the court concluded that the AMI clause was not binding on the buyers to the extent it referred to lands in the area of the farmout acreage because those lands were not identified sufficiently.

A different result was reached in *Mountain West Mines, Inc. v. Cleveland-Cliffs Iron Company*, 376 F. Supp. 2d 1298 (D. Wyo. 2005), *aff'd* 470 F.3d 947 (10th Cir. 2006). Cleveland-Cliffs Iron Company (CC) obtained an option from Mountain West Mines, Inc. (MW) to acquire various uranium properties in the Powder River Basin in Wyoming in exchange for payments to MW, including a percentage royalty on uranium produced. The option agreement contained an AMI clause that obligated CC

to pay a 2.5 percent royalty to MW on any lands it thereafter acquired in the Powder River Basin. CC exercised the option and acquired four properties from MW. CC later sold those properties to third-party buyers. MW claimed that, as a result of the AMI clause and successors and assigns language in the option agreement, it was entitled to a royalty on uranium produced by those buyers from properties they acquired in the Powder River Basin after acquiring the original properties.

The *Mountain West* court held that the AMI clause was a personal covenant that did not run with the land. It found that, under Wyoming law, four elements must be met in order to establish that a covenant runs with the land: (1) the original covenant must be enforceable; (2) the parties must intend that the covenant run with the land; (3) the covenant must touch and concern the land; and (4) there must be privity of estate between the parties. The court determined that neither the intent element nor the privity of estate element was met. Privity of estate was lacking because, in the conveyances of the original properties from CC to the buyers, any obligation of the buyers to pay to MW a royalty on production from properties other than the original properties specifically was disclaimed. The court also found that the option agreement did not demonstrate the parties' intent that the AMI clause run with the land. It cited the fact that the AMI clause used the word "it" and did not mention CC's successors. The court found it unbelievable that the parties intended that MW would be entitled to a royalty not only on all properties acquired by CC subsequently within a broad geographic area but also on all unrelated properties in that same large geographic area that were acquired subsequently by each buyer of one of the original properties.

What do these cases tell us about whether a mining company or oil and gas company buyer is going to be subject to a preexisting AMI clause included in an agreement affecting the property being purchased? First, one has to look at what the test is for determining whether a covenant runs with the land in the state where the property is located. That test likely will focus in large part on the intent of the original parties to the agreement containing the AMI clause. However, as discussed in *Mountain West*, other elements also may need to be met for the AMI clause to attach to the land. If the AMI clause itself refers to successors and assigns, that will be stronger evidence that the parties intend it to be a covenant running with the land than a general provision in the agreement stating that it is binding on the successors and assigns of the parties. Further, an AMI clause that clearly identifies the affected land and is limited in scope geographically is more likely to be determined to be a covenant that attaches to the land. The larger the geographic area beyond the land subject to the agreement containing the AMI clause that an AMI covers, the less likely it will be found to be a covenant running with the land, on the grounds that the obligations created are too unrelated to the land subject to the agreement to attach as a covenant to that land. Also, the less well defined the property description contained in an AMI clause is, the less likely a buyer will be subject to it.

Given the constructive notice concept and the duty that courts generally impose on buyers to reasonably investigate unrecorded agreements that are referenced in documents in their chain of title, the fact that an agreement containing an AMI clause is not recorded is unlikely to preclude a buyer from being subject to obligations imposed by the AMI clause. A buyer obviously is in a better position to determine whether an AMI clause imposes obligations that it finds unacceptable if it knows about the clause. Due to the short time periods often allowed for preclosing due diligence in mining and oil and gas property acquisitions, a buyer may not be able to identify on its own all agreements containing AMI clauses that affect the leases or other property being purchased. Thus, in addition to conducting its own due diligence, the buyer may want to require that the seller identify such agreements in a schedule to the purchase contract and avoid any broad assumption of agreements previously entered into by the seller that the buyer has not reviewed thoroughly. If the buyer is concerned about the obligations created by an AMI clause, particularly one that has a broad geographic scope, it should seek to obtain a specific disclaimer from the seller that the clause runs with the land.

Ms. Feriancek is a partner in the Denver office of Holland & Hart LLP, and a member of the editorial board of* Natural Resources & Environment. *She may be reached at jferiancek@hollandhart.com.

Shifting the Focus of Wetlands Protection to State and Local Governments

Paula J. Schauwecker

As thoroughly explored and discussed in a previous issue (*see* 22:1 *Natural Resources & Environment*, Summer 2007), the precise definition of what constitutes a wetland subject to jurisdiction under Section 404 of the Clean Water Act (CWA) remains unclear after the Supreme Court decision in *Rapanos v. United States*, U.S. 126 S.Ct. 2208 (2006) and the subsequent Joint Guidance issued by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps). *See* Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (Joint Guidance), 72 Fed. Reg. 31,824 (June 8, 2007), *available at* www.epa.gov /owow/wetlands/guidance/CWAwaters.html. Nevertheless, one thing seems perfectly clear: more of the burden for regulating and protecting wetlands will shift to state and local governments. Now, more than ever, it is critically important that states lacking independent wetlands programs enact such legislation and states that already have wetlands programs evaluate and amend them to fill in the gaps created by the fractured decision in *Rapanos* and the subsequent Guidance. While it may still be somewhat unclear just what those gaps are, there is little doubt that a significant percentage of wetlands throughout the United States may no longer be subject to CWA Section 404 jurisdiction or state certification under Section 401. For states without independent wetlands regula-