



THE **Energy Dispatch**

A PUBLICATION OF THE
IEL YOUNG ENERGY
PROFESSIONALS' COMMITTEE

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Lucas Liben, Brett Podkanowicz, Erin Potter
Sullenger

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

April's National Young Energy Professionals' Conference

By Liz Och, Hogan Lovells US LLP

Over a hundred attendees descended on New Orleans for the 2nd National Young Energy Professionals' Law Conference earlier this month. Planned by young professionals for young professionals, the conference showcased its members' legal expertise in the field through panels on regional and case updates. The program featured topics of interest to oil and gas attorneys, including post-bankruptcy lessons, legal risks of climate change, and frac hit litigation. Attendees were also treated to an entertaining and inspiring keynote by the Honorable Jay C. Zainey on the importance of professionalism (and giving back) in the legal progression.

It wouldn't be an IEL conference without insider tips from in-house counsel, and this year's conference featured a panel with practitioners from ConocoPhillips, Chevron, ARD Operating, and Cabot Oil & Gas, who provided best practices for young attorneys to use when interacting with inside counsel. The conference also featured an engaging lunchtime fireside chat with Dianne B. Ralston, the Executive Vice President, Chief Legal Officer & Corporate Secretary of TechnipFMC plc. And those attendees who stuck around until the very last Saturday session were treated to what one attendee called "the most entertaining ethics CLE of all time," which chronicled various ethical issues that arose in a highly publicized oil and gas case and how to avoid such pitfalls.

In addition to the conference programming, participants donned their smart casual attire to mingle with their co-registrants at two social events—one at Pat O's overlooking

the Mississippi River, and the other at the Maison Bourbon Jazz Club on Bourbon Street. Keep your eye on *The Energy Dispatch* for more information about next year's conference!

Interview with Professor Bruce Kramer

By: Lucas Liben, Reed Smith LLP

Bruce Kramer is currently a visiting professor of oil and gas law at the University of Colorado Law School and Of Counsel with McGinnis, Lochridge & Kilgore. Professor Kramer previously sat as the Jack F. Maddox Professor of Law Emeritus at the Texas Tech School of Law, and is the author or editor of numerous oil and gas treatises including *Williams & Meyers Oil & Gas Law* and *The Law of Pooling & Unitization*. Additionally, Professor Kramer has served as an expert witness in oil and gas cases for more than three decades. I caught up with Professor Kramer to learn about how he got his start, what he enjoys most about the law, his thoughts on some of the recent and still to come developments in the law of oil and gas, and a few pointers for young lawyers in the energy field.

LL: How did you get started working in oil and gas law?

BK: I didn't head to law school with a particular specialty in mind. Although I enjoyed my property and land use classes, I have always regretted that while at school I didn't take UCLA's oil and gas course, then taught by Professor Richard Maxwell. However, about six years after I started teaching at Texas Tech, the oil and gas professor there (Richard Hemingway) left to go to the University of Oklahoma. As I had always enjoyed my property classes, I thought it would be a good fit to begin teaching the oil and gas curriculum as well. I did then, and I do now, view oil and gas as simply an advanced property course.

LL: Many of our readers may know you from your work on *Williams & Meyers*. How did you get involved with that seminal treatise?

BK: I knew Charlie Meyers – one of the original *Williams & Meyers* authors – through my work with various industry groups. After Professor Meyers passed away, Professor Williams kept up the treatise on his own until sometime in the 1990s. When he stopped that work, however, the publishers – who I knew from my work on *The Law of Pooling and Unitization* – offered Professor Patrick Martin and myself the opportunity to continue on with the treatise.

LL: You've worn a lot of hats in your career: professor, expert witness, presenter, even some time in private practice. What do you enjoy the most?

BK: The teaching and research that comes with being a law

school professor are probably my favorite parts of my career. As a professor I'm free to teach and engage in research that lines up with my own interest, and that, in addition to the interaction I get with law school students, has been the high point of my work life.

LL: Any recent decisions that you've been surprised by?

BK: Plenty. The two that jump to mind first both involve royalty litigation. In Ohio, in the Lutz case, I was disappointed that the Supreme Court failed to decide whether or not the use of the term "at the well" would allow for a producer to utilize the net-back method in calculating royalties. The New Mexico Supreme Court recently also refused to answer the same question, leaving it for the Tenth Circuit to discern the state of New Mexico law on the topic. Both of these seemed like opportunities for the courts to make a clear statement of their state's laws.

LL: And are there any decisions coming down the pipe that you are awaiting?

BK: Always. Particularly right now, both the Texas and Kansas Supreme Courts should shortly be issuing decisions regarding the applicability of the rule against perpetuities to various oil and gas instruments. Each of those decisions has the potential to have a significant impact in the industry. Also, following up on your last inquiry, at some point the courts in New Mexico and Ohio will need to answer those questions; I'll be very interested to see how they do so.

LL: Finally, any advice for young lawyers practicing in the energy industry?

BK: From a pragmatic standpoint, I think it's important for all lawyers – young and old, in-house or outside counsel – to remember that when they retain an expert that individual is not an advocate. They are an expert. I may be espousing a position or reflecting a custom and practice that is supportive of a certain position, but I cannot act as an advocate. I learned that early on in my career, and I think it is helpful for any attorney – or expert – to learn the same. When I put my name on a report it is mine, and it is not going to change to deal with an advocacy position. From a broader standpoint, I would say to younger energy attorneys not to lose the forest from the trees. Try not to get too focused or pinned down on a particular area of the field, but instead maintain your intellectual curiosity for our practice. Along those lines, stay as current as you can on all of the various developments in the law. With the geographical and substantive depth of our practice, new law is constantly being made and lawyers must be aware of it. Finally, try your best to contribute to the intellectual discussion that will help shape the future of that law.

YEP Member Highlight

Liz Klingensmith ([Bio](#))

Partner at Blank Rome LLP

Hobbies:

- Spending time with family
- Playing the marimba
- Hosting casual dinners for family friends



Notable Achievement this Past Year:

Helping a veteran recover his out of pocket expenses through the Houston Volunteer Lawyers Program, and successfully transitioning her practice to a new home at Blank Rome.

Advice for other young lawyers:

"Too many times, I hear young lawyers talk themselves out of an opportunity before they've even taken a crack at it. Think big and go for it! Own your career by taking thoughtful risks and creating opportunity for yourself."

Special Editor's Note:

We would like to thank Liz for her incredible service as chair of the YEP Committee for the Institute of Energy Law. Liz devoted countless hours to encouraging young lawyers to set higher goals, connecting young lawyers with mentors, and selflessly supporting our careers. Liz's genuine support for YEP lawyers will always be cherished, and we are proud to dedicate this month's newsletter to her.

Eye-to-Eye Marketing

By: Ashley Hallene, Alta Mesa Holdings, LP, and Erin Potter Sullenger, Crowe & Dunlevy

If you've graduated law school, you've no doubt had at least one lecture or seminar on the importance of establishing an online profile and the importance of marketing yourself throughout your career. How to get started as a young attorney is not always clear and online may appear to be the best avenue, especially if you think you have nothing to offer (yet). However, this is the time to start the age-old art of in-person networking and marketing. It can feel awkward, uncomfortable, and even a little frightening. But there is good reason to re-direct your attention from your screen back to the real world. This is where most of your clients exist and where the face-to-face (or phone-to-phone) relationship builds client loyalty, trust, familiarity, and ultimately a steady book-of-business. It takes work and practice. Your online presence is a way to establish credibility and allow others to learn more about you and your practice, but the internet highway is crowded. Get out of your office and put a face, personality, and a warm handshake with your name. We've identified four tips to help young attorneys get valuable face

time and build their client base.



Photo by Alejandro Escamilla on Unsplash

Tip #1: Market yourself where you are.

For new attorneys or attorneys that have recently moved firms or companies, your first clients and potential clients are usually the partners, managers, senior associates, or general counsel at your new place of employment. Do they know about you? This is especially important if you want to specialize in a particular field, industry, or a particular type of case. Identify those individuals that are doing the work you want to do. Introduce yourself – go by their office or pick up the phone and make a personal introduction. Avoid email if possible. Schedule time to meet with them (coffee, after-work drinks, breakfast or lunch) to learn about their practice and be prepared to share your skills and experiences and make a direct ask. Share why you are interested in their work and ask to be assigned to a particular case, a particular client, or to use you for future matters in a particular area. Do not forget follow-up! Do not expect work to fall from the clouds after just one meeting. Continue to develop those relationships.

Tip #2: Meet your clients/potential clients on their ‘turf’.

We mentioned the crowded internet highway earlier where it is too easy to blend into the crowd. Interacting with a client on their “turf” can help you stand out. If you are a new associate and trying to get face time with a particular partner to market yourself (i.e. executing Tip #1), you may need to strap on your running shoes for a 2 mile-run or head to the racquetball court for a match with a particular partner. Young attorneys should not shy away from industry trade shows or professional associations with your ideal clients. For example, if you practice business law, you may want to check out the US Small Business Administration for information on local chapter activities. If you practice oil and gas law, consider attending events sponsored by your state oil and gas association (e.g. Texas Independent Producers & Royalty Owners Association) or get involved in an organization comprised of your target clients (e.g. American Association

of Professional Landmen). Meeting clients on their “turf” can also be a natural place to ask for referrals or, at a minimum, introduction to others in attendance to expand your network. It can also lead to an impromptu opportunity for your client to share a personal testimonial of your work with a potential client while you are standing right there.

Tip #3: Talk about your work.

Identify appropriate avenues to talk about your work or a particular on-trend topic in your legal field. This can be a brown-bag lunch for colleagues in your practice group or department. Consider offering a webinar or seminar for your clients or local Chamber of Commerce where you can talk about a topic of interest and your work. Be genuinely interested in the topic when you talk to people about it and show your personality. The fact that you are out talking about it alone can convince clients (and potential clients) of your expertise on the matter, not to mention your enthusiasm about a topic that relates to them will help lay the foundation for a meaningful connection. Also, do not look past opportunities to write an article for a community or professional association newsletter, a Q&A for a local newspaper, or an article for your local or state bar journal. These publications allow you to demonstrate expertise in a topic and reach a broader audience.

Tip #4: Form relationships.

It is one thing to meet fellow associates, partners, executives, clients and even potential clients. It is quite another to form a relationship. The relationship is what can and usually will mean that it is you they think of when the need to hire an attorney, particularly an attorney with your expertise and skill set, arises. Marketing gurus can refer to this as a “stickiness factor” – how well do you stick in your client’s or potential client’s mind? These relationships take time and for young attorneys, patience and focus on the long-game is required. Form a relationship with existing clients of senior partners or managers – at some point the relationship partner may retire or decide to cut back the number of hours worked. If you have developed a relationship with the client, the odds are good that the client chooses to stay with the firm and wants you working on their legal needs. Form a relationship with your fellow associates, inside and outside your place of work – our peer group will continue to develop and make career moves that will put them in a position to assign or hire out legal work. This also includes relationships with non-legal professionals. These relationships start with coffee breaks, trips to driving range or wine tastings, volunteering at a charity event, and going to bar association and professional organization events. Finally, don’t go in thinking attorneys in your area of practice need to be avoided. Attorneys do not

want to refer business they cannot handle or are conflicted out of to attorneys they do not know. These attorneys are also more likely to be opposing counsel on matters. Having that personal relationship with counsel for the other side can minimize the acrimony and combativeness and lead to better communication and a better outcome for your client.

With these tips in mind, put a plan together for 2018 to start increasing your stickiness. Get out from behind the screen and build those relationships!



"Coffee Break" - Photo by [Andrew Neel](#) on [Unsplash](#)

Business Meals: Keeping It Light But Professional

By: Brett Podkanowicz, EnCore Permian

Young professionals at the forefront of their career will almost certainly have a number of business lunches, dinners, and coffee chats with work colleagues, industry contemporaries, and new contacts, whether by proactively seeking to build their network or by being asked by someone else to tag along and have a conversation. As a side note, if you are frequently dining alone during the workday then make an effort to invite colleagues and contacts; if you don't know someone at your table during a business meal then make an introduction and strike up a conversation with those around you. The reason for dining together might be client acquisition or maintenance, catching up, or even just not wanting to eat alone. While successfully navigating a business meal might not exactly be rocket science, there are still some important items to be mindful of to prevent making a less than stellar impression. The following is not an exhaustive list, but it should still cover some important points:

Attempt to Sync Up With Your Dining Partner's Order.

Assume for instance your dining partner orders a lunch salad, whereas you order an opening soup and salad, with a steak to follow, and capped off by a rich slice of chocolate cake – this will lead to you eating at some points when your dining partner is not, which could be somewhat awkward. The most

prudent course of action would be to mirror what he or she orders, whether it is only a meal with an appetizer and sides, or just an entrée. Also consider the type of food you will be ordering, and consider making a selection that would not be difficult to eat.

Don't Be Bland But Don't Be a Comedian. Your personality is what makes you who you are – by all means you should be relaxed and able to let your true self shine through. However, unless you have a pre-existing relationship with your dining partner and they are not your superior, it would be wise to not be overly informal or familiar with them. Take your cues from them and go where the conversation naturally leads, whether the discussion might relate to work matters, learning more about one another's family and background, or even about a recent sporting event or news story. The topics of conversation during any given meal will at least partially be governed by who you are dining with, so come in with some ideas to facilitate a discussion but be flexible if your dining partner takes the lead – it may even be worthwhile to quickly review major current events and articles if your partner likes discussing the latest happenings and think-pieces. Since people tend to like talking about who they are and what they do, researching their background and areas of practice usually can provide a great starting point to the conversation if you are meeting someone for the first time.

Good Manners Go Beyond the Table. Most people have at one point or another known someone who generally seems quite likeable and courteous, but who treats wait staff, drivers, or other customer service professionals as second-class citizens. How a person treats others around them when they aren't necessarily thinking about it can be a telling and honest window into their personality – as the adage suggests, true character reveals itself only when no one is watching. What this means for you is that being cordial and interesting during lunch will be severely undercut if you bookend things by being ill-tempered and rude to your server or with other people that you interact with.

Enjoying the Meal and Tactfully Concluding. Hard as it is to believe it is 2018, and it is well established that most legal professionals have a smartphone on their person at all times. While it should hopefully go unstated, a business lunch is not the time to answer scores of emails or text messages – if you receive a phone call that must be answered, be sure to excuse yourself and take the call away from the table. Even when the meal concludes, that is not an excuse to stare at the glowing screen between your last bite and the time you leave. Most of us are pretty busy and understandably would like to get a jump on responding to emails and voicemails – with that being said, nobody likes it when someone they are talking with is constantly checking his or her phone or watch

after the meal has concluded. Inquiring when your dining partner's next appointment is or what the rest of their day has on tap is a courteous way to subtly indicate that it's time for all of you to head back to the office.

These tips for a business meal only scratch the surface for how to comport oneself while dining, and ultimately common sense will serve anyone well in making sure that – rather than falling prey to an avoidable pitfall – they always make a positive impression.

The article below is being published in a two-part series. Part 1 is below.

Ready! Fire! Aim! Two Drafting Traps to Avoid in Papering a “Rush” Deal

By Brandon Durret, Dykema Cox Smith

Agreements for the acquisition of oil and gas properties—indeed, acquisition agreements in any context—often require highly complex legal drafting within a short time frame.

Parties are typically eager to get under contract and close as quickly as possible to avoid the other party losing interest or backing out. Sellers, in particular, want to limit the amount of time their assets are off the market and the amount of time their buyers may inspect the assets for defects. These time constraints make acquisition agreements particularly prone to errors and drafting oversights.

This article will discuss the proper use and risky misuses of two clauses common to oil and gas acquisition agreements that are often perceived as drafting shortcuts in “rush” deals. The first topic is the effect of a “subject to the Purchase and Sale Agreement” clause in an assignment of leases, and the degree to which it controls over the actual assignment terms and prevents merger of the Purchase and Sale Agreement into the assignment. The second topic is when, how, and to what extent the phrase “notwithstanding anything herein to the contrary” will cause the language it precedes to override other contract terms.

I. “SUBJECT TO THE PSA” CLAUSE VS. MERGER BY DEED

The urgency involved in a sale of oil and gas leases does not end when the parties sign a formal Purchase and Sale Agreement (“PSA”). In the author’s experience, the parties’ eagerness to close is usually even more intense. Typically, the weeks between contracting and closing is a whirlwind of time-intensive due diligence, including data room analysis, review of financial records and corporate filings, examination of title documents and material contracts, regulatory and environmental inspections, purchase price adjustments and knockdowns, and minor renegotiations.

With all that activity, both before and after getting under

contract, the parties look for time-saving efficiencies wherever they can find them. As a result, the formal assignment of leases often gets less drafting attention than it deserves. Rather than carefully drafting the assignment to closely track the relevant PSA terms, it is tempting to simply pull an unrelated assignment form from your files, fill in the blanks and exhibits, and add a clause making the conveyance “subject to” the terms of the PSA. The thinking behind this approach is that the PSA terms will control in the event they conflict with the assignment terms, so an error or omission in the assignment is not critical.

This thinking is wrong and hazardous due to the legal doctrine of “merger by deed,” or the merger doctrine. It holds that when the seller executes, and the buyer accepts, a conveyance pursuant to a contract for sale of real property, the contract “merges” into the conveyance. As a result, the contract terms regarding the property conveyed do not survive closing, even if they contradict the conveyance terms. *Alvarado v. Bolton*, 749 S.W.2d 47, 48 (Tex. 1988). Put another way:

[I]n the absence of fraud, accident, or mistake in the execution, the deed, an absolute conveyance on its face, must be considered the *final expression* and the *sole repository* of the terms upon which [the parties] have agreed with respect to the property conveyed, the consideration, and the method of payment.

Carter v. Barclay, 476 S.W.2d 909, 914-15 (Tex. Civ. App.—Amarillo 1972, no writ) (emphasis added). But can the merger doctrine be expressly overridden? Not easily, it seems. The merger doctrine is so durable, in fact, that it cannot be defeated by making the conveyance “subject to the terms” of the contract for sale, as the following cases demonstrate in the oil and gas context.

A good illustration of how merger by deed and a “subject to” clause interact is *Devon Energy Prod. Co., L.P. v. KCS Res., LLC*, decided in 2014 by the Houston 14th District Court of Appeals. 450 S.W.3d 203 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Devon had entered a PSA to sell KCS a large package of mineral tracts, which was duly closed by delivery of deeds. Years later, a third party operator proposed new wells on some of the mineral tracts and a question arose as to whether Devon had conveyed all of its right, title, and interest in the entire tracts, per the deed language, or merely in certain existing wells thereon listed in the PSA. Devon filed a declaratory judgment action to determine the parties’ respective rights.

KCS argued that because the rights of the parties rest solely in the deeds, per the merger doctrine, a construction of the PSA by the court would not resolve any justiciable

claim and therefore the court lacked jurisdiction to do so. Devon countered that because the deeds were “expressly made subject to” the PSA, no merger occurred and the PSA terms still control what interests were conveyed. The court disagreed:

The Supreme Court of Texas has long recognized that the conveyance provisions in a contract for the sale of real property merge into the deed executed in accordance with the contract. The merger doctrine requires courts to look to the deed alone in evaluating the parties’ respective rights even if the terms of the deed vary from the contract.

Id. at 211. The court further stated, “we reject Devon’s argument that the [deed’s] language that it is ‘subject to’ the PSA indicates the parties’ intent that the PSA would not be merged into, superseded by, or mooted by the [deed].” *Id.* at 214. As supporting evidence, the court cited revisions made to legal descriptions in the deed exhibits due to title errors found during KCS’s due diligence investigations, though the PSA exhibits were not correspondingly revised. “[I]f the conveyance terms of the [deed] were ‘subject to’ the PSA,” the court stated, “then the revisions the parties made to deeds during the due diligence period would be irrelevant” and would “undermine the purpose of the merger doctrine.” *Id.*

The court also rejected Devon’s argument that because the PSA contains surviving collateral terms, meaning contract obligations not fully performed by execution and delivery of the deeds, such as indemnification provisions and covenants to cooperate in effectuating the intent of the PSA. The court agreed that such terms are not released or impaired by the merger doctrine, observing that the PSA merges into the deed only as to “property conveyed, the consideration, and the method of payment.” *Id.* citing Carter, 476 S.W.2d at 914-15. But Devon’s claim failed because the parties disputed the scope of the conveyance itself, not surviving collateral terms of the PSA.

In March of 2017, the Corpus Christi Court of Appeals directly addressed a similar merger question involving an overriding royalty conveyance in *Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy, LLC*. 516 S.W.3d 638 (Tex. App.—Corpus Christi 2017, pet. filed). Burlington and Texas Crude had entered a Prospect Development Agreement (“PDA”) with an “Area of Mutual Interest” clause providing, among other things, that Texas Crude will reserve an overriding royalty in any oil and gas lease it assigns to Burlington, and likewise Burlington will assign an overriding royalty to Texas Crude in any oil and gas lease it acquires.

All of the assignments creating Texas Crude’s overriding

royalties stated that the override will be paid based on the “amount realized” from the sale of production. As operator and owner of the working interests that the overrides were carved out of, Burlington had been proportionately deducting post-production costs from Texas Crude’s overriding royalty payments. However, prompted by the landmark holding in 2016 by the Supreme Court of Texas in *Chesapeake Exploration, L.L.C. v. Hyder*, 483 S.W.3d 870 (Tex. 2016), Texas Crude sued Burlington to recover those post-production costs, arguing that the “amount realized” language in the assignments prohibited such deductions.

Burlington countered that the PDA does not authorize or contemplate overrides that are free of post-production costs, and that, because the override reservations and conveyances were expressly made “subject to the terms and conditions of the PDA,” the court should construe them as “typical” overrides that bear such costs. Citing Devon, the court disagreed based on application of the doctrine of merger by deed:

[E]ven assuming that the PDA ... contemplated only the reservation of “typical” [overrides], which would bear post-production costs, the assignments themselves are the only instruments we must look to in determining whether such “typical” [overrides] were, in fact, conveyed. We conclude that they were not.

Like *Devon*, the *Texas Crude* case demonstrates that “subject to” language in the closing assignment pursuant to a PSA has little or no effect in preventing application of the merger doctrine. Disappointingly, the court does not explain how or why. But this case prompts the author to wonder, “What is the actual function or purpose of a ‘subject to the PSA’ clause in a closing conveyance?” It is present in most, if not virtually all, assignments closing large PSAs. But if it does not prevent merger, and the surviving collateral PSA terms are enforceable regardless, does it have any legal effect at all? The only effect the author can think of is to supply record notice to future purchasers that they may be subject to unperformed surviving collateral obligations under the PSA.

As *Texas Crude* demonstrates, the merger doctrine can override “subject to” language not just in PSAs, but in any kind of oil and gas agreement that contemplates formal transfer of a real property interest. This may include farmouts, lease offers, participation agreements, joint ventures, operating agreements, and letter agreements.

Keep in mind that the merger doctrine only applies to assignment terms “with respect to the property conveyed, the consideration, and the method of payment [of consideration].” But *Texas Crude* illustrates the long reach of the merger doctrine in abrogating the terms of the underlying agreement.

Specifically, merger extends even to real covenants benefiting the interest conveyed—calculation of royalty, in this case—not just to terms which directly control the size and shape of the property conveyed, such as legal description or reservations.

Texas law does not give us a comprehensive list of the types of assignment terms that may be subject to merger, but they appear to include the following:

- Legal descriptions (*Carter*, 476 S.W.2d at 914-15)
- Reservations from the grant (depths, royalty, security interest, etc.) (*Barker v. Coastal Builders, Inc.*, 271 S.W.2d 798 (Tex. 1954); *Tex. Indep. Exploration, Ltd. v. Peoples Energy Production-Texas L.P.*, 2009 Tex. App. LEXIS 6941 (Tex. App.—San Antonio 2009, no pet.))
- Exceptions to the grant (tracts, prior reservations, easements, etc.) (*Turberville v. Upper Valley Farms, Inc.*, 616 S.W.2d 676 (Tex. App.—Corpus Christi 1981, no writ))
- Warranties and disclaimers thereof (general vs. special vs. none, against encumbrances, etc.) (*Alvarado v. Bolton*, 749 S.W.2d 47 (Tex. 1988))
- Conveyance language (quitclaim vs. grant of land, grantor's capacity, etc.) (*Commercial Bank, Uninc. v. Satterwhite*, 413 S.W.2d 905 (Tex. 1967))
- Royalty calculation (sales price vs. market value, etc.) (*Tex. Crude, LLC*, 516 S.W.3d at 642)
- Performance covenants and conditions (payment or drilling obligations, etc.) (*Sunderman v. Roberts*, 213 S.W.2d 705 (Tex. App.—San Antonio 1948, no writ))
- Restrictions on use (*Smith v. Harrison County*, 824 S.W.2d 788 (Tex. App.—Texarkana 1992, no writ))
- Reservations of vendor's liens (*Scull v. Davis*, 434 S.W.2d 391 (Tex. Civ. App.—El Paso 1968, writ ref'd n.r.e.))

Although the author has not identified Texas cases directly on point, merger would also arguably eliminate, if left out of the assignment, terms like special limitations on the duration of the grant (as in term assignments, oil and gas leases, etc.), proportionate reductions of the grant (for an overriding royalty, for example), and consents to assign. However, Texas cases also illustrate the type of collateral contract terms which would survive closing and not be merged into the assignment, like indemnity obligations (*Devon Energy*, 450 S.W.3d at 209), arbitration provisions (*Stanford Dev. Corp. v. Stanford Condominium Owners Ass'n*, 285 S.W.3d 45 (Tex. App.—Houston [1st Dist.] 2009, no pet.)), obligations to furnish materials (title policy, files, data, etc.) (*Pleasant Grove Builders, Inc. v. Phillips*, 355 S.W.2d 818 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.)), and releases and assumptions of liability (*Bates v. Lefforge*, 63 S.W.2d 360 (Tex. Com. App. 1933, holding approved); *Baker v. Baker*, 207 S.W.2d 244 (Tex.

Civ. App.—San Antonio 1947, no writ)).

Editor's Note: Part II. Perils of the “Notwithstanding” Clause will appear in the next issue of *The Energy Dispatch*.

Recent Cases from Federal Courts of Appeal Indicate Expansion of Both Jurisdiction and Liability Under the Federal Clean Water Act

By Claire Juneau, Kean Miller LLP

Recent cases from the Federal Fourth Circuit Court of Appeal and the Federal Ninth Circuit Court of Appeal could mean a significant expansion of both jurisdiction and liability under the Federal Clean Water Act (“CWA”). These cases follow a recent trend from a number of district court cases examining similar issues.

Decided this past February, the Ninth Circuit in *Hawai'i Wildlife Fund v. County of Maui*, 886 F.2d 737 (9th Cir. 2018) held that Maui County's unpermitted point source discharges and injections of treated wastewater into disposal wells violated the CWA despite the fact that the injected wastewater reached a navigable water body (the Pacific Ocean) only via groundwater.

In *Hawai'i Wildlife Fund*, a number of environmental groups sued Maui County under the citizens' suit provision of the CWA. The claim arose from the County's operation of four injection wells at the Lahaina Wastewater Reclamation Facility. It was undisputed that the County was injecting approximately 3 to 5 million gallons of treated wastewater per day into the groundwater via its wells. And it was undisputed that some of this wastewater reached the Pacific Ocean.

On summary judgement, the district court found that the county violated the CWA because it was discharging pollutants from its wells into the ocean without a proper NPDES permit. In affirming the district court, the Ninth Circuit found CWA liability because: “(1) the county discharged pollutants from a point source, (2) the pollutants [were] fairly traceable from the point source to a navigable water such that the discharge [was] the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water [were] more than *de minimis*.” The Court, notably, rejected the Environmental Protection Agency's proposed standard for when liability attaches for indirect discharges – a direct hydrological connection between the point source and the navigable water – and, instead, required only a “fairly traceable connection” for a CWA violation to be found.

In reaching this holding, the court rejected Maui County's

argument that a NPDES permit was not required because the point source (the injection wells) did not directly convey pollutants to navigable waters of the United States. Relying on language from Justice Scalia's plurality opinion in *Rapanos v. United States*, the Court reasoned that Maui County "is reading into the statute at least one critical term that does not appear on its face – that the pollutants must be discharged directly to navigable waters from a point source." And the "plain language of a statute should be enforced according to its terms."

In an amended opinion filed shortly after the original decision, the Court clarified that they are "not suggesting that the CWA regulates all groundwater...[but] are reinforcing that the Act regulates point source discharges to a navigable water, and that liability may attach when a point source discharge is conveyed to a navigable water through groundwater." There must be "some evidence" of a link between discharges and contamination of navigable waters for the CWA to apply.

Less than two months after the Ninth Circuit rendered its decision in Hawai'i Wildlife Fund, the Fourth Circuit issued its decision in *Upstate Forever v. Kinder Morgan*, Case No. 17-1640 (4th Cir. Apr. 12, 2018), 2018 WL 1748154. There, the Court analyzed and considered two issues: (1) whether a pipeline spill constitutes an "ongoing violation" where the pipeline has been repaired but the released pollutants continue to migrate to navigable waters; and (2) whether a discharge of pollutants that reaches navigable waters via groundwater can support liability under the CWA. On both issues, the court answered "yes."

The facts of *Upstate Forever* are as follows: In 2014, an underground pipeline spill occurred in Anderson County, South Carolina, that allegedly released over 369,000 gallons of gasoline. Although the pipeline was quickly repaired, two environmental interest groups filed a CWA citizens' suit alleging that the gasoline continued to seep into nearby navigable waters.

The defendants first argued that the suit should be dismissed for lack of jurisdiction because the CWA only authorizes citizen suits for continuous or ongoing intermittent violations, and the pipeline had long since been repaired. The motion was initially granted by the trial court, but the Fourth Circuit disagreed and reversed, finding that the CWA does not require that the point source continue to release a pollutant—only that the discharge from the point source continue to release a pollutant.

The Fourth Circuit then examined whether plaintiffs stated a recoverable claim under the CWA. Relying on the Ninth Circuit's *Hawai'i Wildlife* decision, the Fourth Circuit held that indirect discharges to navigable waters via groundwater

can lead to CWA liability. But, the Fourth Circuit did not consider whether the pollutants were "fairly traceably" from the point source through groundwater to a navigable waterbody. Rather, it determined that the CWA requires a "direct hydrological connection" between groundwater and navigable waters in order to state a claim under the CWA for an indirect discharge. On this basis, the Fourth Circuit concluded that plaintiffs had stated a cognizable claim, and remanded to the trial court for further proceedings.

Since these decisions, the Environmental Protection Agency (EPA) issued a Request for Public Comment on whether the Clean Water Act should regulate discharges from point sources to surface waters via groundwater. The Request cites the *Hawai'i Wildlife Fund* decision and seeks comment on whether regulatory programs other than the CWA are better equipped to handle groundwater discharges. Comments to the EPA's Request must be received no later than May 21, 2018.

Surface Use at the 5th Circuit

By Robert Woods, Yetter Coleman LLP

Surface use agreements (SUAs) are part of the new reality of oil and gas development, especially when sophisticated lessors with large tracts of land are involved. Thus, it's no surprise that lawsuits over the meaning of surface use agreements are heading up to the courts of appeals.

Under a classic oil and gas lease, without a surface use agreement in place, the lessee has the right to use as much of the surface as is "reasonably necessary" to exploit the mineral estate and there is no common law duty to restore the property to its prior condition. After all, in Texas, the mineral estate is the "dominant" estate.

This can be a relatively harsh state of affairs for landowners. To change it, lessors can impose some specific protections against surface damage by requiring the lessee to enter into a surface use agreement alongside their lease (or even embedded within their lease). For older leases, this is often done in conjunction with negotiations of lease extensions or the resolution of disputes on other topics. The precise terms of surface use agreements vary, but they may specify liquidated damages for specific uses of or damages to the surface (e.g., a fixed price for a well pad), require restoration, ensure lessor input into the planning of surface development, delineate water rights or surface mining rights in greater detail, protect prized wildlife, etc.

In *Fort Worth 4th St. Partners, L.P. v. Chesapeake Energy Corp.*, 882 F.3d 574 (5th Cir. 2018), FWP sued Chesapeake for breach of a surface use agreement. FWP had leased its minerals to another company, who eventually assigned the

lease to Chesapeake. There was a surface use agreement in place that required the lessee to pay \$6 per square foot of surface land used for various operations, as of a certain date. If Chesapeake drilled a set number of wells by then, however, the price dropped to \$3 per square foot.

Before the payment date, Chesapeake purchased FWP's surface rights for \$34 million. There were two contracts involved in this transaction: (1) a real estate agreement conveying surface rights to Chesapeake and (2) a "Master Agreement" providing for amendments to the surface use agreement and the lease.

The real estate agreement conveyed the surface "together with all improvements and fixtures thereon and all rights, privileges, easements, benefits and agreements appurtenant thereto." The Master Amendment contained the following provisions:

- "Elimination of Surface Use Restrictions . . . FWP shall no longer be entitled to restrict or limit where or how operations for drilling, operation and producing oil, gas or other minerals under the Lease are conducted. Therefore, any provision of the Surface Agreement which purports to limit or restrict the Working Interest Owner's right to enter upon or use any surface of the FWP Lands are hereby deleted and terminated, including, but not limited to Paragraphs 1 through 13."
- "The terms, provisions, covenants, and conditions [of the surface use agreement] are intended to be, and shall be deemed to be covenants running with the FWP Lands." (The SUA itself stated that "[t]he terms, provisions and conditions hereof shall be covenants running with land and shall be binding upon and inure to the benefit of the Working Interest Owner, the Surface Owner, and each of their respective successors".)
- "The parties hereto acknowledge and agree that the terms and provisions of the Lease, the [surface use agreement], and the Joint Operating Agreement, as amended, shall remain in full force and effect."

FWP claimed in its lawsuit that it retained the right under

the surface use agreement to receive the per square foot payment on the payment date, whereas Chesapeake argued that this right was extinguished and/or transferred to Chesapeake when Chesapeake purchased the surface rights from FWP. Both sides moved for summary judgment, and FWP attached to its motion an affidavit from one of its owners claiming that the parties intended the per square foot payment to be a personal right held by FWP, not a "covenant running with the land." In Texas, a covenant (promise) "runs with the land" when four requirements are met: (1) it touches and concerns the land; (2) it relates to a thing in existence or specifically binds the parties and their assigns; (3) it is intended by the original parties to run with the land; and (4) the successor to the burden has notice. Only (1) and (3) are relevant here.

The district court rejected FWP's argument and the Fifth Circuit affirmed. Circuit Judge Dennis, writing for the Court, first noted that FWP apparently was arguing that the benefit of the square foot payment did not run with the land, while at the same time arguing that the duty to make that payment did run with the land. Setting this apparent contradiction aside, the Court reasoned that the right to receive payment under the surface use agreement touched and concerned the land because it did not merely compensate FWP for damage, but was structured such that Chesapeake has the incentive to use as little of the surface as necessary. As such, it was sufficiently connected to the land itself that it touched and concerned the land.

The Court then noted that the parties must have intended the payment right to run with the land, because they agreed in the Master Agreement and the surface use agreement itself that the covenants of the surface use agreement would run with the land, without exception. Because it held that the contracts were unambiguous, the Court ignored FWP's affidavit.

In the end, Chesapeake avoided over \$2 million in additional surface fee damages, but it took a decent amount of Texas real property law to get there.

Upcoming IEL Events

[**5th Mergers & Acquisitions in Energy Conference**](#) – May 17 in Houston, TX

[**Energy Industry Environmental Law Conference**](#) – May 18 in Houston, TX

[**5th Appalachia Young Energy Professionals' General Counsel Forum**](#) – May 24 in Pittsburgh, PA

[**9th Law of Shale Plays Conference**](#) – September 5-6 in Pittsburgh, PA

[**11th YEP General Counsel Forum**](#) – September 20 in Houston, TX



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