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The Third Age of Oil and Gas Law

JAMES W. COLEMAN*

History's biggest oil boom is happening right now, in the United States, ushering in the third age of oil and gas law. The first age of oil and gas law also began in the United States a century ago when landowners and oil companies developed the oil and gas lease. The lease made the modern oil and gas industry possible and soon spread as the model for development around the world. In the second age of oil and gas law, landowners and nations across the globe developed new legal agreements that improved upon the lease and won these resource owners a larger share of the benefits of oil and gas production. The third age of oil and gas law, which is now beginning, will be defined by three forces. First, fracking is transforming the common law doctrines that underlie oil and gas law and policy. Second, both private and public landowners are perfecting agreements that can win them a greater share of the oil and gas under their land. Third, public landowners are beginning to seek ways to balance their efforts to extract maximum value from their oil with their efforts to limit climate change.

This Article is the first to identify these ages of oil and gas law, which have been central to the development of law, the global economy, and the modern world. It also reveals the legal and economic logic of agreements between oil and gas companies and public and private landowners, and how they have evolved over the past century. And it describes how landowners could ensure maximum benefit from the unprecedented oil boom now transforming global oil production.

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INTRODUCTION

Oil is the lifeblood of the global economy.¹ The internal combustion engine forever changed global transport, trade, and war—rendering every car, ship, armored vehicle, and plane dependent on oil supplies.² For the last century, the price of oil has determined whether the world economy boomed or stagnated, and oil reserves have often determined how the world’s wealth is distributed.³ Over these same years, access to oil has been the cause of conflicts and often determined these conflicts’ fates.⁴ The history of oil tells much of the history of the modern world: the rise of the United States as a global superpower, the defeat of the Axis powers in World War

1. Donald H. Ford, *Controlling the Production of Oil*, 30 MICH. L. REV. 1170, 1170 n.1 (1932) (“Save the products of agriculture, the products of oil are the most essential to the processes and requirements of our present civilization.”).

2. John C. Jacobs, *Unit Operation of Oil and Gas Fields*, 57 YALE L.J. 1207, 1207 (1948) (quoting *Hail v. Reed*, 54 Ky. (15 B. Mon.) 479, 490 (Ky. 1854)) (“In less than a century, petroleum has changed from ‘a peculiar liquid not necessary nor indeed suitable for the common use of man’ to a substance indispensable to the military security and economic prosperity of a modern nation.”).

3. Rex G. Baker & Erwin N. Griswold, *Percentage Depletion – A Correspondence*, 64 HARV. L. REV. 361, 362 (1951) (“Both in peace and in war the country must have and is very dependent upon oil and gas. Our civilian economy and the national safety would be jeopardized if we failed to maintain adequate reserves of petroleum.”); James D. Hamilton, *Historical Oil Shocks* 26 (Nat’l Bureau of Econ. Research, Working Paper No. 16790, 2011) (since World War II all but one U.S. recession was preceded by a spike in oil prices).

4. See Wm. E. Colby, *The Law of Oil and Gas: With Special Reference to the Public Domain and Conservation*, 30 CALIF. L. REV. 245, 245 (1942) (“Without petroleum modern warfare would be impotent and hence we have the life and death struggles which are now going on in the world to reach and control the sources of supply.”).

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