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What did you study in college, and why did you want to become a lawyer?

I initially enrolled as a pre-med student at the University of Virginia, thinking that I would one day become a doctor. However, like many other students, I was eventually weeded out by the pre-med intro classes during my first year of college. Later, when I went home and told my parents that I no longer wanted to become a doctor, they said that is great but that I better figure something out with my future, so I decided to switch from pre-med to study rhetoric and communications in college. My new major included classes on English and philosophy, and I formulated an idea that maybe I should just become a lawyer after all, which I eventually did. I also knew that I wanted a long-term career rather than simply having different jobs, and I knew that going to law school and becoming a lawyer would give me just that.

You graduated from the University of Virginia in 1987 and then Howard University School of Law in 1994. What did you do in the years in between?

After college, I initially worked for a temp agency in the DC office of Nissan, where several executives were responsible for sending daily updates to headquarters. At the time, I was tasked with monitoring updates from the Department of Transportation ("DOT") about the new rules regarding three-part seatbelts. I also worked for MCI. Eventually, I decided that it was time to go to law school and attended the only law school I had ever wanted to attend – Howard University School of Law.

Walk me through your legal career path from the start to the present day and how you ended up practicing in your area, and tell us a bit about your time at FERC?

During my first year of law school, I worked for a law clinic that did social security disability appeals, but the work was not entirely satisfactory. In my second year, I went to work for Washington Gas as my father reminded me that everyone needs utilities. I actually listened to my dad (good for me), and while working at Washington Gas, something just clicked. I found the work to be highly interesting, and I ended up continuing to work for them my entire third year of law school. After graduation, I got picked up as an associate at a small DC firm with only five partners doing a mix of electric, hydro, and gas-related work, and I stayed with them for about 3.5 years until I went to practice for Sutherland (today Eversheds Sutherland). I worked at Sutherland for a year before joining the Solicitor's Office at the Federal Energy Regulatory Commission ("FERC"). I remained at FERC for three years until one day, a headhunter called and asked me to come in-house. However, this was at the time of Enron, so the company I worked for eventually closed its DC office before being taken over by someone else. Once the company closed, I went back to FERC and the Solicitor's Office. Then I worked for Republican Commissioner Marc Spitzer during his entire 5-year term. Once his term expired, I joined FERC's pipeline office eventually becoming the acting director and deputy director of the office. After that, I came to work at Steptoe & Johnson LLP in the firm's DC office as counsel in the energy group, primarily focusing on work related to oil and gas pipelines. I was promoted to partner in 2021.

Do you recommend other lawyers work for a regulator rather than going straight to private practice?

The job training at FERC was invaluable, enabling me to truly grasp what energy law is, whether it is oil, hydro, gas, electric, or any other energy source. Also, learning how the regulator thinks about energy issues, meeting all types of industry professionals, and seeing how they conduct themselves was a fantastic opportunity for me. I also feel that I got more responsibility at FERC sooner than if I had continued in private practice throughout my entire career. However, working at a law firm gave me other responsibilities

and insights that I did not acquire at the regulator, particularly strategizing with clients, anticipating upcoming issues, and learning and thinking about how to provide value to your clients. Working at a regulator can be valuable for private practice as having seen the innerworkings of the regulator and what the regulator does is often highly regarded with clients.

Would you please describe your practice and what you do on a day-to-day basis, and what matters you often work on for your clients?

My primary practice area is natural gas and oil, and most often, I represent pipeline companies in that space. The work ranges from tariff filings to representing my clients in rate cases or strategizing with them on a project. I also try to anticipate what new issues will come out of FERC or any other emerging policy trends at the state, regional, and federal levels and what is not on the client's radar yet can create long-term issues. I also defend my clients against any complaints or negotiate on their behalf if they are in a proceeding. I would say that my day-to-day work is client-driven and depends on whether I am in the midst of litigation, filing an answer, or perhaps responding to a client that calls me and says, "Hey, we anticipate issue X, can we have a call about this." In sum, my goal is to help clients resolve problems and take matters off their plate.

Why are you interested in energy, and what are your thoughts on the oncoming energy transition?

Energy is fascinating to me because it affects many areas and is just not a matter of business dollars. Energy has both political and international implications. For example, the whole shale revolution changed the trajectory of energy security which is fascinating. I was actually working at FERC when representatives from George Mitchell's Devon Energy came in to show Commissioner Spitzer and me a black piece of shale rock and explained how it releases large quantities of natural gas through horizontal drilling – a new technology. Having experienced how horizontal drilling of shale rock drastically changed people's lives financially, as new discoveries were made in non-traditional areas – North Dakota, Ohio, Pennsylvania, for example. These discoveries made a real impact on both economies and people's lives, some negatively. But these discoveries allowed the United States to become an exporter rather than an importer of energy.

Regarding the energy transition, it is interesting that people are more aware of energy as a concept today than when I started working in the industry. Many people I met used to think I was an environmental lawyer. However, with climate change and the ongoing energy transition, energy is on the front of the Wall Street Journal and constantly being discussed in many media outlets. As energy impacts every aspect of our lives, I think the energy transition should be an all of the above strategy. For example, there are so many things coming from oil and gas that are often overlooked. It should not be forgotten that replacing one energy source with another has consequences and benefits that need to be closely considered. As a practical matter, if you are traveling up I-95 from Florida to Maine, there are gas stations and rest areas but are we building out enough electric charging stations? What about battery life? And there are just so many issues beyond saying that we need to move towards more renewables. Another example is landowner groups who want more renewable energy sources to be green but do not want to build the necessary infrastructure to make that happen. In addition, there are thousands of products made from petroleum products and natural gas, including some of the fibers used for clothing and carpeting, as well as plastic parts for cars and appliances. Reliable, cost-effective alternatives must be developed if fossil fuels are going to be eliminated, yet I only hear discussions about substitutions for fuel sources for the generation of electricity. The conversation needs to broaden.

Have you had any mentors in your career that helped you reach where you are today or any other tips for young lawyers?

Mentors are important, but I would make a distinction between mentors and sponsors. In my professional life, sponsors have been more significant and include those who can go into a room where decisions are being made and speak positively about you. For example, when I applied to an in-house company position, I applied with a list of references and a resume. However, when I spoke to the head of the office, he told me that one of his good friends was a partner at the firm I had been with and had told him great things about me. After this experience, it solidified to me that you do not know who has relationships with others and who may be talking about you, so it is crucial always to present your best face. A similar thing also happened to me after the company I worked for shut down, and I returned to FERC, and someone recommend me to work for one of the new commissioners. There will be people who will promote you and really speak well of you, and sometimes you do not know who they are, so it is essential always to do your best and work as hard as you can, acquire expertise, and doors will eventually open.

If you were a young lawyer just starting in the energy field, what would you like to work on at this moment in time, and what advice do you have to younger energy lawyers?

If I were starting out again, I would gain more experience in cybersecurity and privacy as I think both the physical and

data security area will be an area of ongoing concern for the energy industry. For example, if you have an engineering background and can marry that with a legal background, that is great. Any young energy lawyer should also ask themselves where energy companies are going. For example, by investing in greener spaces, what does that mean, and how will companies and policies change over time. I would also say that it is important to make sure to retain and maintain relationships that you are acquiring along the way in your career. Probably around 90% of the jobs you will have are because of relationships. It is really important to ask whom I am meeting professionally at my level. You will all grow up together in the same space, so having many different tentacles throughout the industry is important in so many different ways. Following this advice will make someone more informed and more well-rounded as a person. I also recommend any young lawyer attempt to be excellent in everything you do, own up to mistakes, and always do your best, and it will eventually work out. In other words, work hard and dig in. Usually, things do not work out as you think, and you must be willing to take risks in your career.

How do you deal with work-life balance and other questions young professionals might be pondering about today?

Luckily for me, I have two children – one a teenager and one a young adult – who were able to work independently on their academics, so during COVID, my children were able to take care of themselves. But even before COVID, there were many resources available for me to balance law and my family life. For example, FERC had a daycare downstairs from the office so I could go and see my children during work, and my husband and I hired a male nanny when they were a bit older and in school. I think that it takes a village to raise a child and you can't do everything simultaneously. I think you can be great at your job and be a great spouse, but you can't be 100% all the time and at the same time, and I think that is okay. But when you are in the space, whether it is working or being a parent, give 100%.

Would you recommend your children to become lawyers?

Yes, I would recommend my children to at least go to law school because the credential of having a JD is invaluable. I also think that law school helps one learn how to think, and importantly how to get to the point, which are skills that can be used anywhere. Many board leaders and other industry professionals have JDs, and I think it shows that law school is an excellent path to consider. Whether either of my children will end up in law remains uncertain. One of my children is currently looking into investment banking.

What do you like to do when not practicing law?

When not focusing on the law, I like to hang out with my husband, go to the movies, and travel. I particularly love the beach and being near the water. I also volunteer at the Smithsonian Museum and at my church, where I teach preschoolers at Sunday school.

On behalf of the team at the IEL Energy Dispatch, we would like to thank Monique Watson for participating in this interview.

Courtesy is Key: The Importance of Manners When Hosting Virtually

Vickie Adams, The Center for American and International Law

"I'm sorry I was late to the meeting; I was triple-booked."

A year and a half ago, I had never heard this sentence in a meeting. Today I have heard it several times. While it seems the consensus is that Zoom fatigue has set in, it does not appear to be slowing down the frequency with which video meetings take place. Most days, I attend more meetings in one day than I did in an entire week a couple of years ago. With our days filled up with appointments, sometimes the common courtesies that took place when calling an in-person meeting have gone by the wayside.

Meeting invites show up in our inbox without anyone asking if you are available, and meetings go well over time. Attendees are too busy dealing with their emails to pay attention. Some people end up being pushed out of the conversation entirely because of technology issues or people who will not let them have a word.

I am ashamed to say that I am guilty of some of the above offenses, but I am also committed to getting better. I decided to reach out to an array of contacts to see if they shared these virtual frustrations. Below are a few tips from my experience and my contacts for keeping the people you are meeting within your good graces.

Make scheduling quick and painless.

Most of us have probably dealt with someone putting something on our calendars without asking. Often, this is not a problem. But there have been times when I had already offered that time slot to someone else. I had not put a placeholder on my calendar because I was waiting for confirmation.

Everyone runs their calendar a little differently. If you put placeholders on all the optional meeting times you have given someone, you would not have this issue. However, tentative placeholders can get tricky for people who are

constantly in meetings and setting up new appointments.

Utilize Technology

For meetings with external parties with several people, try utilizing technology such as **Doodle** to poll participants regarding their availability. First, set up a few different time slots across one or more days, and then people can select the times that work for them. Polls eliminate the email traffic when you are trying to find a time that works for 15 people, and everyone replies to all.

There are other scheduling tools, such as **Calendly**, which you can link to your calendar and even integrate with your conferencing system. You can send a link to people that shows your availability and lets them click on the time that works for them and automatically schedule something.

A quick Google search boasts several more scheduling tools that may work for your needs. However, it is essential to remember that sometimes external technologies are not the best option. Some companies may block the links to outside scheduling tools. If that is the case, email remains a good option for scheduling. If you must schedule an appointment via email, most people generally agreed that they prefer three or four possibilities across different time slots and days rather than a blank slate of "let me know when you're available."

Internal Meetings

If you are setting up an internal meeting, one option may be to use the **Scheduling Assistant** in Outlook or Teams. Utilizing that tool can show you times that appear to work for the internal parties in the meeting. Once you have found a time that seems to work with the Scheduling Assistant, remember to follow up by email to confirm the availability of the parties.

Make sure the duration of the meeting is appropriate.

It feels necessary to start this section with a simple statement: If you can easily accomplish the purpose of the meeting by sending an email instead of having a meeting, send the email. There is a reason people have packed the internet with memes, and you can even order coffee mugs touting, "I survived another meeting that could have been an email." Also, do not forget that sometimes, a good old-fashioned phone call is best.

However, if you cannot accomplish everything via email or call, you need to have a meeting. I had a situation a few weeks ago where I thought I could avoid having a meeting. A chain of back-and-forth emails quickly showed me that emails were not working, so I scheduled a 15-minute session. After five minutes, we accomplished our purpose and were able to move on.

Before scheduling any meeting, in-person or virtual, you should always think about everything that needs to be discussed and determine the appropriate amount of time. Several meetings I have attended lately were scheduled for an hour when it was clear they could easily have been half that time. When that happens, I am generally happy to have a little "free" time to get other things accomplished, but it also means if I needed to schedule something in the last 30 minutes, I would not have been able to. The real problem for most people is a meeting designed for 15 or 30 minutes that significantly runs over. There are certain people whose meetings always seem to go over time, and it often puts attendees in difficult or awkward positions if they have somewhere else they need to be.

If you are leading a meeting, pay attention to the time. When you only have a few minutes left, you may want to take a quick poll of the group to see if they can stay. You should try to accomplish as much as possible in the time you have left and respect the schedules of others.

Have an agenda or clear purpose.

I do not like the feeling of showing up to a meeting unprepared because the organizer did not give adequate information. Not every session needs a full agenda, but if we ask people to take time out of their schedules to meet with us, we should be giving them information on the discussion that will take place. You should be clear about the purpose of the meeting and conversations that need to occur to accomplish that purpose. You probably did this legwork when you decided to hold the meeting and figured out how long it would be. If you have already done the work, attendees appreciate the extra information in advance, and it will usually make the meeting flow more smoothly.

Run the meeting like you are in person.

When a meeting organizer cannot see the faces of all the attendees, it is difficult to know whether they have something to say. There are times in virtual meetings where I have tried to speak for thirty minutes, but others kept talking over me or did not allow me the opportunity. While some people have a knack for sharing their ideas and making their voice heard, others worry about jumping in and seeming rude, and they lose their opportunity.

If you are running a meeting, make sure that you give everyone on the call an opportunity to share their thoughts. It may be uncomfortable to call on people, but it is better than making that person feel like they are invisible.

If you have something to say as an attendee, remember that

features are built into the technology to help you. If you are not successful at getting the chance to talk, try raising your virtual hand or letting the attendees know through chat that you have a point you would like to make.

Finally, when you are hosting a meeting, do not forget that people need breaks. When everyone is in a room together, you can notice when people start shifting in their seats. Make sure you are not asking people to stay stationary for unreasonable time periods. People need to stretch. People need to take bathroom breaks. People may need to take pumping breaks. Remember to be accommodating and schedule breaks into longer meetings. If you wait until someone asks for a break, you have waited too long.

Be flexible.

It is important to remember that everyone has more meetings than a couple of years ago. School and childcare situations are also vastly different and if you want to meet with someone, know that they may have a kid in the background (or in their arms). As someone who has had to have kids on calls – I am always stressed when this happens, and I appreciate when the others on the meeting show that they are understanding. Emergencies are bound to happen, and you may need to be okay with rescheduling.

In the end, we all need to remember to show courtesy and be flexible in our virtual interactions.

Young Energy Professional Highlight Gabrielle "Gabby" Figueroa, Barclay Damon

Interview by Laura Brown, Liskow & Lewis

LB: Gabby, can you tell us a little about your practice?

GF: I am fortunate to have a very diverse practice in the energy space. I just assisted with two significant transmission project filings this summer, and I am currently working with a local utility on asset transfers to municipalities. I also counsel retail electric and gas suppliers on regulatory requirements in New York and New Jersey. New York recently implemented dramatic changes to their electric and gas choice programs for mass-market customers, and I expect additional changes to be made in the coming years.

LB: Very interesting! Do you have any advice for attorneys who want to expand their practice to the utilities or regulatory space?

GF: Wherever you are on the political spectrum, I think it is important as practitioners in this space to stay up to speed on political decisions being made in the energy arena. I keep informed on legislation, changes to regulations, decisions from regulatory commissions and direction from the state's executive branch. To respond to the ever-changing political climate, energy companies need to be creative, flexible and innovative, and it's our job to make sure our clients have the best information possible so they can make well-informed decisions.

LB: Gabby, you had the unique experience of participating in IEL's Leadership Class when it was entirely virtual. What do you enjoy about IEL, and what are you looking forward to?

GF: The IEL program and seminars are thoughtful, engaging, and interesting. I have been consistently impressed with the caliber of speakers and the depths of their presentations. The leadership program was a bright spot in the pandemic for me, and I have very much enjoyed getting to know my classmates. I was particularly excited to be invited to join the Renewables Practice Committee, and I look forward to sharing with my colleagues some of the different developments happening in the Northeast.

LB: Many of *The Energy Dispatch's* readers are based in traditional oil-producing states like Texas. What do you wish they knew/what do you think they would be interested to know about the energy market or practice of law in the Northeast?

GF: While it may be true that you shouldn't mess with Texas, the renewables programs in New Jersey and New York are nothing to joke about. New Jersey just revamped its solar incentive program to support the development of another 3,759MW of solar by 2026, and New York, with its Clean Energy Standard, and Climate Leadership and Community Protection Act, has an ambitious target of 70% renewable generation by 2030 with a carbon free power sector by 2040. Both states are in the process of building large-scale offshore wind projects to further support renewable energy generation and diversify the states' energy portfolios. Only time will tell which state will get its offshore wind project(s) up and running first.

In addition to supporting retail electric and gas choice, both New York and New Jersey have developed community solar programs, adding another layer of choice for residential customers who want to support renewable development without the expense of installing rooftop solar. I think additional innovation and consumer choice is on the way for residents in these states as renewable energy becomes more affordable and as energy storage is further deployed. The increase in energy storage technology will also lend itself to

the development of electric vehicle infrastructure, which will give consumers another opportunity to make environmentally sound decisions.

LB: It sounds like these neighboring states are both ambitious and relatively aligned in policy.

GF: What I find interesting about practicing law in New York and New Jersey is that while both states have much in common when it comes to electric and gas markets (including retail choice programs and renewable energy goals) each state has charted a different course to achieve a substantially similar outcome. While regulation may have stymied some of the retail choice options for customers (particularly in New York), it is also a driver of increased innovation in the energy sector. It's been exciting to practice law in this space over the past decade, and I'm looking forward to what happens next.

LB: So speaking of "transitions," as the Northeast emerges from the pandemic—kind of, we hope—have you transitioned from home back to the office environment? If so, how is that going?

GF: My firm, Barclay Damon, has been wonderful throughout the pandemic, and my colleagues have been an amazing source of support over the past year and a half. Right now, we have the option to work from home or in the office, so I generally head into the office two to three days a week. I'm enjoying my time back in the office, but I am also enjoying the option to work from home (especially on Fridays in the summer). And while I am sure my coworkers miss seeing my cats in every (every!) video conference, it is nice to take a deposition or participate in a meeting without a furry helper on my keyboard.

LB: Leave us with an interesting fact about yourself.

GF: As the leadership class already knows, I have a yarn problem. I love to knit and crochet, and the pandemic was very helpful in giving me some extra time to work through my yarn stash (apparently I was over-prepared for spending a year inside and I didn't even know it). For me, working up a shawl or a baby blanket or mittens or whatever I'm doing is an opportunity to be creative and relax at the same time. I moved to Syracuse to join Barclay Damon, and the winter weather has definitely inspired some cozy new creations.

LB: Jay Ray says he would like some mittens. Thank you for your time, Gabby!

In BPX Operating, the Texas Supreme Court Ruled that Cashing Royalty Checks Did Not Ratify a Unit, but the Court was Unable to Address Commingling Issues

John M. Byrom, McCarn & Weir, P.C.

Since the proliferation of horizontal drilling, oil and gas well operators have increasingly relied upon allocation wells in lieu of pooling or when pooling is not available. An allocation well is a horizontal well where the lateral drill pipe crosses multiple tracts or lease lines without the interests being pooled, and production is allocated to each interest owner based on the productive lateral feet of drill pipe located in each tract. The "productive lateral feet" are measured from the first take point in the well pipe to the last take point.

Allocation wells can be problematic because there is typically no agreement in place between the parties on how to pay royalties. Typically, mineral owners attempt to control drilling on or through their lands by negotiating specific clauses in their lease, with particular emphasis on the pooling clause. In Texas, forced pooling occurs in only very limited circumstances, so mineral lessors can exert a substantial amount of control on pooling issues. The following types of questions arise then: Should a lessee be able to disregard a negotiated pooling clause and drill an allocation well? Moreover, how should royalties for an allocation well be paid, especially if there is a commingling clause? Could actions by a lessor ratify an unauthorized pooling?

It is with this context that the Texas Supreme Court delivered its opinion in *BPX Operating Co. v. Strickhausen*, No. 19-0567, 2021 Tex. LEXIS 468 (June 11, 2021). In *BPX Operating,* a lessee created an unauthorized pooled unit and alleged that the lessor had impliedly ratified the unauthorized pooling through their actions. The lessor had negotiated strict pooling and commingling clauses in their lease and had not expressly ratified the unit. Ultimately, in a contested 5-4 decision, the Court ruled that the lessor did not ratify the pooled unit. This article discusses the case, it's holding, and related issues.

In *BPX Operating,* Strickhausen owned half of the minerals under a tract of land and leased her interest to a predecessor-in-title of BPX Operating Co. ("BPX"). *BPX Operating*, No. 19-0567, 2021 Tex. LEXIS 468 at *4. The lease's pooling clause provided:

> POOLING: Notwithstanding any provision or reference contained in this Lease agreement to the contrary, pooling for oil or gas is *expressly denied* and shall not be allowed under *any circumstances* without the *express written*

> *consent* of the Lessor named herein. Further, Lessee is denied the right to seek, or consent to, or participate in the forced pooling of any part of the Leased Premises under the Texas Mineral Interest Pooling Act and any and all amendments thereto or any other pooling or unitization statutes of the State of Texas without Lessor's written consent. *Id.* at *4-5 (emphasis added).

BPX pooled the acreage covered by the Strickhausen lease with other leases that allowed for pooling to create a 320-acre pooled unit named White Kitchen Unit No. 4. *Id.* at *5. Subsequently, in April 2012 BPX drilled the WK Unit 4 No. 1H Well, which had its surface location on Strickhausen's tract and ran horizontally under the rest of the "pooled" tracts. *Id.* Strickhausen, however, had not given prior consent for the pooling of the lease. *Id.*

On September 20, 2012, BPX sent Strickhausen a letter requesting her to sign a ratification and a pooling consent agreement. *Id.* Strickhausen did not execute the documents, and forwarded them to her attorney. *Id.* By letter dated October 12th, Strickhausen's attorney responded to BPX and raised concerns that the lease appeared to be pooled against its terms and requested BPX to cite what authority it used to pool the lease. *Id.* at *6-7. Furthermore, Strickhausen's attorney inquired how BPX would calculate the royalties if Strickhausen did not consent to the pooling. *Id.*

On December 10th, BPX sent a letter that acknowledged the lease prohibited pooling without the lessor's consent, admitted BPX didn't obtain consent, and outlined that if Strickhausen consented to the pooling then her royalty would be calculated on a "tract participation" basis (*i.e.*, the method used in pooling), otherwise it would be calculated based on the length of the perforated lateral in her tract (*i.e.*, the method used for allocation wells). *Id.* at *7-8. However, BPX concluded the letter by stating that if Strickhausen did not consent to the pooling, BPX would put her royalties in suspense. *Id.* at *8.

A couple of months later, BPX filed a certificate of pooling authority on February 18, 2013. On February 20th, BPX mailed Strickhausen the first check for royalties from the "WK UNIT 4 1H" for production from August 2012 to December 2012. *Id.* Strickhausen's attorney and BPX exchanged offers to settle the prohibited pooling issue, the last of which expired March 18, 2013, but no agreement was expressly reached. *Id.* at *8-9. On March 11th, Strickhausen deposited the first check sent by BPX, and continued to deposit monthly checks that BPX sent thereafter. *Id.* at *9. Purportedly, Strickhausen's attorney continued to communicate with BPX until the filing of the lawsuit, making it clear that Strickhausen would not ratify the pooling. *Id.* On August 1, 2014, Strickhausen sued BPX for breach of contract, among other claims. *Id.* "BPX argued that Strickhausen – despite her protests – impliedly ratified the pooling and was estopped from challenging the pooling agreement because she accepted royalty payments calculated on a pooled basis." *Id.* at *10. Strickhausen argued she was always opposed to pooling, and that she thought the "WK UNIT 4 1H" notation on the check stub referred to the well on her land rather than the pooled unit. *Id.* "She accepted the checks because she believed she was entitled to royalties on all gas produced from the well on her land, and that she accepted the checks not because she intended to ratify the pooling but because she wanted to ensure that she would receive the royalties she believed to be owed." *Id.* Strickhausen's assertion that she was entitled to "all" gas produced suggests she was relying on the argument that when gas is commingled then the lessor is entitled to royalty on all gas from the well.

The trial court ruled in favor of BPX's motions for summary judgment on several claims, including wrongful pooling, commingling, and failure-to account. *Id.* at *10-11. The trial court found as a matter of law that Strickhausen was estopped from denying that she did not ratify the pooled unit because she accepted the royalty checks. *Id.* at *11. However, the trial court granted a permissive interlocutory appeal on the ratification of the pooling issue, but not the estoppel issue. *Id.* at *11, *11 n.4. On the permissive appeal, the appellate court reversed the trial court's holding and held that Strickhausen's ongoing challenge created a fact issue; therefore, the evidence cannot conclusively establish as a matter of law that Strickhausen ratified the pooling. *Id.* at *11. Accordingly, the Supreme Court considered whether the pooled unit was ratified.

The Court first tackled the standard to apply and interpreted BPX's claims as asserting the categorical rule that a lessor's acceptance of royalties calculated on a pooled basis always amounts to ratification of pooling as a matter of law. *Id.* at *18. However, the Court disagreed with BPX's categorical rule and distinguished the current case from the cases that BPX relied upon. *Id.* BPX relied on *Hooks v. Samson Lone Star, Limited Partnership*, 457 S.W.3d 52 (Tex. 2015), where the court found Hooks impliedly ratified an amended unit. *Id.* at *16. In that case, Hooks received a notice letter, refused to challenge the amended unit, and only asserted that the lessee could not "unpool" the original unit. *Id.* at *16-17. *Hooks* does not stand for the proposition that *any* inconsistent act supports ratification as a matter of law, the Court reached its conclusion only after considering all the relevant facts and circumstances together. *Id.* at *17. BPX also relied on *Montgomery v. Rittersbacher*, 424 S.W.2d 210 (Tex. 1968), where the court stated theoretically that a royalty owner can ratify an unauthorized pooling by accepting royalties, but it never addressed whether the pooling was ratified in that manner, because Montgomery

had previously sued to enforce the pooled unit. *Id.* at *18-19. "*Montgomery* stands for the unremarkable proposition that lessors who sue to *enforce* a pooling agreement cannot later claim not to be bound by it." *Id.* at *19.

Having dispelled the asserted categorical rule, the Court outlined that "[r]atification is the adoption or confirmation by a person with knowledge of all material facts of a prior act which did not then legally bind [the person] and which [the person] had the right to repudiate." *Id.* at *12 (quoting *Wise v. Pena*, 552 S.W.2d 196, 199 (Tex. App.—Corpus Christi—Edinburg 1977, writ dism'd). For implied ratification, a party's subjective state of mind is immaterial, and courts instead look to objective evidence of intent. *Id.* at *12. The Court, while reflecting on the oil and gas lease, explained that the right to contract also includes the corresponding right to refuse to accept a contract, and it compared ratification to wavier of a contractual clause. *Id.* at *15. "It is well-settled that '[w]hile waiver may sometimes be established by conduct, that conduct must be *unequivocally inconsistent* with claiming a known right.'" *Id.* at *15 (quoting Van Indep. Sch. Dist. v. McCarty, 165 S.W.3d 351, 353 (Tex. 2005) (emphasis added)). Thus, the Court held ratification should be subject to a similar requirement and that BPX must show Strickhausen's behavior clearly evidenced an intent to ratify the pooled unit. *Id.* at *16.

With the standard set, the Court was left to determine whether Strickhausen's actions clearly evidenced an intent to ratify BPX's unauthorized pooling. The Court held her actions did not, and "certainly not to the extent required to establish ratification as a matter of law." *Id.* at *20. Facts in Strickhausen's favor included that she negotiated a lease that prohibited pooling under any circumstances without her express written consent. *Id.* As soon as Strickhausen learned of the pooling, her attorney sent a letter to BPX demanding an explanation, and her attorney continued to hold her anti-pooling stance. *Id.* at *21. Additionally, Strickhausen was entitled to royalties with or without pooling. *Id.* at *22.

On the other hand, BPX notified Strickhausen that if she did not ratify, her royalties would be put in suspense, but she was sent royalty checks. *Id.* at *21. Further, Strickhausen accepted the benefit of the royalty checks, which could amount to ratification. *Id.* at *23. However, the Court rationalized that "[c]onduct that can be otherwise explained may not effect ratification." *Id.* at *23 (quoting Restatement (Third) of Agency § 4.01 cmt. d). The Court found that Strickhausen had a reasonable explanation for her acceptance of the checks, that she knew BPX owed her royalties regardless of the pooling, and that BPX – despite the parties' mutual acknowledgment that Strickhausen had not consented to the pooling – continued to send checks. *Id.* at *24. The Court explained that BPX could not have reasonably inferred that Strickhausen's acceptance of the checks meant she consented to the pooling, and, moreover, ratification is not a game of "gotcha" like a categorical rule would be applied. *Id.* at *24-26. Ultimately, the totality of the circumstances viewed objectively did not provide the clear evidence needed to support a holding of implied ratification as a matter of law. *Id.* at *29. The Court affirmed and remanded the case to the trial court for further proceedings consistent with its holding. *Id.*

There was a lengthy dissent that contended Strickhausen knew the royalty payments were for royalties from the horizontal well on the pooled unit, and that she knew those royalties were calculated on a tract participation basis, so she ratified the pooling. The dissent further emphasized that Strickhausen could have indicated her disagreement with the royalty payments by, among other actions, "disputing BPX's *calculations* as she accepted the checks," but the dissent found no evidence she accepted the checks under a form of protest. *Id.* at *47 (emphasis added).

Additionally, the dissent addressed an argument related to commingling, which Strickhausen appeared to assert, but it was addressed very little in the majority opinion. The Supreme Court has previously held that accepting an underpayment of royalty is not inconsistent with a claim of being entitled to a greater amount of royalty. *Id.* at *47 (citing Samson Expl., LLC v. T.S. Reed Props., Inc., 521 S.W.3d 766, 778 (Tex. 2017) (holding parties' acceptance of royalty payments on one well was not inconsistent with demand for royalty payments on that well and another). Strickhausen argued that because she was entitled to "all" of the production (because of commingling), accepting a check as an underpayment did not ratify the pooled unit. *Id.* at *45-46. The dissent found that argument insufficient only because Strickhausen never communicated that position before filing suit. *Id.*

Put simply, commingling, also called the confusion of goods, provides that where homogenous goods of a similar nature and value owned by different parties are commingled so that the property of each owner cannot be distinguished from another, the burden is on the one commingling the goods to properly identify the aliquot share of each owner with reasonable certainty. *Humble Oil & Refining v. West*, 508 S.W.2d 812, 818 (Tex. 1974). If the goods are so confused as to prevent proper division "the loss must fall on the one who occasioned the mixture." *Id.* In other words, if an operator commingles production from different tracts and cannot divide each share with reasonable certainty, then the operator would pay royalties on all of the production to the commingled party. However, the Austin Appellate Court has stated that the traditional penalty is too draconian for horizontal wells, that horizonal wells are important for their efficiency, and a "better

remedy is to allow the offended lessors to recover royalties as specified in the lease, compelling a determination of what production can be attributed to their tracts with reasonable probability." *Browning Oil Co. v. Luecke*, 38 S.W.3d 625, 647 (Tex. App.—Austin 2000, no pet.).

The law on the commingling, as it pertains to production from horizontal wells, is yet to be fully decided. Is it possible a court could find that the method of paying royalties for an allocation well is acceptable as a "division with reasonable certainty" to satisfy commingling issues? The Strickhausen lease actually prohibited commingling of production without the written consent of lessor. *Id.* at *5 n.1. What would be the penalty for commingling without written consent? The majority opinion appears to have given credence to Strickhausen's argument that her production was commingled and she was accepting underpayment, but the appeal was unfortunately, limited in scope to the issue of implied ratification. On remand, this case could offer much needed legal holdings on the commingling issues created by allocation wells.

BPX Operating adds to the developing common law on what actions can evidence implied ratification of a pooled unit. The appeal was specifically limited to the ratification of the pooling issue, so the Court could not rule on estoppel, and did not have the opportunity to make findings on relevant commingling issues. Professionals in the energy industry should follow the remanded case for possible new legal developments.

Ecuador: The Obsolescing Bargain

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1. Introduction

The relationship between States and their private partners are sometimes characterized by such harsh terms as 'mistrust', 'hostage' or 'obsolescing bargain'. Raymond Vernon, Long-Run Trends in Concession Contract, *Proceedings of the American Society of International Law*, 1967, pp. 81-89. The Deardorffs' Glossary of International Economics defines the obsolescing bargain as 'a model of interaction between a multinational enterprise (MNE) and a host country government, which initially reach a bargain that favors the MNE but where, over time as the MNE's fixed assets in the country increase, the bargaining power shifts to the government.' **http://www-personal.umich.edu/~alandear/glossary/o.html** last accessed on August 15, 2021.

In the energy sector, the unstable character of these relationships is due to natural economic cycles; the rise of energy prices is generally followed by the revision of the terms of investments by the producing countries' governments. Additionally, such features as the long duration of oil and gas contracts, the necessity to deal with sovereign States, and important capital investments make a private party particularly vulnerable in the case of successful exploration. Thus, a main concern of any party dealing with a sovereign State is to foresee a new nationalistic wave and to keep the State from unilaterally interfering with the investment. Thomas W. Wälde, Renegotiating acquired rights in the oil and gas industries: Industry and political cycles meet the rule of law, *Journal of World Energy Law & Business*, 2008, Vol. 1, No. 1, p. 56; Thomas W. Waelde; George Ndi, Stabilizing International Investment Commitments: International Law Versus Contract Interpretation, *Tex. Int'l L. J.*, No. 31, 1996, p.225.

Oil prices are considered to affect the balance of power between host countries and international energy companies, resource nationalism being a 'byproduct of high prices'. Vlado Vivoda, Resource Nationalism, Bargaining and International Oil Companies: Challenges and Change in the New Millennium, *New Political Economy*, Vol. 14, No. 4, December 2009, p. 518. However, the political cycle does not always follow the oil price cycle, and some countries and regions are more prone to the resurrection of resource nationalism than others. A popular example is the energy policies of Latin-American States, including Ecuador.

This article examines the Ecuadorian energy investment policy over the last 30 years and discusses the possibility of a new nationalistic wave in the near future.

2. The Cooperative Period

When one speaks about the energy industry in the Western hemisphere, it is important to keep in mind the history of colonization and some countries' general resentment toward foreigners. Thus, the privatization of the energy sector and the ostensible openness to foreign direct investment (FDI) in Latin America in the 1990s ultimately created a backlash against international oil companies (IOCs).

The period between 1990 and 1999 was cooperative, which was characterized by the following features: low oil prices (the Brent crude price per barrel in 1998 was as low as US$12.21 (*BP Report*, 2006.)), compatible interests of actors in the international energy industry, the desire of the resource rich countries to maximize productive efficiency, and deregulation and privatization. Importantly, the 1990s were marked by the disappearance of resource nationalism and the dominant position of IOCs *vis-a`-vis* the contracting States.

Prior to 1993, Ecuador used service contracts for granting rights for hydrocarbon exploration to foreign investors. Obviously, this model was not working as no service contracts were signed

between 1988 and 1993. *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6; Decision on Remaining Issues of Jurisdiction and on Liability (English) dated September 12, 2014, paras 55- 56. Since 1993, Ecuador started to encourage foreign energy investments by implementing such investment friendly measures as, *inter alia*, the enactment in 1993 of the Law No. 44 recognizing 'participation contract' as the primary contractual model, the enactment in 1997 of the Law No. 46 on 'Promotion and Guarantee of Investments', the enactment of privatization laws in 2000, allowing foreigners to acquire up to 51% of shares in certain businesses, and amendments to its Constitution guaranteeing foreign investors the same rights as nationals. *Ibid.*; paras 57 and 60.

These measures proved fruitful and by 1994, Ecuador reduced its public sector budget deficit, decreased inflation, and created foreign currency reserves. Between 1995 and 1996, the public investment was estimated at 6.4% of GDP; however, by the end of the 20th century, Ecuador remained highly dependent on hydrocarbon exports and domestic fuel sales. https://1997-2001.state.gov/issues/economic/trade_reports/latin_america95/ecuador.html last accessed on August 15, 2021.

3. The Backlash

The first decade of the 21st century was marked by a rapid increase in oil prices which lasted until 2008. As an example, the Brent crude price was US$54.52 per barrel in 2005 and exceeded US$147 per barrel in July 2008. The short fall of the prices in 2008-2009 was followed by a quick recovery.

This period was completely opposite compared to the end of the 20th century. It was marked by the economic crisis that started in 2007, the revived investment protectionism and resource nationalism. Kalman Kalotay, 'The Political Aspect of Foreign Direct Investment: The Case of the Hungarian Oil Firm Mol', *J World Investment & Trade*, No. 11, 2010, p.79; Paul Stevens, National oil companies and international oil companies in the Middle East: Under the shadow of government and the resource nationalism cycle, *Journal of World Energy Law & Business*, Vol. 1, No. 1, 2008, p 24.

Ecuador undertook several measures aimed to recalibrate economic balance and increase control over its energy resources. In 2006, Ecuador implemented a new law requiring foreign contractors to pay the state 50% (and later 99%) of 'extraordinary income' calculated as the difference between the selling price of Ecuadorian oil and its market price at the time of conclusion of a contract. Simultaneously, it seized an oil field controlled by Occidental Petroleum, a US-based energy giant. In 2009, Ecuador withdrew from the ICSID Convention and, between 2007 and 2017, it denounced twenty BITs. The status of the Ecuadorian BITs can be checked at https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search last accessed on August 15, 2021. See also Elisabeth Eljuri; Clovis Trevino, Energy Investment Disputes in Latin America: The Pursuit of Stability, *Berkeley J. Int'l L.* No. 33, 2015, p. 313; Tom Childs, 'The Current State of International Oil and Gas Arbitration' 13 *Tex J Oil Gas & Energy L.* No. 13, 2018, p. 8; Kristin Kluding, 'Disincentivizing the Growing Trend of Denunciating the Investment Treaty Framework: Tracking the Criticisms and Analyzing the Future of Transnational Regulation of Investment Law', *Hous J Int'l L.*, No. 41, 2018, p. 168; Julian Arato, Corporations as Lawmakers, *Harv. Int'l L.J.*, No. 56, 2015, p. 270. In addition, since 2010, private oil companies were forced to replace production-sharing agreements with flat rate service contracts. Joachim Karl, FDI in the Energy Sector: Recent Trends and Policy Issues in *Foreign Investment in the Energy Sector Balancing Private and Public Interests*, Eric De Brabandere and Tarcisio Gazzini eds. 2014, p. 19. As a result, oil production has been stagnant over the past 10 years and Ecuador is currently forced to import refined oil products. **https://www.eia.gov/international/analysis/country/ECU** last accessed on August 13, 2021.

4. The New Beginning

The second decade of the 21st century was characterized by two drastically different sub-periods. The first sub-period continued the trend of the previous decade associated with high oil prices, while the second sub-period witnessed a steep drop of oil prices, which occurred at the end of 2014 (from about US$110 a barrel to less than US$50 a barrel between July 2014 and January 2015). Don C Smith, Looking ahead: The top ten energy and natural resources issues in 2015, *Journal of Energy & Natural Resources Law*, Vol 33, No 1, 2015, p. 4. Further, the hydrocarbon sector was dramatically affected by the COVID-19 pandemic, and the seemingly stabilizing oil prices are still unstable. Don C Smith, COVID-19 and the energy and natural resources sectors: little room for error, *Journal of Energy & Natural Resources Law*, Vol 38, No 2, 2020, p.125.

Under these circumstances, on July 16, 2021, new Ecuadorian President Guillermo Lasso signed a decree ratifying the ICSID Convention which will enter into force on September 3, 2021. The President's priority is to attract back the foreign investment in hydrocarbons to fight Ecuador's economic crisis. Indeed, rejoining ICSID system is as an efficient means to promote foreign investment. However, on July 27, 2021, Ecuador's National Assembly took a decision to challenge the President's decree. This decision may be used in the future as one of the grounds of non-admissibility of the investment disputes due to lack of the State's consent. https://

globalarbitrationreview.com/ecuador-deposits-ratified-icsid-convention last accessed on August 15, 2021.

Only twelve years have passed since the complete refusal of the Ecuadorian government to cooperate with foreign investors and less than four years since the denunciation of the last BITs. Potential investors should be wary of a possible renaissance of resource nationalism and a possible re-orientation of Ecuador's foreign energy investment policies in the near future.

Endeavors Clause in the 2019 AIPN Farmout Agreement: A Note to a Practitioner

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In a farmout agreement, someone who owns drilling rights (the farmor or farmoutor) assigns all or a portion of those rights to another (the farmee or farmoutee) in return for the farmee's drilling and testing on the property. J, Lowe, Analyzing Oil and Gas Farmouts agreements, 41 SW L.J. 759 (1987). A farmout agreement assumes there will be payment for or performance of drilling or testing operations on the acreage in question. J. Lowe, Oil and Gas in a Nutshell, 422 (2019). Developed in the United States, farmout agreements are commonly used in oil and gas transactions. Generally, the AIPN Model 2019 Farmout agreement (2019 Model FOA) represents/warrants that the farmee and farmor have the requisite authority and corporate power to enter into the agreement and perform the obligations stipulated thereto. Over time, farmout agreements have been modified or amended to reflect changing circumstances in oil and gas transactions.

An interesting turn in the 2019 Model FOA is the inclusion of the English concepts of best endeavors and reasonable endeavors in the conditions precedent clause. The clause provides that "Each party shall use its best endeavours/reasonable endeavours (a) to satisfy the Conditions Precedent that is to satisfy at its sole expense; and (b) to assist another party to satisfy a condition precedent that is to satisfy (subject to the other party's request and other party's expense)." 2019 Model FOA, Art 2.3.3.

The 2019 Model FOA insists that parties use their best endeavors or reasonable endeavors to satisfy the conditions precedent. *Id.* Of English origin, these clauses are not standard in American jurisprudence. Parties to the agreement who wish to adopt the model agreement without modification must understand the import and the operative meaning of these clauses since they may determine the enforcement of the contract. This article looks to English law and decided cases to unravel the difference (if any) and import of the clauses.

In one case, the court described best endeavors as, generally speaking, leaving no stone unturned within the bounds of reason. *Sheffield District Railway Co. v Great Central Railway Co* (1911) 27 TLR, 451, 452. In another English case, *IBM United Kingdom Ltd. v. Rockware Glass Ltd.,* (1980) FSR 335, at 343) the agreement conditioned the purchase of a piece of property on whether the buyer (IBM United Kingdom) obtained planning permission for the property. The sale contract obligated plaintiffs to use their best endeavors to apply for and obtain the planning permission. The buyer sought planning permission, but the local city council refused the application. The buyer abandoned the contract and did not appeal the denial of the planning permission. The buyer, IBM, sued, and the court interpreted the best endeavors clause to require the buyer to "take all those steps in their power which are capable of producing the desired results." *Id.* at 349. The court went ahead to say that "these words (best endeavours) oblige the purchaser to take all those reasonable steps which a prudent and determined man acting in his own interests and anxious to obtain planning permission would have taken." *Id.* at 345. The court noted that the buyer failed to use his best endeavors to obtain the desired result by neglecting to appeal the denial of the planning permission.

Based on the ruling in *IBM United Kingdom*, the inclusion of the best endeavors clause in the model farmout agreement obligates the farmor and farmee to make all reasonable efforts to satisfy their condition precedents. Simply trying may not be enough, but the endeavor may be sufficient if the party exhausts all reasonable avenues available in the circumstances.

In some cases, the English courts have required contractual parties to incur commercial costs to satisfy best endeavors clauses. For example, in *Jet2.com v. Blackpool Airport Ltd,* (2012) EWCA (Civ 417). The agreement provided that Jet2.com and BAL will cooperate and use their best endeavors to promote Jet2.com's low services from Blackpool airport, and BAL will use all reasonable endeavors to provide a cost base that will facilitate Jet2.com's low-cost pricing. The agreement required Blackpool airport to keep the hotel open after normal operating hours to accommodate Jet2.com's low-cost flights that arrive after normal operating hours. The court noted that there is common ground that all reasonable endeavors mean

the same as best endeavors. Blackpool allowed Jet2.com to operate its low-cost flight operations to Blackpool airport for four years without any disagreement. Subsequently, Blackpool airport realized that it was running losses and, in order to improve profitability and reduce losses, decided to reduce its operating hours, thereby shutting out Jet2.com from operating outside normal operating hours. Jet2.com sued, arguing that the Blackpool airport must stick to the terms of agreement and keep the airport open to service the low-cost flight operations that land outside the normal operating hours for the duration of the contract. The court agreed and stopped Blackpool Airport, the defendant, from reducing its operating hours and ordered it to accommodate Jet2.com's airline operations in the airport even though it came at a commercial cost to Blackpool. The court reasoned that an obligation to use best endeavors still holds even at a commercial cost to a party.

On the other hand, in the English case of *Jolley v. Carmel Limited,* (2000) 2 EGLR 153*,* the court stated the following when analyzing reasonable endeavors and best endeavors:

> Where a contract is conditional upon the grant of some permission, the courts often imply terms about obtaining it. There is a spectrum of possible implications. The implication might be one to use best endeavors to obtain it (see Fischer v Toumazos [1991] 2 EGLR 204), to use all reasonable efforts to obtain it (see Hargreaves Transport v Lynch [1969] 1 WLR 215), or to use reasonable efforts to do so. The term alleged in this case [to use reasonable efforts] is at the lowest end of the spectrum.

Id. at 159. *In Jolley,* the court held that reasonable efforts imply a less stringent obligation than best endeavors.

Additionally, in *Rhodia International Holdings v. Huntsman International,* (2007) 1 C.L.C. 59, 74, the court reasoned that "an obligation to use reasonable endeavors to achieve the aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavors probably requires a party to take all the reasonable courses he can" (emphasis added).

The English cases discussed above provide a birds-eye view of how a court may treat best endeavors and reasonable endeavors clauses if they are disputed in the context of the 2019 Model FOA. Since these clauses are English in origin, English cases interpreting the clauses will likely be persuasive authority outside of England. Practitioners considering the contents of the model contract should pay close attention to the outcomes of these cases to decide whether to adopt or adapt the best or reasonable endeavors clauses.

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