

JANUARY 2021

VOL. 21-1

PRATT'S

ENERGY LAW REPORT



LexisNexis

EDITOR'S NOTE: THE NEW YEAR! Victoria Prussen Spears

ESG LITIGATION RISKS FOR MINING AND METALS COMPANIES

Oliver Wright, Rebecca Campbell, Michael Kendall, Kevin M. Bolan, Clare Connellan, and Karen Eisenstadt

OPERATOR ROLE IN A JOINT OPERATING AGREEMENT

Zaid Mahmoud Aladwan

HOW MIDSTREAM PROVIDERS MUST RESPOND TO LATEST EXPLORATION AND PRODUCTION BANKRUPTCIES

Keith N. Sambur, Seth R. Belzley, and Andrew Thomas Gillespie

NOW. NORMAL. NEXT. CURRENT REGULATORY AND POLICY ISSUES FOR MICROGRIDS

Brooke E. McGlinn, Pejman Moshfegh, and Arjun Ramadevanahalli

Pratt's Energy Law Report

VOLUME 21

NUMBER 1

January 2021

Editor's Note: The New Year!

Victoria Prussen Spears

1

ESG Litigation Risks for Mining and Metals Companies

Oliver Wright, Rebecca Campbell, Michael Kendall, Kevin M. Bolan,
Clare Connellan, and Karen Eisenstadt

3

Operator Role in a Joint Operating Agreement

Zaid Mahmoud Aladwan

19

**How Midstream Providers Must Respond to Latest Exploration and
Production Bankruptcies**

Keith N. Sambur, Seth R. Belzley, and Andrew Thomas Gillespie

26

Now. Normal. Next.

Current Regulatory and Policy Issues for Microgrids

Brooke E. McGlinn, Pejman Moshfegh, and Arjun Ramadevanahalli

29

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please email:

Jacqueline M. Morris at (908) 673-1528
Email: jacqueline.m.morris@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT’S ENERGY LAW REPORT [page number]
(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT’S ENERGY
LAW REPORT 4 (LexisNexis A.S. Pratt)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc. Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

SAMUEL B. BOXERMAN

Partner, Sidley Austin LLP

ANDREW CALDER

Partner, Kirkland & Ellis LLP

M. SETH GINTHER

Partner, Hirschler Fleischer, P.C.

STEPHEN J. HUMES

Partner, Holland & Knight LLP

R. TODD JOHNSON

Partner, Jones Day

BARCLAY NICHOLSON

Partner, Norton Rose Fulbright

BRADLEY A. WALKER

Counsel, Buchanan Ingersoll & Rooney PC

ELAINE M. WALSH

Partner, Baker Botts L.L.P.

SEAN T. WHEELER

Partner, Latham & Watkins LLP

Hydraulic Fracturing Developments

ERIC ROTHENBERG

Partner, O'Melveny & Myers LLP

Pratt's Energy Law Report is published 10 times a year by Matthew Bender & Company, Inc. Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher

POSTMASTER: Send address changes to *Pratt's Energy Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

How Midstream Providers Must Respond to Latest Exploration and Production Bankruptcies

*By Keith N. Sambur, Seth R. Belzley, and Andrew Thomas Gillespie**

In the bankruptcy case of Extraction Oil & Gas, the U.S. Bankruptcy Court for the District of Delaware issued an opinion that, according to the authors of this article, undermines the framework for how the midstream industry operates and obtains financing. The authors discuss the decision, which they say calls into question bedrock principles on which midstream companies rely in constructing, investing, and financing midstream infrastructure.

The dual impact of a COVID-19 demand slump and market pricing pressures has led to a host of bankruptcy filings by exploration and production (“E&P”) companies. This distress led producers to seek rejection of midstream agreements that producers viewed as burdensome or whose minimum financial commitments restrained the financial flexibility that producers would seek in a period of a “new normal.”

Recently, in the bankruptcy case of Colorado-based Extraction Oil & Gas, the U.S. Bankruptcy Court for the District of Delaware—one of the most influential bankruptcy courts in the country—issued an opinion under Colorado law that undermines the framework for how the midstream industry operates and obtains financing.

BACKGROUND

By way of background, one of the tools the U.S. Bankruptcy Code generally provides debtors is the ability to (1) reject any executory contract under Code Section 365, and (2) treat the damages arising from rejection as an unsecured claim. This tool is often necessary to restructure feasibly or sell assets for higher value.

This powerful tool has a critical limitation: debtors can use Section 365 to terminate a contract but not unwind a conveyance of a real property interest.

* Keith N. Sambur is a partner at Holland & Knight LLP representing a wide range of senior lenders, including commercial banks, private equity firms, and hedge funds. Seth R. Belzley is a partner at the firm and a member of the Energy Transactions team practicing in energy related mergers and acquisitions, financing, joint ventures, restructuring, and project development. Andrew Thomas Gillespie is an associate at the firm focusing on credit origination, asset acquisitions and divestitures, and restructuring. The authors may be reached at keith.sambur@hklaw.com, seth.belzley@hklaw.com, and andrew.gillespie@hklaw.com, respectively.

As midstream agreements typically include contractual payment and performance provisions as well as dedications (or conveyances) of oil and gas mineral rights (or real property interests), midstream companies and their financing sources believe that midstream agreements constitute a real property conveyance that a debtor could not reject.

If the midstream agreement burdens the mineral estate, the E&P company could not get out from its burdensome effects, and the midstream company and its financing sources have little reason to fear an E&P bankruptcy. It is the belief that midstream agreements burden the mineral estate that allow midstream companies to efficiently finance themselves.

THE COURT'S RULING

In the Extraction bankruptcy, the Delaware court ruled that three sets of midstream transportation and gathering agreements did not create “covenants running with the land” under Colorado law. The ruling cleared the way for Extraction to reject the agreements to the significant economic detriment of the midstream counterparties.¹

The court ruled that under Colorado law for a covenant to run with the land—and therefore create a real property estate or interest:

- (1) Parties must intend to create a covenant running with the land;
- (2) The covenant must touch and concern the land with which it runs; and
- (3) There must be privity of estate between the original covenanting parties at the time of the covenant's creation.

Failure to satisfy any of these elements is fatal.

Somewhat remarkably, the court found that the gathering and dedication commitments did not touch and concern the land, because they only concern “personal property and do not affect the physical use of real property or closely relate to real property.”

In other words, because the agreements related primarily to the delivery of as-extracted minerals, those minerals became severed from the real estate and no longer constituted a real property interest or touch and concern the land.

The court also noted that the agreements allowed Extraction to satisfy its obligations under the agreements not by delivering minerals extracted from the

¹ In order to reject the agreements, Extraction must still demonstrate that rejection is in its proper business judgment, including that other means exist for transportation of the minerals. With that said, facing the prospect of unused infrastructure is likely to cause the midstream counterparties to renegotiate their agreements with Extraction.

land, but simply by paying money, which further distanced the agreements from one that would touch and concern the land.

The court further ruled that the parties cannot make agreements touch and concern the land if, as a matter of law, the agreement does not involve a real property interest.

Accordingly, any statement in the midstream agreements that the contracts touch and concern the land is self-serving at best.

Because the court concluded that the dedications do not “touch and concern” a real property interest, the court was also able to conclude that there was no privity of estate as between the parties. Privity of estate—according to the court—does not entail mere contractual privity but a conveyance of the real property estate in question and at issue. As the severed mineral interests were not a real property interest, there was no privity of estate.

Although the midstream agreements did provide the midstream companies with surface easements, the court reasoned that those surface easements again related only to as extracted minerals and therefore could not be used to show privity as it related to the minerals themselves.

CONCLUSION

This decision calls into question bedrock principles on which midstream companies (and their financing sources) rely in constructing, investing, and financing midstream infrastructure.

This wave of E&P restructurings has again demonstrated the need for midstream companies and their financing sources to creatively rethink their legal documentation.

As the industry braces for more restructurings and consolidation, proactive midstream companies and their financing sources should use this ruling as a roadmap for strengthening their documents and rethinking their approach.

Fortunately, such tools exist.