Institute for
ENERGY LAW

Oil & Gas E-Report

ARTICLES

ISSUE 4 DECEMBER 2018

The IEL Oil & Gas E-Report is a publication the Institute for Energy Law of The Center for American and International Law. Please forward any comments, submissions, or suggestions to any of the editors or IEL's Associate Director, Vickie Adams.

Court Enjoins BOEM and BSEE from Approving Use of Hydraulic Fracturing or Acidizing in Pacific Until Endangered Species Act and CZMA Violations are Corrected

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Environmental Defense Center v. Bureau of Ocean Energy Management, 2018 WL 5919096 (C.D. Cal. 2018) is a successor to two previous cases in which environmental organizations brought suit, asserting that the federal government violated the National Environmental Policy Act by approving fifty-one permits for offshore well stimulation—either hydraulic fracturing or acidizing—on the Pacific Outer Continental Shelf (POCS). In the two earlier suits, *Environmental Defense Center v. Bureau of Safety and Environmental Enforcement*, CV 14-921 (C.D. Cal.) and *Center for Biological Diversity v. Bureau of Ocean Energy Management*, CV 15-1189 (C.D. Cal.), the parties reached settlements in which the federal government agreed to conduct an Environmental Assessment (EA) of the potential environmental impacts of well stimulations off the California coast. In particular, the settlements provided:

> BOEM and BSEE will undertake a programmatic Environmental Assessment ("EA") pursuant to the National Environmental Policy Act ("NEPA") to analyze the potential environmental impacts of well-stimulation practices on the Pacific OCS, including hydraulic fracturing and acid well stimulation. The focus of the EA will be on foreseeable future well-stimulation activities requiring federal approval, not past completed or expired activities for which no further federal actions remain, except to the degree that analysis of such past actions may be relevant to assessing the environmental baseline and/or an analysis of cumulative or other effects. This assessment will result in a determination that either an Environmental Impact Statement ("EIS") and Record of Decision ("ROD") is required or a Finding of No Significant Impact ("FONSI") is appropriate. BOEM and BSEE shall complete and issue the final programmatic EA by May 28, 2016, and will also issue a FONSI by that date if BOEM and BSEE determine that a FONSI is the appropriate outcome of the EA.

The federal government issued a Draft EA in February 2016 and a Final EA in May 2016. The Final EA considered four alternatives. Under Alternative 1 (the alternative that the federal government adopted), the Bureau of Safety and Environmental Enforcement (BSEE) would approve proposals to use hydraulic fracturing and acidizing on the POCS if the proposals were compliant with performance standards found in BSEE regulations. Under Alternative 2, BSEE would approve the use of such well stimulation techniques, but would impose subsurface seafloor depth limitations. Under Alternative 3, BSEE would prohibit open water discharge of waste fluids from well stimulation activities. Under Alternative 4, BSEE would not allow the use of hydraulic fracturing or acidizing in the future on the POCS. The Final EA concluded that none of the four proposals were "expected to result in adverse impacts on the environment." Based on that finding, BSEE and the Bureau of Ocean Energy Management (BOEM) issued a Finding of No Significant Impact (FONSI) and adopted Alternative 1.

In late 2016, three groups of plaintiffs filed separate suits challenging the EA and FONSI. In the three actions, which were consolidated, the plaintiffs alleged that BOEM and BSEE violated the National Environmental Policy Act (NEPA) by failing to take a "hard look" at potential environmental impacts of hydraulic fracturing and acidizing operations on the POCS, and for preparing an EA, rather than a full Environmental Impact Statement (EIS); violated the Endangered Species Act (ESA) by failing to engage in consultation with appropriate agencies to ensure that BOEM's and BSEE's actions did not jeopardize listed species or either destroy or adversely modify habitat of such species; and violated the Coastal Zone Management Act (CZMA) by failing to prepare a consistency determination to verify whether the agencies' proposal to allow these well stimulation techniques was consistent with California's coastal management plan.

The federal defendants argued that NEPA, ESA, and CZMA did not apply because the defendants had not approved any particular proposal to use well stimulation techniques and instead had merely issued a general evaluation of well stimulation techniques. Thus, argued the defendants, their issuance of the EA and FONSI were not federal actions that triggered NEPA, ESA, and CZMA duties. The federal district court disagreed, stating that the defendants' actions had the effect of ending a moratorium on the approval of requests to conduct hydraulic fracturing or acidizing on the POCS and had adopted a policy about how proposals to conduct such operations would be treated. Although the plaintiffs and others might have a chance to challenge the granting of specific permits in the future, they should also be allowed to challenge the general program being adopted by BOEM and BSEE with respect to the use of stimulation techniques.

The court then considered the merits of the plaintiffs' arguments. The plaintiffs argued that the defendants had breached their obligations under NEPA in several ways (readers are referred to the case itself for the court's discussion of each of the several alleged shortcomings in the federal defendants' NEPA analyses). Ultimately, the court rejected each of these arguments and concluded that the federal defendants had complied with their obligations under NEPA.

The court rejected some of the plaintiffs' arguments regarding the federal defendants' alleged violations of the Endangered Species Act, but ultimately concluded that BSEE and BOEM had breached the ESA by failing to conduct certain required consultations with the United States Fish & Wildlife Service (FWS). Under Section 7(a)(2) of the ESA (16 U.S.C. § 1536(a)(2) and 50 C.F.R. § 402.13(a), an agency must conduct informal consultation before taking any action that "may affect" a listed species. If it is determined that an action is "likely to adversely affect" a listed species, 50 C.F.R. §§ 402.13(a) and 402.14(a)-(b) require the agencies to engage in formal consultation. The court concluded that BOEM and BSEE had complied with some of their consultation duties, but that they had violated the ESA by failing to complete a formal consultation with FWS regarding certain species before issuing the Final EA and FONSI.

Finally, the court evaluated the plaintiffs' claims that BOEM and BSEE had violated the Coastal Zone Management Act. Under 16 U.S.C. §1456(c)(1), a federal agency taking actions that may affect coastal zones are consistent with state coastal management plants "to the maximum extent practicable." As part of this requirement, a federal agency whose actions may affect a coastal zone must make a "consistency determination" as to whether the actions would be consistent with state law, and the federal agency must submit that determination to the relevant state for review. The court concluded that BOEM and BSEE were obligated to perform such a consistency evaluation, but that they had breached the CZMA by failing to perform the evaluation.

The court then turned to remedies. The court issued an injunction prohibiting the BOEM and BSEE from approving any plans for the use of hydraulic fracturing or acidizing on the POCS unless and until they complete formal consultation with FWS regarding certain listed species and complete the consistency determination required by the CZMA.

A Kick to the Teeth: U.S. Sanctions on Iran Are Back and the Energy Industry is in the Crosshairs

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U.S. economic sanctions on the Iranian government came back in full force on Monday, November 5, when the second and final window allowing for wind-down transactions with Iran closed.[1] With the United States' roll-back of the relief from sanctions provided for under the Joint Comprehensive Plan of Action ("JCPOA") – the landmark nuclear agreement put into effect in 2016 between Iran, the so-called "P5+1,[2]" and the European Union– the U.S. government returns to the system it enforced prior to the JCPOA. Iran's energy industry is one of the main targets of this sanctions "snap-back." Companies doing business in the Iranian energy sector can expect to come under intense scrutiny, but the ultimate success of the sanctions may lie outside the United States' control.

I. BACKGROUND

So what does it mean that sanctions have snapped back? For one, entities outside the United States that are owned or controlled by a citizen or entity of the United States can no longer do business with Iran without exposing their U.S. parent to liability.[3] During the JCPOA period, foreign entities owned or controlled by U.S. citizens or entities in the United States had been granted relief to conduct business with Iran without exposing their U.S. parent to stiff civil and criminal penalties. Now the same rules apply to U.S. citizens, companies in the United States, and non-U.S. entities owned or controlled by U.S. persons, and the reprieve for non-U.S. companies owned or controlled by U.S. citizens or entities in the United States has been terminated.

One of the most seismic changes will be the re-imposition of secondary sanctions for engaging in business with a host of Iranian targets. The United States will once again use the threat of "secondary" sanctions – or extraterritorial sanctions imposed on a non-U.S. person for engaging in business with specified persons or certain sectors in Iran – to shape the behavior of non-U.S. persons. Secondary sanctions are designed to force non-U.S. entities to choose between doing business with Iran and doing business with the United States.

The close of the first wind-down period on August 7, 2018 began the re-imposition of secondary sanctions on foreign persons engaged in transactions involving any of the following: Iranian rials, the Iranian automotive sector, Iranian sovereign debt, and gold and certain other metals, among other things.[4] The second and final wind-down brought with it the re-imposition of secondary sanctions on those who engage in business with Iran's port operators, shippers, shipbuilders, and

[1] U.S. Dep't of Treasury, "U.S. Government Fully Re-Imposes Sanctions on the Iranian Regime" (Nov. 5, 2018), *available at* https://home.treasury.gov/news/featured-stories/us-government-fully-re-imposes-sanctions-on-the-iranian-regime.

[2] The "P5 + 1" are the five permanent members of the United Nations Security Council, namely China, France, Russia, the United Kingdom, and the United States, plus Germany.

[3] U.S. Dep't of Treasury, "Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA)" (May 8, 2018), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf, FAQ No. 4.4.

[4] Executive Order, "Reimposing Certain Sanctions with Respect to Iran" (Aug. 6, 2017), *available at* https://www.treasury.gov/resource-center/sanctions/Programs/Documents/08062018_iran_eo.pdf.

energy sector; significant transactions related to Iranian petroleum, petroleum products, or petrochemical products; material assistance to the National Iranian Oil Company ("NIOC"), Naftiran Intertrade Company ("NICO"), and the Central Bank of Iran; and the provision of financial services to designated Iranians, among other measures.

In addition, as part of the snap back of sanctions, the Office of Foreign Assets Control ("OFAC") added more than 700 parties to the Specially Designated Nationals and Blocked Persons List ("SDN List").[5] These designations were the largest number of parties ever designated in a single day. Many of the parties designated are subject to secondary sanctions, which means that even non-U.S. persons who engage in business with these designated entities may find themselves subject to U.S. sanctions.

II. ENERGY SECTOR IN THE CROSSHAIRS

Because of the importance of the energy sector to Iran, the re-imposed sanctions take special aim at crippling the industry. Sanctions specifically target petroleum, petroleum products, petrochemical products, NIOC, NICO, and the energy sector writ large. The Trump Administration views the sale of Iranian energy resources as a major source of revenue funding the "malign activities" of Iran.[6]

In fact, the Trump Administration's stated goal is to drive Iranian oil exports toward zero.[7] This is belied somewhat by the issuance of a Significant Reduction Exemption ("SRE") to eight countries – China, India, Italy, Greece, Japan, South Korea, Taiwan, and Turkey – that will allow them to continue to import Iranian oil without subjecting their financial institutions to U.S. sanctions, albeit at reduced levels. The Administration, however, has underscored that these waivers were granted only following significant reductions in the import of Iranian crude oil, and has emphasized the temporary nature of the waivers.[8] As of the most recent tally, between the announcement of the re-imposition of sanctions in May and the close of the final wind-down period in November, Iranian oil exports were cut by around 1 million barrels per day.[9]

The re-imposition of sanctions also indirectly targets the energy industry through sanctions on Iran's shipping industry. One of the entities targeted for secondary sanctions is the National Iranian Tanker Company ("NITC"). Ships owned by NITC and its subsidiaries move tens of millions of barrels of oil a year for Iran. The United States has identified this as a major source of revenue for the Iranian regime and hopes to use sanctions – both primary and secondary – to cut off these funds.

Finally, the Administration hopes to create significant transaction costs for even lawful transactions in the energy sector. Transactions involving Iran have long been discouraged from being denominated in U.S. dollars, as OFAC takes the position that doing so necessarily involves the U.S.

[5] U.S. Dep't of Treasury, "Publication of Updates to OFAC's Specially Designated Nationals and Blocked Persons List and 13599 List Removals" (Nov. 5, 2018), *available at* https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20181105_names.aspx.

[6] *See* "U.S. Government Fully Re-Imposes Sanctions on the Iranian Regime," *supra* note 1.

[7] *See* U.S. State Dep't, "Briefing on Iran Sanctions" (Nov. 2, 2018), *available at* https://www.state.gov/secretary/remarks/2018/11/287090.htm.

[8] *Id.*

[9] *Id.*

financial system and is therefore prohibited under U.S. primary sanctions. This creates a barrier for foreign companies engaging in oil transactions, as the most widely-recognized benchmark rates for oil are denominated in dollars. A particular feature of the re-imposition of sanctions on Iran is the requirement that countries that have received a SRE must deposit payments in local banks in currency other than U.S. dollars for any oil they purchase from Iran. Those funds may only be used to purchase humanitarian goods or to engage in bilateral trade with the SRE country involving non-sanctioned goods or services. Moreover, many banks are likely to decline even lawful business involving Iran since engaging in this business imposes a greater compliance burden than the business is worth, and many banks fear the possibility that they too may be sanctioned for facilitating trade with Iran.

III. REACTION OF THE WORLD COMMUNITY

One major unknown is how the rest of the world will react now that the sanctions have been re-imposed. Because the United States is not a major trading partner with Iran, the success of the sanctions largely depends on how other nations treat the sanctions. It is no secret that the Trump Administration's declaration that it would pull out of the JCPOA was not met favorably by other agreement signatories.[10] If a number of key nations were to openly ignore or flaunt the sanctions, the sanctions might be rendered ineffective.

European partners were especially unhappy with the United States' withdrawal from the JCPOA.[11] The long-dormant EU blocking statute was revived and revised over the summer to make it unlawful for European companies to enforce the U.S. secondary sanctions re-imposed as a result of the U.S. leaving the JCPOA.[12] The blocking statute not only disallows the enforcement of U.S. sanctions by EU companies, but also allows for EU entities to recover damages arising from the application of U.S. sanctions. However, enforcement of the blocking statute is left up to the individual EU member countries and, despite heated rhetoric, no country has yet signaled that it will step up to enforce the blocking statute in any significant way.

One way that European signatories to the JCPOA have determined to bypass the re-imposed sanctions is by designing and implementing a special purpose vehicle ("SPV") clearing house for trade between Iran and other European nations.[13] The SPV would allow the trading partners to barter for goods and services between nations without involving the U.S. dollar or transferring currency between an EU country and Iran. An Iranian company that sold into a European country would accrue credits that could then be used to purchase goods from another firm. However, as of yet the SPV has not gotten off the ground as no EU country has been willing to host it for fear of reprisals from the United States.[14]

[10] *See e.g.* Kara Fox, "European leaders 'disappointed' in Trump's withdrawal from Iran deal," CNN (May 9, 2018), *available at* https://edition.cnn.com/2018/05/08/europe/iran-deal-world-leaders-react/index.html.

[11] *Id.*

[12] *See* Commission Delegated Regulation (EU) 2018/1100 (June 6, 2018), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2018.199.01.0001.01.ENG&toc=OJ:L:2018:199I:TOC.

[13] *See* Saeed Kamali Dehghan and Patrick Wintour, "European 'clearing house' to bypass US sanctions against Iran," The Guardian (Nov. 6, 2018), *available at* https://www.theguardian.com/world/2018/nov/06/european-clearing-house-to-bypass-us-sanctions-against-iran.

[14] Robin Emmott, Jon Irish, and Francois Murphy, "EU plan unraveling for non-dollar Iran trade, oil sales: diplomats," Reuters (Nov. 14, 2018), *available at* https://www.reuters.com/article/us-iran-nuclear-eu/eu-plan-unraveling-for-non-dollar-iran-trade-oil-sales-diplomats-idUSKCN1NJ1Z0.

IV. CONCLUSION

November 5, 2018 opened a significant new phase in the United States' campaign to use sanctions against Iran to accomplish its diplomatic purposes. Secondary sanctions have the potential to broadly impact trade between Iran and other nations and will be a landmine to navigate for anyone looking to trade with Iran. Any company in the energy industry that deals with Iran must evaluate its exposure to U.S. primary and secondary sanctions, as the energy sector is a major target of the re-imposed sanctions. However, the effectiveness of the sanctions may ultimately lay in the willingness of other countries to cooperate.

Louisiana First Circuit Allows Landowner Seeking Remediation of Contamination to Proceed Under Citizen Suit Provision

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In certain circumstances, Louisiana Revised Statute 30:14 authorizes a private citizen to file suit to prevent an ongoing or threatened violation of Louisiana's conservation laws. *Global Marketing Solutions, L.L.C. v. Blue Mill Farms, Inc.*[1] raises the issue of whether an individual can use Revised Statute 30:14 to remedy past violations of the conservation laws.

Global Marketing's Private Claims

Global Marketing Solutions, L.L.C. acquired land in West Baton Rouge Parish by cash sale in 2005.[2] In 2006, Global brought suit, asserting that it discovered subsequent to the sale that the land was contaminated. Global named several oil and gas companies as defendants, asserted that the defendants' oil and gas operations had caused the contamination years prior to the sale.

While the suit was still pending at the district court level, the Louisiana Supreme Court decided *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.*, 79 So. 3d 246 (La. 2011). In *Eagle Pipe*, a plaintiff purchased land. Subsequent to the purchase, the plaintiff discovered that the land had been contaminated by a company that had leased the land from a prior owner. The plaintiff filed tort claims against that company and several other defendants, seeking a money judgment to compensate for the contamination, but the Louisiana Supreme held that the suit should be dismissed. The court explained that if a tortfeasor causes contamination of land, the resulting tort claim belongs to the person who owned the land at the time the contamination occurred. If the land is subsequently sold, the purchaser may have a claim against the seller in redhibition, but the tort claims against the individuals who caused the contamination still belong to the person who owned the land at the time the contamination occurred (unless that person assigns the cause of action to the new landowner).

In *Global Marketing*, the district court dismissed Global's claims, based on *Eagle Pipe*. The Louisiana First Circuit affirmed.

Global Marketing Asserts Citizen Suit Claim

Global amended its petition, seeking to assert a claim against the defendants based on Louisiana Revised Statutes 30:14 and 30:16.[3] Revised Statute 30:14 states in part:

> Whenever it appears that a person is violating or is threatening to violate a law of this state with respect to the conservation of oil or gas, or both, or a provision of this Chapter, or a rule, regulation, or order made thereunder, the commissioner shall bring suit to restrain that person from continuing the violation or from carrying out the threat.
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> ***

[1] Global Marketing Solutions, L.L.C. v. Blue Mill Farms, Inc., 2018 WL 5816971 (La. App. 1st Cir. 2018).

[2] *Id.*

[3] When a suit is dismissed based on an exception of no cause of action, the plaintiff may amend its petition in an attempt to state a claim on which relief can be granted.

> In this suit, the commissioner may obtain injunctions, prohibitory and mandatory, including temporary restraining orders and preliminary injunctions, as the facts warrant ***

Louisiana Revised Statute 30:16 states:

> If the commissioner fails to bring suit within ten days to restrain a violation as provided in La. R.S. 30:14, any person in interest adversely affected by the violation who has notified the commissioner in writing of the violation or threat thereof and has requested the commissioner to sue, may bring suit to prevent any or further violations, in the district court of any parish in which the commissioner could have brought suit. If the court holds that injunctive relief should be granted, the commissioner shall be made a party and shall be substituted for the person who brought the suit and the injunction shall be issued as if the commissioner had at all times been the complaining party.

Global's amended petition alleged that it had notified the Commissioner of Conservation of the contamination on its land and asked that the Commissioner file suit against the defendants, but the Commissioner had not done so. Instead of filing suit against those companies to require a clean-up, the Commissioner issued an order to the defendants, requiring them to submit a work plan for evaluating contamination at the site. The defendants apparently submitted such a plan, but Global filed suit, seeking a judicial remedy.

The defendants filed a peremptory exception of no cause of action, seeking dismissal of Global's claim. The district court dismissed, concluding that Louisiana Revised Statute 30:16 only authorizes citizens to bring suit to stop an ongoing violation of the conservation laws or to prevent a threatened violation, not to remedy a past violation. Because the contamination that Global sought to remedy was the result of past activities, not an ongoing violation or threated violation of conservation laws, Global could not bring suit under Revised Statute 30:16. The district court dismissed Global's suit, based on the reasoning advanced by the defendants. Global appealed.

A five-judge panel of the Louisiana First Circuit reversed and remanded the case to district court to allow the litigation to proceed. Judge Guidry dissented, stating in his dissenting opinion that 30:16 cannot be used to remedy past violations. Judge Holdridge issued a concurring opinion. He agreed with the defendants that some of the language of 30:16 seems to authorize citizen suits only for ongoing or threatened violations. He stated, however, that he thought some of the language in 30:14 and 30:16 was ambiguous and could be read as authorizing a broader range of citizen suits than merely suits to remedy past violations. For that reason, he concurred with the judgment reversing the district court's dismissal and allowing the litigation to proceed.

Court Provides Primer on Louisiana Oil Well Lien Act in Resolving Dispute

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Marlborough Oil & Gas, L.L.C. acquired a mineral servitude covering certain land in West Baton Rouge Parish.[1] Marlborough later granted a mineral lease to Northwind Oil & Gas, LLC. Northwind drilled two wells— Marlborough Oil & Gas, LLC No. 1 Well and Marlborough Oil & Gas, LLC No. 3 well. Baker Hughes Oilfield Operations, Inc. provided services and materials to support the drilling of the second of those wells, Marlborough Oil & Gas, LLC No. 3 Well, but Northwind failed to pay for those services and materials.[2]

Baker Hughes recorded a statement of privilege in the mortgage records of West Baton Rouge Parish, relying on the Louisiana Oil Well Lien Act (LOWLA).[3] Baker Hughes also: filed suit against Northwind; recorded a notice of the pendency of the suit in the mortgage records;[4] and obtained a judgment for the fees it was owed, as well as for interest, costs, and attorney fees.[5] In addition to granting a monetary award, the judgment "foreclosed" against Northwind's interest in the Marlborough Oil & Gas, LLC No. 3 well.

Marlborough filed suit, seeking a declaratory judgment that Baker Hughes' lien and judgment did not encumber Marlborough's servitude or any "tubing, casing, equipment, pipelines, or other constructions" on the leased premises.[6] The district court granted summary judgment in favor of Marlborough, holding that Baker Hughes' lien was ineffective as to Marlborough, Marlborough's servitude, and as to the Marlborough Oil & Gas, LLC No. 1 Well (Northwind did not owe Baker Hughes compensation relating to this well). The trial court also found that Baker Hughes' statement of privilege was deficient. Baker Hughes appealed.

The Louisiana First Circuit reversed.[7] The appellate court noted that Baker Hughes recorded a notice of its privilege within 180 days of its last activity that gave rise to its privilege, as required by Louisiana Revised Statutes 9:4865(a) and 4848. Further, Baker Hughes filed its suit against Northwind, seeking judicial recognition of the privilege, within one-year of filing its notice of privilege, as required by Louisiana Revised Statute 9:4865(B).

[1] Marlborough Oil & Gas, L.L.C. v. Baker Hughes Oil Field Operations, Inc., 2018 WL 5961770 *1 (La. App. 1st Cir. 2018).

[2] *Id.* For purposes of uniformity, Louisiana regulations provide rules for the naming of wells. La. Admin Code. tit. 43, Pt XIX, § 103.E. One of the rules provides that the name of wells drilled on a lease basis must contain the name of the lessor. *Id.*

[3] *Marlborough*, 2018 WL 5961770 at *1. LOWLA is found at La. Rev. Stat. 9:4861 *et seq*. Under Louisiana law, a "privilege" is analogous to the type of right that would be called a "statutory lien" in other states. *See* In re Green, 516 B.R. 347, 350-1 (E.D. Bankr. 2014). Thus, although the statute at issue in *Marlborough* is commonly known as the Louisiana Oil Well Lien Act, the right conferred by the Act is known is a "privilege." Indeed, the text of the Act generally uses the word "privilege," rather than "lien."

[4] The Louisiana Oil Well Lien Act requires the filing of such a notice in order to keep the privilege effective as to third persons. La. .Rev. Stat. 9:4865(C).

[5] *Marlborough*, 2018 WL 5961770 at *1. The privilege created by LOWLA secures the amount of the obligation that is the basis of the privilege, as well as interest due on the obligation, the cost of preparing and filing the notice of privilege and the notice of pendency of an action on the obligation, and the amount of a reasonable attorney fees, not to exceed ten percent of the obligation. La. Rev. Stat. 9:4862(B).

[6] *Marlborough*, 2018 WL 5961770 at *2.

[7] *Marlborough*, 2018 WL 5961770 at *1.

The trial court had found that Baker Hughes's statement of privilege was deficient, but the appellate court found that "this finding is clearly contrary to LOWLA." Louisiana Revised Statute 9:4865(A)(5) requires a person filing a notice of privilege pursuant to LOWLA to describe either the operating interest upon which the privilege is claimed or "the well with respect to which the operations giving rise to the claimant's privilege were performed." Louisiana Revised Statute 9:4868(B)(1) states that "[a] well is adequately identified if the statement of privilege gives the name and serial or other identification number of the well and the name of the field where it is located as these are designated by the records of the commissioner of conservation." Baker Hughes' notice of privilege contained a description that met this standard.[8]

With respect to the trial court's holding that the privilege did not apply to the well other than the well for which Baker Hughes had provided services and materials, the appellate court rejected that holding too. The appellate court cited Louisiana Revised Statute 9:4863(A)(1) and a Louisiana Supreme Court decision, *Guichard Drilling Company v. Alpine Energy Services, Inc.*, 657 So.2d 1307 (La. 1995) for the proposition that "the privilege granted is not restricted to the proceeds of the well actually drilled, but rather exists on the entire lease as a whole."[9]

Marlborough argued that summary judgment in its favor had been proper because Baker Hughes' privilege attached to the oil and gas lease held by Northwind, and that lease had terminated for a lack of production in paying quantities. The appellate court rejected this argument too. The court stated that, because Marlborough asserted that the lease had terminated, Marlborough bore the burden of proof. Marlborough had presented evidence that neither the Marlborough Oil & Gas, LLC No. 1 well nor the Marlborough Oil & Gas, LLC No. 3 well still produced in hydrocarbons, but Marlborough had neglected to offer any summary judgment evidence to establish that no other well was providing production that maintained the lease.[10]

Finally, the appellate court rejected Marlborough's contention that Baker Hughes' privilege created a cloud on Marlborough's title that would prevent it from granting a new lease to a new operator. The court stated that a new lease would not be affected by Baker Hughes' lien.[11] Louisiana Revised Statute 9:4863(C) provides that a LOWLA privilege does not affect the portion of "hydrocarbons produced from an operating interest that is owned by a lessor, sublessor, overriding royalty owner, or other person who is not a lessee of the operating interest," or the "proceeds arising from the disposition of such hydrocarbons that are owned by or payable to such persons."

[8] *Id.* at *3.

[9] *Id.* at *7-8.

[10] *Marlborough*, 2018 WL 5961770 at *10.

[11] *Id.* at *10.

Court Halts Work on Keystone Pipeline Pending Further Review Under NEPA and Pending More Detailed Explanation of Decision to Grant Permit

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In *Indigenous Environmental Network v. U.S. Department of State*,[1] three environmental organizations sued the United States Department of State, asserting that the Department violated the National Environmental Policy Act, the Administrative Procedures Act, and the Endangered Species Act (ESA) by granting a Presidential Permit that would allow TransCanada Keystone Pipeline, LP to construct a cross-border pipeline known as the Keystone XL pipeline.[2] TransCanada intervened in support of the State Department's decision to grant the permit.[3]

NEPA Claims

Many of the plaintiffs' arguments centered on the National Environmental Policy Act ("NEPA"). Unlike many environmental statues, NEPA does not impose substantive requirements. Instead, it is procedural. It requires the federal government to evaluate and document the environmental impacts that certain federal actions are likely to cause. Further, it requires all federal agencies to issue an environmental impact statement (EIS) before taking any major federal action that would significantly affect the quality of the environment.[4] The term "major Federal actions" includes the granting of federal environmental permits. An EIS must discuss the environmental impacts of the proposed action, as well as any adverse environmental impacts that cannot be avoided and also the possible alternatives to the proposed action, including the alternative of taking no action.

The plaintiffs asserted several arguments in support of their contention that the State Department violated NEPA. Their first argument was that the State Department's "purpose and need" statement was too narrow. Federal regulations require that each EIS include a statement of the "purpose and need to which the agency is responding" by considering or proposing the action (and the alternatives) discussed in the EIS.[5] A purpose and need statement fails to satisfy regulatory requirements if it provides too narrow of a description of the purpose and need for the proposed action. A potential problem with an overly narrow description of the purpose and need is that it can restrict the range of acceptable alternatives (to the proposed action) to an extent that the restriction "preordains" the result.[6] But courts allow agencies "considerable discretion" in defining the purpose

[1] Indigenous Environmental Network v. U.S. Department of State, 2018 WL 5840768 (D. Mont. 2018).

[2] NEPA is found at 42 U.S.C. § 4321 *et seq*. The Endangered Species Act is found at 16 U.S.C. § 1531 *et seq*. The Administrative Procedures Act is found at 5 U.S.C. § 551 *et seq.* The State Department's authority derives from Executive Order No. 13337, *Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States* (Apr. 30, 2004). In that Executive Order, the President of the United States delegated to the State Department the responsibility to evaluate permits for pipelines to cross a U.S. border.

[3] 2018 WL 5840768 at *1.

[4] 42 U.S.C. § 4332(2)(C).

[5] 40 C.F.R. § 1502.13.

[6] Alaska Survival v. Surface Transp. Bd., 705 F.3d 1073, 1085 (9th Cir. 2013).

and need of a project.[7] Further, NEPA allows a federal agency to consider the "objectives of the private applicant" when preparing a statement of purpose and need.[8]

The State Department's EIS stated that, for TransCanada, "the primary purpose of [Keystone] is to provide the infrastructure to transport Western Canadian Sedimentary Basis … crude oil from the Canadian border, to existing pipeline facilities near Steele City, Nebraska, for onward delivery to Cushing, Oklahoma, and the Texas Gulf Coast area." The State Department described its own purpose as fulfilling its duty to evaluate permits for proposed cross-border pipelines and either to grant or deny a permit, based on whether the proposed project is in in the national interest. The court concluded that the State Department's purpose and needs statement was sufficient.

Next, the plaintiffs argued that the State Department did not analyze a sufficient range of alternatives to the proposed action. NEPA regulations require an agency proposing a major federal action to "[r]igorously explore and objectively evaluate" both the proposed action and "all reasonable alternatives."[9] The court noted that the Department analyzed four alternatives, including the possibility of denying the permit (the no action alternative). The court concluded that the State Department's consideration of these alternatives was sufficient.

Next, the plaintiffs argued that the State Department's EIS failed to adequately consider the impact of the proposed pipeline on the production of oil from the tar sands, and therefore the Department breached a duty imposed by 40 C.F.R. § 1508.8 to consider both the direct and indirect effects of a proposed federal action. The court concluded, however, that the State Department's analysis was sufficient.

The plaintiffs also argued that the State Department did not sufficiently consider the effects of lower oil prices on the viability of the Keystone Pipeline. The EIS had been prepared when oil prices were higher, and the State Department gave some consideration to changes in prices, but the court agreed with the plaintiffs that the Department had not given sufficient consideration to the effect of lower prices.

The court also agreed with the plaintiffs that the State Department violated NEPA by not giving sufficient attention to the cumulative effects of greenhouse gas emissions from the Keystone pipeline and Albert Clipper pipeline extension, by not completing an evaluation of cultural resources on approximately 1038 acres of the area that could be affected by the Keystone pipeline, and by failing to update its EIS analysis of the impacts of possible oil spills to consider new data on the frequency of pipeline spills and the challenges of cleaning up spills of diluted bitumen, the substance which would be transported in the Keystone pipeline.

APA Claim

The plaintiffs argued that the State Department violated the Administrative Policy Act (APA) by not giving a sufficient explanation of why the Department changed its policy by granting a permit for the Keystone pipeline (during the Trump administration) after the Department previously had denied such a permit (during the Obama administration). The court noted that the APA does not bar a change in policy, but courts have held that the APA requires an agency to support a change in policy with statements demonstrating that: (1) the agency is aware it is changing its position; (2) the

[7] Westlands Water Dist. V. U.S. Dept. of Interior, 376 F.3d 853, 866 (9th Cir. 2004).

[8] Alaska Survival v. Surface Transp. Bd., 705 F.3d 1073, 1085 (9th Cir. 2013).

[9] 40 C.F.R. § 1502.14.

new policy is permissible under federal statutes; (3) the agency believes its new policy is better than the old policy; and (4) the agency has "good reasons" for the new policy.[10] The court held that the State Department failed to meet these requirements because it "ignored" certain information on which the Department previously had relied in rejecting the permit, instead of having confronted the information and explained why, notwithstanding the information, a change in policy was appropriate.

ESA Claims

Finally, the plaintiffs argued that the State Department violated the Endangered Species Act by: failing to use the best available science to assess potential harms to whooping cranes, interior least terns, and piping plovers; failing to consider impacts to the whooping crane outside the U.S.; failing to sufficiently address the effect of oil spills on listed species; and failing to reasonably analyze impacts of the proposed pipeline on the black-footed ferret, rufa red knot (a bird), northern long-eared bat, and western prairie fringed orchid. For the most part, the court rejected the plaintiffs' arguments regarding alleged violations of the ESA. The court agreed, however, that the State Department did not sufficiently consider the potential effect of oil spills.

Court's Judgment

Based on these conclusions, the court granted in part and denied in part the plaintiffs' motions for summary judgment, as well as the defendants' motions for summary judgment. The court order

- vacated the State Department's Record of Decision in support of its grant of a permit to Keystone and
- enjoined the State Department and TransCanada from engaging in any activity in furtherance of construction or operation of the Keystone pipeline and associated facilities until the State Department issues a supplemental EIS that corrects the problems identified by the court—in particular, the lack of consideration of
    - the effects of oil spills (as part of the NEPA analysis and ESA analysis of potential impacts on listed species)
    - the effect of lower oil prices on Keystone, and
    - the effect of the proposed pipeline on cultural resources in a 1038-acre area where the Department had not completed its analysis.

[10] Federal Communication Commission v. Fox Television Stations, Inc., 566 U.S. 502, 515 (2009).

Ohio Supreme Court Finds Independent Landman Needed Real Estate License to Engage in Leasing Activities[1]

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Independent landmen play a critical role in many producers' leasing activities in Ohio. Not only do they negotiate oil and gas leases, but they often acquire needed lease amendments, surface-use agreements, easements (surface and subsurface), and rights-of-way, among the myriad other agreements used in oil and gas development. Recently, our Supreme Court, facing an issue of statutory interpretation, upheld a lower court's decision finding that an independent landman could not turn to Ohio's courts to seek payment for engaging in oil and gas leasing activities on behalf of a producer. The reason—the landman never obtained an Ohio real estate license.[2]

In *Dundics v. Eric Petro. Corp.*,[3] an independent landman filed suit alleging that he had been hired to assist a producer identify prospects and negotiate oil and gas leases and, in exchange, would be paid $10 for every acre leased plus a one percent override in every well located on the leased lands. He further claimed that the producer had failed to pay, at least in part, its obligations under their agreement, even after the producer sold its interest in the relevant leases to another lessee. The producer moved to dismiss the lawsuit, arguing that Ohio law prohibited the landman from filing suit because he had failed to obtain a real estate license as required under R.C. Chapter 4735. Both the trial court and the Seventh District Court of Appeals agreed.

The Supreme Court affirmed. Noting first that Ohio law prohibited anyone from acting as a real-estate broker without a license, the Court observed that activities requiring a license included "**negotiating the lease of real estate**, holding one's self out as engaged in the business of leasing real estate, and '**the procuring of prospects** or the negotiation of any transaction … which does or is calculated to result in' the lease of real estate." After reaffirming that oil and gas leases create an interest in real estate, the Court found "**[t]here** is **simply no exception** in the statutes governing real-estate-broker's licenses for oil-and-gas leases or oil-and-gas land professionals."

In reaching its decision, the Court directly addressed the point made by our industry that it doesn't make sense to group oil and gas leases with traditional real estate agreements, such as residential and commercial leases, to meet the underlying purposes of the licensing statute (e.g., the education requirements for the professions differ dramatically, as do their day-to-day activities). "**But**," the Court said, "**whether that makes sense is a policy question for the General Assembly to decide**. Our task is to interpret and apply the statutory language."

The Court's decision has already had a significant impact. Some independent land companies, and the producers they work for, have substantially curtailed their land activities as they assess how to proceed. Others are restructuring their employment practices to take advantage of certain limited exclusions from the licensing requirements. And, taking their cue from the Supreme Court's commentary, industry representatives are pursing regulatory and legislative initiatives, including a potential exemption for independent landmen engaged in their professional duties, to provide some relief.

[1] This article is based in part on a previous article authored for the Ohio Oil and Gas Association's *Bulletin*.
[2] Note that the decision did not address in-house landmen.
[3] 2018-Ohio-3826.

Oklahoma Corporation Commission has Exclusive Authority to Regulate Temporary Pipelines Carrying Produced Water

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Companies often use temporary pipelines to transport water to and from the site of an oil and gas well. The water transported away from an oil and gas well typically is either *produced water* that is recovered from the well along with the oil or gas that flows from the well or *flowback water* that is recovered from the well after the well is hydraulically fractured. The water that is transported to an oil and gas well can be either freshwater or produced water (from other wells) that will be used at the well site for any one of several purposes, such as hydraulic fracturing, a water flood operation, mixing drilling mud, or washing down the drilling rig.

The use of pipelines to transport water can have several benefits when compared to transporting water via trucks, which is the main alternative to pipelines. For example, transporting water via pipelines often is more economical than transporting water via trucks. In addition, the use of pipelines can substantially reduce the number of deliveries that must be made to the well site by truck, thereby lessening wear and tear on local roads. The reduced number of deliveries by truck can also diminish the amount of traffic that local drivers and residents will encounter.

Further, some members of the oil and gas industry have argued that, by making it more economical to transport produced water, the use of pipelines can make it more likely that companies will use produced water for hydraulic fracturing operations, rather than using freshwater. This can reduce competition for freshwater between the oil and gas industry and other users of water, such as municipalities, the agriculture industry, and other industries. This can be important because freshwater sometimes is a scarce commodity. Moreover, the use of produced water in hydraulic fracturing operations can decrease the amount of produced water that must be sent to injection disposal wells. The reduction in injection disposal volumes can be a benefit in areas such as Oklahoma, where there is concern about the possibility that injection disposal can increase the risk of induced seismicity.

Often, however, the period of time during which high rates of water must be transported to or from the well site is too short to justify the costs and environmental impacts associated with the installation of a permanent pipeline. For this reason, the oil and gas industry has turned to temporary pipelines to transport water. In Oklahoma, oil and gas companies often have placed the temporary pipelines within the easement of county roads, with the consent of local boards of county commissioners.

But the increased use of temporary pipelines has generated concern in some local communities, particularly with respect to the transport of produced water. Some individuals have expressed concern about the possibility of leaks and the environmental consequences that would ensue from leaks of produced water. In response to such concerns, the Kingfisher County Commissioners announced in April 2018 that they no longer would approve the use of temporary lines to transport produced water within county road easements.

In August 2018, the Oklahoma Oil & Gas Association (OKOGA) filed an application with the Oklahoma Supreme Court, asking it to assume original jurisdiction of a lawsuit filed by OKOGA to challenge Kingfisher's ban on placing temporary pipelines for carrying produced water within county road easements. OKOGA asserted that the Supreme Court had discretion to assume original jurisdiction over the suit pursuant to Article 7, Section 4 of the Oklahoma Constitution. Further, OKOGA argued that the court should assume such jurisdiction because the use of temporary pipelines is of significant importance to the state and the dispute regarding the regulation of such pipelines presented a pure question of law—whether Kingfisher's ban on temporary pipelines for transporting produced water was illegal.

On the merits of the dispute, OKOGA argued that the ban was illegal because 52 Okla. Stat. § 139 gives the Oklahoma Corporation Commission exclusive authority to regulate the disposal of produced water. Further, 52 Okla. Stat. § 137.1 generally prohibits local governments from regulating oil and gas activity. Section 137.1 contains some exceptions to the prohibition of local regulations. For example, it allows local governments to regulate some matters that are incidental to oil and gas activity, such as road use. OKOGA argued, however, that Kingfisher's ban on placing temporary pipelines for produced water within county road easements could not be properly regarded as a regulation of road use because the Commissioners did not ban the placement of pipelines carrying freshwater within county road easements. Thus, argued OKOGA, the ban on pipelines carrying produce water constituted an unlawful attempt by a local government to regulate the disposal of produced water, rather than a ban on the type of objects (*e.g.*, pipes) that may be placed within county road easements.

On November 13, 2018, by a 6-to-3 vote, the Oklahoma Supreme Court issued a brief order that assumed original jurisdiction and issued a declaratory judgment stating that Kingfisher's ban on placing temporary pipelines carrying produced water within county road easements was illegal because state law grants the Corporation Commission exclusive authority over the transportation and disposal of produced water. The case is *Oklahoma Corporation Commission v. The Kingfisher County Commissioners*, No. 117,303.

A news story (from newsok) states that Kingfisher County has asked the Oklahoma Supreme Court to reconsider its ruling.

Court Rejects Texas Landowner's "creative" Use of Accommodation Doctrine

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Roddy Harrison is the trustee of the Harrison Trust, which owns the surface estate for a 320-acre tract in Reeves County, Texas.[1] The State of Texas owns the mineral estate. In 2009, Harrison executed an oil and gas lease on behalf of the State, pursuant to statutes that authorize a surface owner to grant a lease on behalf of the State, as agent for the State,[2] in return for the right to receive delay rentals and one-sixteenth of production in compensation for "all damages to the soil."[3] The Harrison lease expressly granted the lessee the right to use water from the leased premises, though the lease generally prohibited the lessee from using water from the surface owner's wells and from conducting waterflood operations with water that was either potable or suitable for agriculture.

Harrison sued the original lessee for alleged surface damages. As part of the settlement, a successor-in-interest to the original lessee agreed to make repairs to a water well belonging to the surface owner and to purchase 120,000 barrels of water at fifty cents per barrel. The successor lessee complied with the agreement. The successor also built a lined pit to hold the water that it purchased.

Later, the lease was assigned to Rosetta Resources Operating, LP. Rosetta began drilling additional oil wells. Rosetta purchased water from a neighboring property and transported it to the leased premises via temporary lines that Rosetta then removed. Rosetta stored the water in tanks located near the sites of the new oil wells.

Harrison sued Rosetta, alleging that Rosetta's purchase of water from the neighboring land violated a local custom called the "West Texas Rule", under which a lessee would purchase water only from the leased premises and not from elsewhere. Harrison also asserted that Rosetta violated the accommodation doctrine by not purchasing water from Harrison and that Rosetta had acted negligently or committed a trespass by placing the temporary water lines on the leased premises. The trial court granted Rosetta's motion for summary judgment and dismissed Harrison's claims. He appealed.

The "accommodation doctrine" comes from *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971). In *Getty*, the Texas Supreme Court recognized that, although a mineral lessee generally may use as much of the surface as reasonably necessary to produce minerals, if a particular operation would preclude or impair the surface owner's "existing use" of the land, and if "established practices" of industry would allow the lessee to recover the minerals by alternative means, "the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee."[4]

[1] Harrison v. Rosetta Resources Operating, LP, 2018 WL 3751740 (Tex. App.-El Paso 2018).

[2] Tex. Nat. Res. Code §§ 52-172 through 52-190.

[3] Tex. Nat. Res. Code § 52-182 ("The payment of delay rentals and the obligation to pay the owner of the soil one-sixteenth of the production and the payment of same when produced and the acceptance of same by the owner, shall be in lieu of all damages to the soil.").

[4] *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971).

Harrison seemed to argue that his “existing use” was his use of the land as a source of water to sell to the oil and gas lessee. Thus, Rosetta’s failure to purchase water from him prevented him from using the land as he had before. The appellate court stated that Harrison’s theory was “creative,” but that the issue before the court was “less complicated” than the issues in some of the prior accommodation doctrine cases. The court noted that Rosetta’s use of the leased premises “does not impair the [Harrison] trust’s existing surface use in any way, except in the sense that not buying the water has precluded the trust from realizing potential revenue by selling Rosetta its water.” Because Rosetta had no obligation under the lease or the accommodation doctrine to purchase water from the surface owner, the appellate court affirmed the lower court’s dismissal of Harrison’s accommodation doctrine claim.

The appellate court also affirmed dismissal of Harrison’s negligence and trespass claims. Although Rosetta would not have needed to place temporary lines on the property if the company had purchased water from Harrison, Rosetta “had the right to conduct its operations as it saw fit … unless the use interfered with the surface owner’s then existing use.” Because Harrison did not produce evidence of such interference or of negligence or of Rosetta having occupied more of the land than was reasonably necessary to run the temporary water lines, the trial court’s dismissal of the negligence and trespass claims was proper.

The Accidental Contract: Adventures in English Law

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Abstract

One of the greatest features of English law is what is known as 'freedom of contract' – persons can create a binding contract under English law with minimal formality. This can include oral contracts and implied contracts, and so this can be a powerful and risky concept. Inadvertent contract creation, through a party's conduct or based on its communications via email exchanges, could have unintended consequences for one or more of the persons involved.

This article considers how contracts are formed under English law, the implications of a recent case before the English Commercial Court on implied contracts, and considerations for persons contracting in the oil and gas industry where English law could feature.

Contract formation under English law

English law relies on the customary elements of offer, acceptance, consideration, an intention to contract and certainty of terms to create a binding contract. Once these elements come together and a binding contract has been established no other particular formality is required.[1] A contract could be oral or in writing (or a combination of the two) or it could be implied by the conduct of the parties. It is this latter category of contract, the implied contract, which has most recently been considered by the Commercial Court.

Glencore v OMV

In *Glencore Energy UK Ltd v OMV Supply & Trading Ltd* [2] the parties to a sales contract for crude oil (on cost and freight terms and which incorporated standard BP terms and conditions for sales and purchases of crude oil) were held to have entered into a separate implied contract, which was formed after the parties exchanged a series of emails. The Commercial Court found that it was a term of the implied contract that Glencore (the seller) was entitled to be remunerated by OMV (the buyer), by reference to the demurrage rate, for the time that the seller's chartered vessel had to spend waiting offshore pending the availability of a berth at the discharge port, as well as for the cost of bunkers consumed during that time.

On 9 November 2015 the buyer emailed the seller stating that there was congestion at the discharge port of Trieste in Italy and requesting the seller to hold the vessel offshore Trieste until further instructions were issued. The email also included a request to record the number of bunkers at the time of anchoring in the waiting area, and the estimated sailing time to Trieste. The following day the master of the vessel provided an estimated time of arrival at the waiting area. Three days later the buyer requested details of the demurrage rate from the seller, which the seller duly provided. On 16 November 2015 the buyer emailed the seller requesting the master of the vessel to find a safe waiting area north of Corfu, where the vessel arrived the following day and proceeded to wait there for a

[1] See, for example, *Proton Energy Group SA v Orlen Lietuva* [2013] EWHC 2872 (Comm).

[2] *Glencore Energy UK Ltd v OMV Supply & Trading Ltd* [2018] EWHC 895 (Comm).

further twenty-four days. The crude oil was finally discharged to the buyer at Trieste in mid-December 2015.

The seller claimed that: (i) an implied contract had been created as a result of the seller complying with the requests in the buyer's emails of 9 and 16 November 2015 that the vessel wait for a berth at Trieste; and (ii) it was a term of the implied contract that the seller was entitled to be remunerated for the time the vessel spent in the waiting area, as detention and calculated in accordance with the contractual demurrage rate, in addition to the cost of the bunkers used during this time. This claim was brought by the seller after the contractual time-limit for demurrage claims under the sales contract.

The buyer, on the other hand, rejected the seller's claim on the basis that it was a demurrage claim either under the terms of the sales contract or as a result of a variation to the sales contract by virtue of the seller agreeing to its requests in the emails of 9 and 16 November 2015, and was therefore time-barred.

The Commercial Court held that the seller's claim for "waiting time" did not fall directly under the sales contract and that the amendments necessary to the sales contract would be substantial and not necessary to give business reality to the agreement that had been reached between the seller and the buyer. Instead, by waiting offshore pending the availability of a vessel berth at Trieste, the parties had effectively agreed an implied contract for "delay by agreement". Without this implied contract, the seller would not be entitled to payment for its waiting time, and so the implied contract was required to give “business reality” to the parties’ agreement.

Given that: (i) the buyer had inquired about the demurrage rate, which the seller had duly provided, the Commercial Court held that the demurrage rate had become the "implied contractual benchmark" for quantifying the seller's claim for providing the services of the vessel while it was waiting to berth at Trieste; and (ii) the buyer had requested that the master record the bunkers on arriving and leaving the waiting area, the Commercial Court held that there was an additional implied term that the buyer would pay for the bunkers consumed as a result of the vessel having to wait before berthing at Trieste. The result was that the seller's claim was not time-barred.

The practical implications

This Commercial Court's decision in in *Glencore v OMV* serves as a cautionary tale of how parties could inadvertently enter into a separate implied contract after exchanging emails, however informal this type of exchange may be. During the performance of a contract the parties should be cautious when entertaining arrangements with their counterparts that are different from those previously agreed. Given the identities of the parties involved, this case will be of interest to companies that buy and sell crude oil and LNG cargoes, particularly in events factually similar to those in this case or where an issue arises with their back-to-back sale and purchase arrangements, including changes to the destination port, ship size or quantity of cargo. Often cargo sale and purchased workarounds are implemented by contracting parties to address these interface issues. Depending on the conduct of the parties and the content of their communications in these situations, if all of the elements are present for the formation of an implied contract the parties will be bound by their workaround arrangements which may, as in *Glencore v OMV*, have unintended consequences for one or more of the counterparties.

The Commercial Court's decision also has wider implications for the oil and gas industry as every day companies communicate via email and phone, both at an operational and a transactional level.

Parties need to be mindful of what they do and say as their actions and words may be taken into account when determining whether or not they have entered into an enforceable contract under English law - it is easier to bind oneself into a contract by email or phone than one may realise. From a practical perspective, potential contracting parties should seek to protect themselves from inadvertently entering into an enforceable contract by careful qualification of their correspondence and their intent.

Oil and Gas Development in West Virginia Involving Unknown or Unleased Parties

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Babst Calland

West Virginia law presents unique challenges regarding jointly owned property in situations where a minority owner cannot be identified, is not available or refuses to join in the leasing of oil and gas. It is not uncommon for oil and gas rights in West Virginia to be owned by members of the same family for several generations, and the result is that an operator may need to approach multiple parties to lease a single parcel. Historically, West Virginia law has placed strict requirements on a lessee in leasing cotenants and required the consent of all parties before oil and gas operations could commence. However, when leasing all cotenants in an oil and gas property is not feasible, there are several statutory options available in West Virginia that may provide relief to an operator, including a new Cotenancy Modernization and Majority Protection Act that was passed this year.

Legal Background in West Virginia

West Virginia has long been among the minority of jurisdictions with the strict requirement that all cotenants of a mineral interest must consent to any development of oil or natural gas[1]. West Virginia courts have held that a tenant in common cannot unilaterally develop oil and gas under a property without risking a claim for waste from the remaining cotenants. The Supreme Court of Appeals in West Virginia has enjoined oil and gas development where a 1/172 fractional interest holder remained unleased[2]. Therefore, there is a significant risk to a producer in situations where all cotenants are not under a lease. However, this strict rule can be avoided through different legal processes that can protect both the operator and majority cotenants.

Proceeding in West Virginia Courts to Lease Unknown or Unleased Parties

West Virginia has a statutory procedure to lease unknown or missing mineral owners, which may be an option where efforts to locate a missing owner have been exhausted[3]. To initiate this proceeding, a petition must be filed in the applicable county court which includes a summary of the missing parties, a description of the proposed operations and the actions taken to identify the missing parties[4]. If all the requirements of the statute are met, a special commissioner will be appointed by court to negotiate a lease on behalf of the missing owners. Further, in a case where an owner can be located but has not leased, a statutory partition proceeding may allow a majority cotenant to proceed with leasing. Under this law, an owner or lessee can petition a court to have the jointly owned property subdivided or force a sale or purchase of the entire property where a subdivision cannot be conveniently made[5]. The downside to these procedures is that they are often costly and time-consuming, and are only effective in limited situations.

West Virginia's Recent Cotenancy Act

This past year brought a major development regarding an oil and gas operator's ability to develop property where the entire ownership interests cannot be leased. West Virginia HB 4268, known as

[1] Williamson v. Jones, 43 W. Va. 562 (1897)
[2] Law v. Heck Oil Company, 106 W. Va. 296 (1928).
[3] See W. Va. Code §55-12A-1, et seq.
[4] See W. Va. Code §55-12A-5.
[5] See W. Va. Code § 37-4-1, et seq.

the “Cotenancy Modernization and Majority Protection Act” was enacted and became effective June 3, 2018[6]. This Act, which was discussed in the last issue of the *E-Report* in the context of an update on West Virginia legislation, streamlines the oil and gas leasing process for unleased cotenants, and facilitates development without unnecessary delay by creating a new exception to the West Virginia statute governing waste between certain cotenants[7].

At a fundamental level, the Cotenancy Act re-defines the relationship between cotenants owning undivided interests in oil and gas underlying a single tract of land by providing, in certain defined circumstances, a statutory defense against claims for waste and trespass. Where there are seven or more cotenants, operators may develop land if 75% of the royalty owners, as defined in the Act, sign leases and reasonable efforts were made to negotiate with all royalty owners. If the conditions are satisfied, the development of the mineral tract is permitted, and is not considered waste or trespass. Further, the consenting cotenants are not liable for damages for the same due to the development.

In addition to permitting the development of oil and gas under the framework above, the Act implements several conditional safeguards and restrictions regarding nonconsenting and unknown or unlocatable mineral interest owners. Nonconsenting cotenants shall elect to receive payment in accordance with two alternative options and royalty payments equal to the highest percentage royalty paid to a consenting cotenant will be be reserved for unknown and unlocatable mineral interest owners[8]. Specific requirements are included to search for unknown and unlocatable owners and reporting is made to the State Treasurer[9].

There remain a few areas of the new act that potentially may need clarification. The reasonable effort standard required of a producer in lease negotiations could be a point of conflict. Further, the payment options available to a nonconsenting oil and gas owner may be a source of disputes. Nonetheless, the new law is a major advancement for oil and gas producers dealing with an unleased minority cotenant.

Conclusion

The leasing of unknown interest holders or minority cotenants that refuse to lease can be a challenge in West Virginia. However, several statutory options exist that may be applicable in various situations to avoid claims for waste. Further, West Virginia’s Cotenancy Act now provides a streamlined pathway to the development of these untapped resources. These legal processes can provide relief to oil and gas producers to address the problem of unleased cotenants in West Virginia.

[6] See W. Va. Code § 37B-1-1, et seq.
[7] See W. Va. Code § 37-7-2; and § 37B-1-4(a).
[8] See W. Va. Code § 37B-1-4(b).
[9] See W. Va. Code § 37B-1-4(d).

Oil & Gas: Scope of Force Majeure Clauses in Yemen PSAs

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Force majeure clauses typically excuse liability for, or suspend performance of, contractual obligations on the occurrence of a specified event. In the recent case of *Gujarat State Petroleum Corporation Ltd et al. v Republic of Yemen et al* (Civil Action No. 16-cv-1383 (DLF)), the United States District Court for the District of Columbia confirmed an arbitral award deciding that a contractor was entitled to terminate a production sharing agreement pursuant to a force majeure clause. The arbitral award is a useful reminder that the manner in which an arbitral tribunal or court might construe such a clause depends heavily on the precise wording of the clause, and on the relevant laws to be applied.

Facts

The PSAs

In 2008, Gujarat State Petroleum Corporation Ltd and others (the "**Contractor**") and the Yemen Ministry of Oil and Minerals and others (the "**Ministry**") entered into three production sharing agreements with materially identical terms (the "**PSAs**"), under which the Contractor was to carry out petroleum exploration and production activities in Yemen.

The PSAs were governed by Yemeni law, and included the following provisions:

(1) Article 22.2 of the PSAs defined "Force Majeure" as "*any order, regulation or direction of the Government… or any act(s) of God, insurrection, riot, war, strike (or any other labor disturbances), fires, floods, or any cause not due to the fault or negligence of the Party invoking Force Majeure, whether or not similar to the foregoing, provided that any such case is beyond the reasonable control of the party invoking Force Majeure.*"

(2) Article 22.1 excused the Contractor for any non-performance or delay in performance by the Contractor of any obligation under the PSAs "*if, and to the extent that, such non-performance or delay is caused by Force Majeure.*"

(3) Article 22.4 gave the Contractor the option to terminate its obligations under the PSAs upon prior written notice if the Force Majeure event "*continues in effect*" for a period of six months.

The Termination

From January 2011, the security situation in Yemen appeared to deteriorate. A number of tribal clashes, attacks and kidnappings took place, and a number of governments advised their citizens to leave Yemen. In March 2011, the Yemen government declared a 'State of Emergency'.

Following these events, the Contractor issued a notice to the Ministry in April 2011 declaring 'Force Majeure' under the PSAs. Around two years later, in February 2013, the Contractor sought to terminate the PSAs pursuant to Article 22.4, and referred the matter to arbitration under the Rules of Arbitration of the International Chamber of Commerce (seated in Paris).

Decision

In deciding that the termination was valid, the arbitral tribunal considered a number of issues, which are outlined below.

Qualifying Events

Article 22.2 listed several events as 'Force Majeure' events: (a) direction of the Government, (b) riot, (c) insurrection, and (d) any cause "*not due to [the Contractor's] fault or negligence*" which is "*beyond [the Contractor's] reasonable control*".

The Contractor pointed out that category (d) included events "*whether or not similar to the foregoing*", and that, therefore, this category should not be interpreted as restricted in any way by the categories preceding it. Although the award did not explore this in any greater detail, it appears that this wording was sufficient to displace the principle of *ejusdem generis*, to the extent this may have been relevant in Yemeni law. (This principle provides, in summary, that where a list of particular things have a common characteristic, a general term that follows only applies to things that are similar to the particular things.)

(1) Any Cause

The Contractor argued that "*the extreme risk of crime and kidnapping and the extreme risk for any kind of transport and logistics activities*" and the unavailability of contractors between March 2011 and February 2013 fell within category (d) above and that, therefore, these events qualify as Force Majeure.

The Ministry pointed out that in Yemeni law, the concept of force majeure requires proof that a specified event was unforeseen and that performance of contractual obligations has become impossible. It argued that the PSAs were governed by Yemeni law, and that, therefore, the Yemeni law principles of foreseeability and impossibility must be implied into the PSAs.

In agreeing with the Contractor, the arbitral tribunal made the following remarks:

- Article 212 of the Yemen Civil Code provides that "*if the contract provisions are clear, no interpretation may be allowed on the basis of wishing to know the parties intentions*". The arbitral tribunal considered this to mean that if the wording of a provision of the PSAs is clear, those words must be given effect.
- Further, Article 24 of the PSAs stated that "*[the PSAs] will be governed and interpreted according to Yemeni laws, except the laws which are inconsistent with [the PSAs]*". Relying on this article, the arbitral tribunal considered that the terms of the PSAs should prevail over general principles of law, insofar as they make specific provisions for particular matters.
- The PSAs made specific provisions for Force Majeure. These provisions were clear. There was therefore, no need to imply any further terms, for example regarding unforeseeability and impossibility. The parties had agreed specific wording and such wording should be given effect.

(2) Direction of the Government, riot, or insurrection

The arbitral tribunal stated that, because the above events amounted to Force Majeure, it did not need to determine whether any other events also qualified as Force Majeure. However, for the sake of completeness, it remarked that there had also been "*directions of the Government*", "*riots*" and "*insurrections*" falling within the definition of Force Majeure under the PSAs.

In relation to the reference to a "*riot*" in Article 22.2, the arbitral tribunal decided that it should be given its natural and ordinary meaning, which the Contractor submitted is "*an unlawful disturbance of the peace by a number of people*". The arbitral tribunal considered that if the parties intended for the term to have a more specific meaning, the PSAs would have said so. On that basis, the Ministry was wrong to argue that it should be interpreted in a way consistent with Yemeni law, so that it meant "*protests which are illegal, not protests which fall within the legitimate right to protest or demonstrate enshrined in the Yemeni constitution*".

Causation

The parties agreed that in order for any non-performance by the Contractor of its contractual obligations to be excused under Article 22 that non-performance must be *caused* by Force Majeure. However, they disagreed on what that meant.

The Contractor argued that all that was required was "*a sufficient link between the event and the consequence, nothing more*". The Ministry argued that the "*but-for*" test applied, so that the Contract's non-performance was only excused if it could and would have performed its obligations but for the Force Majeure events.

The arbitral tribunal decided in favour of the Contractor, on the following basis:

- The PSAs (at Article 22) set out a self-contained regime for Force Majeure, and for termination as a result thereof. A requirement to show that a Force Majeure event was the only cause of non-performance is not found in the text of Article 22.1, which simply requires non-performance to be "*caused*" by Force Majeure. Applying reasoning similar to that applied in relation to Article 22.2 above, it decided that the wording of Article 22.1 was clear and additional requirements should therefore not be implied.
- Therefore, "*as long as there is an obligation that a party is prevented from performing because of Force Majeure, then, irrespective of whether some other event could have also caused non-performance, that party is entitled to rely on Article 22 of the PSAs to terminate the PSAs…*". The Contractor did not need to show a willingness to perform had the relevant Force Majeure event not occurred.

The arbitral tribunal then decided that, based on the facts, the Contractor's non-performance was "*caused*" by the Force Majeure events, and those events continued in effect for over six months so that the Contractor was entitled to terminate the PSAs in accordance with Article 22.4.

Comment

The decision in this arbitration fell on the precise wording of the force majeure provisions in the PSAs. Had the wording been less clear, the operation of force majeure under Yemeni law and the requirements of unforeseeability and impossibility may have been more relevant, and the outcome of the arbitration may have been different. Further, had the categories of events constituting force majeure been less wide or been defined more restrictively, the events that occurred in Yemen between 2011 and 2013 may not have qualified as Force Majeure events so as to trigger the relevant force majeure provisions.

This case is a good reminder of how drafters can mitigate local political risk through specific and thoughtful drafting of force majeure provisions. Rather than treating such provisions as boilerplate, it would be wise to consider carefully what events should qualify as force majeure, to what extent the parties should exclude or have recourse to principles of the applicable law, and what language should be used to achieve this.

This arbitration also illustrates the significance of the applicable law on the interpretation of force majeure clauses. For example, if the PSAs applied English law, there is a significant body of case law that appears to divide force majeure provisions into (i) contractual frustration clauses or (ii) contractual exclusion clauses. Further, it is suggested that different principles concerning construction of the clause and rules of causation apply depending upon the category into which the clause properly resides.

Interestingly, however, assuming that English law would have classed the force majeure clause in this arbitration as a 'frustration' clause, as it discharged the obligation to perform, the result would have been the same and the "*but for*" test for causation would not have applied. See, in this regard, the English Court's reasoning in *Classic Maritime Inc. v Limbungan Makmur SDN BHD* [2018] EWHC 2389 (Comm).[1]

Arbitral Tribunal:

Dr. Laurent Lévy (Chair), Philippe Pinsolle, and Sir Bernard Rix.

References:

Gujarat State Petroleum Corporation Ltd et al. v Republic of Yemen et al (Civil Action No. 16-cv-1383 (DLF))

The [Final Award dated 10 July 2015] in *Gujarat State Petroleum Corporation Limited, Alkor Petroo Limited, and Western Drilling Constructors Private Limited v. Republic of Yemen and the Yemeni Ministry of Oil and Minerals* (ICC Arbitration No. 19299/MCP)

[1] A summary of this judgment is available on the CMS Law-Now website, via the following link: http://www.cms-lawnow.com/ealerts/2018/09/force-majeure-clauses-and-causation

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Issue 4 December 2018