



HARVARD LAW SCHOOL

Environmental Law Program
POLICY INITIATIVE

Induced Seismicity by Underground Injection Panel

Groundwater Protection Council

September 28, 2015 Oklahoma City

Kate Konschnik – *When the Potential for Litigation Meets
the Promise of Data Sharing*

Why is a Lawyer on this Panel?

- ❑ Risk characterization and mitigation requires good data and open communication, yet
- ❑ Liability concerns have held up data sharing.

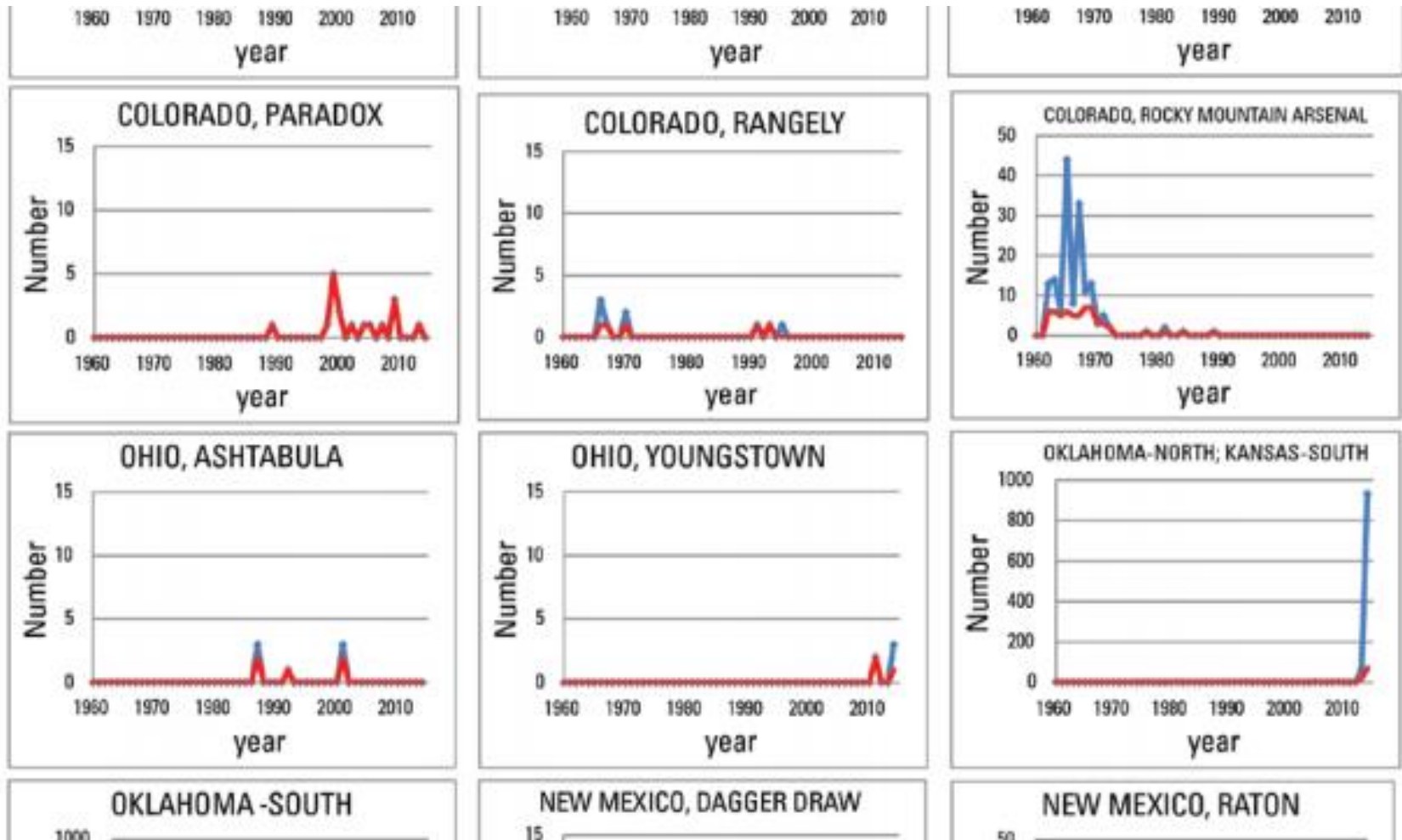


OR



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Issue: Uptick in Non-Tectonic Earthquakes



Link between Injection and Seismic Activity

- ❑ Rocky Flats Arsenal (Healy et al. 1968)
- ❑ Rangely Oil Field, CO (Raleigh et al. 1976)
- ❑ 30 cases incl. sites in AR, CA, CO, NY, OH, OK, and TX (Nicholson & Wesson 1992)
- ❑ Strong evidence supporting 12 cases in US (Davis & Frohlich 1993)

Sources of Liability Law

- Common law
- Liability statute
- Contract provisions
- Insurance policy language

Common Law Claims for Recovery

Data can help establish causation between an action and a harm (a house falling down). But:

- Scientific evidence is different from legal evidence
- Intervening forces can block or reduce liability
- Other barriers to a successful claim



Credit: AntagonistWiki

Additional Showings

- ❑ **Negligence:** the owner of the house has to show you owed her a “duty of care” and breached it by **failing to exercise reasonable care**, and that the chain of events that led to the harm was **foreseeable**.

Example of a Negligent Company

Collins v. Chartiers Valley Gas Co., PA Supreme Court, Jan. 1891.

- Knew the geological formation;
- Had “ample practical experience in the management of the water veins”;
- Shut water out of gas well but did not keep the salt and freshwater separate, causing them to mingle; and
- Knew how to prevent this, at modest expense.
- Did contractor know of risk to fresh water?



“Certainly I know that. I’ve had that occur often.”

Today's Negligence Suits

- ❑ Operators are generally not liable for acts, failures to act of independent contractors.
- ❑ Permits do not shield operators from common law suits.

Additional Showings

- ❑ **Strict liability:** the owner of the house has to show you engaged in such an **ultrahazardous activity** that there is no way to conduct it safely

Strict Liability in the Oil & Gas Context

What activities are “ultra-hazardous”?:

- ❑ LA – well perforation in 1992, not by 2000
- ❑ LA – trucking drilling fluid additives is not UH
- ❑ TX – drilling, seismic operations are not UH
- ❑ CA, 1986 – welding a full oil truck with a blowtorch is ultrahazardous

Ladra v. New Dominion (2015)

- ❑ Additional barrier to recovery in Oklahoma raised, then rejected by the Supreme Court.
- ❑ Can OK courts hear oil and gas cases? Answer: Yes, if they involve private claims.
- ❑ Mrs. Ladra still has to prove other elements of negligence and/or strict liability.

Enter: Data Sharing

Data sharing can:

- ❑ Avoid sensor duplication/cover more area;
- ❑ Help regulators identify, mitigate potential drivers more quickly;
- ❑ Improve public confidence; and
- ❑ Encourage public reporting to supplement institutional data-gathering.

State Liability Regimes

- ❑ Courts may limit or preclude application of nuisance, strict liability law.
- ❑ Courts may adopt new “standards of care” to track BMPs in risk mitigation.
- ❑ Legislatures may do the same, or
- ❑ Preempt common law with a statutory scheme for allocating responsibility and costs.

NOTE: Mention of a particular model is not an endorsement.

Liability Funds

- ❑ Fund may cover state permitting, oversight, enforcement activities
- ❑ Companies may establish community funds
- ❑ Fund may assume some or all liability
- ❑ Fund may provide streamlined payouts for certain types of claims (often with caps)
- ❑ Fees may be tied to risk assessment

Liability Funds

Examples:

- ❑ Fisherman's Contingency Fund
- ❑ The Geysers Funds
- ❑ ND, MT pooled liability funds
- ❑ Price-Anderson Nuclear Indemnity Fund
- ❑ Oil Spill Liability Trust Fund

Liability Funds

Design Features:

- Source, timing of funding
- Methods for ensuring solvency
- Eligible uses/purposes
- Limits on ability of industry to rely on the fund
- Legal rights of the fund
- Public/private management of the fund

Questions?

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