Oil & Gas E-Report

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Court Holds President Lacks Authority to Unilaterally "Pause" Federal Oil and Gas Leasing

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President Joe Biden has issued various executive orders that directly impact the oil and gas industry. In one of these, the President ordered the United States Department of the Interior to stop granting any oil and gas leases covering federal lands or federal waters until further notice. The President characterized the order as a "pause" on federal leasing. He has not stated how long the "pause" will last. The purported purpose of the "pause" in federal oil and gas leasing is to fight climate change—in particular, the emission of greenhouse gases from the production and consumption of oil and gas.[1]

Opponents of the executive order have filed lawsuits to challenge the orders. Thirteen states, including Louisiana, joined together in one suit against the Biden administration, asserting that the administration's halt on federal leasing is illegal. That action, *State of Louisiana v. Biden*, No. 2:21-cv-778, is now pending in the United States District Court for the Western District of Louisiana. In addition, a fourteenth state—Wyoming—has filed a separate lawsuit in federal district court in Wyoming, similarly challenging the Biden administration's halt on federal leasing. That case is *Wyoming v. U.S. Dept. of Interior*, No. 21-cv-56.

The States challenging the executive order contend that the President lacks authority to unilaterally stop the granting of leases. Federal legislation establishes a public policy that the oil and gas potential of federal lands and waters will be developed. For example, the Outer Continental Shelf Lands Act provides that "the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards."[2] Further, the U.S. Department of the Interior's Bureau of Ocean Energy Management "shall prepare and … maintain an oil and gas leasing program," which "shall consist of a schedule of proposed lease sales."[3] These provisions arguably preclude a total cessation of federal leasing.

Further, even if these provisions are not interpreted as prohibiting a total cessation of federal leasing, an argument exists that a President's unilateral action to halt all federal leasing is an inappropriate procedure for halting leasing. OCSLA establishes a procedure for the Department of the Interior to establish a schedule of lease sales. The process requires the Department to publish a proposed schedule in the Federal Register, to consult with other federal agencies, and to

[1] *See* Executive Order 14008 (Jan. 27, 2021), *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7619 (Feb. 1, 2021).
[2] 43 U.S.C. § 1332.
[3] 43 U.S.C. § 1344.

consult with state governments.[4] Further, once a schedule of lease sales has been established, any significant revision of the schedule must follow the same process of publication and consultation.[5] Moreover, an argument exists that a complete pause on federal leasing would first require a review under the National Environmental Policy Act.

With respect to onshore leasing of federal lands, the Mineral Leasing Act and the Federal Land and Policy Management Act also seem to contemplate that there will be some leasing of federal lands and that certain procedures must be followed to withdraw lands from the pool of land available for leasing.

In *Louisiana v. Biden*,[6] the federal court granted a preliminary injunction on June 15, 2021, enjoining the Biden administration from continuing the “pause” in federal onshore and offshore leasing. In doing so, the court concluded that the plaintiffs are likely to prevail on the merits in demonstrating that the President cannot unilaterally cease such leasing by Executive Order. On August 16, the Biden administration filed a notice of appeal. In the meantime, the administration has stated that it will comply with the district court’s order.

The plaintiffs have complained to the district court that that the administration is not working quickly enough to resume leasing. In response, the administration filed a brief with the district court on August 24, 2021, stating that it is working on preparing for lease sales and that it anticipates the Department of the Interior will send a Record of Decision to the Federal Register by the end of August 2021, to publish during September a notice of a Gulf of Mexico lease sale that would be held in October or November 2021.

[4] *Id.* at § 1344(c)-(d).
[5] *Id.* at § 1344(e).
[6] 2021 WL 2446010 (W.D. La.) (Doughty, J.).

New IRS Revenue Ruling Provides Opportunities for Financing Carbon Capture Equipment

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On July 1, 2021, the Internal Revenue Service published Revenue Ruling 2021-13, which provides guidance on three important issues related to the income tax credit for carbon oxide sequestration found in section 45Q of the Internal Revenue Code. Recall that section 45Q provides for a credit against a taxpayer's income tax liability based on the amount of carbon oxide (a) captured using carbon capture equipment, (b) placed in service at a qualified facility and (c) disposed of, injected, or utilized in a specified manner.

Revenue Ruling 2021-13 addresses the application of section 45Q to carbon dioxide captured with carbon capture equipment installed at a methanol plant that had existing carbon dioxide separation equipment. The plant produces methanol by first creating syngas from the natural gas input in an acid gas removal unit that removes carbon dioxide, and then converts the purified syngas gas into methanol. The acid gas removal unit was installed by the owner of the methanol plant and placed in service on January 1, 2017, from which time the separated carbon dioxide was released into the atmosphere. In 2021, an investor installed new carbon capture equipment at the plant to create a single process train for capturing, processing, and preparing to transport the carbon dioxide previously released into the atmosphere. The investor owned the new carbon capture equipment but did not acquire an ownership interest in either the acid gas removal unit or the methanol plant.

Revenue Ruling 2021-13 concludes that: (1) the acid gas removal unit is carbon capture equipment as that term is defined in section 1.45Q-2(c) of the Treasury regulations because one of its functions is to separate carbon dioxide from a natural gas stream; (2) the investor could claim the section 45Q tax credit even though it only owned the equipment it installed to capture the carbon dioxide and not any other equipment in the single process train; and (3) the relevant placed-in-service date for the carbon capture equipment for purposes of eligibility to claim the section 45Q credit was 2021, the date that the investor first placed the single process train in a condition of readiness for the specifically designed function of capturing, processing, and preparing carbon dioxide for transport for disposal, injection, or utilization, rather than relating back to 2017 when the acid gas removal unit had been placed in service. This third conclusion was important because the amount of the section 45Q tax credit was increased in 2018, meaning that the higher credit could be claimed by the investor and not the lower credit in place when the acid gas removal unit was placed in service.

It is the second conclusion above that provides new opportunities for owners of plant facilities to finance the investment in carbon capture equipment necessary to prevent emitting carbon dioxide produced at their facilities into the

atmosphere. Instead of utilizing internal capital to finance the entire investment necessary for the plant facility and the carbon capture equipment, plant owners may turn to discrete investors for assistance in constructing, owning and operating the carbon capture equipment in a single process train, particularly those investors who can utilize the section 45Q tax credit to reduce their anticipated future income tax liabilities.

Consider the case of a new plant facility being constructed by a project company the equity funding of which will be provided by a private equity firm whose investors are mostly tax-exempt institutions. Income tax credits like the section 45Q credit are of no value to those tax-exempt institutional investors and thus would not be considered in their determination of overall project rate of return. But if the ownership of the carbon capture equipment can be isolated in an investment vehicle separate from the project entity owning the plant facility, the investment vehicle owning the carbon capture equipment generating the section 45Q tax credit can target taxable investors who will place value on the section 45Q tax credits and consider those credits along with annual cash flow distributions in their determination of project rate of return. This, of course, is exactly what happens today in wind farm electricity generation projects in which taxable investors like certain financial institutions invest in “tax equity” to receive the benefit of the section 45 renewable energy tax credit. After this Revenue Ruling, project owners can target additional sources of equity capital in situations in which ownership of the main plant facility can be segregated from ownership of the carbon capture equipment creating the single process train.

United States Supreme Court Blocks New Jersey's Sovereign Immunity Challenge to FERC Certificate Holder's Condemnation of State-Owned Land

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On June 29, 2021, the United States Supreme Court, in a 5-4 vote, held that a natural gas company's right to condemn property for a pipeline under the Natural Gas Act includes the right to condemn state-owned property. In *PennEast Pipeline Co. v. New Jersey*,[1] the divided Court held that a certificate from the Federal Energy Regulatory Commission (FERC) entitled PennEast Pipeline Company (PennEast) to use the federal government's power of eminent domain to seize property owned by the State of New Jersey.

In this case, PennEast sought to exercise the federal eminent domain power bestowed upon it by the Natural Gas Act (NGA). Under the NGA, FERC confers eminent domain authority to private entities through issuing a certificate of public convenience and necessity to certain authorized entities, including interstate natural gas transporters. The issue in this case centered around the relationship between the federal eminent domain power afforded to a FERC certificate holder and the sovereign immunity rights held by a state.

In 2015, PennEast sought a certificate of public convenience and necessity from FERC authorizing the construction of a 116-mile pipeline from Luzerne County, Pennsylvania, to Mercer County, New Jersey. In January 2018, FERC granted PennEast's request. Shortly thereafter, PennEast exercised the federal eminent domain power bestowed upon it under the NGA by filing several condemnation lawsuits across the pipeline's planned route. Relevant to this case, PennEast sought to condemn two parcels in which New Jersey asserted a possessory interest, and 40 parcels in which the state claimed nonpossessory interests.

New Jersey moved to dismiss PennEast's condemnation actions based on its sovereign immunity. The district court denied New Jersey's motion to dismiss and held that New Jersey's sovereign immunity did not protect it from PennEast's exercise of the federal government's eminent domain power. On appeal, the Third Circuit reversed because, in its view, PennEast's exercise of eminent domain would infringe on New Jersey's sovereign immunity. Although the Third Circuit acknowledged that the federal government can condemn state-owned property, it reasoned that the ability to bring a condemnation suit against a state is in fact the product of two separate powers: (1) the federal government's eminent domain power and (2) its ability to sue nonconsenting states. Accordingly, the Third Circuit accepted that the federal government properly delegated its eminent domain power to PennEast but did not accept that the delegation allowed PennEast to bring a condemnation suit against New Jersey to enforce that power. Therefore, the Third Circuit concluded that because the NGA delegated only the power of eminent domain and not the power to sue nonconsenting states PennEast was not

[1] 19-1039, 2021 WL 2653262 (U.S. June 29, 2021).

authorized to condemn New Jersey's property. On appeal, the Supreme Court disagreed.

In its decision, the Supreme Court noted that since its founding, the federal government has exercised its eminent domain authority through its own officers and private delegates. The Court further noted that the eminent domain power has long been used to take property interests held by both individuals *and states*. Contrary to the Third Circuit's reasoning, the Supreme Court stated that the eminent domain power is inextricably intertwined with the ability to condemn. Therefore, the federal government's eminent domain power cannot be separated from its ability to bring a condemnation proceeding against a nonconsenting state. The Court made clear that a natural gas company's exercise of its rights under the NGA are an "unexceptional instance" of this established practice.

As to New Jersey's claim of sovereign immunity, Chief Justice Roberts writing for the Court opined that states surrendered their immunity from the exercise of the federal eminent domain power when they ratified the Constitution. Justice Roberts clarified that the eminent domain power "carries with it the ability to condemn property in court." Therefore, the Court concluded that by virtue of its exercise of federal eminent domain power, a FERC certificate holder is not precluded by a state's sovereign immunity from condemning state-owned property.

While the *PennEast* decision is certainly a win for the pipeline industry, opponents of fossil fuel development worry the decision is detrimental to nationwide environmental efforts. Nevertheless, as PennEast emphasized in its statement on the Supreme Court victory, this decision represents a win for consumers who rely on infrastructure projects like the PennEast project for much-needed energy.[2] As illustrated most recently by the energy crisis in Texas early this year, "interstate natural gas infrastructure is so vital for our way of life, public safety, and enabling clean energy goals."[3]

[2] PennEast Pipeline, *PennEast Pipeline Statement on Favorable U.S. Supreme Court Decision*, June 29, 2021, https://penneastpipeline.com/penneast-pipeline-statement-on-favorable-u-s-supreme-court-decision/.
[3] *Id.*

Northern District of Illinois Dismisses ICFA Claim in Class Action Against Alternative Retail Natural Gas Supplier

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In *Burger v. Spark Energy Gas, LLC*, 507 F. Supp. 3d 982 (N.D. Ill. 2020), the Northern District of Illinois considered an alternative retail natural gas supplier's motion to dismiss a putative class action stemming from the variable rates charged to customers.

In that case, Plaintiff Becky Burger contracted with Defendant Spark Energy Gas, LLC ("Spark Energy") for residential natural gas supply services. The Plaintiff hoped that she would save on the cost of natural gas. Instead, however, Plaintiff alleged that Spark Energy charged her more than if she had continued receiving natural gas from her local utility. The Plaintiff then filed a putative class action against Spark Energy alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA").[1] The Plaintiff also brought claims for breach of contract and the implied covenant of good faith and fair dealing, as well as unjust enrichment. While the Court dismissed the Plaintiff's ICFA claims without prejudice, it found that her other claims could proceed.

Before addressing the Plaintiff's allegations against Spark Energy, the Court summarized the deregulation of the natural gas supply market in Illinois. Like other states, Illinois did so to increase market competition. As a result of this deregulation, alternative retail natural gas suppliers ("AGSs"), like Spark Energy, offer retail services to Illinois residents. Illinois residents can therefore receive natural gas services from their local utility or switch to an AGS.

Local utilities and AGSs operate under different rules and rate regulations. The Illinois Commerce Commission regulates the rates that local utilities can charge. AGSs, on the other hand, are not regulated by the Illinois Commerce Commission and do not have to file or seek approval for the rates they charge. AGSs typically use a variety of purchasing strategies to reduce natural gas costs, which, theoretically, should allow AGSs to offer competitive or lower rates when compared to local utilities.

A number of consumer protection regulations protect consumers due to the deregulation of the natural gas supply market. These include regulations protecting the right of consumers to rescind an agreement with an AGS.[2] Other regulations require an AGS to "clearly and conspicuously" disclose the prices, terms, and conditions of the products and services being offered and sold to the consumer.[3]

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[1] 815 Ill. Comp. Stat. 505/1 *et. seq.*
[2] 815 Ill. Comp. Stat. 505/2DDD(f).
[3] 220 Ill. Comp. Stat. 5/19-115(g)(2).

As for Spark Energy's business model, Spark Energy offered the Plaintiff an initial fixed natural gas rate comparable or lower than her local utility. Once the initial fixed rate expired, however, Spark Energy told the Plaintiff it would transition her to a month-to-month variable rate plan. The Plaintiff's rates would vary according to market conditions under that variable rate plan. The Terms of Service provided to the Plaintiff did not disclose a monthly administrative fee, but Spark Energy allegedly began charging her a fee of $6.25 per month once the fixed rate period ended.

The Court recognized that "[d]espite there being no material difference between the costs Spark Energy incurs for its fixed and variable rate customers, Spark Energy charges a substantially higher variable than fixed rate."[4] The Court also recognized that "[b]etween August 2017 and May 2018, the last ten billing periods during which [the Plaintiff] paid Spark Energy's variable rate, Spark Energy's variable rates were, on average, 305% higher" than the Plaintiff's local utility.[5]

Regardless of Spark Energy's higher variable rates, the Court dismissed the Plaintiff's ICFA claim without prejudice because she failed to adequately plead that Spark Energy's representations proximately caused her damages. The Court recognized that an ICFA claim must allege four things: (1) a deceptive or unfair act or practice, (2) intent that a consumer rely on the deceptive or unfair practice, (3) that the deceptive or unfair practice occurred while conducting trade or commerce, and (4) actual damage caused by the deceptive or unfair practice.

The Plaintiff alleged that Spark Energy's representations were different from what a reasonable consumer would expect. However, because the Plaintiff also alleged that Spark Energy provided her with their Terms of Service, a cause of action under the ICFA required allegations that the services Plaintiff received differed from her expectations upon reviewing the Terms of Service. This is because the ICFA requires individualized proof of causation. Stated another way, "personal exposure to the alleged misrepresentation is crucial under Illinois law."[6]

As for the Plaintiff's breach of contract and the implied covenant of good faith and fair dealing claim, the Court denied Spark Energy's motion to dismiss. Specifically, the Plaintiff alleged that Spark Energy breached its promise to charge a variable rate that would vary according to market conditions. She also alleged that Spark Energy did not disclose that it would charge a monthly administration fee. Because the Terms of Service used permissive language and stated that the rate charged "may" vary according to market conditions, the Court concluded that Spark Energy made no guarantee about how it would set rates. Therefore, the Court concluded that Spark Energy did not breach any contractual promise regarding the rate it charged the Plaintiff.

Even so, the Court found that the Plaintiff could proceed on her contract claim based on an alleged breach of the implied duty of fair dealing. Indeed, the Plaintiff alleged that Spark Energy set commercially unreasonable variable rates.

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[4] *Burger*, 507 F. Supp. 3d at 987.
[5] *Id.*
[6] *Id.* at 988 (quoting *Mednick v. Precor, Inc.*, 320 F.R.D. 140, 149 (N.D. Ill. 2017)).

The Court noted, however, that the Plaintiff would need to demonstrate that Spark Energy exercised its discretion in setting variable rates "in bad faith, unreasonably, or in a manner inconsistent with the reasonable expectations of the parties."[7] The Court similarly allowed the Plaintiff to proceed on her claim for breach based on Spark Energy allegedly charging her an undisclosed administrative fee.

As a final matter, the Court permitted the Plaintiff to proceed on her unjust enrichment claim, which she pleaded as an alternative to her contract claim. In doing so, the Court recognized that Seventh Circuit case law does not require a plaintiff to plead deceptive conduct as part of an unjust enrichment claim.[8]

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[7] *Id.* at 990 (quoting *Hickman v. Wells Fargo Bank N.A.*, 683 F. Supp. 2d 779, 792 (N.D. Ill. 2010)).
[8] *Id.* at 991 (citing *Ass'n Benefit Servs., Inc. v. Caremark RX, Inc.*, 493 F.3d 841, 854-55 & n.7 (7th Cir. 2007)).

Louisiana Supreme Court Overrules Prior Decision and Holds That "Excess Remediation Damages" Generally Are Not Available in Oilfield Contamination Cases

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In *State of Louisiana v. Louisiana Land & Exploration, Co.*, 2020-685 (6/30/2021), --- So. 3d ---, 2021 WL 2678913, the Louisiana Supreme Court held that plaintiffs generally are not entitled to "excess remediation damages"[1] in oilfield contamination or "legacy litigation" cases,[2] and that instead remediation damage awards generally should be limited to an amount sufficient to clean-up the property to regulatory standards. The Court's recent decision overruled a 2013 decision of the Court in the same dispute, *State of Louisiana v. Louisiana Land & Exploration, Co.*, 12-884 (1/30/2013), 110 So. 3d 1038 (hereafter, "*LL&E I*").

Background

This case began in September 2004, when the Vermilion Parish School Board (VPSB) sued several oil and gas companies, alleging contamination of certain Section 16 Lands[3] that were or had been subject to oil and gas leases granted by VPSB. Although the State of Louisiana was not involved in bringing the lawsuit, VPSB's petition purported to bring claims on behalf of both itself and the State of Louisiana, which explains why the caption of the suit reads "*State of Louisiana v. Louisiana Land & Exploration Co.*"

VPSB's petition asserted claims for negligence, strict liability, unjust enrichment, trespass, breach of contract, and violation of Louisiana's environmental laws. VPSB requested a damages award to cover the costs of remediating the property and to compensate for other alleged harms. The suit was governed by the 2006 version of "Act 312," which establishes certain procedures for legacy litigation disputes.[4]

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[1] "Excess remediation damages" are the difference between the amount of an award sufficient to remediate a property to regulatory standards and a higher amount that would be sufficient to remediate the property to a condition that is cleaner than regulatory standards.

[2] In *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, 238 n.1 (La. 2010), the Louisiana Supreme Court explained:

> "Legacy litigation" refers to hundreds of cases filed by landowners seeking damages from oil and gas exploration companies for alleged environmental damage in the wake of this Court's decision in Corbello v. Iowa Production, 02–0826 (La.2/25/03), 850 So.2d 686. These types of actions are known as "legacy litigation" because they often arise from operations conducted many decades ago, leaving an unwanted "legacy" in the form of actual or alleged contamination.

[3] "Section 16" refers to the area within each public land surveying system township that is designated as Section 16. In the early 1800s, the federal government took action to support the establishment of local public schools by donating to Louisiana the Section 16 lands then owned by the federal government within the State. Louisiana has retained record title to the surface, but has given school boards effective ownership of Section 16 mineral rights. *See* La. Rev. Stat. 30:152 (authority to grant mineral leases on Section 16 lands); La. Rev. Stat. 30:154 (right to keep all revenue from mineral leases); La. Rev. Stat. 17:51 (authority to sue).

[4] "Act 312" refers to La. Acts 2006, Act No. 312, which was codified at Louisiana Revised Statute 30:29.

During discovery, the "UNOCAL" defendants (Union Oil Company of California and Union Exploration Partners) admitted responsibility for environmental damage and for funding a cleanup to regulatory standards, without admitting liability for VPSB's other claims. Louisiana Code of Civil Procedure 1563 allows for such limited admissions in legacy litigation disputes.

UNOCAL also filed an exception of liberative prescription, asserting that VPSB's strict liability claim was time barred.[5] UNOCAL noted that strict liability claims are governed by a one-year prescriptive period and that VPSB had hired counsel to investigate VPSB's potential claim more than a year before filing suit. UNOCAL argued that even if *contra non valentem*[6] delayed the running of prescription for some period after the land became contaminated, prescription would have started running no later than when VPSB hired counsel. VPSB argued that the hiring of counsel does not necessarily mean that a prospective plaintiff knows enough to start the running of prescription.

VPSB also contended that its claim was immune from prescription. Although school boards generally are not immune from the running of prescription,[7] the State of Louisiana is.[8] VPSB argued that, because it had named both itself and the State of Louisiana as plaintiffs, the claims that it asserted were immune from the running of prescription. UNOCAL contended that VPSB had no authority to bring a contamination claim on behalf of the State and that VPSB cannot shield itself from prescription simply by purporting to bring a claim on behalf of both itself and the State, when VPSB lacked any authority to sue on behalf of the State.

The trial court denied UNOCAL's prescription exception, and the case went to a jury trial. The jury returned a verdict awarding $3,500,000 for remediation of the land to a regulatory standard and an additional $1,500,000 in other damages under VPSB's strict liability claim. The jury rejected VPSB's other claims, including its claim for breach of contract. VPSB sought a new trial, based on a contention that the jury's verdict was inconsistent. In particular, VPSB argued that, because a lessee has a duty to return the property to the lessor with no more than the normal wear and tear at the end of a lease, the jury was inconsistent in awarding monetary damages to remediate contamination, while rejecting VPSB's claim for breach of contract. VPSB had hoped to obtain excess remediation damages under its contract claim.

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[5] Liberative prescription is a civil law concept that is equivalent to a statute of limitations.

[6] "*Contra non valentem*" is short for "*contra non valentem agere nulla currit praescriptio*," a civil law doctrine that can suspend the running of prescription in certain circumstances, such as when a plaintiff has neither actual nor constructive knowledge of a claim. Corsey v. State, 375 So. 2d 1319, 1321 (La. 1979). Thus, *contra non valentem* can operate like the common law's "discovery rule," which can toll a statute of limitations.

[7] Louisiana Civil Code article 3467 provides, "Prescription runs against all persons unless exception is established by legislation." No legislation makes an exception for school boards.

[8] Article XII, § 13 of the Louisiana Constitution provides that the State is generally immune from the running of prescription. The relevant provision states: "Prescription shall not run against the state in any civil matter, unless otherwise provided in the constitution or expressly by law."

VPSB and UNOCAL each appealed. The Louisiana Third Circuit affirmed the trial court's ruling on prescription, holding that VPSB's claims were immune from prescription. In addition, the Third Circuit held that the jury's verdict was inconsistent. For that reason, the appellate court reversed the trial court's judgment and remanded for a new trial. UNOCAL filed a writ application with the Louisiana Supreme Court, which granted the application.

Liberative prescription

The Louisiana Supreme Court noted that, because the face of VPSB's petition did not show that its claim was prescribed, UNOCAL had the burden of proof on its exception of prescription. Assuming VPSB's claims were not immune from prescription, prescription would begin running when VPSB acquired or should have acquired knowledge of its injury. Thus, to prevail on its prescription exception, UNOCAL needed to prove that VPSB had actual or constructive knowledge of its injury at least a year before filing suit.

In attempting to meet its burden, UNOCAL offered evidence that VPSB had hired an attorney to represent it more than a year before filing suit. UNOCAL argued that Louisiana jurisprudence establishes that, when a plaintiff knows enough to hire an attorney, that party knows enough to start the running of prescription. The Court disagreed. The Court stated that a party's hiring of an attorney is merely evidence that a trial court can consider when making a factual determination regarding the time when a party first acquired actual or constructive knowledge of its injury.

The minutes of a VPSB meeting showed that the VPSB went into an executive session to discuss "potential litigation" and that VPSB authorized the hiring of counsel during the same meeting, but that did not necessarily indicate that VPSB had actual or constructive knowledge of an injury at that time. Further, a trial court's factual findings are reviewed under a manifest error standard. The Court held that the trial court did not commit manifest error in concluding that VPSB's claim had not prescribed. Accordingly, without reaching the issue of whether VPSB's claim was immune from prescription, the Court affirmed the trial court's ruling rejecting UNOCAL's prescription exception.

Excess remediation damages

VPSB asserted that the jury's verdict was inconsistent because the jury had found that the land contained environmental damage for which UNOCAL was liable, but the jury verdict concluded that UNOCAL had not breached its lease by causing more than the normal amount of wear and tear to the property. In contrast, UNOCAL contended that the verdict was not inconsistent. UNOCAL and at least one *amici* asserted that it is possible for contamination to exceed current regulatory standards, thus triggering liability under Act 312, without the contamination necessarily constituting more than the wear and tear on property that would have been

expected under the oil and gas lease standards that existed several years ago, at the time the property allegedly became contaminated.[9]

The Louisiana Supreme Court concluded that the jury's verdict was not inconsistent, given the instructions issued to the jury, but that the jury instructions were flawed. The Court itself took the blame for this, stating that the erroneous instructions were made "in light of this Court's 2013 *La. Land & Expl I*. [sic] decision, which we now see with clarity, was made in error."

One of the issues in *La. Land & Expl. I* was the extent to which a plaintiff in a legacy litigation case can receive remediation damages in excess of what is needed to remediate the land to regulatory standards. In *La. Land & Expl. I*, the defendants argued that the amount that plaintiffs can recover for remediation damages cannot exceed what is needed to pay for a remediation to regulatory standards, absent an express contractual provision between the parties that gives the plaintiff the right to a greater clean-up.

The defendants based their argument in part on Act 312. Act 312 requires that, when a defendant is found liable for environmental damages, the payments that the defendant makes for remediation of environmental damage must be deposited into the registry of the court for use in funding a remediation to regulatory standards. If the funds deposited prove inadequate to complete a remediation to regulatory standards, the district court may require the defendant to deposit additional funds. If money is left over after a remediation is complete, the excess is returned to the defendant.

The 2006 version of Act 312 also addressed the possibility of excess remediation damages, stating that Act 312 would not "preclude a judgment ordering damages for or implementation of additional remediation in excess of [regulatory standards] as may be required in accordance with the terms of an express contractual provision." The defendants in *La. Land & Expl. I* asserted that this implies that excess remediation damages are not available in the absence of an express contractual provision, but in its 2013 decision the Louisiana Supreme Court disagreed.

In its June 2021 decision, the Louisiana Supreme Court concluded that *La. Land & Expl. I* was erroneously decided and that the 2006 version of Act 312 did, in fact, preclude such "excess" remediation damages. Further, because the trial court's jury instructions were based on the now-overruled decision in *La. Land & Expl. I*, those instructions were erroneous and constituted reversible error. Accordingly, the Supreme Court remanded for a new trial.

The Louisiana Supreme Court did not have before it the question of whether the current version of Act 312 would preclude excess remediation

[9] The author of this paper filed an amicus brief, making that argument and supporting the defendants' writ application to the Louisiana Supreme Court.

damages, absent an express contractual provision authorizing such damages, but the Court seemed to suggest that the current version would do so.

Fifth Circuit Holds Removal was Timely in Louisiana Coastal Land Loss Litigation

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Six Louisiana Parishes brought forty-two lawsuits in various state courts against oil and gas companies, alleging violations of the Louisiana State and Local Coastal Resources Management Act and asserting that the alleged violations contributed to coastal land loss. The defendants removed the cases based on various jurisdictional theories, including federal question jurisdiction, but the federal district courts remanded.

After the remand orders, the plaintiffs produced an expert report (the "*Rozel* Report") that the defendants believed demonstrated, for the first time, that the plaintiffs' claims relied in part on the defendants' activities during World War II, when the companies were governed by a federal wartime agency known as the Petroleum Administration for War. The defendants removed again. In support of this second removal, the defendants again relied on federal question jurisdiction, but they also relied on federal officer removal (28 U.S.C. § 1442).

The United States District Court for the Western District of Louisiana again issued a remand order in one of the cases removed to that court, concluding that neither federal question jurisdiction nor federal officer jurisdiction existed.[1] Likewise, in a case removed to the United States District Court for the Eastern District of Louisiana, the federal district court concluded that removal was untimely and that, even if removal had been timely, neither federal question nor federal officer jurisdiction existed. Therefore, the Eastern District Court issued an order of remand.[2] The defendants appealed both remand orders and the appeals were consolidated. On original hearing, the United States Fifth Circuit Court of Appeal affirmed the district courts' remand orders, concluding that the removals were untimely.[3]

But the Fifth Circuit granted a motion to reconsider and reversed course. The court began its rehearing opinion by noting that remand orders generally are not appealable, but that an order remanding a case that was removed based on federal officer removal is appealable. Further, in *BP p.l.c. v. Mayor and City Council of Baltimore*, ––– U.S. ––––, 141 S. Ct. 1532 (2021), the United States Supreme Court held that, when a party appeals a district court's orders remanding a case that was removed based on both federal officer jurisdiction and other theories of jurisdiction, an appellate court may review both the district court's rejection of federal officer jurisdiction and its rejection of other jurisdictional theories.

[1] *See Parish of Cameron v. Auster Oil & Gas, Inc.*, 420 F. Supp. 3d 532 (W.D. La. 2019).
[2] *See Parish of Plaquemines v. Riverwood Production Co.*, 2019 WL 2271118 (E.D. La. May 28, 2019).
[3] *Parish of Plaquemines v. Chevron USA, Inc.*, 969 F.3d 502 (5th Cir. 2020).

The Fifth Circuit then turned to the timeliness of removal, concluding the removal was timely. The court noted that, if the face of a plaintiff's petition reveals a basis for federal jurisdiction, a defendant has thirty days from service of the petition to remove the case. When the face of the petition does not reveal a basis for federal jurisdiction, but a subsequent paper served in the litigation does, a defendant has thirty days from the service of that paper to remove.

The United States District Court for the Eastern District of Louisiana concluded that the plaintiffs' petition showed that the defendants' conduct going back to World War II and even earlier might be an issue. The district court reasoned that the *Rozel* Report simply added more specificity to the plaintiffs' allegations. Thus, the 30-day deadline to remove had lapsed thirty days after the petition was served, which was long before the defendants removed for the second time.

But the Fifth Circuit disagreed. The Fifth Circuit noted that the plaintiffs' argument that the defendants violated the State and Local Coastal Resources Management Act (SLCRMA) is based in part on an argument that certain of the defendants' activities failed to qualify for an exemption from SLCRMA permitting requirements because the activities violated various state regulations. And the *Rozel* Report was the first paper that notified the defendants that some of their activities that the plaintiffs allege violated state regulations were activities during World War II. Thus, the defendants had thirty days from service of the *Rozel* Report in which to remove the case and they removed the cases before that deadline arrived.

Having concluded that removal was timely, the Fifth Circuit addressed subject matter jurisdiction. The Fifth Circuit agreed with the lower courts that federal question jurisdiction does not exist, but the Fifth Circuit remanded the question of federal officer jurisdiction to the lower courts, noting the district courts' remand orders had been issued before the Fifth Circuit adopted a new standard for evaluating the propriety of federal officer removal.[4] The Fifth Circuit reasoned that the district courts should be given a chance to evaluate the question of federal officer jurisdiction using the new standard.

[4] *See Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 290 (5th Cir. 2020) (en banc).

Ohio Supreme Court Further Clarifies Exception Under Ohio's Marketable Title Act

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In *Erickson v. Morrison*, the Supreme Court of Ohio expanded upon its prior decision in *Blackstone v. Moore* to address the "specific reference" exception under Ohio's Marketable Title Act, R.C. 5301.47, et seq. (the MTA).[1] The MTA serves to extinguish stale interests in land in existence prior to the recording of a claimant's root of title, with the purpose of simplifying and facilitating land title transactions by allowing purchasers to rely on a record chain of title.[2] But that marketable record title is taken subject to, among other things, interests inherent in the record chain of title—with the following limitation: "[A] general reference … to … interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such … interest."[3] In *Erickson*, the relevant land was subject to a severance of all of the coal, gas, and oil. The surface owners argued that this severed interest was extinguished under the MTA because references to it in their root of title and subsequently filed deeds were not sufficiently specific under R.C. 5301.49(A), as they failed to identify the owner of the interest. The Court ultimately disagreed.

The severed interest was created in 1926 by deed stating: "Excepting and reserving therefrom all coal, gas, and oil with the right of said first parties, their heirs and assigns, at any time to drill and operate for oil and gas and to mine all coal." The interest ultimately came to be owned by the Ogle heirs, who filed suit in 2017 against the surface owners, Paul and Vesta Morrison, to have their ownership judicially confirmed. While the trial court found in favor of the Ogle heirs, the Fifth District Court of Appeals reversed, finding that under the Supreme Court of Ohio's prior decision in *Blackstone v. Moore*, references to the severed interest in their root of title and subsequent deeds were too general to prevent the extinguishment of the interest under the MTA.

The Supreme Court of Ohio accepted the Ogle heirs' appeal to determine whether a reference to an interest in the chain of title that does not include the name of the interest owner (i.e., a reference that simply identifies what the severed interest is) is general or specific under R.C. 5301.49(A). The Ogle heirs maintained that neither the language of the MTA, nor the Court's prior decision in *Blackstone* require the identification of the interest owner or the recording information of the severance deed in order to prevent the extinguishment of the interest. Arguing the opposite, the surface owners relied on the *Blackstone* decision itself, which held that a reference to an interest that identified both the nature of the inter-

[1] 2021-Ohio-746.
[2] *Id.* at ¶16.
[3] R.C. 5301.49(A) (emphasis added).

est and the interest owner was specific under R.C. 5301.49(A). Based on that decision, the surface owners argued that a reference only identifying the nature of the interest was not specific, and thus could not prevent the interest's extinguishment.

Rejecting the surface owners' argument, the Court clarified its decision in *Blackstone*. Although *Blackstone* had held that a reference that identified the nature of the interest and name of the owner was specific, the Court here clarified that its earlier holding should not be read as requiring that name in order to prevent extinguishment under the MTA. Instead, applying the test it laid out in *Blackstone*, the Court found the references in the surface owners' root of title and subsequent deeds to be specific. It based this finding on the plain language of the statute and the ordinary meaning of the words "general" and "specific." According to the Court, the references in these deeds were not vague references to prior reservations that may or may not exist. "Rather, the [surface owners'] root of title and subsequent conveyances are made subject to a specific, identifiable reservation of mineral rights recited throughout their chain of title using the same language as the recorded title transaction that created it." And the Court found this conclusion was supported by the fact that the General Assembly had amended other provisions of the MTA in 1988 to require, for other purposes, the name of the interest owner, a description of the affected property, and the recording information of the document creating the interest, but did not amend R.C. 5301.49(A) to require that same specificity.

Where does that leave us? Because there are countless ways to reference an interest in a deed (with varying degrees of specificity), the application of R.C. 5301.49(A) will almost certainly be the subject of additional litigation in the future. For now though, the Court's decision in *Erickson* provides a much-welcomed clarification of the test laid out in *Blackstone*.

Oklahoma Supreme Court Holds Claim for Overriding Royalties was Timely Asserted

Mark Christiansen

The plaintiffs in *Claude C. Arnold Non-Operated Royalty Interest Properties v. Cabot Oil & Gas Corp.*[1] held an overriding royalty interest in oil and gas produced under mineral leases executed in 1973. In 2012, defendant began producing oil and gas from a new geologic formation on lands covered under those same leases. The plaintiffs sought payment of their share of royalty from the new production, but defendant refused to make payment, and plaintiffs brought this lawsuit. Finding they continued to hold a valid overriding royalty interest under the 1973 leases, the district court granted judgment to the plaintiffs after a bench trial. The Court of Civil Appeals, however, reversed after determining that a statute of limitations barred plaintiffs' claims in full due to a purported cloud on their interest arising from subsequently recorded oil and gas leases. Because the later-recorded leases did not reasonably give plaintiffs notice of any interest adverse to their own, the Oklahoma Supreme Court held that the plaintiffs' cause of action did not accrue until defendant refused to pay royalties on the new production in 2012, and the plaintiffs filed a timely lawsuit. Therefore, the Supreme Court vacated the Court of Civil Appeals' Opinion and affirmed the trial court's judgment.

In analyzing the dispute, the Oklahoma Supreme Court identified the "key issue" as whether the plaintiffs timely asserted their right to payment of an overriding royalty interest in an oil and gas producing formation. The Court of Civil Appeals held that they did not, but the Supreme Court disagreed.

The Supreme Court stated that the plaintiffs could not have asserted a claim "until the defendant first developed the disputed formation—which proved productive and profitable—in 2012, and then refused the plaintiffs' request for payment of royalties from that production." Nothing that preceded those could reasonably have foreclosed the plaintiffs' ability to press their claim for the payments to which they were entitled under valid mineral leases. Accordingly, the Court held that "the plaintiffs filed a timely lawsuit to enforce their valid overriding royalty interest."

The parties' dispute centered around two oil and gas producing formations—known as the Chester and the Marmaton—located in Beaver County, Oklahoma. In 1973, Arnold Petroleum, Inc.—the predecessor in interest of the plaintiffs, whom the Oklahoma Supreme Court collectively referred to as Arnold—obtained six oil and gas leases covering land in Beaver County. They filed each of these 1973 leases in the county land records. The leases each had a primary term of three years, plus a five-year extension period.

In all the leases, the provisions on lease expiration were modified by a clause that the parties called the "exception clause." It says: "provided, however, that Lessee shall not be obligated to release any formation, horizon or zone, the

[1] 2021 OK 4, 485 P.3d 817.

production from which would conflict with any existing producing horizon, formation or zone."

During 1973 and 1974, Arnold Petroleum assigned its leases to Dyco Petroleum Corporation, expressly reserving an overriding royalty interest in any oil and gas produced under the leases. Dyco then assigned the leases to Harold Courson—the predecessor in interest of the defendant, Cabot Oil & Gas Corporation—with this assignment being made expressly subject to Arnold's overriding royalty interest. During the leases' primary term, Courson drilled and completed two vertical wells in the Chester formation, which underlies the lands covered by the 1973 leases. Importantly, the two wells in the Chester formation have produced "mostly gas with some oil" continuously since the mid-1970s, and "at no point since then has Arnold ever stopped receiving payments on its overriding royalty interest in those producing wells."

In 1984, Courson obtained several new leases from the mineral owners who had granted the 1973 leases. The 1984 leases purported to cover the same rights as the original 1973 leases, but the 1984 leases were silent as to any particular geologic formation or zone. The 1984 leases were recorded in the county land records, but no one told Arnold about them. Arnold did not become aware of the 1984 leases until 1999. In that year, Arnold and other royalty holders received a letter from Courson explaining he had recompleted a well in the Chester formation that had originally been drilled into the separate *Lower* Chester formation by another company, Natural Gas Anadarko, Inc. (NGA). NGA derived its interest in the Lower Chester formation from the 1984 leases. Having learned that Courson's recompleted well would now be producing from the Chester (where Arnold retained an overriding royalty interest), Arnold's landman contacted a Courson representative for further explanation. In the 1999 conversation, the Courson employee told the Arnold landman that the 1984 leases covered only the "deep rights" or "lower depths" that had expired under the 1973 leases.

Courson assigned his leases to Cabot in August 2011, and Cabot soon set about drilling and completing two horizontal wells (to be followed later by a third well) in the Chester's neighboring formation, the Marmaton. Cabot's initial two horizontal wells began producing in the first half of 2012. In July 2012, Arnold contacted Cabot to request payment, taking the position that its rights in the Marmaton formation were held by virtue of the 1973 leases' exception clause. Arnold maintained that the Marmaton had always been *capable* of producing oil and gas in commercial quantities, but was prevented from doing so by a conflict caused by simultaneous (and continuous) production from the 1970s-era vertical wells drilled in the Chester. Because the exception clause allowed such a formation to be held by the conflicting production in a different zone, then (in Arnold's view) the 1973 leases preserved its interest in the Marmton.

Cabot rejected Arnold's request for payment, and Arnold sued in October 2012. Arnold sought damages against Cabot for nonpayment of royalties and asked the district court to quiet title to the overriding royalty interest as to the Marmaton. Cabot, in turn, argued Arnold's claims were barred because the applicable statute of limitations began to run with the filing of the new leases in 1984, which event (in Cabot's view) should have put Arnold on notice of an adverse claim to the Marmaton. After a four-day bench trial, the district court—having found that Arnold's

cause of action accrued on July 20, 2012, the date Arnold's representative contacted Cabot to request payment of the override—granted judgment in favor of Arnold. The district court quieted title to the overriding royalty interest in Arnold and awarded $769,000 in actual damages and $493,000 in prejudgment interest, plus postjudgment interest, attorney fees, and costs.

Cabot appealed. Agreeing with Cabot that Arnold's claim accrued in 1984 upon the filing of the new leases in the county land records, the Court of Civil Appeals reversed the trial court's judgment on the grounds that 12 O.S. 2011 § 93(4)'s 15-year statute of limitations barred Arnold's claims as untimely. According to the Court of Civil Appeals, Arnold would have needed to sue no later than 1999 to avoid the 15-year statute of limitations and to keep its Marmaton rights. The Supreme Court granted certiorari to examine the application of the statute of limitations based on purported notice of a recorded lease, where the parties' lengthy course of business conduct indicated neither awareness nor acknowledgement of the lease's effect on the oil-and-gas formation at issue.

The Supreme Court noted that the "matter comes to us as an appeal from a judgment rendered following a bench trial in a quiet-title action," and that the case "boils down to one main question: when did Arnold's cause of action arise?" Or, "when was Arnold 'injured,' such that it could successfully sue to establish its rights in the Marmaton formation?" The Court concluded that no injury occurred before July 2012, when Arnold first requested payment of its overriding royalty interest.

Cabot contends that—once the 1984 leases were filed in the Beaver County land records—two things supposedly happened right away: (1) Arnold was put on notice about an adverse interest that jeopardized the ongoing validity of its overriding royalty interest; and (2) the clock began to run on any potential cause of action to quiet title to that interest, based on 12 O.S. 2011 § 93(4)'s 15-year statute of limitations. Endorsing that reasoning, the Court of Civil Appeals reversed the district court. The Oklahoma Supreme Court thought, however, that the district court reached the correct result: the existence of the subsequent 1984 leases—notwithstanding the fact of their recording—did not *reasonably* cast doubt on the viability of Arnold's interest in the as-yet-undeveloped Marmaton formation. The extent of that interest (and any adverse claims thereto) would not be put at issue until 2012, when horizontal drilling began and the Marmaton finally began to prove profitable for all parties concerned. No cause of action accrued until Arnold asserted its right to payment under the still-operative 1973 leases in 2012, and Cabot refused to pay.

The evidence at trial established that (1) simultaneous vertical-well production from the Marmaton would have conflicted with existing development in the Chester alone, thereby permitting *both* formations to be held by production in the Chester under the plain language of the leases' exception clause, (2) the Chester formation has produced continuously since drilling began in the mid-1970s, (3) Arnold has never stopped receiving its overriding royalty on that production, and (4) neither Cabot nor Courson ever surrendered or otherwise released their interests in the specific manner required by the 1973 leases. The filing of the 1984 leases did not alter those facts. The Court stated that "it is difficult to see wherein the [subsequent] recording of defendant's mineral deed . . . could have any effect on plaintiff's rights or constitute notice to plaintiff of such deed."

But here, Arnold had no role in drafting or recording the 1984 leases, which were entirely silent about the Marmaton formation. Nothing in the 1984 leases suggested the parties (who are unquestionably sophisticated about the oil and-gas business) considered the 1973 leases terminated as to the Marmaton; nothing in the 1984 leases said anything about the Marmaton at all. The parties' business relationship continued as before, with Arnold receiving uninterrupted royalty payments from the Chester production. When Arnold spoke to Courson in 1999 about the 1984 leases, the Marmaton never came up because the status of that formation was not at issue. The fact that wells were drilled under the 1984 leases to the *Lower* Chester—a formation that no party has ever argued was held by production under the 1973 leases' exception clause—could not, by itself, tell Arnold anything about its Marmaton interest. The Court explained that, from 1984 to 2012, nothing could reasonably alert even a sophisticated party like Arnold about an adverse claim to its Marmaton interest. The Court stated, "We decline to impose a notice requirement on a party some three decades before that party, in fact, has anything whatsoever to sue over."

At trial, the district court found that Cabot "entirely ignored" the title opinion's warning until *after* it began drilling operations in the Marmaton. The Oklahoma Supreme Court emphasized that "we cannot give a defendant the benefit of some other contract he in hindsight might wish he had made. We can only interpret the plain language of the contract now before us."

The trial judge pointedly and succinctly identified the ultimate problem with Cabot's theory of the case when it asked Cabot's counsel at trial: "Why do you today get to decide which part was released and which part wasn't[?] . . . Why do you get to decide which part was or wasn't if it wasn't expressed?" The answer, of course, is that Cabot does not get to decide that question in a way that goes against the plain words of the 1973 leases and the parties' decades-long course of conduct. Arnold should have been secure in its good-faith belief that the terms of the 1973 leases continued to control its interest as to both formations until the actual injury to its interest in the Marmaton occurred in 2012. The Court held that Arnold brought a timely lawsuit in 2012 to enforce its valid overriding royalty interest in the Marmaton formation under the oil and gas leases executed in 1973.

The words of the 1973 leases allowed the Marmaton formation to be held by the neighboring Chester formation's conflicting and continuous production. The conduct of the parties (and their predecessors in interest) showed a consistent intent—for almost forty years—to keep paying an overriding royalty to Arnold under the same 1973 leases. The recording of the 1984 leases did not change that. Nothing in law or equity supports requiring a plaintiff, in effect, to sue no later than 1999 for an injury that would not happen until 2012. Arnold filed a timely lawsuit to vindicate a valid interest. Accordingly, the Court affirmed the judgment of the district court in all respects.

The Court of Appeals for the Fifth Circuit Elaborates on the "Look Through" Jurisdictional Analysis for Federal Arbitration Act Petitions and Holds the Phrase "Arising Out Of" Is Broad in the Context of Arbitration Clauses

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On March 30, 2021, the Court of Appeals for the Fifth Circuit issued *Polyflow, L.L.C. v. Specialty RTP, L.L.C.*,[1] a decision concerning the arbitrability of claims related to the unauthorized use of trade secrets.

Background

In 2014, John Wright resigned as the president of Polyflow LLC ("Polyflow"), the manufacturer of a proprietary pipe called Thermoflex used in the oil and gas industry, to form a competitor, Specialty RTP. Polyflow sued Specialty RTP and John Wright (collectively, "Specialty") in 2015 for allegedly manufacturing a pipe identical to Thermoflex and deriving from Polyflow's protected and confidential information. The parties settled this dispute in 2017, and the settlement agreement imposed a two-year limitation on Specialty's ability to manufacture any competing pipes. After the two-year ban, Specialty was free to independently design a competing pipe, but, as a safeguard, the parties agreed to hire a neutral pipe expert to adjudicate whether Specialty was, in fact, independently designing its own product. The settlement agreement also contained an arbitration clause stating: "The sole and exclusive jurisdiction and venue for any action arising out of this Agreement shall be an arbitration in Harris County, Texas."

In 2019, Polyflow sent notice to Specialty and the neutral pipe expert claiming it was terminating the expert because the expert breached his neutrality and failed to follow the process specified in the settlement agreement. Polyflow also sent John Wright an arbitration demand alleging fraudulent inducement, breach of the settlement agreement, trademark infringement, and other statutory and common law violations. Specialty resisted arbitration, resulting in Polyflow filing a lawsuit in the Southern District of Texas in 2020 requesting an order compelling Specialty to arbitrate. In this case, Polyflow moved to compel arbitration, and the district court denied the motion without explanation.

The Fifth Circuit's Decision

Appealing the case to the Fifth Circuit, Polyflow challenged the district court's single-sentence order denying its motion to compel arbitration. Specialty disputed federal court jurisdiction for the first time on appeal. Polyflow conceded there was not diversity jurisdiction but argued the case presents a federal question.

[1] 993 F.3d 295 (5th Cir. 2021).

To determine federal question jurisdiction, the Fifth Circuit relied on the Supreme Court ruling in *Vaden v. Discover Bank*[2] which rejected using the well-pleaded complaint rule ordinarily used to analyze federal jurisdiction and substituted instead the "look through" approach for federal jurisdictional analysis in arbitrability disputes. Under this substituted approach, courts may "look through" a Federal Arbitration Act, 9 U.S.C. § 4 petition to determine whether the petition "is predicated on an action that 'arises under' federal law," as required by 28 U.S.C. § 1331. This "'look through' analysis does not depend upon the petition's strict language, but upon 'the controversy' or 'substantive conflict between the parties.'"

The Fifth Circuit held the arbitrability dispute presented a federal question, finding Polyflow's arbitration demand contained at least three federal statutory claims under the Lanham Act. The Fifth Circuit further found Specialty's arguments that Polyflow did not plead the Lanham Act claims until its First Amended Complaint unconvincing. The Fifth Circuit explained that what matters is that Lanham Act claims "animated the underlying dispute, not whether Polyflow listed them in its original complaint."

As no dispute that a valid agreement to arbitrate between the parties existed, the Fifth Circuit next determined whether the dispute in question fell within the scope of the arbitration clause in the parties' settlement agreement. For this determination, the Fifth Circuit looked to ordinary-state law principles governing the formation of contracts and found "if the parties have contracted to arbitrate, there is a 'presumption' that their disputes 'will be deemed arbitrable unless it is clear that the arbitration clause has not included them.'"

The Fifth Circuit held the clause requiring arbitration of "any action arising out of" the agreement is "broad" and encompasses all of Polyflow's arbitration demand. The Fifth Circuit clarified a past Fifth Circuit case, *Pennzoil Exploration v. Ramco Energy*,[3] which distinguished "broad" arbitration clauses from "arising out of" clauses. In *Pennzoil*, the Fifth Circuit had described "arising out of" clauses as "narrow." In *Polyflow*, the Fifth Circuit held that its prior "narrow" holding was dicta and the *Pennzoil* decision "stands alone in [the] court's jurisprudence compared to [its] consistent 'broad' holdings both before and after." The Court was also unconvinced by Specialty's reliance on cases interpreting "arising under" clauses, as that language was not at issue in this case and both "arising under" and "arising out of" clauses could coexist as "broad" without being redundant.

Applying the strong presumption in favor of arbitrability, the Fifth Circuit reversed and remanded the case with instructions to order arbitration.

[2] 556 U.S. 49 (2009).
[3] 139 F.3d 1061, 1067 (5th Cir. 1998).

FERC Must Try Again Regarding Brownsville LNG Terminals and LNG Pipelines

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Vecinos Para El Bienestar De La Comunidad Costera v. FERC, _ F.4th_, 2021 WL 3354747, Nos. 20-1045 & 20-1093 consolidated with No. 20-1094 (D.C. Cir. Aug. 3, 2021), held that FERC's authorizations of two Brownsville LNG terminals and of two 135 mile-long LNG pipelines connecting to one of them were deficient under the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA") for failure to properly analyze the projects' impacts on climate change and environmental justice communities, and held that FERC's public interest and convenience determinations under Sections 3 & 7 of the Natural Gas Act were likewise deficient.[1] The Court remanded for further proceedings without vacatur.[2]

Facts

FERC approval is required for siting, construction, and operation of LNG export terminals and for construction and operation of interstate LNG pipelines.[3] Under NEPA, FERC conducts an environmental review before approval of any LNG terminal or pipeline and prepares an Environmental Impact Statement ("EIS") when it determines that there will be "'major Federal action [ ]' that will 'significantly affect[ ] the quality of the human environment.'"[4] Additionally, Exec. Order 12,898, § 1-101, 59 Fed. Reg. 7,629 (Feb. 11, 1994), requires federal agencies to make "'environmental justice' analyses … for areas surrounding facilities or sites expected to have a substantial environmental, human health, or economic effect on the surrounding populations."[5]

Each project sought FERC's approval in 2016, had an EIS completed in 2019, and received FERC's approval in November 2019.[6] Rehearing requests asserting the claims discussed in the Court's opinion were denied and review was sought.[7]

Court's Rulings

The Court applied the APA's arbitrary and capricious review standard to FERC's analyses of greenhouse gas emissions.[8] Each project's EIS quantified the emissions, described the existing and cumulative climate change impacts in the

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[1] *Id*. *1 & 6. The appeal challenging approval of a third LNG terminal was dismissed as moot because that project was abandoned. *Id.* *3.
[2] *Id.* *1 & 6.
[3] *Id.* *1.
[4] *Id.* ([ ]'s in original).
[5] *Id.* *2.
[6] *Id.*
[7] *Id.* *2-3.
[8] *Id.* *3.

project's area, and explained that the project would increase greenhouse gases "and contribute incrementally to future climate change impacts."[9] And, each EIS concluded that FERC "was 'unable to determine the significance of the Project's contribution to climate change'", explaining that "there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to [the] Project's incremental contribution to [greenhouse gas emissions]" such that "it is not currently possible to determine localized or regional impacts from [greenhouse gas] emissions from the Project."[10]

Petitioners asserted that 40 C.F.R. § 1502.21(c)[11] necessitated the "use of the 'social cost of carbon' protocol" or another "generally accepted methodology to evaluate the impact … to climate change."[12] Section 1502.21(c) states "that '[i]f … information relevant to reasonably foreseeable significant adverse impacts cannot be obtained … because the means to obtain it are not known, the agency shall include within the environmental impact statement … [t]he agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.'"[13] The social cost of carbon protocol is a tool for estimating the cost of climate change caused by greenhouse gas emissions that was developed in 2010 by a federal interagency working group and "withdrawn" by executive order in 2017.[14] FERC gave three reasons for not using that protocol: (1) lack of consensus on the discount rate for analyses spanning multiple generations, (2) the tool does not measure a project's actual incremental environmental impacts, and (3) lack of established criteria for the monetized values considered "significant" for a NEPA analysis.[15]

The Court observed that the regulation "appears applicable on its face" and that its significance was never discussed by FERC despite its having been raised before the agency.[16] Accordingly, the Court held that "[t]o the extent that [FERC] failed to respond to Petitioners' argument that 40 C.F.R. §1502.21(c) required it to use the social cost of carbon protocol or some other generally accepted methodology to assess of the impact of the projects' greenhouse gas emissions, we agree … that [FERC] failed to adequately analyze the impact of the projects' greenhouse gas emissions."[17] It further opined that "[b]ecause [FERC] failed to respond to significant opposing viewpoints concerning the adequacy of its analyses of the projects' greenhouse gas emissions, we find its analyses deficient under NEPA and the APA."[18] The Court said that FERC's "discussion of the social cost of carbon protocol does not excuse its failure to address the significance of 40 C.F.R. § 1502.21(c)" and distinguished an earlier decision

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[9] *Id.*
[10] *Id*. ([ ]'s in original).
[11] *Id.* Codified as 40 C.F.R. § 1502.22(b) when the EIS's were done. Id.
[12] *Id*. *4
[13] *Id.*
[14] *Id*. (citing Exec. Order 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).
[15] *Id.*
[16] *Id*. Nor did FERC mention the regulation in briefing to the Court. *Id.*
[17] *Id.*
[18] *Id.*

approving FERC's use of the same three reasons for non-application of the social cost of carbon protocol because that decision never considered the "significance of that regulation to [FERC's] refusal to use the social cost of carbon protocol."[19] The Court directed that on remand, FERC "must explain whether 40 C.F.R. § 1502.21(c) calls for it to apply the social cost of carbon protocol or some other analytical framework, as 'generally accepted in the scientific community' within the meaning of the regulation, and if not, why not."[20]

On environmental justice communities, the Court stated that NEPA and APA review was available despite the Executive Order's recitation that it created no right to judicial review.[21] It also opined that FERC's determination "of the area potentially affected by a project must be 'reasonable and adequately explained.'"[22] Although it found that each project's environmental impacts extended well beyond a two-mile radius, FERC used census block groups within a two-mile radius of the projects to assess environmental justice communities.[23] The Court concluded that FERC's unexplained decision to use a two-mile radius in its analyses was "arbitrary" because FERC "offered no 'rational connection between the facts found and decision made.'"[24] On remand, FERC was directed to explain its two-mile radius choice or analyze the projects using a different radius.[25] It was also required on remand to "explain whether its finding that 'all project-affiliated populations are minority or low-income populations' is still justified and, if so, whether its conclusion that the projects 'would not have disproportionate adverse effects on [such populations] in the area' holds."[26]

As FERC's determinations of public interest and convenience rested on flawed analyses of climate change and environmental justice communities, those determinations were also arbitrary and capricious to the extent that they relied on the deficient analyses.[27] On remand, FERC was ordered to reconsider those determinations "along with its analyses of the impacts on climate change and environmental justice communities."[28]

Finally, the intervenor project owners argued that remand without vacatur was justified because any deficiencies would likely be remedied and vacatur would jeopardize the ability to secure the funding needed for timely completion.[29] The Court agreed and remanded for further proceedings without vacatur because it was "reasonably likely that on remand [FERC] can redress its failure of

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[19] *Id.* Though not deciding if the protocol was such a method, the Court noted that, previously, FERC had not disputed that the social cost of carbon protocol was a generally accepted method for estimating greenhouse gas impact. *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* *5.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id*. (record citations omitted).
[27] *Id.* *6.
[28] *Id.*
[29] *Id.*

explanation with regard to its analyses of the projects' impacts on climate change and environmental justice communities, and its determinations of public interest and convenience …, while reaching the same result" and "vacating the orders would needlessly disrupt completion of the projects."[30]

[30] *Id*.

New Legislation Signals Strong Support for CCUS in Texas

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On June 9, 2021, Texas Governor Greg Abbott signed House Bill 1284 ("HB 1284"), which was introduced along with its Senate companion, SB 450, during the state's 87th legislative session. HB 1284 grants the Texas Railroad Commission ("RRC"), the governmental agency that regulates the state's oil and gas industry, sole jurisdiction over Class VI Injection Wells and carbon capture, use, and sequestration ("CCUS") activities in Texas.

Class VI Injection Wells are used to inject carbon dioxide ("CO2") into deep rock formations, also known as geologic sequestration. This technology is utilized in order to reduce CO2 emissions to the atmosphere and mitigate climate change. Class VI wells are one of six types of underground injection well classes established by the U.S. Environmental Protection Agency ("EPA") that are subject to the requirements of Section 1421 of the Safe Drinking Water Act for the purpose of protecting underground sources of drinking water from endangerment.

A Class VI Underground Injection Control permit is required prior to drilling and operating a Class VI well for CCUS operations. While Texas currently has "primacy" (approval from the EPA for permitting and enforcement authority) over issuing permits for wells in Classes I-V, it does not yet have primacy for wells in Class VI, which means that final authorization still comes from the EPA. At this time, only Wyoming and North Dakota currently have Class VI primacy, though Louisiana is currently in the process of applying for primacy.

Until the passing of HB 1284, which is effective immediately, the RRC and the Texas Commission on Environmental Quality ("TCEQ") split jurisdiction over geologic storage of CO2, depending on whether the geologic formation itself was capable of producing oil, gas or geothermal resources. This shared regulatory responsibility within the state created an impediment to Texas' eventual goal of receiving primacy from the EPA.

HB 1284 changed that by tasking a single agency with seeking delegation authority from the EPA on Class VI Injection Wells. The RRC now has sole jurisdiction in Texas over the regulatory processes for these wells, simplifying the steps toward and paving the way for the RRC to seek primacy from the EPA and thus streamline the permitting process. If Texas were granted primacy from the EPA over Class VI Injection wells, the RRC would be required to enforce the EPA's environmental standards, and primacy could be revoked if the RRC failed to do so. The TCEQ will also continue to have input on each application for a permit to build a Class VI well, regardless of whether or not primacy is achieved.

This recently enacted legislation is indicative of strong support in Texas for the development of CCUS projects and helps clear the path for onshore and offshore CCUS deployment within the state. The next step will be for Texas to

apply for primacy from the EPA, a process which is expected to take one to two years. Louisiana began this process last year, sending drafts of primacy documents to the EPA for review at the end of 2020. Class VI regulations were published in the Louisiana Register on January 20, 2021, and it is expected that the EPA will complete its review of the package and public comments by the third quarter of this year.

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