



THE **Energy Dispatch**

A PUBLICATION OF THE
IEL YOUNG ENERGY
PROFESSIONALS' COMMITTEE

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Welcome to the Inaugural Issue

Dear YEPs,

We are thrilled to send you our first issue of The Energy Dispatch! In this issue, you'll find a member spotlight, substantive articles on trending legal issues in the energy industry and advice on building your network. We want to make The Energy Dispatch valuable to our members. To help us achieve that goal, we welcome your feedback and contributions. We will be on the hunt for newsworthy stories to include in our next edition of The Energy Dispatch. Let us know if you have a story to share. Special thanks and congratulations to all of our Energy Dispatch subcommittee members: Ashley Hallene, Brett Podkanowicz, Miles Indest, Liz Och, Lucas Liben, Erin Sullenger and Tod Everage!

All the best,
Liz Klingensmith
Young Energy Professionals Committee Chair

Interview with Laura Robertson

By: Liz Och, Hogan Lovells US LLP

Laura Robertson is the Deputy General Counsel, Litigation and Arbitration, for ConocoPhillips. She was promoted into this role in 2015 at just 40 years old. Laura manages the company's litigation and arbitration docket worldwide, which involves managing a team of 30 employees and a budget of \$35 million. Laura is also an Executive Committee Member of the Institute for Energy Law and was the Co-Chair of its 67th and 68th Annual Oil and Gas Law Conferences. I sat down with Laura to learn more about her view of the oil and gas industry and her advice for young lawyers in the field.

LO: How did you become interested in oil and gas law?

LR: I first became interested in oil and gas law while I was

in law school at the University of Texas. I took a variety of oil and gas classes in law school, and I knew that I enjoyed the field—I was one of those unique people who actually enjoyed Property class. My dad was a litigator, so I've had an interest in litigation since I was a little girl. Oil and gas litigation was a natural fit.

LO: Tell us about your path to in-house counsel.

LR: I began my career out of law school as an associate at King & Spalding in Houston. It was a relatively new office at that point, and we weren't broken out into practice areas, so I was able to work in litigation in all sorts of energy-related areas—environmental, royalty, antitrust, and really any kind of energy litigation that came through the door. In fact, my docket today in house looks a lot like my docket did right out of law school. I really enjoyed partnering with the business side of things, which caused me to consider going in house. I left King & Spalding in 2006 to take an in-house position at Chevron, and made the move to ConocoPhillips a year later. I've been at ConocoPhillips ever since.

LO: What's the biggest difference in your day-to-day life as in-house counsel versus working at a law firm? What have been the benefits and downsides?

LR: The biggest difference for in-house counsel is having only one client to serve. The law firm model is built around attorneys as profit centers, but as in-house counsel, you're a service provider for your client, not a profit center. I think anyone who goes from a law firm to in house will tell you that it is generally a much more intense business day—the goal is to get everything done between 8am and 5pm so you can go home. This causes me to be very tied to my calendar, and my day is typically booked solid in half-hour increments. Relatedly, the biggest benefit of being in-house, hands-down, is not being tied to the billable hour.

LO: What advice do you have for young lawyers who think they might want to go in-house?

LR: My biggest piece of advice for young lawyers, regardless of their career paths, is to be open to new opportunities. Anyone who has ever been successful will tell you that at some point in their career, an opportunity came up that they weren't expecting, and they took it. Often these are opportunities you never would have even considered, let alone planned for. When the opportunity to come to ConocoPhillips came up, it was not the best time for me personally, but I took a leap of faith and that got me to where I am today. That advice is equally applicable to attorneys in law firms, or really wherever you are in your career. Be open-minded when something comes across

your desk that is a new and exciting opportunity. It can really make a difference in a way you can never anticipate.

LO: What traits do you look for in your outside counsel?

LR: In selecting outside counsel, we look for smart lawyers who are skilled in the area of law that we need but whom we also enjoy being around and partnering with. We use outside counsel when we need specific expertise and don't have the resources to develop internal expertise in every area of the law. We don't handle litigation internally, so we hire counsel that is licensed in whatever jurisdiction we are being sued in. We also have a strong focus on having a partnership with our outside counsel—we are heavily involved in case strategy, case development, and internal witness preparation. We look for outside lawyers who respect that, and respect that we are partners, but that at the end of the day, ConocoPhillips owns the case. The lawyers I enjoy working with the most are ones who enjoy that partnership and appreciate our input. It sounds obvious, but we also like lawyers who we like to work with. And of course, we value efficiency in our outside counsel.

LO: What advice do you have for young lawyers working with in-house counsel?

LR: It's said a lot, but no surprises! Make sure you communicate regularly with inside counsel so that the client knows what you are doing and why you are doing it. Never forget who actually owns the matter. The biggest mistake I see, especially with young lawyers, is not understanding that you work for the client—they don't work for you.

LO: What do you see as the biggest challenge and the biggest opportunity facing the energy industry today?

LR: I think the greatest challenge for the industry is dealing with the sustained lower commodity prices. It is unusual that it has gone on for as long as it has. The concern is that there is a systematic change in supply and demand for energy. The industry needs to be nimble in addressing this, which also necessarily involves addressing concerns about climate change and addressing the desire for alternative energy sources.

On the other hand, what can be exciting about the energy industry today are the technological advances that make the cost of supply cheaper. This allows us to be nimble and turn a profit at a lower price than before.

LO: What would you say is the importance in being involved in the Institute for Energy Law?

LR: I find it extraordinarily beneficial to be part of IEL because of the networking and invaluable knowledge sharing amongst leaders in energy law.

YEP Member Highlight

By: Miles Indest, Haynes and Boone, LLP

Christopher M. Hogan (Bio)
Partner at Reynolds Frizzell LLP

Hobbies:

- Watching the Pittsburgh Steelers
- Exploring parks and playgrounds around Houston with my kids
- Hiking
- Shotgun shooting



Notable Achievement this Past Year:

First-chaired and prevailed in a jury trial, securing a favorable jury verdict on breach of contract and breach of fiduciary duty, and a dismissal of all counterclaims.

Advice for other young lawyers:

“To succeed as a commercial litigator, you need to know more than just the applicable law. You also need to understand each client's business and industry. Having that foundational knowledge will help you to make the right strategic decisions for your clients when the time comes.”

Step Up Your Networking Game

Tools to get the most out of your next conference

By: Ashley Hallene, Alta Mesa Holdings, LP

If you are reading this article, you have probably been there before. You found yourself in an oversized conference room, hoping you are positioned close enough to the exits so you can come and go unnoticed. Whether you are there for CLE, an update on case law and legislation, or to get face time with other established leaders in your field, there are ways to get more out the conferences you attend, even if you consider yourself an introvert and dread social interaction. Here are a few ideas to get you started down the road to becoming a power player at these events. Many of these ideas can apply at networking social events as well.



Image by FotografieLink via pixabay (copyright free)

Step One: Be on the Lookout for Pre-Conference Events.

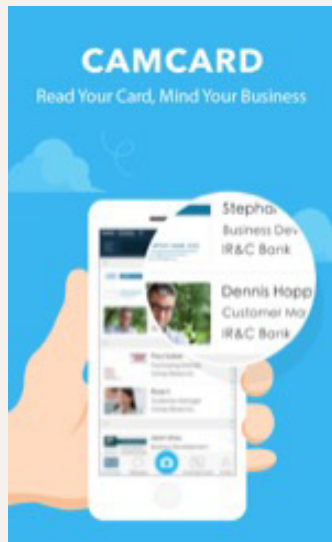
Many conferences will schedule events either the day or the evening before they start, often for new attendees or a specific subset of the attendees specializing in a certain area. The events often have a smaller audience, giving you a better chance to stand out. The attendees also have something in common with you, either being new to the conference or maybe the field in general, or they have an interest in the specialized area you are interested in, and they are looking to build new relationships. For new attendee events, often the hosts will have experienced members or attendees there to welcome you, answer questions, and offer ideas or direction.

Step Two: If They Make a List, Check it Twice.

Many conferences will have an attendee list available a week or so before the conference. If you can get your hands on this, look it over. The names will be fresh in your mind while you are there. Also, if there are a few specific connections you would like to make, you can try reaching out ahead of the conference to pre-introduce yourself and schedule a time to meet up, maybe for coffee before the conference starts, or during one of the luncheons. You may also see names you recognize. Conferences are also a great opportunity to catch up and further your existing relationships.

Step Three: Play Your Business Cards Right.

Make sure the information on your business card is up to date and that you bring plenty of cards with you. After your conversation, jot down a note or two on the card to jog your memory later. The real question lies in what do you do with the cards you collect at the conference. The easiest way to turn business cards into contacts is with a business card scanning app on your phone. If you do not already have one, check out CamCard by INTSIG



Information Co. Ltd. This app can capture and transcribe business cards on iPhone or Android smartphones, allowing you to save the information to your contacts. You can export contacts as .VCF files and send to your Outlook to download and save. You can add memos and notes to the contact (such as the ones you would normally write on the back of the card), share the

contact with others via email or text message, or call the contact directly from within the app. All of these features on a free app make CamCard an excellent choice to try for your next event.

Step Four: Connect with the Speakers

The speakers and panelists at a conference are likely to be experts in your field, and good people for you to get to know. If you have questions, do not be afraid to ask them, or hang around after the session to say hello, tell them what you liked about the presentation and grab their business card. If you do not get a chance to ask your question in person, you can always send a follow-up email.

Step Five: Follow-up

It is best to follow-up within a week after the conference. Often these conferences are held on a Thursday and Friday, giving you the weekend to forget who you met and why you wanted to connect. Add the chaos of going back to the office on Monday and it is easy to see how these connections go cold before you have the opportunity to take advantage of them. Take an hour on Sunday or maybe during your lunch break Monday to email a short note to the contacts you made at the conference, letting them know you enjoyed meeting them, and reference the conversation if something stood out about it (perhaps you discussed sports or alma maters or a particular industry issue.) This is where your quick notes from earlier will come in handy. You can also use this opportunity to schedule a phone call or face to face meeting if you have a specific business project to discuss further.

Keep these ideas in mind the next time you head to a conference and you will likely find it to be an even more fulfilling and beneficial experience.

Finding Value in Mistakes When the Value is Not Immediately Apparent: Adding Arrows to Your Quiver

By: Brett Podkanowicz, EnCore Permian

I recently had the unpleasant task of informing our team that, due to an inexcusable and incompetent mistake for which I was solely responsible dating back almost a year, a property that we had acquired around that time was effectively half of what we thought it was (i.e., we paid double) because of the information prepared only by me and relied upon by my superiors. There will likely be material ramifications, both in terms of excess money paid for the property, as well as my colleagues having to drop what they're doing to try to salvage things on the asset going forward in light of my mistake. Being that I am someone who takes his work and

profession quite seriously (probably too seriously, to some), it's a pretty jarring precept to come up against: *your error singlehandedly cost your colleagues and your company significant time and money.*

I've just completed Ray Dalio's new book [Principles](#) (which I highly recommend to anyone reading), and he spends some time in the section titled "Work Principles" discussing the value of making mistakes, and then learning from them. In his lead-in to Work Principle #3, "Create a Culture in Which It is Okay to Make Mistakes and Unacceptable Not to Learn From Them," he writes:

Everyone makes mistakes. The main difference is that successful people learn from them and unsuccessful people don't. By creating an environment in which it is okay to safely make mistakes so that people can learn from them, you'll see rapid progress and fewer significant mistakes... [I]f you look back on yourself a year ago and aren't shocked by how stupid you were, you haven't learned much.

A prior manager of mine a few years ago told me something that I'd not heard before but, upon reflection, I couldn't really disagree with - he said something to the effect of "the thing I like about you is that you rarely make the same mistake twice." This probably makes sense for someone like me who is borderline neurotic about learning from my mistakes, and even the mistakes of others, mainly out of a fear of failure, fear of losing my job, and even the fear of having the confidence I have in myself and that others have in me partially or totally negated. I can point to specific situations in my career where I did a particular thing wrong, analyzed what caused the error, and took care to implement steps to prevent the same error going forward - the analogy I prefer is that another arrow was added to my quiver.

However, in considering the aftermath several days later of how the error I referenced at the start of this writing affected myself, my team, and the company, the most difficult part to deal with in this particular instance is that I can't yet seem to distill a good guiding principle to take with me going forward; I can't yet grasp what arrow has now been put into my quiver. Usually mistakes are a bit more granular in nature, so it's easy to say "do X next time" or "don't do X next time," but in this instance all I've been able to arrive at is a general self-admonishment of "be more careful;" a hardly satisfying lesson when you do want to make each mistake count going forward. It so happens that the particular mistake I made was performing a function that I rarely perform anymore (though I did for some time beforehand), so the granular lesson is seemingly less applicable. Learning to deal with our company's rapid growth and expansion has, at times,

felt like drinking from a firehose. It's probably safe to say we have collectively made many small errors or mistakes that cost smaller amounts of money, or maybe cause redundancy and/or duplication of efforts. But such a large mistake coupled with such a generic principle with which to take away is profoundly unsatisfying to me. Perhaps the arrow will show itself at a later point once some time has passed.

It's gratifying to work with people who have instilled a company culture of being forthright and upfront in a professional and ethical environment. It was profoundly deflating realizing how poorly I erred (and I am still working through that); but, given that our culture is one of transparency and honesty, I always knew it would be far better to head off the situation and preempt the matter as opposed to quietly sitting on it and allowing the problem to fester. This seems to be the best way to run a team with regard to "failing well" - a work environment where someone gets excoriated for any mistake will lead to mistakes being swept under the rug rather than brought out to the open, leading to more problems and pain. To the credit of my colleagues, they've jumped in immediately to try to find the best workable solution in light of my mistake rather than casting blame or pointing fingers, although I certainly deserve plenty of both.

And now, if you please, this crow is getting cold...

Eyes on the Bayou: The Future of Offshore Regulation Begins in Louisiana

By Tod J. Everage, Kean Miller LLP

Federal regulators are not only facing challenges in Washington but offshore as well. In 2017, the Bureau of Safety and Environmental Enforcement (BSEE) – the federal agency tasked with enforcing offshore safety – has been under attack for regulatory overstepping. And, with the current administration's distaste for expanded regulations, there may be little relief for BSEE in sight. As those who practice and/or operate in the Gulf Coast region may already know, BSEE suffered considerable and important losses in several cases heard in Louisiana federal district courts last year. And now, contractors should be focused on the U.S. Fifth Circuit and the newly-minted BSEE Director, Scott Angelle, a former Secretary of the Louisiana Dept. of Natural Resources. For offshore contractors, the effects of those cases may not be immediately felt, but lawyers who represent those contractors should take note of significantly broadened regulatory, criminal, and likely civil defenses available to their clients.

Historically, BSEE's predecessors – MMS and BOEMRE

– issued Incidents of Non-Compliance (INCs) only to oil and gas lease holders on the Outer Continental Shelf for accidents, spills, safety system deficiencies, and structural defects offshore. However, in a 2011 press release BSEE announced that it would begin issuing INC's to contractors working for the lessees and operators on the OCS; something they had not done in the past. This pronouncement came despite no change in the applicable statutory or regulatory language.

In Interim Policy Document (IPD) No. 12-07 (effective August 15, 2015), then BSEE Director Brian Salerno advised again that while BSEE's enforcement actions would continue to primarily focus on lessees and operators, BSEE's official policy would be to also issue INC's and civil penalties to contractors for serious violations of BSEE regulations. In instances where INCs were issued to a contractor, INCs would continue to also be issued to the lessee or operator. In 2016, Director Salerno issued a Bureau Interim Directive (BID) No. 2016-012N highlighting BSEE's re-focused National Enforcement Policy, citing to its "Enforcement and Compliance Continuum" that affirmed its dedication to enforcing its regulations on lessees and contractors alike.

BSEE (as with its predecessors) draws its regulatory authority from the Outer Continental Shelf Lands Act (OCSLA) (43 U.S.C. §§ 1331, et seq.). Under this statutory authority, regulations were implemented governing offshore safety and operations under 30 CFR §§ 250, et seq. (Part 250). Under the Obama Administration, BSEE and the EPA were encouraged not only to increase their regulatory oversight offshore, but also to work with federal law enforcement to begin charging offshore companies and personnel criminally for alleged violations of federal laws and regulations, including the Clean Water Act, OCSLA, and Part 250, among others. The aforementioned Enforcement and Compliance Continuum specifically mentioned BSEE's intention to report all willful misconduct or otherwise unlawful activity to the appropriate criminal law enforcement agency.

Since 2011, BSEE has issued a multitude of INCs to contractors and other non-leaseholders. Many of those contractors have cried foul and objected to this new policy. They argue that BSEE has overstepped its bounds and misinterpreted the existing law, and according to Louisiana federal courts, it appears they have a legitimate argument.

BSEE's self-awarded authority over contractors took hits in two recent cases in Louisiana. First, in 2016, the U.S. District Court for the Eastern District of Louisiana dismissed the criminal charges against the offshore contractor-defendants under Part 250 related to the 2012 explosion on Black Elk

Energy's WD-32 platform. See *U.S. v. Black Elk Energy Offshore Operations, et al.*, 2016 WL 1458925 (E.D. La. April 14, 2016). Therein, Judge Milazzo held that BSEE's definition of "You" as it is used throughout Part 250 did not include contractors, subcontractors or service providers. Thus, the government could not use Part 250 to impose any criminal sanctions on offshore contractors. Judge Milazzo expressly avoided commenting on any issues with BSEE's regulatory or civil enforcement authority. This marked the first reported challenge to and victory against BSEE's authority. The US Government appealed Judge Milazzo's ruling to the US Fifth Circuit.

On September 27, 2017, the US Fifth Circuit affirmed Judge Milazzo's ruling, agreeing that Part 250's definition of "You" did not include offshore contractors. See *U.S. v. Moss, et al.*, Case No. 16-30561 (5th Cir. Sept. 27, 2017). The Fifth Circuit panel was influenced also by the Government's sixty-year history of a "hands off" approach to contractors, which contradicted the policy arguments asserted by the Government. The decision of the US Fifth Circuit bars the US Government from further criminalizing the BSEE Regulations, at least as they pertain to any non-leaseholder off the coast of Texas, Louisiana, and Mississippi. The Court's sound reasoning will be difficult to overturn should the US Government appeal to the US Supreme Court, and an affirmation by the highest court would create controlling law nation-wide - something BSEE likely does not want.

In the second case, a contract operator – Island Operating – challenged INC's issued by BSEE through the administrative appeals process. Island Operating's gripe with BSEE was more expansive – BSEE had no regulatory authority whatsoever over offshore contractors. First, the Interior Board of Land Appeals affirmed BSEE's authority, relying heavily on IPD No. 12-07, mentioned above. Island Operating then appealed to the U.S. District Court for the Western District of Louisiana, where Judge Doherty disagreed. See *Island Operating Co. v. Jewell*, 2016 WL 7436665 (W.D. La. Dec. 23, 2016). After a trial on the briefs (including numerous amici briefs filed on behalf of industry groups), Judge Doherty issued a simple and well-reasoned decision falling back on OCSLA, the statute that empowers Part 250. Analyzing the statute rather than the regulations, Judge Doherty held that OCSLA simply "does not embrace contractors." This dealt a much stronger blow to BSEE, completely eroding its statutory authority to regulate offshore contractors. BSEE reacted almost immediately, sending letters to contractors who had pending INC's advising that they would be suspending further enforcement pending a resolution of these two cases. The US Government also appealed this case to the US Fifth Circuit,

which was later held in abeyance pending the Fifth Circuit's decision in the *U.S. v. Moss* case. Though the Court passed on the OCSLA argument at issue in *Island Operating Co. v. Jewell*, it is easy to expect that the Fifth Circuit will issue a similar ruling, further eroding BSEE's authority over contractors.

So, what does this all mean for the future of BSEE regulation offshore? Clearly, BSEE will need an act of Congress to amend the OCSLA to gain any authority over contractors. But, is that even feasible? With many offshore platforms utilizing contract labor, will BSEE feel the urge to push for regulatory authority to ensure it can govern those companies; or, will BSEE continue with its reform and allow the operators and lessees to self-regulate?

It seems obvious that offshore contractors should be governed to some extent, but it is no secret that President Trump has put regulatory reform at the forefront of his agenda. And, the Department of Interior is no exception. BSEE's website states that "Regulatory reform is a priority issue for the President and Secretary of Interior Ryan Zinke. As a 'we can do it all' agency, BSEE is taking a comprehensive look at our existing and planned regulations in order to reduce any unnecessary burden they place on American companies and American people." There are currently over 400 regulations under Part 250, including those focused on increasing offshore safety – which is a universally-common goal. According to Louisianaian and BSEE Director Angelle: "Regulatory reform doesn't mean relaxing safety standards." And, there is no real expectation that safety standards will actually relax as a result of these cases. Lease holders, who remain beholden to BSEE and Part 250, have not only a legal obligation, but a financial incentive to require their contractors to continue to adhere to those safety standards even in the absence of governmental oversight. Certainly, the recent rulings on Part 250 do not affect the continued application of SEMS II or Part 250 against lessees.

So, what does that mean for the future of offshore regulation of contractors? In terms of daily operations and internal policy or procedure changes, likely nothing. In terms of avoiding fines, criminal charges, and improving civil litigation defenses, likely much more. With external pressure being applied to BSEE from the court system and a new President, and with the Secretary of the Interior and BSEE Director working from the inside, the Louisiana federal courts and BSEE Director Angelle appear to have a starring role in the regulation (or de-regulation) of offshore contractors.

Constitutional Challenges to *Corban Flounder*: The Ohio High Court Decision Remains Intact One Year Later

By: Lucas Liben, Reed Smith LLP

One of the most watched decisions in Ohio oil and gas jurisprudence came down from the state's Supreme Court almost exactly a year ago, in *Corban v. Chesapeake Exploration, L.L.C.*, 76 N.E.3d 1089 (Oh. 2016). In the year since, there have been numerous constitutional challenges to Corban's rulings, none of which have been successful.

Corban – The Journey Begins

In *Corban*, the Supreme Court of Ohio addressed the Ohio Dormant Mineral Act ("ODMA"), a statute involving the potential reunification of a severed mineral estate with the surface estate, if certain events do not occur over a twenty (20) year period. The ODMA was passed in 1989 and amended in 2006. *Corban* addressed whether the 2006 version or the 1989 version applies to claims asserted after 2006 alleging that the rights to oil, gas, and other minerals automatically vested in the surface landholder prior to the 2006 amendments as a result of abandonment. Justice O'Donnell wrote the plurality opinion, holding that the use of the legislative language "deemed abandoned and vested," meant the Ohio legislature created a "conclusive presumption" establishing that a mineral rights holder abandoned a severed mineral interest if the 20 year statutory period passed without a saving event. Because the conclusive presumption of abandonment was an evidentiary device that applied to a quiet title action, the 1989 ODMA was found to not automatically transfer the mineral interest to the surface owner by operation of law. The plurality found, in analyzing the "sequential legislation" regarding the ODMA, that the legislature did not intend title to dormant mineral interests to pass automatically, outside the record chain of title. Instead, a surface holder seeking to claim a severed mineral interest under the 1989 ODMA needed to commence a quiet title action.

Next, reviewing the 2006 amendment, the court found that the amendment's notice and recording requirements did not violate the Retroactivity Clause of the Ohio Constitution. The court held that the statute did not eliminate a surface holder's right to abandoned mineral interests that accrued prior to the effective date of amendment, but only changed the method and procedure through which the right is recognized and protected. As a result, surface owners bringing claims after June 30, 2006 are required to follow the notice and recording procedures contained in the 2006 amendment.

Walker – A SCOTUS Challenge

Walker v. Shondrick-Nau, 74 N.E.3d 427 (Oh. 2016) was decided the same day as *Corban*. In *Walker* the Ohio court applied *Corban* and found that the 2006 amendments applied to the case, which had been filed after 2006. Under those amendments, the surface owner was prevented from declaring the rights abandoned because the mineral owner had filed a claim to preserve those rights. That claim operated as a “saving event,” preventing the reversion of the mineral interests. The surface owner attempted to challenge the Ohio court’s decision, but the Supreme Court of the United States denied the surface owner’s petition for certiorari. See *Walker v. Shondrick-Nau*, 137 S.Ct. 824 160475 (Mem) (2017). The basis for the certiorari petition, however, has been repeated by surface owners in post-*Corban* cases in federal and state court: a contention that the *Corban* decision deprived surface owners of “a vested property right in the accrued cause of action and conclusive presumption of mineral ownership under Ohio’s 1989 Dormant Mineral Act[.]” in violation of the Fourteenth Amendment to the United States Constitution.

Buell, Village of Jewett, and Hickman – Corban Remains Intact

In *Chesapeake Exploration, L.L.C., et al. v. Buell, et al.*, No. 2:12-cv-916 (S.D. Oh. May 4, 2017) the surface owners sought leave to amend their pleadings to “expressly assert” the “conclusive presumption” they alleged was granted to them by *Corban*. They also sought to request a declaratory judgment: (1) that the surface owners acquired a property right in the minerals, (2) that *Corban*, while for the first time recognizing these property rights, deprived the surface owners of those rights in violation of the Fourteenth Amendment of the United States Constitution, and (3) that the surface owners, if *Corban* is constitutional, are enabled to assert their “conclusive presumption” of ownership.

The court ruled that leave to amend should be denied as futile. Regarding the “conclusive presumption” of mineral ownership which the surface owners wished to “expressly assert,” Magistrate Judge Kemp stated that this request:

refers to a remark in the *Corban* decision that the 1989 DMA created a “conclusive presumption” that a mineral rights holder had abandoned a severed mineral interest if the 20-year statutory period passed without a saving event. However, [the surface owners’] reliance on that statement is misplaced because the court went on to reason that the conclusive presumption of abandonment was “only an evidentiary device that applied to litigation seeking to quiet title to a dormant mineral interest.”

Magistrate Judge Kemp held, because the surface owners

had not filed a quiet title action under the 1989 Act, that the “conclusive presumption” was irrelevant. The magistrate judge continued on to find that because the surface owners did not acquire – or lose – a substantive right, and because the United States Supreme Court had denied certiorari in *Walker*, there was no “plausible argument that the Ohio Supreme Court unconstitutionally deprived [the surface owners] of a right.”

Nearly identically to *Buell*, in *Village of Jewett v. North American Coal Royalty Co., et al.*, No. 2:14-cv-175 (S.D. Oh. June 8, 2017) the court once more faced a motion to amend to add claims that, as a result of *Corban*, the surface owners were “‘deprived of a vested property right without due process of law’ in violation of the Fourteenth Amendment.” The surface owners were again “attempting to ‘expressly assert’ the ‘conclusive presumption’ in [the] quiet title claim as articulated in *Corban*.” The court again held that the “conclusive presumption of abandonment” was irrelevant as it only applied in quiet title actions filed under the 1989 act, not to litigations filed subsequent to the 2006 amendments. The court further held, responding to the argument that the 2006 amendments “extinguished the ‘conclusive presumption,’” that “the enactment of the 2006 DMA can properly ‘be viewed as the withdrawal of a remedy rather than the destruction of a right.’” The Magistrate Judge decision in *Village of Jewett* was adopted and affirmed by District Judge George C. Smith. See *Village of Jewett v. N. Am. Coal Royalty Co.*, 2017 U.S. Dist. LEXIS 112259 (S.D. Oh. July 19, 2017).

Attacks on *Corban* have also been made in the state courts. In *Hickman, et al. v. Consolidation Coal Co., et al.*, No. 2013 CV 00683 (Oh. Ct. C. P. Columbiana County May 4, 2017), the surface owners “submit[ted] that *Corban*’s interpretation of the 1989 DMA is such that Plaintiffs owned a cause of action against [the severed mineral owners] for the abandonment of their respective reservations. Under Ohio law, Plaintiffs’ ability to sue [the severed mineral owners] for the abandonment of the Reservations is a property right protected by the United States Constitution and therefore, cannot be abrogated by the enactment or application of the 2006 DMA.” The state court ruled against the landowners, relying “most importantly [on] *Corban* ...” The court noted that “the Constitutional arguments of the Plaintiff are at least innovative[.]” but ultimately did not agree with those arguments. *Hickman* is currently on appeal to the Seventh District Court of Appeals of Ohio.

While there is no way to tell whether the attacks on the constitutionality of the *Corban* decision will continue, the initial wave of these cases has been unsuccessful in challenging this new precedent.

Changing Political Winds Invite Citizen Enforcement

By: Erin Potter Sullenger, Crowe & Dunlevy

“The pessimist complains about the wind; the optimist expects it to change; the realist adjusts the sails.” - William Ward

The Trump administration ushered in a strong political wind with a focused effort to undo or revise many of the environmental regulations from the Obama administration that the new administration views restrictive to economic growth. This includes several regulations focused on all segments of the oil and gas industry, including exploration, production and transmission. To date, the Trump administration has taken steps to review, and in some cases revise, regulations such as the Clean Power Plan, a foundational component of the Obama administration’s effort to combat climate change and regulate greenhouse gas emissions, the Clean Water Rule, a rule that would have a significant impact on exploration and transportation segments of the industry, and methane rules specifically focused at the oil and gas industry. It has also forecasted reducing funding for enforcement actions and restructuring the EPA regional offices. Given what is happening, there can be a temptation for the industry to relax or postpone environmental compliance activities, especially those that may be new or expensive. Succumbing to this temptation has risks and could prove more costly in the long run.

One real risk to the industry is the increased frequency of citizen suits. Many major federal environmental statutes contain provisions allowing private citizens or groups of citizens to bring suit against alleged violators of those statutes. The violator can be a company, an individual, or even a government agency—it just has to be a party that is alleged to have violated an order, condition or established standard under a particular environmental statute. While citizen suits normally increase during periods of decreased government enforcement, the current political climate and increased funding of environmental advocacy organizations is expected to spawn a higher than usual citizen suit effort.

Here are a few thoughts about citizen suits as we near the end of the first year of the Trump administration:

First, citizen suits have successfully obtained judgments or reached favorable settlements with defendants. The success stories create roadmaps for new citizen suit actions in other parts of the country. Consider the success of the “sue and settle” lawsuits brought against the Obama administration. While not a new strategy, it proved highly successful because the administration was seen as a willing participant in the litigation. Citizen suits ended with

settlements, or consent decrees that ultimately altered the scope of rulemaking procedures that would otherwise be required under the Administrative Procedure Act (APA) and judicially achieved regulatory objectives that might otherwise prove difficult to achieve in administrative settings. Additionally, the settlement would often include attorneys’ fees and costs paid to the environmental advocacy organization by the government.

Consider also a recent settlement between Sierra Club and Burlington Northern Santa Fe Railway (BNSF) stemming from a citizen suit filed in the U.S. District Court for the Western District of Washington, *Sierra Club v. BNSF Railway Co.*, No. C13-967-JCC (W.D. Wash. 2013). The Sierra Club, along with several other environmental organizations, alleged BNSF was in violation of the Clean Water Act by not having a discharge permit when coal dust from its rail cars landed into the waters along the track. The case ultimately settled with BNSF committing money towards studying coal dust loss during transport and feasibility of car covers (fires notwithstanding), money towards environmental projects along the water ways, including removal of coal along BNSF’s right-of-way.

Second, citizen scientists now have access to a variety of tools to investigate and identify instances when a violation may have occurred. This includes reasonably priced infrared cameras to capture potential air emission violations from tanks, valves, compressors, pipelines, or smokestacks, handheld air monitoring equipment and water sampling kits to test streams and creeks downstream of industries. Citizen groups also utilize drones equipped with high-resolution cameras to fly over or near facilities to gain a bird’s eye view of a facility behind the fence line. The groups use these images, along with those from Google Earth and other satellite services, to identify and report potential violations to environmental agencies and to use in their own citizen suits.

In addition to the increased technology available to citizen groups, the United States Environmental Protection Agency (EPA) and several states have made a shift towards more and more electronic reporting for all compliance requirements. While the efficiency of the agencies increases, the public can more easily see the data reported. The EPA’s Enforcement and Compliance History Online (ECHO) database (<https://echo.epa.gov/>) is just one example of a locus of data and information on facilities and industries. Additionally, the EPA’s Next Generation Compliance initiative changes the way the EPA requires compliance, including electronic reporting requirement into rules as the standard process for submittal; paper copy submissions are now the exception. (<https://www.epa.gov/compliance/next->

[generation-compliance](#)).

Third, citizen suit statutes require notice to any defendant prior to filing the suit. Depending on the statute involved, the Notice of Intent to Suit, or the NOI letter, must be delivered to the alleged violator and the responsible environmental agencies a minimum of 60 or 90 days prior to filing of the suit. Should a company receive a notice letter, it should contact an environmental attorney shortly after receiving the letter to discuss strategy. If the NOI letter identifies a violation that is easily remedied, it is likely best to take that such action. If the NOI identifies a violation that will take longer than the 60- or 90-day pre-suit period to remedy, a company can consider contacting the federal or state environmental agency to discuss entering into a consent decree before the expiration of the pre-suit period. Another strategic move might be to engage with the noticing party to evaluate potential for compromise or other alternatives in lieu of litigation.

Fourth, maintaining environmental compliance programs and a relationship with state and federal environmental agencies positions a company for a strong defense in a citizen suit and may lead to an order of dismissal after a suit is filed. One viable defense to citizen suits is “diligent prosecution” by the responsible agency. If it can be shown that the responsible agency is or has taken action on the alleged violations in the NOI, the defendant company can

argue the citizen suit can be dismissed. Diligent prosecution can even occur after receipt of the NOI letter itself. One notable example is *Karr v. Hefner*, 475 F.3d 1192 (10th Cir. 2007). There, the EPA filed its enforcement action against several of the defendants only moments before the citizens filed an amended citizen suit complaint. The court upheld dismissal of the defendants from the case because of the EPA’s diligent prosecution. Should your company find itself the recipient of an NOI letter, the decision to ignore it is always the wrong decision. Companies should engage outside counsel with citizen suit experience sooner rather than later in order to evaluate the allegations and formulate a strategy.

Given this tumultuous regulatory climate, maintaining environmental compliance programs, staying current on permit renewals and staying informed about regulatory revisions makes good business sense. The political winds will surely shift and blow a new direction. A new administration will take the helm and revise environmental regulations and modify enforcement priorities to the new administration’s liking. Staying current with corporate environmental compliance programs will position a company to be able to nimbly adapt to changing regulations and to address and respond to citizen suits.

The foregoing should not be understood as, or considered a substitute for, legal advice. For specific inquiries, please contact Sullenger, or another licensed attorney.

Upcoming Events

The 2017 year is ending and the last IEL program of the year will be a webinar entitled “[What Every Lawyer Should Know About Oil & Gas Law](#)” on **December 13** at 1:00 pm Central. This webinar will be a great overview of oil and gas issues—perfect for lawyers that are still early in their careers, students, and lawyers that don’t work in this area all of the time.

2018 will kick off with the [ITA-IEL-ICC Joint Conference on International Energy Arbitration](#) on **January 18-19** in Houston. Thursday, January 18 will feature a Young Lawyers Roundtable presented by IEL’s Young Energy Professionals, Young ITA, and ICC Young Arbitrators Forum.

The 69th edition of IEL’s flagship conference, the [Annual Oil & Gas Law Conference](#), will take place on **February 15-16** in Houston. The conference will feature a keynote presentation with James A. Baker, III, two hours of ethics credit, multiple tracks with six different modules and the John Rogers Award Dinner at the Petroleum Club honoring Dan O. Dinges of Cabot Oil & Gas Corporation. We hope you will be able to join us at the whole conference, but even if you can’t, we hope you will join us for the annual meeting of the Young Energy Professionals’ practice committee the day before the conference, **February 14**. More information on the annual YEP Committee meeting will be sent to all members of the YEP committee.

The [2nd National Young Energy Professionals Law Conference](#) will take place in New Orleans on **April 6-7**. Information for this year’s social events is already on our website. We hope that you will join us for another weekend of networking, learning, and fun!

The next scheduled **YEP Happy Hour** will take place in Houston on **April 13** in conjunction with the Career Paths for Young Attorneys in the Energy Sector Law School Symposium. If you or your firm are interested in sponsoring this event, please contact IEL’s Associate Director, Vickie Adams (vadams@cailaw.org; 972.244.3421).

IEL’s spring calendar is filled with several more exciting programs. To view a full list of our upcoming programs, please visit our [website](#). We hope to see you soon at an IEL program!



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