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An Overview of Legislation, Administrative Actions, and Texas Supreme Court Decisions Affecting the Texas Oil and Gas Industry in the First Half of 2013

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This paper provides a discussion of recent legislative, administrative, and Texas Supreme Court case law developments affecting the Texas oil and gas industry. The paper is not intended to present a comprehensive overview of all recent developments in Texas oil and gas law; instead it seeks to provide an overview of select developments affecting the industry that occurred in the first half of 2013.

I. Legislative update

The Texas Legislature recently concluded its 83rd regular session. The session included several bills important to the state's energy industry. Overall, the results of the session were beneficial to oil and gas industry, both in terms of the bills enacted into law and those that were not passed. The following section provides an overview of select legislation during the 83rd regular session that bears upon the energy industry.

A. Select bills affecting the energy industry that passed during the 83rd regular session

1. Funding approved for State Water Plan

In the 1950s, responding to what at the time was the greatest drought in the State's history, the Texas Legislature created the Texas Water Development Board ("TWDB") and tasked it with developing a plan to address the state's future water needs. The TWDB published State Water Plans in 1968, 1984, 1990, 1992, 1997, 2002, and 2007, but implementation of the recommendations contained in the plans generally did not occur.

In 2012, on the heels of an unprecedented drought, the TWDB published its latest State Water Plan. The 2012 State Water Plan projects that water needs in Texas will increase by 130 percent between 2010 and 2060 and forecasts critical water shortages in that time period affecting over half the state's population absent implementation of various water management strategies. The 2012 State Water Plan recommends several water management strategies, including conservation, surface water projects, groundwater resources projects, water reuse, and desalination. The Plan calls for $57 billion in expenditures (in 2013 dollars) over the next 50 years.

In an effort to begin addressing the state's current and future water needs, the Legislature in 2013, upon consideration of three bills (SJR 1, HB 4, and HB 1025), approved initial funding totaling $2 billion to begin implementing the State Water Plan. The funding, however, is contingent upon a statewide vote in 2013 to amend the Texas Constitution in order to allow the transfer of $2 billion from the state's Rainy Day Fund[1]

[1] The Rainy Day Fund is a savings fund where the state places any excess revenues for use when there is an unexpected shortfall in revenue. Currently, there is approximately $8 billion in the Rainy Day Fund.

to two new funds[2] set up to begin funding the State Water Plan. If the proposed amendment does not pass, the $2 billion in funding will remain in the Rainy Day Fund and not go towards implementation of the State Water Plan.

Although it remains contingent on a statewide vote, movement toward implementing the State Water Plan is a positive for the oil and gas industry because of the importance to the industry of readily available water resources. The importance of water to the industry stems largely from the increased use of hydraulic fracturing to extract oil and gas. It is estimated that per well, hydraulic fracturing requires between 1 million to six million gallons of water. According to a recent study by the University of Texas at Austin's Bureau of Economic Geology, 38 billion gallons of water were used to fracture approximately 15,000 wells in the Barnett Shale between 2000 and 2011.

Although it does require considerable amounts of water, statewide consumption of water for hydraulic fracturing remains small compared to the use of water for agriculture, manufacturing, and by municipalities. The impact of hydraulic fracturing on available water does, however, vary widely from community to community. For instance, in West Texas, where oil and gas resources are abundant, water supplies are critically tight. Additionally, as noted, the TWDB forecasts a significant increase in water shortages during the next few decades if no action is taken to implement the State Water Plan.[3] For these reasons, among others, it is a positive development for the industry that the Legislature has taken steps to ensure that Texas' future water needs are met.

2. Bill enacted to increase recycling and reuse of oil and gas wastewater

In addition to taking steps toward funding the State Water Plan, the Legislature also passed a bill that should improve water availability for hydraulic fracturing. The bill, HB 2767, signed into law by Governor Perry, is intended to promote the recycling of wastewater from oil and gas operations.

As noted in the bill analysis prepared by the Energy Resources Committee of the House of Representatives, most oil and gas wastewater is currently disposed of in underground injection wells. Industry estimates suggest that 80 percent of all wastewater is injected into underground storage wells.

Generally, drilling companies have been willing to route their wastewater to third-party treatment companies for recycling. Certain concerns addressed by HB 2767, however, often prevented them from doing so. Specifically, drilling companies were

[2] The two proposed new funds are the State Water Implementation Fund of Texas and the State Water Implementation Revenue Fund of Texas.

[3] As of July 23, 2013, over 60 percent of the State of Texas was experiencing drought conditions and nearly 80 percent of the state was experiencing abnormally dry conditions. In 2011, Texas suffered through the worst drought in its history.

concerned that they would remain liable for any damages arising from the treatment and subsequent use of wastewater that they delivered to treatment companies for recycling. HB 2767 eliminates that risk by amending the Natural Resources Code to expressly provide that when wastewater is transferred to a treatment company the treatment company, at the time it takes possession, is the owner of the wastewater until the wastewater (or treated wastewater) is transferred to another company for disposal or use.

In addition to specifying that that the transferee owns wastewater at the time of transfer, HB 2767 also eliminates certain tort liability for the treatment company that may arise from the subsequent use of treated wastewater. Specifically, when treated wastewater is delivered by a treatment company to another person with the contractual understanding that the treated product will be used in connection with drilling for oil and gas, the treatment company is not liable in tort for an injury resulting from the subsequent use of the treated product by the person to whom the product is transferred by the treatment company. Tort liability does remain for personal or property injuries that may arise from exposure to treated wastewater.

The new law calls for the Railroad Commission to develop and disseminate new rules governing the treatment and reuse of oil and gas wastewater. As a whole, HB 2767, as enacted into law, promises to encourage water recycling and reuse in oil and gas drilling operations, helping to improve the availability of water for drilling operations.

3. Bill enacted to provide funds repairing road infrastructure of rural areas experiencing oil and gas production activities

Much of the recent exploration and production of oil and gas in Texas is occurring in rural areas. The Eagle Ford Shale, for instance, sits under predominantly rural communities. While the growth in activity in the Eagle Ford Shale has brought great economic benefits to the area (as well as the entire state), many of the roads and bridges in rural areas were not designed for the heavy traffic and overweight vehicles associated with energy exploration and development. Consequently, many roads and bridges in rural areas experiencing high levels of energy production have sustained damage and or excessive wear-and-tear. In addition, there has been an increase in automobile accidents in these areas.

HB 2300 and SB 1747 sought to address the highway infrastructure issues in rural areas resulting from increased oil and gas exploration and production by creating a $225 million grant program that counties can access to build and repair roads and bridges affected by energy production. Additionally, the bills grant authorization to counties to create, through a commissioner's court, County Energy Transportation Reinvestment Zones ("CETRZ") upon determining that an area is affected by oil and gas exploration activity. Once established, CERTZ are empowered to direct local property tax funds to specified transportation projects located in the designated zone and to jointly administer CETRZ in conjunction with another county or counties.

The enactment into law of HB 2300 and SB 1747 benefits the state's oil and gas industry by allocating funds for the repair and maintenance of rural roads and highways where exploration and production is occurring and by empowering counties to create CERTZ that enable the use of property taxes to promote transportation projects in these counties.

4. Streamlining greenhouse gas permitting

Early in President Obama's first term, the Environmental Protection Agency ("EPA") determined that greenhouse gas was a form of pollution that the EPA could regulate pursuant to the Clean Air Act. The EPA asked states, who can issue permits under the Clean Air Act, to develop by 2011 their own processes for permitting greenhouse gas emissions and to ensure that those processes included New Source Review permitting requirements. For new major sources of an air pollutant, or a major modification to an existing source, New Source Review permitting requires Prevention of Significant Deterioration ("PSD") permits. Issuance of PSD permits requires the use of best available technologies to control emissions, an air quality analysis, additional air quality impact studies, and public comment.

The EPA's requirement that greenhouse gas emissions be permitted went into effect in January 2011. Texas, alone among the states, refused to comply with the rules and refused to set up a state-level permitting program comporting with the EPA's New Source Review requirements. Consequently, the EPA assumed permitting greenhouse gas permitting authority for Texas. The Texas Commission on Environmental Quality ("TCEQ"), however, continued to handle issuance of all other necessary permits relating to air pollutants. As a result industries seeking to build new facilities or modify existing ones were required to engage in a dual-track permitting process, seeking greenhouse gas permits from the EPA and all other required air pollutant permits from the TCEQ. Unsurprisingly, a backlog in permitting soon formed, causing many companies to begin considering moving their proposed projects out of Texas.[4]

In an effort to eliminate the permitting backlog created by Texas' refusal to establish a state-level greenhouse gas permitting process, the Legislature passed HB 788; Governor Perry later signed the bill into law. HB 788 aims to streamline the process for obtaining greenhouse gas permits and to reduce federal involvement in the process by authorizing the TCEQ to adopt a statewide permitting program that satisfies federal regulations. Under the bill, the TCEQ can immediately begin developing the permitting process but it will not become effective until approved by the EPA. Due to the

[4] For instance, Targa Resources sought permits to build a fractionator in Mont Belvieu, Texas. At hearings on HB 788, Targa Resources' President and Chief Operating Officer, Mike Heim, testified that "if I had known it would have taken this long to get a permit, I probably would have gone to Louisiana and built my plant over there. I've lost $90 million worth of revenue in a year waiting for this [permit] that I will never recoup." Heim further noted that as of February 2013 there were over 50 projects in Texas waiting on the EPA to issue greenhouse gas permits.

importance of the issue, the TCEQ has stated that it will submit its proposed permitting process to the EPA within 180 days.[5]

5. Allowing for electronic filing of well logs

The Railroad Commission of Texas is responsible for collecting well logs from operators. To update and improve the efficiency of the collection of well logs, HB 878 allows for electronic filing of well logs and amends the confidentiality period for a well log. The bill provides that no later than 90 days after the completion of a drilling operation, the operator shall file a well log including each borehole section of the log at all depths run after September 1, 2013, and allows for the filing of the log electronically. HB 878 further allows for an operator to file with the Railroad Commission a written request asking that the well log remain confidential and not be made available as public information for a period of three years for onshore wells and five years for bay or offshore wells. The previous confidentiality period was one year.

B. Discussion of select bills affecting the energy industry that did not pass in the 83rd regular session

The foregoing section provides a discussion of select bills from the 83rd regular session that were enacted into law. In addition to bills enacted into law that affect the state's energy industry, certain bills that did not pass warrant comment.

A. Railroad Commission Sunset Bill fails to pass

Pursuant to the Texas Sunset Act, all state agencies must undergo a comprehensive review every 12 years by the Sunset Advisory Commission (the "Sunset Commission"). The Sunset Commission consists of 12 members appointed by the Lieutenant Governor and Speaker of the House and is tasked with determining whether there is a need for an agency being reviewed to continue to exist. In addition to recommending the continuation or abolishment of a state agency, the Sunset Commission may also propose changes to how the agency operates. Once its review is completed, the Sunset Commission forwards its recommendations to the Legislature. Generally, agencies subject to sunset review are abolished unless legislation is enacted to continue

[5] Texas has challenged in court the EPA's authority to regulate greenhouse gas emissions and to assert control of greenhouse gas permitting in Texas. With respect to its challenge to the EPA's authority to regulate greenhouse gases, Texas joined 11 other states and various industry groups in a lawsuit styled *Coalition for Responsible Regulation v. EPA*. In a decision handed down in June 2012, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit unanimously rejected four interconnected challenges to the EPA's rulemaking with respect to greenhouse gases. Texas, along with its co-parties, has asked the U.S. Supreme Court to review the decision. As for Texas' challenge to the EPA's authority to take control of Texas' permitting process (*Texas v. EPA*), a three-judge panel for the U.S. Court of Appeals for the D.C. Circuit held against Texas and co-party Wyoming in a 2-1 decision issued in June 2013. According to the majority, Texas and Wyoming lacked standing to challenge the EPA's authority to require certain greenhouse gas permitting systems.

them. Since the Sunset Act's enactment in 1978, 58 state agencies have been abolished and 12 have been consolidated with other agencies.

The Railroad Commission ("RRC"), the state agency with primary regulatory jurisdiction over the oil and gas industry, came up for sunset review in 2010. The Sunset Commission's report criticized the RRC for not aggressively enforcing its rules or assessing penalties for rule violations. The Sunset Commission also recommended that the RRC's procedure of holding statewide elections to elect its three commissioners be replaced with the appointment of a single commissioner.

Initially, heading into the Legislature's 82nd session in 2011, some momentum existed to adopt the Sunset Commission's recommendations. Ultimately, however, the Legislature did not approve legislation adopting any of the recommendations. Instead, the Legislature agreed to continue the RRC for another two years and directed the Sunset Commission to re-review the RRC and to present its revised recommendations to the 83rd legislative session for consideration in 2013.

The Sunset Commission issued its re-review sunset report for the RRC in November 2012. The Sunset Commission, recognizing the state's energy boom, concluded that a need continued to exist for a state agency to regulate the oil and gas industry. The Sunset Commission, however, urged certain reforms. Most basically, the Sunset Commission recommended changing the agency's name to the "Texas Energy Resources Commission," noting that referring to the state agency regulating the oil and gas industry as the "Railroad Commission" continues to sow confusion among the state's residents (not infrequently, the RRC receives telephone calls from citizens complaining about train noise).

More significantly, the Sunset Commission recommended a number of ethics changes with respect to how the RRC conducts business. For instance, the Sunset Commission's report called for limiting the amount of time a commissioner could solicit political donations. Currently, commissioners are elected to the RRC for 6 years and can solicit political donations during their entire time as a commissioner. The Sunset Commission recommended restricting the period a commissioner could solicit donations to within a year and a half of an election. The Sunset Commission also recommended prohibiting commissioners from accepting political donations from companies with contested cases pending before the RRC. Finally, the Sunset Commission recommended requiring a RRC commissioner running for a different elected office to resign from the RRC.

At the 83rd Legislature, the Sunset Commission's recommendations were incorporated into SB 212. Although the bill passed the Senate, it did not make it out of committee in the House. Thus, for second straight legislative session, no recommendation of the Sunset Commission with respect to the RRC was passed by the Legislature. The RRC did, however, survive, as it was added to a catch-all reauthorization bill and extended in its current form until 2017. Additionally, the recommendation that a commissioner resign if running for another elected office was

added to a broad government ethics bill, SB 219. SB 219 was passed by the Legislature but vetoed by Governor Perry.

B. Overhaul of State's eminent domain law fails to pass

In 2012, the Texas Supreme Court issued a significant opinion on the ability of pipeline companies to exercise the power of eminent domain. In *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, the Court held that for a company to qualify under § 111.002(6) of the Natural Resources Code as a common carrier with the power of eminent domain, "a reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier." The Court further held that issuance of a permit by the RRC granting common carrier status was prima facie valid. But, if a landowner challenged the status of the company as a common carrier, "the burden falls upon the pipeline company to establish its common carrier bona fides if it wishes to exercise the power of eminent domain."

The *Denbury* holding represents a significant departure from prior practice where a pipeline company could effectively obtain common carrier status, and thus eminent domain authority, by declaring itself a common carrier on forms filed with the RRC.[6] Now, under *Denbury*, if a landowner challenges a pipeline company's claim that it is a common carrier, the pipeline company must present evidence in district court that the pipeline in question will more likely than not serve as a common carrier.[7] *Denbury* thus provides landowners with considerably more leverage than they previously possessed with respect to pipeline easements and potentially subjects pipeline construction to prolonged delays stemming from potential challenges from multiple landowners regarding a company's status as a common carrier.

In hopes of alleviating the uncertainty created by *Denbury*, HB 2748 was introduced at the 83rd Legislature. HB 2748 provided for a hearing before the RRC to determine whether a proposed new line would qualify as a common carrier. The RRC's determination would then be binding on all property owners whose land the proposed

[6] While a footnote in *Denbury* indicated that its holding was limited to companies seeking common carrier status under § 111.002(6) of the Natural Resources Code (applying to carbon dioxide and hydrogen pipelines), recent appellate court authority suggests that the reasoning of *Denbury* may be more broadly applied. *See Crosstex NGL Pipeline, L.P. v. Reins Road Farms-1, Ltd.*, -- S.W.3d – 2013 WL 2250747 (Tex. App.—Beaumont May 23, 2013, no pet. hist.) ("Although Crosstex points out that the [Denbury] Court's holding is limited to carbon dioxide lines regulated by section 111.002(6) of the Natural Resources Code, we are not persuaded the Court's reasoning concerning the process of obtaining a T-4 permit applies only to carbon dioxide lines."). At present, it remains uncertain how broadly the holding in *Denbury* will be applied.

[7] *See, e.g., In re Texas Rice Land Partners, Ltd*, -- S.W.3d --, 2013 WL 2250717 (Tex. App.—Beaumont May 23, 2013, orig. proceeding [mand. pending]) (holding that after landowner challenged common carrier status of pipeline company, pipeline company presented sufficient evidence to show that its proposed pipeline would be used for common carriage).

pipeline was to cross. HB 2748 was initially voted out of house committee, but then returned to committee as a result of a procedural point of order. The bill did not make it back out of committee, and failed to pass.

It is expected that legislation addressing *Denbury* will again be proposed in the 84th Legislature in 2015. The debate over HB 2748 involved several powerful interests, including the Bass brothers and Koch brothers, and reflects a tension within Texas between support for strong property rights and support for the oil and gas industry.

C. Select additional bills that failed to pass

In addition to the bills that failed to pass discussed above, the following bills affecting the oil and gas industry did not pass in 2013:

- SB 873, another bill addressing water issues affecting the energy industry, failed to pass. SB 873, opposed by the industry, related to permitting for water wells. If enacted, the bill would have restricted the industry's ability to obtain permits for water wells. Specifically, the bill would have given groundwater conservation districts, empowered under the Texas Constitution to manage and conserve groundwater, authority to require a well engaged in hydraulic fracturing to obtain a water well permit. Currently, oil and gas exploration operations are generally exempt from the requirement of obtaining a water well permit from a groundwater conservation district. It is anticipated that this issue will be considered again in the next legislative session. SB 873 was passed by the Senate but did not make it out of committee in the House.

- HB 448 proposed amending the Natural Resources Code to add a section requiring the RRC to adopt a rule that would mandate that an operator of a well for which hydraulic fracturing was to be performed mail to each person residing within 500 feet of the well a list of the chemical ingredients the operator anticipated including in the hydraulic fracturing treatment. HB 448 was not voted out of committee in the House.

II. Administrative update

The following section discusses two select issues that have recently been subject to RRC action, allocation wells and amendments to the RRC's well construction requirements.

A. Allocation wells

Allocation well permitting is one of the biggest recent issues to confront the RRC. Generally, the RRC uses the term "allocation well" to refer to a horizontal well running under two or more un-pooled tracts. Until fairly recently, the general assumption in the industry was that the RRC would not issue a permit for such a well. In recent years, however, operators began obtaining permits to drill "production sharing wells" wherein a well was drilled beneath two or more existing leases after the operator obtained a production sharing agreement from the royalty owners to drill the well. Production sharing agreements provided a means for determining how to allocate production between tracts. In 2008, the RRC announced that it would grant permits for production sharing agreement wells so long as at least 65% of the total of royalty interests in all affected tracts agreed to the production sharing agreement. Since 2008, approximately 700 production sharing agreement wells have been permitted.

Subsequent to the RRC's granting of production sharing agreement well permits, operators began to obtain permits from the RRC for wells crossing two or more tracts with no production sharing or pooling agreement in place. These wells are known as allocation wells. Approximately 60 allocation well permits have been issued by the RRC although no RRC rule or regulation exists allowing for the permitting of allocation wells.

The issue of allocation well permitting appears to have come to a head recently with the filing by EOG Resources, Inc. ("EOG") for a permit to drill an allocation well in DeWitt County, Texas. Several landowners and the Texas General Land Office opposed the granting of the permit. On June 25, 2013, the RRC examiners assigned to consider EOG's permit application issued a Proposal for Decision ("PFD") in the case recommending that EOG's application to drill the well be dismissed. The examiner's based their reasoning largely on the fact that the authority to pool was a property right retained by the mineral owners and noted that RRC regulations may not cause the transfer of any property rights.

The parties had until July 19, 2013 to file exceptions to the proposal and until July 29, 2013 to file replies to exceptions. A voluminous number of exceptions have since been filed. If it remains unchanged following the examiner's review of the exceptions and replies, the PFD will soon go before the RRC for decision of the commissioners. A decision on jurisdictional grounds, rather than one addressing the substantive issues, seems quite possible, but regardless, further appeals can be expected. For a more detailed discussion of these issues please see materials accompanying Chris Lindsey's seminar presentation.

B. Amendment of well construction requirements

On May 24, 2013, the RRC approved important amendments to the well construction requirements it promulgates. The requirements are set forth in Statewide Rule 13 (Title 16, § 3.13 of the Texas Administrative Code). The amendments represent the biggest overhaul of well construction regulations since the 1970s. The new

amendments to Statewide Rule 13 include, but are not necessarily limited to, the following:

- A requirement that RRC approval be obtained before setting surface casing to a depth of more than 3,500 feet;

- A requirement that for wells undergoing hydraulic fracturing treatments, an operator pressure test well casings to the maximum pressure expected during the fracture treatment and notify the RRC of a failed test;

- A requirement that during hydraulic fracturing, operators monitor the annular space between the well's casings for pressure changes (which could indicate a leak in casing) and suspend hydraulic fracturing operations if the annuli monitoring indicates a potential down hole casing leak;

- A requirement that operators use air, fresh water or fresh water-based drilling mud until surface casing is set and cemented in a well to protect usable quality groundwater;

- A requirement that for wells where drilling time will exceed 360 hours, operators verify the mechanical integrity of surface casing and intermediate casing for wells to ensure that the rotation of the drill string inside the surface casing does damage surface casing integrity or other intermediate casing strings;

- A requirement that for vertical wells that are vertically hydraulically fractured in shallow fields in the Abilene, Midland, San Antonio, Wichita Falls areas that additional testing and monitoring be conducted for wells where the vertical distance between the base of usable quality water and the top of a formation to undergo hydraulic fracturing treatment is less than 1,000 vertical feet;

- A requirement that operators isolate (place cement behind casing) across and above all formations that have a permit for an injection or disposal well within one-quarter mile of a proposed well;

- Updates to cement quality, cementing, well equipment, well casing centralizers, and well control references;

- Sets a minimum cement sheath thickness of at least 0.75 inches around the surface casing (steel pipe) and a minimum cement sheath thickness of 0.50 inches around subsequent casing;

- Updates requirements for well control and blowout preventers, and distinguishes between the use of well control equipment on inland, bay and offshore wells; and

- Implements Article 2 of House Bill 2694 passed by the 82nd Texas Legislature in 2011 to reflect the bill's requirement that authority for assessing the depth of surface casing for each well needed to protect groundwater be transferred from the TCEQ to the RRC.

The amendments to Statewide Rule 13 go into effect on January 1, 2014 and will apply to wells drilled on or after that date.

III. Texas Supreme Court Case law update

On June 21, 2013, the Texas Supreme Court issued its opinion in *Merriman v. XTO Energy, Inc.*[8] Merriman marks Supreme Court's first substantive engagement with the accommodation doctrine in nearly 20 years. The case involved a cattle operation conducted by Homer Merriman and the drilling of a well on Merriman's land by XTO Energy, Inc. ("XTO").

Merriman, a pharmacist by trade, owned 40 acres of land in Limestone County, Texas (the "Land"). In addition to working as a pharmacist, Merriman worked cattle. On the Land, Merriman built permanent fencing and corrals that he used in his cattle operation (the "Cattle Structures"). Merriman also built his home and a barn on the Land.

Merriman leased acreage adjacent to the Land for the purpose of grazing his cattle. Approximately once a year, he would bring his cattle to the Cattle Structures on the Land to sort and work the cattle.

XTO is the lessee of the mineral estate beneath the Land. In or around September 27, 2007, XTO approached Merriman and informed him that it intended to drill a well on the Land. Merriman objected, telling XTO that the proposed well site would prevent him from using the Land for his cattle operation. Merriman requested that XTO drill its well on the southwest portion of the Land, where it would not interfere with his cattle operation, but XTO declined Merriman's request.

When XTO began to construct the well site and drill the well, Merriman filed suit seeking temporary and permanent injunctions barring XTO from drilling the well. Once

[8] *Merriman v. XTO Energy, Inc.*, -- S.W.3d – (Tex. June 21, 2013).

the well was drilled, Merriman amended his pleadings to seeking a permanent injunction the required XTO to remove the well. In his lawsuit, Merriman contended that XTO did not accommodate his existing use of the Land for his cattle operation and thus exceeded its rights in the mineral estate and trespassed on the Land.

Without stating its reasons, the trial court granted summary judgment in favor of XTO. Merriman appealed to the Waco Court of Appeals. The appellate court affirmed the trial court's granting of summary judgment in favor of XTO. In doing so, the appellate court's analysis relied heavily on assessing (1) whether Merriman produced evidence showing he could not use the Land for any other agricultural purpose besides his cattle operation, and (2) whether Merriman produced evidence that moving his cattle operation to the adjacent acreage he leased was not a reasonable alternative.

The Texas Supreme Court affirmed the judgment in favor of XTO, but disapproved of the Waco Court of Appeals' analysis of the accommodation doctrine. The Supreme Court began its analysis by restating the accommodation doctrine. Specifically, the Court noted that the mineral estate is dominant and the party possessing it has the right to go onto the surface of the land to extract minerals along with incidental rights that include using the surface as much as is reasonably necessary to extract and produce the minerals. In the event, however, that there are reasonable alternative uses of the surface available to the mineral owner, one that will prevent the surface owner from using the surface as intended and another that will allow such use, the mineral owner must use the alternative that allows the surface owner to continue to use the surface as intended. As stated by the *Merriman Court*,

> To obtain relief on a claim that the mineral lessee has failed to accommodate an existing use of the surface, the surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which an existing use can be continued. If the surface owner carries the burden, he must further prove that given the particular circumstances, there are reasonable, customary, and industry-accepted methods available to the lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use.

Applying the standard it set forth, as quoted above, the Supreme Court concluded that the Waco Court of Appeals erred in two ways. First, the Waco Court of Appeals concluded that if Merriman could use the Land for an agricultural purpose other than his cattle operation, then XTO's drilling of the well did not preclude or substantially impair Merriman's existing use of the Land. Under this analysis, Merriman could not satisfy the first prong of the accommodation doctrine, and his claim thus failed. The Supreme Court disagreed and held that the "use" in question was solely Merriman's use of the Land for his cattle operation. According to the Supreme Court, the appropriate test was not whether Merriman could use the Land for any agricultural purpose, but whether

"Merriman had any "reasonable alternatives for conducting his cattle operation on [the Land]."

Second, the Supreme Court disagreed with the Waco Court of Appeals' analysis of the second prong a landowner must show to obtain accommodation of an existing use. According the Waco Court of Appeals, Merriman did not show that he could not have used the acreage he leased adjacent to the Land for his cattle operation; therefore the appellate court concluded that a reasonable alternative was available to Merriman and his claim failed. The Supreme Court held that the Waco Court of Appeals' focus whether Merriman could use the leased acreage was incorrect. As stated by the Supreme Court, the question was whether Merriman had a reasonable alternative to conduct his cattle operation on the Land, not the adjacent acreage. In explaining its holding, the Court stated that requiring a surface owner to show that it could not conduct its existing use on land held by short term leases (i.e. the adjacent acreage) would "too greatly alter the balance between those who possess and have established a use of the surface estate and those who possess the mineral estate."

Despite disagreeing with the Waco Court of Appeals' analysis, the Supreme Court nevertheless affirmed the judgment in XTO's favor. It did so upon concluding that Merriman failed to produce competent summary judgment evidence showing that he could not continue to use the Land for his cattle operation even with the well present. Merriman's evidence, in other words, failed to show that he could not move the Cattle Structures to another portion of the Land and thus continue his cattle operation thereon. According to the Court, Merriman produced evidence only that he would be inconvenienced by the well, not that he had no reasonable alternative available to him to maintain the existing use.

In sum, the Supreme Court's disagreement with the analysis used by the Waco Court of Appeals, and resulting clarification of the appropriate standard, benefits landowners by narrowing what they must show to obtain an accommodation. Nevertheless, the requirement that a surface owner prove the absence of any reasonable alternative method to maintain an existing use remains a difficult standard to meet.

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Charles maintains an active practice in the area of commercial litigation. He has extensive trial and appellate experience in the state and federal courts of Texas in a variety of legal disciplines. Charles has successfully resolved many complex cases in the areas of oil and gas, admiralty, contract, construction, environmental contamination, antitrust, fraud, trusts, property damage, toxic torts and personal injury. He has also successfully litigated complex multi-district litigation and class action lawsuits. His clients include energy and energy service companies, chemical companies, insurance companies, franchisors, and other businesses in the fields of banking, shipping, and offshore construction.

In addition to his litigation practice, however, Charles also regularly advises clients on general corporate matters including regulatory compliance, safety, employment, and contract construction.

A particular interest in Charles' practice has been representing companies involved in the energy industry. Charles has successfully litigated operator and working interest owner disputes, contractor disputes, reservoir damage and other property damage, pollution, and personal injuries on the Outer Continental Shelf. In addition, Charles has reversed and rendered several judgments important to the industry and affirmed many others. Charles' latest appellate victory clarified the re-litigation exception to the Anti-Injunction Act, determining when a federal court may properly enjoin a state court proceeding. *See Duffy & McGovern Accommodation Services v. QCI Marine Offshore, Inc.,* 448 F.3d 825 (5th Cir.2006). He also recently filed two successful amicus briefs with the Texas Supreme Court on behalf of the American Petroleum Institute and the Independent Petroleum Association of America arguing that the fraudulent concealment doctrine does not toll the statute of limitations when readily accessible, publically available information could lead to the discovery of an underpayment of royalties. See Shell Oil Co., et al. v. Ross, 356 S.W.3d 924 (Tex.2011). Other appellate victories reversed and rendered trial court judgments in favor of plaintiffs injured on the OCS.

Charles is a member of the Advisory Board for the Institute of Energy Law and is a member of the Planning Committee for the Judge Alvin B. Rubin Conference on Maritime Personal Injury Law. He recently spoke at the conference on the topic of "Navigating the Labyrinth of a Complex Maritime Case." Charles has also written papers and lectured on the benefits of jury focus groups, the advantages and disadvantages of mediation, and accident investigations on the OCS.

Charles is admitted to practice before all state courts in Texas

and the United States District Courts for the Southern, Eastern and Northern Districts of Texas. He is also admitted to practice before the United States Court of Appeals for the Fifth Circuit. Charles is one of Texas' Top Rated Lawyers, receiving an AV Preeminent 5.0 rating by Martindale-Hubbell, a designation that his peers rank him at the highest level of professional excellence. Charles is a member of the American Bar Association, the Houston Bar Association, the Maritime Law Association of the United States, and the Southern Admiralty Law Institute.

Charles received his J.D. *magna cum laude,* from South Texas College of Law in 1992. During law school, he was elected to the *Order of the Lytae* and received honors for his trial advocacy.

The following is a sample of Charles' litigation experience:

- Successfully defended a publicly-traded exploration and production company in a $1.2 billion lawsuit alleging fraud and conspiracy in the farmout of several offshore leases; after four years of extremely complex litigation, the parties settled shortly before trial for defendant's cost of defense
- Successfully defended a logistical solutions company in a $20 million lawsuit alleging breach of contract and fraud in the construction of temporary housing following Hurricane Katrina; defendant filed a third-party action against a New Orleans university for breach of contract and then, following three years of exacting litigation, reached a seven-figure settlement with the university and resolved plaintiff's claims shortly before trial for defendant's cost of defense
- Successfully defended a television network in a $15 million lawsuit alleging breach of contract and fraud in the production of television programming; after a short period of discovery, defendant negotiated a very favorable settlement agreement on confidential terms
- Successfully defended an exploration and production company in a $12 million lawsuit alleging securities fraud, misrepresentation, and conspiracy in the sale of two oil and gas investments in South Texas; after the criminal indictment and bankruptcy of a co-defendant, and three years of protracted litigation, defendants settled shortly before trial on very favorable terms
- Successfully defended an exploration and production company in a lawsuit alleging breach of a purchase and sale agreement for a $10.5 million working interest in an East Texas gas field; defendant filed a counterclaim against plaintiff for its breach of the agreement and, shortly before trial, obtained a very favorable settlement from plaintiff on confidential terms
- Successfully defended a publicly-traded chemical company in a $10 million lawsuit alleging environmental damage to the property of 350 plaintiffs; following a period of time for discovery, defendant resolved all claims against it for less than the cost of its defense
- Successfully defended an offshore pipeline contractor in a $4 million personal injury lawsuit resulting from a slip and fall on a pipelay vessel; following trial in Lufkin, the court found plaintiff 65% liable and awarded him $380,000 in damages; defendant reversed and rendered the judgment on appeal, resulting in a $0 judgment
- Successfully defended a pipeline construction company in a $3.5 million personal injury lawsuit resulting from the explosion of a pipeline during pressure testing; defendant filed a third-party action against its contractor for breach of contract and then, following three years of complex litigation, settled plaintiff's claims for a reasonable sum and obtained a judgment against the contractor for the

amount of the settlement plus defendant's attorneys' fees
- Successfully prosecuted a $3.4 million claim of a working interest owner against the operator of a large Texas gas field for breach of the operating agreement and damage to the reservoir; following a period of time for discovery, plaintiff obtained a very favorable settlement from defendant on confidential terms
- Successfully defended a pipeline inspection company in a $3 million lawsuit alleging negligence in the inspection of oil well casing; after a brief period of discovery, plaintiff agreed to settle for an amount that was substantially less than defendant's cost of defense
- Successfully defended a synthetic rubber manufacturer in four multi-million dollar lawsuits alleging wrongful death from exposure to butadiene; defendant worked with plaintiffs' counsel outside of the normal discovery process to quickly demonstrate defendant's lack of liability; defendant obtained an early dismissal of all claims without incurring significant legal fees
- Successfully defended a work boat operator in a multi-million dollar lawsuit resulting from damage it caused to an offshore gas well and flowline; defendant demonstrated that its liability would be limited to the value of the vessel and settled with plaintiff for that amount
- Successfully defended a publicly-traded exploration and production company in a $1.4 million breach of contract lawsuit alleging the failure to pay for subsea construction work; defendant filed a counter-claim against the contractor for its failure to perform the work in a good and workmanlike manner and settled shortly before arbitration for $10,000
- Successfully overturned a $900,000 maritime personal injury judgment rendered in Galveston federal court, resulting in a $0 judgment for an offshore drilling contractor
- Successfully defended a large chemical storage facility on the Houston Ship Channel in an $800,000 lawsuit resulting from product contamination; defendant demonstrated that the product manufacturer acted unreasonably in its disposition of the contaminated product and settled with the manufacturer shortly before trial for $175,000

Published Works & Presentations:

- Presenter, Navigating the Labyrinth of a Complex Maritime Case

Professional Affiliations:

- American Bar Association
- Houston Bar Association
- Maritime Law Association of the United States
- Southeastern Admiralty Law Institute
- Judge Alvin B. Rubin Conference on Maritime Personal Injury Law at Louisiana State University – Planning Committee

Honors:

- AV Rating by Martindale-Hubbell

Articles Authored...

- Discovery of Electronically Stored Information Under the Federal Rules of Civil Procedure

- An Overview of the False Claims Act, Its Qui Tam Provisions, The Fraud Enforcement Recovery Act of 2009, and The Proposed False Claims Act Clarification Act
- The Changing Regulatory Regime For Investigation of Accidents on Offshore E&P Facilities: MMS and USCG Developments - Association of Corporate Counsel Energy Address

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Virtual Business Card

Education

University of Minnesota, J.D., *cum laude*, 2005
University of Michigan at Ann Arbor, B.A., *with distinction*, 1992

Bar Admissions

Texas (2006)

Practice Areas

COMMERCIAL LITIGATION
OIL, GAS AND ENERGY TRANSACTIONS
OIL AND GAS REGULATORY PRACTICE
ADMIRALTY AND MARITIME

David Bryce's practice is concentrated on commercial litigation. He has experience working on trial and appellate matters in Texas state court and federal court. His trial level experience includes successfully defending a publicly-traded exploration and development company in a $1.2 billion lawsuit alleging fraud and conspiracy in the farmout of several offshore leases (case settled shortly before trial for defendant's cost of defense) and successfully defending a logistical solutions company in a $20 million lawsuit alleging breach of contract and fraud in the construction of temporary housing following Hurricane Katrina (obtained seven-figure settlement from third-party defendant, and, shortly before trial, settled plaintiff's claims for cost of defense). His appellate experience includes the preparation of amicus briefs for a publicly-traded pipeline company and a national trade association in respective appeals before the Supreme Court of Texas.

In addition to his litigation practice, David assists clients in various corporate matters, including regulatory compliance, where his experience includes advising clients on regulatory matters relating to oil and gas operations in the Gulf of Mexico and advising clients on environmental liability issues. David also has experience with eminent domain issues arising from the construction of common-carrier pipelines.

Published Works & Presentations:

- *Pipeline Gathering in an Unbundled World: How FERC's Response to Spin Down Threatens Competition in the Natural Gas Industry* (Minnesota Law Review, Vol. 89)
- *Pitfalls to be Avoided in Drafting: Select Issues under Texas Law and Louisiana Law*, 59th Annual Institute on Mineral Law, Paul M. Hebert Law Center, Louisiana State University, 2012

Professional Affiliations:

- State Bar of Texas
- Houston Bar Association

Articles Authored...

- Social Media in the Workplace - Potential Traps for Employers and Employees
- An Overview of the False Claims Act, Its Qui Tam Provisions, The Fraud Enforcement Recovery Act of 2009, and The Proposed False Claims Act

Clarification Act