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ISSUE 2 JUNE 2024

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Expansion of CCS Facing Delays in Illinois

Keith B. Hall
LSU Law Center

Illinois is home to the nation's first, and so far, only operating CCS project.[1] That project is an Archer Daniels Midland operation that sequesters CO_2 captured from the company's ethanol production facilities near Decatur, Illinois. This CCS project began operations more than a decade ago. Further, it seemed that Illinois might be set for an expansion of CCS operations, as multiple companies were planning projects to capture CO_2 from numerous ethanol and fertilizer plants in several Midwestern states, then transport the CO_2 via pipelines to injection sites in Illinois and elsewhere.

But two companies that were seeking permits from the Illinois Commerce Commission to construct CO_2 pipelines in Illinois have withdrawn those applications. First, in October 2023, Navigator CO_2 Ventures cancelled its proposed project, which would have routed pipelines through several states, including Illinois, after South Dakota regulators denied the company's permit as to the portion of the proposed pipeline route within South Dakota. Because the company was cancelling its project, it withdrew its permit application in Illinois.

Then, in November 2023, Wolf Carbon Solutions U.S. withdrew its permit application to the Illinois Commerce Commission after Commission staff expressed concerns and recommended that the Commission reject the application. The company stated that it planned to address the concerns raised by the Commission staff and refile a permit application in 2024. Thus, unlike Navigator CO_2 Ventures, Wolf was not planning on cancelling its project. Instead, its attempt to get a permit would simply be delayed for a few months.

Now, however, it appears that there will be significant additional delays for that project, as well as others. In late May 2024, the Illinois Legislature passed Senate Bill 1289, dubbed the "Safety and Aid for the Environment in Carbon Capture and Sequestration Act," or the "SAFE CCS Act," and Governor J.B. Pritzker has stated that he intends to sign the legislation.[2] The Bill, which runs to 104 pages, contains a broad set of rules for CCS, including a moratorium on the construction of new carbon dioxide pipelines in Illinois until July 2026 or until the federal Pipeline and Hazardous Materials Safety Administration (PHMSA) has

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[1] Although this is the only example of a CCS project in the U.S., the country has significant experience with the various steps in CCS—the capture, transport, injection, and storage of carbon dioxide. The U.S. captures significant quantities of CO_2 in natural gas processing plants and at LNG facilities. It has had CO_2 pipelines for decades, and currently has over 5000 miles of such pipelines in operation. It injects large quantities of CO_2 into the subsurface at enhanced oil recovery (EOR) operations. And, although the purpose of EOR operations is the production of oil, these operations incidentally cause the permanent storage of a significant amount of CO_2 in the subsurface.

[2] A PDF copy of the legislation is available at:
https://www.ilga.gov/legislation/103/SB/PDF/10300SB1289lv.pdf.

adopted revised rules for carbon dioxide pipeline safety,[3] pursuant to a proposed rulemaking announced by PHMSA[4] that has Regulatory Information Number (RIN) 2137-AF60.[5] Senate Bill 1289 provides that all pending applications for permits to construct CO_2 pipelines are dismissed without prejudice.[6]

The legislation also addresses other issues relating to CO_2 pipelines and CCS generally. For example, the legislation purports to require applicants for permits to construct and operate CO_2 pipelines to prepare and submit emergency operations plans to state regulators.[7] This requirement may be preempted by the federal Pipeline Safety Act, which includes requirements regarding safety planning and an express preemption provision.

Further, although Illinois does not have primacy under the Safe Drinking Water Act for Class VI injection wells for CCS,[8] the legislation purports to prohibit anyone from conducting CCS without a permit from state regulators.[9] The legislation also contains multiple pages of requirements for CCS projects that appear to address the same issues as are addressed by the federal Safe Drinking Water Act regulations for Class VI wells.

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[3] This provision appears at pages 47 to 48 of the bill, which would be codified at 220 ILCS 75/20(g).
[4] PHMSA announced on May 26, 2022 that, in response to the CO_2 pipeline failure near Satartia, Mississippi, that the agency would pursue a new rulemaking. See "PHMSA Announces New Safety Measures to Protect Americans From Carbon Dioxide Pipeline Failures After Satartia, MS Leak," available at https://www.phmsa.dot.gov/news/phmsa-announces-new-safety-measures-protect-americans-carbon-dioxide-pipeline-failures.
[5] An information page for RIN 2137-AF60 appears at (though little information is yet available): https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=2137-AF60.
[6] This provision appears at page 50 the bill, which would be codified at 220 ILCS 75/20(j).
[7] This appears at page 43 of the bill, and would be codified at 220 ILCS 75/20(b)(6.4).
[8] The federal regulations that implement Part C of Safe Drinking Water Act, relating to underground injections, recognize six classes of injection wells (I through VI) and provide different regulations for each.
[9] This appears at p. 80 of the bill, which would be codified at 415 ILCS 5/59.5.

Oklahoma Court Says State Cannot Enforce Anti-ESG Law for Now

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Steptoe & Johnson PLLC

States are taking varied positions on environmental, social, and governance (ESG) policies as a tool for investing and risk management. Many businesses have adopted ESG policies and states' responses to this practice have become politicized. Some states have enacted legislation restricting state agencies from investing in or doing business with companies based on their ESG policies, while other states have embraced the policies as a risk management tool.

States that have enacted or are considering enacting restrictive laws are Alabama, Arkansas, Florida, Idaho, Indiana, Kentucky, Louisiana, Minnesota, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia.

Oklahoma passed the Energy Discrimination Elimination Act (EDEA) in 2022. The EDEA prevents state agencies from doing business with financial institutions that boycott traditional energy companies. The Act requires the state treasurer to identify offending financial institutions and distribute a list of those entities to state agencies. State agencies are then prohibited from conducting business with these listed financial institutions, except in specific cases, and are required to divest from any publicly traded securities in those institutions.

Recently, an Oklahoma court enjoined the enforcement of the EDEA, at least on a temporary basis. In a lawsuit filed by an Oklahoma taxpayer and beneficiary of a state pension plan, the plaintiff alleged the EDEA violated the state constitution and sought a temporary injunction against its enforcement. The Oklahoma EDEA would have required the state pension plan to divest itself of the publicly traded securities of identified financial institutions.

In granting the temporary injunction, the court found there was a substantial likelihood of success on two of the plaintiff's claims. First, the court held that language in the EDEA was unconstitutionally vague (and therefore unenforceable). The court also found that the EDEA violated the exclusive benefits provision of the Oklahoma Constitution, which requires the state's public retirement systems to be handled for the exclusive benefit of the participants and beneficiaries (and not for other purposes, including any political agenda).

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[1] *DISCLAIMER: These materials are public information and have been prepared solely for educational purposes. These materials reflect only the personal views of the authors and are not individualized legal advice. It is understood that each case is fact-specific, and that the appropriate solution in any case will vary. Therefore, these materials may or may not be relevant to any particular situation. Thus, the authors and Steptoe & Johnson PLLC cannot be bound either philosophically or as representatives of their various present and future clients to the comments expressed in these materials. The presentation of these materials does not establish any form of attorney-client relationship with the authors or Steptoe & Johnson PLLC. While every attempt was made to ensure that these materials are accurate, errors or omissions may be contained therein, for which any liability is disclaimed.*

The court order temporarily enjoins enforcement of the provisions of the EDEA by the state treasurer and his employees and agents. As the case develops, the court will determine whether to permanently enjoin enforcement of Oklahoma's EDEA.

Louisiana Appellate Court Holds That Excess Remediation Damages Are Not Available Absent Express Contractual Provision

Keith B. Hall
LSU Law Center

In *Louisiana Wetlands, LLC v. Energen Resources Corporation*, 2024 WL 1694715 (La. App. 1st Cir. 2024), James J. Bailey III filed a legacy litigation action against several defendants, based on contamination of land that had been used for oil and gas activity. The defendants included BP America Production Company, Chevron U.S.A., Inc., and Southern Natural Gas Company, L.L.C. (SNG), each of which was a successor-in-interest to Pan-American Production Company, the original lessee under a 1948 mineral lease that covered land owned by the Bailey family. Mr. Bailey sought damages and a restoration of the property to its original condition, arguing that the defendants were liable in tort and based on an alleged breach of implied contractual obligations not to operate in an unreasonable or excessive manner.

In 2020, Chevron and SNG filed limited admissions of liability, as permitted under Louisiana's laws governing legacy litigation. Specifically, Chevron and SNG admitted being liable for a clean-up of the Bailey property to regulatory standards. The trial court referred the matter to the Louisiana Department of Natural Resources (DNR), which conducted a hearing to determine the most feasible plan for remediation of the property to regulatory standards, as required by Louisiana Revised Statue 30:29, commonly called "Act 312." DNR developed a remediation plan and referred the plan to the trial court, which adopted that plan as the most feasible plan to remediate the land to regulatory standards. Chevron and SNG then deposited funds into the registry of the court to fund the plan adopted by the court.

In the meantime, the district court granted summary judgment to BP on Mr. Bailey's tort claims, concluding that they were prescribed. Later, BP moved for summary judgment on Mr. Bailey's contract claims, apparently arguing that those claims—based on an alleged breach of an implied contractual duty not to operate in an unreasonable or excessive manner—should be dismissed because BP had not conducted any operations on the property. The trial court granted summary judgment in favor of BP, dismissing all claims against it, but based on different reasoning. The trial court concluded that Mr. Bailey's purported contract claims were really tort claims, and because the court already had ruled that the plaintiff's tort claims were prescribed, the trial court dismissed all remaining claims. Mr. Bailey appealed to the Louisiana First Circuit.

On appeal, BP argued that the trial court's judgment should be affirmed because the 1948 lease did not contain any express clause requiring restoration of the leased premises to their original condition, or to any other particular standard,

and under Louisiana Revised Statute 30:29, a plaintiff cannot recover remediation damages in excess of what is required to fund the most feasible plan. Louisiana Revised Statute 30:29 states in part:

> M. (1) In an action governed by the provisions of this Section, damages may be awarded only for the following:
>
> (a) The cost of funding the feasible plan adopted by the court.
>
> (b) The cost of additional remediation only if required by an express contractual provision providing for remediation to original condition or to some other specific remediation standard.
>
> (c) The cost of evaluating, correcting or repairing environmental damage upon a showing that such damage was caused by unreasonable or excessive operations based on rules, regulations, lease terms and implied lease obligations arising by operation of law, or standards applicable at the time of the activity complained of, provided that such damage is not duplicative of damages awarded under Subparagraph (a) or (b) of this Paragraph.
>
> (d) The cost of nonremediation damages.

The appellate court noted that, in 2013, the Louisiana Supreme Court interpreted the 2006 version of Louisiana Revised Statute 30:29—which had different language than that quoted above—as allowing a plaintiff to seek remediation damages in excess of what is required to restore the property to regulatory standards, even if a mineral lease does not have express language providing a right to a more rigorous remediation. The appellate court then noted that, the following year—2014—the legislature amended Revised Statute 30:29 to match the language quoted above, and that this 2014 amendment was an apparent attempt to legislatively overrule the Louisiana Supreme Court's 2013 decision. Later, in 2021, the Louisiana Supreme Court itself concluded that its 2013 decision was based on "palpable error," and that the 2006 version of Revised Statute 30:29 did not allow remediation damages in excess of what is required for a clean-up to regulatory standards, in the absence of an express contractual provision requiring a more rigorous clean-up.

The Louisiana Supreme Court's 2022 decision was not directly controlling because that case was governed by the 2006 version of Louisiana Revised Statute 30:29, whereas Mr. Bailey's claim was governed by the 2014 version of the statute. However, the appellate court interpreted the 2014 version of Louisiana Revised Statute 30:29, like the Louisiana Supreme Court interpreted the 2006 version, as prohibiting remediation damages in excess of what is required to fund the most feasible plan for restoration of property to regulatory standards. Further, because Chevron and SNG had already deposited funds into the registry of the court to pay

implementation of the most feasible plan, the appellate court reasoned that Mr. Bailey had no basis to recover against BP. Therefore, the court affirmed the district court's grant of summary judgment in favor of BP.

Judge Welch dissented, based on his reading of Louisiana Revised Statute 30:29(M)(1)(c). He reasoned that a monetary award for so-called "excess remediation"—that is, a more rigorous remediation than a remediation to regulatory standards—is an award for "repairing environmental damage" as that phrase is used in Revised Statute 30:29. Further, he reasoned that compensation for excess remediation would not be "duplicative of damages awarded" to pay for a remediation to regulatory standards. Thus, Judge Welch interpreted 30:29(M)(1)(c) as authorizing an award of so-called "excess remediation damages."

Louisiana Second Circuit Interprets "Exclusive" Pipeline Servitude

Keith B. Hall
LSU Law Center

ETC Tiger Pipeline, LLC v. DT Midstream, Inc., 2024 WL 1545705 (La. App. 2nd Cir. 2024) considers whether the plaintiff's "exclusive" pipeline servitude precluded the defendant from constructing a pipeline that runs perpendicular to the plaintiff's pipeline, crossing under it with a safe vertical separation.

In 2010, Red River Louisiana I LP ("Red River"), as landowner, granted a servitude of use to ETC Tiger Pipeline, LLC ("ETC") to construct and operate a natural gas pipeline across Red River's land in DeSoto Parish. ETC recorded the servitude in the public record, and then constructed and began operating a 42-inch diameter, high pressure natural gas pipeline.

The servitude agreement stated, in part:

> Grantor … does hereby grant and convey to Grantee an exclusive servitude of use sixty feet (60') in width and eighteen thousand three hundred seventy six and one tenth (18,376.10') linear feet … for the purposes of constructing … [and] operating, … one (1) pipeline for the transmission of natural gas … across … the … described property[.]
>
> ***
>
> BUT ONLY as to the location specified for such servitude on the sketch attached hereto as Exhibit A[.]
>
> ***
>
> Grantor may not use any part of the servitude if such use may unreasonably damage, destroy, injure, and/or interfere with the Grantee's use of the servitude for the purposes for which this servitude is being sought by Grantee. Grantor reserves the right to use the servitude for any and all purposes not inconsistent with the purposes set forth in this servitude. Grantor's uses may include but shall not be limited to right to cross the servitude and to construct roads, highways and bridges across it and the right to erect, install and construct over and across the servitude power lines, railroads, tram roads, switch tracks, dams, roads, fences and such other similar facilities. … [These] shall be erected, installed, constructed and maintained so as not … unreasonably with the rights granted herein. Such roads, highways, bridges, and other facilities that will cross the servitude must cross the servitude at any angle of not

less than forty-five (45) degrees to Grantee's pipelines, provided that all of Grantee's required and applicable spacings, including depth separation limits and other protective requirements are met by Grantor. ***

Several years later, DT Midstream, Inc. ("DTM") obtained a pipeline servitude agreement from the landowner. In 2022, DTM contacted ETC about constructing a natural gas pipeline that would run across Red River's land in a direction perpendicular to ETC's pipeline and cross beneath ETC's pipeline with a safe vertical separation. ETC refused to consent to such a crossing. When it appeared that DTM planned to cross underneath ETC's pipeline anyway, ETC sought injunctive relief in the 42nd Judicial District Court for the State of Louisiana, DeSoto Parish. ETC argued that its exclusive servitude covered all depths and that DTM's planned crossing would violate ETC's existing, recorded servitude. ETC also argued that DTM's planned crossing could not be done safely.

The district court found that DTM's planned crossing could be safely done and that ETC did not have a right to block the crossing on safety grounds. However, the court agreed with ETC's argument that DTM's planned crossing would violate ETC's servitude. For this reason, the district court issued a preliminary injunction, pursuant to Louisiana Code of Civil Procedure article 3663, which authorizes injunctive relief to protect a party's possession of immovable property or its quasi-possession of a real right in immovable property. DTM appealed the district court's order.

The Second Circuit rejected ETC's argument that its "exclusive" servitude gave it an exclusive right as to all depths. The appellate court noted that the servitude did not specify a depth for the pipeline, and that the servitude only allowed ETC to construct one pipeline. The court reasoned that "the purpose of the servitude supports the finding" that, once ETC constructed the pipeline, the depth at which the pipeline was constructed set the maximum depth to which the servitude applied. Thus, ETC's servitude did not give the company exclusive rights as to all depths.

Further, the Second Circuit concluded that no other provision in the servitude agreement precluded DTM's proposed crossing of ETC's pipeline. The agreement did not state that Red River was prohibited from authorizing underground crossings of ETC's pipeline, but only that Red River could not interfere with ETC's exercise of its rights. Indeed, the servitude agreement expressly contemplated that Red River could make or authorize constructions that would cross ETC's servitude (though the agreement did expressly refer to construction of a pipeline that crossed ETC's servitude). Rather than prohibiting such crossings, the agreement merely stated that the angle of crossing had to be at least forty-five degrees and that an "appropriate depth" separation had to be maintained. Here, the district court concluded that a crossing could be done safely, with an

appropriate depth separation. Thus, neither safety nor interference with ETC's exercise of its rights was an issue.

Accordingly, the Second Circuit unanimously reversed the district court's order granting a preliminary injunction. Two of the three judges on the appellate panel (Cox and Ellender) joined the majority opinion. The third (Thompson) wrote separately, expressing reasoning similar to that in the majority opinion.

Louisiana's Anti-SLAPP Provision Not Applicable in Pipeline Servitude Dispute

Keith B. Hall
LSU Law Center

In *Energy Partners, LP v. New Generation Gas Gathering LLC*, 2024 WL 2176462 (La. App. 2nd Cir. 2024), Energy Transfer LP (and related parties, collectively referenced herein as "ETP") had several pipeline servitudes, and was the owner and operator of natural gas pipelines that run from the Haynesville Shale to the Louisiana Gulf Coast, including a 42-inch diameter pipeline running from the Haynesville Shale to natural gas hubs further south.

New Generation Gas Gathering LLC ("NG3") is a company in the business of gathering natural gas in the Haynesville Shale area and transporting that gas to the Louisiana Gulf Coast. NG3 is in the process of constructing an approximately $1.6 billion gas gathering system to gather gas in the Haynesville Shale area, treat it, and transport it across five parishes to deliver it to the Gillis Hub near Gillis, Louisiana in Calcasieu Parish.

Representatives of NG3 contacted ETP about constructing natural gas pipelines that would cross under ETP's pipelines at 106 locations along the pipeline's route between DeSoto Parish and Beauregard Parish. Representatives of the companies met on several occasions, but they were not able to reach an agreement. In August 2023, ETP filed a lawsuit in DeSoto Parish, seeking a declaratory judgment that NG3 may not cross under ETP's pipelines without ETP's consent. NG3 filed an answer and a reconventional demand,[1] in which NG3 asserted claims based on the Louisiana Monopolies Act, the Louisiana Unfair Trade Practices Act, and tort law. Both parties filed various motions and exceptions. Relevant to the court decision cited above, ETP filed a peremptory exception of no cause of action and a motion to strike, based on Louisiana Code of Civil Procedure article 971.

The district court denied all of the motions and exceptions, except for one discovery motion. Because NG3 asserted claims under the Louisiana Monopolies Act, and because Louisiana Revised Statue 51:135 makes interlocutory orders immediately appealable in cases involving Louisiana Monopolies Act claims, ETP was able to appeal the district court's overruling of its exception of no cause of action and the court's denial of ETP's motion under Louisiana Code of Civil Procedure 971 for the court to strike certain claims asserted by NG3.

Louisiana Code of Civil Procedure article 971 is an anti-SLAPP law,[2] which seeks to prevent parties from using meritless litigation to deter other persons from

[1] Under the Louisiana Code of Civil Procedure, a counterclaim is called a "reconventional demand."
[2] "SLAPP" refers to strategic litigation against public participation.

exercising certain constitutional rights, such as freedom of speech and the right to petition for redress of grievances. Louisiana Code of Civil Procedure article 971 states in part:

> A. (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim.
>
> (2) In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.
>
> …
>
> F. (1) "Act in furtherance of a person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue" includes but is not limited to:
>
> (a) Any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law.

ETP argued that this anti-SLAPP provision applied because NG3 was suing based on ETP's exercise of its right to assert claims in court. The Louisiana Second Circuit rejected ETP's argument that Article 971 applied. The court noted that Article 971 itself refers to litigation that might deter persons from exercising their constitutional rights relating to "public issues." Further, Louisiana cases have held that a "public issue" is a matter relating to political or social issues or other concerns of the community. Courts have held that ordinary disputes between private parties are not "public issues." The appellate court concluded that the dispute regarding whether ETP's servitudes give it the authority to preclude others from constructing pipelines that cross beneath ETP's pipelines was a private dispute that did not involve "public issues." Thus, Code of Civil Procedure article 971 did not apply. For this reason, the Second Circuit affirmed the district court's denial of ETP's motion to strike.

Next, the Second Circuit considered ETP's no cause of action exception. The court concluded that NG3 had pleaded facts sufficient to state a cause of action, and that ETP's arguments in support of its no cause of action exception were basically that NG3 would be unable to prove its claims. The Second Circuit stated that whether NG3 could *prove* its claims is a matter for trial, or perhaps for summary judgment, if NG3 lacks any evidence to support some essential element of its claims, but that NG3's alleged inability to prove its claims does not justify a dismissal

for no cause of action. Therefore, the Second Circuit affirmed the district court's overruling of ETP's peremptory exception of no cause of action.

Ohio Court Finds Anti-Washout Provision Inapplicable

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In *Bounty Minerals, LLC v. LL&B Headwater II LP*, Ohio's Seventh District Court of Appeals addressed whether a Term Royalty Conveyance burdened subsequent oil and gas leases.[1] The facts were straightforward: On November 13, 2007, the Waliguras entered into an oil and gas lease with Mason Dixon Energy that had a 5-year primary term, an option to extend for an additional 5 years, and a secondary term so long thereafter as oil and gas were produced in paying quantities (i.e., a fairly typical lease habendum clause for that time in Ohio). Several years later, the Waliguras conveyed a Term Royalty Conveyance giving the grantee "a 1/8th royalty interest in and to 55.00 acres *** **so long as [the Mason Dixon Lease] remains in full force and effect.**" (emphasis added). That conveyance also contained an anti-washout provision stating: "In the event that the [Mason Dixon Lease] is **terminated, surrendered, cancelled, released or is otherwise determined to be no longer valid** at any time **before the primary term or any extensions thereof or the secondary term** of the Subject Lease **would otherwise expire**, then the grant contained in this Term Royalty Conveyance shall apply to any lease or leases granted by Grantor *** within three years after the Subject Lease ceases to be valid." (emphasis added).

The primary term of the Mason Dixon Lease was extended to September 13, 2017, at which time the lease expired by its own terms for nonproduction. A week later, the Waliguras entered into a second lease, this time with Salt Fork Resources Operating, and then conveyed a portion of their mineral interest to Bounty Minerals. The Salt Fork Lease was pooled into a unit that was later developed by one of the prior lessees of the Mason Dixon Lease. When one of the then-owners of the Term Royalty Conveyance refused to release it of record, Bounty filed suit to declare that interest terminated and that it did not burden the Salt Fork Lease. The trial court granted summary judgment in Bounty's favor.

On appeal, the Seventh District affirmed the trial court's decision below. Interpreting the anti-washout provision, it stated: "**The Term Royalty Conveyance prevents the lessor and lessee from artificially terminating the lease and washing-out the term royalty owner's interest.**" (emphasis added). "By its own terms, the Term Royalty Conveyance only extended to new leases if the Mason Dixon Lease terminated prior to the conclusion of the primary term or prior to when the secondary term would otherwise expire." In doing so, the appellate court rejected the argument that this interpretation was inconsistent with the last antecedent rule. Appellant argued that the phrase "before the primary term or any extensions thereof or the secondary term … would otherwise expire" modified only the phrase "is otherwise determined to be no longer valid" and not the words "terminated, surrendered, cancelled [or] released." The court, however, found that the last antecedent was the entire clause, relying on a U.S. Supreme Court case stating that "[when] several words are followed by a clause which is applicable as much to the first and

[1] 2024-Ohio-944 (Mar. 14, 2024).

other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."

Accordingly, because the Mason Dixon Lease expired on its own terms at the end of its primary term, the anti-washout provision did not apply (i.e., the lease had not been surrendered, cancelled, released or otherwise terminated prior to its natural end).

Texas Appellate Court Rules in Pipeline Easement Dispute

Keith B. Hall
LSU Law Center

In *Premcor Pipeline Co. v. Wingate*, 2024 WL 1565334 (Tex. App—Beaumont 2024), Premcor Pipeline Co. is the successor-in-interest to Gulf Refining Company as the grantee under nine pipeline easements granted in 1954. Premcor, which is part of the Valero family of companies, owns two pipelines that run approximately eighteen miles, carrying butane from the Fannett Terminal in Beaumont, Texas to Valero's Port Arthur Refinery on the Texas Gulf Coast. One of the pipelines is six inches in outside diameter and the other is four inches. The two pipelines cross over numerous tracts of land, including a tract owned by the plaintiff, Jim Wingate, who is a successor to prior owners of the land, who granted the nine easements held by Premcor. None of the easements specifies a width for the easement rights granted.

After a dispute arose between Premcor and Wingate regarding Premcor's use of roads and bridges on Wingate's land, Wingate filed a suit seeking damages, a declaratory judgment, and injunctive relief to limit Premcor's use of his land. As part of the relief he sought, Wingate asked the court to declare a fixed boundary for the easements. He asserted that the extent of Premcor's easements should be determined by using the circumference of the two pipelines. Wingate argued that such relief was appropriate under the Texas Supreme Court's decision in *Houston Pipe Line Co. v. Dwyer*, 374 S.W.2d 662 (Tex. 1964).

Premcor disputed Wingate's legal arguments, asserting that, because the easements do not specify a width, Premcor is entitled to use as much area as is reasonably necessary, causing as little burden as possible to the servient estate. Premcor relied in part on the Texas Supreme Court's decision in *Southwest Electric Power Co. v. Lynch*, 595 S.W.3d 678 (Tex. 2020).

The trial court entered a temporary injunction in favor of Wingate, and after a bench trial, entered a permanent injunction limiting Premcor to use of an area twenty feet in width, which the court held was the width of Premcor's easement. The court relied on *Dwyer* in issuing its order. The trial court also awarded expert witness fees to Wingate, who had used an expert witness at trial, as well as over $200,000 in attorney fees. Premcor appealed.

The appellate court noted that, in interpreting an easement, courts use the same rules of construction and interpretation as for interpreting contracts. Thus, if an easement is unambiguous, a court should not consider extrinsic evidence. The appellate court concluded that the easements at issue were unambiguous, and that extrinsic evidence therefore should not be considered. Interpreting the easements, the appellate court noted that the easements in dispute do not specify a width for the grantee's rights.

The appellate court stated that the Texas Supreme Court has "recognized the existence of general easements that do not specify a fixed width," and in such cases, courts have been "reluctant to write fixed widths into easements." Further, the absence of a fixed width does not make an easement ambiguous or require a court to fix a width. Instead, the Texas Supreme Court stated in *Coleman v. Forister*, 514 S.W.2d 899 (Tex. 1974) that, when a general easement without a specified width is granted, there is an implied right for the grantee to use as much area as is reasonably necessary and convenient, while causing as little burden as possible to the servient estate.

The appellate court distinguished *Dwyer*. In that case, the Texas Supreme Court held that the grant of a pipeline easement that included the right to "operate" and "maintain" the pipeline was broad enough to include a right to remove and replace the pipeline, but that the pipeline company could not install a replacement pipeline that was larger than the original pipeline, even though the document that granted the easement did not specify the size of the pipeline. *Dwyer* did not involve the width of an easement, and for that reason, the appellate court found that it was inapplicable.

Accordingly, the appellate court reversed the portions of the trial court's judgment that limited Premcor's easement rights to a width of twenty feet, and granted judgment in favor of Premcor, provided that it was entitled to use as much area as reasonably necessary. The appellate court reversed the award of attorney fees to Wingate, noting that those had been premised on Wingate having prevailed, but now Premcor prevailed. The appellate court also reversed the portion of the judgment awarding expert witness fees to Wingate, explaining that expert fees for a court-appointed expert can be taxed, but that the fees for a party's expert generally cannot be taxed as costs.

The Supreme Court of Texas Rules in Producer's Favor in Royalty Case Involving Fuel Gas

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In *Carl v. Hilcorp Energy Co.*, -- S.W.3d --, 2024 WL2226931 (Tex. May 17, 2024), the Supreme Court of Texas answered two questions certified by the Fifth Circuit concerning the payment of royalty on gas used in off-lease postproduction activities. The *Carl* lease provided for a market-value-at-the-well royalty on gas "sold or used off the [leased] premises" and limited free-use to gas used on the leased premises. Texas's high court agreed with the other Texas courts to consider the issue and concluded that the value of the gas used in off-lease post-production activities was a post-production cost that could be shared with the royalty owner.

Background

It is settled law in Texas that, when a lease provides for royalty to be valued "at the well," the royalty bears its share of postproduction costs. For many years, the consensus in the industry has been that, when gas is used for fuel in postproduction activities, the value of that gas can be properly accounted for as a postproduction cost when calculating wellhead value. *Carl* and other recent cases challenged that position.

Integral to understanding *Carl*, however, is a brief overview of another recent Supreme Court of Texas fuel gas case, *BlueStone Natural Resources II, LLC v. Randle*, 620 S.W.3d 380 (Tex. 2021). *Randle* concerned whether a lessee owed royalty on gas used off the leased premises for compression and plant fuel. *See id.* at 384. The lease's addendum provided for royalty based on the "gross value received" by the lessee at a downstream sales point without deduction for postproduction costs. *Id.* The lessee, BlueStone, argued that it owed no royalty on gas used off-lease under the lease's free use clause: "Lessee shall have free from royalty or other payment the use of … gas … produced from said land in all *operations which Lessee may conduct hereunder*." *Id.* at 394. Deciding an issue of first impression, the Supreme Court of Texas held that the free-use clause was limited to gas used on the leased premises, meaning that BlueStone owed royalty on the off-lease use prior to the point of sale and calculation of gross proceeds. *Id.* at 384.

In the wake of *Randle*, royalty owners with market-value-at-the-well leases filed numerous cases alleging underpayment of royalty associated with off-lease gas use. One such case was *Carl v. Hilcorp Energy Co.*, a putative class action filed in the Southern District of Texas. 2021 WL 5588036 (S.D. Tex. Nov. 30, 2021).[1] The *Carl* lease contained a free-use clause substantively identical to the one in *Randle*.

[1] Other such cases were *Fitzgerald as Trustee for Jackson Family Mineral Trust v. Apache Corp.*, 2021 WL 5999262 (S.D. Tex. Dec. 20, 2021) and *EnerVest Operating, LLC v. Mayfield*, 2022 WL 4492785 (Tex. App.–San Antonio Sept. 28, 2022, no pet.). Both *Apache* and *EnerVest* contained lease language substantively identical to that in *Carl*, and the courts in both cases determined that the free-use clause did not impact the royalty owners' obligation to share in postproduction costs.

See id. at *1. And the lessor argued that the lessee, Hilcorp: (1) owed royalty on gas used off the leased premises; and (2) was prohibited from considering the value of that gas in calculating the wellhead value of the gas. *Id.* Hilcorp moved to dismiss, asserting that the lease's "at the well" valuation point meant that the royalty bore its share of postproduction costs, and that neither the free-use clause nor *Randle* changed that structure. *Id.* at *1, 4. The district court agreed with Hilcorp and dismissed the case, finding that *Randle* was inapposite because it did not interpret a lease containing a market-value-at-the-well royalty clause. *Id.* at *4.

After the lessor appealed, the Fifth Circuit certified two questions to the Supreme Court of Texas:

1. "After *Randle*, can a market-value-at-the well lease containing an off-lease-use-of-gas clause and free-on-lease use clause be interpreted to allow for the deduction of gas used off lease in the post-production process?"

2. "If such gas can be deducted, does the deduction influence the value per unit of gas, the units of gas on which royalties must be paid, or both?"

Carl as Co-Trustee of Carl/White Trust v. Hilcorp Energy Co., 91 F.4th 311, 317 (5th Cir. 2024).

Opinion

Question 1: The Supreme Court of Texas began by highlighting a point it has made time and again—"[m]inerals that have already been processed or transported are generally more valuable than the same minerals taken straight from the ground." *Carl*, -- S.W.3d --, 2024 WL2226931, at *1. Accordingly, where a lease provides for royalty to be valued "at the well," the lessor would receive a windfall if paid royalty based on a downstream sales price without accounting for postproduction costs. *Id.* The Court emphasized that the workback method accounts for this disparity between the value of gas "at the well" and at a downstream sales point. *Id.*

The Court next determined that Hilcorp had properly accounted for the value of the gas used off-lease by subtracting that volume from "the total volume of gas on which it calculated the royalty." *Id.* at *2. The Court found "no fault" with such a method, explaining that the "'sold or used off the [leased] premises'" language "does not alter [Carl's] obligation to bear the 'usual share of postproduction costs' as the holder of an 'at-the-well' royalty." *Id.*

Finally, the Court clarified that *Randle* had no "particular impact on the outcome" of the case because it involved a gross-proceeds lease with anti-deduction language, not a market-value-at-the-well lease, and "amounted to a distraction from the real issue between these parties, which is post-production costs." *Id.* at *3. However, the Court did note that *Randle* "reiterates the longstanding

rule that an ‘at-the-well’ royalty ‘bears its usual share of postproduction costs.’” *Id.* In summary, the Court answered “Yes” to the first certified question. *Id.*

Question 2: single paragraph, the Court declined to definitively answer the second certified question, explaining that “[t]he parties appear to agree that the question is primarily one of accounting and that it does not impact their legal rights[.]” *Id.* at *4. The accounting methods at issue are best demonstrated through an example. Assume a lessee produces 100 mcf of gas, uses 20 mcf of gas in postproduction activities, and then sells 80 mcf of gas at a downstream location. Under the first method, the lessee adjusts the volume included in its netback calculation to account for the 20 mcf of used gas. Under the second method, the lessee includes the value of the 20 mcf of used gas as a postproduction cost in its netback calculation. In *Carl*, the Supreme Court of Texas concluded that these two accounting methods would yield the same royalty payment and declined to offer further thoughts on the issue. *Id.* The Court expressed no preference for any particular method of royalty accounting, so long as it “results in [Carl] being paid what he is lawfully owed.” *Id.*

Takeaway

The Supreme Court of Texas confirmed that a royalty owner with a market-value-at-the-well lease must bear its share of all postproduction costs, including the value of gas used for off-lease postproduction activities. The Court expressed no preference as to the accounting method used to calculate royalty in this context.

U.S. Ninth Circuit Orders Dismissal of Case Seeking "Phaseout of Fossil Fuels"

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In 2015, twenty-one plaintiffs sued the United States of America in a federal district court in Eugene, Oregon, claiming to represent "future generations." They asked the court to formulate and impose upon the country a "national remedial plan" to "restore the Earth's energy balance" and stabilize the climate. They based this lawsuit on an assortment of legal theories, including a purported substantive due process right to particular climate conditions and a purported equal protection right to live under the same climate as prior generations. The plaintiffs specifically asked that the court order a phaseout of fossil fuels. Some people dubbed this litigation "the Children's Climate Case."

The United States moved to dismiss, arguing that the plaintiffs lacked standing to bring such claims. The district court denied that motion, but the United States Ninth Circuit Court of Appeals reversed, concluding that the relief sought by the plaintiffs was outside the authority of the federal courts and that the plaintiffs lacked standing to bring claims for such relief. The appellate court stated: "For the reasons above, we reverse the certified orders of the district court and remand this case to the district court with instructions to dismiss for lack of Article III standing." *Juliana v. United States*, 974 F.3d 1159, 1175 (9th Cir. 2020).

After remand, the district court, which clearly sympathized with the plaintiffs, defied the appellate court's mandate and refused to dismiss, even after the United States filed pleadings requesting a dismissal and noting that the district court's failure to dismiss was a violation of the Ninth Circuit's mandate. The district court still refused to dismiss, asserting two arguments by which it attempted to justify its refusal to dismiss the plaintiffs' claims. First, the district court stated that the Ninth Circuit's order had not expressly prohibited the district court from allowing the plaintiffs to amend their petition. Second, the district court argued that its refusal to dismiss was justified by a change in the law. In response, the defendants sought a writ of mandamus from the Ninth Circuit, again ordering the district court to dismiss.

The Ninth Circuit made short work of the two arguments by which the district court sought to justify its refusal to dismiss. *United States v. United States District Court for the District of Oregon, Eugene*, No. 24-684 (05/01/2024) (U.S. 9th Cir.). The appellate court first addressed the district court's contention that the appellate court had not expressly prohibited the district court from allowing the plaintiffs to amend their petition. The Ninth Circuit responded in a single short paragraph, stating: "The first reason fails because we 'remand[ed] … with instructions to dismiss for Article III standing.' Neither the mandate's letter nor its spirit left room for amendment." (internal citations omitted from quote).

The Ninth Circuit then disposed of the district court's second argument—again, in a single paragraph. The district court's second argument was that there had been a change in the law relating to the "redressability" analysis used in evaluating Article III standing. The Ninth Circuit acknowledged that a district court is not bound by an appellate court's mandate when a subsequently decided case makes a change in the law on which the mandate was based. The problem here was that the district court pointed to a change in the law that had no relevance to Ninth Circuit's mandate. The district court pointed to a change in the legal standard for evaluating Article III standing when a plaintiff seeks an award of nominal damages for past harms. Here, the plaintiffs were not seeking any damages—nominal or otherwise. Instead, they sought only prospective relief in the form of a declaratory judgment and an injunction.

Accordingly, the Ninth Circuit granted the petition for mandamus, stating: "The district court is instructed to dismiss the case forthwith for lack of Article III standing, without leave to amend."

Oil & Gas E-Report
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OIL & GAS E-REPORT

Issue 2 June 2024