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End of the Trail: Supreme Court to Hear Atlantic Coast Pipeline Appeal

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On October 4, 2019, the Supreme Court of the United States granted certiorari to hear an appeal of the Fourth Circuit's decision vacating the United States Forest Service's special use permit authorizing the Atlantic Coast Pipeline (ACP) to cross beneath a segment of the Appalachian National Scenic Trail. In *Cowpasture River Preservation Association v. Forest Service*, 911 F. 3d 150 (4th Cir. 2018), a three-judge panel from the Fourth Circuit Court of Appeals ruled that the United States Forest Service lacked the statutory authority pursuant to the Mineral Leasing Act (MLA) to grant a pipeline right-of-way across the Appalachian Trail. The Fourth Circuit's decision halted the construction of the ACP. If the decision stands, it could impede the completion of the ACP and affect other current and future pipeline projects along the east coast, like the Mountain Valley Pipeline, that would also cross the Trail.

Background

The ACP is a 600-mile proposed pipeline that will transport natural gas from the Marcellus and Utica Shale plays of West Virginia to consumers in eastern Virginia and North Carolina. The proposed pipeline route winds through private, state and federal lands, including two national forests and a national trail. At a point in the George Washington National Forest, the pipeline's proposed path crosses 600 feet beneath the Appalachian National Scenic Trail, a 2,000-mile footpath that extends through 14 states from Georgia to Maine.

After obtaining FERC approval, the Forest Service, having administrative jurisdiction over national forest lands, issued a special use permit authorizing Atlantic Coast Pipeline, LLC (Atlantic) to construct its pipeline through the George Washington National Forest, including beneath the forest lands traversed by the Appalachian Trail. The Forest Service also granted Atlantic a right-of-way for pipeline purposes through the same lands. Several environmental groups, led by Cowpasture River Preservation Association, petitioned the Fourth Circuit to vacate the Forest Service's decisions on multiple grounds.

Fourth Circuit Decision

In December 2018, the Fourth Circuit granted Cowpasture's petition and vacated the special use permit and right-of-way issued by the Forest Service.[1] The court's opinion largely faults the Forest Service's decision-making process in granting the special use permit and right-of-way, and castigates the Forest Service for having a change of "tenor" during its administrative review, stating that the Forest Service modified its stance on the amount of information it needed before it would make a decision.[2] Additionally, and perhaps an even larger impediment to the ACP's progress, the court ruled that the Forest Service lacked the authority under the MLA to grant a pipeline right-of-way through land in the George Washington National Forest traversed by the Appalachian Trail.[3]

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[1] *See Cowpasture River Preservation Association v. Forest Service*, 911 F. 3d 150, 155 (4th Cir. 2018).
[2] *Id.* at 158.
[3] *Id.* at 155.

The MLA authorizes "the Secretary of the Interior or appropriate agency head" to grant pipeline rights-of-way across "Federal lands".[4] Under the Act, "Federal lands" are defined as "all lands owned by the United States except lands in the National Park System."[5] National Park System lands are "any areas of land and water" administered by the Secretary of the Interior through the National Park Service.[6]

The National Scenic Trail Act (Trails Act) charges the Secretary of Interior with the overall administration of the Appalachian Trail, and the Secretary has assigned management authority of the Trail to the National Park Service.[7] The Trails Act provides that the Appalachian Trail is to be administered "primarily as a footpath" by the Secretary, in consultation with any other Federal agencies whose land the Trail traverses.[8] The Park Service has acknowledged "[w]hile responsibility for overall Trail administration lies with the National Park Service," Federal agencies, such as the Forest Service, retain their jurisdiction[9] over the lands through which the Trail passes.[10]

The Fourth Circuit, however, viewed the Appalachian Trail and its underlying lands as being under the administrative jurisdiction of the National Park Service. The court held that the segment of land in the George Washington National Forest that the Appalachian Trail traverses is land within the National Park System and therefore is exempt from the MLA. In the court's view, because Congress, through the Trails Act, designated the Appalachian Trail as a National Scenic Trail to be administered by the Secretary of the Interior, who delegated that authority to the National Park Service, the Appalachian Trail is land in the National Park System.[11] Because the Trail is land in the National Park System, the court held that the Forest Service was not the "appropriate agency head" under the MLA to grant a right-of-way across the Appalachian Trail, notwithstanding the fact that National Park lands are outside the scope of the MLA.

The Fourth Circuit's decision ostensibly converts National Forest lands underlying the Appalachian Trail, which are generally considered to be under the jurisdiction of the Forest Service, into lands in the National Park System, under the jurisdiction of the National Park Service. Because the court categorizes the land traversed by the Trail as National Park land, it considered this land to be excluded from the MLA. Under the court's decision, authority to grant a right-of-way across the Trail would need to come from another statute authorizing pipeline rights-of-way across National Park lands.

Arguments on Appeal to Supreme Court

On appeal, Atlantic and the Forest Service (Petitioners) argue that the Forest Service has jurisdiction over the forest lands traversed by the Trail and that, pursuant to the MLA, it is the appropriate federal agency to grant pipeline rights-of-way beneath these lands.

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[4] 30 U.S.C. §185(a).
[5] 30 U.S.C. § 185(b)(1).
[6] 54 U.S.C. § 100501.
[7] 16 U.S. C. § 1246(a)(1)(A).
[8] 16 U.S. C. § 1244(a)(1).
[9] Jurisdiction, as used throughout, includes the right to exercise the incidents of ownership, including the right to grant rights-of-way or easements.
[10] *See* Nat'l Park Serv., *Appalachian Trail Management Plan* 12-13 (1981); Nat'l Park. Serv., *Appalachian Trail Management Plan* III-1 (2008); General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30,252.01-30,253 (June 30, 1983); Director's Order No. 45: National Trails System, 6-8 (2013).
[11] *Cowpasture*, 911 F.3d at 179.

Petitioners assert that the Weeks Act provides the Forest Service with jurisdiction over the forest lands at issue. The Weeks Act, signed into law in 1911, empowers the Secretary of Agriculture to acquire land to be "permanently reserved, held, and administered as national forest lands."[12] Pursuant to such authority, the Secretary of Agriculture acquired lands to form the George Washington National Forest. The Secretary, who is vested with administrative jurisdiction over national forests, delegated such authority to the Forest Service.[13] Petitioners argue that Congress intended for the Weeks Act to preserve all land in the George Washington National Forest as permanent national forest lands, to be forever under the jurisdiction and control of the Forest Service. The segment of forest land traversed by the Trail, they argue, is no exception.

Petitioners argue the fact that the Appalachian Trail traverses the Forest does not alter the Forest Service's jurisdiction over the land. In their briefs, the Petitioners point to a section of the Trails Act expressly providing that "nothing contained in [the Act] shall be deemed to transfer among Federal agencies any management responsibilities under any other law for federally administered lands which are components of the National Trails System."[14] Further, Petitioners note that the Trails Act provides that the "Appalachian Trail shall be administered primarily as a footpath" and argue that this designation of responsibility to administer the Trail neither converts the lands through which the Trail passes into Park System lands nor displaces the Forest Service's jurisdiction to administer such lands.[15] Petitioners suggest if Congress intended for the Trails Act to transfer jurisdiction over federal lands between federal agencies, it would have expressly stated that in the text of the statute, like it did in the Rivers Act, enacted the very same day.[16]

In opposition, Cowpasture urges the court to affirm the Fourth Circuit's decision. It maintains that the circuit court's decision was correct on the merits and no dispute exists as to whether this segment of the Appalachian Trail is part of the National Park System. The group claims that the issue before the Court does not rise to a level of national importance and that Atlantic can seek alternative routes to circumvent the Trail.[17]

Multiple environmental groups and trade associations filed amicus briefs. A coalition of 18 states, led by West Virginia, submitted an amicus brief supporting the Petitioners arguments and urging the Court to allow the pipeline's construction.[18]

Conclusion

The Fourth Circuit's ruling in Cowpasture, if upheld, poses a potentially significant barrier to the ACP and other current and future pipeline projects planned to traverse national scenic trails. Pipelines like the ACP are a safe and environmentally-friendly solution for transporting critical resources to customers. The high Court heard oral argument on February 24, 2020 and its decision is expected by early July. The case is styled before the Court as *United States Forest Service, et al. v. Cowpasture River Preservation Association, et al.*, No 18-1584.

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[12] 16 U.S.C. § 521.
[13] *See* 16 U.S.C. § 472 and 36 C.F.R. 200.3(b)(2).
[14] *See* Atlantic's brief, 2019 U.S. S. CT. Briefs Lexis 7158, pg. 37, *citing* 16 U.S. C. §1246(a)(1)(A).
[15] *Id.*
[16] The Rivers Act expressly provides that "[a]ny component of the national wild and scenic rivers system that is administered by the Secretary of the Interior through the National Park Service *shall become a part of the national park system*." 16 U.S.C. § 1281 (c) (emphasis added).
[17] *See generally* Respondent's brief, 2019 U.S. S. CT. Briefs Lexis 3597.
[18] 2019 U.S. S. CT. Briefs Lexis 7305.

Fifth Circuit: Court Finds Request for Payment to New Lessor Not Adequate Notice under Article 137

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The Fifth Circuit's opinion in *Louisiana Oil & Gas Interests, L.L.C. v. Shell Trading U.S. Company, et al.*, No. 19-30396, 2020 WL 701066 (5th Cir. Feb. 12, 2020) provides some guidance as to what constitutes "notice" under Louisiana Mineral Code Article 137.[1]

Plaintiff, Louisiana Oil & Gas Interests, L.L.C., alleged that on January 17, 2014, it sent a letter to defendant, Shell Trading U.S. Company ("Shell"), informing Shell that it had acquired interest in a mineral lease from Thomas Barr IV Louisiana Properties-General, Limited Liability Company ("Properties-General") and requesting future payments be issued to Plaintiff. Shell responded that Plaintiff needed to submit a copy of the recorded transfer.

Plaintiff did not send Shell a copy of the recorded transfer, and Shell continued to remit payment to Properties-General. Thomas Barr, IV is the sole owner of both Plaintiff and Properties-General. Plaintiff was able to deposit the checks into its bank account despite not being the payee. In 2015, Plaintiff switched banks and was no longer able to deposit the checks issued to Properties-General. On April 21, 2015, Plaintiff faxed Shell a copy of the recorded transfer, and on April 23, sent a letter to Shell enclosing the March and April 2015 checks issued to Properties-General. The letter stated:

> Enclosed please find the following checks returned to Shell Trading for reissuance in the new name Louisiana Oil & Gas Interests, LLC, as is evidenced by the Transfer and Assignment faxed to you.
>
> 0000289629 3/19/2015 $54,410.35 Owner#420540 Citibank
> 0000295338 4/19/2015 $45,345.48 Owner#420540 Citibank
>
> Thank you for your assistance in the re-issuance of these checks as soon as possible.

Shell issued payment to Plaintiff for the March and April royalty on June 2, 2015. Plaintiff sued Shell and the other lessee, Gulfport Energy Corporation ("Gulfport"), for failure to pay royalties, contending that Shell and Gulfport had thirty days after the January 2014 letter to pay royalties due and thirty days after the April correspondence to remit the April 2015 payment. Plaintiff sought double royalties, attorney's fees, and costs under Articles 139 and 140 of the Louisiana Mineral Code.[2]

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[1] Article 137 states:

> The lessee shall have thirty days after receipt of the required notice within which to pay the royalties due or to respond by stating in writing a reasonable cause for nonpayment. The payment or nonpayment of the royalties or stating or failing to state a reasonable cause for nonpayment within this period has the following effect on the remedies of dissolution and damages.

[2] Article 139 states:

> If the lessee pays the royalties due in response to the required notice, the remedy of dissolution shall be unavailable unless it be found that the original failure to pay was fraudulent. The court may award as damages double the amount of royalties due, interest on that sum from the date due, and a reasonable attorney's fee, provided the original failure to pay royalties was either fraudulent or willful and without reasonable grounds. In

Shell and Gulfport filed Rule 12(b)(6) motions to dismiss for failure to state a claim, arguing that Shell timely paid all royalties to the lessor of record and that Plaintiff never gave the statutorily-required notice under Article 137. Gulfport additionally argued that Plaintiff never sent any written correspondence to it, only to Shell.[3]

The Western District of Louisiana granted the motions to dismiss. Plaintiff appealed. The Fifth Circuit reviewed de novo and affirmed. The Fifth Circuit quoted *Rivers v. Sun. Expl. & Prod. Co.*, 559 So. 2d 963, 968-69 (La. App. 2d Cir. 1990) when it noted that the notice under Article 137 is not a "demand for performance;" it "is merely to inform the lessee he has not paid royalties deemed by the lessor to be due." The court then relied on *Ross v. Enervest Operating, L.L.C.,* No. 48,229 (La. App. 2 Cir 6/26/13); 119 So. 3d 943, 960 in finding that the January 2014 letter was not adequate notice because it informed Shell of the transfer and requested future payments to be made to Plaintiff, but it did not state that any royalty payments were past due.

Likewise, the court found that the April 2015 letter was not adequate notice under Article 137. It made the same request as the January 2014 letter and did not complain that Shell had failed to make royalty payments. The Fifth Circuit agreed with the district court that it did "not give rise to a reasonable inference that any deficiency in payment ha[d] occurred." The court noted that while an argument could be made that the April 2015 letter "was, in effect, notice that Shell had 'improperly made payment, the adequacy of Article 137 notice is made on a case-by-case basis" and "it is reasonable, as a matter of law, to construe the April 2015 letter as another request that prospective payments be made out to Plaintiff, and not as notice of a failure to make proper payments."

> all other cases, such as mere oversight or neglect, damages shall be limited to interest on the royalties computed from the date due, and a reasonable attorney's fee if such interest is not paid within thirty days of written demand therefor.

Article 140 states:

> If the lessee fails to pay royalties due or fails to inform the lessor of a reasonable cause for failure to pay in response to the required notice, the court may award as damages double the amount of royalties due, interest on that sum from the date due, and a reasonable attorney's fee regardless of the cause for the original failure to pay royalties. The court may also dissolve the lease in its discretion.

[3] The Fifth Circuit did not address this argument.

Under Statute Authorizing Penalty Against Any Company that "Maintains" Inaccurate Reports, Company had Duty to Correct Its Past Reports After ONNR Notified It of Inaccuracies

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Statoil USA E&P, Inc. v. United States Dept. of Interior, 2020 WL 476394 (5th Cir. 2020) involves an oil and gas lease held by Statoil on the Outer Continental Shelf. In August 2010, the federal government's Office of Natural Resources Revenue (ONRR) found "significant volume variances" when comparing natural gas production information reported by Statoil for the period April 2006 through December 2007 to information ONRR acquired from gas-plant operators. ONRR therefore sent an order to Statoil instructing Statoil to correct its reports within 30 days. The order also noted that Statoil could incur penalties if it failed to comply. Statoil did not correct its reports within 30 days.

ONRR contacted Statoil about the variances again in both January 2011 and May 2011. Statoil acknowledged that its prior reports were inaccurate, but it did not correct the reports. In August 2011, ONRR informed Statoil that penalties would accrue for a "knowing or willful failure to maintain accurate information." Statoil still failed to correct its reports.

In February 2012, ONRR sent a notice of civil penalty to Statoil. ONRR relied on 30 U.S.C. § 17119(d), which authorizes the imposition of a penalty against any person who "knowingly or willfully prepares, maintains, or submits false, inaccurate, or misleading reports, notices, affidavits, records, data, or other written information." Under the provision, ONRR may impose a penalty of up to $25,000 per violation for each day that a violation continues. ONRR imposed a penalty of $50 per day for each inaccurate report, starting from the date in January 2011 when Statoil first acknowledged that the reports were inaccurate. The total penalty amounted to $406,350.

In imposing the penalty, ONRR stated that the penalty was being imposed for a "knowing and willful maintenance of incorrect information on gas sales volumes reported." Statoil challenged the penalty, arguing to an administrative law judge that the company had not "maintained" inaccurate reports because the reports were stored in ONRR's online database. Thus, ONRR had "maintained" the data. Statoil asserted that, in order to "maintain" information, a person must be in possession of the information. The administrative law judge rejected that argument. Statoil appealed to the Department of Interior's Board of Land Appeals, but the Board affirmed. Statoil appealed to the United States District Court for the Southern District of Texas, but the district court affirmed. Statoil then appealed to the United States Fifth Circuit.

The Fifth Circuit also rejected Statoil's arguments and affirmed. The court noted that, in the Webster's Third New International Dictionary, one meaning of "maintain" is "to keep in a state of repair, efficiency, or validity." The court concluded that, for purposes of 30 U.S.C. § 1719(d), a lessee must correct reports that they know are false, inaccurate, or misleading in order to avoid liability for having maintained inaccurate records. The court stated that it makes little sense to interpret § 1719(d)'s sanctions for maintaining inaccurate records to apply only when a company has physical possession of the inaccurate information. Indeed, stated the Fifth Circuit, "In the context of an online record-keeping system, a distinction based on physical possession makes even less sense."

The Fifth Circuit also stated that Statoil's interpretation of § 1719(d) would "lead to bizarre results" because it would only penalize a company for maintaining inaccurate internal records, and would not penalize a company for failing to correct inaccurate data supplied to the federal government and kept in a government database, even though the government is more likely to use and rely on the data submitted to the government and kept in its database.

U.S. Ninth Circuit Holds that Plaintiffs Lack Standing to Pursue Case Seeking an Order Requiring that Government Develop a Plan to "Phase Out Fossil Fuel Emissions"

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Twenty-one young individuals and an environmental organization sued the United States, the President of the United States, and federal agencies (collectively, the "government"), complaining that the federal government is continuing to "permit, authorize, and subsidize" the use of fossil fuels. The plaintiffs allege that this causes climate change, and climate change causes various harms to the plaintiffs, including psychological harm, impairment to recreational interests, exacerbation of medical conditions, and property damage. The plaintiffs' complaint asserted that they had causes of action for violations of: (1) the plaintiffs' substantive due process rights; (2) their rights to equal protection under the Fifth Amendment to the U.S. Constitution; (3) their rights under the Ninth Amendment; and (4) the public trust doctrine. The plaintiffs sought declaratory relief and an injunction requiring the government to develop and implement a plan to "phase out fossil fuel emissions."

The defendants moved to dismiss on several grounds. The federal district court in Oregon denied the motion, holding that the plaintiffs had standing to sue, that their claims were justiciable, that they stated a cause of action for violation of the Fifth Amendment due process right to a "climate system capable of sustaining human life," and that they stated a public trust doctrine claim that was based on the Fifth and Ninth Amendments.

The federal government unsuccessfully sought a writ of mandamus from the Ninth Circuit and then the Supreme Court. The defendants moved for summary judgment. The district court granted summary judgment on the Ninth Amendment claim, dismissed the President as a defendant, and dismissed in part the plaintiffs' equal protection claims (the court rejected the plaintiffs' argument that age is a suspect class for purposes of equal protection).

The district court denied the government's motion to certify the issues for interlocutory appeal. The Ninth Circuit "invited" the district court to reconsider, noting that, although the Supreme Court had denied mandamus, the Supreme Court had expressed concerns about the justiciability of the case. The district court then "reluctantly" certified the issues for interlocutory appeal and stayed the case. The defendants took an interlocutory appeal to the Ninth Circuit.

The Ninth Circuit began by implying sympathy with the plaintiffs' position, stating that the plaintiffs had presented evidence that the government's "failure to change existing policy may hasten an environmental apocalypse." The Ninth Circuit then analyzed the parties' arguments. The court rejected the defendants' contention that, because the plaintiffs effectively were seeking a change in regulations, they were obligated to proceed under the Administrative Procedures Act.

The appellate court next discussed whether the plaintiffs had standing. The court stated that, in order for a plaintiff to have Article III standing, jurisprudence from the U.S. Supreme Court establishes that: (1) the plaintiff must allege a concrete and particularized injury; (2) the injury must allegedly be caused by the conduct about which the plaintiff claims; and (3) the alleged injury must be redressable by a favorable judicial decision.

The Ninth Circuit concluded that the plaintiffs satisfied the requirement of having alleged a concrete and particularized injury. In order to satisfy this element, it is not required that each plaintiff allege an injury that is concrete and particularized. It is sufficient that at least one plaintiff allege a concrete and particularized injury. In this case, one plaintiff alleged that she was forced to leave her home because of water scarcity. Another plaintiff alleged that his home had been subject to coastal flooding. The Ninth Circuit concluded that the district court correctly held that these alleged injuries were concrete and particularized. Thus, the first element for the existence of Article III standing was satisfied.

The Ninth Circuit concluded that the plaintiffs had also satisfied the causation element. The plaintiffs alleged that carbon dioxide emissions from the U.S. currently account for a significant portion of the world's emissions—about 15%—and that emissions from the U.S. had accounted for a greater portion of the total in the past. Further, the plaintiffs had presented evidence that would tend to show that carbon dioxide emissions were causing climate change and that climate change would cause the types of harm the plaintiffs alleged. The appellate court stated this satisfied the causation element.

Finally, the Ninth Circuit addressed the third element—redressability. The court noted the record showed that addressing climate change would require a "fundamental transformation of this country's energy system" that "can be achieved only through a comprehensive plan." Expert testimony showed that this would require "everything from energy efficient lighting to improved public transportation to hydrogen-powered aircraft." The plaintiffs conceded that the relief they requested would not be sufficient alone to solve climate change problems, but it would help.

The Ninth Circuit reasoned that the sort of comprehensive plan that the plaintiffs sought would require extensive oversight by the court. The plaintiffs argued that the court need not develop the plan, but only need order the government to develop and implement a plan. The court believed, however, that an order that the government develop and implement a plan would likely lead to disputes regarding the adequacy of any plan developed by the government. The plan would require a great deal of policymaking and choices between different policy options. These decisions were matters best decided by the political branches, rather than courts. "And, given the complexity and long-standing nature of global climate change, the court would be required to supervise the government's compliance with any suggested plan for many decades."

In addition, the court noted that the plaintiffs were not alleging the violation of a purely procedural right that could be remedied just by requiring a hearing. For these reasons, the Ninth Circuit held that the redressability requirement was not satisfied. Therefore, the plaintiffs lacked Article III standing. The court remanded to the district court and ordered the court to dismiss for lack of Article III standing.

One judge dissented.

Laches Held to be a Cognizable Offensive (As Opposed to Defensive) Claim to Establish Title to Mineral Interests in New Mexico

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Parties usually plead laches as an affirmative defense to offensive claims for relief, including in suits for quiet title or trespass to try title. In *TDY Indus., LLC v. BTA Oil Producers, LLC*, 2019 WL 4014852 (D.N.M. Feb. 15, 2019), however, the District Court for the Federal District of New Mexico applied New Mexico precedent to permit a plaintiff to plead laches offensively to establish title to mineral interests—much as one would assert the statute of limitations offensively to establish title by adverse possession.

In 1968, Borax contracted with CARCO to sell its real property interests in New Mexico, including its mineral interests. The parties executed a number of documents to memorialize the transaction, including four separate warranty deeds. An escrow agreement, a supplemental escrow agreement, and a land inventory indicated that Borax was divesting all of its real property interests in New Mexico, including all oil and gas and mineral rights.

One of the warranty deeds from Borax to CARCO executed in the transaction, the "893 Deed," conveyed the surface estate only to certain lands, which included the lands at issue in this case. For some of the lands in the 893 Deed, Borax did not own the oil and gas rights. However, for other lands in the 893 Deed, Borax did own the oil and gas rights (the "Disputed Oil and Gas Rights"), and these were not conveyed by the 893 Deed. Borax later acknowledged that the reservation of oil and gas rights in the 893 Deed was in error.

In 1972, TDY succeeded to all the rights of CARCO including the Disputed Oil and Gas Rights. TDY alleged it had "openly leased the mineral estate, allowed development, and received royalties for oil and gas production" on the Disputed Oil and Gas Rights continuously for more than 10 years.[1]

In 2014, BTA leased from TDY a 40-acre portion of the Disputed Oil and Gas Rights. Discovering the "surface estate only" language in the 893 Deed, BTA required TDY to obtain a quit claim deed from Borax or file a quiet title action to remove Borax's claim as a cloud on title. TDY failed or refused to satisfy the requirement.

Ultimately, BTA obtained two quit claim deeds from Borax conveying to BTA the Disputed Oil and Gas Rights. BTA then began to produce oil and gas from the Disputed Oil and Gas Rights without TDY's permission and without paying TDY compensation. BTA also allegedly contacted TDY's other lessees and claimed superior title to the Disputed Oil and Gas Rights.

TDY brought this action to quiet title to the Disputed Oil and Gas Rights under a number of theories. The case came before the court on BTA's motion to dismiss for failure to state a claim as to particular causes of action, including, in relevant part for this article, TDY's claim of "offensive laches." Functionally, TDY's offensive laches claim alleged that BTA and its predecessor, Borax, delayed in asserting its rights to TDY's prejudice, which would preclude BTA from claiming title superior to TDY.

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[1] *TDY Indus., LLC v. BTA Oil Producers, LLC*, 2019 WL 4014852 *2 (D.N.M. Feb. 15, 2019).

Laches is typically plead as an affirmative defense—a bar to another party's recovery. Under New Mexico law, the elements of laches are: (1) conduct on the part of another which forms the basis for the litigation in question; (2) delay in the assertion of the complaining party's rights; (3) lack of knowledge or notice on the part of the [party invoking laches] that the complaining party would assert such rights; and (4) injury or prejudice to the [party invoking laches] in the event relief is accorded to the complaining party or the suit is not barred.[2]

In general, laches "never runs in favor of one claiming real property, by or through a void deed, who is not in possession or *against a duly recorded title.*"[3] However, a panel of the New Mexico Court of Appeals has permitted laches to be asserted offensively where issues are joined by a claim and counterclaim, and one of the claims is for declaratory relief.[4]

The *Village of Wagon Mound* court reasoned, "[W]e see no theoretical reason why laches can only be asserted in defense. Laches is designed to prevent litigation of a stale claim where the claim should have been brought at an earlier time and the delay has worked to the prejudice of the party resisting the claim.... The core of the doctrine is concern over staleness and prejudice.... The order in which parties appear on the caption should not carry the critical weight the [defendant] espouses."[5]

In the present case, the court found that New Mexico law does not preclude a claim for offensive laches, at least where the issues are joined by complaint and counterclaim and declaratory relief is sought. The court further found that TDY's complaint sufficiently alleged facts to plead a claim of offensive laches. In particular, the complaint alleged that Borax delayed in asserting a right to ownership of the Disputed Oil and Gas Rights, which was sufficient to state a claim against BTA because BTA stepped into the shoes of Borax with respect to the Disputed Oil and Gas Rights.

Accordingly, the court denied BTA's motion to dismiss TDY's claim for offensive laches as a matter of law, and permitted the case to proceed to the discovery phase of litigation.

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[2] *Id.* at * 5.
[3] *Mosely v. Magnolia Petroleum Co.*, 114 P.2d 740 (N.M. 1941).
[4] *Village of Wagon Mound v. Mora Tr.*, 62 P.3d 1255, 1265 (N.M. Ct. App. 2002).
[5] *Id.*

First Assignee of Oil and Gas Lease Loses Title to a Subsequent Assignee Under New Mexico's Recording Statute Because of a Defective Notary's Acknowledgment

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Marathon Oil Permian, LLC v. Ozark Royalty Co., LLC, 2019 WL 1433363 (D.N.M. Mar. 29, 2019) demonstrates the power of recording statutes to change the ownership of interests in land.

In November 2016, Ozark obtained an oil and gas lease from Herren-Sweat covering 40 mineral acres in Lea County, New Mexico. The lease was recorded, and the recorded version was stamped "Please Return Recorded Originals to: Black Mountain." Less than a month later, Ozark assigned the Herren-Sweat lease to Black Mountain. Mr. Coker signed the assignment on behalf of Ozark. "However, in the certificate of acknowledgment, a notary public notarized *his own name* when he should have notarized that of the signing party, Mr. Coker."[1] On March 22, 2017, the county clerk rejected the Ozark/Black Mountain assignment for recording because of the error.

On June 1, 2017, Black Mountain assigned the Herren-Sweat lease to Marathon, effective March 1, 2017. Marathon recorded the Black Mountain/Marathon assignment on June 8, 2017, with no problem. Marathon and Black Mountain then pressed Ozark to fix the defective acknowledgment on the Ozark/Black Mountain assignment. Ozark refused and took the position that the defective acknowledgment invalidated the assignment for all purposes.

On November 22, 2017, Ozark assigned the very same Herren-Sweat lease, which it had previously assigned to Black Mountain, to Tap Rock. Tap Rock recorded the assignment successfully in December 2017. Marathon (successor to Black Mountain's interest) then notified Tap Rock of its prior claim to the lease. On June 13, 2018, Marathon filed this action (invoking diversity jurisdiction) alleging quiet title against Tap Rock and claims against Ozark for declaratory judgment, slander of title, and breach of contract.

The case came before the District Court for the Federal District of New Mexico on Marathon's motion for partial summary judgment against Tap Rock on the quiet title claim and Ozark's motion to dismiss Tap Rock's claims of slander of title and breach of contract.

The primary issues before the court were whether Tap Rock was on notice of, and therefore took subject to, Marathon's interest in the lease either because (A) the Black Mountain/Marathon assignment was duly recorded, or (B) the original lease was stamped "Please Return Recorded Originals to: Black Mountain," which should have alerted Tap Rock that Black Mountain had an interest in the lease, enabling Tap Rock to locate the Black Mountain/Marathon assignment in the grantor index.

In general, under New Mexico law a purchaser of an interest in land, including an oil and gas lease, takes subject to prior interests of which it had notice. New Mexico has a notice-type recording statute, N.M. Stat. Ann. 14-9-3, which states, "No . . . instrument in writing not recorded . . . shall affect the title or rights to, in any real estate, of any purchaser, . . . without knowledge of the existence of such unrecorded instruments."

[1] *Marathon Oil Permian, LLC v. Ozark Royalty Co., LLC*, 2019 WL 1433363 at *1 (D.N.M. March. 29, 2019) (emphasis added).

Under a notice-type statute, a subsequent purchaser for value prevails if, at the time of conveyance, the purchaser had no actual or constructive notice of the prior conveyance, regardless when the competing conveyances are recorded. A purchaser is charged with constructive notice of all recorded documents in the purchaser's chain of title.

Another form of constructive notice is inquiry notice. Once a prospective purchaser learns of facts that trigger a duty to inquire about the title, the purchaser will be charged with knowledge of such facts as would have been discovered by a reasonably diligent investigation. Thus, to protect against subsequent bona fide purchasers, an owner of an interest in real property must record the instrument creating its interest. To be recorded, an instrument must be properly acknowledged before a notarial officer. N.M. Stat. Ann. 14-8-4. An instrument that is not acknowledged or is improperly acknowledged may not be recorded; if such an instrument is recorded, it is not entitled to constructive notice.

Additionally, a purchaser is deemed to be on inquiry notice of any references or recitals to unrecorded instruments that are made in an instrument that is recorded in the purchaser's chain of title.[2] Inquiry notice includes the terms of, and interest created by, any such unrecorded instruments.

In this case, the court reasoned that Tap Rock was on neither actual nor constructive notice of the Black Mountain/Marathon assignment and thus of Marathon's prior interest in the Herren-Sweat lease. First, the Ozark/Black Mountain assignment was not entitled to constructive notice because it was improperly notarized and thus not recorded.

Second, the Black Mountain/Marathon assignment was not entitled to constructive notice because it was not within Tap Rock's chain of title because it would not have been disclosed by Tap Rock's search of the *grantor index*. The court stated, "If Tap Rock had located Ozark's name in the grantor index and ran it forward, it would not have shown that Ozark parted record to Black Mountain. From Tap Rock's view, Ozark was the record owner of the lease from March 2017 until December 2017, when Tap Rock recorded its interest."[3]

Without stating it explicitly, the court construed N.M. Stat. Ann. 14-10-3, which requires certain fields be included in a county's index of recorded documents. Under this court's implicit interpretation of the statute, instruments must be recorded in a grantor–grantee index to be entitled to constructive notice. There was no discussion of the practice of conducting title searches on numeric tract indexes (either at the office of the recorder of deeds or a private title or abstract company).

In practice, an ordinary and reasonable purchaser in Tap Rock's position would have conducted a search of at least a numeric tract index, which should have disclosed the Black Mountain/Marathon assignment. If correct, this should have placed Tap Rock on inquiry notice of the contents of the Black Mountain/Marathon assignment, leading to a different result in this case.

The court further held that the stamp bearing Black Mountain's name on the original oil and gas lease did not impart constructive notice to Tap Rock or place Tap Rock on inquiry notice. The court stated, "The 'return originals' stamp bearing Black Mountain's name does not qualify as a 'description, recital of fact, [or] reference to other documents,' that put Tap Rock on inquiry. There

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[2] *Camino Real Ents. v. Ortega*, 1988-NMSC-061; *Taylor v. Hanchett Oil Co.*, 1933-NMSC-099.
[3] *Marathon Oil Permian*, at *5 (emphasis added).

is no indication in the Ozark/Ms. Herren-Sweat conveyance that Black Mountain had any relationship to that transaction. Black Mountain's interest is nowhere mentioned on the lease."[4]

The court accordingly denied Marathon's motion for summary judgment and held that Marathon could not establish superior title to the Herren-Sweat lease despite being the prior assignee.

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[4] *Id.* at *6 (internal citations omitted).

Ohio Court Requires Notice and Demand for Development Before Lessor Can Claim Breach of Implied Covenant, Even Where Decades Have Passed Since the Last Well was Drilled

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In *Pavsek v. Wade*, the Seventh District Court of Appeals recently held that under Ohio law, a lessor must give notice and make a demand for additional drilling in order to assert a claim for a breach of the implied covenant to reasonably develop in an oil and gas lease.[1] And, the court held, that remains the case even where the period of non-development lasted for over 80 years.

Plaintiff filed suit to terminate a lease covering 50 acres of land that had a single producing well on it. The well had been drilled pursuant to a nearly-ninety year old oil and gas lease, and evidence submitted on summary judgment suggested that an additional four wells could be drilled on the property given the current spacing requirements, that a reasonable producer would have tested or drilled additional wells, and that it was unlikely that the existing well was fully developing the lease. Nonetheless, the trial court granted summary judgment in favor of the producer, finding that Ohio law provides a lessee with a reasonable period of time to commence drilling operations after receiving notice that a lessor believes further development is required.

In affirming the trial court's decision, the Seventh District rejected the argument that notice is not required when the period of non-development is excessive. It stated: "The concept that notice and demand are waived if there has been no development for an unreasonable period of time does not appear to be supported by the law. The only circumstance under which notice and demand are waived is when the lessee indicates to the lessor, by words or conduct, that he will not commence further development of the lease despite demand made by the lessor."[2] The court's reasoning: "That the lessor has permitted the lessee to hold the lease for a long period of time without demanding development **is an added reason for requiring that the lessor communicate to the lessee** his demand for further development, **rather than a reason for dispensing with notice**."[3] As a consequence, where a lease is being held by production in paying quantities, in order for a lessor to assert a breach of the implied covenant to develop the leased property, the lessor must provide notice demanding further development and provide the lessee with a reasonable time to comply. "This notice is not excused merely because a long time has passed since the still-producing well was drilled."

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[1] 2019-Ohio-5250.
[2] Quoting *Superior Oil Co. v. Devon Corp.*, 604 F.2d 1063, 1070 (8th Cir. 1979).
[3] Quoting 3 *Summers, Oil and Gas*, Section 22:3 (3d Ed.) (emphasis added).

Oklahoma Court of Civil Appeals Reverses Lower Court Order Dismissing Claims for Fraud and Related Causes of Action Under 12 O.S. §2012(B)(6)

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The Oklahoma Court of Civil Appeals in *Devon Energy Prod. Co., L.P. v. Wyckoff*[1] reviewed Devon's appeal of the trial court's judgment granting the Wyckoff defendants' motion to dismiss Devon's suit for failure to state a claim on which relief could be granted under 12 O.S. §2012(B)(6).

Devon alleged that the defendants' attorney "approached Devon about entering into leases with his two clients regarding lease holdings that had recently been released"[2] by Chesapeake Exploration. Devon and the defendants entered into two new oil and gas leases covering Section 3, Township 20 North, Range 17 West, Woodward County, Oklahoma. Devon paid almost $1.6 million for the two leases. The court found that Devon was to assume responsibility for a title search[3] and noted that the new lease did not provide any warranty of title by the defendants. Devon subsequently learned that Chesapeake's only interest in the property at issue was a wellbore in the Wyckoff #2-3 well located on the leased premises. A 1956 lease covering multiple sections, including the mineral acres Devon understood it was acquiring under the new lease, was still held by production from one or more wells. As a result, the Wyckoff and Griffith Trust defendants had no mineral acres available for lease at the time they entered into the new leases with Devon. Yet, the defendants argued that, since they did not warrant title to Devon, the defendants should be permitted to keep the lease payments made by Devon.

In the present lawsuit, Devon asserted claims for breach of implied covenant of quiet enjoyment, actual and/or constructive fraud, rescission and unjust enrichment. The court reviewed Devon's appeal under a de novo standard of review. After reviewing certain prior decisions relevant to the issues before the court, the appellate court concluded that the district court's decision should be reversed in light of Devon's allegation of fraud. It cited findings in a prior case that "the doctrine of caveat emptor would 'not shield a seller from purporting to sell that which he does not have.'"[4] Here, Devon alleged that the defendants knew or should have known the net mineral acres were not available for lease to Devon because they were covered by the 1956 lease that continued to be held in force and effect by production.

The court found that, on the record before it, the court could not determine whether any fraud was perpetrated. "In light of the uniquely fact specific fraud claim presented here, Defendants did not meet"[5] their burden before the district court to show the legal insufficiency of the petition. The Court of Civil Appeals reversed the district court's order granting the defendants' motion to dismiss Devon's petition for allegedly failing to state a claim upon which relief could be granted. The cause was remanded to the district court for further proceedings.

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[1] 2020 OK CIV APP 4, ____ P. 3rd ____.
[2] Id. at ¶2.
[3] The court noted in footnote 2 of this opinion that "Devon's title search did not reveal an existing 1956 lease at the time the parties entered into the lease agreement."
[4] *French Energy, Inc. v. Alexander*, 1991 OK 106, 818 P.2d 1234, at 1239.
[5] 2020 OK CIV APP 4, ____ P. 3rd ____, at ¶9.

Medical Marijuana in Pennsylvania: What Employers in the Oil and Gas Industry Should Know[1]

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Employers face substantial challenges when addressing and preventing substance abuse in the workplace. These challenges may be compounded by recent enactments of states' legislation legalizing or de-criminalizing marijuana. Employers in Pennsylvania, including those in the oil and gas industry, should be ready to face medical marijuana use – and potentially recreational use – by their workforces.

National Legal Landscape

The federal Controlled Substances Act ("CSA") categorizes marijuana as a Schedule I controlled substance. 21 U.S.C. § 844. Schedule I controlled substances are considered to have no accepted medical use with a high probability of addiction. Marijuana's neighbors within Schedule I include heroin and LSD.

Notwithstanding marijuana's continued categorization under the CSA, to date, the District of Columbia and every state except Idaho and South Dakota have enacted laws providing various degrees of public access to marijuana. Public opinion regarding the medicinal and recreational use of marijuana has grown positively for several years with two-thirds of Americans now supporting marijuana legalization according to a recent Pew Research Center survey.

Pennsylvania Legal Landscape

Pennsylvania enacted the Medical Marijuana Act, 35 P.S. § 10231.101, *et seq.* ("MMA"), in 2016. The MMA provides an avenue for Pennsylvanians diagnosed with at least one of 23 serious health conditions to be certified to obtain and use medical marijuana. Notably, individuals are not prescribed medical marijuana; instead, they are certified for its purchase and use. Still, individuals may be subject to criminal penalties if they possess and use marijuana outside the parameters of the MMA.

The MMA restricts both employers and employees. Employees are prohibited from being under the influence while working with chemicals that require a permit, working with high voltage electricity or other utilities, working in confined spaces or at heights, working in life-threatening situations, or working in any setting involving public safety risks.

Employers cannot discharge, threaten, refuse to hire, discriminate, or retaliate against an employee solely on the basis of an individual's certification to use medical marijuana (or on the

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basis of an underlying disability). This prohibition covers most terms and conditions of employment. However, employers are not required to provide an employee a workplace accommodation to ingest marijuana on company property or during work time or to permit employees to work while under the influence.

"Under the influence" is currently a difficult standard to measure for marijuana. Tetrahydrocannabinol, or THC, can remain detectable in a person's system for weeks after last using marijuana. Further, it is difficult, if not impossible, to detect the severity of an individual's level of impairment simply because a drug test detects the presence of THC. This grey area will make the enforcement of drug testing policies difficult under Pennsylvania law. Additionally, the issue of whether a positive drug test is indicative of current impairment will undoubtedly be disputed.

The conflict between the federal CSA and Pennsylvania's MMA has presented a quandary for employers in Pennsylvania seeking to enforce drug policies, especially zero tolerance policies. In fact, enforcement of these drug policies has already exposed employers in Pennsylvania and other states to litigation over a certified medical marijuana user's employment protection.

Courts in jurisdictions with medical and recreational marijuana laws are split regarding applicant and employee protections for marijuana use. In *Coats v. Dish Network, LLC*, the Colorado Supreme Court upheld the termination of a customer service representative who tested positively for THC during a random drug screening because of his state-certified use of medical marijuana. 350 P.3d 849 (Colo. 2015). However, the recent trend has been in favor of certified marijuana users and against employers, especially with respect to the enforcement of zero tolerance drug testing policies. For example, in *Whitmire v. Wal-Mart Stores, Inc.*, the U.S. District Court for Arizona found an employer liable for damages for terminating a certified medical marijuana user after she tested positively for THC. 359 F. Supp. 3d 761 (D. Ariz. 2019).

While there have been several lawsuits filed for alleged violations of the MMA against employers in Pennsylvania, there is no binding legal authority from a Pennsylvania appellate court governing the use of medical marijuana in the employment arena. Employers should be on the lookout for developing cases in Pennsylvania, including:

- *Palmiter v. Commonwealth Health Systems, Inc.*, Lackawanna County C.C.P. Docket No. 19-CV-1315: The Court of Common Pleas in Lackawanna County overruled an employer's argument that an employee terminated for failing a drug test because of state-certified medical marijuana use had no private cause of action under the MMA. The court, acknowledging that the issue is ripe for appeal, granted the employer's motion to amend the prior order for the purpose of taking an interlocutory appeal. *Palmiter* may be the test case that further defines and clarifies employer and employee rights under the MMA.

- *Gesell v. Starline Holdings, LLC*, U.S. District Court for the Western District of Pennsylvania at Civil Action No.: 2:19-cv-01486 (CB): A job applicant filed a lawsuit against a company for rescinding a job offer after he tested positively for THC in a pre-employment drug screening. The plaintiff claims his job would not be a "safety-sensitive" position as outlined in the MMA.

It is also worth mentioning that Pennsylvania may be on the verge of legalizing recreational use of marijuana. In a much-publicized listening tour that visited all 67 counties, Lieutenant

Governor John Fetterman, at the request of Governor Tom Wolf, sought to better understand Pennsylvanians' opinions on the matter. In the final report released in July of 2019, one key takeaway was that 65-70% of tour attendees approved of legalizing recreational marijuana use in the Commonwealth.

U.S. Department of Transportation Drug Testing

The issue of whether a positive drug test is indicative of impairment is virtually neutralized for the approximately 12.1 million transportation employees performing safety-sensitive functions under the jurisdiction of the U.S. Department of Transportation ("DOT"). Mandatory DOT drug testing with specified testing rates occurs in a multitude of sectors for employees in safety-sensitive positions, including those employees who perform operations, maintenance, or emergency-response functions on pipelines or liquified natural gas facilities that are subject to the Pipeline and Hazardous Materials Safety Administration ("PHMSA"). Under PHMSA, 50% of employees performing safety-sensitive functions must be randomly drug tested each calendar year. Importantly, an employee is working in a DOT safety-sensitive position based upon the tasks performed and not the job title. An employee working in a DOT safety-sensitive position who tests positively for THC must immediately be removed from performing safety-sensitive functions. The employer may terminate the employee from such a position or require the employee to follow a course of action governed by DOT regulations before returning to a safety-sensitive position.

Best Practices

Applicant and employee use of medical marijuana represents risk for employers. Employers should assess their risk tolerance and ensure a plan is in place before an applicant or employee fails a drug test and presents a duly issued medical marijuana identification card. Employers should consider:

- Updating and revising drug policies to comprehensively define prohibited substances, including addressing medical and recreational use of marijuana;
- Updating and revising drug testing procedures and staying current on available drug testing methods;
- Ensuring that drug and drug testing policies are uniformly applied;
- Preparing for and engaging in an interactive process if a certified medical marijuana user fails a drug test; and
- Identifying those employees performing safety-sensitive functions so that the DOT's unique drug testing policies are correctly applied.

The legal landscape of marijuana in the employment law arena is fast-paced and subject to rapid change. Employers should be vigilant in staying up-to-date on these developing laws.

Pennsylvania Supreme Court holds that, in absence of physical intrusion into subsurface of neighbor's land, a company's use of hydraulic fracturing does not defeat application of rule of capture. Court declines to decide whether an intrusion by fracturing fluid would constitute trespass.

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In *Briggs v. Southwestern Energy Production Company*, 2020 WL 355911 (Pa. 2020), the plaintiffs owned the surface and mineral rights in an unleased tract of approximately 11 acres. Southwestern Energy held an oil and gas lease on the neighboring tract. Southwestern drilled and conducted hydraulic fracturing on and beneath that neighboring tract.

In November 2015, the plaintiffs filed suit against Southwestern, asserting that Southwestern had extracted natural gas from beneath their tract, and that they had claims for trespass and conversion to recover damages for such extraction. Notably, the plaintiffs did not expressly allege that Southwestern's activities had caused the wellbore or hydraulic fracturing fluid to intrude into the subsurface of their land.

Southwestern filed an answer and requested a declaratory judgment that the company had no liability to the plaintiffs. Southwestern stated that the plaintiffs' claims were barred by the rule of capture. Southwestern also asserted that the plaintiffs had failed to plead the elements necessary to establish a trespass, but Southwestern did not file a preliminary objection in the nature of a demurrer or a motion to dismiss for failure to state a claim. In responding to Southwestern's assertions, the plaintiffs alleged that Southwestern acted with the intent to extract gas from beneath the plaintiffs' land, but the plaintiffs again failed to expressly allege a physical intrusion of any kind.

The parties filed cross motions for summary judgment. In their memoranda to the trial court, the plaintiffs suggested for the first time that Southwestern *might* have caused a physical intrusion into the surface of their land, but they still did not expressly allege that an intrusion had occurred. The trial court denied the plaintiffs' motion and granted Southwestern's motion for summary judgment, concluding that the rule of capture barred the plaintiffs' claims.

The plaintiffs appealed. The appellate court focused much of its discussion on whether the rule of capture should apply in unconventional reservoirs, such as shale formations where hydraulic fracturing is necessary in order to economically produce oil or gas. The appellate court concluded that the rule of capture should not apply if a company uses "artificial" means, such as hydraulic fracturing, to stimulate flow.

The appellate court noted that the plaintiffs did not seem to be basing their claim on a contention that there was a physical intrusion, but the appellate court also characterized the issue before it as whether a trespass occurs when a defendant uses hydraulic fracturing in a way that extends into an adjoining landowner's property and results in the withdrawal of natural gas from beneath that property." The appellate court concluded that a trespass does occur in such circumstances. In reaching that conclusion, the appellate court relied in part on the dissenting opinion in *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008) and the court's decision in *Stone v. Chesapeake Appalachia, LLC*, 2013 WL 2097397 (N.D. W. Va.). Both of those cases involved allegations that the defendant had caused a physical intrusion into the subsurface of the plaintiffs' land. The appellate court reversed the trial court's decision, stating that the plaintiffs' "allegations" were sufficient to preclude summary judgment.

The Pennsylvania Supreme Court agreed to hear the case, which was argued before that court in September 2019. The Pennsylvania Supreme Court noted various curious aspects of the case below. For example, the plaintiffs purported to assert a subsurface trespass claim, but at the trial court level they never alleged—either in their pleadings or their briefing—that Southwestern had caused a physical intrusion into the subsurface of the plaintiffs' land. The appellate court seemed to acknowledge this, but parts of the appellate court's opinion seemed to treat the case as if the plaintiffs had alleged such an intrusion. The appellate court noted that nothing in the record showed how far the fractures induced by Southwestern had extended, and a party that bears the burden of proof generally must present some *evidence* to defeat summary judgment, but the appellate court held that plaintiffs' *allegations* were sufficient.

The Pennsylvania Supreme Court then analyzed the case. The Court stated that the appellate court was wrong to conclude that the rule of capture would not apply whenever a defendant uses some artificial means, such as hydraulic fracturing, to facilitate recovery of oil and gas. The Supreme Court noted that drilling itself is an artificial means. The Court concluded, therefore, that if Southwestern did not cause a physical intrusion into the subsurface of the plaintiffs' land, the rule of capture would apply and Southwestern would not have conversion liability for drainage of natural gas, even if some of the gas that Southwestern produced was drained from beneath the plaintiffs' land. Further, in the absence of a physical intrusion, Southwestern would not have liability for trespass.

The Court noted Southwestern's "fallback" argument that the company would not be liable even if it did cause a physical intrusion because (Southwestern contends) the rule of trespass would not apply in the same way far beneath the surface of the earth as it does at the surface. The Court stated, however, that it need not resolve that issue. The Court strongly implied that mere allegations by the plaintiffs should not be able to defeat a motion for summary judgment, and the Court noted that the plaintiffs had not produced evidence of a physical intrusion. Nevertheless, rather than enter a judgment dismissing the plaintiffs' claims, the Court remanded for further proceedings.

The tenor of the Court's opinion seems to imply that, if Southwestern files a motion seeking summary judgment on the grounds that the plaintiffs' have not produced evidence of a physical intrusion, the onus will be on the plaintiffs to produce such evidence if they wish to defeat the motion.

Texas Holds that Contractual Conditions Preclude Partnership and Judgment Exceeding Half-a-Billion

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Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P., No. 17-0862, 2020 WL 500259 (Tex. Jan. 31, 2020) refused to reinstate a judgment exceeding half-a-billion dollars by holding that parties can conclusively agree to conditions precedent preventing partnership formation unless those conditions are satisfied or waived. The Court also limited the evidence capable of proving waiver of such conditions.

The Facts

Market conditions at the major crude oil market hub at Cushing, Oklahoma gave rise to the transactions in the case.[1] At a time when no pipeline transported crude oil south from Cushing to Gulf Coast refineries, a price-depressing oil glut arose at Cushing after an influx of oil from the Dakotas and Canada.[2] Major pipelines, including Energy Transfer Partners (ETP)[3] and Enterprise, sensed economic opportunity and began evaluating how to move Cushing-stored oil southward.[4]

Enterprise tried several options. It unsuccessfully urged its co-owner (ConocoPhillips) to reverse the direction of their Seaway Pipeline to transport oil south to the Texas Gulf Coast instead of north to Cushing.[5] It discussed a joint venture with Enbridge to no avail.[6] Finally, it agreed with ETP to explore a possible pipeline project, calling it "Double E".[7] Double E's concept included converting a natural gas pipeline, Old Ocean, for use in transporting crude oil from Cushing to Houston.[8] Three written agreements—a Confidentiality Agreement, a Letter Agreement with a "Non-Binding Term Sheet", and a Reimbursement Agreement—reiterated the parties' intention "that neither party be bound to proceed until each company's board of directors had approved the execution of a formal contract."[9] ETP admitted that no partnership yet existed when the last of the three agreements was signed in April.[10]

By May 2011, an "integrated team" had been formed to pursue the project.[11] In the spring and summer, the parties sought shipping commitments that were essential to Double E's economic viability, marketed the pipeline project as a "50/50 JV", prepared engineering plans, and explored building an entirely new pipeline instead of retrofitting Old Ocean.[12] Shippers had to be convinced that Double E would be the first pipeline to market.[13] After the FERC mandated "open season" for shipper commitments was twice extended, ETP hoped that the necessary commitments would materialize as a result of Chesapeake's major commitment on the second

[1] 2020 WL 500259 at *1.
[2] *Id.* Technological advances had enabled that northern production. Id.
[3] The decision and this article refer to multiple Enterprise and ETP entities by single names. Id. at nn.2-3.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at *1-2.
[9] *Id.* at *1.
[10] *Id.* at *2.
[11] *Id.*
[12] *Id.*
[13] *Id.*

open season's final day, August 12, 2011.[14] Three days later, Enterprise told ETP that their relationship was over and soon sent a written termination notice.[15]

Shortly before its termination notice, Enterprise restarted discussions with Enbridge.[16] In September 2011, ConocoPhillips announced that it would sell its Seaway interest, which Enbridge purchased, becoming co-owner with Enterprise.[17] Enterprise and Enbridge secured a large shipping commitment from Chesapeake that resulted in further commitments.[18] In June 2012, Enterprise and Enbridge, having invested billions to reverse pipeline's direction and make modifications, opened their financially successful Wrangler Pipeline to transport crude oil from Cushing to the Gulf.[19]

ETP sued claiming that a partnership to market and pursue a pipeline had been established by conduct and that Enterprise breached its statutory duty of loyalty by participation in Wrangler.[20] The jury, responding to a question based on the multi-factor test for partnership-formation in the Chapter 152 of the TEX. BUS. ORGS. CODE ("TBOC"), found existence of a partnership[21] and found that Enterprise violated its duty of loyalty to its partner.[22] The trial court reduced the disgorgement portion of the award and entered judgment for $535,794,777.40 plus post-judgment interest.[23] The Court of Appeals reversed; and, ETP petitioned the Texas Supreme Court.[24]

Decision

The case turned on whether parties can "override the default test for partnership formation in [TBOC] Chapter 152 by agreeing not to be partners until conditions precedent are satisfied."[25] The Court considered several provisions of TBOC Chapter 152:

- "an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether: (1) [they] intend to create a partnership; or (2) the association is called a 'partnership', 'joint venture', or other name". § 152.051(b);
- "Factors indicating that persons have created a partnership include the persons': (1) receipt or right to receive a share of profits of the business; (2) expression of an intent to be partners in the business; (3) participation or right to participate in control of the business; (4) agreement to share or sharing: (A) losses of the business; or (B) liability for claims by third parties against the business; and (5) agreement to contribute or contributing money or property to the business". § 152.052(a);
- "[t]he principles of law and equity and the other partnership provisions supplement this chapter unless otherwise provided...". § 152.003.[26]

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at *3.
[18] *Id.*
[19] *Id.*
[20] *Id.* The statutory duty of loyalty is in TBOC §§ 152.204 & 152.205.
[21] *Id.* at *3 & 6.
[22] *Id.* at *3 & n.5. The jury absolved Enbridge of conspiracy to breach the duty of loyalty to ETP. Id. at n.5
[23] *Id.* at *3
[24] *Id.*
[25] *Id.* at *4.
[26] *Id.* at *3-4.

The Court may have foreshadowed its ruling by calling TBOC's test a "default rule" during its discussion of an earlier decision;[27] but, the Court's ruling rested on "freedom of contract."[28] The Court considered freedom of contract because § 152.003 imported "other 'principles of law and equity' into the partnership-formation analysis" and "the word 'include' in § 152.052(a) makes the factors enumerated there nonexclusive."[29] With freedom of contract in the mix, the Court pinned a paean to freedom of contract: noting a "well-developed body of common law that 'strongly favors parties freedom of contract'", emphasizing its lineage ("decades older than the TBOC or its predecessor" with its importance underscored by quoting one of Britain's "most influential" 19th century judges), recounting that the Court itself "reinforced this public policy [freedom of contract] virtually every Court Term", and noting that "Texas courts regularly enforce conditions precedent to contract formation… especially when that language is the result of arm's-length negotiations between sophisticated business entities."[30]

After declaring that it had "never squarely addressed whether parties' freedom to contract for conditions precedent to partnership formation can override the statutory default test, in which intent is a mere factor", the Court explained why two prior decisions did not settle the issue.[31] It then reaffirmed its observation from an earlier case "that the Legislature did not 'intend[ ] to spring surprise or accidental partnerships' on parties"[32] before returning to freedom of contract, stating:

> Section 152.003 expressly authorizes supplementation of the partnership-formation rules of Chapter 152 with "principles of law and equity", and perhaps no principle of law is as deeply engrained in Texas jurisprudence as freedom of contract. We hold that parties can contract for conditions precedent to preclude unintentional formation of a partnership. …[33]

On waiver, the Court agreed that TEX. R. CIV. P. 279 required a jury finding of waiver or its conclusive proof. By analogy to its decision that intent to form a partnership could not be shown by evidence of § 152.052(a)'s other factors, the Court held that "only evidence directly tied to the condition precedent is relevant."[34] Evidence probative of expression of intent to be partners or of any other factor in § 152.052 was irrelevant. Hence, ETP's evidence that the parties held themselves out as partners and worked closely together was not relevant to waiver.[35] Instead, there was no "evidence that Enterprise specifically disavowed the Letter Agreement's requirement of definitive, board-of-directors-approved agreements or that Enterprise intentionally acted inconsistently with that requirement".[36]

The Court concluded by "hold[ing] that parties can conclusively negate the formation of a partnership under Chapter 152 of the TBOC through contractual conditions precedent. ETP and

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[27] *Id.* at *4 (discussing Ingram v. Deere, 288 S.W.3d 886 (Tex. 2009) and saying that Ingram discussed the evolution of Texas partnership law without involving any agreed conditions precedent to partnership-formation).
[28] *Id.* at *5-6.
[29] *Id.* at *5.
[30] *Id.* at 4.
[31] *Id.* at *6 (distinguishing Coastal Plains Development Corp. v. Micrea, Inc., 572 S.W.2d 285 (Tex. 1978) and Root v. Tomberlin, 36 S.W.2d. 596 (Tex. App.—El Paso 1931, writ ref'd)).
[32] *Id.* at * 6 (quoting Ingram, 288 S.W.3d at 898). The Court had earlier noted Ingram's observation. Id. at *4.
[33] *Id.*
[34] *Id.* at *7 (Reasoning from Ingram, 288 S.W.3d at 900).
[35] *Id.*
[36] *Id.* at *7

Enterprise did so as a matter of law here, and there is no evidence that Enterprise waived the conditions."[37]

Conclusion

Texas has specifically blessed contractual conditions precedent to partnership-formation. Further, the Court's evidentiary test for evidence of waiver probably provides contractual conditions precedent to partnership-formation with a largely effective inoculation against claims of waiver.

[37] *Id.* at *8.

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