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OIL & GAS E-REPORT

3	IT'S SETTLED: COLORADO'S CENTERLINE PRESUMPTION APPLIES TO MINERALS, EVEN IF THE GRANTOR RETAINS OTHER PROPERTY ALONG THE RIGHT-OF-WAY
8	D.C. CIRCUIT VACATES FOUR OF FIVE CHALLENGED NEW NATURAL GAS PIPELINE REGULATIONS
11	COURT ISSUES PRELIMINARY INJUNCTION TO BLOCK "BAN" ON NEW LNG EXPORT APPROVALS
13	LOUISIANA LEGISLATION REGARDING PRODUCED WATER AND OTHER BRINE
17	LOUISIANA ENACTS NEW CCS LEGISLATION
22	ORGANIZATION CHANGES FOR LOUISIANA DEPARTMENT OF ENERGY AND NATURAL RESOURCES
24	NEGOTIORUM GESTIO DOCTRINE DOES NOT AUTHORIZE DEDUCTION OF POST-PRODUCTION COSTS
28	COURT DISMISSES CITY OF BALTIMORE'S CLIMATE SUIT AGAINST OIL AND GAS COMPANIES
31	U.S. COURT OF APPEALS HOLDS ASSIGNMENTS OF OVERRIDING ROYALTY INTERESTS DO NOT ATTACH TO UTICA SHALE/POINT PLEASANT FORMATION
33	PENNSYLVANIA ENACTS CCS LEGISLATION
39	CSB SAFETY STUDY CALLS FOR REMOTE ISOLATION EQUIPMENT AT CHEMICAL FACILITIES
41	ORAL ARBITRATION AGREEMENT IN COURT CONTROLLED UNDER TEX. R. CIV. P. 11.

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5201 Democracy Drive, Plano, TX 75024

It's Settled: Colorado's Centerline Presumption Applies to Minerals, Even if the Grantor Retains Other Property Along the Right-of-Way

Diana S. Prulhiere
Steptoe & Johnson PLLC

On May 6, 2024, the Colorado Supreme Court announced its ruling on a question never before explicitly addressed by the State's highest court: "When the centerline presumption applies, is the conveyance of land abutting a road or highway presumed to carry title to the centerline of both the surface *and* the mineral estates beneath a dedicated right-of-way?"[1] The court answered this question in the affirmative, provided that no contrary intention appears on the face of the conveyance instrument. The decision also clarified the elements of the test to determine whether, as a threshold matter, the centerline presumption applies, rejecting the Colorado Court of Appeals' ruling that a grantor must alienate every single piece of property it owned anywhere along the right-of-way for the presumption to apply.

Background

The case of *Great Northern Properties LLLP v. Extraction Oil and Gas Inc.*[2] pertains to the interpretation and effect of several deeds from the mid-1970s. A real estate developer subdivided land that it owned in Greeley County, Colorado, into three separate parcels. Each of these parcels adjoined a road (11th Street) which the developer dedicated to the City of Greeley in 1974. By the end of 1975, the developer had sold all three parcels to third parties (lot owners), without any reservation of minerals or other interests.

In 2019 (more than 45 years later), the developer purported to convey its interest in the minerals underlying 11th Street to Great Northern Properties LLLP (GNP). GNP brought suit to quiet title to the minerals underlying the street. Both GNP and the lot owners had leased their minerals to Extraction Oil and Gas Inc. (Extraction); thus, the outcome of the quiet title action only affected which parties were proper lessors entitled to receive royalties.

The district court held that the developer had conveyed the minerals to the centerline of the street when it conveyed the abutting parcels of land and therefore quieted title in the lot owners. GNP appealed, and a division of the Colorado Court of Appeals unanimously affirmed the district court's decision, relying on well-settled property law principles in reaching its conclusion, and noting that the application of the centerline presumption was in accord with public policy.

The Colorado Court of Appeals concluded that: "when the centerline presumption applies . . . , it applies to all interests the grantor possesses in the

[1] *Great Northern Properties LLLP v. Extraction Oil and Gas Inc.*, 2024 CO 28, ¶ 3 (*en banc*, May 6, 2024).
[2] 2024 CO 28.

property underlying the right-of-way, including mineral interests."[3] The division further set forth a test to determine when the centerline presumption applies, stating that "the presumption applies only if the party claiming ownership to land abutting a right-of-way establishes that (1) the grantor conveyed ownership of land abutting a right-of-way; (2) the grantor owned the fee underlying the right-of-way at the time of conveyance; (3) the grantor conveyed *all* the property it owns abutting the right-of-way; and (4) no contrary intent appeared on the face of the conveyance document."[4] In applying the test, the Colorado Court of Appeals found that the developer had conveyed its mineral rights under 11th Street to the lot owners, the last outstanding condition (*i.e.*, (3)) having been met when the last lot owner took title.

GNP then petitioned the Colorado Supreme Court for certiorari review. The questions that the court agreed to review were described as follows:

1. Whether a deed that describes land lying next to a dedicated right-of-way but does not purport to convey any interest in the right-of-way should be presumed to convey the mineral estate underneath the right-of-way.

2. Whether the court of appeals erred in determining that the centerline presumption does not apply if the grantor retains ownership of any property abutting the right-of way.[5]

Analysis

The Colorado Supreme Court acknowledged that the centerline presumption has been applied in Colorado for over a century, describing the general rule as follows: "where a grantor conveys a parcel of ground bounded by a street, his grantee takes title to the center of such street, to the extent that the grantor has any interest therein,' unless a contrary intent appears on the face of the conveyance."[6] This general rule is based on well-settled property law principles (including those that the division relied on in reaching its conclusion in the prior case), such as: (i) the presumption that a grantor intends to convey their entire interest unless they expressly except and/or reserve an interest, or specifically describe something less than the whole, in the conveyancing instrument; (ii) the similar presumption that a grantor likely does not intend to strand property or retain ownership in a narrow strip of land that has little value to anyone except the adjoining landowner; (iii) the rule that a conveyance of land, without mineral reservation and absent a prior severance, conveys both the land itself and the minerals underlying it, and (iv) the rule that any severance of minerals from the surface must be accomplished by clear and distinct language. These property principles also comport with public policy by avoiding "'a prolific source

[3] *Id.* at ¶ 13, *citing to Great Northern Properties, LLLP v. Extraction Oil & Gas, Inc.*, 2022 COA 110 ¶¶ 13, 17 (Court of Appeals of Colorado, Division Four, Decided September 15, 2022).
[4] *Id.* at ¶ 13, *citing to Great N. Props.,* 2022 COA 110 ¶ 24.
[5] *Id.* at ¶ 16, Footnote 3.
[6] *Id.* at ¶ 16 (internal citations omitted).

of litigation' arising from 'narrow strips of land distinct in ownership from the adjoining territory.'"[7]

GNP argued that the division's ruling that the centerline presumption applied to minerals was a "judicially created rule of construction that conflicts with . . . the plain meaning of the text in a deed."[8] They also asserted that technological advances such as horizontal drilling make owning minerals under narrow strips valuable, which opposes the prior view that stranded lands were of little value to anyone except the adjoining property owner. The court disagreed with both propositions, noting that the first argument "disregards" and "ignores" the well-established property law precedent and rules of construction mentioned above. As to the second argument, the court identified that horizontal drilling did not exist in 1974 and 1975 and "[i]t is the value of the mineral interest at the time of the grantor's conveyance that controls, not the claimed value decades later."[9] The Colorado Supreme Court also posited that the force of the public policy rationale is "arguably at its apex in a case like this," because if an exception were created here, "grantors and their successors-in-interest could emerge *en masse* to seek disgorgement of oil and gas royalties obtained by countless landowners over the last century."[10]

Turning to the question of whether the test established by the Colorado Court of Appeals for when the centerline presumption applies was correct, the Colorado Supreme Court found error in the holding that the centerline presumption cannot apply if the grantor retains ownership of any property at any point along the entire right-of-way. Indeed, both GNP and Extraction argued that such requirement was "unworkable" and in error, but for different reasons. Ultimately, the Colorado Supreme Court said that the holding below "makes too much" of language in prior decisions which stated that "to retain ownership in a narrow strip of land [] *is of little value to all but the adjacent landowner*," clarifying that such language contained no requirement for a complete divestiture nor did it "place importance on whether the grantor owned *other* property contiguous to the right-of-way."[11] It criticized the requirement of complete divestiture as contravening the "settled principle" that interests which pass by deed do not depend on conduct or acts that occur *after* a grantee obtains title. Moreover, the Colorado Supreme Court reasoned that, to comport with such a requirement, parties would necessarily have to provide evidence of the grantor's "entire ownership portfolio anywhere along a right-of-way – no matter how long – and then chain title to every other parcel," calling this possibility "untenable" and in conflict with public policy concerns.[12]

Finally, the Colorado Supreme Court considered the specific properties of the "dedication" of the street from the developer to the City of Greeley pursuant to GNP's argument that the developer's dedication had effectuated a horizontal

[7] *Id*. at ¶ 22 (internal citations omitted).
[8] *Id*. at ¶ 24.
[9] *Id*. at ¶ 28.
[10] *Id*. at ¶ 30.
[11] *Id*. at ¶¶ 37, 39, 40.
[12] *Id*. at ¶ 41.

severance of the minerals underlying the street. The court explained that there are two types of dedications under which a government entity acquires rights to use land for public purposes, and that the rights acquired under each type differ in Colorado. Under a common law dedication, the governmental entity acquires an easement only; conversely, under a statutory dedication, the governmental entity acquires a "qualified fee" which is "limited to that which 'is reasonably necessary to enable [it] to utilize the surface and so much of the ground as might be required" to accomplish the purpose(s) for which the land was dedicated (and which is extinguished when the governmental entity's needs for such interest end).[13] The Colorado Supreme Court also discussed a Wyoming Supreme Court case (*Town of Moorecroft v. Lang*, 779 P.2d 1180 (Wyo. 1989)), which it classified as a "decision in which the divided court declined to apply Wyoming's version of the centerline presumption doctrine to convey the mineral estate underlying a statutorily dedicated street."[14] Specifically, the majority opinion in the *Moorecroft* case held that, in Wyoming, a common law dedication creates an easement across the surface estate, but a statutory dedication severs the surface and mineral estates.[15] The Colorado Supreme Court distinguished Colorado law from that of Wyoming, noting that "nothing in Colorado law suggests that statutory dedication in and of itself horizontally severs a mineral estate from the surface estate" and "severance of a mineral estate doesn't happen implicitly in Colorado," suggesting that the Wyoming court's majority opinion appeared to be based on that state's unique dedication statute.[16]

Conclusions

The Colorado Supreme Court ultimately found that the developer's dedication of 11th Street to the City of Greeley did not sever the mineral estate from the parcels adjoining the road, but rather, the developer retained ownership of the same along with the adjacent lands "as a contiguous estate," which could be (and was) conveyed to the lot owners via deed. Because the deeds from the developer to the lot owners did not contain any language excepting or excluding the mineral estate, nor did such deeds contain any intention on their face that the minerals were not to be conveyed, the Colorado Supreme Court found that the lot owners took title to "the most valuable estate" that the developer owned at the time of conveyance, being both the surface and mineral estates to the centerline of the road. The court also delineated the three-part test which determines whether the centerline presumption applies as follows, clarifying that the same applies "irrespective of whether the grantor owns other property abutting the right-of-way"[17]: "the centerline presumption applies to mineral interests under a right-of-way if the party claiming ownership to land abutting a right-of-way establishes that (1) the grantor conveyed ownership of land abutting a right-of-way; (2) the grantor owned the fee – to both the surface estate and the mineral rights – underlying the

[13] *Id*. at ¶¶ 44-46, 52.
[14] *Id*. at ¶ 47.
[15] *Id*. at ¶ 48*, citing to Moorecroft*, 779 P.2d at 1185 (the dissent argued that the severance did not extend to the minerals but only applied to "the width, depth and length of the property required for the street" (*Id*. at ¶ 49*, citing to Moorecroft*, 779 P.2d at 1187)).
[16] *Id*. at ¶¶ 50, 51.
[17] *Id*. at ¶ 58.

right-of-way at the time of the conveyance; and (3) no contrary intent appears on the face of the conveyance document."[18]

[18] *Id*. at ¶ 18.

D.C. Circuit Vacates Four of Five Challenged New Natural Gas Pipeline Regulations

Keith B. Hall
LSU Law Center

In 2022, the Pipeline and Hazardous Materials Safey Administration (PHMSA) promulgated a number of new safety standards for natural gas pipelines. The Interstate Natural Gas Association of America (INGAA) challenged five of the new standards. In August 2024, the D.C. Circuit issued a decision vacating four of the five new standards, while rejecting INGAA's challenge to the fifth standard.[1]

Background

The United States Department of Transportation is required to "prescribe minimum safety standards for pipeline transportation and for pipeline facilities,[2] and within that Department, the task of regulating pipelines is delegated to PHMSA.[3] In promulgating regulations, PHMSA must follow the Administrative Procedure Act. In addition, however, PHMSA must follow provisions in 49 U.S.C. § 60102(b) regarding cost-benefit analyses.

Indeed, PHMSA must conduct two cost-benefit analyses during the rulemaking process. First, PHMSA must perform a cost-benefit analysis as part of a "risk assessment."[4] PHMSA must submit the risk assessment to an advisory committee of experts for comment, and PHMSA must accept public comments. The advisory committee submits a report to PHMSA that recommends adopting, rejecting, or changing a new safety standard proposed by PHMSA.[5] PHMSA must then consider the advisory committee's recommendations and the public comments, and at this stage PHMSA must give explicit consideration to a cost-benefit analysis.[6]

In 2016, PHMSA published a Notice of Proposed Rulemaking that included numerous proposals to change safety standards for natural gas pipelines. In August 2022, PHMSA published a final rule. INGAA petitioned PHMSA for reconsideration of certain provisions in the new rules. PHMSA largely denied the petition. INGAA sought review in the D.C. Circuit.

The Four Vacated Standards

One of the standards that INGAA challenged relates to pipes manufactured by electric resistance welding (ERW) using high-frequency currents. Prior to 1970, most ERW was done using low-frequency currents, but now high-

[1] *Interstate Natural Gas Association of America v. Pipeline and Hazardous Materials Safety Administration*, --- F.4th ---, 2024 WL 3837458.
[2] 49 U.S.C. § 60102(a)(2).
[3] 49 U.S.C. § 108(f); 49 C.F.R. § 1.97(a)(1).
[4] 49 U.S.C. § 60102(b)(3).
[5] 49 U.S.C. § 60115(c)(2).
[6] 49 U.S.C. § 60102(b)(5).

frequency currents are used, and this provides a higher quality weld. Prior to PHMSA's adoption of the challenged standard, a PHMSA regulation requiring immediate repair of pipes when metal loss is discovered along welding seams was based on an industry standard for pipes manufactured using low-frequency current ERW. The standard PHMSA adopted in 2022 would also require immediate repair when metal loss is found along seams of pipe manufactured by high-frequency current ERW.

In justifying the new standard, PHMSA asserted that the standard would add no new costs because the existing regulation already required immediate repair. But INGAA correctly noted that this requirement only applied to pipes manufactured with low-frequency current ERW. The new standard would impose a new requirement and additional costs when applied to pipes manufactured using high-frequency current ERW. The court stated that nothing in the record indicated that PHMSA had considered costs. PHMSA argued that the pipes manufactured using high-frequency current ERW are at risk of failure if they are not repaired when there is metal loss. The court noted, however, that this goes to the benefit of the new standard. The law requires PHMSA to consider costs, as well as benefits, and it had not done so. Therefore, the court vacated this new standard.

The second of the new standards that INGAA challenged related to repairs of cracks or other anomalies. PHMSA had proposed a standard that would require operators to immediately repair a crack or anomaly if the crack or anomaly would cause the predicated failure pressure of the pipe to occur at a pressure less than 1.1 times the maximum allowable operating pressure for the segment of the pipeline with the crack or other anomaly. During the rulemaking process, however, PHMSA changed its proposal to require immediate repair if a crack or anomaly would cause a predicted failure pressure to be less than 1.25 times the maximum allowable operating pressure. PHMSA explained that it did not believe its original proposal provided an adequate safety margin, but PHMSA did not analyze costs of the 1.25 standard. The court vacated the standard, holding that PHMSA's failure to consider costs was fatal to the validity of the new standard.

The third of the new standards challenged by INGAA related to requirements to make repairs or conduct monitoring if an operator finds dents. The court vacated the standard because PHMSA altogether failed to consider costs.

The fourth of the standards challenged by INGAA was a new corrosive-constituent standard. The existing standard already required an operator to monitor for internal corrosion when a pipe carries a corrosive gas. The new standard would require monitoring for corrosion when a pipe carries a stream that contains "constituents" that are not themselves corrosive, but which can be corrosive when combined with other substances. An example would be carbon dioxide and water. Alone, neither is corrosive. But in combination, they can be corrosive. The court found that PHMSA's analysis of costs was defective because it was internally inconsistent. At one point, PHMSA claimed that the new standard

would not impose new costs. At one another point in the record, PHMSA claimed that it imposed costs, but the costs would be difficult to estimate. Because of this inconsistency, the court held that PHMSA failed to satisfy the requirement for a reasoned analysis of costs. Therefore, the court vacated the standard.

The fifth standard challenged by INGAA requires monitoring for stress corrosion cracking. The final rule included a minor word change from the original proposal made by PHMSA. INGAA challenged the standard based on that change. PHMSA stated that the minor change of wording would impose no additional costs relative to the costs that it had considered under the original wording and INGAA's petition did not contradict that statement. For this reason, the court rejected INGAA's challenge to this new standard. On appeal, INGAA asserted that the change in wording would impose additional costs, but the court held that INGAA had not preserved that argument.

Court Issues Preliminary Injunction to Block "Ban" on New LNG Export Approvals

Keith B. Hall
LSU Law Center

Exports of natural gas, including liquefied natural gas (LNG), are governed by the Natural Gas Act (NGA). The NGA requires a person seeking to export LNG from the United States to apply to the U.S. Department of Energy (DOE) for approval.[1] The NGA requires the DOE to approve a request to export LNG to countries with which the United States has a free trade agreement, but U.S. exports of LNG to those countries only accounts for about 12 percent of U.S. LNG exports.[2] Exports to non-free trade agreement countries (non-FTA countries) account for 88 percent of exports.[3] Thus, it is important for an LNG export facility to obtain permission to export to non-free trade countries

The NGA does not make approval of exports to non-FTA countries automatic, but the NGA does create a statutory presumption in favor of approving requests to export to non-free trade countries. The NGA requires approval of such requests unless the DOE determines that the exports would be inconsistent with the national interest.[4] Further, the NGA requires that DOE "ensure expeditious completion of" proceedings on requests for permission to export LNG to non-free trade countries.[5]

In January 2024, President Joe Biden announced that his Administration would make a "temporary and perhaps indefinite" halt on the consideration of requests for approval to export LNG (the court referred to this as the "LNG Export Ban"). He stated that his Administration wished to take time to "update the assessments" used to evaluate request for export approvals.

Sixteen states filed suit in the United States District Court for the Western District of Louisiana, asserting that, given the NGA requires that the DOE approve LNG export requests absent a finding that the exports would be inconsistent with the national interest, and that the NGA requires expeditious consideration of requests, it was unlawful to simply halt the consideration of requests for export approval, without any finding that exports would be inconsistent with the national interest. The plaintiffs said that the DOE can review and update its assessment methodology and initiate new studies regarding LNG exports, but the DOE cannot cease consideration of export requests while awaiting future studies.

The defendants asserted several defenses. They argued that the district court lacked jurisdiction because 15 U.S.C. § 717r(b) provides that parties aggrieved by an order issued in a proceeding on an applicant's request for permission to

[1] 15 U.S.C. § 717b(a).
[2] Louisiana v. Biden, 2024 WL 3253103 (W.D. La.).
[3] *Id.*
[4] 15 U.S.C. § 717b(a).
[5] 15 U.S.C. § 717n(c)(1)(A).

export LNG is taken to the court of appeals. The district court rejected that argument, concluding that, because the plaintiffs were not complaining about an order granted in a proceeding relating to a particular export application, 15 U.S.C. § 717r(b) did not apply.

The defendants argued that the plaintiffs lacked standing. The court concluded, however, that the plaintiffs had offered credible evidence that they would suffer a decrease in severance taxes, royalties, and other revenue due to the LNG Export Ban. The defendants suggested that the harm allegedly caused by the LNG Export Ban was speculative because there was no guarantee that any particular export application would have been approved but for the LNG Export Ban. But the court rejected this argument too, noting that, because the DOE has never found that an LNG export application was inconsistent with the public interest, the harms caused by the Ban were not purely speculative.

The defendants argued that the plaintiffs had no right to bring their suit because the Export Ban was not a final agency action. The DOE had not made a final ruling on particular applications. But the court rejected this too. The DOE had made a final decision to halt the consideration of applications, notwithstanding a statutory obligation to decide applications expeditiously. Indeed, because an approved export application is required before making exports, the defendants' halting of proceedings was effectively a denial of the applications pending further information.

The court then turned to the motion to dismiss on grounds other than jurisdiction and standing. The plaintiffs conceded that certain counts in their complaint should be dismissed, but they argued that the others were viable. The court agreed. The court dismissed several of the "Counts" in the plaintiffs' complaint, but rejected the motion to dismiss other Counts.

In particular, the court denied the motion to dismiss as to: Count I, alleging that the LNG Export Ban was a final agency action and contrary to 5 U.S.C. § 706 because the Ban is unlawful; Count II, alleging that the Export Ban is not authorized by statute; Count III, alleging that the Ban is effectively a new rule and that the defendants' violated the Administrative Procedures Act's notice-and-comment requirement by implementing the rule without notice and comment; Count IV, alleging that the LNG Export Ban is arbitrary and capricious because it is unreasoned; Count XII, alleging that the LNG Export Ban violates the Congressional Review Act, 5 U.S.C. §§ 801 to 808 because the Ban is effectively a rule, the Congressional Review Act requires that new rules be submitted to Congress to give it a chance to disapprove of the rule, and the defendants had not submitted the Ban to Congress; and Count XIV, alleging that the Ban violated the Constitution's separation of powers because, by imposing the Ban, the DOE had assumed powers belonging to Congress.

The court then analyzed the standards for granting a preliminary injunction and concluded that they were satisfied. Accordingly, the court issued a preliminary injection to enjoin the DOE's enforcement of the LNG Export Ban.

Louisiana Legislation Regarding Produced Water and Other Brine

Keith B. Hall
LSU Law Center

In the last several years, there has been growing interest in the treatment and re-use of produced water to conserve other sources of water. More recently, there also has been a growing interest in extracting lithium or other valuable substances from produced water or other brine. In its 2024 Regular Session, the Louisiana Legislature passed Senate Bill No. 285, which became Act No. 126 of the 2024 Regular Session after being signed by the Governor. Act No. 126 addresses ownership of produced water and the substances in it, the Office of Conservation's authority to create fieldwide units for production of brine, and the Office's authority to enter orders creating drilling units and pooling orders that apply to brine.

Ownership of Produced Water and Substances In It

Often, subsurface formations that contain natural deposits of oil or natural gas also contain briny water, and oil and gas wells drilled to those formations often simultaneously produce oil and water or gas and water, or in some cases a combination of oil, gas, and water. This water is often called "produced water" or "brine" or "salt water." By far the most common method to manage this water is to put it back into the subsurface via Class II injection wells—either injection disposal wells or injection wells used for secondary recovery of oil.

For several reasons, no one argued about who "owned" the produced water or substances dissolved in it. First, under the typical mineral lease, a lessee would have a right to produce oil or gas found in paying quantities, even if produced water was co-produced along with the oil or gas, because doing so would be reasonably necessary to the production of oil and gas. Second, even if a landowner might theoretically own the produced water, the lessee typically would have a right to use it for secondary recovery operations. Third, unless it was used for secondary recovery, produced water typically had no value. Indeed, it was a liability, because often the only practical and legal means of managing the produced water was to send it to injection disposal wells, and this costs money. Given that this regulatory responsibility is imposed on the oil and gas operator, a landowner would have no reason to claim ownership of the produced water.

However, in recent years, because of increased need for water to support oil and gas activity in arid areas, there has been an increased interest in potential recycling of produced water for use in oil and gas operations (or for other purposes) as a means of conserving other sources of water. However, an oil and gas operator might be hesitant to re-use produced water if the oil and gas operator had to worry about the possibility that the surface owner or mineral lessor would become aware of that beneficial use, claim to be the owner of the water, and argue that the oil and gas operator was liable for conversion. To encourage recycling or

other use of produced water, some states have enacted legislation declaring an oil and gas operator to be the owner of produced water.

In addition to the increased interest in promoting the re-use of produced water to conserve the consumption of other sources of water, there has been a growing interest in the possibility of extracting valuable substances—such as lithium—from produced water. This possibility also raises the issue of who owns produced water.[1]

One of the provisions in Act No. 126 will be codified as a new statute—Louisiana Revised Statute 30:2.1, to be entitled "Ownership of brine produced incident to oil and gas operations"—that addresses ownership of produced water. The new Revised Statute 30:2.1 states:

> Unless expressly provided otherwise by contract, brine produced incident to the production of oil and gas by the person, including operators and producers acting on behalf of the person, who has the right to drill into and to produce from a pool and to appropriate the production, either for himself or for others, belongs to such person, regardless of whether such brine is saved, retained, used, or sold for the purpose of extracting the constituent parts, minerals, elements, compounds, or substances contained in or dissolved in the brine.

Thus, the new statute declares the oil and gas operator to own the produced water, as well as any substances that can be extracted from it, unless the parties have expressly agreed otherwise by contract. This certainly should be valid as to the rights of mineral lessees and mineral servitude owners under mineral leases and servitudes granted after the effective date of the new statute because this simply states how a new contract will be interpreted unless the parties agree otherwise. At some point, someone may challenge whether this legislation can validly apply as to the rights under contracts that existed prior to the effective date of the statute.

Unit Operations for Brine

In addition to the interest in possibly extracting lithium or other valuable substances from produced water, there is growing interest in pumping other subterranean sources of brine to the surface for extraction of lithium or other valuable substances. In one potential scheme, the brine would be pumped to the surface, some chemical means would be used to extract the brine (a process called "direct lithium extraction"), and the remaining water would be reinjected into the same formation.

The reinjection of water from which lithium already has been extracted would, over time, dilute the concentration of lithium in the subterranean brine.

[1] It also raises other questions, such as whether the substance to be extracted from the produced water is a "mineral" covered by the mineral lease.

However, reinjection might take years to dilute the subterranean brine to lithium concentrations that make commercial extraction uneconomic. Further, such reinjection would be a cost-effective means of dealing with a large quantity of water left over after the extraction of lithium, and would help to preserve the pressure of the formation from which the brine is pumped.

A similar operation has been used for decades to recover bromine from brine found in southern Arkansas. Further, such an operation would be similar in some respects to a secondary or tertiary recovery for oil, in which some wells are used for injection of water or some other substance, other wells are used to recover a mixture of oil and the injected substance (injectate), and after separating the recovered oil from the recovered injectate, the injectate is recycled to be injected again. The network of injection wells and recovery wells required for such an operation often will include multiple tracts of land and thus may necessitate unit operations.

For decades, Louisiana has had a statute that authorizes the Louisiana Office of Conservation or its predecessor agency to enter orders for unitization (sometime called "fieldwide unitization"),[2] and statutes that authorize the agency to enter orders creating drilling units[3] and pooling the separately owned interests within such a unit.[4] But Louisiana's regulators did not have the authority to enter such orders for the recovery of brine.

Act No. 126 changes this. It amends Louisiana Revised Statute 30:5, which authorize the Office of Conservation to create fieldwide units for the recovery of "oil or gas" to create such units for the recovery of "oil, gas, or brine." As a prerequisite to creating such a unit for recovery of oil or gas, at least three-fourths of the interest owners (owners of the right to produce) and three-fourths of any royalty owners must approve. As a prerequisite to creating such a unit for the recovery of brine, at least three-fourths of the interest owners must agree, without the necessity of showing approval by any fraction of royalty owners.

To facilitate these changes, Act No. 126 also changes the definitions of "field", "pool", "producer", and "product" in Louisiana Revised Statute 30:3 to add references to "brine" to the existing references to "oil" and "gas" in the definitions. A similar change is made to the definition of "waste," and new definitions of "brine", "brine operations", and "multiple mineral development area" are added. Further, in a clear indication that Act No. 126 is motivated in part by interest in lithium production, the Act also adds language indicating that the definition of "product" includes "lithium carbonate, lithium hydroxide, and any other commodity or product made from the brine or any constituent parts, minerals, elements, compounds, or substances contained in or dissolved in the brine, whether hereinabove enumerated or not."

[2] La. Rev. Stat. 30:5.
[3] La. Rev. Stat. 30:9.
[4] La. Rev. Stat. 30:10.

Drilling Units and Pooling for Brine

Act No. 126 also amends Louisiana Revised Statute 30:9, the source of the Office of Conservation's authority to create drilling units, in multiple places to add references to substitute "oil, gas, and brine" for "oil and gas." Those additions, combined with the additions of "brine" to some of the definitions in Louisiana Revised Statute 30:3, may give the Office of Conservation the authority to create drilling units for the production of brine. Further, to the extent that oil or gas wells for drilling units might produce produced water that might have some value, the drilling unit should apply to the production of both the oil or gas and the produced water.

Act No. 126 makes similar changes to the provisions found in Louisiana Revised Statute 30:10 that authorize the Office of Conservation to enter orders pooling the separately owned interests within a drilling unit created under Louisiana Revised Statute 30:9, when the owners of those separately owned interests have not agreed to pooling on their own.

Regulation of Brine Production and Multiple Mineral Development Areas

Act No. 126 amends Louisiana Revised Statute 30:4, which describes the authority of the Office of Conservation, to state that the Office has authority to regulate brine production and adjudicate disputes in a "multiple mineral development area" if there are "conflicts among brine production operations" if there is potential injury to other mineral deposits or mineral development operations or if there are concurrent activities by other mineral owners or lessees.

Additional Changes

Act No. 126 also amends:

- Louisiana Revised Statute 30:11, relating to allocation of allowable production in the event that the Office of Conservation limits production, so that it applies with respect to brine,
- Louisiana Revised Statutes 30:103.1 and 30:103.2, which together comprise the Well Cost Reporting Statute, so that it applies with respect to brine, and
- Mineral Code Article 4, so that Article 4's prior statement that, in addition to applying to minerals, the Mineral Code "also" applies to "subterranean water" now states that the Mineral Code also applies to "subterranean water including brine."

Louisiana Enacts New CCS Legislation

Keith B. Hall
LSU Law Center

During its 2024 Regular Session, the Louisiana Legislature enacted five bills relating to carbon capture and storage, four of which became law after being signed by the Governor, and one of which was vetoed by the Governor. The highlights of the legislation are: (1) a repeal of the statutory provisions authorizing CCS operators who acquired a certificate of public convenience and necessity to use eminent domain to acquire pore space rights; (2) the creation of unitization of pore space rights for CCS operations; and (3) an expansion of the already-existing authority to use eminent domain to acquire rights-of-way for CO_2 pipelines for CCS projects.

Eminent Domain Authority for CO_2 Pipelines for CCS—Act No. 620 (H.B. 492)

Act No. 620 of the Louisiana Legislature's 2024 Regular Session revised Louisiana's laws relating to use of eminent domain for CCS projects. Prior to being amended by Act No. 620, the Louisiana Geologic Sequestration of Carbon Dioxide Act[1] provided in Louisiana Revised Statute 30:1108(A)(1) that a storage operator that acquires any permit and certificate of public convenience and necessity that it needs from the Office of Conservation can "exercise the power of eminent domain and expropriate needed property to acquire . . . rights and property interests necessary or useful for . . . laying, maintaining, and operating of pipelines for the transportation of carbon dioxide to a storage facility."[2]

Louisiana Revised Statute 30:1108(C) stated that this eminent domain power "shall be exercised pursuant to the procedures found in R.S. 19:2 and shall be in addition to any other power of eminent domain authorized by law." Louisiana Revised Statute 19:2 contains certain procedural provisions, but also contains provisions granting eminent domain authority in various circumstances. This included an authorization of the use of eminent domain by a company or related legal entity "engaged in the injection of carbon dioxide for the underground storage of carbon dioxide approved by the commissioner of conservation" to acquire "property interests necessary or useful for the purpose of constructing, operating, or modifying a carbon dioxide storage facility or transporting carbon dioxide by pipeline to such storage facility." Thus, a CCS storage company that receives approval from the Office of Conservation clearly had eminent domain authority for carbon dioxide pipelines.

Act No. 620 does not alter Louisiana Revised Statute 30:1108(A)(1). However, Act 620 amends Louisiana Revised Statute 19:2 to authorize companies

[1] La. Rev. Stats. 30:1101 through 30:1112.
[2] For the most part, this language was part of Louisiana Revised Statute 30:1108 from the time it was enacted by Acts 2009, No. 517, though Acts 2020 No. 61 made a minor amendment. The 2020 legislation added the word "of" to the language quoted above, so that "operating pipelines" became "operating of pipelines."

to use eminent domain to acquire property interests useful or necessary for pipelines to be used to transport carbon dioxide to a storage facility, even if the company seeking to use eminent domain is neither the company that is going to store the carbon dioxide nor a company related to the company that will be storing carbon dioxide. Thus, under the amended law, a company need not be the storage operator or an affiliate of the storage operator in order to use eminent domain for acquiring property interests for pipelines or carbon dioxide pipelines.

Eminent Domain Authority for Pore Space Rights for CCS—Act No. 620 (H.B. 492)

As enacted in 2009, Louisiana Revised Statute 30:1108 in the Louisiana Geologic Sequestration of Carbon Dioxide Act authorized a company that receives a certificate of public convenience and necessity and any required permits from the Office of Conservation to use eminent domain to acquire pore space rights for CCS.[3] As originally enacted, Louisiana Revised Statute 30:1108(B) provided that the exercise of eminent domain could not be used to "prevent persons having the right to do so from drilling through the storage facility in such manner as shall comply with the rules of the commissioner issued for the purpose of protecting the storage facility against pollution or invasion and against the escape or migration of carbon dioxide."[4] This was amended by Acts 2022, No. 163 to create Louisiana Revised Statute 30:1108(B)(2), which provided that, for any CCS project to be located in Caldwell Parish, eminent domain could be used to obtain a prohibition on anyone drilling through the CCS storage reservoir if certain requirements were met.

Act 620 amends Louisiana Revised Statutes 19:2 and 30:1108 to prohibit the use of eminent domain to acquire pore space rights for CCS, except for projects to which 30:1108(B)(2) applies. The projects to which 30:1108(B)(2) applies would be CCS projects in Caldwell Parish that meet certain requirements specified in 30:1108(B)(2).

This does not mean, however, that except for CCS projects to be located in Caldwell Parish, Louisiana law no longer has a mechanism for dealing with holdout landowners. As noted below, other legislation that became law in 2024 created unitization authority for CCS.

Unitization for CCS—Act No. 645 (H.B. 966)

Act No. 645 adds a new statute—Louisiana Revised Statute 30:1104.2—to grant the Office of Conservation the authority to enter orders for the unitization of pore space rights for CCS. As a prerequisite for a unitization order, the Office of Conservation must find that three-fourths of the pore space owners (based on acreage interest, as opposed to heads) have consented in writing to the CO_2

[3] Acts 2009, No. 517.
[4] Acts 2009, No. 517.

geologic storage.[5] In that respect, the new unitization authority is more analogous to the fieldwide unitization authority for oil and gas that the Office has under Louisiana Revised Statute 30:5, than to the authority of the Office to create drilling units for oil and gas under Louisiana Revised Statute 30:9 and to order the pooling of separately owned interests in the drilling unit under Revised Statute 30:10.

An order for unitization of pore spaces for CCS must "provide for just and equitable compensation to all owners in interest, including the storage operator, other owners in interest who consented in writing to geologic storage, and owners in interest who did not consent in writing to geologic storage, except that the order shall not vary, alter, or otherwise apply a standard of benefit sharing or compensation to, the terms of any contracts between the storage operator and any owner in interest."[6] The legislation also states some requirements for a unitization order:

> The order shall set forth the method, formula, or other basis by which the just and equitable sharing of the benefits shall be determined, including the timing of payments thereof. In determining the method, formula, or other basis, the commissioner may take into consideration such factors that include but are not limited to the computational modeling submitted by an existing or proposed storage operator, whether there is an impact to a tract, the extent of any impact to a tract, each separately owned tract's proportionate share of the total surface acreage contributed to the storage unit, the costs required to perform the unit operation, and the viability of any third-party geologic storage projects within the storage unit and any associated third-party contracts executed by an owner in interest.[7]

The legislation provides that a unitization order can only be issued after notice and a public hearing,[8] and the legislation gives interested persons the right to judicial review of a unitization order pursuant to Louisiana Revised Statute 30:12,[9] which provides a process for judicial review of orders of the Office of Conservation. The legislation also gives the Office of Conservation the authority, after notice and a public hearing, to revise or dissolve any order for a storage unit.[10]

Notice Regarding Storage Applications—Act No. 645 (H.B. 966)

Act No. 645 amends Louisiana Revised Statute 30:28 to require notice of any CCS storage applications to persons who own a residential or commercial

[5] La. Rev. Stat. 30:1104.2(B).
[6] La. Rev. Stat. 30:1104.2(C).
[7] La. Rev. Stat. 30:1104.2(C).
[8] La. Rev. Stat. 30:1104.2(B).
[9] La. Rev. Stat. 30:1104.2(D).
[10] La. Rev. Stat. 30:1104.2(E).

structure within five hundred feet of the "area of review"[11] for the Class VI permit[12] for a CCS injection well, except if the structure is owned by the applicant for a Class VI permit "his lessor, or other predecessor." The legislation also provides that persons entitled to such notice have a right, upon request, to a hearing on the permit application.

In addition, Act 645 adds a new statute, Louisiana Revised Statute 30:1113. This new statute provides that, once a Class VI permit application is deemed administratively complete, the applicant must make a good faith effort to give notice via United States mail to various persons, including persons who own oil and gas wells or who have the right to conduct oil and gas operations within the area of review for the Class VI permit. The new statute also requires an applicant for a Class V stratigraphic test well to make a good faith effort to give notice to owners of oil and gas wells and persons having a right to drill for oil and gas at any locations within five hundred feet of the site proposed for the Class V well.[13]

Liability Protection for Landowners—Act No. 461 (H.B. 937)

Act No. 461 (H.B. 937) creates a new statute, Louisiana Revised Statute 30:1109.1, which provides that a landowner will not have liability for harms caused by CCS operations "by the mere fact of being a landowner or by the mere fact of entering a contract to allow his property to be used for geologic storage, injection, or transportation of carbon dioxide."

Emergency Preparedness—Act No. 702 (H.B. 516)

Act 702 creates a new statute, Louisiana Revised Statute 30:1107.2, which requires a CCS operator to have an emergency and remedial response plan in place before commencing injection of carbon dioxide.[14] The operator must provide a copy of this plan to local authorities. The plan must provide for continuing training of operating and maintenance personnel.[15] The operator must also conduct at least one tabletop exercise with appropriate emergency response agencies to simulate an emergency situation and response.[16]

Location Restrictions—Act No. 702 (H.B. 516)

Act No. 702 contains provisions to prohibit any Class VI injection well from being located within five hundred feet of a school, health care facility, or inhabited dwelling owned by a person other than "the storage operator or any owner in

[11] Under the regulations that implement the Safe Drinking Water Act's underground injection control provisions, an area surrounding a proposed injection wells is evaluated to determine whether the proposed injections can take place without threatening Underground Sources of Drinking Water or USDWs. The area examined as part of the permit application and evaluation is the "area of review."
[12] Part C of the federal Safe Drinking Water Act generally prohibits the subsurface injection of fluids without a permit. The Safe Drinking Water Act's underground injection control (UIC) regulations recognize six class of UIC wells. Injection wells for CCS are Class VI wells under these regulations.
[13] La. Rev. Stat. 30:1113(B).
[14] La. Rev. Stat. 30:1107.2(A).
[15] La. Rev. Stat. 30:1107.2(B).
[16] La. Rev. Stat. 30:1107.2(C).

interest bound by a contract with the storage operator that allows for location of a Class VI injection well within five hundred feet of an inhabited dwelling."

Groundwater Quality Monitoring—Act 702 (H.B. 516)

Act No. 702 requires CCS storage operators to conduct periodic testing and groundwater quality monitoring above the confining zone of their storage operation and to report the testing and monitoring results to the Office of Conservation semi-annually.

Revenue Sharing with Local Government—Veto of H.B. 934

In 2023, Louisiana enacted legislation that generally requires the State to share any revenue it receives from agreements granting pore space rights to areas beneath state-owned lands. In particular, the 2023 legislation provided for 30% of such revenue such a pore space lease to be shared with the local government or local governments where the CCS project is located. This has been interpreted as not applying to CCS projects on property owned by the Louisiana Department of Wildlife and Fisheries. In 2024, the Louisiana Legislature passed H.B. 934, which would have provided that the requirement for revenue sharing applied to land owned by the Department of Wildlife and Fisheries. Governor Jeff Landry vetoed this legislation.

Organization Changes for Louisiana Department of Energy and Natural Resources

Keith B. Hall
LSU Law Center

Act No. 727 (H.B. 810) of the 2024 Regular Session of the Louisiana Legislature provides for certain organizational changes within the Louisiana Department of Energy and Natural Resources (DENR). One change is to move the Louisiana Oil Spill Coordinator from the Louisiana Department of Public Safety to DENR. Other changes include the creation within DENR of the "Louisiana Natural Resources Trust Authority" and three new offices—the:

- Office of Enforcement,
- Office of Energy, and
- Office of Land and Water.

The new Louisiana Natural Resources Trust Authority, "governed by the State Mineral and Energy Board," will have powers that include:

> (1) Setting financial obligations of operators or applicants, consistent with the purposes, authorities, and functions of the Department of Energy and Natural Resources and its officers.
>
> (2) Indemnifying members, officers, and employees against liabilities.
>
> (3) Executing necessary contracts and instruments.
>
> (4) Entering agreements for deductions, payments, and the administration of Paragraph (5) of this Subsection.
>
> (5) Soliciting, accepting, and expending grants.

It will also have authority to adopt rules and regulations, in accordance with Louisiana's Administrative Procedure Act.[1]

The Office of Enforcement shall be responsible for inspections of regulated activities and the enforcement of laws and regulations within DENR's jurisdiction.[2]

The Office of Energy shall organize and administer DENR functions and programs relating to alternative energy infrastructure within the state.[3]

[1] This authority is codified in a new statute. La. Rev. Stat. 36:356.1.
[2] La. Rev. Stat. 36:358(E).
[3] La. Rev. Stat. 36:358(F).

The Office of Land and Water shall be responsible for state water bottoms management, including the issuance of rights-of-way relating to energy activities, as well as energy-related leasing of state water bottoms.[4] The Office of Land and Water also generally will be responsible for administration of groundwater, surface water, and other water resources with respect to quantity, unless the DENR Secretary designates otherwise.[5]

[4] La. Rev. Stat. 36:358(G)(1).
[5] La. Rev. Stat. 36:358(G)(2).

Negotiorum gestio Doctrine Does Not Authorize Deduction of Post-Production Costs

Keith B. Hall
LSU Law Center

In *Self v. BPX Operating Co.*, 388 So. 3d 366 (La. 2024), the Louisiana Supreme Court answer a certified question from the United States Fifth Circuit relevant to whether the operator of a compulsory drilling unit can deduct post-production costs from the proceeds the operator distributes to unleased owners when the unleased owners do not make their own arrangements to sell their share of production and the operator sells the unleased owner's share of production. Specifically, the Court held that the *negotiorum gestio* doctrine is not a basis for the operator to deduct post-production costs in such situations.

Background

Like most other states that have oil and gas activity, Louisiana has statutory provisions that authorizes its conservation agency (the Louisiana Office of Conservation) to enter orders to designate drilling units[1] and to "pool" the separately owned mineral interests within the tract if the owners have not already agreed to pooling by contract.[2] Once there is pooling, a portion of the unit's production is allocated to each tract in the unit, and some provision will be made for the allocation of unit costs.[3]

For a time, Louisiana was a "free ride" state with respect to the allocation of costs. That is, if an owner of a mineral interest for tract in a unit did not voluntarily agree to participate in drilling costs, that owner effectively became a carried interest.[4] They would not share in costs if the well lost money. If the well made a profit, they would receive their share of production, but would be responsible for their share of costs out of their share of production. The operator could not impose a risk charge on mineral interest owners who did not agree to "participate" in costs and risk, and could not force those persons who give up their operating interest in return for some payment.

In 1984, however, Louisiana added a risk charge provision to its pooling statute.[5] The risk charge only applies with respect to mineral lease interests held by lessees who are not the operator. Thus, the risk charge does not apply to unleased interests, who still can get a "free ride."[6] With respect to mineral lessees who hold interests in the drilling unit, the risk charge works much like provisions

[1] La. Rev. Stat. 30:9(B).
[2] La. Rev. Stat. 30:10(A)(1).
[3] La. Rev. Stat. 30:10(A)(1).
[4] *See* Davis Oil Co. v. Steamboat Petroleum Corp., 583 So. 2d 1139, 1143 (La. 1991).
[5] La. Acts 1984, No. 345. This Act became effective after the Commissioner of Conservation created the drilling unit at issue in *Davis Oil Co. v. Steamboat Petroleum Corp.*, and for that reason the court treated the risk-charge statute as inapplicable. 583 So. 2d at 1142 n. * (in the court's written opinion, the footnote is not numbered, and instead is designated by an asterisk).
[6] La. Rev. Stat. 30:10(A)(2)(e)(i).

common in most joint operating agreements. The operator can give the non-operator mineral lessees an opportunity to voluntarily agree to participate.[7] If the operator does this, and a non-operator mineral lessee chooses not to participate in the costs and risks of drilling, the operator can impose a "risk charge" on that mineral lessee.[8] This risk charge is in addition to that mineral lessee's share of the costs incurred by the operator. The risk charge is a stated fraction of "the cost of drilling, testing, and completing the well."[9] Thus, any post-production costs that the operator incurs in processing and transporting natural gas prior to a sale of the natural gas do not add to the risk charge.

An Operator's Sale of Production Attributable to an Unleased Interest

In theory, each person who would have had a right to drill on a tract, but for the order creating the drilling unit and requiring pooling, is entitled to receive his or her tract's share of unit production of oil or gas in kind, and can arrange his or her own sales of that product. But the typical mineral interest owner who is not in the oil and gas business—such as a landowner or mineral servitude owner (somewhat analogous to the owner of a severed mineral estate, a concept not allowed in Louisiana)—does not wish to take product in kind and has no ability to do so. They want a share of the proceeds.

Recognizing this, Louisiana Revised Statute 30:10(A)(3) provides that, if the owner of an unleased interest has not made his or her own arrangements to sell or otherwise do something with his or her tract's share of the oil or gas produced from the unit, the operator may make arrangements to sell that portion of the unit production. In such circumstances, Louisiana Revised Statute 30:10(A)(3) requires the operator to pay to the unleased owner his or her "tract's pro rata share of the proceeds of the sale or other disposition of production within one hundred eighty days of such sale or other disposition." The provision does not say anything one way or another about deduction of costs, and does not say whether the tract owner's "share of the proceeds" refers to the *gross* proceeds or the *net* proceeds remaining after a deduction of costs.

Whether Post-Production Costs Are Deductible

The provision that is now 30:10(A)(3) was not part of the original statute, and before this provision was added, the practice was that operators would sell the unleased owner's share or product, even if they lacked express authority. The operator would then distribute revenue, after deducting drilling and operating costs, and if the operator had incurred post-production costs, after deduction of operating costs. Thus, a question is whether, by enacting 30:10(A)(3), legislature intended to prohibit the deduction of costs and require that the operator absorb the unleased owner's share of gross costs. Few people, if anyone, seriously suggest that this was the intent. That is, few (if any) people argue that the operator

[7] La. Rev. Stat. 30:10(A)(2)(a)(i).
[8] La. Rev. Stat. 30:10(A)(2)(b).
[9] La. Rev. Stat. 30:10(A)(2)(b)(i).

is altogether precluded from deducting any costs whatsoever, whether they be drilling costs, operating costs, severance taxes, or post-production costs.

However, some unleased owners have argued that 30:10(A)(3) precludes the deduction of post-production costs. Although Louisiana Revised Statute 30:10(A)(3) does not explicitly discuss the deduction of any costs, the unleased owners essentially concede that the operator can deduct drilling costs, operating costs, and severance taxes. But the unleased owners assert that post-production costs are different and the operator cannot deduct these. So what, according to the unleased owners, distinguishes post-production costs?

In support of their argument, the unleased owners note that the introductory language to Louisiana Revised Statute 30:10(A)(2) provides that a unit operator is entitled to recovery from the owners in the unit "the cost of development and operation of the pooled unit." This is the lead-in language to the risk-charge provision, and 30:10(A)(2)(e)(i) expressly states that the risk-charge provision is inapplicable to unleased owners. The unleased owners effectively argue that the introductory part of 30:10(A)(2) applies to all owners—even unleased owners—and that it is only the later portions of 30:10(A)(2) that explicitly talk about the risk charge are made inapplicable to unleased owners by 30:10(A)(2)(e)(i). Thus, the introductory language to 30:10(A)(2), which allows the operator to recover development and operating costs from owners, is not made inapplicable to unleased owners.

Thus, they argue that 30:10(A)(3) states a general rule that the operator who sells an unleased owner's share of production must pay to that unleased owner that owner's share of the gross proceeds, but that 30:10(A)(2) makes an exception for development and operating costs (and the unleased owners conceded that they are responsible for their share of severance taxes, so the operator can deduct those), but no exception to 30:10(A)(3)'s alleged general requirement for distribution of gross proceeds allows for the deduction of post-production costs.

Much of the litigation over this matter has occurred in federal court. Counsel for operators argued that 30:10(A)(3) was merely setting a deadline to pay, and that did not limit in any way the unit operator's ability to deduct any portion of the reasonable costs it incurred, including post-production costs, when distributing proceeds to unleased owners. The United States Fifth Circuit rejected this argument.

Later, when the case was remanded back to the federal district court, the operators argued that the Louisiana civil law principle of *negotiorum gestio* applied and allowed the operator to deduct its reasonably incurred post-production costs. This doctrine relates to a person's management of the affairs of another without having authority to do so, in circumstances where the person whose affairs are managed reasonably would want someone to act on their behalf. Suppose, for example, that a storm damages your neighbor's roof when he is on vacation in Europe. You purchase and put a tarp on his roof to minimize interior damage from

subsequent rainfalls that might occur before your neighbor returns and can arrange repairs. Under such circumstances, the person who purchases and puts the tarp on his neighbor's room might be entitled, under *negotiorum gestio*, to receive reimbursement for the price of the tarp from the neighbor who was in Europe.

Here, the operators argue that they were arranging for the sale of the unleased owners' in-kind share of product, and that the unleased owners would reasonably want that done. Indeed, Louisiana Revised Statute 30:10 only authorizes the operator to sell the product on behalf of an unleased owner when that unleased owner has not made arrangements himself to sell or otherwise do something with the product. The federal district court agreed. On appeal, the United States Fifth Circuit certified to the Louisiana Supreme Court the question of whether *negotiorum gestio* applies.

The Louisiana Supreme Court accepted the certification and answered that it does not apply. In a relatively brief opinion, the Court held that *negotiorum gestio* only applies when a person acts without authority. The Court stated that, because Louisiana Revised Statute 30:10 authorizes the operator to sell product on behalf of unleased owners, the doctrine of *negotiorum gestio* does not apply. In a vigorous dissent, Justice Weimer asserted that *negotiorum gestio* does apply. He stated that, in these circumstances, the "without authority" requirement is met because the operator does not have any authority or any agreement with the unleased owner, and thus does not have any agreement regarding the handling of costs.

Court Dismisses City of Baltimore's Climate Suit Against Oil and Gas Companies

Keith B. Hall
LSU Law Center

In July 2018, the City of Baltimore filed suit against a number of oil and gas companies, blaming them for global climate change, claiming that the City has suffered damages because of climate change, and that the defendants are liable.[1] The next month, the defendants filed a notice of removal.

Some readers will recall this case. The defendant's removal of the case to federal court was based on multiple theories of removal, including federal-officer removal. The federal district court granted the City's motion to remand, but the defendants appealed. When a case is removed based on diversity jurisdiction or federal question jurisdiction, a remand order is not appealable, but if a case is removed based on the federal officer removal statute, a remand order is appealable. On appeal, the defendants asserted as error both the federal district court's rejection of federal-officer removal and its rejection of federal-question removal.

The case went all the way to the United States Supreme Court on the question of whether, when a remand order is appealable because the defendants removed based on federal-officer removal, can the defendants have the federal appellate court consider both the applicability of federal-officer removal and the applicability of federal-question removal. The U.S. Supreme Court said that the defendants can raise both issues on appeal, but the case ultimately was remanded to state court anyway.

Back in state court—namely, the Circuit Court for Baltimore City—the defendants filed a motion to dismiss for failure to state a claim upon which relief may be granted. The City was asserting eight causes of action: (1) public nuisance; (2) private nuisance; (3) strict liability failure to warn; (4) strict liability for design defect; (5) negligent design defect; (6) negligent failure to warn; (7) trespass; and (8) violation of the Maryland Consumer Protection Act (MCPA).

The court clearly had some concern about climate change. The court's July 10, 2024 "Memorandum Opinion and Order" on the defendants' motion to dismiss opened by stating:

> There is no question that global warming and climate change are wreaking havoc on our environment. It is quite possible that this world, this country and, perhaps, this City have reached the point of no return in addressing the effects of global gas emissions and climate change. According to the United Nations

[1] Memorandum and Order (July 10, 2024), *Mayor of Baltimore v. BP P.L.C.*, No. 24-C-18-004219 (Circuit Ct. for Baltimore City).

> Intergovernmental Panel on Climate Change, massive incidents of floods, drought, heat waves, etc. will continue if there are not significant and drastic measures taken to decrease the use of fossil fuels.

Nevertheless, when the court analyzed the plaintiff's eight purported causes of action, the court ultimately concluded that the City had failed to state a claim.

The Court's Analysis

The court noted that the City argued that its claims were not based on harms caused by interstate or international pollution, and instead that the City was "only addressing the [defendants'] alleged promotion and sale of fossil fuel products and the concealment and misrepresentation of the products' known dangers." But the defendants asserted that the City was really claiming injuries arising from emissions. The court agreed, concluding that the City's characterization of their claims was simply artful pleading, and that the City really was complaining about international and interstate emissions. The court said that it agreed with the Second Circuit's decision in *City of New York v. Chevron Corporation*, 993 F.3d 81 (2nd Cir. 2021) that state law claims for international and interstate emissions are preempted by federal law.

The court rejected the City's reliance on *Mayor & City of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022) (*Baltimore IV*), concluding that the portion of that decision on which the City relied was dealing with whether federal law so completely displaced state law that federal question removal was proper based on the complete preemption doctrine. But such an analysis does not control whether federal law preempts state law to the extent that it provides a preemption defense to state law claims. The court rejected *City & County of Honolulu v. Sunoco, LP*, 153 Haw. 326 (2023), which relied on the Fourth Circuit's decision in *Baltimore IV*, even thought that case dealt with the existence of complete preemption for purposes of federal question jurisdiction, not whether federal law preemption provided a defense to state law claims.

Although the court held that the City's state law claims were all preempted, the court also examined whether those claims could survive on their own terms if they were not preempted. The court concluded that, to the extent that the City merely complained about the defendants' sale and promotion of their products, nuisance law did not apply. The City's claim was really more of a products liability claim.

To the extent that the City argued that there was a duty to warn, given that fossil fuels are used worldwide, and it is the worldwide use of fossil fuels that contributes to climate change, the duty to warn would have to extend worldwide. The court concluded that Maryland law did not require that. The court also concluded that the City had not alleged facts to show that the defendants' product had a design defect. The court concluded that the facts alleged by the City did not amount to a trespass, which is an interference with a plaintiff's exclusive

possession of their property by causing some physical invasion of it. Finally, the court concluded that the City's Maryland Consumer Protection Act or MCPA claim was time barred. Thus, concluded the court, even if the City's causes of action were not preempted, the City's allegations would fail to state a claim upon which relief can be granted. Therefore, dismissal was proper.

U.S. Court of Appeals Holds Assignments of Overriding Royalty Interests Do Not Attach to Utica Shale/Point Pleasant Formation

Casey N. Valentine
Vorys, Sater, Seymour and Pease LLP

In 1993, Plaintiff Sabre Energy Corporation acquired certain overriding royalty interests by way of two assignments from Transatlantic Energy Company, the predecessor in interest to Defendants Gulfport Energy Corporation and Antero Resources Corporation. Attached to each assignment as "Exhibit A" is a description of the 25 "vertical shallow wells" assigned, having depths ranging from 2,500 to 5,500 feet deep, and stating expressly:

> THIS ASSIGNMENT OF OVERRIDING ROYALTY INTEREST PERTAINS TO THE AFOREMENTIONED WELLS AND THE DRILLING UNITS ASSOCIATED THEREWITH AND DOES NOT EXTEND TO THE UNDRILLED ACREAGE ASSOCIATED WITH THE LEASE REFERENCED AND/OR POOLING AGREEMENT.

Nearly 20 years later, the Defendants began drilling horizontal wells in the Utica Shale/Point Pleasant formation at depths ranging from 5,000 to deeper than 10,000 feet. Several of the Defendants' wells produced oil and gas from underneath the vertical shallow wells and drilling units subject to Sabre Energy's overriding royalty interests. When Sabre Energy demanded royalty payments on the production from the Defendants' wells, the Defendants refused. Sabre Energy filed a lawsuit seeking, among other claims, unpaid royalties and a declaratory judgment that the horizontal wells were subject to Sabre Energy's overriding royalty interests. The trial court granted summary judgment in favor of the Defendants, concluding that the use of the term "drilling unit" in the assignments restricted Sabre Energy's overriding royalty interests to a depth of 4,000 feet. In addition, the trial court held that the phrase "undrilled acreage," when used in the context of oil and gas, encompasses both subsurface and surface acreage. As a consequence, the trial court determined that Sabre Energy's overriding royalty interests did not extend to the Defendants' horizontal wells drilled in the Utica Shale/Point Pleasant formation (i.e., undrilled acreage at the time of the assignment).

In a split decision, the court of appeals affirmed, agreeing that the use of the term "drilling unit" in the assignments restricted Sabre Energy's overriding royalty interests to a depth of 4,000 feet. Although the assignments did not define the term "drilling unit," the court of appeals explained that Ohio law requires a permit to drill an oil and gas well and in order to obtain a drilling permit, a proposed well must have a drilling unit containing the minimum acreage required to drill wells of certain depths. For example, Ohio law in effect at the time of the assignments provided that a drilling unit containing 40 acres or less could not have a well drilled to a depth below 4,000 feet. Accordingly, the court of appeals held that Sabre Energy's overriding royalty interests in drilling units smaller than 40 acres do *not* attach to the horizontal wells drilled to the Utica Shale/Point Pleasant formation,

but that Sabre Energy's overriding royalty interests in drilling units larger than 40 acres do.

In coming to its decision, the court of appeals rejected arguments from Sabre Energy and the dissent that the oil and gas industry uses "drilling units" as shorthand for surface acreage, rather than depth limitations, and that, without other language limiting the depth of the grant, the grant of rights by "drilling unit" extends to all depths. Specifically, the court of appeals noted that (i) it is not bound by *Talmage v. Bradley*, 377 F. Supp. 3d 799, 821, the case cited by Sabre Energy, and (ii) while the assignments in *Talmage* also used a technical term to limit the overriding royalty interests assigned therein (i.e., "well sites"), unlike the assignments to Sabre Energy, the assignments at issue in *Talmage* defined the technical term. Furthermore, the court of appeals cited a similar case decided a week earlier by Ohio's Seventh District Court of Appeals, holding that an assignment of a 20 acre drill site unit was restricted to a depth of 4,000 feet based on the law in effect at the time of the assignment. *Hogue v. PP&G Oil Co., LLC*, 2024-Ohio-2938.

Lastly, the court of appeals held that the trial court did not err by concluding that the "undrilled acreage" exception in "Exhibit A" to the assignments prevents Sabre Energy's overriding royalty interests from attaching to the horizontal wells drilled to the Utica Shale/Point Pleasant formation. The court of appeals pointed out that Sabre Energy relies on a single case, which alone cannot establish that "undrilled acreage" is a common phrase in the oil and gas industry with a fixed meaning.

Pennsylvania Enacts CCS Legislation

Keith B. Hall
LSU Law Center

In late June 2024, the Pennsylvania General Assembly passed Senate Bill No. 831 to govern carbon capture and storage, and Governor Shapiro signed the bill in July, making it 2024 Act 87. The law is known as the "Carbon Capture and Sequestration Act."[1] The Act is codified at 32 P.S. §§ 696.1 through 696.11.

Declaration of Policy

In the legislation, the General Assembly declared that "[i]t is in the public interest to promote the geologic storage of carbon dioxide," and that "[t]he capture and geologic storage of carbon dioxide will benefit [Pennsylvania] and the global environment by reducing greenhouse gas emissions."[2]

Ownership and Conveyance of Pore Space Rights

The Act states a general rule that "[t]he ownership of all pore space in all strata below the surface lands and waters of the Commonwealth [of Pennsylvania] shall be vested in the surface property interest owner above the pore space,"[3] but it also recognizes that ownership of subsurface pore spaces can be severed from ownership of the surface.[4]

The legislation provides that a severance of pore space rights from surface ownership by sale of surface rights and reservation of pore space rights must be express. In particular, the legislation states: "A conveyance of the surface ownership of real property shall be a conveyance of the pore space in all strata below the surface of the real property unless the ownership interest in the pore space previously has been expressly excepted and reserved, conveyed or otherwise severed from the surface ownership."[5] Further, the legislation provides that an agreement conveying minerals does not convey pore space ownership unless the conveyance expressly conveys pore space.[6] However, the Act states that it does not alter or invalidate any subsurface pore space ownership or rights acquired before effective date of the legislation.[7] Thus, any agreements or conveyances executed prior to the effective date of the Act might be interpreted without regard to the rules stated in the Act.

[1] Act No. 87, section 1, codified at 32 P.S. § 696.1. The remainder of the citations in this article will cite to the codified statute. As a general rule, a portion of the legislation found in Section "x" of the legislation are codified at 32 P.S. § 696.x.
[2] 32 P.S. § 696.2.
[3] 32 P.S. § 696.4(a).
[4] 32 P.S. § 696.4(b).
[5] 32 P.S. § 696.4.
[6] 32 P.S. § 696.4(b).
[7] 32 P.S. § 696.4(d)(3).

The Act states that pore space ownership can be conveyed in the same "manner provided by law for the transfer of real property interests."[8] Thus, pore space rights can be severed from surface ownership. Nevertheless, the Act prohibits any conveyance or lease of pore space beneath public lands without public notice, a public hearing, and the opportunity for public comment.[9]

The Act states that the legislation is not intended to modify the common law rule that the mineral estate is dominant, and that the owner of a mineral estate has a right to use the surface as reasonably necessary for the subsurface mineral or minerals to which the mineral estate applies.[10]

The legislation requires any instrument that transfers the rights to pore spaces "shall describe the scope of any right to use the surface estate."[11] It also provides that the owner of pore space rights "shall have no right to use the surface estate beyond that set out in a properly recorded instrument."[12] Thus, a transfer of pore space rights apparently does not include an implied right to use the surface.

The Act requires that an instrument transferring pore space rights include a description—whether a metes and bounds description or other description—"of the surface lying over the transferred pore space and identification of the subsurface strata, formations or reservoirs" for which pore space rights are conveyed.[13] If the instrument describes the surface lying above the pore spaces covered, but does not describe particular depths or formations for which pore space rights are conveyed, the conveyance will be deemed to apply as to all depths.[14]

Unitization Via "Collective Storage Orders" for "Collective Storage"

The legislation authorizes Pennsylvania's Environmental Hearing Board (the "Board")[15] to create carbon storage units in the event that a "storage operator does not obtain the consent of all persons that own the storage facility's pore space."[16] An operator has a right to an order creating such a unit if it has secured the consent of 75% of the ownership interests in the pore space to be used by the storage facility, but it has failed to reach an agreement with the other owners of pore space rights, despite the operator's good-faith attempt to negotiate with

[8] 32 P.S. § 696.4(b).
[9] 32 P.S. § 696.4(c).
[10] 32 P.S. § 696.4(d).
[11] 32 P.S. § 696.4(e)(1).
[12] 32 P.S. § 696.4(e)(1).
[13] 32 P.S. § 696.4(e)(2).
[14] *Id.*
[15] The Environmental Hearing Board was created as part of the Department of Environmental Resources, which was created by the Act of December 3, 1970, P.L. 834, codified at 71 P.S. § 510-1 *et seq.* The Environmental Hearing Board was made independent of the Department by the Act of July 13, 1988, P.L. 530 (the "Environmental Hearing Board Act"), codified at 35 P.S. §§ 7511 through 7516. The Department of Environmental Resources became the Department of Environmental Protection by Act No. 1995-18 in 1995.
[16] 32 P.S. § 696.5(a).

those other owners.[17] For purposes of determining whether the storage operator has obtained the consent of 75% of the ownership interests, “an unknown or unlocatable owner shall be deemed to have consented.”[18]

A prospective storage operator that seeks a “collective storage order” must provide the Board with a list of “all persons reasonably known to own an interest in pore space proposed to be collectively used,” and the Board must give notice to all the pore space owners to be included in the proposed order.[19] If the proposed order would include “pore space with an unknown or nonlocatable owner,” notice must be given by publication, and that notice must include various information specified in the statute, including the proposed basis of compensation to pore space owners.[20]

If a collective storage order is granted, the storage operator must record a copy of the order, along with a survey of the storage area, in the office of the country clerk for each county in which a portion of the collective storage area is located.[21] Further, the Board shall provide a copy of the order to the persons entitled to individual notice—the affected pore space owners who are known and locatable.[22] The order must specify how unknown, “nonlocatable,” and nonconsenting pore space owners will be compensated.[23]

A collective storage order “shall not grant the storage operator . . . rights of surface use or access.”[24] Further, a collective storage order cannot include certain categories of land without the consent of the owner or manager of the land or pore spaces beneath it.[25] This includes land owned or managed by the Commonwealth of Pennsylvania, a municipality or agency of it, or other governmental entity of the Commonwealth or a municipality.[26] It also includes land subject to certain conservation easements, certain charitable organizations that have a purpose of protecting or conserving land or wildlife.[27]

The Board may order the storage operator to pay reasonable attorney fees and costs of nonconsenting pore space owners for administrative hearing associated with a collective pore space order.[28]

[17] 32 P.S. § 696.5(a).
[18] 32 P.S. § 696.5(a)(2).
[19] 32 P.S. § 696.5(b)(1).
[20] 32 P.S. § 696.5(b)(3).
[21] 32 P.S. § 696.5(b)(5).
[22] 32 P.S. § 696.5(b)(5).
[23] 32 P.S. § 696.5(b)(4).
[24] 32 P.S. § 696.5(c).
[25] 32 P.S. § 696.5(d).
[26] 32 P.S. § 696.5(d)(1)-(2). The prohibition also applies to: “Land acquired under the act of January 19, 1967 (1968 P.L. 992, No. 442), entitled ‘An act authorizing the Commonwealth of Pennsylvania and local government units thereof to preserve, acquire or hold land for open space uses.’” 32 P.S. § 696.5(d)(4).
[27] 32 P.S. § 696.5(d)(3).
[28] 32 P.S. § 696.5(e).

Seismicity Monitoring

In certain circumstances, the subsurface injection of fluids can trigger seismic activity (earthquakes). This is sometimes called "induced seismicity." The Act requires the storage operator to deploy and maintain a seismicity monitoring system to monitor for seismic events, including induced seismicity.[29]

Seismic Surveys

Under Part C of the federal Safe Drinking Water Act,[30] a person must obtain a Class VI Underground Injection Control (UIC) before injecting carbon dioxide for permanent storage. As part of the application process, the applicant must provide substantial information about the subsurface, to demonstrate to the regulator that the injections can be done without harming underground sources of drinking water. To gather the information regarding the subsurface, a Class VI permit applicant likely will need to perform seismic surveys to map subsurface formations. Performing a seismic survey requires creating a sound (seismic) wave and using a network of "geophones" that are spread over a wide area to monitor for seismic reflections from the interfaces of different subsurface strata. To do this effectively, a prospective CCS storage operator may need to access neighboring properties.

If the storage operator is unable to reasonably negotiate an agreement with a surface owner for access to conduct a seismic survey, the Department of Environmental Protection (DEP) may issue an order allowing the storage operator to enter onto the lands, subject to an obligation to pay reasonable compensation for such access.[31] A seismic survey conducted pursuant to such an order must be limited to gathering information for geologic storage, and the results of a seismic survey shall remain confidential and proprietary.[32]

Permitting Considerations

The legislation directs the DEP to promulgate regulations for CCS to protect Pennsylvania's natural resources and public health, safety, and welfare, and the regulations must consider "community and cumulative impacts."[33] For projects affecting "environmental justice" areas, the DEP may require additional impact assessments and opportunity for public participation.[34]

The legislation requires any CCS project "to isolate any existing or future production from the commercially valuable mineral, including of the coal, or oil and gas estate, from the carbon dioxide plume."[35] Further, the legislation instructs the

[29] 32 P.S. § 696.5a(c).
[30] Part C of the Safe Drinking Water Act is designed to protect "Underground Sources of Drinking Water" or "USDWs."
[31] 32 P.S. § 696.5a(d).
[32] 32 P.S. § 696.5a(e).
[33] 32 P.S. § 696.6(b)(1).
[34] 32 P.S. § 696.6(b)(1)(ii).
[35] 32 P.S. § 696.6(b)(4).

DEP not to grant a permit for storage unless "the department is satisfied that the interests of the mineral, including coal, or oil and gas estate, will not be adversely affected and the subsurface property interest owners have been notified by the storage operator."[36]

Ownership of Injected Substances and Liability

The legislation creates a rebuttable presumption that carbon dioxide and other substances injected by the storage operator are owned by the operator.[37] The legislation provides that no pore space owners or surface owners shall be liable for any effects of the injection "solely by virtue of their interest in the pore space or surface or subsurface rights."[38] The legislation also provides that the storage operator shall not be liable unless a plaintiff shows that "the injection or migration of carbon dioxide was performed without reasonable care and has caused injury to an individual, animal or real or personal property."[39] The legislation expressly recognizes the right of persons suffering injury or damage from storage operations to seek both compensatory and punitive damages, but the Act prohibits the imposition of punitive damages against a storage operator unless "the storage operator is determined to have had a reasonable basis for believing that the carbon sequestration project would not result in migration of carbon dioxide beyond the storage facility."[40]

Establishment of Trust Fund

The legislation establishes the "Carbon Dioxide Storage Facility Trust Fund" as a separate fund within the State Treasury to defray the DEP's cost of processing permit applications and regulating storage facilities after grant of a permit.[41] Further, a restricted account is established within the Fund for managing the costs of any facility for which the State assumes ownership and liability under 32 P.S. § 696.11 after issuing a "certificate of project completion," as is discussed below.[42]

Money in the account can only be used for the purposes stated above,[43] and money cannot be transferred out of the Fund into the general fund.[44] Money in the fund and restricted account is to be annually appropriated by the General Assembly.[45]

[36] 32 P.S. § 696.6(b)(4).
[37] 32 P.S. § 696.7(a).
[38] 32 P.S. § 696.7(b).
[39] 32 P.S. § 696.8(a).
[40] 32 P.S. § 696.8(b).
[41] 32 P.S. § 696.10(a)-(c).
[42] 32 P.S. § 696.10(a)(2).
[43] 32 P.S. § 696.10(c).
[44] 32 P.S. § 696.10(e).
[45] 32 P.S. § 696.10(f).

Transfer of Ownership and Liability to the State

The legislation provides that a storage operator may apply for a "certificate of project completion," which the DEP can issue if at least fifty years have elapsed since injections end "or until an approved alternative period of time."[46] To issue such a certificate, the DEP must also find that the storage operator is in compliance with all laws governing injection and storage, that the storage operator has addressed any pending claims regarding its operations, that the carbon dioxide that was injected is not expected to migrate further and that it poses no threat to human health, safety, or underground sources of drinking water.[47] In addition, the DEP must find that all wells and facilities are in good condition and will retain mechanical integrity, and that the operator has plugged all wells and completed any required reclamation.[48] Upon issuance of a certificate of completion, the Commonwealth will assume responsibility, liability for, and ownership of the storage facility, and will perform any remaining monitoring that is required.[49] The Act specifically states, however, that the Act is not intended as a waiver of sovereign immunity.[50]

Fees

In 32 P.S. § 969.9, the legislation provides that storage operators shall pay the DEP a fee on each ton of carbon dioxide injected to cover the department's anticipated expenses associated with regulating CCS operations, along with any monitoring or maintenance required if the Commonwealth assumes responsibility for a storage operation after the DEP has issued a certificate of project completion.[51] The amount of this fee is to be set by the Environmental Quality Board.[52] Half of the amount collected is to be deposited in the restricted account within the Carbon Dioxide Storage Facility Trust Fund for use in handling any responsibilities assumed by the Commonwealth after issuing a certificate of project completion, and the other half to be deposited in the Fund for the costs of regulating CCS operations.[53] Any amounts received by the Commonwealth on penalties imposed under the Act or any funds received as part of financial responsibility mechanisms are also to be deposited in the Fund.[54]

In addition, 32 P.S. § 696.6(b)(1)(iii) authorizes the DEP to "charge a permit or periodic management fee sufficient to maintain oversight and enforcement of carbon sequestration projects in this Commonwealth." The Act does not appear to expressly require that any permit or periodic management fee be deposited in the Fund, though arguably that is implied.

[46] 32 P.S. § 696.11(a), (b).
[47] 32 P.S. § 696.11(c).
[48] 32 P.S. § 696.11(c).
[49] 32 P.S. § 696.11(d).
[50] 32 P.S. § 696.11(e).
[51] 32 P.S. § 696.9.
[52] 32 P.S. § 969.9(b).
[53] 32 P.S. § 969.9(c).
[54] 32 P.S. § 969.9(d).

CSB Safety Study Calls for Remote Isolation Equipment at Chemical Facilities

Andrew F. Gann, Jr. Adam Sowatzka, J. Brian Jackson, Mitchell Diles, and Christina Bassick
McGuireWoods LLP

The U.S. Chemical Safety and Hazard Investigation Board (CSB) released a safety study on July 25, 2024, that calls for greater use of remote isolation equipment at chemical facilities. Such devices are designed to mitigate chemical releases remotely from a safe location. As a result, CSB believes that they will decrease the likelihood of serious injuries, fatalities, environmental contamination and facility damage following loss-of-containment incidents.

The safety study stemmed from CSB's review and investigation of the November 2019 explosions and fires at the TPC Group chemical plant in Port Neches, Texas. The Port Neches incident occurred after a suction pipe carrying highly flammable butadiene—a building block in the production of a wide range of polymers and copolymers—ruptured and created a butadiene vapor cloud. The vapor cloud ignited, causing extensive facility damage and a fire that burned for more than a month. In its final report on the Port Neches incident, CSB recognized that the chemical plant was not equipped with remotely operated emergency isolation valves (ROEIVs). According to CSB, ROEIVs could have prevented some of the secondary explosions and fires and minimized facility damage. CSB's investigations of several other catastrophic chemical incidents reached similar conclusions.

Notably, CSB's safety study makes three separate recommendations: one each directed to the American Petroleum Institute (API), U.S. Environmental Protection Agency (EPA), and U.S. Occupational Safety and Health Administration (OSHA). CSB recommends that the API "revise its industry guidance documents to apply to more facility types beyond refineries and include criteria for when remote isolation devices should be required that may be automatically activated or remotely activated from a safe location, for processes involving highly flammable or toxic materials and atmospheric storage tanks." To the EPA, CSB suggests that it "incorporate requirements for an evaluation of the need for remote isolation capabilities into its Risk Management Program (RMP) Rule, which regulates processes involving highly flammable or toxic materials." And for OSHA, CSB recommends that it "include requirements for an evaluation of the need for remote isolation capabilities into its Process Safety Management (PSM) standard, which regulates processes involving highly hazardous chemicals."

CSB also makes a plea to operators of chemical facilities, requesting that operators proactively assess whether remote isolation equipment should be installed on major process equipment even in the absence of new industry standards and federal regulations. According to CSB, doing so will save lives, protect the environment and safeguard critical infrastructure.

Only time will tell whether CSB's recommendations will be implemented. In the meantime, the chemical industry should be aware of CSB's warnings and

calls for the industry to proactively install remote isolation equipment to help mitigate loss-of-containment incidents. CSB's safety study may also signal to industry that CSB may be more likely to focus on investigating similar incidents in the future.

Oral Arbitration Agreement in Court Controlled Under *Tex. R. Civ. P. 11*.

David E. Sharp, FCIArb
Law Offices of David E. Sharp P.L.L.C.

Rotary Drillings International, S.A. De C.V. v. Control Flow, Inc., 2024 WL No. 14-23-00648-CV, (Tex.Civ.App., Houston [14th], August 13, 2024) considered whether parties could amend or replace a written arbitration agreement by entering into an oral agreement in court pursuant to *Tex. R. Civ. P. 11.*[1]

Rotary Drillings sued claiming it paid Control Flow over $1.6 million for undelivered goods.[2] Control Flow's counterclaim asserted that it built the equipment as agreed but was not fully paid.[3] Only the counterclaim remained after the Harris County District Court granted summary judgment against Rotary Drilling's claims.[4] The contract had an arbitration agreement requiring:

> [A]ll claims, disputes, controversies . . . shall be determined by binding arbitration before three (3) arbitrators (one in case of controversies of $250,000.00 or less) in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA) . . . . If the amount in dispute is two hundred fifty thousand and no-dollars ($250,000.00) or less, the Parties will agree on one (1) arbitrator or AAA will select a single arbitrator.[5]

At a recorded hearing, counsel for each party confirmed to the court that they had reached an agreement to arbitrate before a former Judge John Wooldridge.[6] Later, Rotary Drillings started an AAA arbitration demanding two arbitrators in addition to Wooldridge; and, Control Flow insisted that the Rule 11 agreement required arbitration before the single, agreed arbitrator.[7]

Rotary Drilling moved to compel arbitration before a panel of three as the counterclaim sought over $250,000 and argued that the Rule 11 did not alter the contractual agreement's provisions governing the number of arbitrators or its $250,000 threshold.[8] Control Flow argued that the Rule 11 replaced or modified the earlier agreement.[9] The trial court ordered arbitration before the agreed arbitrator and stayed the AAA arbitration.[10] Rotary appealed.

[1] *Id*. at *1 & 3 n. 2. *Rule 11* provides: "Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing . . . or unless it be made in open court and entered of record." All agreed that there was a binding oral Rule 11 agreement. *Id*. at *3, n. 2.
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *Id*. Except in quotations, this note ignores misspellings of his name found in the reported decision on Westlaw.
[7] *Id*. at * 2.
[8] *Id*.
[9] *Id*. at * 2 & 3.
[10] *Id*. at * 2.

The Court of Appeals observed that an order on a motion to compel arbitration was reviewed for abuse of discretion, meaning that it deferred to trial court factual findings while reviewing the law *de novo*; and, further, since the trial court did not provide the basis of its ruling, all findings and conclusions needed to support its order would be inferred as to any theory supported by the record.[11]

The Court found that the sole "real issue" was "the extent to which the Rule-11 agreement modified the written arbitration agreement".[12] It also noted that "[a]n arbitration agreement may be revoked, modified, or supplanted—either in whole or in part—by a later agreement, including one made orally in court".[13] Then, the Appellate Court observed that the Rule 11 "plainly states that the parties agreed to arbitrate before Woolridge [sic]", that it mentioned no need for other arbitrators while calling him "our arbitrator", and that appellee's counsel reported confirming the arbitrator's availability and "hoped" the arbitration would take "'a day, maybe two at max'".[14] This, ruled the Court, "supports an implied finding that the parties agreed to a single arbitrator" since they "did not mention needing to find other arbitrators through AAA or needing to schedule their availability through [the agreed arbitrator]."[15] In affirming, the Court of Appeals held that there was no abuse of discretion in ordering arbitration before the agreed arbitrator or in staying the AAA arbitration.[16]

[11] *Id*.
[12] *Id*. at *3. The second appellate issue--the propriety of the stay—depended on that "real issue". *Id*.
[13] *Id*. (citing, among other cases, *Guillen-Chavez v. ReadyOne Indus., Inc.*, 588 S.W.3d 281, 288 (Tex. App.—El Paso 2019, pet. denied) as holding that "[a]n agreement made in open court to alter the terms of a written arbitration agreement is enforceable under Rule 11.").
[14] *Id*.
[15] *Id*.
[16] *Id*. * 4.

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The Center for American and International Law
5201 Democracy Drive
Plano, TX USA 75024

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