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Abstention Doctrines Have a Continued Role in Energy Litigation

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The abstention doctrine continues to be relevant in cases throughout the energy law industry. At the motion to dismiss and motion for summary judgment stages, federal courts must determine whether exercising jurisdiction over claims is proper. Recent cases have involved the *Rooker-Feldman* doctrine, the *Colorado River* doctrine, *Burford*, and *Pullman*. These doctrines/cases analyze how intertwined the state and federal cases are, whether the issues are parallel, whether the state law is clear, and whether a federal decision would impair the state's effort to implement a policy, and other considerations.

Adelphia Gateway, LLC v. Pennsylvania Environmental Hearing Board, et al.

In *Adelphia Gateway, LLC v. Pennsylvania Environmental Hearing Board, et al.*, 1:21-CV-1241 (M.D. Penn. Nov. 23, 2021), the United States District Court of the Middle District of Pennsylvania granted a motion to dismiss a complaint seeking relief pursuant to the Natural Gas Act, 15 U.S.C. § 717 *et seq.* (“Natural Gas Act”).

Facts

Adelphia Gateway, LLC (“Adelphia”) is a natural gas company currently constructing an interstate natural gas pipeline and related facilities in Delaware and Pennsylvania. One facility is located in West Rockhill Township, Pennsylvania (“the facility”), and Adelphia sought a series of approvals from state and federal regulatory entities in order to complete this project. Adelphia applied for approval from the Federal Energy Regulatory Commission (“FERC”) and the Pennsylvania Department of Environmental Protection (“PADEP”). PADEP issued an Air Quality Plan Approval in April 2019, under the Clean Air Act, 42 U.S.C. § 7401 *et seq.* FERC issued its approval pursuant to its authority under the Natural Gas Act in December 2019. FERC issued its Notice to Proceed in October 2020, naming the facility as one of those approved for construction.

Due to environmental concerns, some citizens and entities opposed Adelphia's project and appealed both the FERC and PADEP decisions. The PADEP decision was appealed to the Pennsylvania Environmental Hearing Board (“EHB”), and the FERC decision to the Third Circuit Court of Appeals (“Third Circuit”).

At the EHB, Adelphia filed a motion to dismiss on jurisdictional grounds, citing the Natural Gas Act's judicial review provision, and arguing that only the Third Circuit could hear approval decision appeals. The Natural Gas Act's judicial review provision states in full:

The United States Court of Appeals for the
circuit in which a facility subject to section 717b

of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval ... under Federal law, other than the Coastal Zone Management Act of 1972.¹

EHB agreed with Adelphia and dismissed the appeals. The dismissal was appealed to Pennsylvania's Commonwealth Court, which reversed the dismissal, concluding that EHB did have jurisdiction over the appeals of the PADEP approval decision. The Commonwealth Court held that a proceeding before the EHB was not a "civil action" under the Natural Gas Act's judicial review provision and was, therefore, not preempted.

Following this decision, Adelphia filed the instant action against the individual defendants, West Rockhill Township, and added both the EHB and four EHB judges as defendants. Adelphia sought declaratory and injunctive relief. The first two counts sought declarations that Section 717r(d)(1) of the Natural Gas Act vested the Third Circuit with original and exclusive jurisdiction to review appeals of approval decisions and preempted EHB jurisdiction to hear such appeals. Count III requested preliminary and permanent injunctions against all defendants, preventing EHB from taking any action on the approval decisions and preventing individual defendants from seeking further relief from EHB. Adelphia filed an emergency motion for a preliminary injunction to prevent EHB from maintaining jurisdiction over the approval decision. Eight days after Adelphia filed the complaint, PADEP intervened on behalf of Adelphia.

The individual defendants and West Rockhill Township filed a joint motion to dismiss. The EHB and EHB judges did not sign on with any party on the motion to dismiss, file a brief, or participate in oral argument.

Adelphia invoked the district court's federal question jurisdiction. The moving defendants argued that the court lacked subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine and the court should abstain from exercising its jurisdiction pursuant to the Colorado River doctrine. Further, the defendants argued that if the court found that it had subject matter jurisdiction, the complaint nevertheless failed to state a claim pursuant to Rule 12(b)(6) defenses of res judicata, collateral estoppel, and laches. The court concluded that *Rooker-Feldman* did not preclude its jurisdiction, but that *Colorado River* counsels in favor of abstention. Regardless, "[i]n the exercise of caution," the court held that Adelphia was collaterally estopped from relitigating the issue of EHB jurisdiction after unsuccessfully arguing its case before the Commonwealth Court.

¹ 15 U.S.C. § 717r(d)(1).

Rooker-Feldman Doctrine

28 U.S.C. § 1257 grants the Supreme Court of the United States sole authority to review state court decisions. A federal district court has no appellate jurisdiction over the final determinations of state courts.² This *Rooker-Feldman* doctrine “prohibits the district court from exercising jurisdiction” when a final state-court judgment precedes a federal suit.³ The Supreme Court has described the doctrine as exceedingly narrow.⁴ To determine whether a complaint merits dismissal under the *Rooker-Feldman* doctrine, courts consider whether the allegations of injury are “(1) brought by state-court losers (2) complaining of injuries caused by state-court judgments (3) rendered before the district court proceedings commenced and (4) inviting district court review and rejections of those judgments.”⁵ It also only applies “when the losing party seeks federal relief ‘after the state proceedings [have] ended.’”⁶

In *Adelphia*, the court recognized that its court of appeals recently adopted the “practical finality” approach for the *Rooker-Feldman* analysis and held that the doctrine “does not apply when state proceedings have neither ended nor led to orders reviewable by the United States Supreme Court.”⁷ The court found that Adelphia requested declaratory relief opposed to the conclusions of the Commonwealth Court, and Adelphia and PADEP have filed petitions for allowance of appeal with the Supreme Court of Pennsylvania. Accordingly, the state court proceedings had not concluded. As a result, the court determined that *Rooker-Feldman* was inapplicable in this case.

Colorado River Abstention

This doctrine permits courts to abstain from exercising jurisdiction by staying or dismissing a pending federal action in favor of a parallel state court proceeding.⁸ Courts apply the doctrine cautiously because abstention is an “extraordinary and narrow exception” to a court’s “virtually unflagging obligation” to exercise jurisdiction when conferred by Congress.⁹ The *Colorado River* analysis requires a two-part inquiry: (1) are the actions parallel and (2) whether the matters present the “extraordinary circumstances” contemplated by Colorado-River and its progeny.¹⁰

Proceedings are “parallel” when they involve “substantially similar parties and claims at the time the federal court is deciding whether to abstain.”¹¹ The litigation must be “truly duplicative”, which means “identical, or at least effectively

² *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 416 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 476 (1983).

³ *Great W. Mining & Mineral Co. v. Fox Rothschild*, 615 F.3d 159, 163-64 (3d Cir. 2010).

⁴ See *Lance v. Dennis*, 546 U.S. 459, 464 (2006).

⁵ *Malhan v. Sec’y U.S. Dep’t of State*, 938 F.3d 453, 458 (3d Cir. 2019) (quoting *ExxonMobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 282-84 (2005)).

⁶ *Adelphia Gateway, LLC*, 1:21-CV-1241 *3 (quoting *ExxonMobil*, 544 U.S. at 291).

⁷ See *Malhan*, 938 F.3d at 460.

⁸ *Nationwide Mut. Fire. Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 307 (3d Cir. 2009).

⁹ See *id.*

¹⁰ *Id.* at 307.

¹¹ *Kelly v. Maxim Specialty Ins. Grp.*, 868 F.3d 274, 285 (3d Cir. 2017).

the same.”¹² Courts weigh six factors to determine whether the circumstances are “sufficiently extraordinary” to warrant abstention: (1) in an *in rem* case, which court first assumed jurisdiction over the property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the courts obtained jurisdiction; (5) whether federal law or state law controls the decision; and (6) whether the state court will adequately protect the interests of the parties.¹³ The balance should be “heavily weighted in favor of the exercise of jurisdiction.”¹⁴

The court first turned to parallelism. It observed that the federal case involved the same parties as the state court case with the addition of the EHB and EHB judges. The court recognized that the parties are “substantially the same.”¹⁵ The presence of the EHB did not persuade the court otherwise because the parties were appealing a decision from that administrative body of the EHB, by the EHB judges, to the state intermediate court. Additionally, the EHB and EHB judges did not take a position on Adelphia’s complaint or the motion to dismiss.

Thereafter, the court found that the federal and state court actions involved the same core legal issue. The question in state court was whether the Natural Gas Act divests the EHB of its subject matter jurisdiction to hear an appeal from the approval decision from PADEP. In the federal complaint, Adelphia sought a declaration that the Third Circuit has original and exclusive jurisdiction to review an approval decision under the Natural Gas Act. Accordingly, the state and federal proceedings were parallel.

The court then turned to the question of whether the circumstances were sufficiently extraordinary to warrant abstention. It found that the first two factors were not relevant in this case. But it found that the third and fourth factors favored abstention. The desirability of avoiding piecemeal litigation applies when there is “a strongly articulated congressional policy against piecemeal litigation in the specific context of the case under review.”¹⁶ The court found that the Natural Gas Act provision on which Adelphia bases its suit vests “original and exclusive jurisdiction” in federal appellate courts, not district courts. Therefore, it found that the congressional policy of the Natural Gas Act eliminated the court’s role entirely from judicial review of interstate pipeline permits. Additionally, if the court exercised jurisdiction and abrogated the Commonwealth Court decision, it would run the risk of conflicting with any opinion from the Supreme Court of Pennsylvania. Further, the fourth factor examines the order in which courts obtained jurisdiction. The Pennsylvania administrative and judicial bodies had overseen the litigation of these issues for more than two years at the time the instant case was filed.

¹² See *id.*

¹³ See *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 818-19 (1976).

¹⁴ *Moses H. Cone Memel Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983).

¹⁵ *Kelly*, 868 F.3d at 285.

¹⁶ See *Ryan v. Johnson*, 115 F.3d 193, 198 (3d Cir. 1997).

The fifth factor regarding whether state or federal law controls weighed against abstention according to the court. Interpretation of the Natural Gas Act is the major question in this case.

Finally, the sixth factor weighed in favor of abstention. It considers the adequacy of the state court to “protect the interests of the parties.”¹⁷ This factor carries little weight when state court proceedings are adequate. In this case, Adelphia never questioned that the Commonwealth Court could exercise its jurisdiction to decide in Adelphia’s favor.

The court concluded that abstention was proper under the Colorado River doctrine.

Rule 12(b)(6)

In an abundance of caution, the court examined the defendants’ motion to the extent it was based on Rule 12(b)(6).

The Defendants argued that Adelphia’s complaint was barred by res judicata, collateral estoppel, and laches. Because it found the application of collateral estoppel dispositive, it did not reach the arguments pertaining to res judicata or laches.

Collateral estoppel bars re-litigation of an issue that was conclusively determined in a prior adjudication and that was essential to the original judgment.¹⁸ The court reiterated that the state court proceedings and Commonwealth Court decision resolved the issue presented in this case. The court held that the Commonwealth Court’s opinion was a final judgment until the Supreme Court of Pennsylvania elects to reverse it. Finally, the court found that the parties had a full and fair opportunity to litigate the relevant issue in the parallel proceedings. Therefore, collateral estoppel precluded further inquiry.

Because the Colorado River abstention doctrine applied and, because the court determined that collateral estoppel precluded further inquiry “[i]n an abundance of caution,” the court granted the Defendants’ motion to dismiss.

Jackson Purchase Energy Corp. v. Marshall County, Kentucky, 534 F.Supp.3d 761 (W.D. Mo. 2021).

Jackson Purchase Energy Corporation (“JPE”) and West Kentucky Rural Electric Cooperative Corporation (“WKRECC”) (collectively, “Plaintiffs”) filed a lawsuit against Marshall County, Kentucky, the Marshall County Fiscal Court, the Marshall County Judge Executive, and three Marshall County Commissioners (collectively, “Defendants”). The lawsuit challenged an ordinance requiring Plaintiffs to collect a fee from electric customers and remit the fee to the local government to fund its 911 emergency services. The court bifurcated the litigation because some claims would likely be decided as a matter of law without discovery

¹⁷ *Ryan*, 115 F.3d at 200.

¹⁸ See *Witkowski v. Welch*, 173 F.3d 192, 198 (3d Cir. 1999).

("Phase One"). After the bifurcation, the Plaintiffs filed a Phase One Motion for Summary Judgment.

For Phase One, Plaintiffs urged the Court to invalidate the ordinance pursuant to multiple Kentucky statutes because the ordinance was vague and uncertain. In response, the Defendants urged the Court to abstain from considering Plaintiff's claims pursuant to *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) and *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941). Defendants alternatively argued for application of the statutes to sustain the ordinance.

***Burford* Abstention**

The court first turned to the abstention doctrine. The Defendants argued for abstention under *Burford* as explained in *New Orleans Public Service Inc. v. Council of City of New Orleans ("NOPSI")*, 491 U.S. 350, 361 (1989). The Sixth Circuit has stated:

Burford abstention is appropriate "where timely and adequate state-court review is available and (1) a case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the results in the case at bar, or (2) the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."¹⁹

Further, "*Burford* instructs federal courts to avoid hearing cases where doing so would interfere with a state's regulatory efforts."²⁰ To abstain, "[t]here must be an unanswered question of state law 'whose importance transcends...the case then at bar.'"²¹ "The key question is whether an erroneous federal court decision could impair the state's effort to implement its policy."²²

In *Pullman*, the Supreme Court of the United States instructed federal courts to abstain from decision when unsettled questions of state law must be resolved before a federal question can be decided.²³ "The usual situation for *Pullman*-type abstention is where the unclear issue of state law may make it unnecessary to decide a federal constitutional question."²⁴ "*Pullman* abstention instructs courts to avoid exercising jurisdiction in cases involving an ambiguous state statute that may be interpreted by state courts so as to eliminate, or at least

¹⁹ *Stein v. Thomas*, 672 F. App'x 565, 571 (6th Cir. 2016) (quoting *Caudill v. Eubanks Farms, Inc.*, 301 F.3d 658, 660 (6th Cir. 2002).

²⁰ *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 939 (6th Cir. 2018) (citing *NOPSI*, 491 U.S. at 361).

²¹ *Gray v. Bush*, 628 F.3d 779, 786 (6th Cir. 2010) (quoting *NOPSI*, 491 U.S. at 361).

²² *Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co.*, 621 F.3d 554, 565 (6th Cir. 2010).

²³ See *Hill v. Snyder*, 900 F.3d 260, 265 (6th Cir. 2018) (referring to *Pullman*).

²⁴ 17A Charles Alan Wright et al., *Federal Practice and Procedure*, § 4242 (3d ed. 2007).

alter materially, the constitutional question raised in federal court.”²⁵ But, *Pullman* abstention is not required “if the state law is clear on its face...or if the constitutional issue would not be avoided or changed no matter how the statute is construed.”²⁶ The Sixth Circuit has cautioned that “abstention is ‘the exception and not the rule,’” and “district courts should engage in a thorough analysis of the state-law issue before abstaining under *Pullman*.”²⁷

The court performed an analysis of each of the Phase One claims. First, the court found that the published ordinance “sufficiently cover[ed] the main points of the ordinance and clearly inform[ed] the public of its nature.”²⁸ The court found that the *Hammons* opinion is authoritative and clear on the state law issues raised here.

Second, the court found that *Bluegrass Boarding & Training Kennels v. Jefferson Cnty. Fiscal Ct.*,²⁹ was authoritative on addressing impermissible vagueness. *Bluegrass Boarding* stands for the proposition that a “statute is impermissibly vague when a person disposed to obey the law could not determine with reasonable certainty what conduct is prohibited.”³⁰

Third, the court found that language of KRS 278.040(2) is clear and controlling regarding Count 10. The statute provides Marshall County, as a political subdivision of the Commonwealth, the authority to enact ordinances in this manner.³¹

Fourth, the court held that KRS 65.760(4) was not ambiguous because the plain language of the statute is clear. In *Lincoln County*, 609 S.W.3d at 477, the Kentucky Court of Appeals stated “KRS 65.760 specifically states that the fee can be collected from telephone companies, KRS 65.760(3), but it also states that the fees can come from sources other than telephone companies. KRS 65.760(7).” In this case, the fee collectors are electric companies, not telephone companies, so the fees may be collected by electricity providers pursuant to subsection 7 of the statute.

Fifth, the court recognized that the specific question was whether the ordinance violates KRS 65.760(3), although that subsection only requires telecommunications providers to act as 911 emergency service fee collection agents regarding Count 7. In concluding that the ordinance did not violate KRS 65.760(3), the court recognized that the Kentucky Court of Appeals has twice upheld fiscal court ordinances requiring entities other than telecommunications

²⁵ *Fowler v. Benson*, 924 F.3d 247 (6th Cir. 2019).

²⁶ *Wright et al.*, *supra*, § 4242.

²⁷ *Jones v. Coleman*, 848 F.3d 744, 749-50 (6th Cir. 2017).

²⁸ See *Knox County v. Hammons*, 129 S.W.3d 839, 843 (Ky. 2004) (upholding an ordinance imposing a tax because the summary disclosed the amount of the charge imposed).

²⁹ 26 S.W.3d 801, 805 (Ky. Ct. App. 2000)

³⁰ *Id.* (holding that where a person can readily determine what is required by an ordinance, it is not impermissibly vague).

³¹ See *City of Stanford v. Lincoln County*, 609 S.W.3d 473, 477 (Ky. 2020).

providers to collect fees for 911 emergency services—*Lincoln County and City of Lancaster v. Garrard County*.³²

Sixth and finally, regarding Count 6, the court identified the key issue as whether the ordinance seeks to regulate the use or provision of electricity under KRS 67.083(3)(r). The court again turned to the plain language of the statute to determine that the language was clear. It determined that the statute is clear that subsection (3)(r) is meant to limit a fiscal court's authority in regulating the provision of electricity. It concluded that the ordinance was not seeking to exercise authority over Plaintiffs' supply of electricity, even though it concerned electric providers and related to their service.

The court found that abstention was not required under *Pullman* because the state statutes at issue were clear or already addressed by state courts. Likewise, the court found that abstention was not required under *Burford*. It found that although some of the state law issues raised here may be difficult, they did not rise to the level of requiring abstention. Further, any decision by the court would not impair the state's effort to implement its policy because it found no effort by the judicial, legislative, or executive branches in the state of Kentucky to implement a policy regarding Kentucky counties' collection of 911 emergency services fees.

The court did not abstain and nevertheless denied the Plaintiff's motion for summary judgement on Phase One

Conclusion

The above case reviews emphasize that the abstention doctrine continues to permeate energy law cases. At the motion to dismiss and motion for summary judgment stages, federal courts regularly must judge whether exercising jurisdiction over claims is proper. Federal courts perform extensive analysis to determine if its exercise of jurisdiction would interfere with a state, the state's laws, regulations, and policies, and whether a state court case parallels the federal case.

³² No. 2013-CA-000716-MR, 2017 WL 3446983, at *3 (Ky. Ct. App. 2017) (upholding fiscal court ordinance placing fee on weather meters and requiring fees to be collected and remitted to local government by water utilities).

Acquiring and Defending Carbon Storage Rights

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Carbon Capture and Sequestration (“CCS”) involves the capture of carbon dioxide (CO₂), either directly from the atmosphere (direct air capture) or from man-made emissions that have not yet been released into the atmosphere. The captured CO₂ is then injected deep into the ground for permanent sequestration. In the United States, the Department of Energy estimates that the total storage capacity for CO₂ is in the trillion of tons.¹

Much of that storage is available in the San Andres formation in the Permian Basin and the Gulf of Mexico, which could potentially store all the carbon released in U.S. production.²

For companies seeking to reduce emissions through CCS, one main obstacle will be acquiring the appropriate legal rights to inject into the ground. Companies will need to navigate federal and state-level regulatory hurdles, as well as potential opposition from NGOs.

I. Acquiring Carbon Storage Rights: Permitting and Land Use

There are four ways to acquire the right to inject carbon storage into a subsurface:

- (1) easements and surface use agreement from the owner;
- (2) title to the surface land (surface rights);
- (3) mineral estate to the land; and
- (4) acquire both surface rights and mineral estate.

Depending on which options landowners make available, easements may be the simplest and least expensive approach to acquiring carbon storage rights in a large area. Alternatively, purchasing title to the land and subsurface would guarantee long-term storage across large swaths of land.

Recently, numerous states have passed legislation to address underground storage. Such legislation frequently addresses issues of liability, monitoring, and ownership of pore space and CO₂. For example, Texas has both

¹ Angela C. Jones & Ashley J. Lawson, *Carbon Capture and Sequestration (CCS) in the United States*, p. 12, CONGRESSIONAL RESEARCH SERVICE (Oct. 18, 2021), <https://sgp.fas.org/crs/misc/R44902.pdf>.

² See, e.g., Joe Blommaert, *The promise of carbon capture and storage, and a Texas-sized call to action*, INTERNATIONAL ASSOCIATION OF OIL & GAS PRODUCERS (June 8, 2021), <https://www.iogp.org/blog/benefits-of-oil-and-gas/opinions/the-promise-of-carbon-capture-and-storage-and-a-texas-sized-call-to-action/>; Mella McEwen, Permian’s future could lie in storing CO₂ emissions, MRT (Aug. 29, 2020) <https://www.mrt.com/business/oil/article/Permian-s-future-could-lie-in-storing-CO2-15524972.php>.

onshore and offshore carbon storage legislation. The most recent bill was signed by Governor Abbott in June 2021 (HB 1284, 2021) and granted the Texas Railroad Commission sole jurisdiction over Class VI Injection Wells and carbon storage.

II. Regulatory Hurdles

No matter which approach is taken to acquire storage rights, the operators must obtain the requisite permits from the relevant land office, either state or Federal. While the state permits will vary by location, the following federal permits may be applicable:

- The Environmental Protection Agency (EPA) requires Underground Injection Control Permits. The EPA has regulations for six types of underground well injections. These are controlled by the type of fluids and the depth injected. For example, Class VI wells are used to inject CO₂ for geologic sequestration.
- The Department of Interior (“DOI”) may require acquisition of a right-of-way permit if the injection is on public land. And the National Environmental Policy Act (“NEPA”) requires agencies to assess the environmental impacts of qualifying federal actions—a process that can take years to complete. And if the injection is offshore, permits under the Marine Protection, Research and Sanctuaries Act (“MPRSA”) Permit or the Outer Continental Shelf Lands Act (“OCSLA”) may also be required.

III. NGO Opposition and Other Concerns

Although carbon sequestration is intended to be a solution to global climate change, it is not universally supported. NGOs have expressed concern that CCS enables pollution by providing for a “net zero” calculation for emitting greenhouse gases, therefore relieving the pressure to transition from fossil fuels. In addition, NGOs may challenge CCS projects via citizen suits alleging the injection of carbon into the ground having adverse impacts, such as leakage and changes to natural systems, or that a particular use of pore space may not be in an appropriate geographic location.

Some environmentalists may consider CCS no differently than they would any other waste storage facility and assert citizen suits under legal theories similar to those commonly asserted under RCRA or CERCLA. CCS requires high amounts of energy and resources to build and operate sequestration facilities—NGOs may challenge permits, possible fugitive emissions, or make legal claims on behalf of neighboring communities through Environmental Justice policies, a top priority for the Biden Administration.³

Indeed, on May 13, 2021, the White House Environmental Justice Advisory Council listed CCS opportunities on its list of projects that are not believed to

³ See Michael R. Leslie, Marcella Burke, and Granta Nakayama, *Environmental Justice Rises to the Forefront of EPA Policy* (May 14, 2021), <https://www.kslaw.com/blog-posts/environmental-justice-rises-to-the-forefront-of-epa-policy-2>.

benefit a community.⁴ And companies can face lawsuits for green washing—making false or misleading advertisements that a company’s activities or products are more environmentally friendly than they actually are—when they advertise CCS activities inaccurately.⁵

IV. Conclusion

CCS is a tool that can facilitate the energy transition and reduce global emissions. The United States has enormous capacity for carbon storage, which numerous companies have already begun to tap into. As interest in CCS increases, companies should prepare to take the appropriate legal steps to acquire storage rights through easements, surface use agreements, or otherwise; apply for permits; and trouble shoot NGO opposition.

⁴ White House Environmental Justice Advisory Council, *Justice40 Climate and Economic Justice Screening Tool & Executive Order 12898 Revisions: Interim Final Recommendations*, (May 13, 2021), at 57–8.

⁵ See, e.g., Maxine Joselow, *Lawsuits target Exxon’s social media ‘green washing’*, CLIMATEWIRE (July 22, 2021), <https://www.eenews.net/articles/lawsuits-target-exxons-social-media-green-washing/>.

Colorado Supreme Court to Hear ‘Commercial Discovery Rule’ Challenge

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On January 10, 2022, the Colorado Supreme Court announced that it would hear a challenge to an appellate court’s application of the ‘commercial discovery rule’ to oil and gas leases.

As summarized in more detail in the December 2021 issue of the Institute for Energy Law’s *Oil & Gas E-Report*,¹ the case of *Board of County Commissioners of Boulder County v. Crestone Peak Resources Operating LLC*² presented the Colorado Court of Appeals (Division I) with the question of whether lease habendum clauses calling for ‘production’ required the actual, continuous extraction of oil and gas to maintain a lease beyond its primary term. The *Crestone Peak* court held that ‘production’ was satisfied by discovery in commercial quantities and therefore actual extraction of oil and gas was not required.

Following this ruling, the Board of County Commissioners of Boulder County (“Boulder County”) filed a Petition for Writ of Certiorari (“Petition”) with the Colorado Supreme Court³ on June 24, 2021,⁴ asking that it overturn the appellate court’s decision. Boulder County classified the ‘commercial discovery rule’ as “a minority, disfavored approach to lease interpretation,” proposing the “well-reasoned, majority rule” of ‘actual production’ should instead be applied. It also claimed that the ‘commercial discovery rule’ contravened lease and contract interpretation rules (e.g., applying the plain meaning of terms, giving effect to the parties’ intentions, and construing leases in favor of lessors). Lastly, Boulder County contended that the ‘commercial discovery rule’ was inconsistent with prior Colorado precedent which determined that marketing is an aspect of production,⁵ stating that this conclusion leads directly to the actual production rule.

Crestone Peak Resources Operating LLC (“Crestone Peak,” which is now part of Civitas Resources Inc.) responded with an Opposition to Petition for Writ of Certiorari, filed on July 29, 2021,⁶ asserting that the appellate court correctly applied “long-standing” Colorado law⁷ and “well settled principles of contract construction.” It argued that Boulder County’s characterization of the *Crestone Peak* court’s decision as the ‘minority rule’ was incorrect, and, even if true, was not a reason to grant the Petition. It also maintained that “the commercial discovery rule is good policy” because, as explained by the *Crestone Peak* court, it protects lessees from losing large financial investments if actual production temporarily

¹ Available at <https://www.cailaw.org/media/files/IEL/Publications/ereport/2021/issue-4-december.pdf>.

² 2021 WL 1916380, 2021 COA 67 (Colo. Ct. 2021).

³ All documents referenced herein as filed with the Colorado Supreme Court are available on the Colorado Courts E-Filing system under Supreme Court Case No. 2021SC477.

⁴ Filing ID 90449160E1853.

⁵ *Citing to Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2001).

⁶ Filing ID 83A64B3B62ECA.

⁷ *Citing to Davis v. Cramer*, 837 P.2d 218 (Colo. App. 1992).

pauses, while the implied duty to market protects lessors from operators holding leases indefinitely without making a diligent effort to develop and market the oil and gas. Additionally, Crestone Peak noted that Boulder County waived its argument regarding marketing being an aspect of production before the court of appeals, and therefore, such argument may not now be raised. Regardless, however, Crestone Peak claimed that the precedent to which Boulder County referred had no bearing on the current inquiry as it did not concern the term ‘production’ in a lease habendum clause but rather the allocation of costs associated with producing and processing oil and gas among lessees and lessors.

Boulder County then filed a Reply in Support of Petition for Writ of Certiorari on August 5, 2021,⁸ reiterating its arguments that contracts must be construed according to their plain language and the actual production rule is favored by other jurisdictions. It also claimed that while its briefs to the court of appeals did not address the allocation of cost precedent, the same was raised in oral argument such that “[t]he relationship of marketing and production is an issue squarely before this Court.” Finally, Boulder County asserted that the “well-established” precedent Crestone Peak identified as establishing the ‘commercial discovery rule’ in Colorado has never been cited by another Colorado court for that purpose.

By Order of Court entered January 10, 2022, the Colorado Supreme Court, sitting *en banc*, granted Boulder County’s Petition, reframing the issue it would consider as follows: “Whether the court of appeals erred in adopting and applying the ‘commercial discovery rule’ in interpreting oil and gas leases.” Petitioner’s Opening Brief was originally due by February 21, 2022, with Respondent’s Answer Brief to be filed within 35 days of receipt of the Opening Brief, and Petitioner’s Reply Brief due within 21 days from receipt of the Answer Brief. However, on February 15, 2022, the Court granted Boulder County’s request for an extension of time to file its opening and amicus briefs,⁹ the same now being due on March 14, 2022. As of the writing of this article, no briefs had been filed.

⁸ Filing ID 83366C26CF7C9.

⁹ See Filing ID 230FEBE2D8888 (Petitioner’s Unopposed Motion for Extension of Time to File Opening and Amicus Briefs, filed February 14, 2022).

Issue Resolved: Texas Supreme Court decides the phrase “free of cost in the pipe line” includes delivery to on-site gathering pipelines.

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Introduction

On February 4, 2022, the Texas Supreme Court issued its opinion in Case No. 20-0639; *Nettye Engler Energy, LP v. BlueStone Natural Resources II, LLC*. The opinion, delivered by Justice Devine, affirmed the decision of the Fort Worth Court of Appeals and specifically determined:

A gas gathering pipeline is a “pipeline” in common, industry, and regulatory parlance, and the deed does not limit the delivery location to any specific pipeline nor prohibit delivery to a pipeline at or near the well, if any.²

Further, the Texas Supreme Court held Respondent, BlueStone Natural Resources II, LLC (“BlueStone”), properly deducted postproduction costs against Petitioner, Nettye Engler Energy, LP (“Engler”). These postproduction costs were incurred from the gathering pipelines on the wellsite to the point of sale at the transmission pipeline.³ The court stated:

We hold that BlueStone discharged its royalty obligation by delivering Engler’s fractional share of production in the gathering pipelines on the premises and, therefore, BlueStone properly deducted postproduction costs between that point and the point of sale in valuing Engler’s royalty interest.⁴

In issuing this opinion, the Texas Supreme Court resolved the dispute regarding the royalty valuation point between BlueStone and Engler, determined a “pipeline” includes on-lease gathering lines, and limited the application of the prior supreme court opinion in *Burlington Resources Oil & Gas Co. v. Texas Crude Energy, LLC*.

¹ These materials have been prepared solely for educational purposes. The opinions expressed in this publication are those of the author. These opinions do not reflect the opinions or views of any other person or entity, including Mewbourne Oil Company.

² *Nettye Engler Energy, LP v. BlueStone Natural Resources II, LLC*, No. 20-0639, 2022 WL 33368, at *1 (Tex. 2022).

³ *Id.* at *5.

⁴ *Id.*

Background

This dispute begins with a 1986 special warranty deed (the “1986 Deed”). In the 1986 Deed, Engler’s predecessor-in-interest reserved a nonparticipating royalty interest using the following language:

Grantor hereby excepts and reserves unto itself, its heirs, successors and assigns, an undivided one-eighth nonparticipating (1/8th) royalty interest in and to all of the oil, gas and other minerals on, in and under the Subject Property...provided that...Grantor...shall be entitled to receive from Grantee...a free one-eighth (1/8) of gross production of any such oil, gas or other mineral said amount to be delivered to Grantor’s credit, free of cost in the pipe line, if any, otherwise free of cost at the mouth of the well or mine....⁵

In 2004, BlueStone’s predecessors leased the minerals subject to the 1986 Deed and drilled thirty-four (34) producing wells.⁶ For several years, Quicksilver Resources, Inc. (“Quicksilver”) operated the wells related to the 1986 Deed.⁷ Quicksilver interpreted the 1986 Deed and sold Engler’s share of production – and valued Engler’s royalties – “at the point of sale to the gas purchaser’s pipeline” rather than at the delivery point to the gathering pipelines.⁸ Quicksilver’s interpretation moved the royalty valuation point downstream to the point of sale at the transmission pipeline.⁹ “This valuation rendered Engler’s in-kind royalty not only unburdened by production costs but also free of all postproduction costs.”¹⁰

In April 2016, BlueStone took over operations.¹¹ Unlike Quicksilver, BlueStone interpreted the 1986 Deed to require royalty valuation at the gathering pipelines rather than the transmission pipelines. In its briefing, BlueStone contends it properly values Engler’s royalties at “the on-lease connection between its wells and third-party pipelines.”¹² According to BlueStone, using this location for royalty valuation properly allows the deduction of postproduction costs downstream from this on-lease location.¹³

⁵ *BlueStone Natural Resources II, LLC v. Nettye Engler Energy, LP*, No. 02-19-00236-CV, 2020 WL 3865269, at *1 (Tex. App.—Fort Worth 2020), *aff’d*, 2022 WL 33368 (Tex. 2022) (emphasis added).

⁶ *Nettye Engler Energy, LP v. BlueStone Natural Resources II, LLC*, No. 20-0639, 2022 WL 33368, at *2 (Tex. 2022).

⁷ *Id.*

⁸ *Id.*

⁹ *See id.*

¹⁰ *Id.*

¹¹ *BlueStone Natural Resources II, LLC v. Nettye Engler Energy, LP*, No. 02-19-00236-CV, 2020 WL 3865269, at *2 (Tex. App.—Fort Worth 2020), *aff’d*, 2022 WL 33368 (Tex. 2022).

¹² Br. on the Merits of Resp’t BlueStone Natural Resources II, LLC at xi, 1.

¹³ *See id.*

After BlueStone deducted postproduction costs, Engler’s royalty proceeds dramatically decreased.¹⁴ Engler sued BlueStone in the 153rd Judicial District Court of Tarrant County, Texas based on theories of conversion and money had and received.¹⁵

Procedural History

At the trial court, Engler and BlueStone submitted cross-motions for summary judgment. The trial court judge granted Engler’s motion and denied the motion filed by BlueStone.¹⁶ By Order dated May 31, 2019, the trial court held “[Engler’s] royalty interest is free of all post-production costs besides severance taxes, regulatory fees, and transportation costs.”¹⁷ The trial court did not allow BlueStone to take deductions for postproduction costs such as compression, processing, and dehydration. BlueStone appealed to the Fort Worth Court of Appeals.

On appeal, the Fort Worth Court of Appeals reversed the trial court’s rulings and rendered judgment in BlueStone’s favor.¹⁸ The appellate court decided the 1986 Deed remained unambiguous, and the court sought “to enforce the intention of the parties as it is expressed[.]”¹⁹ In reaching its decision, the appellate court relied on the Texas Supreme Court decision in *Burlington Resources Oil & Gas Company L.P. v. Texas Crude Energy, LLC*.²⁰ Based on this review, the appellate court held:

A strict application of the holding in *Burlington Resources* to the valuation provision in the 1986 Deed compels us to conclude that the valuation point of the royalty interest involved in this case is the equivalent of a valuation point “at the wellhead” and, thus, Engler’s royalty interest bears postproduction costs.²¹

The Texas Supreme Court granted petition for review on September 24, 2021.

Texas Supreme Court Opinion

The Texas Supreme Court affirmed the decision of the Fort Worth Court of Appeals. In reaching its opinion, the Texas Supreme Court began at a familiar location. After a discussion of the standard of review, the court relied on basic rules of contract construction. “When construing an oil-and-gas deed, standard rules of

¹⁴ *Nettye Engler Energy, LP v. BlueStone Natural Resources II, LLC*, No. 20-0639, 2022 WL 33368, at *3 (Tex. 2022).

¹⁵ See *id.*

¹⁶ See Exs. to Appellant’s Br., No. 02-19-00236-CV; *BlueStone Natural Resources II, LLC v. Nettie Engler Energy, LP*; in the 2nd Court of Appeals, Fort Worth, Texas at 48-50.

¹⁷ *Id.* at 51.

¹⁸ *BlueStone Natural Resources II, LLC v. Nettie Engler Energy, LP*, No. 02-19-00236-CV, 2020 WL 3865269, at *1 (Tex. App.—Fort Worth 2020), *aff’d*, 2022 WL 33368 (Tex. 2022).

¹⁹ *Id.* at *3.

²⁰ See *id.* at *3-5.

²¹ *Id.* at *4.

contract construction apply. Our objective is to ‘ascertain the true intentions of the parties as expressed in the writing itself,’ beginning with the instrument’s express language.²² In attempting to ascertain the intent of the parties, the court reemphasized “[w]hether a contract is ambiguous or not is a question of law.”²³ In resolving this question of law about ambiguity, the court concluded “the 1986 deed is not ambiguous.”²⁴

After determining the 1986 Deed was not ambiguous, the court continued in its analysis to ascertain the intent of the parties. Important to the decision, even though various pipelines existed when the parties executed the 1986 Deed, the 1986 Deed “does not specify any particular pipeline or any particular *type* of pipeline, as it could have.”²⁵ “When an instrument does not indicate that language is being used in a technical or special way, we construe the instrument’s words as ‘usually understood by persons in the business to which they relate.’”²⁶ After reviewing a variety of treatises, dictionaries, statutes, and case law, the court opined:

An onsite gathering pipeline qualifies as a pipeline, and the 1986 deed’s reference to a failsafe or default delivery point at or near the point of production does not exclude such a pipeline from bearing its common meaning.²⁷

Having decided the issue of whether an on-lease gathering line qualifies as a pipeline, the Texas Supreme Court opinion turned its attention to whether the language in the 1986 Deed specifically prohibits delivery at or near the well. Again, the court emphasized the 1986 Deed “does not identify any particular pipeline, specify a particular downstream delivery point, or otherwise refer to a pipeline located off the wellsite premises.”²⁸ To now require delivery to a mainstream transmission pipeline would impermissibly add language to the 1986 Deed.²⁹ Instead, the court determined the intent of the parties to the 1986 Deed was to allow delivery to “occur into the pipelines *on the wellsite, if any*, rather than an intent to establish a downstream delivery point that would result in a markedly different royalty calculation.”³⁰

Finally, the Texas Supreme Court reminded the parties that contracts are construed according to their terms and limited the holding in *Burlington Resources Oil & Gas Co. v. Texas Crude Energy, LLC*.³¹ In *Burlington Resources*, the Texas Supreme Court was tasked with interpreting the language of an overriding royalty

²² *Nettye Engler Energy, LP v. BlueStone Natural Resources II, LLC*, No. 20-0639, 2022 WL 33368, at *5 (Tex. 2022) (citations omitted).

²³ *Id.* at *6.

²⁴ *Id.*

²⁵ *Id.* at *7 (emphasis in original).

²⁶ *Id.* (citation omitted).

²⁷ *Id.* at *10.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at *11 (emphasis in original).

³¹ *See id.*

provision.³² The court held the “language assigning an overriding royalty interest equated certain language specifying an ‘into the pipeline’ delivery point with an ‘at the mouth of the well’ valuation.”³³ However, the decision that the “into the pipeline” language was the same as a delivery point “at the mouth of the well” should not be established as a specific rule.³⁴ Rather, *Burlington Resources* stands for the same conclusion reached by the court in this case. “Just as in *Burlington Resources*, our analysis here turns not on an immutable construct but on the parties’ chosen language.”³⁵ Both *BlueStone* and *Burlington Resources* stand for the same principle. The chosen language indicating the intent of the parties will control the how the court interprets the 1986 Deed or any oil and gas instrument.

Key Takeaways

The *BlueStone* opinion provides three (3) key takeaways for oil and gas practitioners.

1. Under case law precedent and rules of contract construction, parties will be bound by the specific language of the contract. Parties should clearly define terms, and if the parties intend to create a limitation or required royalty valuation point, the parties should clearly establish this intent in the contract.
2. The guiding principle of interpretation of the 1986 Deed – and other oil and gas instruments – will be the intent of the parties. In determining the intent of the parties, if the oil and gas instrument “has a certain and definite meaning, the contract is unambiguous, and [the court] will construe it as a matter of law and enforce it as written.”³⁶
3. The Texas Supreme Court’s ruling in *Burlington Resources*, does not establish a rule of interpretation requiring the phrase “into the pipeline” to always be the same valuation as “at the mouth of the well.”³⁷ Rather, the opinion in *Burlington Resources* reemphasizes the reliance on examination of the chosen language to express the intent of the parties.

³² 573 S.W.3d 198, 202-11 (Tex. 2019).

³³ *Nettye Engler Energy, LP v. BlueStone Natural Resources II, LLC*, No. 20-0639, 2022 WL 33368, at *11 (Tex. 2022).

³⁴ *See id.*

³⁵ *Id.*

³⁶ *Id.* at *6.

³⁷ *See id.* at *11.

Houston Court of Appeals for the 14th District Breaks New Ground in JOA Exculpatory Clause Law

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Introduction

The Houston Court of Appeals for the 14th District broke new ground in the law on joint operating agreements, a contract form widely used in the oil and gas industry, in *Apache Corp. v. Castex Offshore, Inc.*¹ The Houston Court of Appeals agreed with the lower court that a JOA's exculpatory clause includes two distinct standards for holding the operator liable—not one—bucking a well-established trend in the judiciary and across the industry.

An exculpatory clause at issue in *Apache* was from the 1982 AAPL form, and the clause read as follows:

Operator shall conduct all operations in a good and workmanlike and in accordance with all rules, laws, and regulations as would a prudent operator under the same or similar circumstances. Operator shall not be liable to the Parties for losses sustained or liabilities incurred as a result of its activities or failure to act as Operator hereunder, except to the extent as may result from the **gross negligence or willful misconduct** of the Operator.

Industry insiders and energy lawyers will be familiar with the above emphasized verbiage—"gross negligence or willful misconduct"—because it appears in the 1977, 1982, 1989 JOAs, and even in the latest iteration, the 2015 AAPL form 610 JOA.² The industry, and the judiciary, leading up to *Apache* understood the language "gross negligence or willful misconduct" to only include one standard for operator liability—basically, the gross negligence standard.³ But the Houston Court of Appeals interpreted the exculpatory language to include two bases for operator liability, and for the first time in joint operating agreement-law history, defined willful misconduct.

The Court defined willful misconduct as "intentionally or deliberately engag[ing] in improper behavior or mismanagement, without regard for the consequences of his acts or omissions" based off the "plain language", dictionary-

¹ 626 S.W.3d 371 (Tex. App.—Houston [14th Dist.] 2021, pet. filed).

² A.A.P.L. Form 610-1977 Model Form Operating Agreement; A.A.P.L. Form 610-1982 Model Form Operating Agreement; A.A.P.L. Form 610-1989 Model Form Operating Agreement; A.A.P.L. Form 610-2015 Model Form Operating Agreement.

³ *IP Petrol. Co., Inc. v. Wevanco Energy, L.L.C.*, 116 S.W.3d 888, 896–98 (Tex. App.—Houston [1st Dist.] 2003, pet. denied); *Reeder v. Wood Cty. Energy, LLC*, 395 S.W.3d 789, 792–97 (Tex. 2012); *BP Oil Pipeline Co. v. Plains Pipeline, L.P.*, 472 S.W.3d 296, 311–15 (Tex. App.—Houston [14th Dist.] 2015, pet. denied.); see John S. Lowe, *Chapter 27: Some Recurring Issues in Operating Agreements and What AAPL's Drafting Committee Might Do About Them*, in 60TH ANN. ROCKY MTN. MIN. L. INST. 27-12–27-13 (2014).

definition of the words.⁴ Though the definition supplied is innocuous enough, JOA operators and non-operators who have an exculpatory clause should be wondering *what does Apache and this new definition mean for me?*

Case Background

The case began as a breach of contract action brought by Apache, the operator under the JOA, against Castex, the non-operator, to recover amounts owed by Castex under the joint interest billing statements (“JIBs”). Castex counterclaimed that Apache breached the parties’ contracts on two bases: first, concerning upgrades made to a gas processing plant (“Belle Isle”), that Apache grossly mismanaged the project, resulting in severe overspending; and second, that Apache grossly mismanaged a natural gas reservoir (“Potomac”) resulting in irreversible damages to the reservoir and Castex’s interest therein.⁵

Castex supported its allegations against Apache by proffering that the Belle Isle project ran nearly \$90 million over initial estimates (the initial AFE estimated the project would cost \$16.9 million; final costs were near \$102 million) and that Apache grossly mismanaged staffing for the project (between late 2011 and May 2014, four different project managers spearheaded the Belle Isle project—under each, costs skyrocketed). For its Potomac claim, Castex proffered that Apache only produced under the lease after pursuing five sidetracks from the original wellbore, which inflated costs. Additionally, the fifth sidetrack only produced a small amount of gas before water interference rendered the entire project uneconomical.

The parties submitted damages and controlling fact questions to a jury, and the jury returned a verdict for Castex on both bases of its breach of contract claim. The jury found that Apache’s breach concerning the Belle Isle and Potomac projects resulted from willful misconduct *but not from gross negligence*. Pursuant to the breaches, the jury awarded Castex \$5.57 million for the Belle Isle breach, \$8.9 million under the Potomac breach for Apache’s failure to operate the well as a reasonably prudent operator, \$44.6 million under the Potomac breach for unrecoverable reserves lost due to Apache, and over \$3.15 million in attorney’s fees. In total, Castex recovered over \$62.2 million for Apache’s willful misconduct.

Apache appealed the jury verdict on sufficiency grounds, arguing that its actions did not amount to willful misconduct. The Houston Court of Appeals affirmed in part and reversed in part; the Court affirmed the jury verdict as to the Belle Isle damages and reversed as to the Potomac damages. The Court found that the verdict was legally insufficient as to the Potomac damages because if there was a breach related to the well, it did not rise to the level of willful misconduct.⁶ Castex has filed a petition for review with the Texas Supreme Court, and the petition remains pending.

⁴ *Apache*, 626 S.W.3d at 381.

⁵ The Belle Isle JOA covers a gas processing plant in Louisiana and the Potomac JOA covers wells in Texas.

⁶ *Id.* at 381 (defining willful misconduct as “intentionally or deliberately engag[ing] in improper behavior or mismanagement, without regard for the consequences of his acts or omissions”).

Questions Presented by *Apache Corp. v. Castex Offshore, Inc.*

The dispute between Apache and Castex highlights two interesting questions. The first question is whether the “gross negligence or willful misconduct” standard contains two distinct means for holding an operator liable, or just one. The matter is currently before the Texas Supreme Court on petition for review. If the Court grants the petition, it will have the opportunity to review whether the Houston Court of Appeals correctly defined willful misconduct under the JOA. The second question—which has not been presented to the Supreme Court because it was not preserved for appeal—is whether a non-operator may withhold payment to an operator for mere breach of the JOA.

1. *One Not Two, or Two Not One?*

In its petition for review, Castex rightfully notes that the “gross negligence or willful misconduct” standard listed in the AAPL form 610 JOA’s exculpatory clause—listed from the 1977 form through the 2015 form—has nearly always been interpreted to be one standard for holding the operator liable, not two.⁷ On the other hand, recognizing two distinct standards does seem to fit in with the plain language of the exculpatory clause,⁸ and giving effect to willful misconduct as a separate standard permits non-operators to look at the body of common law defining willful misconduct.⁹

Recognizing two standards instead of one is not a purely academic question; differing standards could lead to wildly different outcomes in disputes concerning JOAs. While Texas courts have tended to “equate[] ‘willful’ conduct to gross negligence” in many contexts, the Texas Supreme Court recently distinguished willful conduct from gross negligence, finding willful conduct comes close to the line of an intentionally inflicted injury (but just short). See *Mo-Vac Serv. Co. v. Escobedo*, 603 S.W.3d 119, 125-26 (Tex. 2020). The definition proffered by the Houston Court of Appeals in *Apache* is intimated by similar principles and by the plain language, dictionary meaning of the words: as the Court put it, “a defendant is liable for willful misconduct if the evidence establishes that the

⁷ See Petition for Review at 26–27, *Castex Energy Partners, LLC, et al. v. Apache Corp.*, No. 14-19-00605-CV (citing *IP Petrol. Co., Inc. v. Wevanco Energy, L.L.C.*, 116 S.W.3d 888, 896–98 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (“[t]hroughout the history of Texas law, willful misconduct’ has been defined in a manner akin to ‘gross negligence.’”); *Reeder v. Wood Cty. Energy, LLC*, 395 S.W.3d 789, 792–97 (Tex. 2012) (reviewing a form 1989 JOA’s exculpatory clause—which includes “gross negligence or willful misconduct” language—and applying only the gross negligence definition); *BP Oil Pipeline Co. v. Plains Pipeline, L.P.*, 472 S.W.3d 296, 311–15 (Tex. App.—Houston [14th Dist.] 2015, pet. denied.) (interpreting *Reeder*, holding that gross negligence and willful misconduct standards are the same)). It is worth mentioning that this is generally the understanding of the industry writ-large, too. See John S. Lowe, *Chapter 27: Some Recurring Issues in Operating Agreements and What AAPL’s Drafting Committee Might Do About Them*, in 60TH ANN. ROCKY MTN. MIN. L. INST. 27-12–27-13 (2014).

⁸ *Broadway Nat. Bank v. Yates Energy Corp.*, 631 S.W.3d 16, 23 (Tex. 2021) (applying the plain language canon to determine that the use of “or” is disjunctive, requiring one *or the other*, not both); *In re Stalder*, 540 S.W.3d 215, 220 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (same).

⁹ See *Apache*, 626 S.W.3d at 381 (citing *Mo-Vac Serv. Co. v. Escobedo*, 603 S.W.3d 119, 125–26 (Tex. 2020) (Texas Supreme Court defines willful misconduct as “short of genuine intentional injury.”)).

defendant *intentionally or deliberately engaged in improper behavior or mismanagement, without regard for the consequences of his acts or omissions.*¹⁰

These definitions are to be contrasted with the well-settled definition for gross negligence under Texas law. Specifically, a plaintiff must prove that (1) when viewed objectively from the defendant's standpoint at the time of the event, the act or omission involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the defendant had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.¹¹ As opposed to the willful misconduct definitions, gross negligence focuses on an extreme degree of risk to others and includes both objective and subjective components.

This understanding of the different exculpatory clause standards begs the question of why the jury found Apache liable for breach of the JOA under the willful misconduct standard, but not gross negligence? The Houston Court of Appeals held that Apache did not demonstrate willful misconduct in its operation of the Potomac well. That leaves Belle Isle. We speculate that intentionally incurring more costs to complete an already overbudget project would not qualify as a matter involving an extreme degree of risk to others and therefore the jury rightly found no gross negligence. However, such overspending arguably does constitute willful misconduct because Orr was not authorized to spend in excess of the AFE, knew that he was overspending and continued to willfully do so outside the bounds of his authority, and without fully informing his superiors.

2. Breach of the JOA Standard

The second question presented by the Apache-Castex dispute—but not briefed to the Supreme Court—is whether mere breach of a JOA permits a non-operator to withhold payment under the JOA. In their joint Stipulation of Undisputed Facts, Apache and Castex stipulated that Castex failed to pay Apache for over \$2.7 million in JIBs for work completed on the Potomac well. Castex's legal theory was that Apache's prior material breach of the JOA (*i.e.*, its alleged failure to perform work in a good and workmanlike manner) excused Castex from the obligation to pay those outstanding JIBs. The trial court permitted multiple jury questions directed at Castex's theory, and the jury made findings that were in its favor. As a result, Apache was estopped from recovering the unpaid JIB balance.

Ultimately, this issue was not preserved for appeal,¹² but the authors note that it is their judgment that the trial court was incorrect for (1) how it submitted the

¹⁰ *Apache*, 626 S.W.3d at 381 (emphasis added).

¹¹ See *IP Petrol.*, 116 S.W.3d at 897 (citing TEX. CIV. PRAC. & REM. CODE § 41.001(11)) (jury instruction on gross negligence).

¹² *Apache*, 626 S.W.3d at 394. Interestingly, the Houston Court of Appeals for the 14th District would review the question in a case decided the same year as *Apache*, in *Crimson Exploration Operating, Inc. v. BPX Operating Co.*, No. 14-20-00070-CV, 2021 WL 786541, at *5 (Tex. App.—Houston [14th Dist.] Mar. 2, 2021, pet. denied). In *Crimson Exploration*, the Houston Court of Appeals held that the “gross negligence or willful misconduct” standard applies to standard JOA breaches, making its affirmation of the lower court in *Apache* even more vexing.

relevant questions to the jury and, (2) entering judgment on this question in line with the jury's findings.

Under the JOA at issue—a form 1982 AAPL form 610 JOA—the JOA sets forth accounting procedures for the non-operator to dispute amounts billed by the operator. Indeed, COPAS—the Council of Petroleum Accountants Societies—authored the very Accounting Procedure for Joint Operations (which were appended to the Potomac JOA), which promulgates the following procedure:

1. Operators bill non-operators monthly for their proportionate share of expenses under the Joint Account (JIBs);
2. JIBs generated by an operator are *presumed* to be true and correct unless a non-operator serves written exceptions to the JIBs on the operator; and, finally
3. Non-operators are entitled to audit JIBs within 24 months following the end of the calendar year in which operators billed non-operators, and may serve written exceptions on the operator within the same period.

The procedures require a non-operator to pay its share of joint interest expenses (without distinguishing that such portion must be undisputed), but such non-operator is permitted to continue protesting and disputing the correctness of such bills following payment, with adjustments on the bill to follow within the prescribed time period. Therefore, the trial court's decision to permit a non-operator to withhold JIB payments is inconsistent with the accounting procedure set forth in the JOA *and mutually agreed upon by the parties*. The authors further note that had this issue been preserved for appeal, it would give the Texas Supreme Court an opportunity to extend the holding of *Reeder* to the 1977 AAPL form and 1982 AAPL form 610 JOAs,¹³ overturn *Abraxas Petroleum Corp. v. Hornburg*,¹⁴ and align Texas law with federal law on the issue.¹⁵

Implications

The dust from *Apache Corp. v. Castex Offshore, Inc.* has not yet settled, but with the new decision that is inconsistent with prior Texas precedent, a threshold question that operators and non-operators now must consider is for what acts or omissions will the two standards apply, with respect to the exculpatory clause? The line in the sand the Houston Court of Appeals seems to draw is based on whether the operator intentionally or deliberately engaged in a pattern of improper behavior or mismanagement, or instead, was grossly negligent.

Another notable implication from the Houston Court of Appeals' analysis on whether Apache was liable for willful misconduct in the Belle Isle project is that

¹³ *Reeder*, 395 S.W.3d at 794 (opining that the exculpatory clause in 1989 JOAs clearly extend to breach of JOA actions, without opining on whether *Abraxas* or *Stine* is the law of Texas).

¹⁴ 20 S.W.3d 741, 759 (Tex. App.—El Paso 2000, no pet.) (“we conclude that the exculpatory clause is limited to claims based upon an allegation that Abraxas failed to act as a reasonably prudent operator and does not apply to a claim that it breached the JOA.”)

¹⁵ *Stine v. Marathon Oil Co.*, 976 F.2d 254, 261 (5th Cir. 1992) (noting that the gross negligence or willful misconduct standard's “protection clearly extends to breaches of the JOA.”).

the Court imputed liability upon the entire Apache organization based primarily on the actions of a single employee, even though senior executives at Apache took corrective measures, including reassigning and terminating employees, after they were aware of the cost overruns. The analysis should caution organizations to exercise greater executive-level oversight at earlier stages of project developments.

Finally, we propose two more observations about the effects the decision could have on operator and non-operator behavior under *Apache*. Less reputable non-operators may seek to use the *Apache* decision as basis for withholding payment of joint interest expenses, arguing that purported willful overspending on JOA projects constitutes willful misconduct on the part of the JOA's operator. In terms of drafting, operators may consider modifying standard exculpatory clauses to delete any reference to "willful misconduct" to make it clear that only one standard applies. In contrast, non-operators who would like to ensure "gross negligence" and "willful misconduct" impose different standards upon an operator may consider creating defined terms that clearly set forth the standard for each term.

D.C. District Court Vacates Offshore Lease Sale

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LSU Law Center

The United States District Court for the District of Columbia issued a decision on January 27, 2022 vacating Lease Sale 257, the largest sale of federal offshore oil and gas leases in history.¹

Lease Sale 257 was the eighth in a series of offshore oil and gas lease sales held by the Bureau of Ocean Energy Management (“BOEM”) pursuant to its 2017-2022 five-year plan under the Outer Continental Shelf Lands Act (“OCSLA”). Lease Sale 257 offered 80.8 million acres of federal waters in the Gulf of Mexico available for lease in a competitive bidding process. Lease Sale 257 was delayed after President Joe Biden issued an Executive Order putting an immediate and unilateral moratorium or “pause” on new offshore leasing. However, in 2021, in the case *State of Louisiana v. Biden*, the United States District Court for the Western District of Louisiana issued an order enjoining the Biden administration from continuing its “pause” on all federal oil and gas leasing.

In response to the court’s injunction in *State of Louisiana v. Biden*, BOEM held Lease Sale 257 in November 2021. By then, however, certain environmental organizations—Friends of the Earth, Healthy Gulf, Sierra Club, and the Center for Biological Diversity—had brought suit against the Department of Interior, arguing that BOEM was breaching the National Environmental Policy Act (“NEPA”) by going forward with Lease Sale 257 because BOEM had allegedly failed to adequately consider the impact of the Lease Sale on climate change.

It was undisputed that BOEM had made some efforts to evaluate the Lease Sale’s impact on climate change. For example, BOEM evaluated and compared the climate impact of the “No Action” alternative—that is, the option of not holding the lease sale—with the option of conducting the lease sale as planned. BOEM concluded that, if the lease sale was not held, there would be less oil production in the Gulf of Mexico than if the Lease Sale was held. Through the effects of supply and demand, the lower level of production would cause an increase in prices. In turn, the increase in prices would have two effects—it would prompt an increase in the production of oil from other sources, but would also prompt a decrease in the quantity of oil consumed. BOEM used a market simulation program to estimate the decrease in consumption in the U.S. and worldwide that would result if Lease Sale 257 was not held.

BOEM then used the estimated decrease in U.S. consumption to estimate the resulting decrease in carbon dioxide emissions in the United States if Lease Sale 257 was not held. However, BOEM did not estimate the decrease in emissions from other countries. BOEM defended this assumption in part on grounds that the amount of carbon dioxide emissions depends on how oil is used and that the

¹ *Friends of the Earth v. Haaland*, 2022 WL 254526 (D.C. Dist.).

agency lacked complete information regarding what portion of the oil consumed in other countries is put to particular uses.

The district court concluded that the assumption that there would be no reduction in foreign emissions was arbitrary and capricious. The court noted that a report on which BOEM relied had estimated that there would be a decrease in foreign consumption oil in the event that Lease Sale 257 did not occur. Further, though that report noted some uncertainties in how oil is used in other countries, that uncertainty should not preclude altogether any estimate whatsoever of the effect that a decrease in foreign consumption would have on foreign emissions. Moreover, the court noted that, in a preliminary Environmental Impact Statement BOEM was preparing for another, later lease sale—Lease Sale 258—BOEM had estimated the decrease in worldwide emissions that would result from not doing that other future lease sale. This undermined BOEM's contention that it was not practical for the agency to estimate the effect that not conducting Lease Sale 257 would have on worldwide emissions of carbon dioxide.

Two intervenor-defendants—the State of Louisiana and the American Petroleum Institute—argued that an order vacating Lease Sale 257 was not necessary. They argued that the matter could be remanded to BOEM for BOEM to fix the problem. Those defendants pointed to various harms that could result from an order vacating the sale—the decrease in revenue to the State of Louisiana and the possibility that BOEM would not be able to fix the problem and hold a substitute lease sale before the end of BOEM's 2017-2022 five-year plan.

Further, if a substitute lease sale could be arranged, another problem would arise. Lease sales are conducted in a closed-bidding process in which bids are submitted in advance and then opened at the lease sale, after the deadline to submit bids. Thus, the bids for Lease Sale 257 have already been opened. Accordingly, the internal bidding strategy of the companies that submitted bids and the estimated value that they placed on particular lease blocks has become public. This would be unfair in the event the same lease blocks would be offered in a subsequent lease sale.

The court acknowledged, but rejected these arguments. Although an order vacating an action taken in violation of NEPA is not mandatory, the court stated that the default remedy is to vacate an agency action that violates NEPA. The court concluded that an exception to the general rule of vacating an agency action was not appropriate. Therefore, the district court entered an order vacating Lease Sale 257.

An appeal has been filed.

Company Whose Pipeline Strayed Outside Servitude was not Liable for Disgorgement of Profits

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In 2011, the plaintiffs (the “Marys”) granted a 40-foot wide pipeline servitude to QEP Energy Co. (“QEP”).¹ The servitude allowed QEP to install two pipelines across the Marys’ land, along an approximately 4000-foot path that was shaped like the letter “L.” QEP constructed the pipelines, but as installed, the routes of each pipeline “cut the corner” of the “L,” such that a 31-foot section of one pipeline and a 15-foot section of the other pipeline were outside the servitude boundaries.

The Marys sued QEP in state court, asserting claims in tort, contract, and property law. QEP removed the case to the United States District Court for the Western District of Louisiana, based on diversity jurisdiction. The parties settled the portion of their dispute relating to the continuing presence of the pipeline in an area beyond the original servitude, but the Marys continued to pursue a claim that they were entitled to a disgorgement of all the profits that QEP previously had earned by use of the pipelines.

The plaintiffs’ disgorgement claim was based in part on accession, a concept that is grounded in Louisiana property law.² In particular, the plaintiffs advanced a three-part argument that (1) QEP was a “bad faith” possessor of plaintiffs’ land, (2) bad faith possessors must disgorge fruits, and (3) QEP’s pipeline profits constituted a “fruit” derived from the land.

In support of the first part of their argument—that QEP was a “bad faith” possessor—the plaintiffs relied on the Louisiana Civil Code. Although the Civil Code does not define “bad faith,” Civil Code article 487 defines “good faith,” stating,

For purposes of accession, a possessor is in good faith when he possesses by virtue of an act translative of ownership and does not know of any defects in his ownership. He ceases to be in good faith when these defects are made known to him or an action is instituted against him by the owner for the recovery of the thing.

The plaintiffs contended that QEP was a bad faith possessor because QEP did not have an act translative of title as to the portions of the pipelines’ routes that lay outside the original servitude boundaries.

In support of the second part of their argument—that bad faith possessors must disgorge fruits—the plaintiffs pointed to Civil Code article 486, which states, “A possessor in bad faith is bound to restore to the owner the fruits he has gathered,

¹ *Mary v. QEP Energy Co.*, 24 F.4th 411 (5th Cir.).

² Louisiana Civil Code 482 describes the concept of accession by stating, “The ownership of a thing includes by accession the ownership of everything that it produces or is united with it, either naturally or artificially, in accordance with the following provisions.”

or their value, subject to his claim for reimbursement of expenses.” Finally, in support of their contention that QEP’s profits constituted fruits, the plaintiffs relied on two Louisiana Supreme Court cases that—under the facts and circumstances of those cases—referred to profits as “fruits.”

In 2017, the federal district court denied the plaintiffs’ claim for a disgorgement of profits relying on Civil Code article 670, which governs the circumstance in which a landowner constructs a building that encroaches on the neighbor’s land. Article 670 does not provide for a disgorgement of fruits or profits. Under article 670, when a neighbor does not complain until after construction is complete, a court may allow the encroaching building to remain, in return for the owner of it paying the neighbor the value of a servitude for the encroachment area. The United States Fifth Circuit reversed, however, holding that article 670 only applies to encroaching *buildings*, not to other constructions, such as pipelines.

After the remand, the district court again denied the plaintiffs’ claim for disgorgement, noting that the claim was based on the law of accession relating to *fruits*, but that the only valuable substance transported by the pipelines had been natural gas, which Louisiana law would classify as a “product,” rather than a “fruit.”

The plaintiffs appealed and the Fifth Circuit affirmed, but on different reasoning than the district court had relied. The Fifth Circuit “assume[d] without deciding” that Louisiana law would allow disgorgement of profits earned on products, such as natural gas, produced on other lands but transported via a pipeline across the plaintiffs’ land. The Fifth Circuit explained, however, that if the plaintiffs were entitled to a disgorgement of QEP’s profits, it was only the *additional* profits that QEP earned because of the pipelines straying outside the boundaries of QEP’s servitude.

In the two Louisiana Supreme Court cases on which the plaintiffs relied, the court awarded all the trespasser’s profits to the landowner-plaintiff, but in each of those cases, *all* the trespasser’s activities had occurred on the landowner-plaintiff’s land. In contrast, QEP conducted most of its activities in an area where it had a right to conduct those activities. The Fifth Circuit noted that approximately 8000 feet of route used for QEP’s two pipelines were within the servitude, while only about 46 feet of the pipeline’ routes trespassed outside it. Further, the plaintiffs had not shown that QEP earned any additional profits because of that trespass. Thus, the plaintiffs were not entitled to a disgorgement of any profits under the plaintiffs’ primary legal theory—the law of accession that is part of Louisiana property law.

In addition, the Fifth Circuit held that disgorgement was not proper under the plaintiffs’ alternative theories that sounded in contract law and tort law.

North Dakota Supreme Court Clarifies Proper Suspension of Royalties

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The recent decision in *Vic Christenson Mineral Trust v. Enerplus Resources Corp.*¹ addressed the scope of the safe harbor under North Dakota Century Code § 47-16-39.1 (“Act”), governing the timely payment of lease royalties by a mineral lessee/operator. In reversing the trial judge’s summary judgment order – which found the operator liable for improperly suspending proceeds – the North Dakota Supreme Court clarified the statutory standard for operator compliance when faced with “disputes of title” among royalty owners.

To start, let’s take a look at relevant portions of the Act:

The obligation arising under an oil and gas lease to pay oil or gas royalties to the mineral owner ... is of the essence in the lease contract, and breach of the obligation may constitute grounds for the cancellation of the lease in cases in which it is determined by the court that the equities of the case require cancellation. If the operator under an oil and gas lease fails to pay oil or gas royalties to the mineral owner ... within [150] days after oil or gas produced under the lease is marketed and cancellation of the lease is not sought..., the operator thereafter shall pay interest on the unpaid royalties, without the requirement that the mineral owner or the mineral owner’s assignee request the payment of interest, at the rate of [18%] per annum until paid. ... This section does not apply if mineral owners or their assignees elect to take their proportionate share of production in kind, *in the event of a dispute of title existing that would affect distribution of royalty payments*, or if a mineral owner cannot be located after reasonable inquiry by the operator; however, the operator shall make royalty payments to those mineral owners whose title and ownership interest is not in dispute.²

For a simplified version of the facts that gave rise to this case: Party A and Party B owned fractional oil and gas royalty interests in the same tract of land in Dunn County, North Dakota (“Lands”). The Lands were included in drilling units operated by Lessee. Before production, Lessee obtained a title opinion on the Lands, which identified discrepancies in the historical chain of title and raised questions as to the correct distribution of royalties between Party A and Party B. Lessee notified Party A and Party B of these title issues in April 2017, and advised

¹ *Vic Christenson Mineral Trust v. Enerplus Resources Corp.*, 2022 ND 8, Case No. 20210050 (Jan. 6, 2022).

² N.D.C.C. § 47-16-39.1 (emphasis added).

each party that its royalty payments would be held in suspense until they entered a formal stipulation to clarify their respective interests in the Lands.

After failing to reach an agreement, Party A filed a quiet title action in January 2019, arguing that the identified issues should be resolved in its favor. In response, Party B counterclaimed and asserted that a contrary state of title, favoring Party B, was instead correct. Months later, the parties settled the case and stipulated to their interests in the Lands; this stipulation resulted in Party A relinquishing interests it had previously claimed in the suit. Lessee promptly released all suspended funds to the proper parties in accordance with the stipulation.

Party B then brought the subject lawsuit seeking statutory interest under the Act. The district court granted summary judgment in favor of Party B, ruling that Lessee was liable due to its improper suspension of payments. On appeal, however, Lessee argued that it should not owe interest to Party B pursuant to the Act's safe harbor provision. The North Dakota Supreme Court agreed.

As the court described, based on the title examiner's opinion and ensuing litigation between Party A and Party B, there was clearly a "dispute of title." Under its express safe harbor provision, liability imposed by the Act "does not apply ... in the event of a dispute of title existing that would affect distribution of royalty payments." Therefore, Lessee's suspension of royalties was lawful, and no statutory interest was owed to Party B.³

Lastly, of particular note for North Dakota operators: the title dispute in this case affected only a small portion of Party B's total royalty interest in the Lands, but Lessee held all of Party B's proceeds in suspense pending the required curative with Party A. The court rejected Party B's argument that Lessee should, at the very least, owe interest on the remaining portion of Party B's royalties that was not directly implicated in the title dispute.⁴

The court explained that, by the plain language of the Act, Lessee was required to "make royalty payments *to those mineral owners* whose title and ownership interest is not in dispute."⁵ Accordingly, while only a portion of Party B's interest in the Lands was affected by its dispute with Party A, Lessee was entitled to suspend all royalties payable to Party B while the title dispute continued.

³ The court expressly declined to apply the district court's "heightened standard ... requiring a successful title claim to be advanced by [Lessee], as opposed to merely a dispute of title existing." See *Christenson Mineral Trust* at ¶11.

⁴ See *id.* at ¶12.

⁵ See *id.* (quoting N.D.C.C. § 47-16-39.1 (emphasis added)).

PHMSA Final Rule Expands Federal Oversight, Adds New Type of Regulated Gathering Line¹

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On November 2, 2021, the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) issued a Final Rule (the “Final Rule”) to revise 49 C.F.R. Parts 191 and 192 to expand federal oversight of U.S. onshore natural gas gathering pipelines. Under the Final Rule, more than 400,000 miles of previously unregulated gas gathering lines will be subject to federal oversight. To accomplish this, the Final Rule creates two new categories of onshore gas gathering lines: Type C, subject to Parts 191 and 192, and Type R, subject to sections of Part 191. Operators can expect oversight to come quickly, with implementation to begin in 2022 and annual reports due on March 15, 2023.

The Final Rule has two major components. First, the definition of “regulated” expands to subject currently unregulated onshore gas gathering lines to federal safety regulations (Type C lines). Additionally, for the first time all gathering line operators must report safety data such as incident and annual reports (Type C and R lines). PHMSA believes these changes fill a critical regulatory gap.

The Final Rule introduces a new type of regulated gathering line, Type C. Type C lines have an outside diameter greater than 8.625 inches and are found in rural, Class 1 locations. Under §192.9(e), the safety requirements for Type C lines vary depending on factors such as pipeline size and the “consequences of a failure.” For example, Type C lines with an outer diameter greater than 16 inches, and those with an outside diameter greater than 12.75 inches that could impact residential areas and “other structures” must comply with stricter regulation.

The Final Rule will also create a new category of gas gathering line subject only to reporting and monitoring requirements, the Type R line. Type R lines include any onshore gathering line that does not fall under Type A, B or C. It is important to note that the Type R lines are not subject to the Part 191 registration requirements or the Part 192 safety standards. Therefore, unlike Type C lines, only the incident and annual reporting requirements of Part 191 apply to Type R lines.

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Texas: Pipeline Burial Covenants Present Important Legal Implications Regarding the Rights of Surface Estate Owners in Mineral Operations¹

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In *Henry v. Smith*, the Fort Worth Court of Appeals in Texas recently addressed the issue of whether a reservation of a mineral estate terminated certain covenants to bury pipelines to a certain plow depth or whether the covenants ran with the land.² In that case, the Henrys were the surface owners of Camp Creek Ranch (the “Ranch”), a 15,000-acre tract located in the rolling plains of North Texas in Archer County.³ Smith and others were administrators of the Christie Estate, who was the operator of three (3) oil and gas mineral leases that encumbered the Ranch.⁴ The United States Department of Agriculture classified most of the Ranch’s acreage as “prime” agricultural property,⁵ and each lease contained a covenant requiring the Christie Estate as the lessee to bury oil and gas pipelines to a certain depth at the lessor’s (the Henrys) request.⁶

Importantly, when the mineral leases were initially executed by the Henrys’ predecessors-in-interest, the landowners (and lessors) owned both the surface and mineral estates.⁷ Later, however, the surface estate and minerals were severed from one another, with the surface estate eventually conveyed to the Henrys and the minerals leased to the Christie Estate.⁸ The obligation to bury pipelines arose before the two estates were severed from one another, and this fact was critical in the legal analysis of what to do with such an obligation after the dispute arose between the holders of the surface and mineral estates.

The Henrys wanted to use the Ranch for farming but the Christie Estate wanted to use its leases of the land for its mineral operations.⁹ A dispute arose, and because of the way the administrators of the Christie Estate were operating their leases, the Henrys sued to either enforce the covenants or recover damages to the surface estate asserting, among other things, that the Christie Estate refused to bury its pipelines to a certain depth despite having an obligation to do so.¹⁰ The Christie Estate claimed it did not have such an obligation because the covenant had been

¹ This article has been prepared for educational purposes only and should not be construed as legal advice. Although every attempt has been made to ensure that the material addressed herein is true and accurate, errors or omissions may be contained, for which any liability on the part of the authors is disclaimed.

² See generally *Henry v. Smith*, No. 02-20-00169-CV, 2021 WL 5506865 (Tex. App. [Ft. Worth] Nov. 24, 2021), *reh’g denied* (Dec. 16, 2021).

³ *Id.* at *1.

⁴ *Id.*

⁵ Brief of Appellants, No. 02-20-00169-CV, 2020 WL 6291188, at *5 (Tex. App. [Ft. Worth] Oct. 12, 2020).

⁶ *Smith*, 2021 WL 5506865, at *1.

⁷ *Id.* at *2.

⁸ See *id.*

⁹ See Brief of Appellants, 2020 WL 6291188, at *5.

¹⁰ *Smith*, 2021 WL 5506865, at *2.

detached from the surface estate through mineral reservations.¹¹ The Henrys asserted claims for breach of contract, negligence, trespass, and nuisance and sought declaratory and injunctive relief to prevent future damages to the surface estate.¹²

The trial court granted the Christie Estate's Motion for Partial Summary Judgment finding against the Henrys' claim that they could enforce surface covenants in the Christie Estate's leases, essentially holding the pipeline covenant did not run with the land.¹³ This ruling effectively dismissed the Henrys' breach of contract claim. The remainder of the Henrys' claims were tried to a jury, which found in their favor on the negligence, nuisance, and trespass claims.¹⁴ The trial court entered judgment on the jury's verdict and awarded the Henrys' nominal damages.¹⁵ The trial court, however, declined to provide the Henrys a permanent injunction.¹⁶ The Henrys appealed.

The Fort Worth Court of Appeals, Justice Mike Wallach, considered the question of whether, when the estates were severed, the pipeline burial covenant was conveyed with the surface estate or was reserved to the mineral estate in the deeds' mineral reservations. In other words, the court considered whether the mineral reservations detached the covenants from the surface when the estates were severed. The appellate court reviewed the trial court's summary judgment ruling *de novo*¹⁷ and found that the pipeline burial covenants are part of and attached to the surface estate and generally run with the land.¹⁸ This rule is designed to protect the surface estate.¹⁹ To deviate from this general rule, the deed(s) at issue must contain a reservation or exception that expressly reserves or detaches the burial covenant.²⁰ Because the law disfavors reservations, they cannot arise by implication but must be stated clearly and specifically.²¹

Looking to the language in the deeds in the *Henry* case, the court found there was no express reservation revealing the original grantors' intent to detach the pipeline burial covenants from the surface estate.²² Instead, the reservations show that the grantors (the Henrys' predecessors-in-interest) only intended to reserve the mineral rights and detach those specific rights from the surface. For example, one relevant reservation in the deed stated as follows:

¹¹ *Id.*

¹² *Id.* at *1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Smith*, 2021 WL 5506865, at *1.

¹⁷ *Id.* at *4.

¹⁸ *Id.* (citing *Mobil Oil Corp. v. Brennan*, 385 F.2d 951, 953–54 (5th Cir. 1967) (pipeline burial covenant is “attached to the surface estate, and will remain with the same forever unless expressly detached therefrom by the surface owner”).

¹⁹ *Id.*

²⁰ *Smith*, 2021 WL 5506865, at *4 (citing *Brennan*, 385 F.2d at 953–54 (5th Cir. 1967); *Farm & Ranch Inv'rs, Ltd. v. Titan Op., L.L.C.*, 369 S.W.3d 679, 681 (Tex. App.—Fort Worth 2012, pet. denied)).

²¹ *Id.* at *5 (internal citations omitted).

²² *Id.*

Grantors [i.e., Miller] retain and reserve to themselves, as their respective interests now exist, all ownership, right, title and interest, in and to ... [a]ny and all valid, recorded oil, gas and mineral lease or leases now existent and in full force and effect, which includes all royalties, and all delay rentals and royalties, and any and all payments due, or that may become due in the future, or which may become payable under the terms of any existent or future lease or leases to the Grantors, their heirs, successors or assigns.²³

Another relevant reservation provided:

Grantors [i.e., Ferguson] have RESERVED and RETAINED, and by these presents do hereby RESERVE and RETAIN, unto themselves, their heirs, successors and assigns, all of Grantors' rights, title, interests and estates in and to the oil, gas and other minerals in and under, and that may be produced from, the real property described in the attached Exhibit "A" and all rights and appurtenances pertaining thereto, including, without limitation, all of Grantors' rights, titles, interests and estates in all executive rights; all royalty; and all bonus, delay rentals, royalty and other amounts and benefits accruing or to accrue under existing or future oil and gas leases covering all or part of such real property.²⁴

The plain language of these provisions in the deeds reserved only the "rights, title, and interests" to the mineral interests and were completely silent as to the surface estate and the pipeline burial covenants. With no clear and specific reservations from the grantors regarding any intent to detach the pipeline covenants from the surface estate, they cannot arise by implication.²⁵ As such, the court found that the deeds' reservation provisions conveyed only the mineral rights and property rights appurtenant thereto, not the surface covenants.²⁶ Thus, the pipeline burial covenant belonged to the surface estate. The trial court's summary judgment ruling was thus reversed, and the case remanded on the Henrys' breach of contract claim.²⁷

This recent ruling is a win for surface estate owners in Texas. It shows that, absent express reservations to the contrary, a pipeline burial covenant is (a) attached to the surface such that a surface owner can enforce a pipeline burial covenant against a mineral lessee; and, (b) can operate as a limitation on a mineral owner's surface rights. This is an important consideration in land purchases. Review of the language in current deeds may prove to be essential to mineral operators

²³ *Id.* at *2.

²⁴ *Id.* (capitalization in original).

²⁵ *Id.* at *6.

²⁶ *Smith*, 2021 WL 5506865, at *6.

²⁷ *Id.* at *1, *14.

and parties interested in oil and gas leases in Texas who may need or want to detach pipeline burial covenants from the surface estate.

Texas Cases Reject Claims that Royalties are Owed on Off-Lease Use of Gas Where Leases Contain a “Free-Use” Lease Fuel Clause and an “at the Well” Royalty Clause

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In the wake of the Texas Supreme Court’s *BlueStone Natural Resources II, LLC v. Randle*¹ decision, royalty owners brought a number of federal-court class action lawsuits seeking royalties for gas used as fuel off-lease.² To date, courts have rejected two of these lawsuits, with royalty owners nonsuiting several others before motions to dismiss could be decided.³ In *Fitzgerald v. Apache*⁴ and *Carl v. Hilcorp Energy Co.*,⁵ two different federal district courts in Texas granted motions to dismiss, applying Texas law.⁶ These two decisions show a clear path for exploration and production companies to defeat these new “free use” clause royalty cases. No motions to dismiss have been denied in any of these cases.

I. The *Randle* Court Issues Narrow Holding Based on Express Language in the “free use” Clause

One of the issues before the court in *Randle* was whether the “free use” clause found in the lease allowed the lessee to use leasehold gas in *off-lease* operations without paying royalty on that gas.⁷ The lease addendum in *Randle* provided for a gross proceeds royalty, which necessarily required the royalty to be valued at the point of sale.⁸

¹ 620 S.W.3d 380 (Tex. 2021). For a thorough discussion of all of *Randle*’s holdings, see Daniel McClure, Matthew Dekovich and Francisco Escobar-Calderon, *BlueStone v. Randle: Supreme Court of Texas Holds that Producer Could Not Deduct Post-Production Costs when “Gross Value Received” Royalty Clause Controlled, and Must Pay Royalty on Off-Lease Use of Gas Not Covered by “Free Use” Lease Fuel Clause*, OIL & GAS E-REPORT (June 2021). This article will focus on *Randle*’s second holding and the litigation arising from it.

² E.g., *Cook Children’s Health Found. v. EOG Res.*, No. 7:21-cv-00064 (W.D. Tex.); *Cook Children’s Health Found. v. Pioneer Natural Res.*, No. 7:21-cv-00065 (W.D. Tex.); *Fitzgerald v. Apache Corp.*, No. 4:21-cv-01306 (S.D. Tex.); *Cook Children’s Health Found. v. Devon Energy*, No. 4:21-cv-00454-ALM (E.D. Tex.); *Cook Children’s Health Foundation v. Diamondback E&P*, No. 5:21-cv-359-D (W.D. Okla.); *Fitzgerald v. BP Am. Prod.*, No. 1:21-cv-01033-MEH, (D. Colo.); *Carl v. Hilcorp Energy*, Cause No. 4:21-cv-2133 (S.D. Tex.); *Cook Children’s v. XTO Energy*, No. 21-cv-00141-JCB (E.D. Tex.); *Fitzgerald v. Chevron U.S.A. Inc.*, No. 21-cv-2650-JST (N.D. Cal.). All of these cases were based on Texas law and sought classes of royalty owners in Texas wells, but were filed in federal court under the jurisdictional provisions of the Class Action Fairness Act, 28 U.S.C. § 1332(d).

³ *Cook Children’s Health Found. v. Pioneer Natural Res.*, Cause No. 7:21-cv-00065 (W.D. Tex.), *Cook Children’s Health Found. v. EOG Res.*, No. 7:21-cv-00064 (W.D. Tex.), *Cook Children’s v. XTO Energy*, No. 21-cv-00141-JCB (E.D. Tex.), and *Fitzgerald v. Chevron, U.S.A. Inc.* have all been voluntarily dismissed by the plaintiffs.

⁴ 2021 WL 5999262 (S.D. Tex. Dec. 20, 2021) (Rosenthal, J.).

⁵ 2021 WL 5588036 (S.D. Tex. Nov. 30, 2021) (Ellison, J.).

⁶ Both motions to dismiss were granted without prejudice and with leave for the plaintiff to file an amended complaint. The plaintiff in *Carl* filed an amended complaint and Hilcorp filed a second motion to dismiss on January 3, 2022. See Motion to Dismiss Amended Complaint, *Carl v. Hilcorp Energy Co.*, No. 4:21-cv-02133 (S.D. Tex. Jan. 3, 2022) (ECF 32).

⁷ 620 S.W.3d 380, 383 (Tex. 2021).

⁸ *Id.* at 391-93. This was actually the primary holding of *Randle*. See generally McClure et al., *supra*.

Among other things, BlueStone had been deducting costs for fuel gas.⁹ Because the court held that the lease was a gross proceeds lease, BlueStone argued that it was entitled to free use of the leasehold gas to benefit the lease.¹⁰ The “free use” clause provided that

Lessee shall have free from royalty or other payment the use of ... gas ... produced from said land in all operations which Lessee may conduct hereunder, including water injections and secondary recovery operations, and the royalty on ... gas ... shall be computed after deducting any so used.¹¹

Following the Tenth Circuit’s lead in *Anderson Living Trust v. Energen*,¹² the *Randle* court interpreted the “free use” clause to only allow “free use” of gas on the leased premises.¹³ Not only did the “free use” clause only allow “free use” on operations “hereunder” (i.e., on the lease), but the royalty clause also required a royalty on gas “sold or used” off the lease. Therefore, the *Randle* court held that royalty was owed on gas used off-lease.

II. Courts Reject New Royalty Class Actions Based on the *Randle* Decision

After the *Randle* decision, numerous royalty owners brought suits in various federal district courts, claiming that exploration and production companies had breached leases by deducting off-lease fuel costs. Both *Carl v. Hilcorp Energy Co.* and *Fitzgerald v. Apache Corp.* have now considered and rejected the claims of the royalty owners, granting motions to dismiss.

Both the *Carl* and *Fitzgerald* leases were “market value at the well” leases that, like *Randle*, required royalties on gas sold or used off the premises.¹⁴ And both the *Carl* and *Fitzgerald* leases contained “free use” clauses nearly identical to *Randle*.¹⁵ Importantly, neither of the *Carl* or *Fitzgerald* leases contained an addendum similar to *Randle* that changed the royalty valuation provision to a gross proceeds lease.¹⁶

The plaintiffs in *Carl* and *Fitzgerald* argued that the *Randle* decision was controlling and that they were owed royalty on gas used off of the lease. Specifically, both plaintiffs claimed they were entitled to a royalty on gas provided to third-party processors as fuel for the processing plants. However, as explained

⁹ *Id.* at 399.

¹⁰ *Id.* at 393-94

¹¹ *Id.* at 394.

¹² 886 F.3d 826 (10th Cir. 2018).

¹³ *Randle*, 620 S.W.3d at 394.

¹⁴ *Carl v. Hilcorp Energy Co.*, 2021 WL 5588036, at *1 (S.D. Tex. Nov. 30, 2021); *Fitzgerald v. Apache Corp.*, 2021 WL 5999262, at *2 (S.D. Tex. Dec. 20, 2021)

¹⁵ *Fitzgerald*, 2021 WL 5999262, at *2 (“Lessee shall have free use of oil, gas, wood, and water from said land, except water from Lessors’ wells, for all operation hereunder; and the royalty on oil or gas shall be computed after deducting any so used.”); *Carl*, 2021 WL 5588036, at *1 (“Lessee shall have free use of oil, gas, coal, wood and water from said land, except water from Lessors’ wells, for all operations hereunder, and the royalty on oil, gas and coal shall be computed after deducting any so used.”).

¹⁶ *Fitzgerald*, 2021 WL 5999262, at *2; *Carl*, 2021 WL 5588036, at *1.

by the *Carl* court, Texas allows deductions of in-kind payments to third-party processors in “market value at the well” leases because such payments are post-production costs.¹⁷ The plaintiff’s argument that the “free use” clause controlled would have required the court to hold that the “free use” clause trumps the remainder of the lease, including the royalty clause. Rather than do so, the court read the provisions in harmony, applying the logic of the Fifth Circuit’s analogous decision in *Piney Woods Life Sch. v. Shell Oil Co.*¹⁸

In *Piney Woods*, the Fifth Circuit applied Mississippi law to hold that plant fuel was an allowable post production cost and that the “market value at the well” clause allowed deduction of the royalty owner’s share of the plant fuel costs.¹⁹ Indeed, “[b]ecause the use of plant fuel ‘materially enhances the value of the gas (giving royalty owners more than the at-the-well value for which they bargained), the cost of plant fuel must be borne by the royalty owners in proportion to their royalty share.’”²⁰ The plaintiffs’ royalty underpayment claims in *Carl* and *Fitzgerald* thus failed—the defendants were allowed to deduct the plant fuel as an allowable postproduction cost in a market value at the well lease. *Randle*’s holding did not control as *Randle* involved a gross proceeds lease.²¹

III. Implications for Future Royalty Litigation

As shown by *Carl* and *Fitzgerald*, claims by royalty owners for underpayment of royalties based on deductions for off-lease use of gas (when that off-lease use is an allowable postproduction cost) are likely to fail as a matter of law. The *Randle* decision did not change the law with regard to “market value at the well” leases. Texas law remains the same—exploration and production companies may deduct fuel gas in “market value at the well” leases, even when the “free use” clause contains similar “hereunder” language to *Randle*.

Carl and *Fitzgerald* are likely the beginning of the end for these “free use” royalty cases. With these two well-written federal district court opinions, we can expect defendants in future cases to rely on motions to dismiss or summary judgment to defeat such claims.

¹⁷ *Carl*, 2021 WL 5588036, at *3 (first citing *Burlington Res. Oil and Gas Co. LP v. Texas Crude Energy*, 573 S.W.3d 198, 203 (Tex. 2019); and then citing *French v. Occidental Permian Ltd.*, 440 S.W.3d 1, 10 (Tex. 2014)).

¹⁸ *Id.* (citing 905 F.2d 840, 858 (5th Cir. 1990)).

¹⁹ *Id.*

²⁰ *Id.* (quoting *Piney Woods*, 905 F.2d at 857).

²¹ *Id.* at *4-5; *Fitzgerald*, 2021 WL 5999262, at *8 (“Because *Fitzgerald* has only pled that Apache deducted costs that it was permitted to deduct from the market value of gas that is sold, *Fitzgerald* has not alleged that Apache underpaid her royalties for gas sold or used off the lease. Without any allegations to support that *Fitzgerald* received an underpayment of royalties, *Fitzgerald* has failed to state a claim for breach.”). The *Fitzgerald* court went even further, holding that even if *Fitzgerald* had stated a claim for breach, there were no damages sufficiently alleged. *Fitzgerald*, 2021 WL 5999262, at *8.

Louisiana Units' Operator Forfeits Right to Demand Non-Operator's Share of Drilling Expenses

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B. A. Kelly Land Company, L.L.C. v. Aethon Energy Operating, L.L.C., 2022 WL 417410, Case No. 20-30090 (5th Cir. Feb. 11, 2022) considered claims that an operator had forfeited its right to demand that an unleased non-operator contribute its proportionate share of drilling expenses in two compulsory oil and gas drilling and production units containing 16 producing wells.¹

Facts

For units producing oil and/or gas, La. R.S. 30:103.1 requires the unit operator or producer to send certain “sworn, detailed, and itemized statement[s]” to interest owners whose land within the unit is not leased to the operator or producer.² The required statements are an “initial report” containing “costs of drilling, completing, and equipping the unit well”³ and “quarterly reports” containing, along with total production and purchase prices, the following: “(c) [q]uarterly operating costs and expenses, and (d) [a]ny additional funds expended to enhance or restore the production of the unit well.”⁴ Reports must be sent to unleased owners who make a written request for the information that is sent by certified mail addressed to the operator or producer and that contains the interest owner’s name and address.⁵ La. R.S. 30:103.2 provides that when an operator or producer allows 90 days to elapse after well completion and an additional 30 days to elapse after receipt of an unleased owner’s written notice by certified mail “calling attention” to the operator or producer’s “failure to comply with the provisions of R.S. 30:103.1,” the operator or producer “forfeits his right to demand contribution” from such unleased owner “for the costs of drilling operations.”⁶

Kelly owned 160 unleased acres in two units operated by Aethon.⁷ By late 2016, Aethon had replaced J-W Operating Company as operator of both units.⁸ Kelly sent Aethon a December 15, 2017 certified mail letter stating that: (1) it was an unleased owner of oil and gas interests on specified lands, (2) its November 15, 2013, letter to the prior operators notified them of its unleased interests and requested “sworn, detailed, itemized statements of costs and production” for the

¹ *Id.* at *1.

² *Id.* (quoting La. R.S. 103.1).

³ *Id.* Initial reports are to be sent within 90 days of well completion. *Id.* Reporting can be delayed until January of the next year for unleased interest owners whose total allocable share of unit costs is under \$1000. *Id.* *1-2.

⁴ *Id.* at *1.

⁵ *Id.*

⁶ *Id.* at *2.

⁷ *Id.* at *1. Kelly claimed a 24.99071% *pro rata* share of the units. *Id.* at *3 n.5.

⁸ *Id.* at *2 n.2 & 3 n.5.

wells and units, (3) the prior operators had failed to provide the information so that information was again being demanded through November 10, 2013, (4) for times since November 10, 2013, it was requesting for each well information that it described in language that was almost identical to the reporting language in § 103.1(A), (5) the name and serial number of each well, and (6) its name and address.⁹ Aethon received, but did not respond, to that letter.¹⁰ Next, Kelly sent certified mail letter dated April 17, 2018 that referenced Aethon’s receipt of its earlier letter and stated that “[t]his letter is to call to your attention your company’s failure, as unit operator...to comply with Louisiana law which requires an operator to report to an unleased owner ... ongoing operating costs and expenses for the unit well by sworn, detailed, itemized statements.”¹¹ Aethon did not furnish the requested information until either October 2018 or February 2019 , more than 30 days after it received the second letter on April 20, 2018.¹²

Kelly sued asserting a “direct forfeiture claim” based upon its letters to Aethon and a “successor claim” based upon Aethon’s alleged assumption of J-W’s liability for non-reporting.¹³ Kelly moved for partial summary judgment on the direct forfeiture claim; the lower court denied that motion with an order that invited Kelly to respond to the court’s intention to *sua sponte* enter partial summary judgment against the forfeiture claims.¹⁴ Kelly responded and moved for reconsideration.¹⁵ The district court denied Kelly’s motion and granted partial summary judgment for Aethon on both forfeiture claims.¹⁶ Kelly successfully moved for district court to make its order appealable under Fed. R. Civ. P. 54(b).¹⁷

Court’s Analysis

The Fifth Circuit initially found that the district court’s treatment of the direct forfeiture claim “erroneously engrafted conditions into §§ 103.1 and 103.2 that are not present in the text of the statutes.”¹⁸ And, it announced various conclusions, discussed below, based on applying the statutory text.¹⁹ After generally discussing Louisiana’s conservation law,²⁰ it discussed §§ 103.1 and 103.2 and noted that § 103.2 “adds teeth to § 103.1” and “disincentivizes” failure to “comply with ... reporting requirements.”²¹ It also observed that both statutes “address an ‘information asymmetry’ [arising] from...‘forced pooling’” when an interest owner and operator have no lease or contractual relationship.²²

⁹ *Id.* at *4-6.

¹⁰ *Id.* at *3.

¹¹ *Id.* at *6-7.

¹² *Id.* at * 3 & 8 n.9.

¹³ *Id.* at *2 n.2. Kelly also sought an accounting. *Id.*

¹⁴ *Id.* at *4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at *2.

¹⁹ *Id.*

²⁰ *Id.* at *2-3.

²¹ *Id.* at *3.

²² *Id.*

After publishing the full text of both letters,²³ the Court stated that it had to “decide whether the April 17, 2018 letter ... gave Aethon adequate notice under § 103.2 of its default on its statutory reporting duty.”²⁴ The Court noted that the second letter recited “much of the crucial language of §103.2, expressly ‘call[ing]’ to Aethon’s ‘attention [the]...failure... to comply with Louisiana law.’”²⁵ The Court said that “[a] reasonable operator ...would have understood that this more recent letter followed up on the earlier letter regarding the operator’s reporting obligations”, noted three times that letter referred to requirements of § 103.1, and concluded that it complied with the statutory language.²⁶

The Court was unconvinced by Aethon’s claim that the second letter was “vague”, allowing that requesting clarification did not mean that “a reasonable operator would have failed to appreciate that the letter constituted notice under § 103.2 that it was in default on its reporting obligations under § 103.1.”²⁷ Moreover, while Aethon’s landman’s declaration said that he got the impression in a phone call that Kelly sought more information than was required, he never said what could have given that impression; and, a careful reading of his declaration revealed that “he and Aethon...must have known that Kelly was seeking the reports to which it was entitled under § 103.1.”²⁸ Further, his declaration established that Aethon knew that Kelly’s land had become unleased, that Kelly was entitled to the requested well cost data, that Aethon had received both of Kelly’s letters, and that Aethon did “not timely cure its default within thirty days of its April 20, 2018 receipt of Kelly’s second letter.”²⁹

The Court then discussed the district court’s reasoning that the December 15, 2017 letter was insufficient “because it did not specifically cite ‘§ 103.1’ by its number or specifically request that Aethon classify its reports as ‘initial reports’ or ‘quarterly reports.’”³⁰ The Court found no such requirements in the statutory language.³¹ Instead, “its text primarily imposes a duty on *operators* to send reports when requested by unleased owners” and “only requires that the unleased owner ‘request[] such reports in writing, by certified mail addressed to the operator or producer’ and that the request ‘contain the unleased interest owner’s name and address.’”³² The Court said that the district court’s reasoning “engraft[ed] conditions that are not present in the text of the statute itself” and quoted La. Civ. Code art 9: “[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.”³³ Similar

²³ *Id.* at *4-7.

²⁴ *Id.* at*7.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at *7-8.

³⁰ *Id.* at *8.

³¹ *Id.*

³² *Id.*

³³ *Id.*

reasoning disposed of the district court's opinion that the April 17, 2018 letter was insufficient under § 103.2 "because it did not contain an explicit citation to '§ 103.1' or '§ 103.2,' or reference the possibility of 'a lawsuit, penalty, or forfeiture under § 103.2.'"³⁴ Instead, the statutory requirement "that the owner of the unleased interest 'call[] attention' to the operator's 'failure to comply with the provisions of R.S. 30:103.1' was adequately satisfied."³⁵

Accordingly, the Fifth Circuit reversed the order granting summary judgment for Aethon, rendered summary judgment for Kelly on the direct forfeiture claim, and held that there was insufficient evidence in the record to decide about the successor forfeiture claim.³⁶

Conclusion

Parties should expect that the reporting and forfeiture provisions in La. R.S. 1301.1 and La R.S. 1302 will be enforced as written.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at *2, 8 & 9. The Court also affirmed denial of leave to add Aethon LP as a defendant. *Id.* at *8-10.

U.S. Court of Appeals for the Sixth Circuit Affirms Lessees' Royalty Calculations

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In *Zehentbauer Family Land, LP v. TotalEnergies E&P USA, Inc.*, the United States Court of Appeals for the Sixth Circuit addressed whether the lessees' method for calculating royalty payments on production sold to their affiliates was improper.¹ Plaintiffs, a class of royalty owners, claimed that the lessees had miscalculated their royalties by paying on "at the well" prices rather than the downstream sales prices received from their affiliates' sales. The court of appeals upheld the trial court's finding that the methodology used by the lessees was correct.

The facts were straightforward: The parties entered into leases requiring royalties to be "based upon the **gross proceeds** paid to Lessee for the gas marketed and used off the leased premises . . . **computed at the wellhead** from the sale of such gas substances so sold by Lessee." The term "gross proceeds" was defined as "the total consideration paid for oil, gas, associated hydrocarbons, and marketable by-products produced from the leased premises," and when production was sold to an affiliate, it was to be "**without any deductions or expenses.**" The lessees sold production at the wellhead to midstream affiliates, which then processed the raw oil and gas and sold the products to unaffiliated downstream companies. The affiliates paid the lessees for the raw production using the netback method, taking "a weighted average of prices at which the midstream affiliates [sold] the oil and gas at various downstream locations and adjusting for the midstream company's costs of compression, dehydration, treating, gathering, processing, fractionation, and transportation." The lessees then used this netback price as the price upon which they calculated the royalties owed to the plaintiffs.

In upholding that methodology, the Sixth Circuit observed that the lease provides that royalties are to be calculated on "the gross proceeds **paid to Lessee** for gas marketed and used off the leased premises . . . computed at the wellhead." (Emphasis in the court's opinion.) "Thus, [here,] Plaintiffs' royalties are based on the wellhead value of the gas sold. In fact, there's no deduction at all." Rather, "though the Lessees are receiving an amount that is 'net' as to the downstream affiliate, it is **not** 'net' from the Lessees' perspective, but simply the actual cost of the raw product produced by the Lessee production company without any deductions (production or post-production) **by the Lessee** for its production costs." (Emphasis in the court's opinion.) This, according to the court, not only comports with the lease language, but "also reaches a fair result by 'avoid[ing] a windfall to landowners.'"

Notably, the court rejected plaintiffs' argument that royalties under the lease had to be paid on the downstream sales price by equating marketable production with the processed end-product. "[D]efining 'gross proceeds' as including '**marketable** by-products' does not require that the royalties be based on downstream sales of **finished** by-products. A marketable product is one that is

¹ 2022 U.S. App. LEXIS 3151, 2022 WL 294081.

‘capable of’ being marketed; it is not a ‘finished’ by-product.” (Emphasis in the court’s opinion.) This follows a number of recent Ohio state court decisions finding that the term “marketable,” when used in a lease royalty provision, refers to production that is capable of being marketed, i.e., sold.

Zehentbauer is another in a growing body of case law in the Sixth Circuit and Ohio rejecting claims for royalties based on downstream sales prices under commonly-used lease royalty language.

Opinion and Analysis: Electric Vehicles and The Environment

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One would have to be living under a rock to be unaware that much of the U.S. public discourse in newspapers, magazines, scientific journals, movies, television, social media and political debate, centers on the environment in general and climate change, in particular. Indeed, while much of our public discussion of climate change is discussed in terms of certainties, the reality is that many of the mathematical formulas relied upon by scientists are complicated and poorly understood and the conclusions reached are often disputed by other scientists. In reality, the policy decisions implemented to combat climate changes are often based on theoretical assumptions, which all too often generate other environmental issues.

Despite those complicated questions, our public discussion on the challenge of climate change focuses largely on solutions that many assume to be easy, but which tend to be far more complicated than is commonly understood or discussed. Among the “easy solutions,” the introduction of electric vehicles (“EVs”) is most widely accepted as an easy solution to the reduction of atmospheric carbon by activists, lawmakers, reporters, and many, if not almost all, in the media.

However, contrary to what is commonly accepted by “those in the know,” EVs may not be, at least at this point, the easy answer they are assumed to be. Access to and availability of the raw materials for EV batteries, associated costs and impacts, environmental justice issues, and the production and use of EVs have all been largely ignored in the crafting of policies surrounding EVs. Indeed, because they are perceived to be *the* answer, little of our discussion centers on the typical cost-benefit analysis that is commonly undertaken when market forces, over time, drive one industry into retreat as a new and better alternative becomes more widely accepted. Similarly, little, if any, of our public discussion considers whether a rapid conversion to EVs is technically possible or environmentally sound, and whether the mass of the motoring public will voluntarily embrace EVs. It is these two questions that this paper will explore.

I. Background

As of 2020, there were about 287 million cars in the United States of which, just over 1.8 million are EVs, or less than 1%. The Edison Electric Institute projects that by 2030, there will be 18.7 million EVs in the United States² out of approximately

¹ The authors gratefully acknowledge the comments, suggestions, and input of Mike Roman, President, CertainPoint Strategies, LLC to this paper.

² 18.7 million EVs would require the addition of about 9.5 million charge ports across the country. See Kristin Rudman, *EI Celebrates 1 Million Electric Vehicles on U.S. Roads*, Nov. 30, 2018 available at: <https://www.eei.org/resourcesandmedia/newsroom/Pages/Press%20Releases/EEI%20Celebrates%201%20Million%20Electric%20Vehicles%20on%20U-S-%20Roads.aspx#:~:text=EEI%20FIEI%20report%3A-,The%20number%20of%20EVs%,20on%20U.S.%20roads%20is%20projected%20to,on%20U.S.%20roads%20in%202030> (last accessed

317 million cars, meaning 94% of all cars will still be powered by internal combustion engines (ICE). Assuming the same growth in total cars from 2030 to 2040 means about 350 million cars will be on the road and, even if the growth of EVs is 1,000%, we can expect 187 million EVs representing 53% percent of all cars. This would still, however, mean there will be 163 million cars powered by internal combustion engines (ICEs) on the road in 2040. It is against these realities that current forecasts, government proposals and automaker statements³ must be considered.

At this juncture, the current Biden Administration proposals include an increase of the EV tax credit from \$2,500 to \$12,500, provided the EVs are built in the United States with union labor. Additionally, the recently passed infrastructure bill earmarked \$65 billion dollars for upgrades to the country's electric transmission and power infrastructure and \$7.5 billion dollars for 500,000 new EV charging stations.⁴ It has been estimated that 9.5 million charge ports will be needed for the 18.7 million EVs estimated to be on the road by 2030. A simple math calculation will show that if \$7.5 billion dollars was allocated for 500,000 new EV charging stations, the installation of 9.5 million charge ports (19 times more) would require an investment of \$142.5 billion. Assuming ten times the number of charge ports are necessary for the ten times as many EVs on the roads between 2030 and 2040, the cost of the charging stations alone, absent inflation driven cost increases, would be approximately \$1.5 trillion dollars. According to a Wall Street Journal article, the Biden Administration's EV goals would require the entire grid to be rebuilt within 10 years at a staggering cost of \$7 trillion,⁵ or more than the entire 2021 United States federal budget. Are such goals even economically possible?

In addition to the cost that the conversion to EVs will impose on the taxpayer, they are not zero emission. EVs are, and for the foreseeable future, will continue to be powered by electricity generated by coal, oil and natural gas; and carbon dioxide generated from producing one EV battery alone, is equivalent to eight years of carbon dioxide emissions from one ICE vehicle.⁶

Current EV policies may appear to be beneficial and part of the solution to climate change; however, these policies deny the reality of the lack of infrastructure to support EVs in the U.S., issues surrounding the availability of resources, and the degradation of our environment caused by mining the very minerals that are needed to produce and operate the EVs. Furthermore, policymakers are pushing EV policies while ignoring environmental justice issues, as well as the significant

on Jan. 17, 2022).

³ As an example, General Motors announced it will eliminate all gasoline and diesel light-duty cars and SUVs by 2035. WSJ, *GM to Phase Out Gas- and Diesel-Powered Vehicles by 2035*, January 28, 2021. Mike Colias, *GM to Phase Out Gas- and Diesel-Powered Vehicles by 2035*, WallStreetJournal, Jan. 28, 2021, available at <https://www.wsj.com/articles/gm-sets-2035-target-to-phase-out-gas-and-diesel-powered-vehicles-globally-11611850343> (last accessed on Jan. 18, 2022).

⁴ Bengt Halvorson, *Infrastructure bill: \$7.5B toward nationwide network of 500,000 EV chargers*, GREEN CAR REPORTS, Nov. 7, 2021 available at: www.greencarreports.com/news/1134092_infrastructure-bill-7-5b-toward-nationwide-network-of-500-000-ev-chargers (last accessed on Jan. 17, 2022).

⁵ Leonard Hyman & William Tilles, *The \$7 Trillion Cost of Upgrading the U.S. Power Grid*, OilPrice.com, Feb. 25, 2021, available at: <https://oilprice.com/Energy/Energy-General/The-7-Trillion-Cost-Of-Upgrading-The-US-Power-Grid.html> (last accessed on Jan. 17, 2022).

⁶ CPM Group Energy Metals and Technology Practice, available at <https://www.cpmgroup.com/energy-metals-and-technology-practice/> (accessed on Jan. 7, 2022).

hardships on many Americans such policies will create. While EVs may be *part* of a solution to climate change, the EV policy pushed by the Biden Administration does not adequately address these concerns, nor has it proposed a feasible plan to implement the infrastructure and electrical grid improvements across the United States that are necessary to support the proposed influx of EVs.

II. Is Converting All ICE Vehicles to EVs Technically Possible?

The next questions are whether current technology warrants these expenditures, whether EV investments are environmentally sound, and whether the infrastructure and technology advances necessary to convert all ICE vehicles to EVs are possible in the time frames proposed.

Two of the most basic questions that must be answered include: (i) are the raw materials necessary to build 275 million cars actually available and extractable and, if so, in what time frame; and (ii) where and how fast we can install the necessary charging ports for all of those cars.

A. Raw Materials

According to the International Energy Agency's ("IEA") World Energy Outlook Special Report, *The Role of Critical Minerals in Clean Energy Transitions*,⁷ "Lithium, nickel, cobalt, manganese, and graphite are crucial to battery performance, longevity and energy density – which is the key to EV range. Rare earth elements are essential for permanent magnets that are vital for wind turbines and EV motors" and that "a concerted effort to reach the goals of the Paris Agreement (climate stabilisation at 'well below 2°C global temperature rise', as in the SDS⁸) would mean a quadrupling of mineral requirements for clean energy technologies by 2040. An even faster transition, to hit net-zero *globally* by 2050, would require six times more mineral inputs in 2040 than today." In plain English, in order to meet climate goals, the IEA estimates that the production of lithium must increase by 4,100%, graphite by 2,400%, cobalt by 2,000%, nickel by 1,800% and rare earth materials by 600%.

Importantly, the IEA noted that such a demand for those materials "poses huge questions about the availability and reliability of supply" and that the "expected supply from existing mines and projects under construction is estimated to meet only half of projected lithium and cobalt requirements, and 80% of copper needs by 2030."⁹ Indeed, the IEA noted that, "it has taken 16.5 years on average to move mining projects from discovery to first production. These long lead times raise

⁷ International Energy Agency, *The Role of Critical Minerals in Clean Energy Transitions*, May 2021 available at <https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions> (last accessed on Jan. 17, 2022).

⁸ "SDS" means the Sustainable Development Scenario required to meet Paris Climate Goals.

⁹ The IEA's report also addressed several additional concerns including declining resource quality across a range of commodities, the impacts such increased mining has on the environment, the increasing call for sustainably and responsibly produced minerals which may be difficult in light of where such minerals are found.

questions about the availability of supply and the ability to ramp up output if demand were to pick up rapidly.”¹⁰

Moreover, the water intensive process necessary to mine such minerals makes the necessary increases in production difficult to say the least. For example, in order to extract one metric ton of lithium (approximately enough for 125 EV batteries¹¹), it takes about 2 million liters of water. More than half of the world’s lithium lies beneath the salt flats beneath the Andean regions of Argentina, Bolivia and Chile, one of the world’s driest regions.¹² The future impacts to water supplies, and associated environmental justice issues necessitated by a 4,100% increase in lithium production (not to mention the other necessary minerals), would be devastating on both environmental and social levels.

Lastly, is there enough of the necessary minerals to convert all ICE vehicles to EVs? Take lithium, for example. According to UBS, by 2030, EVs will need 2,700 GWh¹³ worth of lithium-ion batteries *a year*” (20 million tons¹⁴) or the “equivalent to 225 billion iPhone 11 batteries - and 13 times more battery power than we use today.”¹⁵ As UBS Global Head of Mining Research, Glyn Lawcock, recently wrote, “There is not sufficient supply to meet this demand projection based on our knowledge of known projects today. That includes all projects whether they are under construction, in feasibility, or still in exploration.” According to a recent Bank of America Global Research report, the global EV battery supply is in danger of running out completely as soon as 2025. “Our updated EV battery supply-demand model suggests the global EV battery supply will likely hit [a] ‘sold-out’ situation between 2025-26, with its global operating rates reaching above 85%.”¹⁶ As Haley

¹⁰ The IEA also noted that for lithium, cobalt and rare earth elements, “the world’s top three producing nations control well over three-quarters of global output. In some cases, a single country is responsible for around half of worldwide production. The Democratic Republic of the Congo (DRC) and People’s Republic of China (China) were responsible for some 70% and 60% of global production of cobalt and rare earth elements respectively in 2019. The level of concentration is even higher for processing operations, where China has a strong presence across the board.” That China’s share reined approximately 35% of all nickel, 50-70% of all lithium and cobalt, and nearly 90% of all rare earth elements should be concern was not lost on the IEA which noted, in a rather understated fashion, that “[h]igh levels of concentration, compounded by complex supply chains, increase the risks that could arise from physical disruption, trade restrictions or other developments in major producing countries.” Thus, it would appear that the Chinese Communist Party could, at any time, restrict output or dramatically increase prices, either of which would dramatically impact the arbitrary timelines set for ICE to EV conversion.

¹¹ Davide Castelvecchi, *Electric cars and batteries: how will the world produce enough?* NATURE, Aug. 17, 2021, available at: <https://www.nature.com/articles/d41586-021-02222-1#:~:text=Amounts%20vary%20> (last accessed on Jan. 17, 2022).

¹² UNCTAD, *Developing countries pay environmental cost of electric car batteries*, July 22, 2020, available at: <https://unctad.org/news/developing-countries-pay-environmental-cost-electric-car-batteries> (last accessed on Jan. 17, 2022).

¹³ GWh, is a unit of energy representing one billion (1,000,000,000) watt hours and is equivalent to one million kilowatt hours.

¹⁴ Taylor Martin, *As Electric Cars Are Built, Will Lithium Run Out?*, MOTORBISCUIT, Nov. 22, 2021 available at: <https://www.motorbiscuit.com/will-lithium-run-out/> (last accessed on Jan. 17, 2022).

¹⁵ Dan Runkevicius, *As Tesla Booms, Lithium Is Running Out*, FORBES, Dec. 7, 2020 available at: <https://www.forbes.com/sites/danrunkevicius/2020/12/07/as-tesla-booms-lithium-is-running-out/?sh=3e017a121a44> (last accessed on Jan. 17, 2022).

¹⁶ Thomas Hum, *Global EV battery industry will be ‘sold out’ by 2015: BofA*, Yahoo!News, July 20, 2021 available at: <https://news.yahoo.com/global-ev-battery-industry-will-be-sold-out-by-2025-bof-a-201302540.html> (last accessed on Jan. 17, 2022).

Zaremba wrote for OilPrice.com, this “supply shortage will be largely a product of rapidly increasing demand in a market that is simply unprepared for the levels of EV adoption coming down the pike in the immediate term.” As she wrote, “even in some of the most developed countries in the world, aging power grids are entirely unprepared to handle the onslaught of increased energy demand.”¹⁷

Yet, policymakers aiming for easy solutions blindly ignore the issues of raw material availability, cost, infrastructure required to handle the massive amount of electricity needed for the increased number of EVs, and the impact to the water supply and environment in the mining processes necessary to convert all ICE engines to EVs.

B. Charging Ports

As noted above, the Biden’s Administration plan calls for 500,000 new EV charging stations, in order to accommodate the 18,700,000 EVs projected to be on the road in 2030. According to the U.S. Department of Energy, Office of Energy Efficiency & Renewable Energy, every 1,000 EVs require, on average, 3.4 Direct Current Fast Chargers (DCFCs) and 40 Level 2 charging ports.¹⁸ As Nives Dolsak and Aseem Prakash noted in Forbes Magazine, “assuming 35 million EVs by 2030, the U.S. will need to build about 50,000 DCFCs and 1.2 million Level 2 ports. This means that 380 EV charging ports will need to be installed each day over the next eight years.

Yet, the U.S. has only installed on average about 30 charging ports a day between 2010 and 2020.”¹⁹ However, if 35 million EVs require 50,000 DCFCs and 1.2 million Level 2 ports, how many would we need for all 317 million cars expected to be on the road in the United States in 2030?²⁰ That 785.7% increase in EVs would mean 392,875 DCFCs and 9.4 million Level 2 ports, or 3,353 a day.²¹

¹⁷ Haley Zaremba, *The World Will Run Out of EV Batteries by 2025*, OILPRICE.COM, Jul 22, 2021, available at: <https://oilprice.com/Energy/Energy-General/The-World-Will-Run-Out-Of-EV-Batteries-By-2025.html> (last accessed on Jan. 17, 2022).

¹⁸ DC Fast chargers provide between 60-80 miles of range per hour of charge and cost approximately \$90,000 installed. Level 2 chargers provide between 10-60 miles of range per hour of charge and cost approximately \$20,000 installed. Nives Dolsak and Aseem Prakash, *The Lack of EV Charging Stations Could Limit EV Growth*, Forbes, May 5, 2021, available at:

<https://www.forbes.com/sites/prakashdolsak/2021/05/05/the-lack-of-ev-charging-stations-could-limit-ev-growth/?sh=1cbf20c26a13> (last accessed on Jan. 17, 2022).

¹⁹ Nives Dolsak and Aseem Prakash, *The Lack of EV Charging Stations Could Limit EV Growth*, Forbes, May 5, 2021, available at: <https://www.forbes.com/sites/prakashdolsak/2021/05/05/the-lack-of-ev-charging-stations-could-limit-ev-growth/?sh=1cbf20c26a13> (last accessed on Jan. 17, 2022).

²⁰ Of course, if we do not convert all ICE cars to EVs by 2030 but, rather, say, by 2050, we would DCFC and Level 2 ports for nearly 390,000,000 vehicles. Alexandre Milovanoff, I. Daniel Posen and Heather L. MacLean, *Electrification of light-duty vehicle fleet alone will not meet mitigation targets*, NATURE CLIMATE CHANGE, available at: https://www.nature.com/articles/s41558-020-00921-7_epdf?sharing_token=EukmtM7wF6B1rWff-4CsnNRqNOjAjWei9jnR3Z_oTv0MwZgD9OhVz9l1pdqn5uP1k1CpCf4fq7znFhbBxuv-brtIqxyaT2o8LLowidXblqj-wRB0Ui-abMCqWsYRe4h0L3uRhskixYmYKBib4YKj6hq_8mTaQOs9OJ7O7YKft0va3xduYptSH7VlsmUReK0tzHjq8aRj4eMK4FkqxQwya2KqjmYhUGeHDCkulx0DXIM%3D&tracking_referrer=www.nytimes.com (last accessed on Jan. 17, 2022).

²¹ However, whether these figures are accurate is unclear because, despite the bans on new gas and diesel cars sale by 2035 California, New Mexico, New Jersey, Massachusetts, Maine, Hawaii, Connecticut, New York, Oregon, North Carolina, Rhode Island, and Washington, the U.S. Energy

To date, the policymakers have not answered some key questions: How long will it take to install those DCFCs and Level 2 ports? Where are they being built? Is the space for those charging stations available? Who is paying for them? How many additional transformers, substations, transmission lines will be needed? Is there space for those where they are needed? Will the 19,519 municipalities, 16,360 town and township governments, and 3,031 county governments across the U.S. issue all of the necessary permits for the DCFCs and Level 2 ports that are necessary for the projected ICE to EV conversion?

One would hope that our elected officials have answers to each of these questions before banning the sale of ICE vehicles. Do our elected officials have those answers? Similarly, one would assume that the car companies that have chosen to stop manufacturing ICE vehicles would want to know the answers to all of these questions before overturning their current business models. Indeed, these are the questions that need to be answered before we try to actually convert all passenger cars to EVs; however, such questions largely appear to have been ignored by those policymakers mandating the elimination of ICE sales in favor of EVs by 2035.

III. The current EV technology is largely inconvenient for many Americans.

While the average new EV sold in the U.S. has a median driving range of 250 miles,²² the average new ICE vehicle has a range of 412 miles.²³ As of September 1, 2021, there were approximately 43,000 charging stations in the U.S., the vast majority of which are Level 2 chargers, which provide between 10-60 miles of range per hour of charge.²⁴ However, almost one-third of all of those stations are in California alone. In fact, most states have less than a few dozen charging stations statewide.²⁵ Correspondingly, there are approximately 150,000 fueling station

Information Administration 2018 Annual Energy Outlook highest EV scenario projected that only 50 million of the 390,000,000 light-duty vehicles (19%) will be EVs, meaning that there will still be 317,000,000 ICE vehicles driving on the America's roads. Alexandre Milovanoff, I. Daniel Posen and Heather L. MacLean, *Electrification of light-duty vehicle fleet alone will not meet mitigation targets*, NATURE CLIMATE CHANGE, available at: https://www.nature.com/articles/s41558-020-00921-7.epdf?sharing_token=EukmtM7wF6B1rWff-4CsnNRqNOjAjl9jnR3ZoTv0MwZgD9OhVz9l1pdqn5uP1k1CpCf4fg7znFhbBxuv-brtlqxyaT2o8LowjdXblqi-wRB0Ui-abMcqWsYRe4h0L3uRhskiXYmYKBib4YKj6hq8mTaQOs9OJ7O7YKft0va3xduYptSH7VlsmUReK0tzHjq8aRi4eMK4FkqxQwya2KjimYhUGeHDCkulX0DXIM%3D&tracking_referrer=www.nytimes.com (last accessed on Jan. 17, 2022).

²² Zachary Shahan, *new US Electric Vehicles Now Have 250-Mile Median Driving Range*, CLEANTECHNICA, Jan. 8, 2021, available at: <https://cleantechnica.com/2021/01/08/new-us-electric-vehicles-now-have-250-mile-median-driving-range/> (last accessed on Jan. 17, 2022).

²³ Loren McDonald, *Statistics of the Week: Comparing Vehicle Ranges for Gas, BEV and PHEV Models*, EVADOPTION, Jan. 27, 2018, available at: <https://evadoption.com/statistics-of-the-week-comparing-vehicle-ranges-for-gas-bevs-and-phevs/#:~:text=Like%20EVs%2C%20vehicle%20range%20of,miles%20and%20mean%20of%20418> (last accessed on Jan. 17, 2022).

²⁴ Nives Dolsak and Aseem Prakash, *The Lack of EV Charging Stations Could Limit EV Growth*, FORBES, May 5, 2021, available at: <https://www.forbes.com/sites/prakashdolsak/2021/05/05/the-lack-of-ev-charging-stations-could-limit-ev-growth/?sh=1cbf20c26a13> (last accessed on Jan 17, 2022).

²⁵ Tina Bellon and Paul Lienert, *Factbox: Five facts on the state of the U.S. electric vehicle charging network*, CHANGE SUITE, Sept. 1, 2021, available at: <https://www.reuters.com/world/us/five-facts-state-us->

across the U.S., approximately 127,500 of which are convenience stores selling fuel.²⁶ Add to the limited number of EV charging stations the fact of the inconvenience of recharging an EV. Indeed, while it usually takes approximately five minutes to refill a passenger car's gas tank, charging an EV using a Level 2 charger can range from 7 hours for a BMW i3, to 12 hours for a Tesla Model S or Model 3.²⁷ Further, it should be noted that regular use of the faster charging DCFCs reduces battery life because the higher current raises battery temperatures.²⁸ Additionally, as noted by Arthur Novichenko in Hotcars.com, different "automakers use three kinds of DC fast charges: most automakers use the SAE Combined Charging System, Nissan and Mitsubishi use CHAdeMO, and Tesla uses Tesla Supercharger. The absence of vehicle compatibility is different from universal vehicle access to gas stations and can be a huge barrier to widespread electric car realization."²⁹

Most importantly, however, EVs lose a significant amount of the expected driving range in cold weather. According to the AAA, the average driving range of an EV decreases by 41 percent at temperatures below 20 degrees Fahrenheit.³⁰ This, of course, would cause an EV owner to make sure the charge is "topped off" to avoid losing a charge; however, EV batteries work best when running at a charge level between 20 percent and 80 percent.³¹ As Andrew J. Hawkins noted in The Verge, when the temperature drops, "EV owners have the same instinct as their internal combustion engine-driving brethren, which is to crank up the heat as high as it will go. This puts a serious strain on an EV's battery, reducing the overall range and increasing the need to charge more often to minimize the chance of being stranded by a dead battery."³² Similarly, as Mr. Hawkins also noted, extreme warm temperatures requiring the use of air conditioning can reduce EV driving range by as much as 17 percent.

More than a mere inconvenience, one of the clear drawbacks of EVs is the inability to charge them during power outages. How many times have we watched as hundreds or thousands of drivers flee their homes to avoid impending natural disasters, or to flee after a natural disaster? How do you charge your EV to escape

[electric-vehicle-charging-network-2021-09-01/#:~:text=The%20United%20States%20currently%20has,majority%20are%20Level%202%20chargers](#) (last accessed on Jan. 17, 2022).

²⁶ American Petroleum Institute, *Service Station FAQs*, <https://www.api.org/oil-and-natural-gas/consumer-information/consumer-resources/service-station-faqs> (last accessed on Jan. 17, 2022).

²⁷ Chanel Lee, *How Long Does it Take to Charge an Electric Car*, KELLY BLUE BOOK, Mar. 15, 2022, available at: <https://www.kbb.com/car-advice/how-long-does-it-take-to-charge-an-electric-car/> (last accessed on Jan. 17, 2022).

²⁸ Charlotte Argue, *What can 6,000 electric vehicles tell us about EV battery health?*, GEOTAB, July 7, 2020, available at: <https://www.geotab.com/blog/ev-battery-health/> (last accessed on Jan. 17, 2022).

²⁹ Arthur Novichenko, *The Main Problems That Electric Car Owners Face*, HOTCARS, November 8, 2021, available at <https://www.hotcars.com/the-main-problems-that-electric-car-owners-face/> (last accessed on Jan. 18, 2022).

³⁰ Andrew J. Hawkins, *Extreme weather is sucking the life from your electric car*, THEVERGE, Feb. 10, 2019, available at: <https://www.theverge.com/2019/2/10/18217041/electric-car-ev-extreme-weather-polar-vortex> (last accessed on Jan. 17, 2022).

³¹ Chanel Lee, *How Long Does it Take to Charge an Electric Car*, KELLY BLUE BOOK, Mar. 15, 2022, available at: <https://www.kbb.com/car-advice/how-long-does-it-take-to-charge-an-electric-car/> (last accessed on Jan. 17, 2022).

³² Andrew J. Hawkins, *Extreme weather is sucking the life from your electric car*, THEVERGE, Feb. 10, 2019, available at: <https://www.theverge.com/2019/2/10/18217041/electric-car-ev-extreme-weather-polar-vortex> (last accessed on Jan. 17, 2022).

a hurricane, or the aftermath of an earthquake or tornado if there is no power? What about those who get stranded on highways where fast approaching snowstorms suddenly trap those stuck in rush hour traffic forcing people to sit in their cars for hours and often abandoning their cars when their fuel tanks are empty and there is no heat? When the storm clears, emergency responders can deliver gasoline to the cars with empty gas tanks. What do we do if hundreds or thousands of those cars are EVs with no access to a battery charge? It is not so easy to deliver the electrons that would be needed.

Thus, for most consumers, the question is why would they buy an EV which has a shorter driving range than ICE vehicles (250 miles v. 412 miles), when there are substantially fewer charging stations across the country compared to gasoline stations (43,000 v. 150,000), the average time to charge an ICE vehicle is exponentially longer than an EV (420 minutes for a BMW i3 and 720 minutes for a Tesla v. 5 minutes for an EV), and EVs' already limited range is further reduced in cold and hot climates? Perhaps they are less expensive?

IV. EVs are significantly more expensive, initially.

According to Money.com, the average transaction price for an electric vehicle in April 2021 was \$51,532 or more than \$11,000 higher than what a full-size gas-powered car would cost, and nearly \$30,000 more than the average compact car sale.³³ While it is true that the Biden Administration's Build Back Better proposal includes thousands of dollars in tax credits to qualifying cars, those cars need to be built in the U.S. by unionized labor.³⁴ Furthermore, while there are other federal tax credits available to EV purchases made after 2010, both Tesla and General Motors have surpassed the 200,000 limit, so no tax credits are available to purchasers of those vehicles.

According to a recent CNBC article, citing the U.S. Department of Energy, after 15 years, electric cars generally cost less than similar gas-only models, when you factor in the purchase price, maintenance, financing, repairs, the federal tax break, and fuel costs. Overall, it is \$0.0219 less a mile to own an EV as opposed to gasoline only vehicle. However, does that two cents a mile (spread out over the typical ownership of 12-15 years) seem worth it to the driver who has to spend more than \$11,000³⁵ up front to buy the EV and then worries about finding a charging station, the time it takes to charge his or her car, or whether turning the heat or air conditioning on will result in running out of a battery charge before finding the next

³³ Ana Lucia Murillo, *The Push for Electric Vehicles Could Affect How Much Your Next Car Costs*, MONEY, Aug. 5, 2021, available at: <https://money.com/electric-car-vs-gas-car-costs-biden/> (last accessed on Jan. 17, 2022).

³⁴ As of now, the Build Back Better plan has been shelved and both Canada and Mexico are threatening to retaliate against the U.S., saying that the EV tax credits violate the United States–Mexico–Canada Agreement. Brian Platt, *Canada, Mexico seek united front over 'damaging' EV tax credit*, BNN BLOOMBERG, Dec. 10, 2021, available at: <https://www.bnnbloomberg.ca/canada-mexico-seek-united-front-over-damaging-ev-tax-credit-1.1694035> (last accessed on Jan. 17, 2022).

³⁵ Importantly, this upfront price differential may mean nothing to those in the top 1%, but where the median income in the U.S. is \$69,560, that \$11,000 equals nearly 16% or more of the income of half of all Americans. U.S. Census Bureau, *Income and Poverty in the United States: 2020*, Sept. 14, 2021, available at: <https://www.census.gov/library/publications/2021/demo/p60-273.html> (last accessed on Jan. 17, 2022).

charging station? Perhaps some percentage of drivers will agree to such a trade off if EVs actually solved the issue of climate change. Currently, however, that seems highly unlikely as a recent poll found that 53% of registered voters would be somewhat or very unlikely to spend extra money to buy an EV rather than an ICE vehicle. In fact, according to a recent National Association of Convenience Stores article discussing a Deloitte survey, close to two-thirds of American consumers would not choose an EV over an ICE vehicle.³⁶ Importantly, 35% of registered voters polled would not spend one dollar out of pocket to mitigate climate change.³⁷

V. EVs are not net zero emission.

The obvious, but seemingly often overlooked fact is that EVs have to be manufactured using electricity and then have to be charged by the electric grid, where nearly two-thirds of the electricity necessary to power the electric grid, that will charge EVs, is created by burning of fossil fuels. According to the U.S. Energy Information Administration, in 2020, 40% of all electricity generation in the United States was supplied by natural gas, while 20% was supplied by nuclear, 19% by coal, 8.4% by wind, 7.3% by hydropower, 2.3% by solar, 1.4% by biomass, 1% by petroleum, and 0.5% by geothermal.³⁸ In other words, two-thirds of our electric grid powered by fossil fuels. Despite technical advances and the application of carbon capture storage, none of this is likely to change in the near future. Furthermore, EVs create two times higher greenhouse gas emissions in production, with battery production responsible for 10-70% of greenhouse gas emissions, and cell manufacturing and battery assembly accounting for 3-80% of the total battery emissions during the production phase.³⁹

According to the Global Energy Institute's review of the IEA's 2018 World Energy Outlook, worldwide energy demand is expected to grow by about 27%, from 2017 to 2040 and, despite the trillions of dollars that will be spent on "decarbonization," hydrocarbons are still expected to account for 74% of all energy supply. Why is that? Because reliably meeting "100% of total annual electricity demand, seasonal cycles and unpredictable weather events requires several weeks' worth of energy storage and/or the installation of much more capacity of solar and wind power than is routinely necessary to meet peak demand."⁴⁰ A recent analysis published in *Energy & Environmental Science* found that an all solar/wind

³⁶ Two Thirds of Americans Don't Want an EV, NACS, January 18, 2022, available at <https://www.convenience.org/Media/Daily/2022/Jan/18/1-Two-Thirds-of-Americans-Don%E2%80%99t-Want-an-EV-Fuels>

³⁷ Kent Lassman and Myron Ebell, *More than One-third of Registered Voters are Unwilling to Spend \$1 Per Month on Climate Change Policies*, May 25, 2021, available at: https://cei.org/news_releases/more-than-one-third-of-registered-voters-are-unwilling-to-spend-1-per-month-on-climate-change-policies/ (last accessed on Mar. 4, 2022).

³⁸ U.S. Energy Information Administration, *Electricity explained*, March 18, 2021, available at: <https://www.eia.gov/energyexplained/electricity/electricity-in-the-us.php> (last accessed on Jan. 17, 2022).

³⁹ Supercharged: The Environmental Impact of Electric Vehicles, Fuels Institute: Literature Review Summary, Oct. 2019.

⁴⁰ Matthew R. Shaner, Steven J. David, Nathan S. Lewis, and Ken Calderia, *Geophysical constraints on the reliability of solar and wind power in the United States*, ENERGY & ENVIRONMENTAL SCIENCE, Issue 4, 2018, available at: <https://pubs.rsc.org/en/content/articlelanding/2018/ee/c7ee03029k> (last accessed on Jan. 17, 2022).

grid could keep America's lights on 99.97 percent of the time using just 12 hours of storage. However, as Mark P. Mills, wrote in City-Journal.org, "[t]hat sounds good until you do the math. On average, that statistical level of reliability means there would be a few hours of zero power every year. But that doesn't include the unpredictable but inevitable episodes—even as few as every couple of years—of continent-wide blackouts due to extended sunlight/wind droughts."⁴¹

Such widespread blackouts occurred in California in August 2021 and China in September 2021. Each series of blackouts was accompanied by a government ordered rush to bring fossil fuels back to secure the energy supply (natural gas in California, and coal in China). Similarly, Europe recently saw blackouts, near blackouts, and energy prices soaring more than 230% when compared to 2020. What caused all of that? Much of Europe shut their coal plants over the past few years, leaving much of the continent to rely on renewables. Then, the wind stopped blowing off the North Sea in August 2021. As Joe Wallace of the Wall Street Journal put it, "[t]he sudden slowdown in wind-driven electricity production off the coast of the U.K. in recent weeks whipsawed through regional energy markets. Gas and coal-fired electricity plants were called in, at extreme costs, to make up the shortfall from wind."⁴² What will happen in 2025, and beyond, if the wind stops blowing again? And, what if there are prolonged periods of cloud cover? It remains unclear as all coal plants in England must close by the end of 2024.⁴³

As Bjorn Lomborg, President of the Copenhagen Consensus and a visiting fellow at the Hoover Institution wrote in the Wall Street Journal, on September 30, 2021, "[t]he solar and wind favored by environmentalists generate only 8% [of electricity]. Though renewables are often touted as the cheapest energy source, it's only true when the sun is shining and the wind is blowing. If it's a still night you need backup power, typically from fossil fuels—which makes electricity costlier because you need to pay for both the solar panel and the gas turbine."⁴⁴ Since we cannot yet control when the sun shines and when the wind blows, and since we do not yet have the battery infrastructure to manage the variables in renewables, we have no choice, for now, but to continue to rely on fossil fuels, even if the extent that we rely on them is reduced over time.⁴⁵

⁴¹ Mark P. Mills, *Transition to Nowhere: California's switch to a primarily solar and wind-powered grid is a dead end*, EYE ON THE NEWS, Oct. 20, 2021, available at: <https://www.city-journal.org/california-switch-to-primarily-solar-and-wind-powered-grid-is-dead-end> (last accessed on Jan. 17, 2022).

⁴² Joe Wallace, *Energy Prices in Europe Hit Records After Wind Stops Blowing*, WALLSTREETJOURNAL, Sept. 13, 2021, available at: <https://www.wsj.com/articles/energy-prices-in-europe-hit-records-after-wind-stops-blowing-11631528258> (last accessed on Jan. 17, 2022).

⁴³ In China, an attempt to rely on renewables combined with a severe drought and increased energy demand caused widespread power outages and a corresponding drop in economic output resulted in a doubling of coal prices. Evelyn Cheng, *Why China's power crunch is such a big deal*, CNBC, September 30, 2021, available at: <https://www.cnbc.com/2021/09/30/heres-how-big-a-deal-chinas-power-crunch-is-for-the-economy.html>

⁴⁴ Bjorn Lomborg, *Want to Lock Down for the Climate?* WALLSTREETJOURNAL, Sept. 30, 2021, available at: <https://www.wsj.com/articles/covid-lockdown-climate-fossil-fuels-electricity-energy-production-africa-carbon-emission-11632943155> (last accessed on Jan. 17, 2022).

⁴⁵ Renewables produce mostly electricity, which is only 19% of all the energy the world consumes. The rest is used for things like heating, transportation and the production of goods like steel and fertilizer. Even if all electricity turned green, most of the world would still run on fossil fuels. Bjorn Lomborg, *Want to Lock Down for the Climate?* WALLSTREETJOURNAL, Sept. 30, 2021, available at:

In sum, because building EVs expends a significant amount of energy and because, for the foreseeable future, most EVs will be powered by batteries that need to be charged regularly using electricity that is reliably generated by the burning of fossil fuels, EVs are not the easy answer to the problem of atmospheric carbon as all too many people assume.

VI. Does the average driver even want an EV?

Notwithstanding the numerous roadblocks, which may or will prevent the complete changeover from ICE vehicles to EVs within the various time frames demanded/proposed, the single most important question in is whether the average American is willing to give up his or her ICE vehicle for an EV.

According to Forbes Magazine, as of October 4, 2021, Bentley, BMW, Ford General Motors, Honda, Hyundai-Kia, Jaguar Land Rover, Mazda, Mercedes-Benz, Mitsubishi, Nissan, Rolls Royce, Stellantis (f/k/a Fiat Chrysler), Toyota, Volkswagen, and Volvo have all made very public statements about their respective EV futures; however, Bentley, General Motors, Honda, Mercedes-Benz, and Volvo have gone so far as to “commit” to ceasing the production of all ICE models in the next decade or so.⁴⁶ At the same time, California, New Mexico, New Jersey, Massachusetts, Maine, Hawaii, Connecticut, New York, Oregon, North Carolina, Rhode Island, and Washington have all adopted bans on the sale of new gasoline or diesel vehicles by 2035.

Did any of the automakers who are pledging to throw out their current ICE-based business models and adopt EV platforms consider whether their customers might just not want to drive an EV? Especially without the necessary infrastructure in place, or even a realistic plan for such infrastructure? Did they, or did the States that have adopted ICE engine bans, ever ask the public for their opinion or are they simply going to force EVs onto a public that is currently highly skeptical?

According to Pew Research, as of 2020, nearly 1.8 million EVs were registered in the U.S., more than three times as many as in 2016.⁴⁷ While EVs increased from 600,000 in 2018 to 1.8 million in 2020, sales have slowed in the U.S. in the past few years, largely due to the declining popularity of plug-in hybrids and the phase out of federal tax credits. Indeed, Pew found that “7% of U.S. adults said they currently have an electric or hybrid vehicle, and 39% said they were very or somewhat likely to seriously consider buying an electric vehicle the next time they’re in the market for new wheels.”⁴⁸ In other words, 61%, or almost two-third of

<https://www.wsj.com/articles/covid-lockdown-climate-fossil-fuels-electricity-energy-production-africa-carbon-emission-11632943155> (last accessed on Jan. 17, 2022).

⁴⁶ Jim Motavalli, *Every Automaker’s EV Plans Through 2035 and Beyond*, Forbes, Oct. 4, 2021, available at: <https://www.forbes.com/wheels/news/automaker-ev-plans/> (last accessed on Jan. 17, 2022).

⁴⁷ Drew Desilver, *Today’s electric vehicle market: Slow growth in U.S., faster in China, Europe*, PEW RESEARCH CENTER, June 7, 2021, available at: <https://www.pewresearch.org/fact-tank/2021/06/07/todays-electric-vehicle-market-slow-growth-in-u-s-faster-in-china-europe/> (last accessed Jan. 17, 2022).

⁴⁸ Drew Desilver, *Today’s electric vehicle market: Slow growth in U.S., faster in China, Europe*, PEW

all Americans are not even considering buying an EV the next time they are in the market to buy a car. How could that be, especially when we are told day in and day out that EVs *are* the future and part of the solution to our environmental problems?

Notwithstanding the untold millions of dollars that have been spent to date on the EV charging infrastructure, consumers are currently dissatisfied with the inconvenience of battery charging when relying on them for their primary mode of transportation and charging costs.⁴⁹ A recent Ford study conducted in the UK, Ford revealed that “just over 10% of customers were actively considering a battery electric vehicle as their next purchase” citing concerns about range, charging infrastructure, and cost.⁵⁰

VII. Conclusion

In conclusion, it is our hope that this paper has helped to shed light on the issues surrounding EVs and that fact that EVs are not the simple answer to climate change that many people assume. With respect to the wave of interest in EVs and governmental mandates to eliminate ICEs, it should be clear that ICE to EV conversion will not come without its significant disadvantages; such as adverse environmental impacts caused by mining, multiple technical hurdles (sufficient amounts of lithium electric grid limitations), and serious inconvenience to many Americans (mileage limitations, battery charging time, and increased costs). None of this analysis should be interpreted to mean that EV production should be curtailed. EVs will certainly have a place in the future mix of transportation alternatives; however, before policymakers and automakers force the widespread conversion from ICE vehicles to EVs, the serious questions we have raised must be answered. Indeed, for now, based on consumer preferences, as we know them today, EVs are not the logical purchase for all U.S. drivers. Therefore, the decisions by policymakers and automakers to advance the production and introduction of EVs should be driven by facts, not wishful thinking, and consumer preferences and needs, not State or federal mandates.

Accordingly, we need to ensure that there is a realistic and technically feasible EV development plan. One that will not negatively impact the environment, create negative environmental justice impacts, or interfere with consumer choice. Such a plan should not just help solve the problem of atmospheric carbon, it should prevent problems such as widespread blackouts that harm those neediest among us, and the dramatic increase of transportation and energy costs for all Americans. Equally important, lawmakers, regulators and automakers must face the reality that the majority of Americans are, at this point, far from convinced that EVs will be able to meet their lifestyle needs.

RESEARCH CENTER, June 7, 2021, available at: <https://www.pewresearch.org/fact-tank/2021/06/07/todays-electric-vehicle-market-slow-growth-in-u-s-faster-in-china-europe/> (last accessed Jan. 17, 2022).

⁴⁹ Surprising number of EV owners switch back to gas power, stud sats, Sean Szymkowski, Road Show by CNET, May 4, 2021, available at: <https://www.cnet.com/roadshow/news/ev-owners-switch-gas-power-study/>

⁵⁰ Elisabeth Mahy, *Car buyers still skeptical about going electric, says Ford boss*, BBC News, May 21, 2021, available at: <https://www.bbc.com/news/business-57200593> (last accessed on Jan. 17, 2022).



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