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Kristi, can you walk us through your career path to the present day, tell us what led you to practice in the energy industry, and what decisions and/or opportunities you credit for where you are today?

I started my career in 2002 as a litigation associate at King & Spalding in Houston, representing a wide variety of companies in complex commercial and tort litigation. Just a few months after I started, I had the opportunity to start working on cases for Chevron under several incredible lawyers, including Laura Robertson, IEL's current chair. She soon became my mentor and really taught me how to be an effective lawyer and maneuver law firm life. Year after year, I continued to work on Chevron matters and took on roles with increasing responsibility and continued to represent many other energy industry clients. Through that work, I got to know several Chevron lawyers who are now my colleagues and friends. I learned a bit about Chevron's culture, and I knew it would be a good fit for me. I really enjoyed my time at King & Spalding – I would never be where I am today without that fantastic experience, but I started to realize the in-house experience was well suited to my strengths and interests. With that in mind, I set my sights on a role at Chevron.

In 2008, I applied for a litigation role inside Chevron just a couple months before I spent six weeks in Louisiana on the trial team for the first Legacy case that Chevron tried. It's a good thing that we won because things might have worked out differently for me otherwise! Less than a month after returning home from trial, I received my offer to join Chevron. It was a bittersweet moment because I was sad to leave my colleagues and career at K&S behind, but I knew I was making a long-term decision for my future.

I joined Chevron in the U.S. Litigation Management Group in September 2008. I spent five years in that group working on cases of all types and sizes, investigations, and pre-litigation matters. I eventually became responsible for the Louisiana Legacy Docket – the very same docket I was working on at K&S right before I joined Chevron. It was so much fun to reconnect with the lawyers I had worked so closely with like Bobby Meadows and Carol Wood of King & Spalding and Mike Phillips and Victor Gregoire of Kean Miller. I also had the opportunity to manage a large commercial arbitration for our Deepwater Gulf of Mexico business unit against a subsea contractor. I was more closely connected to the business in that case than any prior case and got a front-row seat to what it means to be a lawyer supporting a business unit. For the first time, I became intrigued at the idea of moving outside the litigation group, closer to the business. Once again, we won the arbitration – many thanks to the incredible arbitration team from Liskow & Lewis, the late Gene Fendler and Jana Grauberger, for the exceptional work on that case – which once again paved the way for me to make a move.

In 2013, that opportunity came. Wendy Daboval, my predecessor in my current role, offered me a job, managing a group of transactional lawyers supporting Chevron North America Exploration and Production Company's (CNAEP) onshore businesses in the Mid-Continent U.S. and California. That move was a steep learning curve, but that role remains one of my favorites of my career. It was so much fun being so close to the business, acting as a trusted advisor to the leadership team making critical business decisions. And it was very rewarding to lead a group of talented, high performing lawyers whose efforts truly enabled the business to deliver results. I spent a few years in that role and was then moved to more of a headquarters role, supporting issues and advocacy that crossed all CNAEP business units, as well as remote management of Chevron's Appalachia business unit. That role gave me a completely different perspective about CNAEP and Chevron, preparing me for my next role. I also had my baby girl, Harper, when I was in that role. When I returned from maternity leave in August 2017, I learned that, a month later, I would be taking a new role as Wendy's Deputy General Counsel, preparing me to take her role upon her retirement six months later. In March 2018, I took over as CNAEP General Counsel and Vice

President, Land. I'm responsible for delivery of all legal and land services across North America Upstream. I absolutely love my job and feel very fortunate that Chevron entrusts me with it!

You asked what led me to the energy practice and what decisions/opportunities I credit for where I am today. I can honestly say that it has been a lot about luck and timing. I followed my gut in joining King & Spalding, primarily because I really enjoyed the people. That choice exposed me to fascinating work representing industry clients and led me to Chevron. The same was true with Chevron. In both places, I took on all opportunities offered me, even if they were outside my comfort zone. I focused on my work and making the most of it rather than focusing on what was to come next. I was also very fortunate to have fantastic mentors at both places. As I got further along in my career, having a sponsor became increasingly important. I was lucky that Wendy served as an incredible mentor and enthusiastic sponsor for me. She gave me opportunities to stretch my skills and abilities and gave me feedback along the way. She wasn't afraid to have a direct, tough conversation with me to help me improve. Importantly, she was a strong advocate for me within Chevron, paving the way for the role I am in today.

Wow, that is a truly amazing career path in what seems like such a relatively short amount of time! What advice can you give younger lawyers aiming to achieve similar success?

Seize every opportunity that comes your way, even if it you don't know whether you can do what is being asked of you. Take risks. Find at least one good mentor inside and outside your company or firm to provide guidance from different perspectives. While sponsors choose you, put yourself in a situation to be chosen by a sponsor by doing exceptional work and enthusiastically taking on assignments. Carve out time to observe and learn from the more experienced lawyers around you, especially those you want to emulate.

Work/life balance is always something on the minds of young professionals, particularly during this challenging past year. How do you manage a sense of balance and what are some tips you can share with others for doing the same? How has the pandemic impacted this balance, and do you foresee any changes it has caused becoming permanent even if/when things return to "normal"?

A few years ago, one of my colleagues reframed it as work-life integration, which feels much more natural to me, so I adopted that phrase too. For me, it's about being "all in" in whatever I'm doing – I'm "all in" at the office and "all in" with family as soon as I walk in the door.

COVID-19 rocked my world on that front – the lines became blurred, and I found myself "in" both roles 24/7 and not being as effective in either role. I had to adjust to the new normal and open my mind up to an entirely different routine that would allow me to be fully present for both roles. I deliberately rescheduled my hours and prioritized exercise time to help me relieve stress and fuel me to give my all to both roles. It has been a true test all year long, and some days I'm better than others. I've had to give myself grace as an employee and a wife and mom on the days that I haven't shown up at my best. More broadly, though, I think it is important to set boundaries and be direct about the fact that you have things in your life that are important to you outside of work. Technology affords us vast flexibility in terms of the hours we work and from where we work. For example, when not traveling for business, I really try to protect 6-8 pm for dinner and bedtime routine, which often requires me to work once bedtime routine is over to get done what needs to get done. Obviously, if there is a critical issue or pressing matter, I miss dinner and bedtime, but I have found that people are truly willing to work with you if you make your needs known. I also think it is my responsibility as a leader to set a good example and not schedule meetings or call my direct reports at inconvenient times if I can help it.

One silver lining of the pandemic is that we have all proven ourselves capable of delivering results while working remotely, and I believe that companies and firms will have to figure out a way to continue affording flexibility to lawyers even after we are back to "normal" if we want to retain our talent. We expect our lawyers to be available 24/7, so we should treat them as professionals and trust that they will do whatever it takes to get the job done, regardless of whether they do it at a time or from a location that wouldn't work for us. I also think that people have grown comfortable with video conferences, which unlocks opportunities for engagement with people in multiple time zones and locations. While face-to-face communication is unmatched and will remain important, I foresee a decrease in work travel in the future. I see people asking themselves whether hopping on a plane is really critical for a particular meeting or whether it can be done by video.

In addition to the industry challenges raised by the pandemic, the recent election has also raised many uncertainties. What do you see as the most important changes and/or challenges the industry will face, and what are some of the ways we, as young energy professionals, can be aware of and perhaps a step ahead of these issues?

President Biden's early actions suggest that we will face challenges with future leasing, permitting, and development plans. I view it as our responsibility to demonstrate that we are responsible operators and committed to a lower carbon future. We must also be proud of the affordable, reliable, ever-cleaner energy that we provide the world – energy that is essential to achieving a more prosperous and sustainable world. Oil and natural gas have a vital role to play in the journey to a lower-carbon economy. Our industry must use its voice to engage with state and federal governments about the important role we play in powering peoples' everyday lives. As young energy professionals, it's important to stay abreast of current events and take time to learn about lower carbon technologies and the associated legal issues and challenges.

Kristi, your thoughts, advice, and leadership are a tremendous benefit to us all. Thank you very much for sharing your time and insight with the Young Energy Professionals of IEL.

You've Got the Vaccine, Now What? Three Things to Consider While Transitioning from Remote to In-Person Work

Nneka Obiokoye, Holland & Hart LLP

On March 11, 2020, when President Donald J. Trump issued the travel ban in response to the COVID-19 pandemic, America went into disarray. Soon after, state and local governments began to announce lock downs and work from home mandates, and the legal community responded in kind. We all learned to do business a new way; telephone conferences and in-person meetings gave way to video conferences. Parents learned how to work and teach at the same time. Women began to leave the workplace in droves. Megan Cerullo, *Nearly 3 million U.S. women have dropped out of the labor force in the past year*, February 5, 2021, https://www.cbsnews.com/news/covid-crisis-3-million-women-labor-force/.

A little over a year after lockdowns and work from home mandates began, there are vaccines available to protect against the various strains of COVID-19. On television, you are likely to see an ad featuring John Legend telling the African American community that "this is our shot." If you hang on for a few more minutes, you may come across another ad showing how easy it is to get the COVID-19 vaccine. It starts with a man lining up in front of a clinic, then fainting at the sight of the needle, only to realize the actual shot was nothing to be afraid of, really. Aside from the public health message contained in these adverts, there is an even stronger message: it's time to start thinking about return to the office...

According to PWC's Remote Work Survey, 87% of employees say the office is important for collaborating with team members and building relationships, but 55% of those employees would prefer to be remote at least three days a week once pandemic concerns recede. PWC Remote Work Survey, January 12, 2021, https://www.pwc.com/us/en/library/covid-19/us-remote-work-survey.html.

So, what will return to the office look like? No one is certain. While leadership in various organizations continue to grapple with what return to the office will look like, here are a few pointers to what we can do as individuals and leaders to promote a smooth transition to the physical office:

1. **Recognize Differences, While Building on Commonalities**

One thing we are certain of regarding return to the office is that the people returning to the office in 2021 will look a lot different from the same people who packed up and transitioned to working from home in 2020. Many modifications that people made to accommodate life during the pandemic will have become permanent. Individual approaches towards childcare, health care, authenticity, diversity, and other socio-cultural dynamics will have changed during the pandemic. Mental health will be a top priority for most people, who may struggle with feelings of isolation, depression, anxiety, and burnout, having lived through a devastating pandemic, dealt with anxiety regarding job security, and potentially lost loved ones or suffered through the disease themselves. African American employees may be particularly susceptible, having experienced disparate health outcomes during the pandemic, (*See e.g.* Jamila Taylor, *Racism, Inequality, and Health Care for African Americans*, December 19, 2019, https://production-tcf.imgix.net/app/uploads/2019/12/19172443/AfAmHealth_Jamila_PDF.pdf) as well as other trauma associated with recent events exposing years of systemic racism (including racism in the workplace).

Retention remains a crucial issue for women, particularly women with young children, who are disproportionately affected by challenges posed by the pandemic including difficulty in finding and/or retaining reliable and affordable childcare and balancing competing work and increasing household demands. According to a survey contained in the 2020 Women in the Workplace study, co-authored by McKinsey and LeanIn.org, 1 in 4 women are now considering leaving the workplace or downshifting their careers, and 40% of mothers (compared to 27% of fathers) have added 3 or more additional hours of caregiving a day to their schedule. That is 15 or more hours a week, the equivalent of a considerable part-time job. Without significant action, such as additional employer support and training programs, there is a real danger that female labor force participation could face its steepest sustained decline since World War II. Kweilin Ellingrud and Liz Hilton Segel, *COVID-19 has driven millions of women out of the workforce. Here's how to help them come back*, February 13, 2021, https://fortune.com/2021/02/13/covid-19-women-workforce-unemployment-gender-gap-recovery/. Female workforce participation has already dropped to 57%—the lowest level since 1988, according to the National Women's Law Center. PWC Remote Work Survey, *supra* note 2. Interestingly, while 81% of executives say their company has been successful in extending benefits for childcare, just 45% of employees say the same. Of note, women are less likely to say childcare measures have been a success — 41% compared with 49% of male respondents. *Id.*

The post pandemic workplace will therefore need to account for these disparities in individual experiences and allow flexibility in demands for face time and social engagement, particularly for women and BIPOC individuals. Encouraging dialogue and asking questions, rather than making assumptions, and taking a step further to make an integration plan that considers both unique and common experiences will be crucial for rebuilding community and fostering an inclusive and equitable workplace for everyone.

Finally, it is important to understand that everyone will have their own pace for resuming social activities. Make sure to communicate that comfort level is a priority in deciding on attendance for social engagements. Give people space to re-integrate at their own pace and respect their individual preferences, particularly because these preferences may relate to the health and cultural welfare of family members outside the workplace.

2. Consider Both Individual and Aggregate Characteristics

One comment that I often receive in connection with African American women in the workplace, is that they are expected to be either a woman or Black at each point in time, but not both. Being a Black woman myself, this resonates very strongly.

When planning for return to the office, various employers will once again look to surveys and data to help them make decisions on return dates, compensation and promotion. When utilizing this data and in making crucial decisions on these issues, it is important to understand that different characteristics may converge in the same individual. For example, when considering the pay gap, the most prevalent data is that women earn 82 cents to the dollar when compared to the average non-Hispanic man. However, when that data is considered both by gender and race, more disparities show up: on average, African American women earn 62 cents to the dollar; Latina women earn 55 cents to the dollar; Asian American women (other than Burmese women) earn 85 cents to the dollar; and native American women earn 60 cents to the dollar. *Quantifying America's Gender Wage Gap by Race/Ethnicity*, National Partnership for Women and Families Factsheet, March 2021, https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/quantifying-americas-gender-wage-gap.pdf.

Only by looking at data in context (aggregating where necessary) and recognizing that different individual characteristics may converge in certain people, can we begin to figure out the changes that need to go into creating a more inclusive and equitable environment for everyone.

3. Encourage Difficult Conversations

Whether you are a leader or just an employee planning to go back to the workplace, we could all benefit from learning a bit more about one another. There are various books out there (both in hard copy and audio formats) that explore race related issues and history, as well as the backgrounds and nationalities of the people we work with. Take advantages of those books and broaden your perspective. Do not expect already traumatized minorities to also do the work of educating you. Do the groundwork yourself, then encourage them to discuss their experiences, if they choose to.

Welcome differences in perspective and allow room for dialogue and disagreement. Approach other individuals from a place of empathy; this will help you recognize and ask the questions that will make a difference in the productivity and cohesiveness of your team.

Finally, it would be a tragedy if after learning all that we have about racism in the workplace, we return to the office without making any changes. Making public statements and having vague plans about fostering inclusion in the workplace is no longer enough. Organizations need to have an actionable, tangible plan to promote equity and inclusion in the workplace, particularly for BIPOC employees. Human resources personnel need to receive proper training on addressing issues of racism and implicit bias when complaints are brought to them; organizations need to encourage reporting for those issues and establish a proper chain for such reporting. Similar to the more prevalent policies on sexual harassment, organizations will need to establish coherent policies that allow for the proper examination of reports of racial discrimination and establish consequences for bad behavior. Otherwise, black and brown employees affected by discriminatory behavior will consider leaving such organizations as their only recourse.

Employees are already demanding more from their workplaces, particularly with respect to ESG, diversity, equity and inclusion, and flexibility of work. Living through a year of the pandemic has exposed many problems with how we work and relate with others, and I believe these issues will become even more pertinent as we return to the office. The best time to make the changes necessary to position your organization for growth and success in the coming years, is now.

Young Energy Professional Highlight – Jenn Kaiser, Continental Resources, Inc.

Interview by Andrew Elkhoury, Mayer Brown LLP

Steward of the Land

When Jenn decided to practice law in the energy sector, she found herself familiar with concepts like stewardship of the land. Having grown up on a farm and ranch in the Texas panhandle, land stewardship was a way of life for her family. Jenn has tried to apply the same values learned in her time on the farm to her practice of oil and gas law.

Jenn is currently a Senior Attorney at Continental Resources, Inc., where she has shares responsibility of Continental's litigation docket, including litigation in North Dakota, South Dakota, Montana and Oklahoma. She also supports human resources on employment and compliance issues. Before joining Continental in 2013, Jenn was Associate Division Counsel at Chesapeake Energy, where she worked with the land and litigation teams assigned to the Utica and Marcellus shale plays, and has prior experience as a litigator in private practice.

In-House Litigation

In-house litigation positions can be highly sought after and, based on her experience, Jenn believes that two things can assist an attorney in obtaining such a position. First, an attorney should develop litigation and court-room experience in private practice before seeking out an in-house position. An individual with this experience will be a much more effective in-house litigator. Second, an attorney should keep an open mind about opportunities to work as an in-house counsel for prospective employers, even though it may not initially be a litigation position. Speaking from her own experience, Jenn knows that an introductory position may turn into or become a stepping stone for a litigation position.

Advice to Young Attorneys

Looking back on her career, Jenn believes that the attorneys who were toughest on her had her best interests in mind. To young attorneys, she says that most of the supervising attorneys who give you raw, honest feedback do so because they see opportunities for growth and improvement and recognize your potential. Try not to take constructive criticism personally; rather, use it as an opportunity to learn and improve as a young attorney. Feedback—good or bad—is a sign that your supervising attorney desires to help you improve upon your abilities.

While young attorneys can also be tough on themselves, Jenn reminds them that, even on their worst days, things are going to be okay. In the moment, an impossible project or mistake may seem huge and you may question whether practicing law is for you ("trust me," she says, "we ALL ask ourselves this!"). She suggests, "Instead ask yourself: how will this issue affect your life a year from now? Is it really a terrifying, career ending catastrophe…or merely a learning opportunity?" If it's the latter, then learn from it, move on and keep doing your best; that is all you or anyone else can ask you to do.

Bluestone: Texas Supreme Court Adds to Law on Postproduction Costs and Analyzes Issue of First Impression on Free Use Clause

Robert Woods, Yetter Coleman LLP

On March 12, 2021, the Texas Supreme Court issued its opinion in *BlueStone Nat. Res. II, LLC v. Randle*, 19-0459, 2021 WL 936175 (Tex. 2021). The case addressed two primary issues: "(1) whether the mineral lease permits deduction of postproduction costs from sales proceeds before royalties are computed; and (2) whether the lease's 'free use' clause authorizes the lessee to consume leasehold gas in off-lease operations without compensating the lessors." *Id.* at *1. The Court's resolution of the first issue adds to a well-known existing body of Texas law addressing the construction of lease royalty clauses and their effect on the allocation of post-production costs. The Court's resolution of the second issue has perhaps more significant implications. The Court weighed in on an issue of first impression as to Texas law, but previously addressed under New Mexico, North Dakota, and Colorado law. New class action lawsuits apparently sparked by the Court's decision on free use clauses and off-lease gas have already been filed against several large Texas producers. *See, e.g., Fitzgerald v. Apache Corp.*, No. 4:21-cv-1306 (S.D. Tex. April 20, 2021); *Fitzgerald v. Chevron*

U.S.A. Inc., No. 4:21-cv-2650 (N.D. Cal. April 13, 2021). At issue in *BlueStone* was a printed lease form that requires gas royalties to be paid based on the "market value at the well . . . of the gas . . . sold or used [off the premises]." *BlueStone*, 2021 WL 936175 at *2. A separate provision reads: "Lessee shall have free from royalty or other payment the use of . . . gas . . . produced from said land in all operations which Lessee may conduct hereunder, including water injections and secondary recovery operations, and the royalty on . . . gas . . . shall be computed after deducting any so used." *Id.* at *9. An addendum to the lease, which "supersedes any provisions to the contrary in the printed lease," states that the "[l]essee agrees to compute and pay royalties on the gross value received." *Id.* at *2. The addendum contains an additional paragraph providing that "royalties accruing under this lease . . . shall be without deduction" of post-production costs. *Id.*

BlueStone had paid gas royalties after deducting post-production costs to achieve a wellhead price and did not pay royalty on amounts of gas consumed by a third-party midstream provider as plant fuel. *Id.* at *2. The lessors sued BlueStone for royalty underpayment and the trial court granted summary judgment for the lessors. *Id.* The Fort Worth Court of Appeals affirmed. *Id.* at *2-3.

As to the first issue—the "deduction" of post-production costs—BlueStone contended on appeal to the Texas Supreme Court that its royalty payment methodology was proper under the lease because the lease called for calculation of royalty at a particular location "at the well." *Id.* at *4. According to BlueStone, this was true regardless of whether the "market value" calculation method of the printed form or the "gross proceeds realized" calculation method of the addendum applied. BlueStone thus argued that there was no relevant conflict between the printed form and the addendum, because the addendum does not specify at what location BlueStone must calculate the "gross value received" and the printed form provides the answer: "at the well." *Id.* The lessors argued in response that the form and addendum were, in fact, in conflict because "gross value received" indicates both the calculation method and the location where the calculation must occur. *Id.*

The Court sided with the lessors. In support, the Court cited *Judice v. Mewbourne Oil Co.*, 939 S.W.2d 133, 136 (Tex. 1996) in which the Court held, in relevant part, that a division order providing for royalties to be calculated based on the "gross proceeds received at the well" was ambiguous because the terms "gross proceeds" and "at the well" were in "inherent conflict." The *BlueStone* Court reasoned: "[The division order in Judice] is substantially similar to the conjoined one BlueStone presses here—'gross value received at the well'—and we held in Judice that joinder of the terms 'gross proceeds' and 'at the well' gives rise to 'an inherent conflict' that renders a royalty clause ambiguous. That is so, we explained, because 'at the well' is a net-proceeds equivalent that contemplates deductions while gross proceeds 'indicates just the opposite.'" *BlueStone*, 2021 WL 936175 at *7.

The Court then distinguished *Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy, LLC*, 573 S.W.3d 198, 205 (Tex. 2019), in which the Texas Supreme Court held that an overriding royalty based on the "amount realized" delivered "into the pipelines, tanks or other receptacles with which the wells may be connected" should unambiguously be valued at the well. The *BlueStone* Court reasoned: "But unlike the lease here, *Burlington Resources* did not involve conflicting royalty formulas, 'gross' valuation language, or a provision directing how to resolve conflicts. The contract terms *Burlington Resources* evaluated did not inherently conflict, but the terms used in BlueStone's lease do." *Bluestone*, 2021 WL 936175 at *7-8.

Regarding the second issue—the "free use" clause and its effect on royalty payments for gas used off the lease—BlueStone contended on appeal that the free use clause exempted it from paying royalty on amounts used by third party midstream providers as plant fuel, since that use benefited the on-lease "operations . . . hereunder." The lessors argued in response that the plain language of the free use clause limits its application to on-lease use of gas. *Id.* at *9. The Court held for the lessors based on the plain language of the relevant lease provisions after reviewing three out-of-jurisdiction cases regarding how to construe similar free use provisions.

The Court first distinguished *Bice v. Petro-Hunt, L.L.C.*, 768 N.W.2d 496 (N.D. 2009), in which the North Dakota Supreme Court had held that the lessee under a similar "free use" clause did not need to pay royalty on gas used off-lease to power equipment at a central tank battery. The Court recognized that *Bice* was "broadly written" and announced an "expansive rule" regarding the application of a "free use" clause, and reasoned that the "gist" of the holding was that the "off lease" activity at issue—the central tank battery—could have been (and usually was) located on-lease, so pragmatically it made little sense to shift the cost of the gas used as fuel to the lessee simply because a typically on-lease tank battery was located off the lease for efficiency. *BlueStone*, 2021 WL 936175 at *10-11.

The Court also distinguished *ConocoPhillips Co. v. Lyons*, 299 P.3d 844 (N.M. 2013), in which the New Mexico Supreme Court had held a differently worded "free use" clause applied to gas used for off-lease activities so long as the operations benefitted the leased tract. The Court faulted the *Lyons* court for relying on Bice, "conclusory" reasoning, and failing to address the impact of royalty language seeming to authorize a netback pricing method that would have been inclusive of off-lease fuel and rendered the "free use" argument unnecessary. *BlueStone*, 2021 WL 936175 at *11.

The Court ultimately found *Anderson Living Tr. v. Energen Res. Corp.*, 886 F.3d 826 (10th Cir. 2018) persuasive, in which the Tenth Circuit held it was bound by Lyons with respect to a New Mexico lease but held that the plain language of a Colorado lease with royalty language and a "free use" clause similar to the lease at issue in *BlueStone* unambiguously required royalty to be paid on gas used off-lease. *BlueStone*, 2021 WL 936175 at *12-13. In essence, the Court agreed with the *Energen* court's reasoning that the plain language of the "free use" clause (restricted to "operations hereunder") and the royalty clause (requiring payment on gas used off-lease) *both* required the lessee to pay royalty on fuel used off-lease. *Id.* at *13. Finally, the Court was critical of the lessee's proposed interpretation of the "free use" clause on practical grounds: "Given the parties' chosen language, it is unlikely they intended a construction of the free-use clause that would inject uncertainty and lead to a fact-finding mission to determine whether progressively more attenuated uses 'benefit' or 'further' the lease operations. The absence of any discernable limiting principle to BlueStone's favored construction further commends construing the free-use clause as restricted to on-lease uses." *Id.* at *13. The Court remanded the fuel claim to the trial court for further proceedings related to the calculation of volumes used by BlueStone as on-lease compressor fuel. *Id.* at *13-14.

Carbon Capture Updates in a New Era of Growing Concerns Over Climate Change

Carl Stenberg

The recent election of President Biden has shed new light on US climate policy. While de-carbonizing the American economy has largely focused on increasing the levels of renewable energy in the electricity mix, there are few readily available and cost-efficient substitutes to hydrocarbons, particularly in the "hard-to-abate" sectors of the economy (e.g., chemicals, steel, and cement). As a result, negative emissions technologies such as carbon capture have become a trendy topic for their ability to reduce emissions and transform emissions-intensive industrial processes into net-zero emitters. This article examines some of the recent developments in the United States on carbon capture and sequestration.

Despite being promising for its ability to reduce centuries worth of emissions while still permitting the continued use hydrocarbons, carbon capture and sequestration has struggled to commercialize as a mainstream technology. According to the Global Carbon Capture Institute, there are today only 15 completed facilities, one under construction, and several projects in advanced or early development in the United States. GCCI, https://co2re.co/FacilityData (last accessed April 29, 2021). These projects have mainly been driven by the 45Q tax credit extension implemented by the Trump administration through the Bipartisan Budget Act of 2018. However, despite the recent upswing in project activity, a hundredfold increase in current capacity is necessary to impact emissions reduction positively in line with global climate targets. GCCI, "Global Status of Carbon Capture and Sequestration", 2020, at 13.

There are currently insufficient economic drivers for creating a market favoring investment into emissions reduction technology. The current value of the 45Q tax credit is at $50t/CO2 for storage and $35t/CO2 for EOR activities. Despite a few projects benefiting from the 45Q tax credit, initial research suggests that the current levels are not enough to spur investment into carbon sequestration and other negative emissions technology. Rhodium Group, "Opportunities for Advancing Electric Power Sector Carbon Capture", September 23, 2020. To remediate this problem, some projects, for example, Oxy Low Carbon Venture's 1PointFive, are attempting to create net-zero oil in the Permian basin by using CO2 captured with direct air capture technology in its enhanced oil recovery operations. However, projects using captured CO2 for EOR activities can be sensitive to commodity risks such as low oil prices, as shown in last year's shutdown of the Petra Nova carbon capture plant in Texas. NRG, https://www.nrg.com/about/newsroom/2020/petra-nova-status-update.html (last accessed April 29, 2021).

Several new legislative and policy considerations have targeted the lack of commercialization of CCS projects and could potentially jump-start large-scale development.

In mid-March, Senators Chris Coons (D-DE) and Bill Cassidy (R-LA) and Representatives Marc Veasey (D-TX) and David McKinley (R-WA) introduced the Storing CO2 and Lowering Emissions (SCALE) Act. The purpose of the SCALE Act is to incentivize the development of carbon capture storage and transportation infrastructure. The SCALE Act would establish the CO2 Infrastructure Finance and Innovation Act (CIFIA) program to finance CO2 transport infrastructure, authorize cost-sharing grants to develop commercial-scale geological CO2 storage projects, support CO2 utilization emissions, and increase funding to EPA for Class VI CO2 storage wells. CIFIA would be similar to the existing TIFIA program for highways and WIFIA program for water. Clean Air Task Force, https://

www.catf.us/2021/03/u-s-house-and-senate-introduce-bipartisan-scale-act-comments/ (last accessed April 29, 2021).

Senator Capito (R-WV), along with Senator Tina Smith (D-MN), also led the charge on another bill, the Carbon Capture Utilization, and Storage Tax Credit Amendments Act. This bill includes several new proposals. First, the bill proposes extending the 45Q tax credit to the end of 2030. Second, it includes a direct payment option for all clean energy and industrial tax credits. Direct payment would allow project developers to monetize tax credits without needing to utilize the tax equity market, which can be inefficient and lead to higher transactions costs. Carbon capture industry groups view the direct payment option as a critical reform to enhance the development and funding of carbon capture projects. Carbon Capture Coalition, https://carboncapturecoalition.org/carbon-capture-coalition-applauds-introduction-of-bipartisan-senate-carbon-capture-utilization-and-storage-tax-credit-amendments-act/ (last accessed, May 1, 2021). Third, the bill proposes increasing the value of the 45Q tax credit. The bill increases the 45Q credit value from $50 to $120 per metric ton for direct air capture facilities that capture and securely store carbon dioxide (CO_2) in saline geologic formations. It increases the credit value from $35 to $75 per ton for such facilities that store captured CO_2 in oil and gas fields, or for beneficial utilization as fuels, chemicals and useful products. Finally, the bill reforms the Section 48A investment tax credit to allow companies access to existing federal incentives to complement 45Q in financing the retrofit of existing power plants with carbon capture technology. Id.

Carbon capture is also a central component of the Biden Administration's American Jobs Plan. The Plan provides a framework for kick-starting a carbon removal industry in the US by establishing ten demonstration projects for cement, steel, and chemical facilities that have been historically challenging to decarbonize. Clean Air Task Force, https://www.catf.us/2021/04/the-american-jobs-plan-whats-in-it-for-carbon-capture/ (last accessed April 30, 2021).

Another potential avenue for increasing the commercialization of a carbon management industry is the so-called "hubs and clusters" model. Carbon management hubs could create beneficial economies of scale and spill-over effects needed to drive down the current high costs of carbon capture and sequestration technology and make it and other negative emissions technologies commercially feasible. Global CCS Institute, Supra Note 36 at 22. In April, Exxon proposed a $100 billion carbon capture "innovation zone" capturing emissions around the Houston area. Houston Innovation Map, https://houston.innovationmap.com/exxonmobil-carbon-capture-houston-ship-channel-2652676137.html, (last accessed May 1, 2021). Similarly, other countries have put in place official policies for creating specific hubs for the large-scale development of a carbon removal industry, including the United Kingdom's Zero Carbon Humber and the Northern Lights Project in Norway, which is developed by Equinor, Shell, and Total. A carbon removal cluster would reduce independency-risks where one project is dependent on a single emitter and reduce commodity risks such as low oil prices by having multiple firms providing specific carbon removal services.

Despite potential federal bipartisan support in favor of carbon capture and sequestration policies, several state and local policies and regulatory issues need to be addressed before any large-scale development of carbon capture projects can take place. Issues such as pore space ownership, litigation concerns, and Environmental Protection Agency primacy over Class VI wells between the EPA and state regulators need to be settled before large-scale investment into carbon capture and sequestration projects is likely to occur. The low carbon industry in Texas has argued for the Railroad Commission (RRC) to seek primacy over the Safe Drinking Water Act (SDWA) Underground Injection Control (UIC) program Class VI wells. In March, the Texas legislature also introduced Senate Bill 450 (SB 450) a welcomed proposal to settle jurisdictional questions between the RRC and the Texas Commission on Environmental Quality (TCEQ) over underground injection activities for CO_2 storage. SB 450 would grant authority to the RRC over activities related to CO_2 sequestration.

The carbon capture industry has felt the economic effects of the COVID-19 pandemic along with the rest of the economy. However, a recent uptick in project activity and growing bipartisan support for carbon capture and sequestration technologies could potentially bring more projects online in the coming years.

New Texas Accommodation Doctrine Case Deals with Solar Energy Developer: *Lyle v. Midway Solar*

John M. Byrom, McCarn & Weir, P.C

In 2020, solar energy generation made up 2% of the total energy generation in the Texas grid operated by ERCOT. *Fuel Mix Report 2007-2020*, ERCOT, http://www.ercot.com/gridinfo/generation (last visited Apr. 23, 2021). While that may be a relatively small percentage, that is a forty-fold increase since 2013, when it made up only 0.05%. Id. As solar energy continues to grow, surface use issues involving solar companies have also grown. In Texas, courts employ a judicially created standard known as the accommodation doctrine to balance surface use rights between mineral and surface estate owners. *See Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971); *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244 (Tex. 2013). A Texas Court of Appeals recently became the first appellate court to consider the application of the accommodation doctrine in the context of solar energy in *Lyle v. Midway Solar, LLC*, 618 S.W.3d 857 (Tex. App.—El Paso 2020, pet. filed). But while *Lyle* adds to the lengthy body of case law on the accommodation doctrine, the case leaves unanswered several questions regarding the interplay of the accommodation doctrine and solar energy.

Surface disputes often arise when the owners of the mineral and surface estates are different because an existing use of the surface can prevent the mineral owner from accessing its minerals. Mineral owners, as the owners of the dominant estate in Texas, have the right to reasonably use the surface to obtain their minerals. However, the accommodation doctrine may require a mineral owner to utilize a reasonable alternative if it would allow the surface owner to continue an existing use. Accommodation doctrine disputes have traditionally been between oil and gas companies and parties using the surface for agriculture, ranching, or hunting, and usually the surface owner is seeking the accommodation. It was only a matter of time until a surface dispute between a mineral owner and a solar energy company made it to a Texas court.

Lyle primarily held that the mineral owner's claim to enforce the accommodation doctrine on the solar company was not ripe. The appellants, aligned as the "Lyles," owned an undivided 27.5% of the minerals underlying Section 14 and had no plans to lease or develop their minerals. *Lyle*, 618 S.W.3d at 862–63. The 1948 Deed that severed the minerals and the surface reserved "the right to such use of the surface estate in [Section 14] as may be usual, necessary, or convenient in the use and enjoyment of the oil, gas, and general mineral estate hereinabove reserved." *Id.* at 870.

Drgac owned all of the surface of Section 14 and none of the minerals. *Id.* at 863. In 2015, Drgac leased a portion of Section 14 and other adjoining sections to Midway Solar, LLC to construct a solar farm. *Id.* The executed leases expressly recognized that Drgac did not own the minerals. *Id.* The leases were amended to include "designated drill site tracts," which were parcels of land that were left undeveloped for the benefit of any present or future oil and gas operator, and they were located on the north 80 acres and the south 17 acres of Section 14. *Id.* The Lyles had no input on the locations selected for the designated drill site tracts. *Id.* Midway developed 215 acres, approximately 70% of the surface, with solar panels located between the designated drill site tracts. *Id.*

Midway obtained and recorded surface waiver agreements from mineral owners of the adjoining sections that relinquished rights to use the surface of the leased premises for mineral exploration. *Id.* at 864. However, the waivers mistakenly included Section 14 when none of the parties to those waivers owned minerals in Section 14. *Id.* The Lyles complained this created a cloud on their title. *Id.* Midway took actions to correct the issue, including filing a disclaimer of interest, but none of the curative actions were signed by the individuals who signed the original surface waivers. *Id.* at 864.

The Lyles filed suit against Drgac, Midway, and the individuals who signed the waivers asking the court to (1) quiet title in their mineral estate, (2) find that the terms of the 1948 Deed were breached by denying them reasonable access to their minerals, and (3) find that there was a trespass on the mineral estate. *Id.* at 864–65. "The Lyles sought damages for the alleged trespass and breach of contract, contending that the construction of the solar facility had 'destroyed and/or greatly diminished the value' of their mineral estate," and they sought an injunction to remove the panels. *Id.* at 865. The trial court ruled against the Lyles on every issue on partial summary judgment. *Id.* at 865–67. The main issue on appeal was whether the accommodation doctrine applied. *Id.* at 867.

The *Lyle* court began by restating the fundamentals of the accommodation doctrine. To use the accommodation doctrine, the surface owner carries the burden to prove three elements: "(1) the mineral owner's use of the surface completely precludes or substantially impairs the surface owner's existing use, . . . (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued," and (3) "''further prove that given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the [mineral owner] which will allow recovery of the minerals and also allow the surface owner to continue the existing use.'" *Id.* at 869 (quoting *Merriman*, 407 S.W.3d at 249). If the surface owner can carry all of their burden, the accommodation doctrine may require the adoption of that alternative method by the mineral owner and its lessee. *Lyle*, 618 S.W.3d at 869. However, if there is only one means of surface use by which to produce the minerals, then the mineral owner has the right to pursue that use, regardless of surface damage. *Id.* (citing *Tarrant Cty. Water Control & Improvement Dist. No. One v. Haupt, Inc.*, 854 S.W.2d 909, 912 (Tex. 1993)). Because the accommodation doctrine deals with specific property rights, and parties to a deed are free to contract as they see fit, the express provisions of a deed will control over the accommodation doctrine. *Lyle*, 618 S.W.3d at 869.

The Lyles initially contended that the use of the term "usual" in the 1948 Deed expressly reserved the right to drill vertically, which would preclude their need to use the accommodation doctrine. *Id.* at 870. The Lyles argued that the usual manner of drilling for oil and gas in 1948 when the deed was drafted was through vertical wells, so its intent was to allow for vertical wells, instead of horizontal. *Id.* However, the court found that "usual" is no more precise than "necessary" or "convenient," which have already been found to lack precision, so the 1948 Deed does not preclude the application of the accommodation doctrine. *Id.* at 871. Alternatively, if the accommodation doctrine applies, the Lyles relied on the Texas Supreme Court's holding in *Haupt*, which dealt with a tract of land flooded to create a reservoir. *Id.* at 872-73. In that case, the court found that the lessee had the right to pursue surface drilling under the accommodation doctrine when that was the only manner of use whereby the minerals could reasonably be produced. *Id.* at 873.

Midway, on the other hand, argued that its solar panels might only potentially interfere with the development of the minerals at some unknown point in the future, and until it actually did interfere, the Lyles did not have the right to use or control the use of the surface. *Id.* at 873. Midway relied on *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39 (Tex. 2017), where Anadarko obtained a surface lease to drill through a mineral tract leased by Lightning to get to an adjacent mineral tract leased by Anadarko. Lightning brought trespass claims and sought to enjoin Anadarko from drilling through the subsurface it had leased. *Lyle*, 618 S.W.3d at 873–74. Part of Lightning's argument was that Anadarko could potentially disrupt Lightning's future development. *Id.* at 873–74. However, the Court ruled in favor of Anadarko because a decision in favor of Lightning "would render the mineral estate absolutely dominant and significantly alter the balance achieved through the flexible nature of the accommodation doctrine." *Id.* at 874 (quoting *Lightning*, 520 S.W.3d at 52). The *Lyle* court ruled primarily in favor of Midway. It held that Midway does not owe a duty to the Lyles until the Lyles seek to develop their minerals. *Id.* at 874. Further, the court opined that there were too many unknown variables associated with potential future mineral development that would make determining current damages to a mineral owner impossible and illogical, especially since the minerals may never be developed. *Id.* at 874. "We therefore conclude that any trespass or breach of contract claim is premature until such time as the Lyles actually seek to develop their mineral estate." *Id.* at 875. Additionally, the court found that Midway's curative was ineffective to cure the cloud on title and remanded that matter to the trial court to quiet title. *Id.* at 877–79.

Lyle adds to the long history of common law developed in Texas pertaining to the accommodation doctrine. The case reiterates that the accommodation doctrine is not ripe until a mineral owner seeks to develop its mineral estate. However, the court's ruling, and the fact pattern it is based on, leave several questions unanswered. For example, what actions would constitute a mineral owner "seeking" to develop their minerals? Also, are designated drill site tracts a reasonable alternative for a mineral developer in an accommodation doctrine case?

Because solar panels cover most, if not all, of the surface, obtaining surface waivers from the mineral owner and the lessee of the minerals if the minerals are leased, continues to be the most effective way for a solar developer to protect its investment. Additionally, this case demonstrates why a solar developer should take land title seriously, or it may end up as a defendant in litigation. At the time of this analysis, a petition for review has been filed and is pending in this case, so professionals in the energy industry should keep a close eye on any developments.

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5201 Democracy Drive
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