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Ohio's Seventh District Finds No Proper Root of Title and Addresses Who May File a Claim to Preserve

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In *Miller v. Rice Drilling D, LLC*, 2023-Ohio-3588, Ohio's Seventh District Court of Appeals rejected the Appellants' claims that the Ohio Marketable Title Act ("OMTA") and Ohio Dormant Mineral Act ("ODMA") extinguished and abandoned, respectively, the severed oil and gas interests at issue.

Background

The Appellants are the current surface owners of 76.444 acres located in Belmont County, Ohio (the Property). The Property is burdened by three separate oil and gas severances: (1) a 1914 conveyance of 1/16 oil and 1/2 gas interests (the Stoneking Severed Interest); (2) a 1919 reservation of a 1/32 oil and gas interest (the Gump Severed Interest); and (3) a 1922 reservation of a 63/64 oil and gas interest (the 63/64 Severed Interest) (the Severed Interests). In 2012, the Appellants filed a lawsuit against the holders of the Severed Interests (the Appellees) seeking, among other things, to quiet title to the Severed Interests and a declaration that Appellants owned 100% of the mineral rights. The trial court granted summary judgment in favor of Appellees, finding the Severed Interests were not extinguished under the OMTA or abandoned under the ODMA.

OMTA Claim

Citing the Ohio Supreme Court's decisions in *Blackstone v. Moore* and *Senterra, Ltd. v. Winland*, the court of appeals found that the trial court erred in part by holding that the repetition of the 63/64 oil and gas reservation in a 1972 deed precluded that deed from being the Appellants' root of title. It nonetheless affirmed the trial court's judgment. The court clarified that a deed containing a mineral exception *can* qualify as a root of title so long as it accounts for the interest the person is claiming. In this instance, the Appellants were claiming 100% of the mineral rights. However, the 1972 deed repeated the 63/64 oil and gas reservation. Thus, the 1972 deed did not qualify as the Appellant's root of title because the Appellants were claiming to own 100% of the mineral rights while the 1972 deed only purported to create a 1/64 interest. Moreover, the court determined that the OMTA did not extinguish the Stoneking Severed Interest (1/16 oil and 1/2 gas) or the Gump Severed Interest (1/32 oil and gas) because each severed interest is individually greater than the 1/64 interest created by the 1972 deed.

The court of appeals also affirmed the trial court's decision that the repetition of the 63/64 oil and gas reservation in every potential root of title deed is a specific reference to the 63/64 Severed Interest that preserved it from extinguishment under the OMTA. The court found that the reservation language was "specific" under *Blackstone's* three-step inquiry because it used precise figures to describe the quantum of the oil and gas originally reserved (i.e., 63/64). In doing so, the Court contrasted the "unique and accurate amount reserved" in the

repeated reservations with a vague or ambiguous statement such as "preserving all prior mineral reservations."

ODMA Claim

In 2011, one of the Appellants attempted to abandon the Severed Interests pursuant to the notice procedures in the ODMA. The Appellant's notice of abandonment, which the Appellant served partially by certified mail and partially by publication, erroneously included the names of grantors to deeds that *repeated* the 63/64 oil and gas reservation and did not reserve a new mineral interest. The heirs of one of those grantors timely filed a claim to preserve under the ODMA. At trial, the Appellants argued that the claim to preserve was ineffective because the heirs did not own an interest in the Severed Interests. Nevertheless, the trial court held that the claim to preserve operated to preserve the interests of the actual holders under R.C. § 5301.56(C).

The court of appeals affirmed, holding that R.C. § 5301.52 does not require a claim to preserve to be filed by an undisputed and actual holder of the mineral interest. Indeed, any person who attests to their ownership of the property under oath may file a claim to preserve under the statute. The court further explained it was reasonable to conclude that the Appellants did not abandon the Severed Interest because the Appellants named the heirs as potential holders in their notice of abandonment and the heirs timely filed a claim to preserve. However, the court emphasized that its holding is limited to the unique facts presented in this case.

Cessation of Production Clause Did Not Trigger Termination of Colorado Lease

Keith B. Hall
LSU Law Center

In *Board of County Commissioners v. Crestone Peak Resources Operating LLC*, 2023 WL 8010221 (Colo. 2023), the Colorado Supreme Court held that an approximately four-month shut-in of wells that was necessitated by a third party's pipeline being taken out of operation for maintenance did not trigger termination of two leases under their cessation-of-production clauses.[1]

Background

The County of Boulder, Colorado (Boulder) is the successor to the lessors' interest in the two oil and gas leases at issue in this case. Crestone Peak Resources Operating LLC (Crestone) is the successor to the lessee's interest. The habendum clauses in each of the two leases provided that the leases would remain in effect for a primary term of two years and, in addition, for a secondary term that would last as long thereafter as there is production of oil or gas. Each of the leases was in its secondary term when this dispute arose.

Each of the leases had a cessation-of-production clause. The clause in one of the leases stated:

> If, after the expiration of the primary term of this lease, production on the leased premises shall cease from any cause, this lease shall not terminate provided lessee resumes operations for re-working or drilling a well within sixty (60) days from such cessation and this lease shall remain in force during the prosecution of such operations and, if production results therefrom [sic], then as long as production continues.

The other cessation clause was similar, though it used "ninety" days instead of "sixty" days.

In addition, each of the two leases had a shut-in clause. One of the shut-in clauses stated:

> Where gas from a well or wells, capable of producing gas only, is not sold or used for a period of one year, lessee shall pay or tender as royalty, an amount equal to the delay rental ... payable annually on the anniversary date of this lease following the end of each such year during which such gas is not sold or used, and while said

[1] Disclosure: the author of this article was part of a group of oil and gas law professors who submitted an amicus brief to the Colorado Supreme Court.

> royalty is so paid or tendered this lease shall be held as producing property under [the habendum clause].

The shut-in clause in the other lease was somewhat similar, though it referred to a well "capable of producing gas," rather than a well "capable of producing gas only."

Crestone's predecessor-in-interest under the two leases was Encana Oil & Gas (USA), Inc. ("Encana"). Encana produced natural gas from each of the leases. It delivered gas from the leases to Anadarko Petroleum (Anadarko), using a pipeline that was owned by Anadarko. In March 2014, Anadarko closed the pipeline for repairs. As a result, Encana had to shut-in the wells on the two leases. Anadarko completed the repairs and re-opened the pipeline about four months later. At that time, Encana resumed the production and sale of gas from the two leases. Encana also resumed the payment of lease royalties to Boulder, which accepted the royalty payments.

<u>This Dispute and the Lower Court Litigation</u>

In 2018, Boulder sued Crestone, claiming that the two leases had terminated when the production and sale of gas ceased for 122 days during the period when Encana shut-in its wells in 2014. Crestone moved for summary judgment, arguing that Colorado is a "discovery" state for purposes of the habendum clause.

In a discovery state, the term "production" means capable of producing oil and gas in paying quantities. Thus, in a discovery state, although a lessee has a duty to diligently market, the mere existence of a well capable of producing in paying quantities is sufficient to keep a lease alive beyond the primary term, even if the lessee is not extracting and selling oil or gas from the lease. This discovery rule is a minority rule. In most states, a lessee must be extracting hydrocarbons to satisfy the requirement of "production" for purposes of the habendum clause. The district court agreed that Colorado is a discovery state and granted summary judgment in favor of Crestone.

Boulder appealed, but the appellate court affirmed. In support of its conclusion that Colorado is a discovery state, the appellate court pointed to the leases' cessation-of-production clauses. Under each of these two clauses, the lease will not terminate, notwithstanding a cessation of production, if the lessee begins reworking an existing well or drilling a new well within a specified time. The appellate court reasoned that the parties must have intended that the cessation-of-production clause would apply when there was a cessation of production that could be remedied by reworking a well or drilling a new well. This suggests that the parties thought a cessation of production would mean that the lease no longer had wells capable of producing in paying quantities because, if the extraction of hydrocarbons ceased for some reason other than the wells no longer being capable of producing in paying quantities, the cause of the cessation in extraction of hydrocarbons would not be remedied by reworking a well or drilling a new well.

Further, under Boulder's interpretation of the cessation-of-production clauses, the shutting-in of a gas well (for a lease being maintained by production from that well) would cause one of the leases to terminate within 60 days of the lessee shutting-in a well or within 90 days of the lessee shutting-in a well. Each of the leases had a shut-in clause, but the language of the clauses suggested that they were intended to address shut-ins that exceeded one year. Thus, reasoned the appellate court, Boulder's interpretation of the cessation-of-production clauses, as terminating the leases if extraction of gas ceased for more than sixty days or ninety days, would mean that a shut-in of wells would cause lease termination before the shut-in gas clauses would even apply. This would render the shut-in clauses meaningless.

Colorado Supreme Court's Decision

The Colorado Supreme Court affirmed, but on different grounds. The Colorado Supreme Court expressly avoided a ruling on whether Colorado is a "discovery" state. Indeed, the Colorado Supreme Court suggested that there might not be a rule that applied as a matter of law, and that this might depend on the language of individual leases.

The Colorado Supreme Court was influenced, however, by the fact that the cessation-of-production clause in each of the leases would save the lease from termination for a lack of production in paying quantities if the lessee began reworking an existing well or drilling a new well within a specified number of days. To the Colorado Supreme Court, this suggested that the cessation-of-production clauses would not apply unless a cessation of production could be remedied by reworking a well or drilling of a new well. Because the cessation caused by the shutdown of Anadarko's pipeline could not be remedied by the reworking of a well or the drilling of a new well, the cessation-of-production clauses did not apply. Thus, the clauses did not cause the leases to expire when Encana failed to begin reworking a well or drilling a new well within 60 or 90 days.

Further, because the express cessation-of-production clauses did not apply, the temporary cessation of production doctrine could apply. Under this jurisprudential doctrine, a temporary cessation of production does not cause a lease to terminate immediately. Instead, the lease does not terminate so long as the lessee restores production within a reasonable time. Here, Encana resumed production within a time that was reasonable under the circumstances.

The Colorado Supreme Court also noted that, under Boulder's interpretation of the cessation-of-production clauses, the leases' shut-in clauses would be rendered useless, at least in some circumstances.

Oklahoma Limits Foreign Property Ownership, Requires Affidavit of Compliance for Deeds

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A new Oklahoma statutory requirement went into effect on November 1, 2023, which affects every deed filed for record in the State on or after such date. The requirement is established by amendments to the existing state statute derived from Senate Bill 212, which was passed during the 2023 legislative session and signed into law by the Governor on June 6, 2023.

The Oklahoma statute codified at 60 O.S. 121 *et seq.* has, since its inception in 1910, prohibited alien persons – including corporations – from directly owning property in the State. Similar language in Article XXII, Section 1, of the Oklahoma Constitution provides that aliens or persons not citizens of the United States shall not own property in Oklahoma, and directs that the State Legislature enact laws providing aliens or non-citizens who acquire title to property in Oklahoma with five years from the date of acquisition to dispose of the same or proceedings may be instituted to escheat or forfeit the same to the State.[1]

There have always been certain exceptions to these laws, including Native Americans born within the Unites States and aliens or non-citizens who are, or may become, bona fide residents of Oklahoma (provided that if a resident alien ceases bona fide residence in the State, they must dispose of their Oklahoma lands within five years).[2] Oklahoma statutes do not define the term "bona fide resident" so precisely what qualifies as such is unclear, but the inquiry appears to be one of intent to establish domicile or residence in the State (similar to a homestead).[3] The Oklahoma Land and Title Association Government Affairs Committee has described the pre-existing statute and constitutional provisions relative to bona fide residence as follows:

> In simple terms, the ability to hold property depends on "intent" relative to "residency." If an alien takes up bona fide residence in Oklahoma, they may acquire and hold lands during the continuance of such bona fide residency. However, if the alien moves from the state and is no longer considered a resident or intends to remain a resident, then the alien must dispose of their property within five years. If the alien fails to dispose of their property, the State can institute escheat proceedings.[4]

[1] Okla. Const. art. XXII, § 1.
[2] *See id.*; *see also* 60 O.S. §122.
[3] Oklahoma Land Title Association Government Affairs Committee, *Alien Ownership of Land Frequently Asked Questions 60 Okla. Stat. §§ 121 and 122*, #9, available at https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/2023/olta_faqs_10-23-23.pdf.
[4] *Id.* at #1.

The Oklahoma Supreme Court has also clarified that domesticated corporate entities are considered bona fide residents of the State.[5]

Senate Bill 212 did not propose any changes to 60 O.S. §122 – being the section outlining the bona fide residence exception, among other things – and thus, said section remains unchanged and such exception still applies. The changes proposed by and passed in Senate Bill 212 to 60 O.S. §121 are three-fold: (A) tightening of permitted property ownership by aliens and non-citizens, including prohibition of indirect ownership through businesses or trusts; (B) explicit prohibition of certain sources of funding; and (C) requiring that every deed filed for record on or after November 1, 2023 include an executed affidavit of compliance attached as an exhibit thereto.

First, new statutory language prohibits both direct and indirect acquisition of title to Oklahoma property by aliens or non-citizens through a business entity or trust, except as otherwise permitted therein. The incorporation of indirect ownership is a significant change to the statute. Prior to the passage of Senate Bill 212, as noted above, alien persons were prohibited from owning property in Oklahoma outright; however, aliens could own property indirectly if acquired through a domestic or domesticated entity. Now, even such indirect ownership by an alien is prohibited. This concept has been accounted for in the newly required affidavit of compliance (discussed hereinabove), wherein business and trustee grantees to deeds must attest that all of its direct and indirect owners in the case of a business, or all of its trustees and direct and contingent beneficiaries in the case of a trust, are either U.S. Citizens or bona fide residents of Oklahoma.

A new enumerated exemption to the above was created for business entities that are "engaged in regulated interstate commerce in accordance with federal law,"[6] which means that "the business activities in Oklahoma must either (1) be expressly permitted by federal regulation or federal law or (2) not prohibited by federal regulation or federal law (such as illegal cannabis industry operations)."[7] According to the revised statute, subsection A thereof (which contains the limitation on indirect ownership set out above) does not apply to business entities that are engaged in regulated interstate commerce in accordance with federal law. Consequently, the exempt business or trust entity affidavit does not contain any statements regarding the citizenship or residence of its owners, officers, trustees or beneficiaries; rather, such affidavit contains an attestation that the entity is "engaged in regulated interstate commerce in accordance with federal law."

Second, an item required to be disclosed in the newly mandated affidavits (discussed hereinbelow) is that "no funding source is being used in the sale or

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[5] *See id*. at #9, *citing* State ex rel. Cartwright v. Hillcrest Investments, Ltd., 1981 OK 27, 630 P.2d 1263 (1981) ("'a foreign corporation, once it has complied with the domestication procedures established under Oklahoma law, is, for the purposes of restrictions on alien land ownership, a resident of the State and thus no longer subject to the restrictions of' the constitutional prohibitions on alien property ownership"). Note that Oklahoma statutes define a "foreign corporation" as any corporation not formed under the laws of Oklahoma; such term includes both "alien corporations" (formed under the laws of foreign nations) and corporations formed under the laws of other States.
[6] 60 O.S. §121.A.
[7] *Alien Ownership of Land Frequently Asked Questions 60 Okla. Stat. §§ 121 and 122* at #15.

transfer in violation of this section or any other state or federal law."[8] This seems to direct that funding provided by parties who themselves would not be entitled to own property in Oklahoma may not be used in the acquisition of title to Oklahoma property by a party otherwise permitted to own such property. Exempt businesses and trusts still must attest that no prohibited funding is being used in the sale or transfer of property in the affidavit accompanying their deed.

Third, revisions to the statute included the addition of a procedural requirement that all deeds recorded in any county within the State on or after November 1, 2023 "include as an exhibit to the deed an affidavit executed by the person or entity coming into title attesting that the person, business entity, or trust is obtaining the land in compliance with the requirements of this section…"[9] Each and every grantee must sign an affidavit, and the county clerk is prohibited from recording any deed if the required affidavit(s) is missing.[10] As such, this statue effects every deed which is presented for recording in Oklahoma on or after November 1, 2023.

The Oklahoma Attorney General was required to promulgate template affidavits for both individuals and businesses or trusts that comply with the statute and further may identify certain exceptions "when promulgating the affidavit form."[11] These template affidavits were created and the same are available on the Oklahoma Attorney General's website as noted below.[12] The contents covered by these affidavits include the following:

- The person signing the Affidavit is at least 18 years old;
- In the case of an individual, the affiant is either a U.S. Citizen or an alien who is or may become a bona fide resident of Oklahoma;
- In the case of an entity, the affiant is an officer or trustee of the entity;
    - If a business entity, that its direct and indirect owners are U.S. Citizens or bona fide residents of Oklahoma;
    - If a trust, that its trustees and direct and contingent beneficiaries are U.S. Citizens or bona fide residents of Oklahoma;
- The affiant has personal knowledge;
- The affiant acknowledges the law on foreign ownership of property; and
- The affiant acknowledges compliance with the general ban on using prohibited funding sources under 60 O.S. §121 or any other state or federal law.[13]

Several questions remain after the amendments to the statute went into effect. One important question is: what is considered a "deed" for purposes of the affidavit of compliance? It appears clear that any document called a deed—

[8] 60 O.S. §121.B.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Office of the Oklahoma Attorney General, Public Forms, Affidavits for Ownership or Title to Land, at #1, *available at* https://www.oag.ok.gov/public-forms (Individual; Non-exempt business or trust; Exempt business or trust).
[13] *Id.* at #7.

Warranty Deed, Quitclaim Deed, Sherriff's Deed, Transfer-on-Death Deed, Correction Deed and others—will require the statutory affidavit to be attached thereto, whether such deed transfers ownership of real property in fee, severed minerals or surface, and whether the interest conveyed therein is vested or contingent.[14] However, the Oklahoma Land Title Association Government Affairs Committee has acknowledged that, "[a]t the present time, we do not know how other types of 'conveyances' will be treated."[15] As such, it remains unclear how documents such as assignments, affidavits of death and heirship, probate and divorce decrees, will be viewed in light of this statute. Likewise, it is not clear precisely what activities fall under "regulated interstate commerce" and thus whether certain businesses or trusts will be identified as exempt or non-exempt activities for the purposes of the statute, though the Oklahoma Land Title Association Government Affairs Committee has posited that "[m]ost transactions will fall under the 'Non-Exempt' Business Entity Affidavit."[16] Moreover, the question noted above about the precise definition of a bona fide resident is also still unanswered. Other open questions include: how does a grantee who is a minor comply with the new statute; will there be any exemptions or exceptions other than those enumerated in the statute; and what is the penalty for non-compliance.[17]

In the meantime, individuals, companies and other entities selling or acquiring title to property in Oklahoma (and those who represent them) should be aware of the requirement that all deeds must now include this statutory affidavit. Additionally, it should be determined whether business entities purchasing property fall under the interstate commerce exemption. If not, an inquiry should be made into the citizenship and residence of all direct and indirect owners or businesses, and trustees and direct and contingent beneficiaries of trusts, as applicable, to ensure compliance with the statute.

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[14] *Id.* at #10 and #17. *See also* Attorney General Affidavits for Ownership or Title to Land, *supra* Footnote 11.
[15] *Id.* at #10.
[16] *Id.* at #15.
[17] *Id.* at #18.

U.S. Fifth Circuit Certifies Post Production Cost Dispute to Louisiana Supreme Court

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Two separate judges of the United States District Court for the Western District of Louisiana have held that, when the operator of a drilling unit created by order of the Louisiana Office of Conservation sells the portion of unit production attributable to an unleased tract, the unleased mineral owner is liable for its proportionate share of post-production costs, which the operator may deduct from the payment it makes to the unleased owner.[1]

In reaching this conclusion, the judges relied on the doctrine of *negotiorum gestio*—a quasi-contract legal theory that the unit operator did not assert prior to the court's original decision on the question. The court reconciled this doctrine with provisions of Louisiana Revised Statute 30:10(A)(3). In one of these cases, the United States Fifth Circuit has certified to the Louisiana Supreme Court the question of whether *negotiorum gestio* applies in these disputes.[2]

The Relevant Provisions of La. Rev. Stat. 30:10(A)(3)

Louisiana law authorizes the Commissioner of Conservation to create drilling units[3] and pool the separately owned mineral interests within these units.[4] Louisiana Revised Statute 30:10(A)(3) states:

> If there is included in any unit created by the commissioner of conservation one or more unleased interests for which the party or parties entitled to market production therefrom have not made arrangements to separately dispose of the share of such production attributable to such tract, and the unit operator proceeds with the sale of unit production, then the unit operator shall pay to such party or parties such tract's pro rata share of the proceeds of the sale of production within one hundred eighty days of such sale.

The dispute in these cases concerns application of this provision when a unit operator who has sold the portion of production attributable to an unleased tract incurs post-production costs in handling that production, as operators of natural gas wells often do.

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[1] *Dow Construction, LLC v. BPX Operating Co.*, 602 F. Supp. 3d 928 (W.D. La. 2022) (Foote, J.); *Self v. BPX Operating Co.,* 2022 WL 989345 (W.D. La.) (Hicks, J.); *Johnson v. Chesapeake Louisiana, LP*, 2022 WL 989341 (W.D. La.) (Hicks, J.).
[2] *Self v. BPX Operating Co.*, 80 F.4th 632 (5th Cir. 2023).
[3] La. Rev. Stat. 30:9(B) (authorizing Commissioner to create drilling units).
[4] La. Rev. Stat. 30:10(A)(1) (requiring Commissioner to pool separately owned interests if the owners have not already done so).

This Dispute

The first of these cases to be decided by the federal district court was *Johnson*. In *Johnson*, the defendants (collectively, "Chesapeake") were the operators of a Haynesville Shale unit created by the Office of Conservation. The unit contains several unleased interests. Chesapeake operated a unit well that produced natural gas, and the owners of the unleased interests did not make their own arrangements to sell the natural gas attributable to their interests. Accordingly, Chesapeake sold the natural gas attributable to those interests. Chesapeake incurred a variety of post-production costs in handling the natural gas, including costs for gathering, compression, treatment, processing, transportation, and dehydration. Chesapeake paid each owner of an unleased mineral interest an amount equal to that owner's proportion share of the net proceeds of such activity. That is, Chesapeake subtracted its post-production costs from the gross proceeds of the sale, then paid each owner its proportionate share of the remaining amount (the net proceeds).

A group of unleased owners gave notice to Chesapeake, asserting that Chesapeake was underpaying them. Those unleased owners stated that Louisiana Revised Statute 30:10(A)(3) prohibits Chesapeake from deducting its post-production costs from the gross proceeds prior to calculating the amount payable to unleased owners. Chesapeake disagreed and continued to deduct its post-production costs. In October 2016, a group of unleased owners filed suit in state court—the 42nd Judicial District Court for DeSoto Parish. Chesapeake removed the case to the United States District Court for the Western District of Louisiana.[5]

The plaintiffs based their argument on the language of Louisiana Revised Statute 30:10(A)(3). They note that this provision states in part that the operator must pay the owners of unleased tracts within the unit the "tract's pro rata share of the proceeds of the sale of production." The plaintiffs argued that, based on the natural meaning of "proceeds," the quoted phrase requires the unit operator to pay each unleased owner that owner's share of the gross proceeds of the sale, rather than the net proceeds remaining after deduction of post-production costs.

Chesapeake disagreed. Chesapeake noted that the provision states the operator must pay unleased owners a "tract's pro rata share of the proceeds of the sale of production *within one hundred eighty days of such sale*" (emphasis added). Chesapeake argued that this provision merely provides a deadline for making payment and that the provision does not attempt to govern whether the payment owed is a "pro rata share" of gross proceeds or net proceeds. Chesapeake also argued that the post-production costs it incurs are reasonably necessary, that the post-production activities that give rise to such costs add value to the natural gas that it sells, and that the unleased owners would be unjustly enriched if Chesapeake

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[5] The plaintiffs also alleged that Chesapeake violated the Well Cost Reporting Statute, La. Rev. Stat. 30:103.1.

were required to absorb all those costs and pay the unleased owners a share of the gross proceeds, rather than a share of net proceeds.[6]

The court granted partial summary judgment in favor of the unleased owners, ruling that Chesapeake was not entitled to deduct post-production costs.[7] The court reasoned that the language of Louisiana Revised Statute 30:10(A)(3) favored their position. Further, because a statute addresses the issue, a resort to unjust enrichment could not prevail. Chesapeake filed a motion for reconsideration.[8] The court agreed to a hearing, but the hearing and resolution of the motion to reconsider was delayed due to the COVID pandemic.

On rehearing, Chesapeake argued that each unleased owner would be entitled to its proportionate share of unit production in kind. Of course, most unleased owners do not take their proportionate share in kind. Rather, although there is no contractual relationship between the unit operator and the unleased owners, the unleased owners depend on the unit operator to handle the production and then send them a monetary payment. Chesapeake argued that, when a unit operator handles and sells an unleased owner's proportionate share of production, the operator is essentially managing the affairs of the unleased owners and that the law of *negotiorum gestio*, a theory of quasi-contract found at Louisiana Civil Code articles 2292 through 2297 applies. Civil Code article 2292 states:

> There is a management of affairs when a person, the manager, acts without authority to protect the interests of another, the owner, in the reasonable belief that the owner would approve of the action if made aware of the circumstances.

Prior courts have stated that the relationship between the operator of a compulsory unit and unleased owners is quasi-contractual. Further, Chesapeake's argument that its handling of an unleased owner's share of production plausibly falls within the literal circumstances described by Civil Code article 2292. A close reading of Louisiana Revised Statute 30:10(A)(3) shows that it does not expressly authorize the operator to sell the share of production attributable to unleased owners. Rather, the provision describes the operator's payment obligation in the event that "the unit operator proceeds with the sale of unit production." Thus, the operator has no contractual and no express statutory authority to sell the unleased owner's share of production. Further, an operator could reasonably believe that an unleased owner (even it preferred a higher payment amount) would approve of the operator's post-production handling of the natural gas and sale of the natural gas if made aware of the circumstances.

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[6] Johnson v. Chesapeake Louisiana, LP, 2019 WL 1301985 (W.D. La.).

[7] Johnson v. Chesapeake Louisiana, LP, 2019 WL 1301985 (W.D. La.).

[8] In resolving the motion to reconsider, the court noted that, although parties often refer to "motions to reconsider," the Federal Rules of Civil Procedure do not refer to such a motion by name. However, Federal Rules of Civil Procedure 59 and 60 provide means to challenge final judgments, and Rule 54 provides a means to challenge an interlocutory order. An order granting a partial summary judgment is generally an interlocutory order.

Chesapeake also noted that Civil Code article 2297 requires "[t]he owner whose affair has been managed … to reimburse the manager for all necessary and useful expenses." Thus, so long as post-production expenses incurred by an operator are necessary and useful, as Chesapeake asserted its post-production expenses were, Civil Code article 2297 requires that the owner reimburse those expenses. Moreover, by paying the unleased owners their proportionate share of the net proceeds (gross proceeds minus post-production costs), as Chesapeake says it did, it was paying the unleased owners their share of gross proceeds, minus the amount owed by the unleased owner to the operator pursuant to Civil Code article 2297. Further, Chesapeake noted that the unleased owners did not dispute that the operator is entitled to deduct from gross proceeds each unleased owner's proportionate share of the Louisiana severance taxes owed on production. Thus, even the unleased owners concede that the amount owed under 30:10(A)(3) is not a proportionate share of the entire gross proceeds.

The federal district court granted Chesapeake's motion to reconsider, concluding that Louisiana Revised Statute 30:10(A)(3) and the law of *negotiorum gestio* both apply, and that a reconciliation of these provisions leads to the conclusion that the operator of a unit created by the Office of Conservation is entitled to deduct its useful post-production costs from the gross sales proceeds before calculating the amount due to each unleased owner.

In *Self* (decided by the same district court judge who decided *Johnson*) and in *Dow* (decided by a different judge of the United Staes District Court for the Western District of Louisiana), the court resolved the same issue in favor of the unit operator on the same grounds—by applying *negotiorum gestio*.

In each of the three cases, the plaintiffs have appealed. The only decision issued so far by the United States Fifth Circuit has come in *Self v. BPX Operating Co.*, 80 F.4th 632 (5th Cir. 2023). In that case, the Fifth Circuit certified the applicability of *negotiorum gestio* in the context to the Louisiana Supreme Court.

U.S. Fifth Circuit Orders BOEM to Proceed with Offshore Lease Sale 261

Keith B. Hall
LSU Law Center

On November 14, 2023, the United Staes Court of Appeals for the Fifth Circuit ordered the Bureau of Ocean Energy Management (BOEM) to hold offshore oil and gas Lease Sale 261 within thirty-seven days.

<u>Background</u>

The Outer Continental Shelf Lands Act (OCSLA) governs oil and gas development in offshore federal waters. OCSLA establishes a four-step process. First, the Department of Interior develops a five-year plan for conducting lease sales. OCSLA requires the Department to consult with other federal agencies and state governments in developing a five-year plan. Second, the Department conducts lease sales pursuant to a schedule included in the five-year plan. Third, a company that acquires a lease block conducts exploration. And fourth, the leaseholder conducts development operations and produces oil or gas from deposits of oil and gas found during exploration.

On January 17, 2017, during the last days of the Obama administration, the Secretary of Interior approved the 2017-2022 Five-Year Plan that included a schedule for ten lease sales in the Gulf of Mexico and one in Alaska's Cook Inlet. The Five-Year Plan scheduled one of the Gulf lease sales for 2017, two each for the years 2018 through 2021, and one lease sale (Lease Sale 261) in 2022.

In January 2021, shortly after taking office, President Biden entered an executive order that directed the Department of Interior to stop holding lease sales pending further review. Louisiana and several other states filed suit, arguing that President Biden's attempt to unilaterally block the scheduled lease sales was unlawful. The United States District Court for the Western District of Louisiana agreed with this argument and entered a preliminary injunction requiring BOEM to continue holding lease sales, as contemplated by the existing five-year plan. *See Louisiana v. Biden*, 43 F. Supp. 3d 388 (W.D. La. 2021). BOEM then held Lease Sale 257 in November 2010.

But before leases could be issued to the winning bidders from Lease Sale 257, environmental organizations brought a challenge, arguing that BOEM had violated the National Environmental Policy Act (NEPA) by failing to adequately consider the impact that the Lease Sale could have on foreign consumption of oil. A federal district court in the District of Columbia agreed and blocked the granting of leases. *See Friends of the Earth v. Haaland*, 2023 WL 3144203 (D.C. Cir.). After this, the United States Congress stepped in, passing the Inflation Reduction Act (IRA). Provisions in the IRA directed the Department of Interior to proceed with awarding leases pursuant to Lease Sale 257 and to hold the remaining lease sales that had been scheduled in the 2017-22 Five Year Plan by dates specified in the

IRA. Notably, the IRA required BOEM to hold Lease Sale 261 by September 30, 2023.

In March 2023, BOEM issued a proposed notice of sale for Lease Sale 261, specifying the areas that would be offered for lease. Certain environmentalists had argued that portions of the area should be excluded from the sale to protect Rice's Whales, but BOEM concluded that the available scientific information did not support the environmentalists' arguments. Later, though, BOEM began to change its mind. BOEM issued a final notice of sale that specified an area to be offered for leasing that was about 6 million acres smaller than the original proposal. The Sale was scheduled for September 27, 2023.

The Litigation Over Withholding 6 Million Acres from Lease Sale 261

Several plaintiffs filed suit, arguing that withholding 6 million acres from the sale was inconsistent with the directive given by Congress in the IRA and that the change BOEM made between the issuance of the proposed and final notices of sale violated the Administrative Procedure Act. The United States District Court for the Western District of Louisiana agreed, and, on September 21, 2023, granted a preliminary injunction requiring that Lease Sale 261 be conducted by September 30, 2023, and that the Sale cover all the acreage included in the proposed notice of sale. *See Louisiana v. Haaland*, 2023 WL 6450134 (W.D. La.).

BOEM appealed, but limited its appeal to seeking that it be given 37 days from judgment by the appellate court to conduct the sale. BOEM asserted that extra time was needed to give it time to publish a notice in the Federal Register. Various environmental organizations intervened and appealed, seeking a reversal on the merits. The Fifth Circuit stayed the order requiring that BOEM conduct Sale 261 by September 30, 2023. On November 14, 2023, the Fifth Circuit issued its decision on the appeals. It dismissed the appeal of the environmental organizations, holding that they lacked standing. The Fifth Circuit amended the district court's judgment to give BOEM thirty-seven days from the date of the issuance of the Fifth Circuit's mandate to hold Sale 261 with the acreage included in the proposed notice of sale.

BOEM has announced that Lease Sale 261 will be held on December 20, 2023.

U.S. Fifth Circuit Vacates Air Permit that Texas Regulator Granted to LNG Facility

Keith B. Hall
LSU Law Center

In November 2023, in *Port Arthur Community Action Network v. Texas Comm'n on Envt'l Quality*, 2023 WL 7528906 (5th Cir. 2023), the United States Fifth Circuit vacated an air permit that the Texas Commission on Environmental Quality issued to Port Arhtur LNG, L.L.C.

Background Law

In Texas, the Texas Commission on Environmental Quality (TCEQ) is responsible for enforcing the federal Clean Air Act and the Texas Clean Air Act. As required by federal law, Texas has adopted a State Implementation Plan (SIP) for enforcing the Clean Air Act. Under this SIP, a person must obtain a Prevention of Significant Deterioration (PSD) permit before constructing any new "major significant source,"[1] which is defined by federal regulations as being a stationary facility that has the potential to emit more than 250 tons per years of a regulated pollutant,[2] such as carbon monoxide (CO) or nitrogen oxides (NO_x).[3]

To receive a PSD permit, an applicant must show that the emission sources at the proposed facility will satisfy Best Air Control Technology (BACT).[4] To satisfy BACT, a facility generally must reduce pollution to the maximum extent possible, considering costs and other practical concerns.[5] TCEQ has developed guidance for evaluating permit applications, and that guidance provides that TCEQ should consider "[r]ecently issued/approved permits within the State of Texas" and compare each permit application "to the emission reduction performance levels accepted as BACT in recent [New Source Review] permit reviews."[6]

Background Facts and Procedural History

Port Arthur LNG, L.L.C. plans to construct and operate a natural gas liquefaction plant to export liquefied natural gas (LNG) from Port Arthur, Texas. Because the facility has the potential to emit more than 250 tons pers year of a regulated pollutant, the proposal facility qualifies as a major stationary source, and Port Arthur LNG therefore must obtain a PSD permit before constructing the liquefaction plant.

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[1] 40 C.F.R. § 52.21(a)(2)(i).
[2] 40 C.F.R. § 52.21(b)(1)(i)(B).
[3] This is the requirement that applies to areas that have satisfied the clean air standards established by the EPA. 42 U.S.C. §§ 7408-7409; 40 C.F.R. § 50.
[4] 42 U.S.C. §7475(a)(4); Tx. Health & Safet Code § 382.0518(b)(1).
[5] 40 C.F.R. § 52.21(b)(12); 30 Tex Admin. Code § 116.10(1).
[6] *Port Arthur Community Action Network v. Texas Comm'n on Envt'l Quality*, 2023 WL 7528906 (5th Cir. 2023).

For refrigeration compression turbines that would be installed at the liquefaction plant, Port Arthur LNG proposed emissions of 9 parts per million by volume, dry (ppmvd) of NO_x and 25 ppmvd of CO. In June 2020, TCEQ's Executive Director issued a draft permit that included the emissions levels suggested by Port Arthur LNG. In March 2021, after public comment, the Executive Director issued a final decision to recommend those emissions levels. The Port Aurthur Community Action Network (PACAN), a community organization, contested this recommendation, and a hearing was held before two administrative judges (ALJs).

At the hearing before the ALJs, PACAN introduced an exhibit showing that a 2020 amendment to a permit for a different LNG facility—Rio Grande LNG—provided for lower emissions of both NO_x and CO than the emissions levels proposed for the Port Arthur LNG permit. Further, this was true even though Rio Grande LNG planned to use the same make and model of refrigeration compression turbines as Port Arthur LNG. Based on this, the ALJs concluded that Port Arthur's proposed emissions levels did not satisfy BACT.

TCEQ's Executive Director objected to the ALJs' recommendation, concluding that Rio Grande's emission levels should not be considered as the standard for BACT because those emissions levels had not been "demonstrated in practice." The TCEQ granted a permit containing the emissions levels originally proposed, as opposed to the lower emissions levels found in Rio Grande LNG's permit.

<u>Fifth Circuit Decision</u>

PACAN appealed. After determining that PACAN had standing to appeal, the Fifth Circuit analyzed the merits of PACAN's appeal. The United States Fifth Circuit stated that TCEQ's own guidance documents direct the agency to consider previously imposed emissions standards in deciding what constitutes BACT, and that a proposed facility "must have an overall emission reduction performance that is "at least equivalent to those previously accepted as BACT."" This guidance is not binding law, but under Texas law—the Fifth Circuit concluded that Texas law established the standard of review—an agency must explain its reasoning "when it appears to have departed from its earlier administrative policy."

The Fifth Circuit concluded that TCEQ's order granting the permit to Port Arthur LNG constituted a departure from a prior TCEQ policy of requiring a new permit to adhere to the emissions levels set in prior permits. Further, the requirement that BACT emissions levels be supported by operational data was a departure from prior practices. Although TCEQ is not barred from making a departure from past policy, it must explain why it is changing policy. Because TCEQ had not explained its departure from past policy, the granting of the permit was a legal error. Therefore, the Fifth Circuit vacated the order granting the permit and remanded the case to TCEQ.

West Virginia Appellate Court Interprets Mineral Reservation

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In *Nicholson v. Severin POA Group, LLC*, 2023 WL 7487311 (W. Va. Ct. App.), the West Virginia Intermediate Court of Appeals reversed a circuit court and held that a 1902 deed reserved a one-sixteenth mineral interest, not a one-half mineral interest.

In the deed at issue, F.W. Severin conveyed a little over 117 acres of land in Doddridge County, West Virginia to the Nicholsons' predecessors in interest. In the deed, Severin reserved "one-sixteenth of all the oil and gas in and under said land." In 2017, Antero Resources Corporation began to produce oil and gas from the property. Antero began paying royalties to the Nicholsons, but a dispute arose regarding the extent of the Nicholsons' mineral interest. The Nicholsons asserted that Severin had reserved a one-sixteenth mineral interest and that Severin's successor-in-interest, the Severin POA Group, LLC (POA), owned a one-sixteenth mineral interest. The Nicholsons argued that they owned the remaining fifteen sixteenths mineral interest.

POA argued that Severin had reserved a one-half mineral interest and that POA now owned that one-half interest. According to POA, the Nicholsons owned the other one-half interest. POA contended that, in 1902, oil and gas leases typically paid a one-eighth royalty to the lessors. For this reason, parties often used "one-sixteenth" when referring to a one-half interest in minerals, based on their assumption that the owner of a one-half mineral interest would receive one-half of the one-eighth lessor's royalty. The circuit court agreed with POA and ruled in its favor. The Nicholsons appealed.

The West Virginia Intermediate Appellate Court acknowledged that West Virginia courts had interpreted deeds that referred to the reservation of "one-sixteenth" of minerals as being a reservation of a one-half mineral interest. But in those cases, the deeds at issue had included both a reference to a reservation of one-sixteenth of minerals and a reference to the reservation being one-half of a one-eighth royalty.

For example, in *Lockhart v. United Fuel Gas Co.*, 105 W. Va. 69, 141 S.E. 521 (1928), a party granted to the other party "a one undivided sixteenth interest in and to all the oil in and under that certain tract of land," and the West Virginia Supreme Court had interpreted the grant as being a grant of a one-half mineral interest. But the same paragraph of the deed that referred to the grant of a "one-sixteenth" interest in minerals also stated that "the true intention of the grantor herein [is] to convey to the said party of the second part the one-half of the one-eighth of the oil reserved, or to be reserved, in any oil or gas lease that has been executed, and which may be executed." Further, there was an existing lease that required the lessee to pay the lessor a one-eighth royalty on oil. Additionally, other cases in

which West Virginia Courts had interpreted a grant or reservation of “one-sixteenth” of minerals as being a grant or reservation of a one-half mineral interest likewise contained both the reference to “one-sixteenth” and a reference to “one-half” of “one-eighth.”

But the 1902 deed at issue in this case never referred to one-half. The West Virginia Intermediate Appellate Court held that the 1902 deed unambiguously reserved a one-sixteenth interest in minerals, not a one-half interest. Therefore, the Appellate Court reversed the lower court’s decision and ruled in favor of the Nicholsons.

Courts Consider Scope of Louisiana Oilfield Anti-Indemnity Act

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Discussion of Case

The Louisiana Oilfield Anti-Indemnity Act (LOAIA) generally invalidates contractual indemnities for personal injury and death claims in contracts "concerning any operations related to the exploration, development, production, or transportation of oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state." This case addresses whether the LOAIA applies in the context of operations in a salt mine. The critical question in the case is, if there is "drilling for minerals," the drilling must relate the drilling of a well in order for the LOAIA to apply.

Factual Background

In 2019, an electrician employed by MC Electric LLC ("MC Electric") was fatally electrocuted while working in the Cote Blanche salt mine in St. Mary Parish, which is owned by Compass Minerals. In the subsurface mine, Compass uses a "drill-and-blast" method of mining in which the company breaks up by solid salt by drilling holes in the face of the salt and filling the holes with explosives that are then detonated. There is no dispute that the drilling performed in the mine is not the drilling of a well.

At the time of the fatal accident, MC Electric was performing work for the owner of the mine, Compass Minerals Louisiana Inc. ("Compass"), pursuant to a purchase order that required MC Electric to defend and indemnify Compass for personal injury or death claims liabilities that might arise from MC Electric's work, including claims arising from the death or injury of one of MC Electric's employees.

The electrician's survivors sued Compass Minerals and Fire & Safety Specialists, Inc. ("FSS"), alleging that a FSS employee erroneously told the electrician that the electrical lines for a fire suppression system had been "de-energized." The electrician died after contacting one of the electrical lines for the fire suppression system—a line that was still energized. At the time, FSS was performing work for Compass pursuant to a purchase order that required FSS to indemnify Compass for personal injury and death claims that might arise from FSS's work.

Relying on the contractual indemnities in the purchase orders with MC Electric and FSS, Compass sought a defense from QBE Syndicate 1036 ("QBE"), a company that provided commercial general liability insurance policies to MC Electric and FSS. QBE then filed this suit, seeking a declaratory judgment that Compass is not entitled to a defense or indemnity under either of the two purchase orders on which Compass relied. QBE supported its suit by arguing that the

Louisiana Oilfield Anti-Indemnity Act made the contractual indemnities in the purchase orders unenforceable.

The Louisiana Oilfield Anti-Indemnity Act

Louisiana Revised Statute 9:2780 is often called the Louisiana Oilfield Anti-Indemnity Act ("LOAIA").[1] The statute applies to certain contractual indemnities in an agreement for work or supplies relating to a well drilled for oil, gas, other minerals, or water. The statute makes such indemnities unenforceable to the extent that they provide for a defense or indemnity for liability arising from personal injury or death, if the injury or death is caused in whole or part by any fault of the party being indemnified.[2] LOAIA contains a definition of "agreement" for purposes of the statute:

> The term "agreement," as it pertains to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, as used in this Section, means any agreement or understanding, written or oral, concerning any operations related to the exploration, development, production, or transportation of oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, including but not limited to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in or in connection with any well drilled for the purpose of producing or excavating, constructing, improving, or otherwise rendering services in connection with any mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral, or an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental transportation, and other goods and services furnished in connection with any such service or operation.[3]

Analysis in This Case

Compass and QBE each filed a motion for summary judgment. Compass argued that the LOAIA does not apply because the case did not relate to a well. QBE argued that the LOAIA applied because Compass' work involves drilling and because salt is a mineral. Thus, according to QBE, Compass was "drilling for minerals." QBE further argued that, if a company is drilling for minerals, the drilling

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[1] See, e.g., Fontenot v. Chevron U.S.A. Inc., 676 So. 2d 557, 563 (La. 1996); Katherine Fruge Corry, *Removing the Risk from Risk Allocation: Reforming Louisiana's Oilfield Anti-Indemnity Act*, 81 La. L. Rev. 1037 (2021). The court in this case referred to the statute as the "Louisiana Oilfield Indemnification Act," QBE Syndicate 1036 v. Compass Minerals Louisiana Inc., 2022 WL 17741084 (W.D. La.), but this moniker does not seem very common. A few cases have referred to the statute as the "Louisiana Oilfield Indemnify Act." *See, e.g.*, Roberts v. Energy Development Corp., 104 F.3d 782, 783 (5th Cir. 1997).

[2] La. Rev. Stat. 9:2780(B).

[3] La. Rev. Stat. 9:2780(C).

need not relate to a well for the LOAIA to apply. The United States District Court for the Western District of Louisiana rejected this argument, concluding that the mere fact that drilling is involved in an operation is not sufficient to trigger application of the LOAIA. Rather, the drilling must be for a well. In this case, there was no well.

The district court supported this conclusion by relying in part on Louisiana Revised Statute 9:2780(C), which defines "agreement" for purposes of the LOAIA as an agreement that "pertains to a well for oil, gas, or water, or drilling for minerals." The court acknowledged that the United States Fifth Circuit has held that the LOAIA can apply to efforts to produce minerals other than oil and gas. For example, in *Torres v. McDermott Inc.*, 12 F.3d 521 (5th Cir. 1994), the Fifth Circuit held that LOAIA applied to work relating to wells drilled for the production of sulfur through the "Frasch process." Further, the court acknowledged that salt is a mineral. But the court distinguished *Torres* on grounds that it involved the drilling of a well, whereas the only drilling that is done in a salt mine is not the drilling of a *well*. Accordingly, the United States District Court for the Western District of Louisiana held that the LOAIA did not bar Compass' request for an indemnity.[4]

QBE appealed. The United States Fifth Circuit acknowledged that several prior cases had stated that, for the LOAIA to apply, the contract containing the indemnity at issue must relate to the drilling of a well. However, those cases had made such statements in contexts involving such issues as whether the LOAIA would apply in the context of contracts that related to maintenance of oil and gas pipelines or platforms, but not to the drilling of a well. The Fifth Circuit concluded that those cases did not answer the question whether the LOAIA's application to "drilling for minerals" relates only to the drilling of a well, as opposed to drilling into the rock face in a subsurface mine. The Fifth Circuit certified to the Louisiana Supreme Court the question of whether agreements that pertain to "drilling for minerals," but which do not relate to the drilling of a well, are covered by the LOAIA.[5]

Although this case does not involve oil and gas directly, if the Louisiana Supreme Court accepts the certified question, the Court's discussion of the scope of the LOAIA may be relevant to oil and gas disputes involving the LOAIA.

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[4] *QBE Syndicate 1036 v. Compass Minerals Louisiana Inc.*, 646 F. Supp. 3d 746 (W.D. La.) (J., Summerhays).
[5] *See QBE Syndicate 1036 v. Compass Minerals Louisiana, Inc.*, 83 F.4th 986 (2023).

Louisiana Grants Sixth Pore Space Agreement for Carbon Capture and Storage

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Acting through the State Mineral and Energy Board, the State of Louisiana granted an agreement to Castex Carbon Solutions, LLC to use pore spaces beneath approximately 24,181 acres of state-owned water bottoms in the Gulf of Mexico for carbon capture and storage. This is the sixth CCS pore space agreement granted by the State of Louisiana. The agreement with Castex has an effective date of August 30, 2023. A copy is available online,[1] as are the other five CCS pore space agreements granted by the State of Louisiana.[2] The six agreements were each granted after direct negotiations, rather than in a bidding process.

The agreement with Castex provides for an initial payment of approximately $300 per acre, annual rentals of $60 per acre until the end of the "Operational Term" of the agreement, and an injection fee of $7.50 per ton of injected carbon dioxide. The injection fee is indexed to increase by 10% of any increase in the 45Q federal tax credit that applies to CCS, and there is a minimum annual injection fee.

The agreement provides for an "Initial Term" of up to three years, which can be extended for good cause. The agreement will terminate if the CCS operator has not applied for a Class VI[3] permit for CCS by the end of the Initial Term or extended Initial Term. If the CCS operator applies for a Class VI permit before the pore space agreement terminates, the agreement moves to the "Permit/Construction Term." The agreement provides that this term lasts up to four years, with the possibility of an extension for good cause. If the CCS operator does not begin injections of carbon dioxide during the Permit/Construction Term or extended Permit/Construction Term, the lease terminates. If the operator begins injections before the agreement terminates, the agreement moves to the "Operational Term," which will last for so long as the CCS operator does not allow a gap of more than twelve months in injections.

In substance, the pore space agreement is structured as a lease, though the agreement is called an "operating agreement" because the State Mineral and Energy Board granted the agreement pursuant to a statute that authorizes the granting of "operating agreements" (that typically are structed as leases).

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[1] The Castex agreement is available at https://www.dnr.louisiana.gov/assets/OMR/media/forms_pubs/CS006.pdf.
[2] They are available at https://www.dnr.louisiana.gov/index.cfm/page/1366.
[3] Part C of the federal Safe Drinking Water Acts seeks to protect underground sources of drinking water by providing for underground injection control (UIC) regulations. The federal UIC regulations recognize six classes of UIC wells, with Class VI wells being injection wells used for the permanent underground storage of carbon dioxide.

The agreement expressly provides that the State does not guarantee that it will not grant someone else (such as an oil and gas lessee) the right to drill through the reservoir in which carbon dioxide will be stored.

Colorado Grants Carbon Sequestration Exploration Agreement

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Acting through the State Board of Land Commissioners, the State of Colorado granted a "Carbon Sequestration Exploration Lease" to Eos Sequestration LLC on August 24, 2023. The Lease authorizes the lessee an exclusive right to enter the leased area to conduct the work (including the drilling of test wells) needed to evaluate the suitability of the leased area for geologic carbon sequestration. The Lease also grants the lessee an exclusive right to negotiate with the State of Colorado for a pore space lease to conduct carbon sequestration in the area, but the Lease does not guarantee that the State will grant a pore space agreement for carbon capture and sequestration.

BOEM Agrees to Review Drilling and Production Plans for California Offshore Leases

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In September 2022, the Center for Biological Diversity (CBD) sued the Secretary of the Interior (Deb Haaland) and the Bureau of Ocean Energy Management (BOEM) in the United States District Court for the Central District of California, regarding certain oil and gas activities in federal waters off the California coast, near Huntington Beach.[1] In the suit, CBD asserted that the Department of Interior and BOEM were violating the Administrative Procedures Act and Outer Continental Shelf Lands Act by not requiring that the drilling and production plans for the "Beta Unit" be updated. The Beta Unit contains several offshore platforms.

CBD argued in its lawsuit that federal law requires that drilling and production plans for federal offshore oil and gas leases be updated when significant new information becomes available or significant changes in the oil and gas operations occur. CBD supported this argument by contending that the drilling and production plans for the Beta Unit have not been updated in decades, and that significant new information has become available in the meantime. In April 2023, the federal district court granted in part the defendants' motion to dismiss.

In November 2023, the parties entered into the record of the litigation a settlement agreement that requires CBD to dismiss its lawsuit without prejudice and requires BOEM to review the drilling and development plans for the Beta Unit within one year. The agreement does not require BOEM to take any other action, but it reserves CBD's right to file suit again if it is not satisfied with BOEM's actions. The settlement also requires BOEM to pay $64,000 in attorney fees to CBD.

[1] Center for Biological Diversity v. Haaland, No. 2:22-cv-06996 (C.D. Cal.).

California Climate Disclosure Bills

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California Governor Gavin Newsom recently pledged to sign two groundbreaking climate disclosure bills into law. These bills will mandate most large U.S. companies to reveal their complete emissions along their value chains and report on their financial risks and adaptation measures related to climate change.

The California Senate bills, SB 253 ("Climate Corporate Data Accountability Act") and SB-261 ("Greenhouse gases: climate-related financial risk"), have already been approved by the California Assembly and are awaiting the Governor's signature by October 14. Governor Newsom emphasized California's historic leadership in climate legislation, such as establishing the first cap and trade program and emissions standards for vehicles, low carbon fuel requirements, and the mandate for selling alternative fuel cars by 2035.

The Governor confirmed his intent to sign these bills during a climate change (aka "Climate Week NY") event (ending September 24) but mentioned minor language adjustments are needed before they become law.

SB 253 applies to all United States companies (and other "business entities") with total annual revenues in excess of one billion dollars revenue doing business in California. This is predicted to impact over 5,300 business entities operating in California. These companies must annually report emissions from all scopes, including direct emissions from their operations (Scope 1), indirect emissions generated by their use of electricity (Scope 2), and emissions relating to their supply chain (Scope 3). Reporting begins in 2026 for some emissions and follows the Greenhouse Gas (GHG) Protocol standards, with third-party verification required. The GHG Protocol is the globally recognized GHG emissions accounting and reporting standard developed and updated by the World Resources Institute and the World Business Council for Sustainable Development. For additional information on SB 253, see *Full Value Chain Emission Disclosures – A California ESG Bill Resurrected* and *Updates to SB 253: California's Comprehensive Carbon Disclosure Legislation*.

SB 261 applies to US companies with total annual revenues in excess of five hundred million dollars revenue and that do business in California. It mandates disclosure of climate-related financial risks and measures for risk reduction, aligning with the internationally recognized Task Force on Climate-Related Financial Disclosures framework. Reporting begins in 2026, with biennial reporting instead of annual.

At the federal level, the Securities Exchange Commission (SEC) proposed similar significant increases in climate change reporting for publicly traded corporations (see proposed rule here and our brief recent update here). However, the proposed rule (particularly the portions requiring reporting on Scope 3 emissions) resulted in significant pushback from industry, as evidenced by the large number of comments the SEC received in response to publishing its proposed rule.

The SEC rule is expected to be finalized by the end of 2023, but no updates have been announced since the close of the comment period in June 2022. The SEC is likely to face legal challenges, particularly on the SEC's authority to require Scope 3 emissions data. Commentators are now speculating whether the SEC will weaken its proposed regulations but that may now be impacted by the likely passage of the above two bills. Future updates will be provided as we analyze California regulatory scheme and the SEC's final rule.

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