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INDUSTRY UPDATES

Watershed Moment: U.S. Supreme Court Narrows Federal Power Under Clean Water Act - What This Means for Energy Infrastructure In and Around “Wetlands”

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The United States Supreme Court’s decision in *Sackett v. EPA* curtailed the federal government’s power to regulate wetlands under the Clean Water Act (CWA) and changed the test for whether wetlands are “waters of the United States” for purposes of CWA jurisdiction. The ruling will have ripple effects on industries nationwide. For businesses with energy infrastructure operating in and around wetlands, key takeaways include:

- The *Sackett* decision conflicts with the EPA’s newest rule change published on January 18, 2023, which took effect on March 20, 2023.
- While the EPA will take time to modify its new rule to accommodate the *Sackett* decision, the decision clarifies the answer to a critical question the energy industry needed for its long-term planning and capital investments in and around wetlands.
- The *Sackett* decision reflects the current Court’s newly employed limitation on regulatory overreach. With less risk of civil or criminal liability arising from the EPA enforcing the CWA and more certainty for planning new development in and around areas that might have previously been improperly included as “waters of the United States,” companies can avoid unreasonable permitting delays and regulatory uncertainty for properties and operations in and around wetlands.

The *Sackett* decision comes after over a decade of acrimonious litigation between the EPA and Idaho landowners Michael and Chantell Sackett, who argued they did not require an EPA permit to build a home on their property. The EPA contended that the Sackett property, near Priest Lake, Idaho, contained wetlands that qualify as “navigable waters” regulated and permitted by the CWA. The Sacketts fought their way to the Supreme Court and asked for the proper test to determine whether wetlands are “waters of the United States” under the CWA.

The Court held that, for a wetland to be under CWA jurisdiction, it must “as a practical matter [be] indistinguishable from waters of the United States.” The opinion supports a two-part test: (1) is the “water” to which the wetland is connected “a relatively permanent body of water connected to traditional interstate navigable waters”; and (2) is the wetland’s connection to such water a “continuous surface connection” that makes it “difficult to determine where the ‘water’ ends and the ‘wetland’ begins”? As Justice Alito penned, “[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.”

This new test has important implications for current regulatory rules, which had expanded the EPA’s and Army Corps of Engineers’ view of waters qualifying for federal jurisdiction. The new rule expanded the “significant nexus” standard articulated in the U.S. Supreme Court’s 2006 *Rapanos* concurrence by stating:

> A water now has a “significant nexus” if it has a “material influence” on the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters. In making this determination, the agencies will aggregate all “similarly situated” waters and their adjacent wetlands in a “catchment” - an “area of the land surface that drains to a specific location for a specific hydrologic feature.” The EPA and US Army CoE also maintain federal jurisdiction under the new proposed rule over “relatively permanent flows” - which may exist based on multiple repeated storm events with monsoon-like rainfall.

The new rule is inconsistent with the *Sackett* decision and will therefore likely be withdrawn and revised. In the meantime, companies with energy infrastructure operating in and around wetlands should know to what extent the decision will disrupt the current regulatory landscape.

Hunting for Title Defects: Does This Common Practice Violate RICO? The U.S. Court of Appeals for the Fifth Circuit Will Soon Decide.

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A magistrate judge and a district court judge in the Western District of Texas recently authored diverging opinions on the application of the Racketeer Influenced and Corrupt Organizations Act ("RICO") to a common scheme in the oil and gas industry in which "a company uses landmen to find and acquire mineral interests based on purported defects in recorded chains [of title] and then initiates title litigation in statement court to resolve ownership." *DOH Oil Co. v. Kahle*, 2023 WL 102150, at *1 (W.D. Tex. Jan. 4, 2023). Although Magistrate Judge Ronald C. Griffin recommended that Defendants' Motion to Dismiss be denied, holding that Plaintiffs stated a claim for violation of RICO, District Court Judge David Counts held that Plaintiffs failed to state a RICO violation, "[n]o matter how nefarious Plaintiffs choose to characterize Defendants' conduct . . . ." *Id.* The U.S. Court of Appeals for the Fifth Circuit will soon have an opportunity to address this issue, as Plaintiffs have appealed the District Court's decision.

At its core, the dispute involves competing claims to certain mineral interests in Martin, Ward, and Loving Counties in Texas. Plaintiffs traced their title to the properties from tax foreclosure sales. According to Plaintiffs, Defendants Ridgefield Permian Minerals, LLC ("Ridgefield") and its CEO, its Director of Land and Legal, and its Director of Business Development (collectively "Individual Defendants") clouded Plaintiffs' title through a "fraudulent and extortionate RICO scheme" by "(1) a mail and wire fraud scheme involving the purchase of mineral interests from the successors of the defendants in tax foreclosure suits . . . ; and (2) an extortion scheme whereby Defendants brought suits against Plaintiffs to adjudicate title to the minerals in state court." *Id.* at *3. Plaintiffs further claimed that "the purpose of this alleged RICO scheme . . . was 'not to give [Defendants] record title but to fabricate the appearance of a colorable title claim, thereby clouding [Plaintiffs'] valid title and tying up their property, stopping their revenue payments and causing them substantial economic harm, and positioning [Defendants] as a purported rival title claimant for litigation.'" *Id.*

"To state a claim under the civil RICO statute, a plaintiff must allege (1) an injury to plaintiff's business or property from (2) defendant's violation of one or more provisions of 18 U.S.C. § 1962." *Id.* at *5. Section 1962 has four subsections, and Plaintiffs alleged that Defendants violated § 1962(b) by "taking control of an enterprise through a pattern of racketeering activity," § 1962(c) by conducting an enterprise's affairs through a pattern of racketeering activity, and § 1962(d) by conspiring to violate subsections (c) and (d). *Id.* at *6.

Before the Magistrate Judge, Defendants argued Plaintiffs failed to sufficiently allege a pattern of racketeering activity because the filing of purported malicious lawsuits cannot constitute a predicate act for civil RICO violations. *DOH Oil Company v. Kahle*, 2022 WL 18109460, at *4 (W.D. Tex. Sept. 20, 2022). Although the Magistrate Judge viewed Defendants' filing of state court title lawsuits as "part of the overall alleged scheme," the judge concluded that Plaintiffs satisfied their pleading requirement because the state court lawsuits were preceded by "two predicate criminal acts—mail and wire fraud—done to ultimately obtain the rights to the property in question." *Id.* at *5. Thus, the Magistrate Judge found Plaintiffs' allegations that Defendants sent solicitation letters, agreements, and allegedly fraudulent mineral deeds through mail and wires as sufficient to allege a RICO violation. The Magistrate Judge therefore recommended that the District Court deny Plaintiffs' Motion to Dismiss as to the primary RICO claims. The Magistrate Judge did recommend, however, that Plaintiffs' claims against the Individual Defendants be dismissed because Plaintiffs had not alleged facts establishing that they "acted in any capacity other than as company officers for Ridgefield." *Id.* at *7.

Defendants objected to the Magistrate Judge's Report and Recommendation on the grounds that by recommending that the Motion to Dismiss be denied as to Plaintiffs' allegations of racketeering activity, the Magistrate Judge accepted "Plaintiffs' *ipse dixit* that the documents at issue were fraudulent and so the mailing/emailing of them constituted mail and wire fraud." 2023 WL 102150, at *3. The District Court concluded that "a legitimate dispute exists as to title," in part based on the fact that in the two state court lawsuits that had reached the state Court of Appeals, the parties were tied 1-1 and the Courts of Appeals were split. "Because of the split in authority between the courts of appeals that the Texas Supreme Court has yet to resolve, although not binding on this court, Defendants have a legitimate basis to prove up their chain of title in the property records and pursue their title claims in state court." *Id.* at *4. The Court also held that "Plaintiffs' allegations that Defendants' title documents are fraudulent merely because they conflict with Plaintiffs' chain of title are conclusory and legally insufficient to avoid dismissal." *Id.*

The District Court also rejected Plaintiffs' argument that they sufficiently pled a pattern of racketeering activity by alleging instances of mail and wire fraud and extortion. Importantly, the Court noted that all of the mail and wire activity in which Defendants engaged—"exchanging offers, acceptances, title documents, and payments"—"took place between Defendants and third parties" and were not directed toward Plaintiffs. *Id.* at *9. Moreover, the Court held that the predicate acts, even considered together, failed to established a pattern of racketeering activity because the acts did not have "similar purposes, results, participants, victims, or methods of commission" and were not otherwise "interrelated by distinguishing characteristics." *Id.* at *11. In particular, the Court held that the mail and wire activity was directed to third parties and its purpose was to "buy and sell certain purported mineral interests independent of Plaintiffs' adverse chain of title." *Id.* According to the Court, this activity was unrelated to Defendants' purported efforts to subsequently "force" Plaintiffs to relinquish their mineral rights. In total, the Court held that the purposes, results, participants, victims, and methods of commission of the mail and wire fraud and Defendants' extortion activities were distinct and therefore could not collectively constitute a pattern of racketeering activity. Based on these findings, the Court rejected the Report and Recommendation of the Magistrate Judge, granted the Motion to Dismiss, and dismissed Plaintiffs' Complaint.

Plaintiffs have appealed to the U.S. Court of Appeals for the Fifth Circuit and the case is currently in the briefing state. It is very common for parties to locate and take advantage of purported title defects and assert superior title through an adverse chain. If this activity can form the basis of a RICO violation, as Plaintiffs have alleged, it may "deter parties from zealously asserting their mineral ownership rights through litigation," as the District Court noted. *Id.* at *16. As a result, this case is worth monitoring as it continues through the appellate process.

Dougherty v. ABARTA Oil & Gas

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In *Dougherty v. ABARTA Oil & Gas Co., Inc.*, Ohio's Fifth District Court of Appeals reaffirmed that notice to a title reviewer is the primary factor in this analysis. The court held that nearly identical reservation language along with volume and page reference constitutes a "specific reference" that is sufficient to preclude extinguishment under the Ohio Marketable Title Act, R.C. 5301.47 *et seq.*

Dougherty involved the question of whether a 1964 deed constituted a root of title under the Ohio Marketable Title Act, R.C. 5301.47 *et seq.* ("Ohio MTA") and purport to convey the entire fee interest (including the minerals). That 1964 deed included nearly identical reservation language to a prior 1954 severance deed, as well as the recording book and page of that 1954 severance deed (albeit without explicitly stating that is what it was referencing). 22CA000019, 2023 WL 3019693 (Ohio Ct. App. Apr. 18, 2023).

The trial court applied the three-step inquiry established in *Blackstone v. Moore*, 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E.3d 132, but found that the reference in the 1964 deed was general. The court explained that the "general reference does not contain a specific identification of a recorded title transfer [...] No specific identification is made of the parties to the reservation." Thus, the 1964 deed was found to be a root of title.

The Fifth District reversed and entered summary judgment for the severed interest holders, finding that the 1964 deed's use of nearly identical reservation language as the 1954 deed, along with the prior deed references (i.e., the volumes and pages), were sufficient to specifically identify this prior title transaction (mineral severance) and preserve it (i.e., it was *not* a root of title). The Fifth District rejected the implication that the names of the parties to that 1954 deed were a requirement for the reference to be specific, emphasizing that the Supreme Court of Ohio has never set a bright-light rule for what is required. For the Fifth District, the fundamental question was one of notice. The court found that the references in the deed "would provide a title searcher specific information regarding the identity of the persons who created the interest and retained title to the oil and gas with all the additional rights described in the reservation [and] the language of the reservation in all the deeds are virtually identical...."

The *Dougherty* decision reaffirms the importance of the common-sense question of notice in determining whether a reference is specific or general under the Ohio MTA. In contrast, Ohio's Seventh District Court of Appeals' January 23, 2023 decision in *Chartier v. Rice Drilling D L.L.C.* appeared to veer away from this foundation. In *Chartier*, the court determined that the 1951 and 1976 deeds that excepted and reserved a "½ of all oil and gas royalties...together with mining rights and reservations made in the deed conveying said lands from Annie E. Carpenter to Bessie Cook" was a general reference that did not preserve the mineral severance of "one-half interest in the oil, gas, and royalties..." in a 1944 deed from Annie E. Carpenter to Bessie Cook. However, armed with the names of the prior grantor and grantee and the knowledge of the existence of some reservation in the 1951 and 1976 deeds, a title reviewer would easily locate the 1944 severance deed at issue in *Chartier* and see what was severed ("one-half interest in the oil, gas, and royalties...."). The *Chartier* court nevertheless determined it was a general reference because it was ambiguous.

There are purposefully no bright-line rules on what is required to be a specific reference, and the outcome in *Chartier* may be purely a function of its unique facts. However, the *Chartier* Court's focus on the granular differences between the severing deed language and the recitals to find ambiguity seemed to lose the bigger picture. *Dougherty* appears to right the ship.

Supreme Court Limits the Use of Federal Administrative Law Judges; Related FERC Cases Pending

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On April 14, 2023, the U.S. Supreme Court issued an opinion that is expected to result in historic changes to the Federal Energy Regulatory Commission's ("FERC") use of in-house administrative law judges ("ALJs"). In *Axon Enterprise, Inc. v. Federal Trade Commission, et al.*, (*Axon*), the Court unanimously held that federal district courts may hear constitutional challenges to regulatory enforcement actions taken by federal agencies before final agency adjudication. While the Court's holding in *Axon* applies to the Securities and Exchange Commission ("SEC") and the Federal Trade Commission ("FTC"), it is expected to be applied in two active cases concerning FERC. Currently, these two cases challenging the constitutionality of FERC's use of ALJs are working their way through the Fifth Circuit. Importantly, both *TotalEnergies Gas* and *Rover Pipeline, LLC* (collectively "FERC Cases") are stayed pending the resolution of *Axon*.

Writing for the Court in *Axon*, Justice Kagan reasoned "[constitutional] claims cannot receive meaningful judicial review through the FTC Act or [SEC] Exchange Act. They are collateral to any decisions the Commissions could make in individual enforcement proceedings. And they fall outside the Commissions' sphere of expertise." Accordingly, the Court found that constitutional claims are not "of the type" SEC and FTC statutory review schemes reach. In turn, "[a] district court can therefore review them." As a practical matter, FTC and SEC enforcement actions will take place in federal district courts, except where only administrative relief is possible.

In the pending FERC Cases, two district courts in Texas are weighing constitutional challenges to FERC's structure. The similarities between the regulatory framework in *Axon* and that at issue in the FERC Cases is acknowledged by all parties to those matters. For example, in *Rover Pipeline, LLC*, FERC attorneys motioned for stay, arguing the decision in *Axon* will apply to the "substantially similar statutory scheme under the Natural Gas Act." In both cases, the courts agreed with this line of reasoning.

The expected limits on FERC's in-house adjudication process is likely to primarily impact the FERC enforcement process in natural gas cases. While the Federal Power Act (FPA) already gives targets of FERC enforcement the choice of de novo review in federal district court, enforcement actions arising under the Natural Gas Act can only be adjudicated by FERC ALJs. Agency enforcement proceedings are lengthy and time-consuming. Indeed, in instances where the enforcement target is given the option to pursue de novo district court review—such as under the FPA—the overwhelming majority of litigants choose that route.

The future of FERC ALJs, and in-house administrative adjudication generally, is rapidly evolving. With broader challenges to these federal regulatory practices on the horizon, it will be important to monitor the situation closely.

BSEE's Updated Decommissioning Rules Address RUEs and Formalize Predecessor Enforcement Practices

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What started in 2020 as a proposed joint rulemaking between the DOI's Bureau of Safety and Environmental Enforcement ("BSEE") and Bureau of Ocean Energy Management ("BOEM") was recently finalized as a stand-alone BSEE rule addressing decommissioning. BSEE's new regulations focus on Rights-of-Use and Easements ("RUEs") and predecessor enforcement practices. At a later date, BOEM intends to issue a new proposed rule that addresses risk management, financial assurance, and loss prevention issues that were originally part of the proposed joint rulemaking.

BSEE's final rule for the first time includes in the agency's decommissioning regulations RUEs and RUE grant holders. RUE grants are authorizations from BOEM to use a portion of the seabed not encompassed by the holder's lease to construct, modify, or maintain platforms, artificial islands, facilities, installations, and other devices that support exploration, development, or production from another lease. Historically, RUEs have been absent from BSEE's Subpart Q decommissioning regulations, which addressed decommissioning obligations for lessees and RUE grant holders. BSEE added a new regulatory definition of RUE and incorporated RUEs and RUE holders throughout the decommissioning regulations in 30 C.F.R. § 250.1700, *et seq.* BSEE also added a new paragraph (c) to 30 C.F.R. § 250.1701 providing that RUE holders and prior lessees or owners of operating rights are jointly and severally liable for meeting accrued decommissioning obligations for infrastructure installed subject to a lease and maintained after lease expiration under a RUE.

BSEE's final rule also adds a new regulation at 30 C.F.R. § 250.1708, which formalizes BSEE's procedures for enforcement of decommissioning orders issued to predecessors when a subsequent assignee defaults on its obligations. When BSEE issues an order to predecessors, it requires them to monitor, maintain, and decommission all wells, pipelines, and facilities. Proposed 30/60/90-day timeframes were extended to 30/90/150-days in the final rule so that predecessors in receipt of a decommissioning order must now: (1) initiate maintenance and monitoring within

30 days of receiving the order; (2) designate an operator or agent for decommissioning activities within 90 days; and (3) submit a decommissioning plan to BSEE within 150 days. BSEE retains discretion to adjust these timeframes under extenuating circumstances.

BSEE chose not to promulgate previously proposed regulations that would have required parties appealing decommissioning orders to file an appeal bond. Similarly, BSEE withdrew its proposal to require proceeding up the chain of title in "reverse chronological order" against predecessor lessees, grant holders, and owners of operating rights, in the event subsequent assignees fail to perform. Instead, BSEE decided to retain the current framework, under which BSEE's position is that it may issue decommissioning orders to any or all jointly and severally liable parties in the chain of title on a case-by-case basis.

BSEE's final rule can be found at 88 Fed. Reg. 23569 (April 18, 2023). The new regulations took effect on May 18, 2023.

The Inflation Reduction Act's Methane Tax Is Probably Unenforceable

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Section 60113 of the Inflation Reduction Act adds Section 136 to the Clean Air Act, directing the Environmental Protection Agency to impose a first-ever direct "charge" on methane emissions from oil and gas operations. Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 60113 (2022), enacting Clean Air Act § 136(g), to be codified at 42 U.S.C. § 7436. The charge applies to emissions starting in calendar year 2024. However, there are several hiccups that an owner or operator runs into when trying to apply the "waste emissions threshold" formula provided, in order to determine the quantity of emissions taxed. There is not only a practical hurdle in applying the formula but also a legal one. Congress may have not given EPA clear authority in Section 136, or the Clean Air Act in general, to clear up ambiguities in the statute.

The basic tax formula is this: An operator calculates the number of tons of methane it emits in the year from its "applicable facility." Clean Air Act § 136(d). The formula then subtracts from that tonnage a number called the "waste emissions threshold." *Id.* § 136(f). If the operator emits more than the threshold, the excess is assessed what is called the "charge amount." The charge amount is $900/ton for 2024, $1,200/ton for 2025, and $1,500/ton thereafter. *Id.* § 136(e).

As an illustration, assume you own a natural gas producing field, and the field is your applicable facility. Your facility emits 10,000 metric tons of methane per year. Do those emissions exceed the "waste emissions threshold" for gas production? Section 136 says that the threshold for natural gas production facilities is "0.20 percent of the natural gas sent to sale from such facility." *Id.* § 136(f)(1)(A).

There are two problems with applying the tax formula. First, for purposes of the tax, methane is measured by weight—metric tons. But gas "sent to sale" is measured by volume (thousands of cubic feet) or by heating content (millions of BTUs). How much of an apple equals 0.2 percent of an orange? The second problem is that "natural gas sent to sale" typically includes methane plus a series of heavier gaseous molecules. But methane is the only component explicitly taxed.

Unless the text of the statute is amended, EPA will attempt to address the issue through regulation through an interpretation regulation or by issuing a substantive rule through notice and comment rulemaking. But the EPA will face obstacles creating an interpretive regulation changing the waste threshold from the volume of all gas components as stated in the text to the weight of just the methane. Under *Kisor v. Wilkie*, "the regulatory interpretation must be one actually made by the agency; in other words, it must be the agency's authoritative or official position, rather than any more ad hoc statement not reflecting the agency's views." 139 S.Ct. 2400, 2416 (2019). This is a problem for addressing the textual conundrum Congress created here because the phrase "gas sent to sale" does not appear to be in any other EPA regulations in Title 40. So the agency is sailing into uncharted waters. And even if the EPA comes up with an interpretive regulation, it will not have the force of law and cannot bind private parties. See *Perez v. Mortgage Bankers Assn.*, 575 U.S. 92 (2015).

The other approach is for the EPA to issue a substantive rule through notice and comment rulemaking if it has authority to do so. It is difficult to see what in the Clean Air Act gives the EPA rulemaking authority to correct a problem in the tax formula. Section 136 itself mentions nothing about the EPA's rulemaking authority with respect to the waste emissions threshold or the charge amount. And, after *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), it is questionable whether the EPA even has the authority to issue substantive regulations to implement the tax or resolve inconsistencies in the statutory language.

Proposed PHMSA Rulemaking Affects Natural Gas Pipelines

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On May 18, 2023, the U.S. Department of Transportation ("DOT") Pipeline and Hazardous Materials Safety Administration ("PHMSA") published a notice of proposed rulemaking intended to improve the detection and repair of leaks from new and existing natural gas pipelines and certain gas facilities.

The proposed rule would update federal leak detection and repair standards, and affect more than 2.7 million miles of pipelines, over 400 underground natural gas storage facilities and 165 liquefied natural gas facilities. PHMSA said these updates would boost efficiency, cut pollution and waste, and create an estimated $2.3 billion annually in benefits. The estimated annualized monetary cost would range between $740 million and $900 million. According to the proposal, the rule could reduce unintended emissions from regulated gathering pipelines by 27%, from transmission pipelines by 17% and from distribution pipelines by 44% to 62%, and reduce blowdown emissions by approximately 43%.

DOT Secretary Pete Buttigieg stated that "[q]uick detection of methane leaks is an important way to keep communities safe…." In his view, the proposed rule is a "long-overdue modernization of the way we identify and fix methane leaks." While the proposed rule acknowledges PHMSA's existing leak detection and repair standards, as well as the Environmental Protection Agency's own leak detection requirements, it seeks to strengthen leakage survey and patrolling requirements. The proposed rule also seeks to enhance standards for advanced leak detection programs, leak grading and repair criteria with mandatory repair timelines, and requirements for mitigation of emissions from blowdowns, and seeks to clarify requirements for investigating failures, among other things.

The proposed rule would require operators of transmission, distribution and part 192-regulated gathering pipelines to identify and repair all leaks in a timely manner. This would require classifying and repairing leaks according to schedules based on the leak's public safety and environmental risks. To comply, operators would be required to demonstrate that their equipment and programs can detect all leaks above a minimum threshold.

Operators of part 193-regulated liquefied natural gas facilities also would have to perform quarterly methane leakage surveys of non-tank equipment. These operators would be required to repair leaks consistent with maintenance or abnormal operations procedures.

Usus, Fructus, and Abusus – Whose right is it anyway? Examining the Powers of Usufructuaries in Louisiana

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Over the years, Louisiana courts have been called on to examine the balance of rights between landowners and usufructuaries. Usufructs, similar to "life estates" in common law jurisdictions, can be granted for limited periods of time rather than one's lifetime. Usufructs burden land placed into possession of "naked owners" (similar to "remainderman" in common law). From time to time, issues arise as to the authority of usufructuaries versus landowners – who has the right, and to what extent – they can encumber property. The Louisiana First Circuit recently examined that issue again in the case *Poule D'Eau Properties, LLC v. TLC Properties, Inc. and the Lamar Company, LLC*, 22022-1011 (La. App.1 Cir. 02/24/23), 2023 WL 22020182023, which is the basis of this article.

A. Overview of Relevant Property Rights in Louisiana Law

In Louisiana, a property owner enjoys full rights in property, which includes the "usus" or the right to enjoy property without altering it, the "fructus," which is the right to derive profit from the property possessed, and the "abusus," or the right to alienate, consume or destroy property. In contrast, a usufructuary enjoys only the first two limited real rights, and not the right to alienate, consume or destroy property.

1. Types of Usufructs in Louisiana - A usufruct in Louisiana arises either by operation of law ("legal usufruct") or an inter vivos or mortis causa juridical act ("convential usufruct"). See La.Civ.Code art. 544.

Usufructs may be established for a term or under a condition, and are subject to any modification consistent with the nature of usufruct. The rights and obligations of the usufructuary and of the naked owner may be modified by agreement unless modification is prohibited by law or by the grantor in the act establishing the usufruct. If not altered, it will be governed Louisiana law.

The most common type of "legal" usufruct is the surviving spouse usufruct. In Louisiana, under the established law known as "matrimonial regimes," property owned by married persons is considered community property; however, married couples can modify or opt out of the community property regime by entering into a matrimonial agreement/prenuptial agreement, which can set forth different rules to govern their property. See La. Civ. Code art. 2334, et seq. When a spouse dies intestate or without a testament (i.e. will), survived by descendants, owning community property, by operation of law, the surviving spouse is placed into possession of their undivided one-half interest in the community property, with the decedent's heirs placed into possession of the remaining one-half interest in "naked ownership," subject to the usufruct of the surviving spouse. The surviving spouse usufruct will terminate when the surviving spouse dies or remarries, whichever occurs first. See La. Civ. Code art. 890. The power of a "surviving spouse" usufructuary to grant a servitude was the subject of *Poule*, 2023 WL 2202018202, discussed below.

2. Types of Louisiana Servitudes - A usufructuary's authority to grant a servitude over property varies depending on the type of servitude at issue. There are two types of servitudes in Louisiana - personal servitudes and predial servitudes. *See* La. Civ. Code art. 533. A personal servitude is a charge on a thing for the benefit of a person, conferring in favor of person a specified use of an estate less than full enjoyment. *See* La. Civ. Code arts. 534 and 639. The three types of personal servitudes are: usufruct, habitation, and rights of use.

Contrarily, "[a] predial servitude is a charge on a servient estate for the benefit of a dominant estate." *See* La. Civ. Code art. 646. Predial servitudes may be natural, legal, and voluntary or conventional. *See* La. Civ. Code art. 697. The use and extent of such servitudes are regulated by the title by which they are created, and, in the absence of such regulation, by Louisiana law. Louisiana Civ. Code art. 699 provides an illustrative list of predial servitudes, which include:

> Rights of support, projection, drip, drain, or of preventing drain, those of view, of light, or of preventing view or light from being obstructed, of raising buildings or walls, or of preventing them from being raised, of passage, of drawing water, of aqueduct, of watering animals, and of pasturage.

Although a personal servitude, is a real right, it is one granted in favor of a person rather than an estate, and therefore, unlike the predial servitude, it does not continue to burden the property upon its sale.

3. Louisiana Co-ownership - Louisiana property is susceptible of ownership in indivision. *See* La. Civ. Code art. 807. Ownership of more than one person is known as "co-ownership." La. Civ. Code art. 807. Though each co-owner possesses the right to use the co-owned thing, under civilian and roman tradition, the consent of all co-owners is required to alienate or encumber the entire co-owned thing. The drafters of the Louisiana Civil Code distinctly enumerated this tradition in the creation of predial servitudes. *See* La. Civ. Code art. 714 ("When a co-owner purports to establish a servitude on the entire estate, the contract is not null; but, its execution is suspended until the consent of all co-owners is obtained.").

In *Poule*, the Louisiana First Circuit Court of Appeals were called upon to determine the authority of a usufructuary to grant a predial servitude over property co-owned by naked owners, absent their joinder. The First Circuit's opinion shows the difficulty that third parties may have when contracting for rights in property that is subject to these various parties.

B. *Poule D'Eau Properties, LLC v. TLC Properties, Inc., et al.*

In *Poule*, spouses Joseph Duplantis, Jr. and Rosemary Duplantis acquired, during their marriage, a 72-acre estate ("Duplantis Estate"). Rosemary died intestate, leaving behind her one-half community interest in the property. Per the Judgment of Possession for her succession, Joseph was recognized as the owner of an undivided one-half interest, and their six children ("Heirs" or "Duplantis Heirs") were placed into possession, as naked owners, of Rosemary's former one-half interest, subject to Joseph's surviving spousal usufruct.

Representing himself as the "sole owner" of the entire Duplantis Estate, Joseph later granted Lamar Advertising of Louisiana, LLC, and TLC Properties, Inc. (collectively "Lamar") an "easement" or predial servitude of passage over the Duplantis Estate to construct and maintain billboards ("Lamar Servitude"). After Joseph died and the Duplantis Heirs were placed into possession of the entire Duplantis Estate, the Heirs notified Lamar that the servitude granted by Joseph was invalid and offered a lease agreement to Lamar. Simultaneously, or near that time, the Duplantis Heirs sold the Duplantis Estate to Poule D'Eau Properties, LLC.

In 2017, Poule filed a petition for Petitory Action seeking Declaratory Judgment and Eviction of Lamar. The trial court dismissed Poule's claims against Lamar with prejudice; however, the First Circuit, on appeal, reversed the decision, and remanded the case to the trial court for further proceedings.

At the trial court, Poule moved for summary judgment, asserting suspension of the Lamar Servitude pursuant to Louisiana Civil Code article 714 based on the lack of consent to the Lamar servitude by all the co-owners (the Duplantis Heirs). Lamar filed a cross-motion for summary judgment, arguing that by accepting Joseph's succession, the Heirs cured their lack of consent under Louisiana Civil Code article 719. In direct contrast to their earlier ruling, the trial court granted summary judgment in favor of Poule, declaring them the sole owner of all rights over the property. Lamar's cross motion was denied, and they were evicted from use of the Lamar servitude. Lamar filed an appeal to the Louisiana First Circuit.

Both appeal actions largely focused on the Louisiana legal concept of **Suspension** under Article 714 of the Louisiana Civil Code. When a property is co-owned, a predial servitude, like the Lamar servitude, can only be validly established "with the consent ***of all the co-owners,***" however, if some, but not all owners, grant a servitude, the servitude is not considered null, but rather, suspended until "the consent of all co-owners is obtained."

Lamar argued that Poule's trespass claim failed because the suspension of the servitude terminated either before or upon Poule's ownership of the Duplantis Estate. Lamar argued that Joseph's consent was valid as to his one half interest, and that he consented as a legal usufructuary as to the remaining one-half interest inherited by the Duplantis Heirs from their mother. Lamar argued that when the Heirs later accepted Joseph's succession and were placed in possession of his undivided one-half interest in the property, they confirmed his consent to the servitude as to all the acreage of the Duplantis Estate.

Lamar cited to the Louisiana Supreme Court case of *Superior Oil Producing Co. v. Leckelt*, 189 La. 972, 988 (La. 1938) arguing their acceptance of Joseph's succession was a tacit acquiescence to the Joseph's grant of the servitude. In *Superior Oil*, a co-owner heir entered into a mineral deed with a third party purporting to convey an undivided one-half interest in all minerals that he owned in and on the property. The Louisiana Supreme Court found that, while there was no evidence that the remaining co-owner heirs formally consented to the granting of the servitude at the time the deeds were executed, they tacitly consented through their acquiescence in the acceptance of royalties to the third-party and by entering into lease contracts with the third party, authorizing him to go upon the land to explore for oil. Furthermore, the Louisiana Supreme Court noted the absence of any objection on the part of any of the co-owners to the servitude until shortly before suit was filed.

The First Circuit rejected Lamar's reliance on the *Superior Oil* case, citing to a lack of evidence of acquiescence by the Duplantis Heirs. In fact, the only evidence provided by Lamar to the court in support was letters that the Duplantis Heirs sent to Lamar that included the lease offer, before the Estate was sold to Poule.

Lamar secondly argued that the Heirs tacitly ratified the servitude pursuant to Louisiana Civil Code article 719. Louisiana Civil Code article 719 provides that the "successor of the co-owner who has consented to the establishment of a predial servitude, whether on the entire estate owned in indivision or on his undivided part only, occupies the same position as his ancestor." Moreover, that if he becomes owner of a divided part of the estate "the servitude burdens that part, and if he becomes owner of the whole the servitude burdens the entire estate."

The Louisiana First Circuit noted that, while the Duplantis Heirs were Joseph's successor as to his one-half interest, they were not his successor as to the remaining half, which was the half in question. Instead, the Heirs were in fact already the owners of the property, albeit "naked owners". The court explained that Louisiana Civil Code articles 714 through 719 apply where a co-owner grants a predial servitude on an estate or on an undivided part and the co-owner subsequently acquires the ownership of the entire estate, which were not the facts in *Poule*. The Duplantis Heirs were non-consenting co-owners of an undivided one-half interest in the property at the time the Lamar servitude was granted, and Poule acquired its interest in the Duplantis Estate from the Duplantis Heirs, not Joseph. Thus, as owners, Lamar would have needed to show the consent of the Duplantis Heirs rather than Joseph's to prove the validity of the Lamar servitude.

In the end, the First Circuit affirmed the trial court's judgment denying Lamar's cross-motion for summary judgment and held that Lamar had no legal right to possess or occupy any portion the Duplantis Estate because they did not have the consent of all co-owners to the property, but rather, purported rights granted solely by a usufructuary. The court therefore ordered Lamar to vacate the premises within thirty days of Judgment.

C. Conclusion

It is in the best interest of all parties, when entering into any contract regarding real rights in property, to contact competent legal professionals, who can assist in the title research process to ensure your rights are being granted by the proper parties; however, should issues arise, Louisiana Civil Code article 596 provides for the breakdown of responsibility for expenses in such litigation matters. Conventional usufructuaries are liable for expenses of litigation with third persons concerning the enjoyment of the property. The expenses of litigation for matters involving third persons concerning both the enjoyment and the ownership of the property are shared, equally, between the usufructuary and the naked owner. Finally, expenses of litigation between the usufructuary and the naked owner are borne by the person who has incurred them.

We are accepting nominations for the **Excellence in Diversity, Equity, and Inclusion Award**. This award is presented annually to honor and recognize a person, people, or organization that exhibits qualities of leadership and has demonstrated their contribution to advancing diversity, equity, and inclusion in the energy industry or legal profession.

Nominations are due June 30, 2023. To nominate an individual or organization for the award, please fill out the nomination form.

A Message from IEL

The Institute for Energy Law will begin accepting submissions for the September issue of the Energy Law Advisor on July 10th, 2023.

Deadline to submit is August 28th, 2023. The ELA welcomes submissions of member news, industry updates, case comments, signature pieces, and featured student articles for consideration. Submissions must be in word format and conform with other ELA guidelines.

Once again, we would like to thank our IEL publications liasons – this issue has been a great success and we appreciate your support!

If you are interested in being your firm or company's publication liaison to IEL, please contact Kelly Ransom (kelly.ransom@kellyhart.com) and Emma Espey (eespey@cailaw.org).

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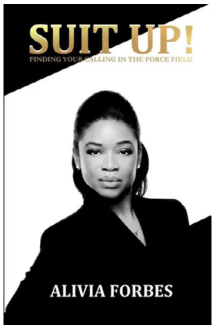

Alivia Forbes, attorney-at-law and new IEL Advisory Board member, recently published her first book, "Suit Up!: Finding Your Calling In The Force Field", a how-to publication on climbing the corporate ladder and eradicating unforeseen obstacles along the way. The book is available in both paperback and e-book formats wherever books are sold online, including Barnes & Noble and Amazon.

Visit www.AliviaForbes.com for more information.

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