

Can Consent Be Withheld Arbitrarily in the Oil Patch?

Energy Law, Farmouts, Mineral Leases / December 10, 2018 / Thomas G. Ciarlane Jr.

The Texas Supreme Court heard oral arguments last week in a case that has the potential to alter the landscape of the industry. In *Barrow-Shaver Resources Co. v. Carrizo Oil & Gas Inc.*, the parties had entered into a farmout agreement that gave BSR the opportunity to earn mineral acreage from Carrizo upon drilling wells that produce in paying quantities. BSR, in turn, sought to assign its rights under the agreement to a third party, Raptor Petroleum.

Carrizo withheld consent for the assignment, however, and—according to BSR—had no reasonable basis for doing so. Indeed, BSR went so far as to accuse Carrizo of extortion, inasmuch as Carrizo allegedly demanded a \$5 million payment in exchange for its consent.

In draft form, the parties' agreement included the following provision:

The rights provided to BSR under this Letter Agreement may not be assigned, subleased or otherwise transferred in whole or in part, without the express written consent of Carrizo, **which consent shall not be unreasonably withheld.**

In its final form, however, the agreement was revised to delete the emphasized language. According to Carrizo, by striking this clause, the parties understood that Carrizo could withhold consent for any reason or, for that matter, for no reason at all.

The Tyler Court of Appeals agreed with Carrizo. In point of fact, the majority opinion took the position that the farmout agreement vested Carrizo with the right to withhold its consent "arbitrarily." Quoting *Black's Law Dictionary*, BSR's briefing explains that, if the Court of Appeals is correct, Carrizo would be within its rights to withhold its consent out of "spite, malice, whim, prejudice, or anything else with no regard for facts, circumstances, fixed rules, or procedures."

Industry participants will want to monitor the outcome of this case. Regardless of the final result on appeal, drafters may want to pay closer attention to assignment clauses, which are often glossed over as boilerplate. Bespoke contract language that specifically defines the circumstances under which consent can be withheld (or that explicitly provides that it can be withheld for any reason or no reason at all) is one option to consider.

The full SCOTX docket, with links to the parties' briefs, is available [here](#).

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