



THE Energy Dispatch

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IEL YOUNG ENERGY
PROFESSIONALS' COMMITTEE

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Interested in writing for *The Energy Dispatch*? Young energy professionals may submit articles or ideas for our next issue to IEL's Deputy Director, Vickie Adams (vadams@cailaw.org).

Upcoming IEL Events

[8th ITA-IEL-ICC Joint Conference on International Energy Arbitration](#)

January 23-24, Houston, TX

[71st Annual Oil and Gas Law Conference](#)

February 20-21, Houston, TX

[4th National Young Energy Professionals' Law Conference](#)

March 25-27, Austin, TX

Visit our [website](#) for our full calendar and a list of our online offerings!

Chase Your Passion, Push Through Obstacles, and Always Show Kindness to Others (and Yourself)

An Expert Interview with Danielle Hunter (former Executive Vice President and General Counsel of C&J Energy Services n/k/a NexTier Oilfield Solutions)

Interview By: Miles O. Indest, McGuireWoods LLP

How did you become interested in the practice of law?

Well, I am not entirely sure. My dad is a lawyer (and fellow Tulane Law alumni) so that provided exposure to the practice (and indeed, it is a practice), and I am sure influenced the decision. I can't say I never thought about doing anything else, but being a lawyer was always some part of it. We had a home video of my first day of kindergarten, and my dad asked if I was scared, and I answered, "No, everyone knows if you're going to be a lawyer, you have to go to kindergarten!"

After practicing at Vinson and Elkins, you went in-house to C&J Energy Services (now NexTier Oilfield Solutions, following the October 31, 2019 acquisition by Keane Group). You quickly rose through the ranks to later guide the company through bankruptcy and its subsequent development. Tell us about that experience and how it impacted your career.

One day I will write a book... for the here and now I will say that C&J offered unique opportunities that I pursued with passion and sacrifice. Because of that (what C&J offered and I was willing to do and give) and through that experience, I earned a unique skill-set. I walked into an entrepreneurial organization that was something of a blank slate – there were so many needs, and hence opportunities to contribute and make a meaningful impact if one was only willing to make the effort and take them on. My willingness to devote significant extra effort and to stretch beyond my expertise and comfort level was critical to “rising through the ranks”, as it drove personal and professional growth and success.

C&J's Chapter 11 challenged me on every level and required strategic and “people” skills (negotiation and consensus building, emotional intelligence, communication, etc.) even more than technical / legal skills. Through the hardest and darkest times, I proved what I was capable of – both to myself and to others. That experience, perhaps more than any other, helped me to develop as a leader and as an executive, as well as a person AND a lawyer.

Have you had any mentors in your career that have helped you succeed?

Absolutely. I contribute so much of what I have achieved – successes big and small that have been the building blocks of my career to date – to the guidance and support of some incredible mentors, as well as wise friends who were there for me in the highs and lows, and everything in between.

I owe so much to C&J's former and last CEO, for supporting my promotion to the General Counsel during an extremely vulnerable time in our company's life. He had been investing in me for some time before that, and when the biggest moment came, he believed in me and unequivocally supported me – in spite of some doubters, quite frankly. I am grateful to also have other mentors who come from different backgrounds, and that diversity of perspective and advice is invaluable.

What is your vision for the Oil and Gas industry in the



next 10-20 years?

While I sincerely hope I am wrong, the short- and mid- to long(er)- term certainly feels pretty bleak at the moment. That said, and in spite of strong interests demanding otherwise, oil and gas will [necessarily] be a major component of global energy consumption for many, many years – in my view anyway. Oil and gas powers our lives – supporting our day-to-day functioning (transportation, commerce, etc.) and significantly enhancing our quality of life. So many of the conveniences and pleasures that we enjoy wouldn't be possible without oil and gas.

At the same time, the industry has to adapt and adopt new ways of thinking and operating, and companies have to work together to tackle the problems facing our world. There is no doubt in my mind that the oil and gas industry is not only smart and capable enough to do so, it is also powered by so many good people with a commitment to bettering our communities and planet.

What do you like to do in your free time?

Eating and enjoying food are pretty much my favorite things to do, perhaps reflecting my South Louisiana upbringing. I truly enjoy experiencing all kinds of food, and have been known to travel solely to enjoy a wonderful meal (for example, I just did a less than 24-hour turnaround for a Truffles and Caviar dinner at French Laundry).

I do love to travel, but also really do love (and in fact, the older I get, the more I find I need) quiet time at home with my fur babies (2 cavaliers and a rescued street kitty). Getting together with my family (I have 8 younger siblings) is also so important and brings me the purest happiness. I am a recovering runner, now favoring lagree and yoga over long runs. Also, skiing and scuba diving are two new hobbies that I picked-up over the last few years.

Do you have any specific advice for young lawyers, such as promoting diversity and inclusion or work life balance?

Find your passion and chase it. Contribute to the well-being of others. Practice kindness – to yourself, and to others – and gratitude on a daily basis.

What is the greatest lesson you have learned in your life that you would like to share with young lawyers? (personal or professional)

Hard work, discipline and perseverance are everything. There are no short cuts and success isn't achievable without obstacles, pain (on multiple levels, including self-inflicted that comes from effort, discipline and perseverance), failure and an active commitment to continuous improvement. Seek feedback – constructive

criticism – and incorporate it. When a mistake is made, own it – apologize and move on, valuing the lesson learned.

Also, I am really loving “Grit” by Angela Duckworth, and have listened to it a few times over the last year (on my 4th round now). I highly recommend it to anyone and everyone, wherever they may be in their journey. But it does provide particular inspiration and perspective to people at the beginning of their careers. She is much more eloquent than I am, and her simple yet profound conclusions include, *“Without effort, your talent is nothing more than unmet potential. Without effort, your skill is nothing more than what you could have done but didn't... as much as talent counts, effort counts twice...”* I also like to remind myself *“...most dazzling human achievements are, in fact, the aggregate of countless individual elements, each of which is, in a sense, ordinary...greatness is doable. Greatness is many, many individual feats, and each of them is doable...”*

Professional Lessons I Learned Outside of My Actual Profession

Kelly Ransom, Partner, Kelly Hart Pitre

In late 2016, I joined the founding Board of Directors of New Harmony High, a public, open-enrollment high school that was set to open in New Orleans, Louisiana a year and a half later and focused on educating students through the lens of coastal restoration and preservation. I had no prior experience serving on a board, much less the board of a yet-to-open charter high school. Nor did I have any particular expertise or experience in education, outside of my own education. But I was drawn to New Harmony's mission and joining this board was an opportunity to serve my local community. What I did not realize then was that this was actually an opportunity to acquire invaluable leadership skills and learn some very important lessons that I believe have made me a better lawyer.

1. Lesson 1: No Experience, No Problem. You're a Lawyer. You Can Figure It Out.

Shortly before the school was set to open its doors, I was elected President of the Board. Remember, this was the first board on which I have ever served. Nevertheless, I was now responsible for chairing board and committee meetings, ensuring compliance with public notice and open meeting laws, recruiting new board members, and being the face of the governing body of this organization, not to mention making sure that the Board fulfilled its oversight role.

Rather than becoming overwhelmed by these new responsibilities, I remembered an adage my partner often uses—plan to over-prepare so you don't under-achieve. This

approach seemed like my best shot—or my only shot—at successfully taking on this leadership role. So I read every book on non-profit boards and charter schools that I could find, dedicated significant time to creating a network of people who had the expertise and experience I lacked, took quite a few CLE courses to better understand the ethical boundaries of serving on a non-profit board, and even completed a six-month charter school board leadership training course.

The point is, I figured it out. I approached this leadership role like a new case that involves completely unfamiliar legal issues. I researched and learned as much relevant information as possible and tried to surround myself with people who had the experience I lacked. As lawyers, we often become experts on new topics through our work. Every case involves different facts and often presents legal issues that require us to master areas of law or topics that we previously knew nothing about. This is an incredibly valuable skill that can be applied outside of the legal profession.

II. Lesson 2: Drop The Ego, Listen, And Be Direct.

When I began leading New Harmony’s Board, I became responsible for board recruiting. I therefore needed to access a pipeline of educational professionals to find the right people to serve on the Board. This seemed daunting because, as a defense lawyer whose practice is focused on environmental and oil and gas litigation, I had few if any educators in my professional network. Perhaps even more daunting was the fact that I dreaded networking, or at least I thought I did.

As I dove into recruiting last year, I actually began to enjoy it. I met educators, politicians, education professionals, and other members of the community involved in the charter system. Because the people I met were more well-versed on education issues than I, I had no choice but to approach every meeting with a willingness to listen, learn, and directly ask for the help and direction I needed. I shamelessly asked each person who I met to connect me to people in their network, and every single person was happy to do so.

As I developed these new relationships, I realized two important things about networking. First, networking is not about showing others how knowledgeable you are. It is about developing relationships, which requires a healthy curiosity and ability to listen rather than an inflated ego. Second, there is no better way to develop a relationship than to ask someone for a favor, whether it’s asking for an introduction to someone, another meeting, or guidance or information on some topic about which that person is interested or knowledgeable. People are generally flattered to be asked for a favor and are willing to help when they can.

III. Lesson 3: Speak Up for Industry.

New Harmony’s mission is to empower students to actively direct their own education through project-based learning that is focused on coastal restoration and preservation. The Washington Post recently described New Harmony as having a “goal of preparing students for careers in coastal protection and restoration.” Frank Jordans, “*‘Generation Greta’: Angry Youths Put Heat on Climate Talks,*” 11/28/19 Washington Post.

I was drawn to the school’s mission because a significant part of my practice is defending oil and gas companies in litigation involving claims of coastal erosion. Though defending clients against claims that relate to the very problem that is at the core of the school’s mission may seem at odds at first glance, the reality is that coastal erosion issues are far too complex to be cast in terms of wrong and right or liable and not liable.

Industry and coastal Louisiana are inextricably bound. Royalty revenues fund critical levee repairs and coastal restoration projects, and the skills and experience of industry and industry-support labor forces are needed to carry out those projects. The oil and gas industry is a vital part of Louisiana’s economy and a necessary part of the conversation about coastal preservation and restoration. Becoming involved with New Harmony allowed me to step away from the hyperbole involved in the onslaught of contentious litigation against the oil and gas industry in Louisiana and into a forum where I can contribute to a more thoughtful conversation about incredibly important and complex issues and the industry’s role in addressing those issues.

IV. Leaving to Learn

A cornerstone of New Harmony is the concept of “leaving to learn,” which means that one of the best places to learn is outside of the classroom and in the real world. Leaving to learn has also proven to be a valuable practice after high school and in the professional world. By serving on and now leading New Harmony’s Board I have gained leadership skills and learned very valuable, professional lessons that will undoubtedly make me a better lawyer and a better member of my community.

YEP Member Highlight



Scott Butcher

Shareholder, Crowe & Dunlevy,
Oklahoma City

Notable Achievement this Past Year

We secured a complete defense verdict in a decade+ litigation in Kansas. The Plaintiff sued our clients (and others) for nuisance and unjust enrichment stemming from alleged damage to the Plaintiff's

underground natural gas storage field. This particular case was filed in 2008, but was only one of several related cases that has been litigated by the Plaintiff over the past decade. We represented the primary Defendants in the case and had to take over in 2018. Plaintiff was seeking to recover \$103 million against the Defendants. After a month long trial, the jury deliberated less than two hours before returning a complete defense verdict.

Hobbies

Watching college football (Boomer Sooner!), going to the zoo and museums with my wife and daughters, home improvement projects, fishing (when I can).

Piece of advice that has stuck with you during your career

Prepare as much as you can, show up early, and be as clear as possible about the chronology of events. It sounds simple, but despite the variety of issues that come up in litigation, being on time and demonstrating a firm grasp of the issues always establishes credibility, which is your most important asset in trying to persuade an adjudicator. Plus, sometimes it's in that 15 minutes before a hearing starts in which lightning strikes with a new idea to simplify a complicated point.

Book Review

Yes, And Authors: Kelly Leonard and Tom Yorton

Reviewed by: Anna Gryska, Winston & Strawn LLP

During my freshman year of college, a touring group from The Second City stopped in our small college town for a performance. I remember laughing through the show, and a moment when one of the actors ended up doing an impression of the college's new president while singing in Latin. Never would I have imagined that what was being demonstrated on stage that night was a master class in leadership skills. But according to Kelly Leonard and Tom Yorton, the authors of *Yes, And*, that is exactly what I witnessed.

Leonard and Yorton are not themselves actors on the stages of The Second City shows, but they work with the organization and have witnessed the tenants of improv permeate the theater's culture and business operations. *Yes, And* chronicles lessons from on and off the stage to show how the skills that are integral to good improvisation can help people become more effective in the business world. In fact, The Second City has a program devoted to working with companies and providing training to leaders and teams to help them develop certain skills, such as listening or working as a more cohesive group (an "ensemble" in improv terms). The book is full of case studies on how these workshops have—and sometimes have not—helped people develop as professionals.

Yes, And is structured around what the authors call the seven elements of improv: Yes, And—on stage, saying no stops a scene, but applying this approach means that every idea should be acknowledged and built upon to stoke creativity and innovation. Ensemble—different from a team or committee, an ensemble approach focuses on the success of the group rather than any individual. Co-creation—working with the audience, or the client, to create a product rather than working in isolation. Authenticity—if an organization acknowledges its flaws and allows issues to come to light, there is room for innovation and progress where it is needed. Failure—the authors encourage organizations to use failure as a tool in the creative process, even creating spaces where people can fail on a small scale in the course of reaching success. Follow the Follower—in connection with the ensemble approach, this is the concept that leadership sometimes means getting out of the way and letting different people lead or follow in turn to best serve the group. Listening—absolutely vital on the improv stage, the authors talk about the importance of listening, and how it underpins so much of what makes a leader effective in collaborations and managing a team (or ensemble).

The thesis of *Yes, And* is stated in its introduction and makes clear just how the authors see the elements of improv applying to leadership and work:

When we are fiercely following the elements of improvisation, we generate ideas both quickly and efficiently; we're more engaged with our co-workers; our interactions with clients become richer or more long-standing; we weather rough storms with more aplomb, and we don't work burdened by a fear of failure. When we are in full improviser mode, we become better leaders and better followers; likewise, we hear things that we didn't hear before because we are listening deeply and fully in the moment.

So many books in the leadership or self-improvement category speak as if they have all the answers. By just following that author's principles, they seem to say, you can become the best leader or most effective manager in the history of business. While there are moments in *Yes, And* that border on such confidence, the authors acknowledge that the tenets they advance cannot be applied 100% of the time, and admit that they have not always followed their own advice. There are sometimes bad ideas that cannot be implemented. After the creativity flows, a decision-maker has to step in and choose the path forward.

This attitude was refreshing, especially in thinking about how the elements could be applied to the legal field. By the nature of the work, there are times when we find ourselves in adversarial situations where agreeing with the opposing counsel's point could be detrimental to the client. Or a high-stakes situation that does not leave room for experimentation and failure. Nevertheless, it is worthwhile to think about the elements of improv and how they can be appropriately applied to everyday scenarios. Certainly most people would benefit from being active and engaged listeners. Although hierarchy and seniority are often factors at play in workplace dynamics, there may be room to adopt an ensemble approach so that the expert in a particular area can step into center stage as needed while others play supporting roles.

Yes, And is not a work of comedy writing or an account of celebrities being good leaders (though names are dropped), but it is an interesting and informative read that looks at leadership and the workplace through a novel lens and real-world stories of The Second City's productions, business operations, and its corporate clients. The authors even describe improv exercises that demonstrate each element on a micro level. For those looking to develop their skills as leaders, managers, and professionals, the seven elements of improvisation could become valuable tools.

Career Transition Highlight – Sarah Nealis Bohan

Interview by Vickie Adams, Institute for Energy Law

Sarah Nealis Bohan recently made the move from working out of the Houston office of a global firm with over 850 lawyers worldwide to opening up The Law Office of Sarah Nealis Bohan PLLC in Bridgeport, West Virginia. Licensed in both Texas and West Virginia, Sarah provides corporate legal services to clients in both states.

The prospect of hanging your own shingle can always be a little daunting, but it also seems like a culture shock after working for a global law firm. I recently reached out to Sarah to talk to her about how she prepared for her brave decision to step into a different role. Sarah shared some great advice

about preparing for change, owning your strengths, and acknowledging your weaknesses.

What type of preparation went into your decision to open up your own firm?

With respect to actually making the decision, my primary factor was feeling confident in my ability to generate a certain level of income in a relatively short period. I was aware of several upcoming projects that clients or potential clients expressly told me that they would like me to handle, but for which they could not justify paying big law rates. So, I set my minimum monthly income that I would be comfortable with earning, along with what I thought would be a reasonable hourly rate, then I just worked backwards to determine how many hours I would have to bill each month to earn that income. When I felt little doubt that I'd hit that target in month one, I decided to go for it (and, I actually tripled my target!).

Did you have an action plan in place before you made your move?

Yes, definitely. As mentioned above, I had a monthly billable target, along with a list of potential firm clients as well as referral sources. My action plan revolved around securing revenue as quickly as possible, but I also blocked off 1-2 hours each day to handle non-billable business needs. This included everything from preparing my office location, hiring an assistant and otherwise organizing the administrative needs of the business.

Would you have benefitted from additional or different resources before or during the transition?

Sure. I have only recently began truly developing my firm's brand identity and marketing strategy, and I'm actually really excited about working on this aspect of my business. There are a lot of fairly simple and cost-effective marketing tools that I simply did not know existed 6 months ago or I probably would already be using them. Regardless, I think it will be fun to explore them in 2020. Also, full disclosure, I definitely recommend engaging a consultant to help with this if it is not already part of your background.

What information would you recommend others gather when considering a similar career transition?

I recommend being truly dedicated to the idea of maximizing the bang for your buck. This involves everything from the professional organizations you join, the CLE programs you attend, the reference materials you subscribe to, the events you sponsor and the administrative functions you outsource. In big law, so much of this is handled for you and it's easy to convince yourself that everything is necessary. But, it's not. So, be intentional about what you buy and then re-evaluate periodically. Also, as a former accountant, I can't resist emphasizing the importance of having and maintaining a

detailed monthly budget (please!).

What is one piece of advice that you would like to share with others about opening a solo practice?

I think it is important to know what type of work you are willing to perform. As a solo practitioner, people will come to you with everything. And, it may be tempting to teach yourself how to draft a will or file a petition for divorce, but I really recommend staying in your lane as much as possible, unless of course you want to be a general practitioner. As a corporate attorney, I think I have been well served by sticking to corporate transactions and advising on general corporate matters. I want to be seen as an expert in this field, and if a potential client hears that I'm also handling a personal injury claim, then they may not think of me when they need help negotiating a commercial agreement.

Any additional information you would like to share?

Yes, just be real with yourself – be confident in your strengths and outsource your weaknesses. We all have both, so just own it.

Texas Supreme Court Leaves Consent-to-Assign Questions Unanswered

Valeria Caso Hatley, Decker Jones, PC

In a recent 5-4 decision, the Texas Supreme Court refused to imply a reasonableness standard to an unqualified consent-to-assign provision in a farmout agreement. *Barrow-Shaver Resources Company v. Carrizo Oil and Gas, Inc.* No. 17-0332, 2019 Tex. LEXIS 688 (Tex. June 28, 2019). Carrizo Oil & Gas, Inc. (“Carrizo”) executed a farmout agreement in favor of Barrow-Shaver Resources Company (“Barrow-Shaver”) that included a consent-to-assign provision, which simply stated that Barrow-Shaver’s rights under the agreement could not be “assigned, subleased or otherwise transferred in whole or in part, without the express written consent of Carrizo.” *Id.* at *4. Barrow-Shaver drilled a well under the terms of the agreement. *Id.* at *5. Shortly thereafter, Barrow-Shaver received an offer for its interest in the farmout agreement. *Id.* Carrizo initially refused to consent to the assignment, but then demanded five million dollars (\$5M) in exchange for its consent. *Id.* Barrow-Shaver did not accept Carrizo’s offer, and Barrow-Shaver’s potential deal fell through. *Id.* While this case dealt with a farmout agreement, the real question for the industry (and for Texas courts) is whether the court’s holding should also apply to unqualified consent-to-assignment provisions in oil and gas leases – which are far more common than farmout agreements.

Unqualified consent-to-assign provisions are common in oil and gas leases. Undoubtedly, lessees should always be

advised to avoid “hard consent” provisions. Many lessees, however, were not a party to the original oil and gas lease negotiations and now have to deal with the potential consequences that follow in light of the *Barrow-Shaver* holding. Since the Court did not expressly limit the holding to farmout agreements, the answers will greatly depend on whether a court can be persuaded that the different characteristics between farmout agreements and oil and gas leases warrant an analysis of restraints on alienation under different bodies of law. Since oil and gas leases convey a real property interest - a fee simple determinable - any restraint on alienation should be analyzed under principles of property law.

Unlike contract law, which seeks to preserve the parties’ freedom of contract, property law seeks to encourage the most efficient utility of real property. With that goal at the forefront, it is easy to understand why restraints on alienation - like the consent right held by Carrizo - are strongly disfavored. Yet, whether a Texas court would invalidate such a provision in an oil and gas lease has been questioned for years. See T. Ray Guy, et al., *The Enforceability of Consent-to-Assign Provisions in Oil and Gas Leases*, 71 SMU L. Rev. 477, (2018).

The *Barrow-Shaver* Court acknowledged that farmout agreements are unique arrangements. Justice Green, writing for the majority, noted that the case involved “a farmout agreement, which is a contract between a working-interest owner (the farmor) and the drilling operator (the farmee) that has *no interest in the minerals until it completes its services under the farmout.*” *Id.* at *11 (emphasis added). Justice Green further described the agreement entered into by the parties as a “drill-to-earn farmout,” which was supported by the testimony of Professor Bruce Kramer, Barrow-Shaver’s expert witness. *Id.* Professor Kramer testified as to the major distinction between an oil and gas lease and a farmout agreement, indicating that unlike a farmout agreement, “*a lease presently transfers the right to develop and possess to the lessee.*” *Id.* (emphasis added).

On the other hand, the Court did not expressly limit the holding to farmout agreements and it easily could have done so. Justice Green, in concluding that the Court could not read a reasonableness requirement into the unambiguous provision, cited a Texas Tech Law Review article whereby the authors indicated that unqualified consent-to-assign provisions in oil and gas leases give the lessor the right to withhold consent for any reason. *Id.* at *45-46. All of the cases relied upon by the law review article authors to support that claim, however, deal with landlord-tenant relationships, not oil and gas lessor-lessee relationships. See Benjamin Robertson, et al., *Consent to Assignment Provisions in Texas Oil and Gas*

Leases: Drafting Solutions to Negotiation Impasse, 8 Tex. Tech L. Rev. 335 (2016). The problem with applying traditional landlord-tenant case law to oil and gas lease disputes is that Texas courts have historically treated oil and gas leases differently than other lease agreements.

The Court briefly discussed restraints on alienation; however, the issue was analyzed under contract law principles. 2019 Tex. LEXIS 688 at *47-49. The Court concluded that imposing a reasonableness standard to the provision would force the Court to balance the utility of the restraint versus the potential harm caused by enforcing it - a risk analysis that the parties have presumably factored into their negotiations, which is reflected by the unambiguous terms of the agreement. *Id.*

On the one hand, the Court's reasoning is in line with Texas' long standing contract law principle of freedom of contract. We expect sophisticated parties to know the risks and benefits of the agreement they are entering into. However, it is directly opposed to our well established principle that real property should be freely alienable and only reasonable restraints should be upheld. Even so, Texas courts have validated restraints on alienation of fee simple estates on various different grounds, sometimes based on confusing reasoning. In short, the law on restraints on alienation has become unnecessarily complicated, making it difficult to predict future court rulings. It is only a matter of time before Texas courts will be asked to apply the *Barrow-Shaver* holding to oil and gas leases. At that time, courts will be forced to address whether the long standing treatment of oil and gas leases as fee simple determinable estates protects lessees from unreasonable restraints on alienation - a protection that was not granted to *Barrow-Shaver*.

Fifth Circuit Extends *Doiron* Test For Assigning Maritime-Contract Status To Contracts That Are Not Oilfield Services Contracts

Andrew Stakelum and Marcella Burke, King & Spalding LLP

The U.S. Court of Appeals for the Fifth Circuit recently held that its two-question *Doiron* test for determining whether oilfield services contracts are maritime contracts also applies when evaluating the maritime-contract status of contracts for any other type of services. *Barrios v. Centaur, L.L.C.*, 942 F.3d 670 (5th Cir. 2019). This decision is important for any company working in the Gulf of Mexico because it simplifies the maritime-contract classification process for their undertakings. Because *Doiron* is no longer read to be limited to oilfield service contracts, entities such as offshore construction and decommissioning companies, whose

service contracts could not always be neatly characterized as “facilitat[ing] the drilling and production of oil and gas,” should have an easier time qualifying their contracts as maritime contracts. It should also enable contracting parties to better assess their maritime or non-maritime status when entering into a service contract because the tests are relatively clear and are not reliant on after-the-fact tort considerations. This clarity is especially important for any type of company working in the Gulf of Mexico, where the maritime or non-maritime status of a contract could determine the governing law. Notably, a non-maritime contract governing services in the Gulf could be subject to Louisiana and Texas's construction and oilfield anti-indemnity statutes, which could make the contract's key risk allocation provisions unenforceable.

1. The *In re Larry Doiron, Inc.* decision established a reasonable test for determining whether oilfield service contracts constitute maritime contracts, but it did not expressly address other types of contracts.

In 2018, the Fifth Circuit issued its decision in *In re Larry Doiron, Inc.*, 879 F.3d 568 (5th Cir. 2018) (en banc), which greatly simplified the standards for assessing when an oilfield service contract is a maritime contract. In doing so, it rejected the nearly 30-year old test of *Davis & Sons, Inc. v. Gulf Oil*, 919 F.2d 313 (5th Cir. 1990), which instructed courts to consider six tort-law factors in determining whether an oilfield service contract constituted a maritime contract. The *Davis & Sons* factors required courts to consider the unique facts of the incident giving rise to the claim under the relevant contract, not what the parties envisioned at the time of signing the contract. Courts applying *Davis & Sons* also had to evaluate the contract in light of prior court decisions which had classified certain types of service contracts as non-maritime contracts.

The *Doiron* Court rejected this cumbersome and somewhat unpredictable approach and replaced it with a two-question inquiry focused on the parties' expectations when signing the contract for oilfield services:

First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters? ... Second, if the answer to the above question is “yes,” does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract?

Doiron, 879 F.3d at 576.

The *Doiron* test, by its own terms, specifically addresses oil and gas contracts, but its original reach over other types of

service contracts had been uncertain. Before *Barrios*, the Fifth Circuit had only one occasion to consider whether this test was limited to oil and gas activities, and that case did not end the uncertainty. In *Crescent Energy Services, LLC v. Carrizo Oil & Gas, Inc.*, 896 F.3d 350 (5th Cir. 2018), the Court considered whether the plugging and abandonment of a well from a fixed platform “facilitate[d] the drilling of production of oil and gas” and met *Doiron*’s first element for qualification as a maritime contract. The court rejected arguments that this decommissioning activity was more akin to non-maritime offshore construction activities. Instead, it adopted a broader view that qualifying activities for *Doiron*’s first element need only relate to the “life cycle” of oil and gas drilling production. *Id.* at 356-357. While ruling the first *Doiron* element was satisfied because the contract dealt with an activity that related in some way to oil and gas production, it left open the possibility that some other oil and gas activities might occur outside of this qualifying life cycle and be classified as the subject of a non-maritime contract. In addition, it did not address how *Doiron* would be applied to determine the maritime-contract status of other types of services unrelated to any oil and gas production.

2. The *Barrios* decision makes clear that all contracts for services to facilitate an activity on navigable waters are to be evaluated under the *Doiron* test when determining maritime status.

In *Barrios*, the Fifth Circuit for the first time considered whether a contract to provide non-oil and gas services is a maritime contract under the *Doiron* standard. The contract at issue involved the construction of a concrete containment rail on an existing dock, which extended into the Mississippi River. The containment rail would help prevent bulk cargo from spilling into the river during vessel loading and unloading operations.

The Court expressly rejected arguments that: (1) *Doiron*’s first prong for determining whether a contract’s principal objective is maritime commerce was merely a “shortcut” only applicable to oil and gas contracts; and (2) for all other types of contracts, a court should ask whether the activity involves maritime commerce and work from a vessel. The Court concluded such an approach for assessing the maritime status of contracts outside the oilfield services area was not desirable because it would likely recreate the previously rejected *Davis & Sons* fact-specific and precedent reliant approach. Rather, the court stated:

Doiron’s two-part test applies as written to all mixed-services contracts. To be maritime, a contract (1) must be for services to facilitate activity [e.g., the construction of a containment railing on a dock or the

abandonment of a well] on navigable waters and (2) must provide, or the parties must expect, that a vessel will play a substantial role in the completion of the contract.

Barrios, 942 F.3d at 680.

Applying this reformulated test, the Court “easily” concluded the *Barrios* contract to install a concrete containment rail along a dock satisfied both required elements set out in *Doiron*. It said the contract at issue met the navigable waters prong because: “Collectively, those facts establish that the Dock Contract required services to be performed to facilitate the loading, offloading, and transportation of coal and petroleum coke via vessels on navigable waters. That some services were also performed on the dock, which was affixed to the land, isn’t dispositive.” *Id.* at 681. The Court then explained the contract satisfied *Doiron*’s second prong because the contract provides for, or the parties expected, a vessel to play a substantial role in fulfilling the contract. In *Barrios*, the project proposal indicated a crane barge would be needed to mix and pour the concrete containment rail and a tug boat would be present to move a barge, as needed. In addition, the undisputed testimony demonstrated that the contract could not have been completed without the use of a vessel, and the Court was willing to rely on this additional evidence to supplement the contract’s terms concerning the need for and importance of the vessel. *Id.* at 681-682.

3. Lessons to be learned from the *Barrios* Decision.

The *Barrios* decision teaches some key points for lawyers concerned with drafting, or litigating issues arising under, any type of service contracts that might qualify as maritime contracts. By eliminating any distinction between contracts for oilfield services and other services when resolving a contract’s maritime status, it establishes the *Doiron* test as the only test to determine whether a mixed-use contract qualifies as a maritime contract. With the *Doiron* test in control, the difficulty of proving the contract for services “facilitated the drilling and production of oil and gas” will no longer be an impediment to having the contract classified as a maritime contract. Use of the *Doiron* test will enable parties to better assess the likelihood of having a contract classified as a maritime contract and will provide more certainty and better risk-allocation decisions in the ever-evolving offshore construction industry. *Barrios* also provides greater insight into the type of evidence courts will consider in determining whether the parties envisioned a vessel playing a substantial role in the completion of a contract as required under *Doiron*’s second prong. The Court’s reliance on documents and evidence outside of the four corners of the contract—the project proposal and

deposition testimony—suggests courts should be willing to consider a wide range of evidence in evaluating this factor and should be likely to reach a decision that is based on the parties’ understandings about the vessel at the time they executed the contract.

U.S. District Court Decision Regarding Drilling on Federal Land

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I. Introduction

Climate change and its correlation to oil and gas drilling has become the subject of much debate in recent years. Most recently, the U.S. District Court for the District of Columbia barred oil and gas drilling on public lands in Wyoming, finding that the U.S. Bureau of Land Management (“BLM”) failed to sufficiently consider climate change when authorizing the leases. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019). The Court issued its opinion after considering the parties’ cross-motions for summary judgment and remanded to BLM while withholding judgement as to whether the leasing decisions were correct. *Id.* at 51. A detailed analysis of this opinion is presented below.

II. Standing

The Plaintiffs in this case were two non-profit organizations, WildEarth Guardians and Physicians for Social Responsibility (“Plaintiffs”). *Id.* Plaintiffs brought suit claiming that BLM violated federal law by not sufficiently considering climate change when authorizing oil and gas leases on federal land in Wyoming, among other states that were not discussed in this opinion. *Id.*

In a case like this one where a plaintiff alleges a violation of his procedural rights, the plaintiff has the burden of proof to show that the claimed interest is more than a mere general interest that the entire public shares. *Id.* at 60. The plaintiff must also prove causation between the government’s procedural violation and a particular risk or injury to the plaintiff’s interest. *Id.* In the event that the plaintiff is an organization, as here, the organization has standing if: (1) at least one member has standing to sue in his own right, (2) the interests the organization seeks to protect are relevant to its purpose, and (3) neither the claim nor the relief requires that a member of the organization participate in the lawsuit. *Id.* at 60-61. Here, the Court held that because at least one member of WildEarth’s members had standing to bring the action, Plaintiffs had standing to bring the matter. *Id.* at 63.

Plaintiffs submitted declarations of two WildEarth members to support its standing. *Id.* at 61. One member stated that he visits the leased land in Wyoming annually and he provided

concrete plans to return within the year. *Id.* The other member stated that he has annually visited and hiked the leased lands since 2001 and planned to visit in August 2017. *Id.* Despite the Defendants’ argument that the declarations lack sufficient geographic specificity as the referenced areas are vast, the Court stated that such specificity is not required. *Id.* at 62. The Court reasoned that the parcels at issue cover thousands of acres of undeveloped land and the oil and gas drilling creates haze and dust in the air that can be seen up to one hundred miles away. *Id.*

The Court held that BLM’s failure to sufficiently consider climate change when authorizing the lease sales enabled the oil and gas drilling, which will cause Plaintiffs’ alleged injuries. *Id.* at 63. In addition to meeting their burden as to causation, the Court found that Plaintiffs met their burden of proving a substantial probability that Plaintiffs were injured and that a favorable decision of the Court could redress the injury, as required at the summary judgment stage to establish standing. *Id.* at 60; 63. Therefore, the Court determined that Plaintiffs met their burden of proof as to standing. *Id.*

III. Analysis

The Mineral Leasing Act’s mandate to lease federal land for the development of natural resources is carried out by BLM. *Id.* at 52. The Federal Land Policy and Management Act of 1976 established a series of steps that BLM is required to follow when leasing federal lands for oil and gas drilling. *Id.* These steps are governed by the National Environmental Policy Act (“NEPA”). *Id.*

“Under NEPA, agency decisionmakers must identify and understand the environmental effects of proposed actions, and they must inform the public of those effects so that it may ‘play a role in both the decisionmaking process and the implementation of [the agency’s] decision.’” *Id.* (quoting *Robertson v. Methow Valley Citizen’s Council*, 490 U.S. 332, 349 (1989)). Moreover, NEPA requires agencies to prepare an Environmental Impact Statement (“EIS”) for each major federal action that significantly impacts the quality of the environment. *Id.* at 53. To determine if an EIS is needed, the agency may prepare an Environmental Assessment (“EA”) to take a “hard look” at the environmental consequences of the proposed action. *Id.* After preparing an EA, if an agency determines that an EIS is not needed, the agency must issue a Finding of No Significant Impact (“FONSI”). *Id.*

In this matter, BLM prepared EAs, determined that the lease sales did not require EISs, and issued FONSI. *Id.* at 55. Plaintiffs claimed that these EAs and FONSI failed to sufficiently assess the alleged impacts of the greenhouse gas emissions generated by the oil and gas development on 473 leases, issued through 11 lease sales, for over 460,000 acres

of federal land in Wyoming, Utah, and Colorado. *Id.* The Court's opinion was limited to 282 leases, issued through 5 lease sales, for about 303,000 acres of land in Wyoming between May 2015 and August 2016. *Id.*

A. The Court found that BLM failed to assess the reasonably foreseeable impacts of greenhouse gas emissions.

Plaintiffs alleged that BLM failed to take a "hard look" at the impacts of climate change and greenhouse gas emissions resulting from its leasing decisions for the lease sales. *Id.* at 63. The Court stated that BLM was required to assess the reasonably foreseeable impacts of oil and gas drilling at the leasing stage because they cannot prevent the emissions from drilling once the leases have been issued. *Id.* at 64. The Court ultimately held that BLM failed to properly assess these impacts. *Id.*

The Court explained that an agency may delay preparation of an EIS if it reserves the authority to preclude all activities while the specific proposals are pending and prevent the proposed activities if the environmental consequences are unacceptable. *Id.* at 65. Here, the leases did not contain stipulations to prevent oil and gas drilling without further approval by BLM. *Id.* Moreover, once the leases were issued, BLM could not preclude drilling or prevent the alleged resultant greenhouse gas emissions. *Id.* at 65-66. The fact that BLM could limit or mitigate the emissions and other environmental impacts by imposing certain conditions after the leasing stage was not persuasive. *Id.* at 66. Since issuing the leases was an irrevocable commitment to allow some greenhouse gas emissions, the Court found that BLM was "required to fully analyze the reasonably foreseeable impacts of those emissions at the leasing stage." *Id.*

However, the Court determined that BLM was not required to undertake site-specific analyses of certain individual parcels at the leasing stage. *Id.* The Court reasoned that at the leasing stage, BLM could not reasonably foresee the projects that would be undertaken on specific parcels, being that BLM did not even know whether a certain lease would actually be drilled on or developed. *Id.* Additionally, BLM could not know which natural resource would be extracted, the type of wells that would be drilled, or the technology that would be used to drill the wells. *Id.* As such, BLM could not evaluate the impacts of the projects on each parcel and was not required to do so under NEPA. *Id.*

Yet, NEPA did require BLM to reasonably quantify the greenhouse gas emissions resulting from oil and gas development on the leased parcels in the aggregate.

Id. at 69. The Court found that BLM could reasonably foresee the impacts of oil and gas drilling on the leased parcels as a whole at the leasing stage. *Id.* at 67. Although BLM provided qualitative discussion of climate change that contributed to their decision-making process, the Court determined that BLM needed to also conduct a quantitative analysis in order to sufficiently assess the environmental impacts of the leases. *Id.* at 70-71. The Court explained that BLM could express the greenhouse gas emission forecasts in ranges, given the unknown factors of the future drilling at the leasing stage, by using the raw data in the EAs regarding the current local and regional climates and how climate change may affect them, as well as studies categorizing the emissions in general terms. *Id.* at 68-70.

Further, the Court determined that NEPA did not require BLM to quantify downstream emissions, but it must strengthen its discussions of the environmental effects of downstream oil and gas use. *Id.* at 75. The Court reasoned that the primary purpose of oil and gas leasing is to produce these natural resources for consumption. *Id.* at 73. "Downstream use of oil and gas, and the resulting [greenhouse gas] emissions, are thus reasonably foreseeable effects of oil and gas leasing." *Id.* The Court concluded that greenhouse gas emissions from downstream use of oil and gas are an indirect effect of BLM's leasing decisions and as such, BLM must discuss the environmental effects in greater detail. *Id.* at 71-72.

Additionally, the Court determined that BLM must discuss the cumulative effects of greenhouse gas emissions in more detail. *Id.* at 76. Under NEPA, BLM must quantify the emissions from past, present, and reasonably foreseeable leasing decisions and compare them to regional and national emissions to evaluate the cumulative effect of the challenged leasing decisions with reasonable specificity. *Id.* at 77. "Although BLM may determine that each lease sale individually has a de minimis impact on climate change, the agency must also consider the cumulative impact of [greenhouse gas] emissions generated by past, present, or reasonably foreseeable BLM lease sales in the region and nation." *Id.*

B. The Court found that BLM's FONSI's were insufficient.

BLM decided not to prepare EISs for the Wyoming leases and instead issued EAs and FONSI's. *Id.* at 80. Plaintiffs contended that BLM's decision to not prepare EISs was improper and the FONSI's accompanying the challenged EAs were deficient. *Id.* The Court looked to the regulations for evaluating the environmental significance of BLM's leasing decisions, noting that implication of any one of the following

factors may be enough to require the development of an EIS and all “should be considered in evaluating intensity” or “severity of impact” of a decision:

1. The degree to which the effects on the quality of the human development are likely to be highly controversial.
2. The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
3. Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.”

Id. at 80-81. First, the Court found that the environmental effects of the lease sales were not highly controversial. *Id.* at 82. In order for a major federal action to be considered “highly controversial,” there must at least be a substantial dispute as to the size, nature, or effect of the action and some evidence that shows the methods or data relied upon in reaching its conclusions was flawed. *Id.* at 81. The Court stated that Plaintiffs failed to show that the significance of the environmental effects of BLM’s leasing decisions was much higher than BLM represented. *Id.* at 82. Further, BLM considered Plaintiffs’ suggested climate change methodologies and explained why it chose not to use them. *Id.* Plaintiffs did not point to any other serious flaws in BLM’s methods or data, so the Court concluded that the action was not highly controversial. *Id.*

Second, the Court found that the environmental effects of the lease sales were not highly uncertain. *Id.* at 83. The Defendants admitted that oil and gas development on the disputed leases would produce greenhouse gas emissions and acknowledged that greenhouse gas emissions contribute to climate change. *Id.* Furthermore, the Court agreed with the Defendants’ contention that oil and gas leasing is common in the area at issue (“the mountain west”) and uncertainty regarding the quantity of greenhouse gas emissions does not establish uncertainty as to the effect of such emissions. *Id.*

As to the third factor, the Court held that because the EAs failed to properly assess the cumulative impacts of greenhouse gas emissions from the leased parcels, it could not determine whether those effects were so significant as to require EISs. *Id.* at 81. “In summary, the challenged EAs

failed to take a hard look at the climate change impacts of oil and gas drilling because the EAs (1) failed to quantify and forecast drilling-related [greenhouse gas] emissions; (2) failed to adequately consider [greenhouse gas] emissions from the downstream use of oil and gas produced on the leased parcels; and (3) failed to compare those [greenhouse gas] emissions to state, regional, and national [greenhouse gas] emissions forecasts, and other foreseeable regional and national BLM projects.” *Id.*

IV. Conclusion

The U.S. District Court ultimately remanded the case to the BLM, leaving the leases in place while allowing BLM to cure the deficiencies claimed. *Id.* at 84. Further, the Court enjoined BLM from issuing any permits to drill for the leases while it cures the EAs and FONSI. *Id.* at 85. Moreover, BLM cannot authorize new drilling on the leased parcels at issue until it sufficiently explains its conclusion that the lease sales did not significantly affect the environment. *Id.* The Court reasoned that this injunction is necessary in case BLM did not choose correctly in making the lease decisions, which cannot be gleaned due to their failure to provide a reasoned and sufficient explanation. *Id.* at 84-85. The Court stated that it will retain jurisdiction over the matter until BLM fulfills its obligations under the National Environmental Policy Act. *Id.* at 85.



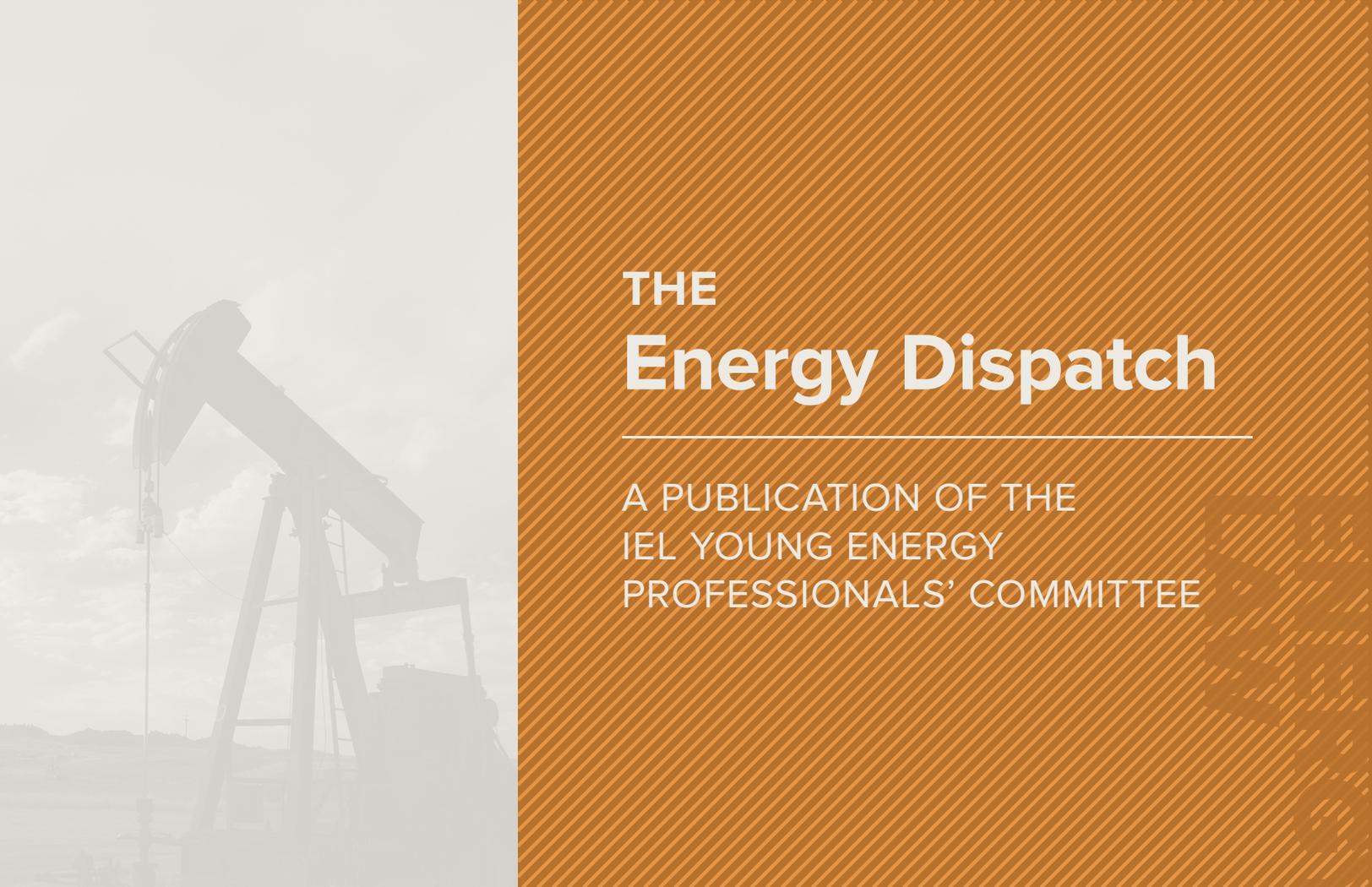
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