JULY-AUGUST 2020
VOL. 20-7

PRATT'S

ENERGY LAW REPORT

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ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S ENERGY LAW REPORT [page number] (LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT'S ENERGY LAW REPORT 4 (LexisNexis A.S. Pratt)

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www.lexisnexis.com

(2020–Pub.1898)

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POSTMASTER: Send address changes to *Pratt's Energy Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Hindsight Is 2020: Top 10 Recent Energy Cases

By Yasser A. Madriz, Megan S. Haines, and Miles O. Indest*

This article summarizes recent developments in energy law across state lines and across subject matters. It covers new cases in Texas, Pennsylvania, Louisiana, New York, Kansas, and federal courts across the nation. This article also covers a wide variety of subjects, including hydraulic fracturing, eminent domain, royalties, trade secrets, partnership formation, environmental law, and securities fraud.

Energy law—like the energy industry—is in a constant state of change and development. Across the United States, state and federal courts are resolving disputes that directly affect energy companies' finances and operations—including their contracts, employment procedures, regulatory environment, and protection of trade secrets and intellectual property. Because the energy industry is so interconnected—legal developments in one jurisdiction will eventually have some impact on the law in other jurisdictions.

A discussion of recent court decisions on significant issues of energy law follows.

Trespass by Hydraulic Fracturing: *Briggs v. Southwestern Energy Prod. Co.*[1]

Key Takeaways/Issues: The Pennsylvania Supreme Court affirmed that the rule of capture applies to unconventional oil and gas development that occurs entirely within the developer's property. But hydraulic fracturing may constitute a "trespass" where subsurface fractures, fracturing fluid, and proppant cross boundary lines into the subsurface estate of adjoining property.

Defendant Southwestern Energy Production Company ("Southwestern") hydraulic fractured a natural gas well on land adjacent to the Briggs' property, for which the company did not have a lease. As a result, the Briggs filed a complaint asserting claims of trespass and conversion. Southwestern filed a motion for summary judgment, arguing that the Briggs had not established

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[1] *Briggs v. Southwestern Energy Prod. Co.*, 224 A.3d 334 (Pa. 2020).

physical invasion and that recovery for any drainage from the Briggs property was barred by the rule of capture. The trial court granted Southwestern's motion for summary judgment, agreeing that the rule of capture applied.

On appeal to the Pennsylvania Superior Court, the court reiterated Pennsylvania's recognition of the rule of capture, but acknowledged that the rule's application to hydraulic fracturing was an issue of first impression in the commonwealth. The Pennsylvania court found that, given the practical differences between conventional methods of extraction and hydraulic fracturing and between the respective positions of oil and gas producers and landowners, the rule of capture did not protect oil and gas producers employing the hydraulic fracturing method.

Adopting this line of reasoning, the Superior Court held that, in Pennsylvania, "the rule of capture does not preclude liability for trespass due to hydraulic fracturing. Therefore, hydraulic fracturing may constitute an actionable trespass where subsurface fractures, fracturing fluid and proppant cross boundary lines and extend into the subsurface estate of an adjoining property for which the operator does not have a mineral lease, resulting in the extraction of natural gas from beneath the adjoining landowner's property." The court remanded the case to determine whether Southwestern's operations had in fact resulted in a subsurface trespass to the plaintiffs' property. Southwestern appealed the decision.

On January 22, 2020, the Pennsylvania Supreme Court issued its highly anticipated ruling, reversing the Superior Court's holding that the rule of capture was not applicable to hydraulic fracturing. The Supreme Court reiterated that the rule of capture applies to unconventional oil and gas development "that occurs entirely within the developer's property." However, the Pennsylvania Supreme Court declined to decide whether the rule of capture precluded trespass claims where a "physical invasion" of unleased property is alleged to have occurred, finding that the issue had not been preserved for the Supreme Court's review. Specifically, the Supreme Court found that the Briggs did not assert before the trial court that Southwestern had "effectuated a physical intrusion onto (or into) their property." Ultimately, the Supreme Court vacated the Superior Court opinion and remanded, neither electing to reinstate the trial court's order granting summary judgment nor finding that the plaintiffs may now proceed on a physical-invasion trespass theory.

Looking Ahead: While the decision upholds long-established precedent that the rule of capture will foreclose claims arising from the migration of natural gas across property boundaries, it also leaves open—at least for now—claims for subsurface physical trespass. Notably absent from the decision was clear guidance on what would constitute a "physical

invasion" and what the applicable standards for pleading and proving one will be. These issues will no doubt be litigated in the future.

Eminent Domain and Constitutional Law: *In re PennEast Pipeline Co., LLC*[2]

Key Takeaways/Issues: Does a company's lawsuit against a state in federal court to condemn state-owned land violate sovereign immunity and the Eleventh Amendment of the United States Constitution?

PennEast Pipeline Company, LLC ("PennEast") sought to construct and operate a 120-mile natural gas pipeline system from Luzerne County, Pennsylvania, to Mercer County, New Jersey. PennEast filed an application with the Federal Energy Regulatory Commission ("FERC"), which regulates interstate natural gas pipelines under Section 7 of the Natural Gas Act ("NGA"). FERC approved the application in 2018 and issued a certificate to PennEast. Thereafter, PennEast filed condemnation actions in federal court regarding land controlled by the State of New Jersey.

The Eleventh Amendment recognizes that States enjoy sovereign immunity from suits by private parties in federal court. Because New Jersey did not consent to PennEast's condemnation suits, those actions could not proceed if they were barred by the State's immunity. The district court held that they were not barred and granted PennEast orders of condemnation and preliminary injunctive relief for immediate access to the properties. The State of New Jersey appealed that decision.

On September 10, 2019, the U.S. Court of Appeals for the Third Circuit reversed the district court, holding that the condemnation suits were barred by New Jersey's Eleventh Amendment immunity. Notably, the Third Circuit distinguished between the federal government's "power of eminent domain and its power to hale sovereign States into federal court." Essentially, the delegation of the government's eminent domain power under the NGA to private parties does not also delegate the power to override Eleventh Amendment immunity. Thus, PennEast could not bring New Jersey into federal court to condemn the state-owned land.

Looking Ahead: The Supreme Court recently granted PennEast's extension of time for filing its petition for a writ of certiorari.

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[2] *In re PennEast Pipeline Co., LLC*, 938 F.3d 96 (3d Cir. 2019).

Federal Officer Removal and Coastal Erosion: *Parish of Plaquemines v. Riverwood Prod. Co.*[3]

> *Key Takeaways/Issues*: Does the United States' supervision and direction of the oil and gas industry during World War II allow a party to remove a case to federal court under the "federal officer" doctrine for claims related to drilling operations during WWII?

Louisiana coastal parishes, including the Parish of Plaquemines, filed 42 lawsuits against more than 200 oil and gas companies claiming that their "dredging, drilling, and waste disposal caused coastal land loss and pollution" and violated Louisiana's State and Local Coastal Resources Management Act of 1978 ("SLCRMA"). SLCRMA regulates coastal use permits and certain activities along Louisiana's coast and, in certain circumstances, provides for a cause of action related to the compliance with coastal use permits.

Plaintiffs brought the lawsuits solely in state court, attempting to disavow potential federal claims under the Rivers and Harbors Act, the Clean Water Act, federal regulations, or general maritime or admiralty law. However, defendants recently removed (for a second time) certain lawsuits to federal court. The defendants relied on federal subject matter jurisdiction, the federal question statute, and the federal officer removal statute, claiming the United States' government supervised and directed their actions during World War II. Plaintiffs claimed the removal was untimely and that the federal officer doctrine did not apply. Defendants argued that removal was timely because they had only recently learned that the case was removable after plaintiff filed an expert report revealing and focusing on pre-SLCRMA activities.

The U.S. District Court for the Eastern District of Louisiana preliminarily agreed with plaintiffs that defendants' removal was untimely under 28 U.S.C. § 1442 finding (among other things) that plaintiffs identified pre-SLCRMA activities in their original petition in 2013. The court then focused on the federal officer doctrine.

The court determined that, under the federal officer doctrine, defendants must show that "(1) it is a 'person' within the meaning of § 1442; (2) it 'acted pursuant to a federal officer's directions and that a *causal nexus* exists between its actions under color of federal office and the plaintiff's claims [or charged conduct;]' and (3) it has asserted a 'colorable federal defense.' " The court disagreed that defendants' evidence related to World War II "establish[ed] the type of formal delegation that might authorize [the oil and gas companies] to remove the case." The court found the fact that "defendants may have complied

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[3] *Parish of Plaquemines v. Riverwood Prod. Co.*, No. 18-5217, 2019 U.S. Dist. LEXIS 88503 (E.D. La. May 28, 2019).

with some federal oversight directives during World War II is precedentially insufficient to confer federal officer removal jurisdiction. The private oil and gas industry's wartime compliance with federal laws or regulations falls short of being within the scope of 'acting under' a federal official for acts 'under color' of such office." Thus, the district court remanded the case back to state court.

> *Looking Ahead*: Defendants have appealed the decision to the U.S. Court of Appeals for the Fifth Circuit. On February 24, 2020, in a separate lawsuit, *Latiolais v. Huntington Ingalls, Inc.*,[4] the Fifth Circuit rejected the "causal nexus" test, because Congress expanded 28 U.S.C. 1442(a) to add the phrase "relating to." Now, to remove under Section 1442(a), a defendant must show (1) it has asserted a colorable federal defense, (2) it is a "person" within the meaning of the statute, (3) that has acted pursuant to a federal officer's directions, and (4) the charged conduct is *connected or associated with* an act pursuant to a federal officer's directions."

Administrative Discretion: *Joseph v. Sec'y, La. Dep't of Nat. Res.*[5]

> *Key Takeaways/Issues*: What is the scope of Louisiana Department of Natural Resource's ("DNR") discretion to issue coastal use permits, analyze guidelines, and satisfy its constitutional public trust duty?

In 2017, Bayou Bridge Pipeline, LLC ("Bayou Bridge") sought to construct a new petroleum pipeline in Louisiana. The pipeline would carry roughly 280,000 barrels of light or heavy crude oil per day from the existing Clifton Ridge Terminal in Lake Charles, Louisiana to crude oil terminals in St. James, Louisiana.

The Louisiana Department of Natural Resources evaluated the proposal, making multiple requests for additional information, holding a public hearing, and making further requests for information. After considering certain Coastal Use Guidelines and finding that Bayou Bridge had "modified, avoided or reduced all adverse environmental impacts to the maximum extent practical," DNR issued a coastal use permit ("CUP") to Bayou Bridge.

Plaintiffs, several individuals and environmental groups, filed petitions for reconsideration to challenge the CUP, which the Secretary of the DNR denied. Plaintiffs then filed an action in state court for judicial review asserting that DNR "violated the Louisiana Constitution and its own guidelines by issuing the proposed permit to Bayou Bridge."

Specifically, plaintiffs made four key arguments:

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

[5] *Joseph v. Sec'y, La. Dep't of Nat. Res.*, 265 So.3d 945 (La. App. 5th Cir. 2019).

(1) DNR did not consider the potential adverse environmental impacts of the proposed pipeline on St. James Parish;

(2) DNR ignored its constitutional and regulatory duties to consider the cumulative impact of the proposed pipeline on St. James Parish;

(3) DNR ignored evidence that the people of St. James Parish may be trapped in the event of an emergency with no viable evacuation plan; and

(4) DNR misapplied its own guidelines.

The district court agreed with plaintiffs, finding that the DNR did not properly apply the Coastal Use Guidelines. The court ordered Bayou Bridge "to develop effective environmental protection and emergency or contingency plans relative to evacuation in the event of a spill or other disaster, in accordance with guideline 719(K), PRIOR to the continued issuance of said permit." DNR and Bayou Bridge both appealed the district court judgment.

The Louisiana Court of Appeal, Fifth Circuit, reversed the trial court. First, the Fifth Circuit noted that it "was constrained to afford considerable weight to DNR's reasonable construction and interpretation of its rules and regulations adopted pursuant to the Administrative Procedures Act." The Fifth Circuit also found that "DNR made a reasonable determination, within the permissible scope of its authority, that the submitted emergency response and contingency plan overview constitutes effective environmental protection and emergency or contingency plans for the proposed pipeline."

Ultimately, the Fifth Circuit found that:

(1) The DNR's conclusion that certain Coastal Use Guidelines did not apply was not unreasonable or arbitrary;

(2) The DNR did not fail to require effective environmental spill cleanup and emergency response plans; and

(3) The evidence supported a finding that the DNR satisfied its constitutional public trust duty when issuing the CUP.

Thus, "the district court erred in remanding this matter to DNR for development of further environmental protection and emergency or contingency plans."

Note: In November 2019, a pipeline operator sued the Railroad Commission of Texas, claiming the agency's decision to allow an oil and natural gas company to burn natural gas produced by 130 wells was arbitrary, abused its discretion, and violated its public duty to

prevent the waste of oil and gas.[6] This lawsuit is still pending.

Royalties and Adverse Possession: *Oxy USA Inc. v. Red Wing Oil, LLC*[7]

Key Takeaways/Issues: The passive receipt and misappropriation of oil and gas royalties, without more, does not constitute adverse possession.

In 1943, the owner of property in Kansas entered into an oil and gas lease with a producer. The property passed to Frank Luther. Luther eventually sold the property, reserving an " 'undivided one-half interest in the oil, gas or other minerals in and under and that may be produced from the . . . property . . . for a period of twenty (20) years or as long thereafter as oil, gas or other minerals is produced therefrom.' "

In 1972, Luther's reservation of its one-half mineral interest expired and reverted to the fee holder at the time—the King Family. However, Luther continued to receive royalties from their "expired" interest for over 30 years, and the King Family never attempted to enforce their reversionary rights.

In 2009, Oxy USA Inc. ("Oxy") completed a productive oil and gas well on the property. Because Oxy could not determine who was entitled to receive royalties, Oxy initiated a quiet title action. Alice King then attempted to enforce her reversionary rights.

The district court granted summary judgment for Luther, finding that King's attempt to enforce her reversionary rights were barred by the statute of limitations. The court of appeals reversed, holding that the real issue was adverse possession. Because King had no notice of Luther's receipt of royalty payments, there was no adverse possession as a matter of law.

For the Kansas Supreme Court, there was one key question: "Can King enforce her reversionary interest in the minerals against the term mineral interest holders or is she now prevented from doing so by a statute of limitations or adverse possession?" But because Luther did not argue that King's claims accrued "more than 15 years prior," the court did not focus on the statute-of-limitations. Rather, the court focused on whether Luther could prove adverse possession.

According to the court, while a mineral interest *can* be adversely possessed, the "mere misappropriation of royalties" without more cannot establish such a claim. Essentially, royalty payments only represent a claim to the *value* of minerals after production, and not the minerals themselves: "being in open,

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[6] *Williams MLP Operating, LLC, et al. v. Railroad Comm'n of Texas*, No. 19-008123, in the 345th Judicial District Court of Travis County, Texas (Nov. 20, 2019).

[7] *Oxy USA Inc. v. Red Wing Oil, LLC*, 442 P.3d 504 (Kan. 2019).

exclusive, and continuous possession of a royalty can never suffice to establish an adverse claim over minerals in place."

Trade Secrets and Freedom of Speech and Association: *Pearl Energy Inv. Mgmt., LLC v. Gravitas Res. Corp.*[8]

> *Key Takeaways/Issues*: Texas law and the freedom of speech do not protect a company's ability to share another's confidential information with others, where the information only relates to the parties' pecuniary interests.

Under the Texas Citizen's Participation Act ("TCPA"), "a party may file a motion to dismiss a 'legal action' that is 'based on, relates to, or is in response to a party's exercise of the right of free speech [or the] right to petition.' "[9] However, the speech must be made "in connection with a matter of great public concern" pertaining to a "good, product or service in the marketplace."

In *Pearl Energy Inv. Mgmt., LLC v. Gravitas Res. Corp.*, an oil and gas production company ("Plaintiff") shared a confidential financial report regarding a potential property acquisition with a private equity firm, seeking financing assistance. The information was subject to the parties' non-disclosure agreement. However, the private equity firm communicated the confidential information and report to their portfolio company to purchase the property themselves.

The Plaintiff sued the private equity firm and its affiliates (its investment fund and a portfolio company) (collectively, "PE Defendants"). Among other things, the Plaintiff brought claims for violation of the Texas Uniform Trade Secrets Act, unfair competition, and tortious interference.

The PE Defendants filed a motion to dismiss under the TCPA, arguing that the sharing of Plaintiff's confidential information was an exercise of their right of association and right of free speech that relate to matters of public concern. The trial court denied the motion to dismiss.

The court of appeals affirmed the trial court's denial of the motion to dismiss, focusing on the TCPA's intent to dispose of lawsuits inhibiting a person's first amendment rights. First, the communication of the confidential report did not concern the public good or citizen participation. The fact that the private equity firm was affiliated and shared a common interest with its portfolio company did not alone trigger the right of association or further the goals of the TCPA.

Second, communications about the confidential report was not protected as free speech because they did not involve a matter of public concern. Rather, it

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[8] *Pearl Energy Inv. Mgmt., LLC v. Gravitas Res. Corp.*, No. 05-18-01012-CV (Tex. App.—Dallas, August 7, 2019, no pet.).

[9] Tex. Civ. Prac. & Rem. Code § 27.003(a).

only involved the PE Defendants' own financial interests. The court of appeals also emphasized that the parties took steps to protect the information and keep it private. The information also concerned a "private business transaction." Thus, the court of appeals affirmed the denial of the motion to dismiss under the TCPA.

> *Note*: The Texas Supreme Court recently re-affirmed that the TCPA does not protect private communications to third parties that only involve "the pecuniary interests of the private parties involved."[10]

"Informal" Partnerships: *Enterprise Prods. Partners, L.P. v. Energy Transfer Partners, L.P.*[11]

> *Key Takeaways/Issues*: The Supreme Court of Texas affirmed that parties can prevent the formation of a partnership through express conditions precedent in preliminary agreements, but parties exploring business relationships still must exercise caution in drafting letter agreements and avoiding waiver through actions that contradict disclaimers of partnership.

In 2011, Enterprise Products Partners, L.P. ("Enterprise") sought to build or modify a crude oil pipeline to run south from Cushing, Oklahoma to refineries located in Houston, Texas. Enterprise approached Energy Transfer Partners, L.P. ("ETP"), and the parties agreed to work together to create the pipeline, called the "Double E Pipeline" (the "Double E").

During their preliminary meetings, ETP and Enterprise signed three key documents:

(1) A confidentiality agreement;

(2) A letter agreement; and

(3) A reimbursement agreement.

The letter agreement stated that it did not create any binding or enforceable obligations and that unless the parties negotiated "definitive agreements" with respective board approval that were signed, executed and delivered, "no binding or enforceable obligations" would be created. The reimbursement agreement provided that ETP would reimburse Enterprise for half of the expenditures to third parties.

Both parties' engineering and marketing teams worked together to determine the feasibility of Double E by participating in the "open season", during which

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[10] *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127 (Tex. 2019) (involving information about "a single well's production").

[11] *Enterprise Prods. Partners, L.P. v. Energy Transfer Partners, L.P.*, 593 S.W.3d 732 (Tex. 2020).

time they would need a commitment of 250,000 barrels per day. Their marketing teams repeatedly referred to the project as a "joint venture" and a "partnership." However, ETP and Enterprise were unable to obtain enough commitments from shippers, the extended open season closed, and Enterprise terminated its participation in Double E.

Approximately two weeks before the end of the open season, Enterprise initiated discussions with another pipeline company, Enbridge US (Inc.) ("Enbridge"), about a pipeline from Cushing to Houston. Enterprise and Enbridge then agreed to work together on a similar pipeline project, referred to as Wrangler. The Wrangler project received sufficient shipping commitments and the two parties began operations.

ETP declared that they had entered into a partnership with Enterprise to "market and pursue a pipeline from Cushing to the Gulf Coast" and sued Enterprise for breach of joint enterprise and breach of fiduciary duty.

Enterprise filed motions for directed verdict and JNOV because the parties' written agreements contained unperformed conditions precedent that precluded the formation of partnership with ETP as a matter of law. The trial court denied the motions, and the jury found that ETP and Enterprise were in a general partnership and Enterprise breached its duty of loyalty to ETP. The jury awarded actual damages of $319,375,000 and disgorgement of $595 million to ETP. On July 29, 2014, the trial court issued a final judgment, reducing the disgorgement award by 75 percent from $595 million to $150 million.

Enterprise appealed the jury verdict to the Court of Appeals for the Fifth District of Texas at Dallas, which reversed the trial court's judgment as to ETP's claims against Enterprise, focusing on the condition precedent argument. According to the court, the letter agreement articulated two conditions precedent before a partnership could be formed: (1) approvals by the parties' respective boards of directors, and (2) executed and delivered definitive agreements. The court also rejected ETP's argument that Texas' flexible five-factor test (the "TBOC Test") for partnerships overrides the contractual and common law partnership laws developed by Texas courts.[12]

On January 31, 2020, the Supreme Court of Texas issued the highly anticipated decision, affirming that no partnership had been formed as a matter

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[12] ETP argued that partnership formation is controlled solely by the five-factor test set forth in § 152.052 (the "TBOC Test") of the Texas Business Organizations Code: "Factors indicating that persons have created a partnership include the persons': (1) receipt or right to receive a share of profits of the business; (2) expression of an intent to be partners in the business; (3) participation or right to participate in control of the business; (4) agreement to share or sharing: (A) losses of the business; or (B) liability for claims by third parties against the business; and (5) agreement to contribute or contributing money or property to the business."

of law because the preliminary agreements created conditions precedent to the formation of such a relationship. The court firmly held that Texas law "permits parties to conclusively agree that . . . no partnership will exist unless certain conditions are satisfied."

The court also affirmed that the TBOC Test does not override Texas' common law of partnership. The court emphasized Texas public policy favoring freedom of contract and finding that the TBOC Test is supplemented by "principles of law and equity," rather than superior to them.

The Supreme Court of Texas also rejected ETP's argument that Enterprise had waived the conditions precedent contained in the preliminary agreements by its subsequent conduct. Justice Nathan Hecht, writing for the court, rejected such outside conduct as indirect and irrelevant, noting that ETP failed to prove a waiver at trial. He also opined that allowing consideration of such extrinsic conduct as evidence of a waiver could result in contracting parties being able to "claim waiver in virtually every case."

Contract Interpretation and Motion Practice: *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*[13]

> *Key Takeaways/Issues*: Parties to a contract have no duty to act in good faith absent a special relationship, and they generally cannot rely on statements that expressly contradict the plain, unambiguous terms of a contract.

Carrizo Oil & Gas, Inc. ("Carrizo") was a lessee in a 22,000-acre lease (the "Parkey Lease") that would soon expire unless a producing well was established. Accordingly, Carrizo contracted with Barrow-Shaver Resources Co. ("Barrow-Shaver") under a farmout agreement, under which Barrow-Shaver would drill on the Parkey Lease and receive a partial assignment of Carrizo's interest.

The parties exchanged several drafts of the farmout agreement, particularly negotiating a consent-to-assign provision. After Carrizo's agent assured Barrow-Shaver that Carrizo would provide its consent to assign, the provision was included in the final agreement. Later, Barrow-Shaver unsuccessfully spent $22 million to drill the well. But Barrow-Shaver eventually found a buyer that offered Barrow-Shaver roughly $27 million for its interest.

However, Carrizo would not consent to the proposed sale and instead offered to sell its own interest in the Parkey Lease to Barrow-Shaver for $5 million. Barrow-Shaver rejected Carrizo's offer. Ultimately, Carrizo's non-consent caused Barrow-Shaver to lose the proposed $27 million sale.

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[13] *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471 (Tex. 2019), reh'g denied (Jan. 17, 2020).

Barrow-Shaver sued Carrizo for breach of contract, fraud, and tortious interference with contract. A jury awarded Barrow-Shaver $27,690,466.86. The Twelfth Court of Appeals of Texas in Tyler reversed the trial court's judgment entering the jury award. The court of appeals held that the consent-to-assign provision was unambiguous and the breach of contract issue should not have been submitted to the jury. There was also no evidence supporting justifiable reliance based on the expressly written consent-to-assign provision.

On January 17, 2020, the Texas Supreme Court affirmed the court of appeals concluding that:

- The parties' agreement and the consent-to-assign provision did not impose a consent obligation on Carrizo and Carrizo's right to withhold consent was unqualified;
- Evidence of the surrounding facts and circumstances concerning the consent-to-assign provision—including the substantive negotiations and prior drafts of the farmout agreement, as well as industry custom and usage—is inadmissible extrinsic evidence;
- Without a special relationship, parties to a contract have no duty to act in good faith, and the court should not add a reasonableness standard into the parties' bargained-for consent-to-assign provision; and
- Barrow-Shaver could not justifiably rely on Carrizo's misrepresentations or promises that expressly contradicted the unambiguous consent-to-assign provision.

Note: Justice Guzman dissented in part, finding that: (1) custom usage should inform the meaning of consent-to-assign provisions; and (2) Carrizo "failed to act in accordance with the consent provision as understood in the industry." Justice Boyd also dissented and found that custom usage should apply to the consent-to-assign provision, but sought reversal and remand to further consider Barrow-Shaver's claims.

Standing and Environmental Law: *Dine Citizens Against Ruining Our Env't v. Bernhardt*[14]

Key Takeaways/Issues: Environmental groups may have standing to challenge a government's issuance of permits to drill wells on public lands, but the governments do not necessarily act arbitrarily by not considering "indirect and cumulative" impacts of drilling when issuing multiple permits.

The U.S. Bureau of Land Management ("BLM"), Department of Interior, and the Secretary of the BLM granted several hundred applications for permits

[14] *Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019).

to drill ("APDs") hydraulically fractured wells on public lands in New Mexico. As a result, environmental groups have sued these parties, alleging violations of the National Historic Preservation Act ("NHPA") and the National Environmental Policy Act ("NEPA").

The environmental groups argued that BLM acted arbitrarily and capriciously when issuing the APDs. Primarily, the groups argue that BLM "failed to analyze the indirect and cumulative impacts" of the wells on environmental resources and cultural sites. After finding that the environmental groups had standing, the district court held that the BLM did not violate either NHPA or NEPA and dismissed the claims with prejudice.

On appeal, the U.S. Court of Appeals for the Tenth Circuit applied the same arbitrary and capricious standard.

First, the Tenth Circuit agreed that the environmental groups had standing—despite no proof of their specific visits to the wells—because the alleged harm was caused by the issuance of the APDs and not the wells themselves.

Second, the Tenth Circuit affirmed that BLM did not act arbitrability or violate NHPA by defining the area of potential effects. BLM was not required to consider "indirect" effects. However, the Tenth Circuit reversed the district court's decision regarding NEPA. BLM's alleged failure to complete the necessary water use analysis and determined the adequate support for water use would be a violation of NEPA.

Accordingly, the Tenth Circuit remanded the case to the district court with instructions regarding the water analysis for the APDs.

> *Note*: In March 2019, the U.S. District Court for the District of Columbia temporarily barred drilling on public lands in Wyoming based on BLM's failure to account for the cumulative impact on climate change and take a "hard look" at greenhouse gas emissions.[15]

Climate Change and Securities Fraud: *People of the State of New York v. Exxon Mobil Corp.*[16]

> *Key Takeaways/Issues*: A company's reporting on climate change risks may not trigger liability under New York's securities fraud laws unless the alleged misstatements or omissions are "material" to a reasonable shareholder.

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[15] *Wildearth Guardians v. Western Energy All.*, 368 F.Supp.3d 41 (D.D.C. Mar. 19, 2019).

[16] *People of the State of New York v. Exxon Mobil Corp.*, No. 452044-2018, 2019 N.Y. Misc. LEXIS 6544 (Sup. Ct. N.Y., Dec. 10, 2019).

In 2018, the state of New York sued ExxonMobil Corp. ("Exxon"), claiming that it caused investors to lose roughly $1.6 billion by falsely stating it evaluated the impact of past, present and future climate change risks and regulations.

New York's blue sky law—the Martin Act—prohibits the use of "any device, scheme or artifice . . . deception, misrepresentation, concealment, suppression, fraud, false pretense or false promise" in connection with the "issuance, exchange, purchase, sale, promotion, negotiation, advertisement, investment advice or distribution" of securities. To establish liability under the Martin Act, the New York State Attorney General was required to prove a misrepresentation or omission of material facts by a preponderance of the evidence. Under New York law, a statement or omission is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to act, considering the "total mix" of information reasonably available to investors.

The trial was the culmination of 3.5 years of investigation and pre-trial discovery that required Exxon to produce millions of pages of documents and dozens of witnesses for interviews and depositions. After a 12-day trial, despite the amount of discovery, the attorney general could not establish by a preponderance of the evidence that Exxon made any material misstatements or omissions that misled any reasonable investor.

The New York court found that Exxon's public disclosures—including Form 10-K disclosures and March 2014 reports that addressed climate change risk and regulations—were not misleading. For example, the attorney general claimed that Exxon's disclosures "led the public to believe that its GHG [greenhouse gas] cost assumptions for future projects had the same values assigned to its proxy cost of carbon." To the contrary, Exxon's reports identified proxy costs of carbon and GHG costs as "distinct and separate metrics."

The court was also persuaded on materiality by an analyst's testimony, who said that analysts pay attention to environmental risks and publicly report that information to investors. In contrast, the attorney general's expert testimony on materiality was found to be unpersuasive, "flatly contradicted by the weight of the evidence," and "fundamentally flawed." Notably, the attorney general produced no testimony from any investor who claimed to have been actually misled by any disclosure, despite "previously represent[ing] that it would call such individuals as trial witnesses."

Thus, the New York court held that the attorney general failed to prove that Exxon made any material misstatements or omissions about its practices and procedures that misled any reasonable investor. Accordingly, the court dismissed the attorney general's claims under the Martin Act and the lawsuit with prejudice.