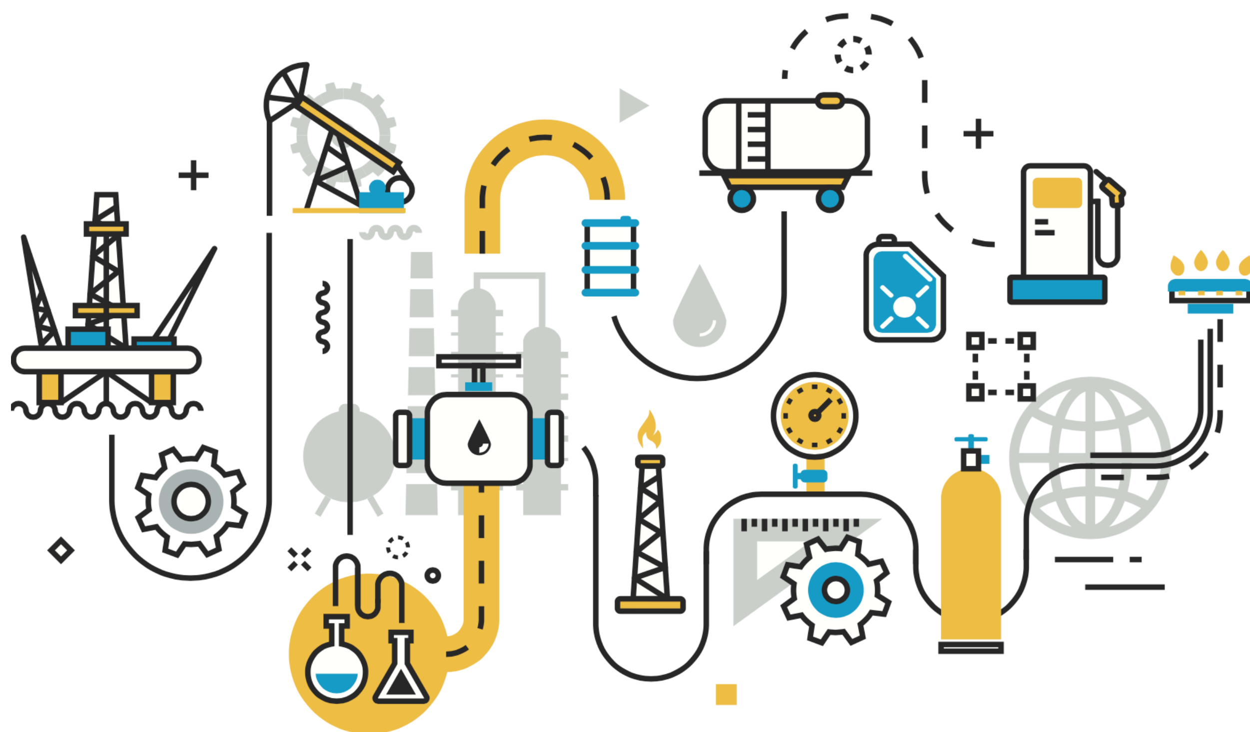
KANE RUSSELL COLEMAN LOGAN | 25 YEARS



Oil & Gas Law 2017 Midyear Update

Thomas G. Ciarlone, Jr.
Energy Practice Group Leader

tciarlone@krcl.com
(713) 425-7428

Table of Contents

Eminent Domain and Pipelines: Denbury v. Texas Rice Land Partners 1

Horizontal Drilling Across Neighboring Tract Not Trespass,
Says Texas Supreme Court 3

Texas Supreme Court Upholds Validity of County-Wide Mineral Deeds 5

Texas Supreme Court Upends Traditional Rules of
Construction for Mineral Deeds 6

Seeing Double: Operator Must Pay Royalties
To Multiple Units, Says Texas Supreme Court 9

Texas Supreme Court: A High Bar for O&G Noise and Pollution Complaints 11

Drilling on Federal Lands: Department of Interior
Issues Order to Curb Delays 13

Class Action Certification In the Oil Patch:
Red Herrings Often Abound 15

Overtime Claims in the Oil Patch 18

The Texas Railroad Commission Will Not Ride Off Into The Sunset 20

Trump Executive Orders Target the Expansion
of Drilling–Onshore and Off 22

Eminent Domain and Pipelines:
Denbury v. Texas Rice Land Partners

Here, the Texas Supreme Court clarified the standards under which a pipeline company can qualify as a common carrier for purposes of exercising eminent domain powers to seize private property to build a gas pipeline.

Historically, a pipeline would qualify as a common carrier simply by self-identifying on a Texas Railroad Commission form. That all changed in 2012, when the Texas Supreme Court handed down an opinion involving a Denbury Resources affiliate and a landowner defendant, Texas Riceland Partners. At that time, the Court held that "unadorned assertions of public use are constitutionally insufficient"; so, for example, the Court explained that merely registering as a common carrier does not conclusively convey the extraordinary power of eminent domain.

The complicating factor with the 2012 decision was that the Court did not go so far as to articulate, affirmatively, the kind of conduct that would, in fact, allow a pipeline company to identify itself as a common carrier for purposes of condemnation.

Fast forward to 2017, and Denbury and Texas Riceland again found themselves in front of the Texas Supreme Court on the same issue. This time around, however, the Justices did articulate a positive test for the kind of evidence that would allow a pipeline to rise to the level of a common carrier for purposes of exercising eminent domain powers. In particular, the Court concluded that the essential hurdle is whether the pipeline can show that it would serve the public interest by transporting gas "for one or more customers who will either retain ownership of their own gas or sell it parties other than the carrier." It's important to note that

in its 2017 decision, the Texas Supreme Court was clear that a pipeline can make the required evidentiary showing after condemning private land and after constructing a gas pipeline. Put another way, the required showing of a public interest does not have to occur prior to the exercise of eminent domain powers, but can instead take place afterward—and this, self-evidently, is a very positive development for the industry.

The case is *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.*, No. 15-0225, in the Supreme Court of Texas.

Horizontal Drilling Across Neighboring Tract Not Trespass, Says Texas Supreme Court

In a case that had been closely watched in the oil-and-gas industry, the Texas Supreme Court decided whether drilling through a mineral estate—one which is not under lease by the driller—to access a reservoir beneath a bordering tract constitutes a form of trespass.

The operator in the case, Anadarko Petroleum, secured permission from the surface owner—of a tract adjacent to the company's leasehold—to spud a well and drill directionally into the mineral estate "next door." The owner of the mineral rights under the surface of the spud site, Lightning Oil, argued that Anadarko trespassed when it bored through Lightning's mineral estate.

The Texas high court affirmed decisions from the appellate and trial courts that had roundly rejected Lightning's claims. As the Texas Supreme Court sees it, the surface owner is presumptively the master of "the mass of earth undergirding the surface," and therefore it alone will usually have the authority to authorize this kind of subsurface activity.

The Court did acknowledge that the appropriate test is nevertheless fact intensive, involving a careful balancing of the competing interests of all the involved parties. The fundamental inquiry will be the extent to which the horizontal drilling will cause the unleased mineral owner to suffer a loss of oil and gas. In Lightning's case, only a "small amount of minerals [was] lost through that process," and, according to the justices, this is not enough to rise to the level of mineral trespass:

[*continued ...*]

> In that context, we have no doubt that individual interests in the oil and gas lost through being brought to the surface as part of drilling a well are outweighed by the interests of the industry as a whole and society in maximizing oil and gas recovery. That being so, we conclude that the loss of minerals Lightning will suffer by a well being drilled through its mineral estate is not a sufficient injury to support a claim for trespass. Accordingly, such a loss will not support injunctive relief.

Lightning also argued that, even if Anadarko's existing well had not caused it to suffer substantial harm, the operator's slate of proposed wells would prejudice Lightning's ability to produce its minerals in the future. This, according to Lightning, would result in precisely the kind of irreparable harm that would support the entry of an injunction against Anadarko. The Court was unimpressed with this argument because Lightning had adduced virtually no evidence of such harm; on this score, Justice Phil Johnson, writing for an undivided Court, was direct and to the point: "Speculation is not enough."

The case is *Lightning Oil Company v. Anadarko E&P Onshore, LLC*, No. 15-0910, in the Supreme Court of Texas.

Texas Supreme Court Upholds Validity of County-Wide Mineral Deeds

In this long-awaited opinion, the Supreme Court of Texas decided an appeal that challenged, as ambiguous, a mineral conveyance that had been made on a county-wide basis (in other words, a mineral deed providing for the transfer of all the seller's oil-and-gas interests in a specific county).

When the Court heard oral arguments in March, industry observers were concerned. After all, to the extent it were held that all-encompassing, county-wide conveyances are invalid as a matter of law, the floodgates would open and unleash a torrent of mineral title litigation. Indeed, as it was argued to the Texas Supreme Court earlier this year, if blunderbuss mineral conveyances are invalidated as ambiguous, we would expect to see small armies of landmen descend on courthouses across the state, all of them tasked to pour over deed records to isolate just these kinds of conveyances—and, then, to obtain mineral leases from those who might have claims to the minerals under the changed law. Naturally, this would wreak havoc on operators that spent millions of dollars developing big plays, only to be confronted with the possibility that entire mineral leaseholds are invalid.

Mercifully, the Texas Supreme Court reached the correct decision, and came to the common-sense conclusion that county-wide mineral deeds are valid and enforceable. Leaving no room for doubt, Chief Justice Nathan Hecht wrote that, on its face, a county-wide conveyance "could not be clearer." Justice Hecht then added, simply enough, that "all means all."

The case is *Davis v. Mueller*, No. 16-0155, in the Supreme Court of Texas.

Texas Supreme Court Upends Traditional Rules of Construction for Mineral Deeds

A deeply divided Texas Supreme Court—in a surprising turn of events—disturbed long-standing rules for interpreting mineral conveyances in its 5-4 decision in *Wenske v. Ealy*. There, when the Wenskes bought property in Lavaca County in 1998, the sellers kept for themselves a 1/4th non-participating royalty interest (the "NPRI"). Five years later, the Wenske family sold the land to the Ealys, by way of a deed expressly providing that the sale was "subject to" the following reservations and exceptions: the Wenskes' reservation of 3/8ths of the minerals; and, more critically, the NPRI.

Fast forward to 2013, shortly after the Wenske and Ealy families had signed mineral leases. It was then that this question arose: who's responsible for shouldering the NPRI? One would think the answer is self-evident—the Ealys, naturally, since they explicitly assumed the burden of the NPRI when, eyes wide open, they bought the land "subject to" this royalty.

Case closed, notch up another pre-ordained victory for the plain-language rule, right?

Wrong.

At the risk of oversimplifying the rationale for its decision, the Texas Supreme Court held that there was no clear expression by the parties of an intent that the "Ealys' interest ... be the *sole interest* subject to the NPRI." (Emphasis in original.)

Accordingly, the Court determined that the Wenske and Ealy families should share the burden of the NPRI, proportionately to their respective interests in the

underlying mineral estate: thus, the Wenskes would pay 3/8ths of the 25% NPRI, and the Ealys would pay the remaining 5/8ths.

As a practical matter, what the Court seems to be saying is that, if one wants the buyer to absorb the full brunt of an NPRI or another existing burden, it's not enough to state that the purchaser is taking the property "subject to" the NPRI. Rather, now, it appears that one would have to take the further step of enunciating that the buyer—*and the buyer alone*—is "subject to" the NPRI.

This additional gloss will come as a surprise to many, and it has the potential to open the floodgates to a large volume of new litigation challenging the allocations of royalty burdens among mineral lessors. On this score, Justice Jeff Boyd (in a dissent joined by Justices Willett, Lehrmann, and Devine) observed that the deed "expressly says that the interest granted to the Ealys is the only interest that is 'subject to' the exception" for the prior owners' NPRI. Justice Boyd then pointed to the chaos that could result from the majority's opinion marginalizing this obvious fact:

> When this court adopts a rule of interpretation, parties who draft agreements will reasonably rely on that rule when deciding how to express their intent. Our decisions can imbue words with "magic," and drafters rely on that talismanic power to create certainty in their instruments. We should therefore be loathe to change long-standing rules in the oil and gas field when doing so would alter the ownership of minerals conveyed in deeds which rely on the law established by this court and followed by lower courts, commentators and especially lawyers advising their clients.

The *Wenske* Court did hedge its bets, noting that "we do not hold that all conveyances of a fractional mineral interest subject to an outstanding NPRI will,

by default, result in the various fractional-interest owners being proportionately responsible for satisfying the NPRI." This is small solace, however. Indeed, the decision in *Wenske* will inject plenty of uncertainty into the mix, without providing the clarity of a bright-line rule of construction that would allow oil-and-gas companies to organize their affairs with confidence. If faced with similar circumstances, an operator in Texas might be wise to obtain stipulations of interest from all involved parties or, otherwise, to place in suspense the appropriate amounts until a court can decide which of the operator's lessors is responsible for the outstanding royalty interest.

Seeing Double: Operator Must Pay Royalties To Multiple Units, Says Texas Supreme Court

The Texas Supreme Court told a cautionary tale for operators with its unanimous opinion in *Samson Exploration LLC v. T.S. Reed Properties Inc.*, which addressed the circumstance in which a well is situated within not just one pooled unit, but instead within two overlapping units.

The operator, Samson Exploration, took it upon itself to pay royalties from the well to interest owners from one of the units, to the exclusion of the other. Unsurprisingly, the royalty owners from the second unit who had gone unpaid promptly balked, arguing that—although Samson may have struck a poor bargain by including a single well in multiple units—a deal is a deal, and so a sophisticated actor like Samson must sleep in the bed that it made.

The Texas Supreme Court, affirming a decision from the Ninth Court of Appeals in Beaumont, sided with the royalty owners.

Samson hung its hat on the principle of property law that title cannot be duplicatively conveyed. Taking this tenet, together with the rule that a pooled unit is invalid unless title is cross-conveyed, Samson reasoned that the second unit never even came into existence—thereby relieving it of any obligation to pay royalties.

Justice Guzman, writing for the undivided Court, did not mince words when, in response, she bluntly announced that "Samson's argument in this case is a theoretical construct that holds no water."

Elaborating, Justice Guzman emphasized that the strictures of property law do not alone control the issue. "Under the law in Texas, pooling implicates both contract and property law—authority to pool emanates from contract but pooling agreements give rise to interests in realty." Owing to this duality, the Supreme Court "discern[ed] no impediment to enforcing Samson's obligations in this case under a contract theory even if the pooling designation failed to effect a conveyance of title."

While the Court had already made itself abundantly clear, it drove its point even further home when it proceeded to invoke the words of a 1968 decision from the Fifth Circuit, *Howell v. Union Producing Co.*, 392 F.2d 95 (5th Cir. 1968):

> To argue that we must enforce only reasonable contracts or contracts which reasonable men enter into, mistakes our function. We can and do enforce unreasonable contracts if they be clear. Unreasonable men make reasonable contracts and reasonable men may make unreasonable contracts.

In short, the Court concluded, "[t]hough Samson bemoans the economic consequences of its actions, this is a circumstance of Samson's own making."

Texas Supreme Court: A High Bar for O&G Noise and Pollution Complaints

The Lone Star State's high court put the kibosh on a Texas municipality's bid to hold the operators of gas compressor stations liable for the ostensibly harmful impacts of noise and pollution. The crux of the Court's opinion is that the town was barred from proceeding under the applicable statute of limitations because it simply waited too long to sue.

The town in question is Clark, Texas, a tiny hamlet close to the State's northern border with Oklahoma. (Well, that's what the town used to be called for generations, at least; back in 2000, at a city council meeting attended by exactly a dozen residents, it was decided that the town would be renamed DISH, in exchange for ten years of free satellite television service from DISH Networks. The town–call it what you will–was also featured in the infamous and highly editorialized HBO documentary, *Gasland*.)

The town first got around to suing the operators of the compressor stations in 2011. Its cornucopia of claims variously included mental anguish, trespass, and diminished property value.

But here's the rub. The first round of complaints from DISH residents about pollution and noise from the compressor stations date all the way back to 2006, a full five years before the town put pen to paper to draft a petition. As the years went by, DISH residents petitioned the state to conduct tests, which came up empty, and also rattled its sabre often, threatening litigation, but never actually following through.

DISH's counterargument was that its residents were not fully tuned into the severity of the threat posed by the compressor stations until an environmental study was commissioned by the town in 2009. Additionally, residents fired back that the noise from the stations skyrocketed in 2009 and 2010, and that this material increase in volume should serve to reset the limitations period.

The problem with these arguments is that they rest almost exclusively on the conjecture of some seriously self-interested parties—the plaintiffs themselves. Here's what the state Supreme Court had to say in this regard: "[Texas law] does not stand for the proposition that mere subjective affidavit evidence can defeat a limitations defense." After all, "if that were the rule, a plaintiff's bare, subjective assertions could always set the accrual date."

The town relied, heavily but unsuccessfully, on a decades-old case, *Natural Gas Pipeline Co. of America v. Justiss*, where a municipality prevailed with noise and odor complaints notwithstanding that it did not initiate litigation until six years after the offending facility had gone into operation. But in *Justiss*, the town had actually come forth with objective, third-party proof that the complained-of conditions had become much more severe during the two years leading up to the lawsuit. The Town of DISH, by contrast, had offered up nothing but its own self-serving affidavits, and to credit those without more would effectively be to eviscerate the statute of limitations.

The case is *Town of DISH v. Atmos Energy*, No. 15-0613, in the Supreme Court of Texas.

Drilling on Federal Lands: Department of Interior Issues Order to Curb Delays

In July, Secretary of the Interior, Ryan Zinke, signed an order that seeks to tamp down on delays in the permitting of federal land for oil-and-gas exploration and production activities. As of January 31st of this year, there was a backlog of over 2,800 applications for drilling permits on federal leases. In a telephonic press conference, Secretary Zinke did not mince words when he noted that "there's a reason why our energy revolution from 2008 forward has been primarily on private lands and state lands, and not federal lands—we have been particularly, I think, punitive in some ways."

Some highlights from the DOI's order include:

- Reviews of applications for drilling permits now must be completed within 30 days. Last year, by contrast, the average processing time was a staggering 257 days.
- The Bureau of Land Management will, going forward, be required to conduct quarterly lease sales.
- The preparation of a status report by Department staff, due to the Secretary's office within 45 days, that will include an action plan "for improv[ing] the Federal onshore oil and gas leasing program."

The decision to cut through delays and other red tape was of course greeted with enthusiasm from the industry. Echoing those sentiments was Congressman Rob Bishop, the Chairman of the House Committee on Natural Resources, who emphasized that the Republican-controlled House would support Secretary Zinke's initiatives with new laws, if that's what it takes:

> Secretary Zinke's commitment to foster regulatory certainty and unleash our energy potential is a welcome shift in priorities at Interior. We will be working in close coordination with the Secretary to provide the Department with the statutory tools to ensure that responsible energy development on federal lands is no longer held hostage to intransigent bureaucracy and ludicrous permitting delays.

Unsurprisingly, the DOI's aggressive measures were met with venom from environmental activist groups. Nada Culver, for example, the senior policy director at the Wilderness Society, has been quoted as saying that "[t]he oil and gas industry has been sitting on thousands of approved permits on their millions of acres of leased land for years now. The real problem here is this administration's obsession with selling out more of our public lands to the oil and gas industry at the expense of the American people."

Before we all get too excited, however, don't look for all of these (long overdue) changes to arrive immediately. As Secretary Zinke himself cautioned on the heels of the DOI's press release announcing the new order: "This is not going to be done overnight."

Class Action Certification In the Oil Patch: Red Herrings Often Abound

Increasingly, class actions are—for all intents and purposes—won or lost at the certification stage. After all, if a class is certified, especially under the heightened standards for class treatment that have been articulated by the United States Supreme Court in recent years, the exposure for defendants in the vast majority of cases is simply too great to risk a jury trial on the merits. This is, of course, why lucrative settlements often follow so closely on the heels of successful motions for class certification.

By and large, class certification motions will rise or fall based on whether the representative plaintiffs can demonstrate "commonality" to the trial court's satisfaction. At the risk of oversimplifying what can sometimes be a highly nuanced concept, commonality exists when there is a critical mass of factual and legal issues that are generally constant across the entire class. Commonality is closely related to, and often confused with, the further requirement of "predominance," which turns on this slightly different question: even assuming there is a nucleus of common questions of law and fact shared by most class members, do they sufficiently outweigh the factual and legal wrinkles that are unique to individual members of the class? Both commonality and predominance are codified in Rule 23 of the Federal Rules of Civil Procedure and, without exception, in all of its state-law equivalents.

All of these dynamics were recently on display when, according to an appeal filed by Devon Energy in the Fifth Circuit (*Seeligson v. Devon Energy Production LP*, No. 17-10320), a Texas federal judge ran afoul of the commonality and predominance requirements by certifying a class of natural gas royalty owners who alleged that the company had for many years shortchanged them on royalty

payments by failing to obtain the best available market prices for their gas. According to Devon's appeal brief, "if it is allowed to stand, the certification order will compel [Devon] to face the fundamental unfairness of attempting to defend thousands of disparate individual claims in a single trial."

On the surface, at least to a casual observer, it looked as though the trial court had done what it was obligated to do under the Supreme Court's seminal decision in *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338 (2011). Namely, District Judge Edward Kinkeade determined that the putative class representatives had isolated no fewer than two questions of classwide applicability. The problem, however, as was aptly observed by the Texas Oil and Gas Association in an amicus curiae brief, was that the court stopped its analysis too soon. In particular, it did "not take the additional step of comparing those classwide questions to the method by which, under Texas law, plaintiffs must prove breach of an implied covenant to market."

Put another way, even crediting that the questions identified by the plaintiffs have classwide applicability, the answers to the questions would not nearly dispose of the class claims. The questions—however "common" they might be—are ultimately red herrings that do nothing to meaningfully advance the plaintiffs' burden of proof. Identifying a similar flaw in logic in another royalty underpayment case, the Fourth Circuit Court of Appeals, in *EQT Prod. Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014), reprimanded "the district court [for] plac[ing] an inordinate emphasis on the sheer number of uniform practices without considering whether those practices are relevant to assessing the defendants' ultimate liability." *Id.* at 366.

The TXOGA's amicus brief perhaps put it best when it explained that:

> In short, it is abundantly clear Rule 23 requires putative class representatives to do more than propose a classwide common question. They must also show that, under the applicable substantive law, the answer to that question will further their

> burden of proof. Because their common questions are irrelevant to their burden of proof under Texas law, the [class representatives] failed to meet this burden.

The lesson learned here should be obvious: before engaging in a debate over whether a fact or a legal principle is “common” to the class, or whether it “predominates” over individual issues, be sure to first ask these fundamental threshold questions: “So what? Why do we care? Does this even matter?” If the answer is no, the class representatives need to move on to greener pastures, if there are any. As obvious as this may seem, it is surprising just how often capable defense counsel allow themselves to get drawn into commonality and predominance arguments about matters that are, in the final analysis, either irrelevant or ancillary to the core matters with respect to which the plaintiffs bear the burden of proof.

Overtime Claims in the Oil Patch

Overtime claims brought under the Fair Labor Standards Act are rapidly becoming one of the biggest litigation headaches for oil and gas companies and oilfield service companies. In a victory for the industry earlier this year, Cameron International succeeded in getting a putative FLSA class action thrown out of a San Antonio federal court—based on the simple theory that the named plaintiff was never actually employed by the company.

The plaintiff, Jeremy Gardea, alleged that he had worked for Cameron as a flowback operator during a three-month period in 2014. Gardea took the position that Cameron had run afoul of the FLSA to the extent it misclassified flowback operators as salaried (and therefore exempt) employees, despite the fact that he was “a classic blue-collar worker,” according to the complaint.

Cameron, for its part, was baffled: it couldn’t find a trace of Gardea’s employment in its own files and asked the Court to bounce the case on this basis.

Former Chief Judge Fred Biery signed off on the report and recommendation from his magistrate judge that determined that the plaintiff failed to establish that he was, at any point, a direct employee of Cameron, since he was hired on by, and paid by, a third-party contractor, an individual named Bill Smith. This is, of course, a common theme in the oil patch—the complex web of employees, independent contractors, and people who fall into troublesome gray areas.

According to the magistrate’s report, “Cameron’s director of human resources searched the company’s employment records using plaintiff’s name and social security number but was unable to locate any record of plaintiff ever being employed.” The magistrate judge concluded that, “[v]iewing the evidence in a light

most favorable to plaintiff, there is insufficient evidence to establish a genuine dispute with regard to whether plaintiff was in fact employed by defendant."

Gardea had argued otherwise, namely, that—regardless of his technical employment status—Cameron worked in concert with Smith to recruit and train employees, who were then "held out as defendant's employees to defendant's customers." The plaintiff also claimed that Smith informed him he would be working for Cameron, and, additionally, the plaintiff pointed out that he trained for close to a month at a Cameron facility in West Texas.

The magistrate judge was not persuaded. He determined that "Plaintiff has not presented any credible facts to establish a joint employer relationship between Bill Smith and Cameron. He claims that the money paid to him by Smith was supplied by Cameron, but he presents no evidence to support this claim."

Given the frequent use by industry participants of independent contractors, staffing services, and other third-party labor arrangements, this decision in *Gardea* is a good one to keep in your back pocket, for the rainy day on which you might find yourself in ensnared in an FLSA suit brought by a non-employee in search of a deep pocket.

The case is *Gardea v. Cameron International Corp.*, No. 5:16-CV-00904, in the U.S. District Court for the Western District of Texas.

The Texas Railroad Commission Will Not Ride Off Into The Sunset

In Texas, all state agencies effectively have an "expiration date": each is periodically abolished, by operation of law, unless the Legislature passes a bill to extend its existence. Established in 1977, the Texas Sunset Advisory Commission evaluates agencies and issues recommendations to lawmakers. According to the agency's website, "Sunset answers a basic question for the Texas Legislature: Are an agency's functions needed, and if so, how can the agency work better and save money for Texans?"

The Texas Railroad Commission—the regulatory body that oversees the oil-and-gas industry—has been closely scrutinized by Sunset staff in three separate investigatory cycles over the last year. The agency recommended a host of sweeping of changes for the RRC, but earlier this year the Texas Senate dismissed the overwhelming majority of them when it passed House Bill 1818, which had previously been approved by vote of the House. The bill, which would extend the RRC's mandate through 2029, will become law unless the Governor affirmatively vetoes it.

Among the amendments recommended by Sunset staffers was to dub the RRC, rather antiseptically, the "Texas Energy Resources Commission." Activist groups have been advocating for the branding reboot for ages, on the theory that the name—admittedly an artifact of vintage agency duties—leaves people scratching their heads and, if you credit the conspiracy theorists, equips the Railroad Commission to operate surreptitiously in the shadows.

The name change was roundly rejected by the Legislature, in a move that was applauded by those in the oil-and-gas business. The Railroad Commission has deep

roots in the Lone Star State, having operated here continuously under the same name for over 125 years. The notion that bureaucrats would disrupt a long-standing tradition did not sit well with many industry insiders.

Another perennial attack leveled at the RRC is that the three elected commissioners who run the agency fill their campaign coffers with money from the same companies they regulate. According to the estimates of some industry watchdogs, approximately sixty percent of the campaign funds raised by RRC commissioners can be traced to the energy sector. To the chagrin of the Sierra Club, House Bill 1818 does nothing to address this dynamic.

All of this is not to suggest that the legislation is entirety bereft of new initiatives. Among other things, the bill provides for:

- a Monitoring and Enforcement Strategic Plan for the RRC's Oil and Gas Division (Section 81.066);
- the promulgation of an Alternative Dispute Resolution Policy (Section 81.065); and
- the imposition of Pipeline Safety and Regulatory Fees (Section 81.071).

Christi Craddick, the Railroad Commission's current chairman, had this to say about the bill's Senate approval in a public statement:

> Passage of the Railroad Commission's Sunset review legislation has come at a critical time for the agency and energy industry. With Texas gearing up for another energy boom, certainty in regulation is critical for energy companies who now are making hiring and investment decisions in communities across the state.

Trump Executive Orders Target the Expansion of Drilling—Onshore and Off

In April, President Donald Trump signed an executive order putting into motion a review by the Department of the Interior of all national monuments established since 1996—on its surface a seemingly uneventful action, but the ultimate purpose of the order is predicted to be the opening of large swaths of currently protected public lands to drilling, as well as mining and logging activities. By way of example, in its waning days, the prior administration established the so-called "Bears Ears National Monument," thereby taking more than one million acres of land out of play for new energy development.

Under the Antiquities Act of 1906, the President has the power to anoint federal lands—of perceived scientific or historical significance—as "national monuments" and, then, to dictate how the lands can (and cannot) be used. As reported by the *New York Times*, some legal commentators question whether the Antiquities Act in fact empowers President Trump to put the kibosh on an existing designation of a national monument. Mark Squillace, a professor at the University of Colorado's law school who specializes in natural resources law, had this to say:

> The Antiquities Act language does not include any authority for presidents to rescind or modify a national monument created by predecessors. That authority is limited to Congress.

The counterpoint to Mr. Squillace and the many activist groups that share in his opinion, according to documents seen by Reuters, is that past administrations have vastly "overused" the Antiquities Act, thus bringing within its ambit massive chunks of land that were undeserving of protection under the law in the first instance.

Trump also signed a second executive order, which will place in its crosshairs existing prohibitions on offshore drilling in the Arctic and Atlantic Oceans, ones which had been instituted under the leadership of former President Barack Obama. The order will direct Ryan Zinke, Trump's Secretary of the Interior, to launch a study of Obama's across-the-board restriction of offshore drilling—at least through 2022—in those waters. The media also reported that the order will aim to roll back a permanent ban, which had been hurried into place by the Obama administration after the election, on drilling in both the Arctic and the Atlantic.

At this point, it is not entirely clear whether the President's executive orders will actually yield any meaningful change. But, as the *Washington Post* reported, if nothing else the measures signal to Trump's base that he is committed to reforms that facilitate energy independence and the aggressive expansion of domestic drilling programs:

> The whirlwind of activity this week seems aimed at demonstrating forward momentum from a young administration criticized for a lack of signature legislative achievements—a sense that doing something, anything, is better than the perception of stagnation.

With these and other executive orders that the President signed the same week, it amounted to a total of 32 in just his first 100 days. According to the White House, this is the most by any president since the Second World War.

KANE RUSSELL COLEMAN LOGAN

CONTACT:

Thomas G. Ciarlone, Jr.
Galleria Tower II
5051 Westheimer Road, 10th Floor
Houston, Texas 77056
tciarlone@krcl.com
Office: (713) 425-7428
Mobile: (210) 446-6999