

ANews

President's Message

With September comes the return to normal schedules. It also brings the return of traffic and, luckily, clients sprinting to finalize their yearend transactions. The College has been active all summer, but activities hit a crescendo in the run-up and follow on for the annual fall meeting.

Boston Annual Meeting

This year the annual meeting is in Boston. While the Red Sox are mired in last place and will be home for October, the ACREL meeting and the City of Boston will have a wide variety of activities to suit every fancy. The meeting is from October 16-19, 2014 in the InterContinental Hotel on Atlantic Avenue backing on to Boston Harbor. As this message is being finalized there are 275 registered members and 120 registered guests, but there is room for more. We want a record crowd to partake in the phenomenal program, activities and delights of Boston.

First the Programs Committee has done an extraordinary job with this program. While the internet and media dull us to the use of superlatives, where everything is amazing and tweets

from celebrities about what they had for breakfast seek to draw attention, this program really is spectacular in every sense of the word. I have seen it come into shape since planning meetings began almost 18 months ago in Naples, Florida, and countless hours have gone into all aspects. This program is the last for Marilyn Maloney as the head of the Programs Committee, and while we owe her a deep debt of gratitude, you really need to see this program, or the loss will be yours. This program, like all programs, is a collaborative effort

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involving a large number of members of ACREL, including the meeting leader, Arthur J. Menor, the fall programs chair, Beth Mitchell and the session leaders, Jack Fersko, Marie A. Moore and S. Scott Willis.

Please note that the Thursday session is a special program that begins earlier than normal, at 3:30 pm, so try to arrive in time to see it. Entitled "Where Have All the Tall Buildings Gone? An Illustrated History of the Skyscraper," it promises to be an engrossing 90 minute history of the skyscraper including what technology has done to make impossibly larger structures a real possibility in the future. With special assistance from Joshua Stein as the session leader for Thursday, this program with media will literally launch our fall meeting.

This meeting will also be the first opportunity to meet our newest members. If you recall we had 40 new members admitted in 2014 and many will show up for their first meeting in Boston. We have 40 mentors assigned to help them navigate the college, but please go out of your way to introduce them to yourself and fellow members as it can be daunting to come to a meeting recognizing few if any faces. Collegiality is a hallmark of the College, so please extend a hand to these new members as well as pay special attention to all those who have been less than 3 years in the College. Many of us became regular attendees only because other members reached out to us when we were new or relatively new to the College.

ACRELSHares

In this newsletter is more detailed information about ACRELSHares, a new communication product that is being rolled out to all College members in Boston. Having used it for over a

year, I can tell you it will dramatically change communication within the College. This rollout is the product of many years of beta testing and hard work. As indicated in a previous newsletter, this was created with literally over 1,000 hours of collective effort from Gordon Tanner and Dan Smith, together with Jill Pace and Henri Keller. A special thanks to Microsoft for the free technical assistance they gave the College to get us up and running. This is the biggest communication software introduction in the history of the College. In simple terms it will allow members to have dramatically enhanced searches of all ACREL materials and to easily post materials for their committees and the College. This software is also a huge new tool for committees. Each committee gets its own site to easily post materials, minutes, work on special projects and it even has a blog to communicate with all committee members. We even have several layers of support and backup for when Fellows have questions about how to access or use ACRELSHares.

Aging of the College and Member Selection

We must view the aging of the College in relative terms and in context. In the past 110 years the average American has added more than 30 years to their life expectancy. That is dramatic progress unequalled in history. A baby girl born today has a projected 1 in 2 chance of living to 100 years of age. At the time of enactment of Social Security the average life expectancy for a man at *birth* was 58 and for women it was 62, less than the Social Security retirement age of 65. A study conducted to look at the quality of life including mobility, life expectancy, and other quality of life features concluded that someone who is 70 today compared equally with someone who was 55 years old in the recent rock and roll era of 1955-1965. In other words, 70 is the new 55 compared with just 50 years ago. Maybe in the future 70

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will be the new 40. Almost any organ except the brain can be cloned and replaced. Medical technology has been incredible and gifted us with brighter outcomes than any previous generation since the dawn of mankind. That is genuine progress!

Nevertheless, eventually we will all retire and at some point become less active in ACREL. This brings us to the member selection process. The admission process for 2015 new members has begun. Last year it got extended, but it created great difficulty for the Member Selection Committee. They had very little time to make their calls and process the nominations. This year we will **NOT BE EXTENDING** the application deadline which is **5 pm on November 13, 2014**. I will be sending a more detailed message about the aging of the College in a few weeks, but suffice it to say if we are to keep ACREL the vibrant, collegial organization it is today with cutting edge members and discussions, we need to replace those who become inactive. There are materials on the ACREL website including a memo from Karen Dennison, chair of the Member Selection Committee, regarding the membership nomination process. Just go to the ACREL website and on the home page on the right hand side under "Membership" click on "2015 Selection". If you have any issues, contact a member of the Member Development Committee, who are also listed on the website. Please remember, if each of us nominates just one person to replace us, then the future of the College will be secure.



Tom Kaufman, President

Meetings Calendar

2014 Annual Meeting
October 16-19, 2014
InterContinental Hotel
Boston, MA

2015 Mid-Year Meeting
March 25-28, 2015
JW Marriott Camelback Inn
Scottsdale, AZ

2015 Annual Meeting
October 22-25, 2015
Four Seasons Hotel
Baltimore, MD

2016 Mid-Year Meeting
March 17-20, 2016
The Grand Del Mar
San Diego, CA

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Regulation of Hydraulic Fracturing

by David L. Callies, William S. Richardson School of Law*

Hydraulic fracturing has transformed the United States' energy outlook in recent years. President Obama dubbed the United States the 'Saudi Arabia of natural gas' because '[w]e've got a lot of it'.¹ In fact, the U.S. Department of Energy's Energy Information Administration (EIA) estimated that the U.S. has over 2,214 trillion cubic feet of recoverable shale gas reserves.² By 2020, the EIA projects that shale gas will comprise over 20% of the total U.S. gas supply.³ Thus, the 'fracking' process has been touted in the U.S. as the key to a clean energy future and to ending dependence on foreign oil.⁴ Hydraulic fracturing is a process whereby fracturing fluids—a combination of sand, water and chemical additives—are pumped into wells under high pressure to generate fractures in underground formations.⁵ Recent technological advancements in hydraulic fracturing have enabled the oil and gas industry to access 'shale gas'—natural gas produced from hydrocarbon-rich shale formations.⁶

Despite the many potential benefits of fracking, many have raised concerns about the impact of fracking on underground water resources, public health, and other environmental effects in the locale of these shale

gas extraction facilities.⁷ The sudden pervasiveness of fracking, in conjunction with communities and environmentalists' concerns, has raised the issue of who regulates fracking. Because fracking is not regulated under federal law, legal battles ensued between state and local governments over who has the power to regulate fracking. A patchwork of regulations evolved in various states across the nation as legislators and municipalities struggled to cope with the competing concerns of environmentalists and the oil and gas industry.⁸

This article briefly reviews the hydraulic fracturing process and summarizes the regulatory regimes applicable or potentially applicable to hydraulic fracturing in the U.S. and analyzes relevant caselaw. Section I gives an overview of shale gas, the technical process of shale gas extraction and the environmental concerns surrounding fracking operations. Section II summarizes the various laws that comprise the Federal fracking regulatory framework. Finally, section III examines the regulation of fracking by the states and examines how courts across the U.S. treat fracking regulations at the state and local level.

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¹ Barack Obama, President of the United States, 'President Obama Discusses the Blueprint for American-Made Energy' *White House Press* <<http://www.whitehouse.gov/photos-and-video/video/2012/01/26/president-obama-discusses-blueprint-american-made-energy#transcript>> accessed 18 January 2014.

² Mason Inman, 'Estimates Clash for How Much Natural Gas in the United States' *National Geographic News* (29 February 2012) <<http://news.nationalgeographic.com/news/energy/2012/03/120301-natural-gas-reserves-united-states/>> accessed 18 January 2014.

³ United States Energy Information Administration, 'Annual Energy Outlook 2009 With Projections to 2030' [2009] <<http://www.eia.doe.gov/oiaf/archive/aeo09/pdf/0383%282009%29.pdf>> accessed 18 January 2014.

⁴ US EIA, 'Annual Energy Outlook' (n 4) 2-3.

⁵ United States Environmental Protection Agency, 'Potential Relationships Between Hydraulic Fracturing and Drinking Water Resources' [2010] 1 <[http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/3B745430D624ED3B852576D400514B76/\\$File/Hydraulic+Frac+Scoping+Doc+for+SAB-3-22-10+Final.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/3B745430D624ED3B852576D400514B76/$File/Hydraulic+Frac+Scoping+Doc+for+SAB-3-22-10+Final.pdf)> accessed 18 January 2014. See also Beth E Kinne, 'The Technology of Oil and Gas Shale Development' in Erica L Powers and Beth E Kinne (eds), *Beyond the Fracking Wars: A Guide for Lawyers, Public Officials, Planners, and Citizens* (American Bar Association 2013) 3.

⁶ Jason B Hutt and Salo L Zelemeyer, 'The Shale Gale: Storming Towards Energy Independence' in ALI-ABA, *Shale Drilling and Hydraulic Fracturing: A Primer for Non-Specialists* (American Bar Association 2012) 17.

⁷ US EPA, 'Hydraulic Fracturing and Drinking Water Resources' (n 1) 1.

⁸ Rachel Degenhardt, 'Hydraulic Fracturing and Groundwater Contamination: Can Disclosure Rules Clarify What's In Our Groundwater?' (2012) 39 *Ecology L Currents* 39. See also United States Department of Energy, 'Modern Shale Gas Development in the United States: A Primer' [2009] 25-27 <http://www.netl.doe.gov/technologies/oil-gas/publications/epereports/shale_gas_primer_2009.pdf> accessed 18 January 2014.

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Regulation of Hydraulic Fracturing

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I. Overview of Shale Gas and Hydraulic Fracturing

Natural gas⁹ is an attractive asset that plays an important role in our nation's clean energy future.¹⁰ Natural gas burns cleanly and emits less potentially harmful emissions than coal and oil.¹¹ Eighty-four percent of natural gas consumed in the U.S. is produced in the U.S., and nearly all (97%) of the natural gas consumed in the U.S. is produced in North America.¹² Shale gas, therefore, has the ability to reduce greenhouse gas emissions and simultaneously curtail the nation's dependence on foreign sources of oil.¹³ As rosy as the nation's energy future may appear, fracking has been challenged on many levels, bringing the regulation of shale gas extraction to the forefront. To understand the complex interplay of regulations currently in place, it's first important to understand two bases for regulations: the natural (and unnatural) resources used in fracking and the potential environmental effects of fracking.

A. The Technical Process of Hydraulic Fracturing

Fracking is not a new process. Fracking was initially developed in the 1940s to increase the production of oil reserves.¹⁴ The rate of fracking operations expanded significantly in the 1980s and through the 1990s to reach coalbed methane (CBM) deposits.¹⁵ The demand for natural gas, advancing fracturing technologies and federal tax credits for nonconventional energy production in the 1980s led to a prominent growth in CBM—from fewer than 100 coalbed wells in 1984 to nearly 8,000 coalbed wells in 1990.¹⁶ The boom in CBM led to the use of hydraulic fracturing on other source of fuel, such as shale gas.¹⁷ The EIA, part of the U.S. Department of Energy (DOE), reports that production from shale formations is the fastest growing source of natural gas.¹⁸

Since the extraction technique was introduced in 1949, nearly 2.5 million fracturing treatments have been executed worldwide.¹⁹ Fracking is employed as 'formation stimulation practice', which increases permeability by allowing more gas to flow to the wellbore.²⁰ Horizontal wells—drilled down vertically over 5,000 feet beneath the earth's surface, then

⁹ 'Natural gas is a mixture of light-end, flammable hydrocarbons primarily composed of methane (CH₄), but also containing lesser percentages of butane, ethane, propane, and other gases. It is odorless, colorless, and, when ignited, releases a significant amount of energy.' J Daniel Arthur, Bruce Langhus, and David Alleman, 'An Overview of Modern Shale Gas Development in the United States' (ALL Consulting 2008) 1 <www.all-llc.com/publicdownloads/ALLShaleOverviewFINAL.pdf> accessed 18 January 2014 (citations omitted).

¹⁰ United States Environmental Protection Agency, 'Natural Gas Extraction-Hydraulic Fracturing' (November 2013) <<http://www2.epa.gov/hydraulicfracturing>> accessed 18 November 2013.

¹¹ Arthur (n 42) 1.

¹² US DOE, 'Modern Shale Gas Development in the United States: A Primer' (n 8) 5.

¹³ United States Energy Information Administration, 'Natural Gas Year-in-Review 2008' (April 2009) <<http://www.eia.doe.gov/naturalgas/review/archive/ngyir2008/ngyir2008.html>> accessed 18 January 2014.

¹⁴ Leonard Dougal and Jacob Arechiga, 'Shale Play Hydraulic Fracturing: Emerging Water Resource and Regulatory Issues' (2012) 10(1) ABA Water Quality and Wetlands Committee Newsletter 3 <http://www.americanbar.org/content/dam/aba/publications/nr_newsletters/wqw/201203_wqw.pdf> accessed 18 January 2014.

¹⁵ Mary Tiemann and Adam Vann, 'Hydraulic Fracturing and Safe Drinking Water Act Issues' (Congressional Research Service 2013) 2 <www.fas.org/sgp/crs/misc/R41760.pdf> accessed 18 January 2014. "CBM production through wells began in the 1970s as a safety measure in coal mines to reduce the explosion hazard posed by methane." *ibid.* Coalbed methane refers to methane that is found in coal seams and is another source of unconventional gas. United States Environmental Protection Agency, 'Unconventional Extraction in the Oil and Gas Industry' (August 2013) <<http://water.epa.gov/scitech/wastetech/guide/oilandgas/unconv.cfm>> accessed 18 November 2013. CBM 'is naturally created during the geologic process of converting plant material to coal (coalification). To extract the methane, CBM operators drill wells into coal seams and pump out ground water . . . [and] the water removal reduces the pressure and allows the methane to release from the coal[.]' *ibid.*

¹⁶ *ibid* 2 (citations omitted).

¹⁷ *ibid.*

¹⁸ *ibid* (citation omitted).

¹⁹ Carl T Montgomery and Michael B Smith, 'Hydraulic Fracturing: History of an Enduring Technology' [2010] J of Petroleum Technology 27 <<http://www.spe.org/jpt/print/archives/2010/12/10Hydraulic.pdf>> accessed 18 January 2014.

²⁰ US DOE, 'Modern Shale Gas Development in the United States: A Primer' (n 8) 56.

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extending horizontally—act as the means for reaching the shale formations.²¹ The increased use of fracking is due to certain technological advancements in horizontal drilling which allow fracking to be applied to extract natural gas from coal beds, tight gas sands and, most importantly here, shale formations.²² Modern fracking has greatly increased recoverable reserves of oil and gas, by 30% and 90% respectively.²³ The Independent Petroleum Association of America (IPAA) estimates that more than 90% of new natural gas wells in the U.S. rely on hydraulic fracturing.²⁴

According to EIA studies, the U.S. contains over 827 trillion cubic feet (tcf) of *recoverable* shale gas reserves.²⁵ Due to the abundance of shale gas, the EIA projects that shale gas production will triple of the next 25 years, from 5 tcf in 2010 to 13.6 tcf in 2035.²⁶ To provide some context, one tcf of natural gas is sufficient to heat 15 million homes for one year, generate 100 billion kilowatt-hours of electricity, or fuel 12 million natural-gas-fired vehicles for one year.²⁷ Six shale regions in the U.S. have been targeted as the most prolific for shale gas production: Bakken, Eagle Ford, Haynesville, Marcellus, Niobrara, and Permian.²⁸ Although shale resources are found in many states, the aforementioned six regions accounted for 90% of domestic oil production—and nearly all natural gas production—from 2011-2012.²⁹ The abundance of natural gas reserves, however, is

without value if it cannot be safely and economically extracted. Hydraulic fracturing, enhanced by technological advancements, is purportedly the long sought-after tool for accessing shale gas.³⁰

Hydraulic fracturing is the only economically viable means of extracting shale gas. Shale gas is found within shale formations, which act as the reservoir for the gas.³¹ Shale gas is created when organic matter deposited within the rock generates natural (methane) gas and the gas itself is located throughout the shale formation in the fine pores of the shale rock.³² The fine pores of the shale rock are not naturally permeable.³³ Hydraulic fracturing seeks to extract the natural gas by injecting, through the wells, large volumes of a fracturing fluid under high pressure to permeate microscopic perforations in shale formations.³⁴ Fracturing fluid is a water-based liquid containing a proprietary blend of chemical additives that help to carry a propping agent, such as sand, through the fractures in the shale.³⁵ Upon stopping the forceful pumping of fluids, the sand (or other proppant) remains within the fractures in the shale and ‘props’ open the fracture to allow gas to escape the dense rock formation.³⁶ More than 10 million gallons of water may be used in shale wells during the fracking process.³⁷ Fluid in the well must be pumped out of the well before extraction of gas can take place.³⁸ This process is called ‘flowback’, which refers to ‘the pro-

²¹ United States Department of Energy, ‘Shale Gas: Applying Technology to Solve America’s Energy Challenges’ [2011] 5 <http://groundwork.iogcc.org/sites/default/files/Shale_Gas_March_2011.pdf> accessed 18 January 2014.

²² Dougal (n 47) 3.

²³ Montgomery, ‘Hydraulic Fracturing: History of an Enduring Technology’ (n 52) 27-28.

²⁴ *ibid.*

²⁵ US DOE, ‘Shale Gas: Applying Technology to Solve America’s Energy Challenges’ (n 54) 4.

²⁶ Hutt, ‘The Shale Gas: Storming Towards Energy Independence’ (n 6) 17.

²⁷ US DOE, ‘Shale Gas: Applying Technology to Solve America’s Energy Challenges’ (n 54) 4.

²⁸ United States Energy Information Administration, ‘Petroleum & Other Liquids: Drilling Productivity Report’ [2013] <<http://www.eia.doe.gov/petroleum/drilling/#tabs-summary-1>> accessed 18 January 2014.

²⁹ *ibid.*

³⁰ US EPA, ‘Natural Gas Extraction-Hydraulic Fracturing’ (n 43).

³¹ US DOE, ‘Modern Shale Gas Development in the United States: A Primer’ (n 8) 14.

³² *ibid.* 15.

³³ *ibid.* 56.

³⁴ US DOE, ‘Shale Gas: Applying Technology to Solve America’s Energy Challenges’ (n 54) 5. See also Tiemann, ‘Hydraulic Fracturing and Safe Drinking Water Act Issues’ (n 48) 1.

³⁵ US DOE, ‘Modern Shale Gas Development in the United States: A Primer’ (n 8) 56.

³⁶ *ibid.*

³⁷ US DOE, ‘Shale Gas: Applying Technology to Solve America’s Energy Challenges’ (n 54) 5.

³⁸ Tiemann, ‘Hydraulic Fracturing and Safe Drinking Water Act Issues’ (n 48) 1.

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cess of allowing fluids to flow from the well following a treatment, either in preparation for a subsequent treatment or in preparation of cleanup and returning the well to production'.³⁹

The extraction of natural gas from shale formations has transformed the natural gas industry by exponentially increasing natural gas production and energy reserve levels to unprecedented levels.⁴⁰ Although the brisk growth of the use of hydraulic fracturing and horizontal drilling for shale gas has enabled the industry to expand markedly, a host of concerns have arisen regarding the potential environmental impacts of fracking on natural resources such as groundwater.⁴¹ Modern fracking operations have come under scrutiny for these potential adverse impacts, and the public is demanding regulation—either on a state level, federal level, or both—of fracking operations and their potential effects.

B. Potential Environmental Concerns Attributed to Hydraulic Fracturing

According to the EPA, fracking operations can conceivably cause the following environmental impacts: (1) stress on surface and ground water supplies from the withdrawal of large volumes of water used in drilling and hydraulic fracturing; (2) contamination of underground sources of drinking water and surface water resulting from spills; (3) adverse impacts from discharges into surface waters or from disposal to underground injection wells; and (4) air pollution resulting from the release of volatile organic compounds, hazardous air pollutants, and greenhouse gasses.⁴²

The possibility that fracking fluid may contaminate underground drinking water sources is of greatest concern to residents and municipalities surrounding fracking operations.⁴³ In any given fracking operation, millions of gallons of fracking fluids—containing chemicals, water, and proppant materials—are pumped into shale formations with just one fracking treatment.⁴⁴ The greatest cause for contamination concerns is the unknown concoction of chemicals and additives that compose fracturing fluids.⁴⁵ The overall concentration of additives is small, relative to the amount of water used, in a typical fracking procedure—between 0.5%-2% additives and 98%-99.5% water.⁴⁶ However, given the vast amounts of fracking fluids that are utilized in each fracking well operation,⁴⁷ the small percentage of additives can be extrapolated to over 500,000 gallons of additives. Not surprisingly, much of the existing regulatory scheme has been driven by the fear that fracking operations will lead to a contaminated ground water supply.

Fracking operations—including everything from well site construction to processing facilities, to pipeline right-of-ways, and access roads—have also been targeted as causing various 'surface-level' effects. Another related surface-level concern is that fracking exacerbates natural fissures in the earth's crust that can lead to the migration of gasses into subsurface potable water aquifers and eventually surface water.⁴⁸ The fracking operation, in itself, has impacts such as fragmentation of forest ecosystems through the creation of open spaces where there were once trees, increased potential for sediment runoff from cleared sites to streams, creation of corridors for invasive species and alteration of the viewscape.⁴⁹

³⁹ *ibid* fn 5.

⁴⁰ Hutt, 'The Shale Gas: Storming Towards Energy Independence' (n 6) 17.

⁴¹ Tiemann, 'Hydraulic Fracturing and Safe Drinking Water Act Issues' (n 48) 4.

⁴² US EPA, 'Natural Gas Extraction-Hydraulic Fracturing' (n 43).

⁴³ US DOE, 'Modern Shale Gas Development in the United States: A Primer' (n 8) 61.

⁴⁴ *ibid*.

⁴⁵ *ibid*.

⁴⁶ *ibid*.

⁴⁷ US DOE, 'Shale Gas: Applying Technology to Solve America's Energy Challenges' (n 54) 5.

⁴⁸ United States Department of Energy, 'Modern Shale Gas Development in the United States: An Update' [2009] 60-61 <<http://www.netl.doe.gov/technologies/oil-gas/publications/epreports/shale-gas-primer-update-2013.pdf>> accessed 18 January 2014.

⁴⁹ *ibid* 58.

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II. The Federal Regulatory Framework

There is a considerable amount of substantive activity over the regulation of fracking at the federal level, even though most such *actual* regulation is at the state and local government levels.⁵⁰ As of 2012, the hydraulic fracturing process itself is exempt from federal regulation under seven different statutes.⁵¹

Fracking became increasingly controversial as the EPA insisted it had no role in its regulation because oil and gas production processes (including fracking) were exempt from the SDWA and other federal statutes, including the Clean Water Act, the Resource Conservation and Recovery Act, the Clean Air Act, the National Environmental Policy Act, and the Comprehensive Environmental Response, Compensation, and Liability Act.⁵² As fracking became more prevalent, litigation over regulation and enforcement flooded the judicial system, initially leaving courts to determine the extent of federal regulation. Although the SDWA exempted the regulation of oil and gas activities, two related cases make it clear that the federal government still has the power to regulate hydraulic fracturing.

1. The Federal Government Could Regulate Fracking Directly

When the SDWA was enacted in 1974, federal and state governments and regulatory agencies such as the EPA had a mutual understanding that fracking

was exempt from regulation under the SDWA.⁵³ The presumption that fracking was exempt from federal regulation under the SDWA left fracking unregulated for decades. This presumption was challenged in 1994 in the so-called LEAF decisions which made it clear the SDWA applied to fracking. The Court's holding in LEAF I – that hydraulic fracturing ‘unquestionably falls within the plain meaning of the definition of [underground injection]’⁵⁴ – raised the possibility that the EPA could be *required* to regulate fracking under the SDWA.⁵⁵

With fracking now subject to regulation under the SDWA, the EPA launched a study to examine the potential effects of fracking on USDW and to formulate regulations that adequately addressed public concerns.⁵⁶ In 2004, the EPA concluded that the injection of fracking fluids into coalbed methane wells posed little or no threat to USDW.⁵⁷ This study was widely criticized by the public, environmental groups and EPA employees.⁵⁸ As a result, only one year after the EPA study, Congress passed the Energy Policy Act of 2005, which addressed an array of energy related issues.⁵⁹ Section 332 of the EPAct amended the SDWA to specifically exempt hydraulic fracturing from regulation.⁶⁰

The EPAct was likely a response to the EPA study and the *LEAF* decisions. The Court's holding in *LEAF I*—that hydraulic fracturing ‘unquestionably falls within the plain meaning of the definition [of underground injection]’⁶¹—raised the possibility that the

⁵⁰ See Rebecca Jo Reser and David T Ritter, ‘State and Federal Legislation and Regulation of Hydraulic Fracturing’ (2011) 57 *The Advocate* (Texas) 31, 31.

⁵¹ Text to section II.

⁵² Shawna Bligh and Chris Wendelbo, ‘Hydraulic Fracturing: Drilling into the Issue’ [2013] 30 no 5 *GPSolo* 72.

⁵³ 151 Cong Rec S7267-01 at S7278 to S7279 (2005); *LEAF I* (n 94) (Alabama argued that the SDWA did not apply to hydraulic fracturing operations because, among other reasons, the purpose of fracking is not disposal, most of the fracking fluids are recovered from the well, and the SDWA's language suggests it was not meant to regulate drilling for oil or gas).

⁵⁴ *LEAF I* (n 94) 1475.

⁵⁵ Tiemann, ‘Hydraulic Fracturing and Safe Drinking Water Act Issues’ (n 48) 18.

⁵⁶ United States Environmental Protection Agency, ‘Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs’ [2004] ES-7.

⁵⁷ *ibid* ES-16.

⁵⁸ See for example, Weston Wilson, ‘EPA Allows Hazardous Fluids to be Injected into Ground Water: A report on EPA's failure to protect America's ground water from the impacts of oil and gas production’ [2004] <<http://www.earthworksaction.org/files/publications/Weston.pdf?pubs/Weston.pdf>> accessed 18 January 2014.

⁵⁹ Energy Policy Act of 2005, Pub L No 109-58, 119 Stat 694 (2005) (EPAct).

⁶⁰ EPAct s 322.

⁶¹ *LEAF I* (n 94) 1475.

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EPA could be required to regulate fracking under the SDWA.⁶² In order to clarify its intent for non-regulation, Congress passed an Amendment to the SDWA as part of the EPAct⁶³ stating that the UIC requirements do not apply to fracking, and amended the definition of ‘underground injection’:

The term ‘underground injection’

(A) Means the subsurface emplacement of fluids by well injection; and

(B) *Excludes*: (i) the underground injection of natural gas for purposes of storage; and (ii) the underground injection of fluids or propping agents (other than diesel fuels) *pursuant to hydraulic fracturing operations* related to oil, gas, or geothermal production activities.⁶⁴

In other words, ‘underground injection’ only includes the subsurface emplacement of fluids by well injection, which specifically excludes the underground injections of fluids or chemicals associated with hydraulic fracturing operations.⁶⁵ Under this newly tailored definition, as long as diesel is not used,⁶⁶ oil and gas extraction companies can now inject anything in association with fracking operations without having to comply with the SDWA.

2. Proposed Legislation and Rules

Since granting the exemption for fracking from federal regulation, Congress has sought to undo its exemption. In May 2013, the Obama administration issued a new set of proposed regulations for fracking on public lands.⁶⁷ These new rules would apply *only to fracking on federal lands*, which contains only 13% of shale production and formations.⁶⁸ The Obama administration originally intended this new set of proposed rules as a guideline for the states, but many of the states affected by hydraulic fracturing had already enacted much stricter regulations.⁶⁹

The new rules would require that the oil companies disclose most of the drilling fluid components (but are allowed to keep certain trade components a secret) and require ‘integrity tests’ on a well to ensure compliance.⁷⁰ If approved, the rules will require a company with just a single well on federal land to disclose the chemical makeup of its fracking operations at any similarly operated wells on private lands.⁷¹ Additionally, the new rules would impose a laundry list of construction standards on fracking wells and add a requirement that fracking well operators put appropriate plans in place for managing flowback waters from fracturing operations.⁷² While environmentalists were disappointed that full disclosure of the chemicals used in the drilling process was not required by the promulgated rules, this stricter regulation is considered a

⁶² Tiemann, ‘Hydraulic Fracturing and Safe Drinking Water Act Issues’ (n 48) 18.

⁶³ EPAct, s 1(a), 119 Stat 594 (2005) (amended paragraph (1) of s 1421(d) of the SDWA (42 USC s 300h(d)).

⁶⁴ EPAct, s 322 (amending 42 USC s 300h(d)) (emphases added).

⁶⁵ 42 USC s 300h(d).

⁶⁶ While the fracking process is not generally regulated under the SDWA, fracking operations that use diesel fuel *do* fall within the definition of ‘underground injection’. Tiemann, ‘Hydraulic Fracturing and Safe Drinking Water Act Issues’ (n 48) 7-8. Recently, the EPA has issued new guidance on fracking with diesel, but most oil and gas companies have already phased diesel fuel out of their fracking operations. Michael Bastasch, ‘EPA Looks to Regulate “Potential” Water Threats From Fracking’ *The Daily Caller* (12 February 2014) <<http://dailycaller.com/2014/02/12/epa-looks-to-regulate-potential-water-threats-from-fracking/>> accessed 12 February 2014.

⁶⁷ ‘Proposed Rule: Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands’ *Regulations.Gov* (24 May 2013) <http://www.regulations.gov/#!documentDetail;D=BLM_FRDOC_0001-0061> accessed 22 November 2013.

⁶⁸ *ibid.*

⁶⁹ Drew Dorner, ‘US DOI Proposing Regulation of Fracking on Federal Lands: Is Such Regulation Coming To A Gas Well Near You?’ (*Fresh Law Blog*, 7 June 2013) <<http://www.freshlawblog.com/2013/06/07/doi-proposing-regulation-of-fracking-on-federal-lands-is-such-regulation-coming-to-a-gas-well-near-you/>> accessed 18 January 2014.

⁷⁰ ‘Proposed Rule’ (n 172).

⁷¹ *ibid.*

⁷² *ibid.*

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victory for those who are against fracking. The DOI is scheduled to release new regulations for fracking on federal lands within the next six months.⁷³

A series of federal laws also play a more attenuated role in the regulation of fracking—although none come close to attaining comprehensive regulation. As of 2012, fracking was exempt from seven different federal laws. The most prominent of these laws include the Clean Water Act and the Clean Air Act.⁷⁴ In short, the CWA regulates surface water discharge from fracking operations and runoff from well sites.⁷⁵ The CAA limits air emissions from engines, natural gas processing equipment and any other potential emissions arising from natural gas extraction activities.⁷⁶ Although federal legislation regulates certain aspects of fracking, the fracking exemption in the EPAct of 2005 renders regulation largely ineffective.

III. State and Local Regulation

While the federal government currently exempts most fracking activity from regulation, states are free to regulate practices as they see fit.⁷⁷ There currently exists a patchwork of state regulations, with each state enacting various requirements for wastewater disposal, underground injection, storm water runoff, water supply acquisition, and the process for spacing, drilling, casing, and operating wells. Many states are also reviewing, amending, or drafting regulations that apply directly to fracking.⁷⁸ Given the

lack of federal regulation and the likelihood that state courts (following *Coastal Oil's*⁷⁹ lead) will be hesitant to interfere with states' regulation of fracking, state regulation may well be the central mechanism controlling fracking and its effects.

A. States Generally Regulates the Oil and Gas Industries Within their Borders

In August 2011, West Virginia enacted emergency rules to regulate horizontal gas drilling while it works on long-term regulations.⁸⁰ West Virginia now has casing and cement standards for wells and also requires permits for horizontal fracking, erosion and sediment control plans, well safety plans, and planned management and disposition of well water from fracking operations. The state also requires a 30-day public notice period for well permit applications. Although temporary, West Virginia's emergency rules have perceived and support from EPA, particularly because they address water issues.

Proponents of federal regulation argue that the federal government is in a better position to provide oversight of and set requirements for the rapidly expanding industry of fracking.⁸¹ In July of 2013, however, the 113th Congress saw the introduction of the Protecting States' Rights to Promote American Energy Security Act.⁸² The Act seeks to require the federal government to defer to individual states' fracking regulations with the goal of 'recogniz[ing] States'

⁷³ Jeffrey Folks, 'The High Cost of Fracking Regulation' *American Thinker* (12 February 2014) <http://www.americanthinker.com/2014/02/the_high_cost_of_fracking_regulation.html> accessed 12 February 2014; Brian Wingfield, 'E-Cigarette, Fracking Rule Changes Seen in 2014 Surge' *Bloomberg Politics* (3 December 2013) <<http://www.bloomberg.com/news/2013-12-04/e-cigarettes-to-fracking-rules-seen-in-2014-surge.html>> accessed 12 February 2014.

⁷⁴ US DOE, 'Modern Shale Gas Development in the United States: A Primer' (n 8) 25.

⁷⁵ *ibid.* See also Beth E Kinne, 'Clearing the Air' in Erica L Powers and Beth E Kinne (eds), *Beyond the Fracking Wars: A Guide for Lawyers, Public Officials, Planners, and Citizens* (American Bar Association 2013) 109 ff.

⁷⁶ US DOE, 'Modern Shale Gas Development in the United States: A Primer' (n 8) 25.

⁷⁷ Tiemann, 'Hydraulic Fracturing and Safe Drinking Water Act Issues' (n 48) 2.

⁷⁸ Dougal (n 47) 3-4.

⁷⁹ *Coastal Oil and Gas Corporation v Garza Energy Trust* 268 SW 3d 1 (TX 2008). The rule of capture, which gave a mineral rights owner title to the oil and gas produced from a lawful well bottomed on the property, even if the oil and gas flowed to the well from beneath another owner's tract, prevented royalty interest owners of a natural gas lease from recovering damages against a well operator on trespass claim that alleged that the operator's subsurface hydraulic fracturing of the natural gas well caused the draining of natural gas, which was subject to the lease, to the operator's well on the adjacent property.

⁸⁰ WV DEP (WVDEP) Rules, ss 35-8-3, -4, -5.1

⁸¹ See Adam Garmezy, 'Balancing Hydraulic Fracturing's Environmental and Economic Impacts: The Need for A Comprehensive Federal Baseline and the Provision of Local Rights' 23 Duke Envtl L & Pol'y F 405, 427-28 (2013) (arguing that fracking regulation should be in the hands of the federal government, not the states).

⁸² 'H.R. 2728: Protecting States' Rights to Promote American Energy Security Act' *Govtrack.us* (21 November 2013) <<https://www.govtrack.us/congress/bills/113/hr2728>> accessed January 4, 2014. Republican Representative Bill Flores of Texas, District 17, introduced H.R. 2728 on July 18, 2013. *ibid.*

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authority to regulate oil and gas operations and promote American energy security, development, and job creation'.⁸³ The bill passed in the House in November of 2013 and goes on to the Senate next.⁸⁴ If enacted, a state's laws or regulations regarding fracking would be the rules applied in that state, not any regulations created by the federal government.

Another argument in favor of state regulation is that states are able to better sense and suit the needs of its citizens through fracking regulations. For example, Illinois recently passed a major comprehensive statute to regulate fracking said to be the nation's strictest regulations for natural gas drilling.⁸⁵ It touches upon most of the important environmentally-sensitive aspects of fracking (with the exception of the little-understood relationship of fracking and seismic activity/earthquakes): water pollution, air pollution, and so forth.⁸⁶ It also leaves regulation of those aspects of fracking otherwise affecting the use of land to the local government in whose jurisdiction fracking takes place.⁸⁷ Some highlights:

- A high volume horizontal hydraulic fracturing permit is required for each fracking well developed. All chemicals anticipated to be added to or used as hydraulic fracturing fluid must be listed in the permit application as well as its concentration and 'mass'.
- Each application for a permit requires a plan for the handling, storage, transportation, disposal or reuse of the fluids, together with a traffic management, containment, and plugging and restoration plan.

- Public notification and hearings are required for each planned application and well. The hearing must be of the contested case variety and is appealable under the Illinois administrative procedures act.
- Emission controls are required for managing gas and hydrocarbon fluids produced during the flow-back period of the extraction process.
- Water quality monitoring of all water sources likely to be affected by the process of fracking.
- Eventual plugging of a well and restoration of the well site is required in accordance with the Illinois Oil and Gas Act, at the expense of the permittee.
- The Act creates a task force on fracking which governs both the membership and reporting duties thereof.
- Lastly, the legislation also creates the Illinois Hydraulic Fracturing Tax Act which provides for a rate of 3% of the value of the oil or gas extracted for the first 2 years of production, and thereafter a more complicated formula which is different for gas and oil. The Tax Act also provides for a modest reduction in royalties tax rates if the process utilizes a local workforce.⁸⁸

B. State Preemption

State fracking laws often, if not usually, preempt local land use controls. When faced with the issue of whether local ordinances conflict with state laws governing oil and gas activity, the courts employ a preemption analysis.⁸⁹ Preemption is a doctrine that "establishes priority between potentially conflicting

⁸³ 'H.R. 2728: Protecting States' Rights to Promote American Energy Security Act' *Govtrack.us* (21 November 2013) <<http://www.gpo.gov/fdsys/pkg/BILLS-113hr2728pcs/pdf/BILLS-113hr2728pcs.pdf>> accessed January 4, 2014.

⁸⁴ 'H.R. 2728: Protecting States' Rights to Promote American Energy Security Act' *Govtrack.us* (21 November 2013) <<https://www.govtrack.us/congress/bills/113/hr2728>> accessed January 4, 2014.

⁸⁵ See Don Babwin, 'Illinois Gas Drilling Rules: Governor Pat Quinn Signs New Fracking Regulations Into Law' *Huffington Post News* (17 June 2013) <http://www.huffingtonpost.com/2013/06/17/illinois-gas-drilling-rules-fracking_n_3455668.html> accessed January 4, 2014.

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ See Matt Kasper, 'Illinois Adopts Nation's Strictest Fracking Regulations' *Think Progress* (19 June 2013) <<http://think-progression.org/climate/2013/06/19/2177811/illinois-adopts-nations-strictest-fracking-regulations/>> accessed January 4, 2014.

⁸⁹ Keith B Hall, 'When Do State Oil and Gas or Mining Statutes Preempt Local Regulations?' [2013] 27 *WTR Nat Resources & Env't* 13, accessed January 18, 2014.

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laws enacted by various levels of government”—federal, state, and local.⁹⁰ Under this doctrine, ‘the law enacted by the higher level of government generally will be given priority, and the law enacted by the lower level of government will be “preempted,” rendering it unenforceable[.]’⁹¹ A collage of state and local fracking regulations has formed a confusing picture, as the limits of local regulation are interpreted on a case-by-case basis. Thus, for example, in *Range Resources Appalachia, LLC v. Salem Township*, 600 Pa. 231 (2009), energy companies sought declarative and injunctive relief from a township ordinance that regulating certain surface development associated with oil and gas well drilling activities. The Court of Common Pleas, Westmoreland County, granted summary judgment to plaintiffs on grounds the oil and gas related provisions in the ordinance were preempted by the Oil and Gas Act. The Township appealed, but the Commonwealth Court affirmed.

Thus, in *Northeast Natural Energy, LLC v. City of Morgantown*, Civil Action No. 11-C-411 (W.V. Circuit Court, Monongalia County, August 12, 2001), a dispute arose over a ban on fracking within a mile of the city of Morgantown, West Virginia. In August 2011, the Circuit Court of Monongalia County struck down the ban as preempted by state law. The court held that the city did not have the authority to completely ban fracking because the industry is regulated solely by the West Virginia Department of Environmental Protection (WVDEP), which had issued permits for wells to be used for gas drilling to the plaintiff.

C. Local Government Regulation

In the virtual absence of comprehensive state and federal regulation, local governments have also

responded to its citizens concerns by enacting ordinances banning, supporting, or restricting fracking. Much of the regulation of fracking still comes at the local government level, even if there is a state statute which arguably governs. Thus, for example, in *Norse Energy Corp. USA v. Town of Dryden*,^{92, 93} an oil company challenged the town of Dryden’s zoning amendment. In Norse, the court faced the issue of whether New York’s Oil, Gas, and Solution Mining Law (“OGSML”) preempts municipal zoning ordinances banning all activities related to the exploration for, and the production or storage of, natural gas and petroleum.⁹⁴

In August of 2011, the Town of Dryden (the “Town”) amended its zoning ordinance to “ban all activities related to the exploration for, and the production or storage of, natural gas and petroleum (the “Zoning Amendment”), and effectively banned “hydrofracking’ to recover natural gas from underground shale deposits.”⁹⁵ The Zoning Amendment was a response to the growing local concern over the proposed used of hydrofracking by locally based oil companies.⁹⁶

The Supreme Court, Appellate Division, Third Department, New York, held that “the OGSML does not preempt, either expressly or impliedly, a municipality’s power to enact a local zoning ordinance banning all activities related to the exploration for, and the production or storage of, natural gas and petroleum within its borders.”⁹⁷ More generally, the court concluded that the OGSML supersession clause: “does not serve to preempt a municipality’s authority to enact a local zoning ordinance prohibiting oil, gas, and solution mining or drilling within its borders.”⁹⁸

⁹⁰ *ibid* (citing *Huntley & Huntley, Inc v Borough Council of Oakmont* 964 A2d 855, 862 (Pennsylvania 2009)).

⁹¹ *ibid*.

⁹² 108 A.D.3d 25 (N.Y. App. Div.2013).

⁹³ The below summary is taken from the following: 7 No. 11 Quinlan, Zoning Bulletin NL 1.

⁹⁴ *Id.* at 28.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 36.

⁹⁸ *Id.* at 36.

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Conclusion

The recent explosion in hydraulic fracturing as a means for extracting natural gas and oil has resulted in a flurry of regulatory activity in the United States. While the federal government may well be a logical locus of such regulation given the plethora of direct federal legislation either regulating the underground injection of non-natural substances, like the Safe Drinking Water Act, or indirectly regulating fracking activity on or below the surface, like the Clean Air Act and the Clean Water Act, the U.S. has fashioned a blanket exception for fracking in the former despite early caselaw upholding U.S. statutory regulation, and the latter is not particularly effective. As a result, most regulation of fracking takes place at either the state or local government levels. But while most states in which fracking occurs have comprehensive oil and gas regulation statutes, few of these actually regu-

late fracking, like Illinois, which has recently passed one of the most extensive such statutes in the nation. Therefore, much of the effective regulation so far appears to come from local government through existing zoning and other land use ordinances. The relatively few cases dealing with fracking do not yet demonstrate a clear pattern, however. Issues of preemption of local government regulation by state statutes along with basic authority for such local regulation are largely unresolved. Some states courts, like New York, have clearly and unequivocally declared that local zoning ordinances may regulate not just the location surface infrastructure, but all aspects of fracking. Other state courts have held that the authority belongs to the states. ■

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Book Review

Owning the Earth: The Transforming History of Land Ownership

Ando Linklater, Bloomsbury, New York, 2013

by Beat U. Steiner, Holland & Hart LLP

I do not recall what foolish lapse of the tongue led me, as a first year associate at Cadwalader Wickersham & Taft, to promote the importance of real estate law to a tax partner in the firm's stately lunchroom. My suggestion that real estate law was at the heart of everything was met with a disdainful, "What do you mean?," reflecting the tax department's generally held view that real estate was a backwater practice at best. Dan Draper, the eminent savings bank lawyer and my supervisor, luckily also at the table, came to my rescue with the retort, "Let's start with where you are sitting." At its core, Aldo Linklater's monumental work, *Owning the Earth: The Transforming History of Land Ownership*, promotes my bold assertion about real estate law. As Linklater puts it, "It's the neighborhood, stupid."

If ever there was a book for the philosophically minded ACREL member, *Owning the Earth* is it. In 480 plus pages, with an equal number of footnotes, Linklater explores the history of land ownership over 4,000 plus years, in a hundred or more societies and on every continent of the earth. For that history, and to allow us real estate lawyers to consider principles of land ownership more philosophically than we ever would in our daily work, the book is a worthwhile read. We labor among lot lines and trees; Linklater takes his readers high above and far and wide for a very broad view of land titles.

Owning the Earth is, essentially, a polemic. Linklater repeatedly makes the case for the balancing of individual liberty and real property rights. The notion that "one person could own part of the earth exclusively" he finds novel and, relative to the whole of human history, recent. He concludes, "The iron law of private property turns out to be a paradox. Although it promotes individuality, it only works by giving equal weight to the public interest." Adam Smith, along with Thomas Jefferson and James Madison, are his heroes. But to read the book for its political

viewpoint, or, worse, to put it down for that reason, would make one miss what is most engaging in it – an overview of the history of land ownership and the forces - physical, religious, political and economic - that shaped how societies have treated land over the centuries.

The book is almost dizzying in its scope. There is little linear or chronological in its presentation. On page 51, for example, Linklater draws from the "correction" of Thomas Hobbes's Leviathan in *The Commonwealth of Oceana*, the 1656 history of English politics by James Harrington, to show how Henry VIII's disposal of monastic estates in the 1540's, the emergence of the "Diggers", who cultivated seemingly unarable land north of London in 1650 with the aim to hold it in common in the manner of the first century Christian Church, is tied to the establishment of farm collectives by the Soviets in the 1930's, the "Green Revolution" in Mexico, and the policies the U.S. followed in the reconstruction of Japan following WWII, not to mention the struggle between capitalism and Communism in Latin America, Asia and the Middle East during the Cold War era. If you have read Jared M. Diamond's *Guns, Germs and Steel*, you will recognize this sweeping style. As Karen Altenburg wrote in her review of the book published in the Wall Street Journal (December 6, 2013), "There is something almost boyish about the execution and energy of this book, the way it races on makes the reader feel as if transported on a Phileas Foggian adventure through the history of ideas. We meet Chinese emperors and Russian czars, German Junker farmers, surveyors employed to measure newly claimed earth, South American revolutionaries, 20th-century politicians, economists trying to sort out the world after two wars, and, eventually, George Soros investing in 6,000 acres of farmland in Latin America in 2009."

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Linklater introduces us to obscure individuals whose lives, actions or circumstances reflected (and sometimes caused) a movement or societal sea change. Such is the story of Edward Gibbon Wakefield whose writings shaped the colonization of Australia and Canada but commenced when he had time on hands, serving a prison sentence for abducting a fifteen year old girl from school and marrying her for her fortune. Another is Wolf Ladejinsky, a Ukrainian refugee and Columbia University economist who joined Douglas MacArthur's military government in post WWII Japan to implement the massive land distribution plan that vested title to 90 percent of Japan's farmland in the farmers that tilled it, a plan replicated in Taiwan and South Korea and slated for implementation in Vietnam but not adopted by President Diem with the succeeding war perhaps as a consequence, or so Linklater suggests.

Linklater sprinkles his work with priceless quotations: "If a man owns a little property, that property is him, it's part of him, and it's like him... and some way he's bigger because he owns it." (John Steinbeck); "Land, which is a necessity of all human existence, which is the original source of all wealth, which is strictly limited in extent, which is fixed in geographical position – land, I say, differs from all other forms of property in these primary and fundamental conditions." (Winston Churchill); "[Homes are] absolutely elemental in the development of the best citizenship, [and for] twenty millions of housekeepers [they serve] as their industrial center as well as their place of abode." (Warren Harding); and "We believe in the family-size farm. That is the basis of our agriculture and has strongly influenced our form of government." (Harry Truman).

Bits of history in the book will be familiar to most real estate lawyers. The significance of Chief Justice Marshall's opinions in *Fletcher v. Peck* and *Johnson v. M'Intosh* in allowing title to the territory inhabited by Native Americans (the so-called "dependent nations") to be transferred solely to the United States and not to private individuals. The origin of townships, ranges and sections in the western states gets some treatment, although much more of their

story is told in Linklater's prior works, *Measuring America: How an Untamed Wilderness Shaped the United States and Fulfilled the Promise of America* (2002) and *The Fabric of America* (2007). The creation of the Torrens system of land registration, and the origin of title deeds, the equity of redemption and the law of coverture and the 1535 Statute of Uses all receive treatment.

Linklater died in late 2013 while working on a sequel of sorts, and it is sad we will never read it. A Scottish polymath with a keen interest in real property and its societal impact has left us with a lot to think about. Take your mind to the gym – read it. ■



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ACRELades

Jana Cohen Barbe was presented with the Rainmaker Award at the Transformative Leadership Awards dinner in Washington on September 17. The award, presented by InsideCounsel during an event that recognizes and supports women leaders in the law, is presented to “a female partner who manages a substantial amount of business exceeding \$2.5 million annually, and recognizes outstanding business generation efforts and exemplary client service.”

Michael M. Berger is scheduled to receive the 2014 Brigham-Kanner Property Rights Prize awarded by the William & Mary Property Rights Project at the William & Mary Law School at its conference October 30-31. The prize is presented each year to an individual whose work “affirms that property rights are fundamental to protecting and preserving individual liberty.” Berger is the first practicing lawyer to receive the prize.

Craig S. Biesterfeld was named “Lawyer of the Year” in Land Use and Zoning Law by *Best Lawyers* 2015. Other ACREL members on the *Best Lawyers* 2015 list include **David Fenley** and **John McNearney**. Congrats, all!

John G. Cameron, Jr. was installed as the public director for the National Council of Architectural Registration Boards in late June. NCARB regulates the practice of architecture through the development and application of standards for licensure and credentialing of architects.

David Kochanski received the “Distinguished Maryland Real Property Practitioner” award from the Maryland State Bar Association’s Section of Real Property, Planning and Zoning at the Section’s annual meeting this past June. The award recognizes a Maryland real estate attorney who “best exemplifies the experience, client service, expertise, integrity, collegiality and courtesy for which all real estate lawyers strive in their professional lives.”

Samuel H. Levine has been appointed chair of the Illinois State Bar Association Commercial Banking, Collections and Bankruptcy Section for the 2014-15 year. He has also been appointed editor of the Illinois State Bar Association’s “Building Knowledge-Construction Law” newsletter.

Michael H. Rubin’s first legal thriller, *The Cottoncrest Curse*, was published by LSU Press in September and is available in hardcover and ebook editions. The story is set in both South Louisiana and in the New Orleans of the 1890s and 1960s. Rubin notes “although it is fiction, the background of the novel was thoroughly researched and its accuracy has been vetted by historians.”

Richard L. Spencer has been selected as the chair of the Real Estate Probate and Trust Law Section of the State Bar of Texas. The Section is the largest of the State Bar, with over 8,000 members.

Send us your news for future issues!

New York's Highest Court Grants License to Change New York Licensing Law

by Adam Leitman Bailey and John M. Desiderio*

Since at least as early as 1849, in the case of *Dolittle v. Eddy*,¹ New York law has defined a license as the “authority to enter on the lands of another, and do a particular act or series of acts, without possessing any interest in the land.” Unlike a tenant who obtains the exclusive right to use and occupy the premises pursuant to a lease in consideration of the payment of rent, a licensee obtains no interest in the land, but only a revocable privilege to use it temporarily for a specified fee. Although the Court in *Dolittle* recognized that “[i]t is sometimes difficult to distinguish between an easement, a license, and a lease,” the authors of this article, nine years ago, published a thorough review of the case law distinguishing leases from licenses,² and we noted that New York courts had consistently held a license exists when (1) the owner retains absolute control over the premises,³ (2) the owner supplies all of the essential services required for the licensee’s permitted use of the premises,⁴ and (3) the owner may revoke the permitted use of the premises “at will.”⁵ Since then, due to the frustration and delays in evictions that commercial landlords have suffered for decades, practitioners have increasingly advised their clients to turn to licensing and self-help lease provisions to facilitate more swift and less costly eviction proceedings.

In February of this year, in *Union Square Park Community Coalition, Inc. v. New York City Department of Parks and Recreation*,⁶ the New York Court of Appeals appears to have redefined and narrowed the limits of what distinguishes a license from a lease by expanding the scope of what may be deemed a license.⁷ In doing so, the Court adopted an approach it had never previously used in such cases. By seemingly setting aside the traditional rule distinguishing a lease from a license, the Court has made it much easier for land owners to require that users of their premises be subject to controls that traditionally have been included only in leases.

In *Union Square Park*, the Court approved an agreement between the City Parks Department and a private business corporation that permits the corporation to operate a seasonal restaurant in the Union Square Park pavilion for a term of fifteen years for an annual “license” fee over that term beginning at \$300,000 and increasing to a maximum of \$450,000, or 10% of the annual gross profits of the restaurant, whichever is greater. The agreement also obligates the restaurant owner to invest “at least \$700,000 in specified capital improvements.” At issue were (a) whether the restaurant constituted a non-park purpose and thereby violated the public trust doctrine, and (b) whether the agreement between the Department and the private business constituted a lease, not a license, and therefore whether the agreement amounted to an unlawful alienation of parkland. The Court held (a) that the restaurant did not violate the public trust doctrine,⁸ and (b) that the agreement was a valid license and not a lease.

In holding that the agreement constituted a license, and not a lease, the Court relied upon the following factors: (1) that the “language of the agreement confirms what it purports to be – a revocable license,” (2) that the “Department retained significant control over the daily operations of the restaurant, including the months and hours of operation, staffing plan, work schedules and menu prices,” (3) that the “use of the premises is only seasonal,” (4) that use “is not exclusive even in the summer, as outdoor seating is required to be available to the general public (with the exception of an area reserved for the service of alcoholic beverages),” and (5) that the restaurant owner is “obligated to open the pavilion to the public for community events on a weekly basis.”

The Court also relied upon the agreement’s requirements that the restaurant owner comply with extensive environmental standards, “use Greenmarket vendors, offer culinary internships, and host charitable

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events.” In conclusion, the Court said: “More importantly, the agreement broadly allows the Department to terminate the license at will *so long as the termination is not arbitrary and capricious,*” and, “Consequently, *despite the 15-year term and payment structure, we agree with the Department that it entered into a valid license arrangement with [the private corporation].*” (Emphasis added).

In so ruling, the Court ignored its earlier precedent in *Miller v. City of New York*,⁹ a case with facts virtually “on all fours” with *Union Square Park*. In *Miller*, the Court had held that an agreement allowing a private corporation to construct a golf-driving range, with accessory shops and a parking lot, on public park land, and to operate the enterprise on a percentage rental basis for twenty years, with certain “revocable” termination rights reserved to the Parks Commissioner, *which were not exercisable “at pleasure,”* was

as a matter of law and on its face . . . a lease and not a mere revocable license or grant of a privilege or concession to do particular acts appropriate in a public park and subject to appropriate power in the Commissioner to control the operation and revoke the grant at will.

Contrary to the reasoning given by the Court in *Union Square Park*, the Court’s *Miller* decision held: (1) that a “document calling itself a ‘license’ is still a lease if it grants not merely a revocable right to be exercised over the grantor’s land without possessing any interest therein but the exclusive right to use and occupy that land,” (2) that controls, such as “prices, times of operation and choice of employees, etc., rather strict and detailed [are] but no more than would be reasonably demanded by a careful owner as against a lessee for such a business use and for so long a term,” and (3) that a termination clause which is not “revocable-at-pleasure” is not truly exercisable “at will.”

Similar to the situation in *Miller*, the restaurant in *Union Square Park* necessarily has exclusive occupancy to park premises for its kitchen and bar facilities; the only exception to exclusivity being certain outdoor seating in the summertime, a requirement that can hardly impinge on the restaurant’s otherwise broad exclusive occupancy of the park pavilion and one that, in the long run, may even serve the restaurant’s commercial interests. And, as *Miller* noted, the controls over the restaurant’s hours of operation, prices, and staffing do not necessarily turn a lease into a license. Finally, as in *Miller*, the agreement with the restaurant is not truly terminable “at will,” as the agreement requires that any termination by the City not be “arbitrary and capricious,” a standard that subjects any decision by the City to cancel the “license” to possible reversal and/or damages after judicial review. Moreover, the agreement’s requirement of the restaurant owner for \$700,000 in capital improvements is certainly unlike the typical license situation where the licensor provides all of the essential services required for the use of the premises.

Contrary to the holding in *Miller*, *Union Square Park* provides authority for commercial property owners (a) to grant licensees more exclusive use and possession of the licensed premises without granting them an interest in the property, (b) for lengthier periods of time than in the typical license agreement granted prior to *Union Square Park*, and (c) for “fees” that may be for amounts that would more typically be expected in rental agreements. Commercial property owners who wish to impose “license” terms that more readily resemble lease provisions, which would otherwise have doomed “license” agreements under prior case law,¹⁰ may now attempt to implement more expansive license agreements that give them the opportunity and right to remove recalcitrant and/or undesirable licensees without resort to the lengthy, costly, and frustrating litigation that so often characterizes landlord/tenant disputes. *Union Square Park* may enable such owners to terminate a licensee’s occupancy and/or to use reasonable self-help to remove the licensee from the premises “at will.”

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It appears, therefore, that, in *Union Square Park*, seemingly in an effort to affirm the power of the City government to determine the best way to use its park space, the Court of Appeals has eschewed its own precedent and that of other courts, regarding the longstanding legal distinction between licenses and leases. Unless *Union Square Park* is limited to its own particularized facts as applied to future cases, the Court will have, perhaps unwittingly, redefined the legal landscape for real estate attorneys in drafting and negotiating licenses for the use of commercial property. ■

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¹ 7 Barb. 74 (Supreme Court, New York County, 1849)

² See Bailey & Desiderio, *Landlords May Entirely Eliminate Leasing*, NYLJ, April 13, 2005.

³ See *Karp v. Federated Department Stores, Inc. d/b/a Macy's*, 301 AD2d 574, 754 NYS2d 27 (2d Dept. 2003).

⁴ See *Nextel of New York v. Time Management Corporation*, 297 AD2d 282, 746 NYS2d 169 (2d Dept. 2002).

⁵ See *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 Ad2d 143, 730 NYS2d 48 (1st Dept. 2001).

⁶ 22 NY3d 648 (2013)

⁷ For a more full discussion of how courts have distinguished licenses from leases, see Bailey & Desiderio, *Landlords May Entirely Eliminate Leasing*, NYLJ, April 13, 2005.

⁸ The Court said that the public trust doctrine question was governed by its earlier ruling in *795 Fifth Avenue Corp. v. City of New York*, 15 NY2d 221 (1965).

⁹ 15 NY2d 34 (1964).

¹⁰ See fn. 7, *supra*.

D.C. Court of Appeals and Nevada Supreme Court Extinguish Lender's Mortgage Lien Following Association Lien Foreclosures

by Roger D. Winston and Joseph E. Lubinski, Ballard Spahr LLP

A recent decision by the District of Columbia Court of Appeals brings into renewed focus the tension between condominium/homeowner associations and lenders when it comes to payment of delinquent association assessment charges. In *Chase Plaza Condominium Association, Inc. v. JPMorgan Chase Bank, N.A.*, (District of Columbia Court of Appeals, 13-CV-623+, August 28, 2014), the District of Columbia Court of Appeals determined that an association's statutory "super-priority" lien for unpaid assessments took priority of position, not just priority of payment, over the lender's mortgage lien. This ruling has significant implications for both lenders and associations.

In the growing number of states that have adopted some variation of "superliens", residential and commercial associations are granted a statutory assessment lien as security for the collection of at least some portion of the assessments. As quoted in the *Chase* opinion, the District of Columbia Condominium Act provides that an association's lien is "prior to any other lien or encumbrance except [among other things] ... [a] first mortgage ... or [first] deed of trust ... recorded before the date on which the assessment sought to be enforced became delinquent." However, this priority of mortgages and deeds of trust is limited under the Act to the extent of any superliens. In jurisdictions such as the District of Columbia that have adopted superliens, the association's assessment lien is senior to mortgages and deeds of trust "to the extent of the common expense assessments based on the periodic budget adopted by the unit owners' association which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien."

At issue in the *Chase* case was the effect of the association foreclosing its assessment lien. Was the association's lien only a priority of payment, such that

following foreclosure by the association the lender's mortgage lien remains (subject to the association's right to collect the superlien, often up to six months' assessments), or a true priority of lien, such that the association's foreclosure wipes out the lender's mortgage lien? Put differently, does the initiation of an assessment lien foreclosure action expose a lender to risk that its collateral will be lost or only that the association has a first right to payment of a portion of the foreclosure proceeds?

Disagreeing with the trial court that ruled the association lien was a priority of payment lien only, the Court of Appeals held that foreclosure of the association's assessment lien extinguished the lender's mortgage lien. The court based its decision on common law principles of lien priority and the absence of a clear intent in the association's governing documents to subordinate the association's assessment lien as against mortgages and deeds of trust. Interestingly, the court reached this conclusion even though the District of Columbia foreclosure laws do not require notice of the foreclosure to the lender. This means that lenders may be wiped out by an association's assessment lien foreclosure without any notice or opportunity to cure. Obviously, the potential for the lender to fail to receive notice is very problematic. It is not clear it is problematic as a constitutional matter in those states that permit the association to foreclose non-judicially, given the weight of authority that has refused to treat such non-judicial proceedings as state action. But it is still problematic as a policy matter.

Chase is not the first case to interpret an association's superlien. Courts in Washington and Nevada have previously confronted the same issue (with the decisions split on whether a mortgage lien survives an assessment lien foreclosure). Recognizing this emerging issue, earlier this year, the Joint Editorial Board

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of the Uniform Laws Commission (“JEB”) amended Section 3-116 of the Uniform Common Interest Owner Act (“UCIOA”) to resolve any ambiguity in a manner consistent with the *Chase* holding. The JEB comments to UCIOA state that the revised lien priority language “makes clear that the association’s lien has true priority over the lien of an otherwise first mortgage lender to the extent of the [superlien amount]. Thus, if the association conducts a foreclosure sale of its association lien and the first mortgagee does not act to redeem its interest by satisfying the association’s [superlien], the mortgagee’s lien would be extinguished.” Notably, the JEB revisions make it clear that the association’s lien foreclosure can extinguish the otherwise-first mortgagee’s lien only if the mortgagee is given notice. However, the laws of each jurisdiction may or may not require such notice. Also, providing effective notice is often challenging, particularly when the loans have been securitized.

On the heels of the *Chase* decision, the Nevada Supreme Court, in *SFR Investments Pool 1, LLC. v. U.S. Bank, N.A.* (Nevada Supreme Court Case No. 63078, September 18, 2014), issued an opinion holding that a homeowners association (“HOA”) lien is a true super-priority lien which, if foreclosed upon, extinguishes a first deed of trust.

In states such as Nevada that had depressed real estate values and significant delinquent HOA assessments, HOAs were foreclosing on liens for assessments, and third parties were buying homes at the resulting HOA foreclosure sales. Although it was generally accepted that the HOA’s foreclosure extinguished the homeowner’s title and interest in the home, the question of whether such foreclosure also extinguished a first deed of trust was not clear.

In *SFR Investments*, the Nevada Supreme Court noted that the Nevada HOA lien statute is based on the Uniform Common Interest Ownership Act of 1982, and that the court could look to the drafters’ comments and the law of other states to interpret the Act. The court ultimately reasoned that a portion of an HOA lien was superior to a first deed of trust, and the

court rejected the first deed holder’s arguments that the HOA statute only provided a payment priority.

To support its analysis, the court found that notice of an HOA foreclosure sale must be given to junior lienholders, and to senior lien holders who ask for notice. The court reasoned that a junior lien holder can simply pay off an HOA lien or establish an escrow account to pay HOA dues—two actions which, if not provided for by the lender, result in an inequity of the lender’s own doing when the lender loses its first deed of trust.

In addition, the court rejected the first deed of trust holder’s other arguments, including that: (1) any super priority HOA lien must be judicially foreclosed upon, as opposed to non-judicially foreclosed upon; (2) a non-judicial foreclosure of an HOA lien violates due process; and (3) a lender-savings clause in the HOA’s CC&R’s—which explicitly subordinates a HOA lien to that of a first deed of trust—is ineffective given that the statute does not allow the HOA superlien to be varied.

Although the opinion holds that a non-judicial foreclosure by an HOA generally extinguishes a first mortgage interest, it leaves several other issues unaddressed. For example, the opinion does not address whether an HOA foreclosure is invalid if a first trust holder attempts to pay off the underlying lien, but the HOA refuses to provide the amount of the lien or refuses to allow the lender to tender payment. This appears to be a common occurrence in Nevada, with some HOAs arguing that they are either prohibited or not obligated to provide the amount of the lien. The opinion also declines to address whether an HOA foreclosure is invalid if the sale is not properly noticed by the HOA. Finally, it is not clear if an HOA foreclosure is void as commercially unreasonable if the sale price is unreasonably low. Houses sold at HOA foreclosures often sell for a tiny fraction of the market value of the property. If such a sale can extinguish a first deed of trust, the lender may be left with a significant unsecured debt and the homeowner is left with a very large deficiency judgment to the lender.

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The effects of the *Chase* and *SFR Investments* decisions (and the revisions to UCIOA) are significant for both lenders and associations. For associations struggling from the effects of nonpayment of assessments, these decisions may provide a powerful tool for collecting delinquent assessments. By contrast, for lenders these decisions complicate loan enforcement strategies on current loans and may require modification to underwriting requirements and loan document escrow provisions in the future. In addition, these interpretations may result in new lender requirements for association documents to require waivers, notices, and/or opportunities for lenders to cure. ■



See you in Boston!

We are looking forward to seeing you at
ACREL's Annual Meeting
in Boston this October.

October 16-19, 2014
InterContinental, Boston, MA

If you haven't registered,
it's not too late!
email Henri Keller at
hkeller4501@acrel.org

Committee on Professional Responsibility

by William B. Dunn, Clark Hill P.L.C.

Information about developments in national and state ethics opinions, disciplinary cases, trends in professional liability, and commentary on matters of regulation of the profession ranging across bar admission reform, unauthorized practice of law, multijurisdictional practice, and challenges to the “system” are all important to our practice, even if they are not our bread-and-butter.

For many years, ACREL has had a committee that was to look after “ethics and professionalism,” among the core values of the College. That committee developed the *ACREL Statement of Professionalism* more than 10 years ago. Since then, despite efforts of some Fellows, the committee has struggled to identify a continuing message, although the subject of ethics has been addressed regularly in programs.

Early in 2014, the Board approved a plan to develop an institutional focus on lawyer regulation; and as first steps, approved changing the committee’s name to the **Committee on Professional Responsibility** (fittingly “CPR”), created a new charter (below), and a current statement of purpose (also below). The committee met in Kauai (the agenda is posted on the new College website, as is the present committee membership roster), and will meet again in Boston. Many useful documents related to our areas of interest are posted within both the committee website, and the new ACRELShares! site. The committee wants to serve as a source of information relevant to transactional practice, as well as produce programs of interest.

We acknowledge that this subject is not the mainstream of most of our practices – but it is an essential adjunct. For that reason, we are inviting you to become a participant in this committee to serve as piece of the network about the law governing lawyers in your jurisdiction and your experience. Please let the committee chair, Bill Dunn (wdunn@clarkhill.com), or Henri Keller (hkkeller4501@acrel.org) know of your interest.

There is a specific request, also. The committee will be presenting a program on “getting the UPL

out of MJR” in Scottsdale next spring. Our intent is to provide more than a recital of what we know already, but to explore how the subject and its premises are undergoing questioning and pressure to change. To assist in that, we would like to know if and how law firms are considering and adopting policies concerning multijurisdictional practice risks – education, precaution, clear mandates, etc.. If you could pass along to Bill, not for publication or attribution, information about this, it will be helpful to the workshop planning as well as perhaps be the basis for some models for others.

Committee Charter

The purpose and commitment of the Committee on Professional Responsibility is to support and promote principles of high ethical and professional standards of Members in their own practices and as leaders of the real estate bar. Its present objectives are

- to review and inform Members about current subjects of the law governing lawyers, including lawyer regulation, affecting transactional lawyers; and
- to encourage active participation by the College with other organizations as appropriate in proposing and supporting interpretation of and change, as necessary, in the rules of lawyer regulation to speak meaningfully to transactional practice.

Summary Statement of Committee Activity (2014)

The committee views matters of lawyer regulation affecting transactional practice as a subject of attention for Members of the College. Information about current developments at local, state, and national levels concerning standards of professional and ethical responsibility in practice will be considered by the committee’s members, and shared with others. Matters of attention currently are barriers to and risks in multijurisdictional practice, implications of long arm jurisdiction on standards of practice, linkage with other ACREL committees in application of professional responsibility principles to specific practices, and developing a national voice for ACREL on lawyer regulation matters.

One if by Land, Two if by Sea ACREL Shares! is Coming!

by Gordon W. Tanner, Stoel Rives LLP and H. Daniel Smith, Smith Gardner Slusky

ACREL Shares! - is a virtual “home” on the internet where ACREL Committees can “live and work” between (and during) meetings and conference calls - anytime, anywhere - by using its features to

- 1) Enhance communication among Fellows,
- 2) Collaborate and use project management tools for Committee business and projects, and
- 3) Search ACREL Docs! - a “treasure trove” of over ten years of ACREL content and resources - *without the need for programming skills*. ACREL Shares! is a companion to, and does not replace, ACREL’s existing website. You can find it now at acrelshares.sharepoint.com. This exciting new tool will be officially rolled out at the 2014 Annual Meeting in Boston.

ACREL Shares! uses new technology to deliver the collegial benefits of ACREL membership to our Fellows in a more efficient, interactive and collaborative way. Here are three significant benefits of ACREL Shares!:

ACREL Docs! All ACREL meeting content from the past ten years is now annotated and easily found at your fingertips. If ACREL published it, you can find it by searching key phrases, document type, document author, date of presentation, city of presentation or other elements, or by browsing the annotated documents by meeting at ACREL Docs! on ACREL Shares! Ask one of our 7 ACREL TechWizards to show you in Boston. They will have bright banners on their name badges.

Enhanced Electronic Directory of Fellows. Finding Fellows is now lightning fast. Use ACREL Search! to find Fellows by name, firm, state, state of admission, ACREL committee membership, areas of interest, or anything else in their ACREL Directory profile. You can even filter your initial results with the click of a mouse.

Committee Collaboration Simplified. Each ACREL Committee now has a “home” on ACREL Shares! All Committee sites have the same 3-part organization: 1) **Administration**, 2) **Collaboration**, and 3) **Library**. The Committee can “live and work” here when not physically together.

- **Administration** includes a roster of Committee members, a place for Agendas and Minutes, a Committee calendar, and a Committee task list to be used as desired.
- **Collaboration** gives each Chair a “Chair’s Corner” blog to enhance communication with Committee members, a Projects Landing Page to manage Committee “work in process”, and a “chat” tool that allows any Committee member to post a question or topic of interest for discussion.
- **Library** is the “institutional memory” of the Committee where final work product, forms, reports, and other project deliverables can live in perpetuity, and where favorite internet links can be shared with all.

We invite all Fellows to give ACREL Shares! a try at acrelshares.sharepoint.com.

At the Office 365 welcome screen type in “[*your first and middle initials and last name*]@acrelshares.onmicrosoft.com” as your user name. Next type your case-sensitive password - **AcresShares!** then check the box “Keep me signed in” and add it to your Favorites or Bookmark bar to more easily launch ACREL Shares! next time. There will be a link on www.acrel.org to help you. You can also email help@acrel.org.