DISCUSSION OF SELECTED FEDERAL COURT JURISDICTION ISSUES IN OIL AND GAS DISPUTES

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I. INTRODUCTION

Federal courts have limited jurisdiction and can only hear cases made available to them through the Constitution, federal law, or a United States treaty.[1] A party seeking federal jurisdiction, whether by filing directly in federal court or removing a suit from state court, bears the burden of establishing that the federal court has subject matter jurisdiction.[2]

State courts, on the other hand, enjoy general jurisdiction, meaning that most state courts will have subject matter jurisdiction, subject to federal courts having exclusive jurisdiction.[3]

These basic rules are applicable to cases of all types. Suits involving oil and gas matters are no different. This paper will discuss and analyze different jurisdictional considerations relevant to oil and gas matters in order to provide a concise outline for practitioners seeking to obtain or avoid litigation in federal court.

This paper will discuss various bases for federal court jurisdiction that are common to oil and gas matters. First, this paper will cover diversity jurisdiction, specifically detailing the amount in controversy requirement and class action concerns. Second, the paper will cover two federal statutes related to oil and gas matters, the Outer Continental Shelf Lands Act and the Natural Gas Act, which both have explicit grants of federal jurisdiction. Finally, selected cases from the Fifth Circuit will be discussed to provide examples of how parties may litigate or avoid the federal forum.

II. DIVERSITY JURISDICTION

Pursuant to 28 U.S.C. §1332(a), federal courts have subject matter jurisdiction in actions between diverse parties where the amount in controversy exceeds $75,000.[4] For parties to be diverse, they must have complete diversity—meaning no plaintiff can share its citizenship with any defendant.[5] For an individual, citizenship is determined based on where the individual is domiciled.[6] Corporations have dual citizenship and are deemed to be citizens of both the state in

[1] *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377 (1994).
[2] *See Howery v. Allstate Ins.*, 243 F.3d 912, 916 (5th Cir. 2001).
[3] Such as patent or copyright matters.
[4] *See* 28 U.S.C. § 1332(a).
[5] *See Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990).
[6] *Freidrich v. Davis*, 767 F.3d 374, 377 (3d Cir. 2014).

which they were incorporated and the state of its principal place of business, subject to few exceptions.[7] On the other hand, citizenship for member-entities like partnerships, LLCs, or unincorporated associations is determined by the citizenship of the individual members instead of the state of organization.[8]

The party seeking federal jurisdiction bears the burden of proving that the amount in controversy exceeds the statutory threshold, excluding interest and costs.[9]

A plaintiff is entitled to plead its claim in any manner that avoids federal subject matter jurisdiction, subject to a good-faith requirement concerning the amount in controversy.[10] A defendant can remove a case to federal court if it can show "to a legal certainty that the amount in controversy exceeds the statutory minimum[.]"[11] The question is not the damages a plaintiff is likely to recover, but instead, what amount is actually in controversy between the parties.[12] The amount in controversy is measured as of the date of removal.[13]

A. Amount in Controversy

In oil and gas matters, the amount in controversy requirement has frequently been the subject of judicial discussion.[14] The character of mineral production has led to disputes regarding the proper method of valuation in cases where the amount in controversy concerns the minerals in dispute. A recurring theme in these cases is determining the proper method for valuing the minerals at issue. Other questions, however, are prevalent. For example, how does one approach the valuation of minerals when the minerals are undisturbed? What about when the valuation concerns minerals on nearby lands? These questions present a variety of issues for courts to consider when determining the amount in controversy.

As we will discuss, in order to successfully establish that the value of the mineral interests at stake exceeds the amount in controversy requirement, the party seeking federal jurisdiction must first establish that minerals exist on the subject property. The moving party must then provide evidence of the value of the underlying minerals. Evidence concerning the value of minerals on surrounding properties may be helpful if the moving party can connect those minerals to the minerals at issue.

The relationship between the characterization and valuation of minerals was discussed by the Sixth Circuit in *Northup Properties v. Chesapeake Appalachia*.[15] The question before the court was whether the amount in controversy requirement was met.[16] In its analysis, the court relied on the well-founded principle that the amount in controversy for actions seeking a declaratory judgment is based on the value of the object of the litigation; this was the case despite the fact the lease at issue had never produced minerals.[17] This dispute involved a lease termination case. The *Northup* court further emphasized the following "metrics" that could be used to value mineral interests for the amount in controversy analysis: "(1) the

[7] 28 U.S.C. §1332(c)(1).
[8] *Grynberg v. Kinder Morgan Energy Partners*, 805 F.3d 901, 905–06 (10th Cir. 2015).
[9] *Usery v. Andarko Petroleum Corp.*, 606 F.3d 1017, 1018 (8th Cir. 2010).
[10] *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006).
[11] *Id.* (quoting *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 398 (3d Cir. 2004)).
[12] *Lao v. Wickes Furniture Co.*, 455 F. Supp. 2d 1045, 1049 (C.D. Cal 2006).
[13] *Clean Air Council v. Dragon Int'l Group*, 2006 WL 2136246, at *3 (M.D. Pa. July 28, 2006).
[14] *Northup Properties, Inc. v. Chesapeake Appalachia, L.L.C.*, 567 F.3d 767, 769-70 (6th Cir. 2009)
[15] *Id.* at 770-71.
[16] *Id.*
[17] *Id.*

tract's fair market value, […] (2) both fair market value and net value of the mineral interest, […] and (3) the diminished value of the land burdened with an oil-and-gas-lease or the increased value without the lease."[18]

In determining that the amount in controversy exceeded the jurisdictional threshold, the *Northup* court relied on Chesapeake's expert engineer, whose accounting of the mineral interests prevented the valuation "from becoming a matter of judicial stargazing."[19] Important to the court's ruling was the engineer's expert opinion that "(1) the 'future cash flows' from the natural gas well [would be] $168,147; (2) the discounted present value of the well [was] between $106,874 and $131,426; (3) the value of the remaining undeveloped acreage of the entire leasehold estate [was] $426,700; and (4) the initial cost of drilling the well [exceeded] $75,000."[20] Notable was the court's decision to include the value of Chesapeake's loss of the mineral estate in its analysis.[21]

In *Usery v. Anadarko Petroleum Corp.*, the court reached the opposite conclusion.[22] There, in appealing the denial of a motion to remand, the plaintiffs (Usery family) asserted that their mineral interest was worth less than $75,000 and thus, federal jurisdiction was improper.[23] Anadarko, however, asserted that the value of mineral interests in dispute exceeded the threshold.[24] The court applied the "plaintiff viewpoint rule," which took into account the "actual value of the object of the suit" from the perspective of the plaintiff, notwithstanding the plaintiffs' claims that the amount in controversy was insufficient.[25] In reversing the district court's ruling that the amount in controversy was met, the Eighth Circuit determined that Anadarko's evidence was insufficient to show that the mineral lease at issue had a value exceeding the jurisdictional minimum.[26] Anadarko introduced evidence from a petroleum engineer with expertise in mineral valuations that a neighboring well had produced over $400,000 worth of minerals.[27] However, Anadarko failed to introduce any evidence that the minerals at issue would be produced from the same shale as the neighboring well.[28] This failure precluded the court from finding that the amount in controversy was met because evidence concerning the value of the subject minerals was lacking.[29]

Compare these cases with *Sullivan v. Chesapeake Louisiana, L.P.* In *Sullivan*, the district court in the Western District of Louisiana granted plaintiff's motion to remand when the defendant failed to present summary-judgment type evidence related to the existence and value of the minerals at

[18] *Id.* at 770. In support thereof, the court cited the following cases: *Occidental Chem. Corp. v. Bullard*, 995 F.2d 1046, 1048 (11th Cir.1993) (using fair market value in assessing the amount in controversy, even though that value exceeded the contract price); *Thomas Well Serv., Inc. v. Williams Natural Gas Co.*, No. 93–4090–SAC, 1993 WL 393708, at *2 (D. Kan. Sept. 8, 1993); *Perrin v. Tenneco Oil Co.*, 505 F. Supp. 23, 25 (W.D.Okla.1980); *Ehrenfeld v. Webber*, 499 F. Supp. 1283, 1293–94 (D.Me.1980) (finding the amount-in-controversy requirement unsatisfied where an expert witness testified that the market value of the tracts at issue amounted to $3,500); *Ladner v. Tauren Exploration, Inc.*, No. 08–1725, 2009 WL 196021, at *2–3 (W.D. La. Jan. 27, 2009); *A.C. McKoy, Inc. v. Schonwald*, 341 F.2d 737, 739 (10th Cir.1965).

[19] *Northup Properties*, 567 F.3d at 771.

[20] *Id.*

[21] *See Id.* at 769.

[22] *Usery v. Andarko Petroleum Corp.*, 606 F.3d 1017, 1020 (8th Cir. 2010).

[23] *Id.* The lawsuit was a suit to quiet title to a mineral interest.

[24] *Id.*

[25] *Id.* at 1019.

[26] *Id.* at 1020.

[27] *Id.*

[28] *Id.*

[29] *Id.*

stake. [30] In attempting to keep the matter in federal court, the defendant submitted press releases that referenced the production rates of wells drilled in the vicinity of the mineral interests at issue.[31] The district court remanded the case because Chesapeake failed to introduce any evidence (1) that there were minerals covered by the subject lease and (2) valuing the supposed minerals.[32]

These cases show that the party seeking to establish that the amount in controversy requirement is met will have to present competent evidence that the value of the minerals interests exceeds the jurisdictional minimum. The best practice would be to present this evidence in the form of expert testimony so the appropriate burden is met.

B. Class Action Fairness Act ("CAFA")

Prior to 2005, class action lawsuits were subject to the complete diversity rule mentioned above. This had the effect of greatly limiting class actions in federal court, at least in the diversity context, because the sheer number of plaintiffs in a proposed class increased the likelihood that complete diversity would be defeated.

The Class Action Fairness Act was enacted on February 18, 2005, after years of Congressional pressure to overhaul the treatment of class action lawsuits.[33] The main effect and purpose of CAFA was to expand federal diversity jurisdiction in class action lawsuits.[34] Under CAFA, federal jurisdiction was expanded to include class actions (1) with 100 or more class members (2) with an amount in controversy exceeding $5 million, after all claims of the class are aggregated, and (3) where *any* class member is a citizen of a state different from *any* defendant, or any member of the plaintiff class (or any defendant) is a foreign state or a citizen or subject of a foreign state.[35]

CAFA also made it easier for a defendant to remove a class action to federal court. First, CAFA removed the outer limit of one year in which a defendant may remove an action.[36] Second, CAFA removed the requirement that all defendants must consent to the removal.[37] Third, CAFA allowed a same-state defendant to remove when they were otherwise precluded from doing so.[38]

1. Citizenship under CAFA

CAFA's changes to the diversity requirement greatly expand the availability of class actions to be litigated in federal court on a diversity basis.[39] In the oil and gas context, parties seeking to avoid state court now have an additional option in class action lawsuits

[30] *Sullivan v. Chesapeake Louisiana, L.P.*, 2009 WL 3735798, at *2 (W.D. La. Nov. 6, 2009) (citing *Northup Properties*, 567 F.3d at 769-70).
[31] *Id.* at *2.
[32] *Id.*
[33] For a more in-depth discussion of CAFA, *see Oil & Gas Class Actions in Louisiana and the Class Action Fairness Act of 2005*. Jonathan D. Baughman, "Oil & Gas Class Actions in Louisiana and the Class Action Fairness Act of 2005" presented to the 54th Mineral Law Institute (2007).
[34] *Id.*
[35] 28 U.S.C. § 1332(d)(5)(B), (d)(2), (d)(6).
[36] *Id.* § 1453(b).
[37] *Id.*; *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 56 (2d Cir. 2006).
[38] 28 U.S.C. § 1453(b). CAFA also allows immediate, expedited appellate review of remand orders. 28 U.S.C. § 1453(c).
[39] To evaluate diversity under CAFA, a party's citizenship is determined as of the date of the filing of the complaint or amended complaint, or, if the case started by the initial pleading is not subject to federal jurisdiction, as of the date of service by the plaintiffs of an amended pleading, motion, or other paper, indicating the existence of federal jurisdiction. *Id.* § 1332(d)(7).

due to CAFA's removal of the complete diversity requirement.

2. Amount in Controversy under CAFA

The Fifth Circuit discussed the amount in controversy requirement under CAFA in *Robertson v. Exxon Mobil Corp.* There, the court stated that the removing party could ask the court to make "common sense inferences" in determining that the amount in controversy exceeded the statutory minimum.[40] Despite the plaintiffs' assertion that the amount in controversy was not met, the court examined the plaintiffs' allegations and concluded that the amount in controversy requirement was satisfied.[41] The Fifth Circuit held that it was "more likely than not" that the amount in controversy exceeded the jurisdictional threshold given the injuries complained of, the nature of the claims, and the number of plaintiffs.[42]

While the *Robertson* ruling indicates that some latitude in inferring the amount of controversy is allowed, not every measure can be included. In the oil and gas context, for example, at least one circuit has held that statutory interest provisions applicable to the late payment of royalties cannot be aggregated with other damages for determining whether the required amount in controversy has been met.[43]

In *Whisenant v. Sheridan Production Co., LLC*, the plaintiff class sued Sheridan Production Co. for underpayment of royalties.[44] Sheridan removed the case to federal court on the basis of diversity jurisdiction pursuant to CAFA. The plaintiff class's motion to remand was subsequently denied and they appealed.[45] The district court determined that the alleged royalty underpayments totaled $3,721,797, an amount less than the $5 million CAFA requirement.[46] The issue before the court of appeals was whether to include statutory interest with the alleged underpayment damages in determining the amount of controversy.[47] In reversing the district court's decision, the Tenth Circuit held that the statutory interest arose solely by virtue of delay in payment of the royalties, and was not intended to be included with the amount in controversy analysis.[48] As a result, federal court jurisdiction did not exist under CAFA. This case could potentially be relevant to parties seeking to prove that the amount in controversy is met in royalty underpayment cases where statutory interest provisions apply.

3. Exceptions to CAFA

While CAFA expands the availability of the federal forum in class action suits, there are many exceptions, some of which are briefly described here. These exceptions should be considered in class actions suits where federal diversity jurisdiction is implicated.

The "local controversy" exception requires a federal district court to decline jurisdiction if:

> (1) greater than two-thirds of the members of all proposed plaintiff classes

[40] *Robertson v. Exxon Mobil Corp.*, 814 F.3d 236, 240 (5th Cir. 2015). The claims in this case related to alleged injuries stemming from an oil pipe-cleaning operation. *Id.*
[41] *Id.* at 241.
[42] *Id.*
[43] *Whisenant v. Sheridan Production Co., LLC*, 627 Fed. Appx. 706 (2015) (unpublished).
[44] *Id.* at 707.
[45] *Id.*
[46] *Id.* at 708.
[47] *Id.*
[48] *Id.* at 709.

> in the aggregate are citizens of the State in which the action was originally filed;
>
> (2) at least one defendant is a defendant (a) from whom significant relief is sought by members of the plaintiff class; or (b) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and (c) who is a citizen of the State in which the action was originally filed;
>
> (3) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and
>
> (4) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.[49]

The applicability of the local controversy exception tends to turn on the undefined terms "significant relief" and/or "significant basis." In determining whether the defendant's alleged conduct forms a significant basis of the claim, the court is to compare the alleged conduct of the in-state defendant with the conduct of the defendants as a whole.[50]

The "home state controversy" exception applies when (1) two-thirds or more of the plaintiff class and (2) all of the "primary defendants" are citizens of the state where the lawsuit was originally filed.[51] To determine if a defendant qualifies as a "primary defendant," the court will assume liability and examine (1) whether the defendant is the primary target of the allegations, (2) if the defendant is the party against whom the allegations are made, and (3) the defendant's losses as compared with its co-defendants.[52]

The "state-action" exception applies to all class actions where the primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.[53] For this exception to apply, all of the primary defendants must be states or other governmental entities.[54]

One discretionary exception, the "interest of justice" exception, permits a district court to decline jurisdiction "in the interests of justice and looking to the totality of the circumstances."[55] This exception only

[49] 28 U.S.C. § 1332 (d)(4)(A)

[50] *See Kaufman v. Allstate N.J. Ins.*, 561 F.3d 144, 156 (3d Cir. 2009).

[51] *Id.* § 1332(d)(4)(B); *Watson v. City of Allen*, 821 F.3d 634, 640-41 (5th Cir. 2016).

[52] *Vodenichar v. Halcón Energy Props., Inc.*, 733 F.3d 497, 505–06 (3d Cir. 2013).

[53] 28 U.S.C. § 1332(d)(5)

[54] *Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 546 (5th Cir. 2006); Additionally, there are other mandatory exceptions to CAFA that are less relevant to this article. One of those exceptions deals with securities litigation. 28 U.S.C. § 1332(d)(9)(A). Other exceptions deal with "mass actions," which are actions in which monetary claims of 100 or more putative class members are to be tried jointly as the claims involve common questions of law or fact. Those exceptions are not discussed here.

[55] *Id.* § 1332(d)(3).

applies when between one-third and two-thirds of the class members and primary defendants are citizens of the state in which the action was originally filed.[56] In determining whether to apply this exception, district courts consider several factors, which are enumerated in § 1332(d)(3).[57]

4. Class Certification

Inherent in CAFA's application to the jurisdictional analysis discussed above is the ability of class members to sue on behalf of representative parties. To successfully apply for class certification, the moving party must assert (1) that the class is definable and ascertainable, (2) that the requirements of Federal Rule 23(a) are met, and (3) the action falls within one of the three categories enumerated in Federal Rule 23(b).[58]

The first prong, that the class is definable and ascertainable, is met when the parties can determine whether a particular member is part of the proposed class.[59]

The second prong requires the moving party to satisfy the obligations contained in Federal Rule 23(a). Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[60]

Class actions fall within the first category if the prosecution of separate suits would create the risk of (1) inconsistent rulings for different class members; or (2) rulings in one matter prejudicing the interests of putative class members in another.[61]

Class actions fall in the second category if the class seeks declaratory or injunctive relief and such relief is appropriate against the defendant on grounds generally applicable to the putative class.[62]

Class actions fall under the third 23(b) category if two requirements are met. First, common questions of law must predominate over issues related to individual class members.[63] Second, the class action vehicle must be more appropriate than other methods for the fair and efficient adjudication of the controversy.[64]

While this paper will not delve into the judicial analyses of class certification, a few recent United States Supreme Court decisions are worthy of mention for their

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[56] *Id.*
[57] *Id.*
[58] *See Wal-Mart Stores v. Dukes*, 564 U.S. 338, 345 (2011)
[59] *See John v. National Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007).
[60] FED. R. CIV. P. 23(a). These requirements are typically referred to as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation, and must be met for class certification. *See Anderson Living Trust v. WPX Energy Production, LLC*, 306 F.R.D. 312, 319 (D.N.M. 2014).
[61] *Amchem Prods. V. Windsor*, 521 U.S. 591, 613-14 (1997).
[62] *See* FED. R. CIV. P. 23(b)(2); see *also Wal-Mart*, 564 U.S. at 360.
[63] *See* FED. R. CIV. P. 23(b)(3); see *also Amchem Prods.*, 521 U.S. at 615.
[64] *Id.*

restrictive reading of Rule 23(a) of the Federal Rules of Civil Procedure.

In *Wal-Mart Stores, Inc. v. Dukes*, the United States Supreme Court narrowed the commonality requirement in ruling that class certification filed on behalf of female Wal-Mart employees was improper.[65] The proposed class in *Wal-Mart* consisted of female employees of Wal-Mart who were challenging alleged discriminatory practices.[66] In analyzing the commonality requirement, the Court discussed that the common contention to the class must "be of such a nature that is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[67] The Court utilized this restrictive interpretation to hold that the commonality requirement was not satisfied because "significant proof that Wal-Mart operated under a general policy of discrimination" was lacking.[68]

The *Wal-Mart* ruling is significant because it changes the basis on which the commonality requirement is decided. Before *Wal-Mart*, commonality was present when there were common questions to the class, and the solution of a common issue would affect all or a significant number of the putative class members.[69] The *Wal-Mart* ruling "heightened the standards for establishing commonality" so that now, the issue is dependent on whether the class generates common answers that are capable of resolving the suit.[70]

The *Wal-Mart* rationale was extended in *Comcast Corp. v. Behrend*. In that case, the putative class brought an antitrust action against Comcast as a result of Comcast swapping customers with competitors and gaining regional domination over the cable markets.[71] The putative class of Comcast subscribers argued that the predominance requirement of Rule 23 was met because the class provided a method of measuring damages available to the class.[72] The class, however, did not present evidence that such a method was just or reasonable, or otherwise tie the method of damages to Comcast's actions.[73] The lower court agreed with the putative class and ruled that damages were capable of classwide measurement because the class put forward a method of calculating damages.[74]

The Supreme Court disagreed and ruled that in order to satisfy the predominance requirement, the putative class should have tied the applicability of potential damages to the class with the claims asserted by the class.[75] Citing *Wal-Mart*, the Court stated that courts are required to conduct a more rigorous analysis to determine that the Rule 23 requirements are satisfied.[76]

The *Wal-Mart* and *Comcast* rulings heightened the requirements for establishing class certification. These rulings have also prompted increased scrutiny of other requirements for class certification, at least in

[65] See *Wal-Mart Stores,* 564 U.S. at 359.
[66] *Id.*
[67] *Id.* at 350.
[68] *Id.* at 354 (internal quotations omitted).
[69] *Dvorin v. Chesapeake Exploration, LLC*, 2013 WL 6003433, at *5 (N.D. Tex. 2013) (quoting *Forbush v. J.C. Penney Company, Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (internal quotations omitted).
[70] *Wal-Mart*, 564 U.S. at 350; *see M.D. v. Perry*, 675 F.3d 832, 839-40 (5th Cir. 2012).
[71] *Comcast v. Behrend*, 133 S.Ct. 1426, 1430-31 (2013).
[72] *Id.* at 1432-33.
[73] *Id.* at 1434.
[74] *Id.* at 1432-33.
[75] *Id.* at 1433-34.
[76] *Id.* at 1434.

regard to the ascertainability prong, which requires the members of the proposed class to be definite and ascertainable.

The Third Circuit, in building on *Wal-Mart*, adopted the rigorous analysis requirement with regard to the ascertainability prong in *Carrara v. Bayer Corp*.[77] Previously, the putative class could meet the ascertainability requirement by articulating the members of its class based on some objective criteria.[78] The *Carrera* court heightened this requirement and held that the putative class must instead show that the class is definable by reference, and its members can be identified in an economically practical matter.[79] This ruling means that the putative class must now show a method of determining its class members, and allows the opposing party to challenge the evidence used to classify the class.[80]

Some courts have refused to adopt the heightened ascertainability standard announced in *Carrera*,[81] and the matter remains undecided in the Fifth Circuit.

5. Selected Cases

At least in Texas federal court, *Wal-Mart* has already had the effect of narrowing the availability of class certification in the oil and gas context. In *Dvorin v. Chesapeake Exploration*, for example, the court relied on *Wal-Mart*'s "heightened commonality standards" in denying class certification, in part because the commonality requirement was lacking.[82] There, the putative class filed suit complaining of royalty underpayments.[83]

Despite the fact that a common question predominated the class, the court ruled that the commonality requirement was not met because of the difference in lease language for the 70 leases at issue.[84] Common answers, the court concluded, could not resolve the suit as a result of the various lease language among the leases held by the putative class.[85]

III.
FEDERAL QUESTION JURISDICTION

In addition to federal diversity jurisdiction, federal courts have subject matter jurisdiction in suits arising out of the Constitution, federal law, or a U.S. treaty.[86] Federal question jurisdiction turns on the "well-pleaded complaint rule," that is, federal question jurisdiction will attach when a federal question is apparent on the face of the plaintiff's complaint.[87] The "well-pleaded complaint rule" allows a plaintiff to keep its case in state court by only relying on state claims.[88] Federal question jurisdiction will not be conferred if the federal question is found in a defense or counterclaim.[89]

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[77] *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).
[78] *Id.* At 306.
[79] *Id.* At 307-08.
[80] *Id.*
[81] *Compare Walney v. SWEPI LP*, 2015 WL 5333541 (W.D. Pa. 2015) (finding that the ascertainability requirement was met when the class was defined as members signing a particular Pennsylvania oil and gas lease after a certain date) *with Abraham v. WPX Energy Production, LLC*, 317 F.R.D. 169 (D.N.M. 2016). In *Abraham*, the putative class was a group of royalty owners who owned a royalty in gas that was produced at one of three plants. *Id.* At 254-55. There, the court ruled that the ascertainability requirement was not satisfied because there was no way to show which royalty owners' gas went to the specific plant in question, when there were three potential plants that the owners' gas was sent. *Id.* At 257-58.
[82] *Dvorin v. Chesapeake Exploration, LLC*, 2013 WL 6003433, at *6 (N.D. Tex. 2013).
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] U.S. Const. art. 3, §2; 28 U.S.C. §1331.
[87] *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998).
[88] *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987).
[89] *Vaden v. Discovery Bank*, 556 U.S. 49, 60-61 (2009).

For a matter to arise out of federal law, the suit must (1) assert a cause of action created by federal law, (2) assert a cause of action implied by federal law, or (3) involve a state claim with a substantial federal question.[90]

In the oil and gas context, the Outer Continental Shelf Lands Act and the Natural Gas Act, are two statutes that are subject to federal question analysis. While both acts have jurisdictional grants, they are applied in different ways. There are other federal statutes that may be implicated such as the National Environmental Policy Act (NEPA), Longshore & Harbor Workers' Compensation Act, and the Jones Act. These statutes will not be discussed in this paper.

A. Outer Continental Shelf Lands Act

Prior to the early 1950s, oil and gas production in the coastal waters of the United States created tensions between the federal government and states regarding the ownership of minerals beneath the continental shelf.[91] Twice, the Supreme Court of the United States restricted the states' ownership of the coastal minerals, which only contributed to the growing tensions.[92] Furthering this momentum, Congress enacted the Submerged Lands Act (SLA), which asserted the federal government's dominion over the coastal minerals, save for three geographical miles from the states' coast.[93] In 1953, Congress enacted the Outer Continental Shelf Lands Act ("OCSLA"), which built on the SLA and "extended the 'jurisdiction and control' of the United States to the 'seabed and subsoil of the entire Outer Continental Shelf adjacent to the shores of the United States…"[94]

The "OCSLA declares the Outer Continental Shelf to be an area of 'exclusive federal jurisdiction'" and extends federal law to the subsoil and seabed of the Outer Continental Shelf ("OCS").[95] Relevant to our discussion here are the (1) OCSLA provisions that confer federal subject matter jurisdiction and (2) OCSLA choice of law provisions. In reading, one should note that OCSLA jurisdiction does not impede on the state's coastal jurisdiction, which extends three nautical miles from the coast.

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[90] *See Merrell Dow Pharms. v. Thompson*, 478 U.S. 804, 808, 813 (1986); *see Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

[91] The history of oil and gas production in the coastal waters of the United States is briefly outlined in *The Outer Continental Shelf Lands Act's Provision on Jurisdiction, Remedies, and Choice of Law.* David W. Robertson, *The Outer Continental Shelf Lands Act's Provisions on Jurisdiction, Remedies, and Choice of Law: Correcting the Fifth Circuit's Mistakes*, 38 J. MAR. L. & COM. 487 (2007).

[92] *United States v. California*, 332 U.S. 19, 38-39 (1947) ("Now that the question is here, we decide for reasons we have stated that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."); *United States v. Louisiana*, 339 U.S. 699, 705-06 (1950) ("So far as the issues presented here are concerned, Louisiana's enlargement of her boundary emphasizes the strength of the claim of the United States to this part of the ocean and the resources of the soil under that area, including oil.").

[93] *See* Submerged Lands Act, 43 U.S.C. § 1302, 1312 ("SLA"); *see* Robertson, *supra* note 48. It is worth noting that the term "geographical mile" is a bit more (~6076 feet) than an English mile (5280 feet). Robertson, *supra* note 48.

[94] *See* Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq.; *Amoco Production Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1205 (5th Cir. 1988) (citations withheld).

[95] *Gulf Offshore Co. v. Mobil Oil Corp*., 453 U.S. 473, 480 (1981). While the statute makes reference to the OCS as an area of "exclusive jurisdiction," case law is clear that the OCSLA does not divest a state court of concurrent jurisdiction. *Id.* at 481-82.

1. OCSLA's Conferral of Federal Jurisdiction

Section 1349 of the OCSLA creates the basis for federal subject matter jurisdiction:

> Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.[96]

"The Fifth Circuit has interpreted this language as straightforward and broad" and its provisions do not need to be expressly invoked to confer jurisdiction.[97] The question of whether an action may be brought in federal court under OCSLA has generally been reduced to a two-part test: (1) whether the activities causing the injury constituted an "operation" on the Outer Continental Shelf involving the exploration, development, or production of minerals, and (2) whether the action "arises out of, or in connection with the operation."[98] While courts and commentary have noted OCSLA's broad application, Section 1349 has not been free of judicial interpretation.[99]

a. What constitutes an operation?

The OCSLA contains lengthy and informational definitions of the terms "exploration," "development," and "production," yet provides no guidance as to what constitutes an "operation."[100] This has led to many courts discussing what an OCSLA "operation" entails.

In *Amoco Production Co. v. Sea Robin*, the meaning of "operation" as used in § 1349 formed at least part of the dispute.[101] Prior to the lawsuit, Sea Robin and Amoco executed a take-or-pay contract for the purchase of natural gas that was being produced from federally-owned reservoirs in the OCS.[102] Some time after the execution of the take-or-pay contract, Sea Robin notified Amoco that it would not purchase, nor pay, for the amount of natural gas contracted

[96] 43 U.S.C. § 1349(b)(1). Section 1349(c) concerns review of leasing programs and production plans.

[97] *In re DEEPWATER HORIZON*, 745 F.3d 157, 163 (5th Cir. 2014).

[98] *Id.* While the OCSLA describes the Outer Continental Shelf to be an area of "exclusive federal jurisdiction," nothing in the OCSLA prevents a state's concurrent jurisdiction. *Gulf Offshore Co*., 453 U.S. at 479, 480.

[99] *In re DEEPWATER HORIZON*, 745 F.3d at 163; *see* Robertson, *supra* note 48.

[100] *See Amoco Production Co.*, 844 F.2d 1202, 1206 (5th Cir. 1988) ("Neither § 1331 nor any other section of the OCSLA gives express guidance as to the meaning of the undefined term 'operation' which appears in § 1349.").

[101] *See Amoco Production Co.*, 844 F.2d at 1206-07. This case sought to resolve a split among Louisiana federal district courts concerning jurisdiction in take-or-pay contracts. *See id.*at n. 19.

[102] *Id.* at 1203, 1210.

for.[103] Shortly after this notification, Amoco filed suit in state court in Louisiana.[104] Sea Robin removed the action to federal court pursuant to the OCSLA; Amoco's motion to remand was denied and an appeal was filed.[105] In holding that the action arose out of the OCSLA, the Fifth Circuit analyzed the use of the term "operation" throughout the OCSLA, and determined that the term meant not only "some physical act" but also the "cessation of physical acts" so that the failure to comply with a take-or-pay provision constituted "operations" under the OCSLA.[106]

The Fifth Circuit extended this rationale in *EP Operating Ltd. Partnership v. Placid Oil Co.*, when it ruled that the underlying action involved an "operation" on the Outer Continental Shelf ("OCS"), despite the fact that the offshore facilities had lain dormant for more than three years.[107] In this case, EP Operating filed suit seeking a partition of offshore facilities that were shut down when the wells being serviced by the facilities were not producing in paying quantities.[108] The United States District Court dismissed the case for lack of subject matter jurisdiction because there was no "operation" on the Outer Continental Shelf as required by § 1349.[109] The Fifth Circuit reversed on the basis that (1) operations had occurred on the OCS, (2) operations would be restarted, and (3) if the operations did not restart, the facilities would have to be removed from the OCS.[110]

The broad holdings of *Amoco Production* and *EP Operating* were based on two important rationales. First, the courts were cognizant of the notion that the OCSLA was intended to be a broad grant of federal jurisdiction, so that the efficient exploitation of federally-owned minerals could be protected and furthered.[111] This persuaded the court to assign broad definitions for key terms that support the conferral of federal jurisdiction.

Second, the courts acknowledged the considerations relevant to oil and gas disputes in affording a broad reading to the pertinent terms of §1349.[112] Specifically, the Fifth Circuit stated in *Amoco*:

> In resolving the question of jurisdiction under § 1349, we think this record safely permits the court to take judicial notice of certain operating considerations unique to oil and gas wells. These wells are not like mines for solid minerals, where one can mine as fast or slowly as one cares or even interrupt mining operations entirely for relatively long periods and be secure in the knowledge that whatever mineral wealth is there to be had will eventually be procured […] Pursuing these conceptual factors there is every reason to conclude also that the operation and

[103] *Id.* at 1204.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 1207.
[107] *EP Operating Ltd. Partnership v. Placid Oil Co.*, 26 F.3d 563, 567 (5th Cir. 1994).
[108] *Id.* at 565-66.
[109] *Id.* at 567.
[110] *Id.* at 567-68.
[111] *Amoco Production Co.*, 844 F.2d at 1210; *see EP Operating Ltd. Partnership*, 26 F.3d at 569 ("Further, this broad reading of the jurisdictional grant of section 1349 is supported by the expansive substantive reach of the OCSLA.").
[112] *Amoco Production Co.*, 844 F.2d at 1210 (discussing the unique character of oil and gas wells); *see EP Operating Ltd. Partnership*, 26 F.3d at 569.

> controversy over such take-or-pay obligations will have consequences as to production of the well (and reservoir) in the sense of the productive process and productibility of the well/reservoir.

These considerations allow courts to broadly construe the jurisdictional provisions in support of the first prong in the two-prong jurisdictional test, as the Fifth Circuit did in *Amoco*.

b. What constitutes production, development, exploration?

The statutory definitions of exploration, development, and production are as follows:

> "The term "exploration" means the process of searching for minerals, including (1) geophysical surveys where magnetic, gravity, seismic, or other systems are used to detect or imply the presence of such minerals, and (2) any drilling, whether on or off known geological structures, including the drilling of a well in which a discovery of oil or natural gas in paying quantities is made and the drilling of any additional delineation well after such discovery which is needed to delineate any reservoir and to enable the lessee to determine whether to proceed with development and production…"
>
> "The term "development" means those activities which take place following discovery of minerals in paying quantities, including geophysical activity, drilling, platform construction, and operation of all onshore support facilities, and which are for the purpose of ultimately producing the minerals discovered…"
>
> "The term "production" means those activities which take place after the successful completion of any means for the removal of minerals, including such removal, field operations, transfer of minerals to shore, operation monitoring, maintenance, and work-over drilling…"[113]

It appears that the terms "exploration" and "development" are not as frequently litigated as the terms "production" or "operation." Perhaps this is because these terms are confined to the initial process of discovering minerals and the activities following thereafter.

The term "production," like the term "operation," is not as clear because "production" entails a broader set of activities than exploration or development.[114] In *Amoco*, the Fifth Circuit enlarged the definition of the term "production" to include

[113] 43 U.S.C. § 1333 (k)-(m).

[114] *Amoco Production Co.*, 844 F.2d at 1208 ("The statutory definitions indicate that exploration and development generally signify sets of activities that constitute preparation for production of the minerals of the OCS. In this case, those preparations were complete and production had begun. It is the subsequent *cessation, suspension or reduction* of production which gives rise to the controversy.").

the absence or cessation of production, as disputes concerning production would tend to threaten the total recovery of federally-owned minerals.[115] While this definition may not be intuitive, it is consistent with the Congressional intent for the disposition of matters involving federal minerals to occur in the federal forum.

c. What actions "arise out of" an OCSLA operation?

The second inquiry a court must make in determining whether it has federal jurisdiction under OCSLA, is whether the action arises out of or is in connection with the OCSLA operation. In keeping with the broad reading of the OCSLA, case law is clear that only a "but-for" connection is required for an action to be deemed "arising out of" the operation.[116] This has led to grants of federal subject matter jurisdiction in a wide variety of cases, even ones that do not necessarily implicate oil and gas concerns.[117]

Fifth Circuit analysis regarding the "arising out of" language runs through two main cases: *Laredo Offshore Constructors v. Hunt Oil* and *Amoco Production*. [118]

In *Laredo*, the plaintiff filed suit regarding payment for the partial construction of a platform that was to be affixed to the OCS.[119] Laredo sought dismissal on the theory that Congress did not intend for the OCSLA to extend to contractual matters, despite the fact that the specific provision at issue related only to the construction of the platform.[120] In highlighting Congress' intent to establish federal control of the minerals on the OCS, the Fifth Circuit ruled that the action arose out of the OCSLA operation because the alleged contract breach related specifically to the building of a platform that was to be placed on the OCS.[121]

The second main case regarding the "arising out of" language is *Amoco Production*. As discussed earlier, the court in *Amoco Production* held that a dispute regarding a take-or-pay contract was subject to federal jurisdiction under the OCSLA.[122] In finding that the action arose out of the OCSLA, the court was persuaded by the statute's intent to regulate and protect the production of federal-owned minerals.[123] The court's holding was explicitly based on the "immediate bearing" that take-or-pay contract rights had on the production of federally owned minerals, and thus clearly arose out of the OCSLA according to the court.[124]

These two approaches have the effect of conferring federal jurisdiction in almost every action that involves oil and gas activity on the OCS. As long as the party seeking

[115] *Id.* at 1210; *see EP Operating Ltd. Partnership*, 26 F.3d at 568-69.
[116] *In re DEEPWATER HORIZON*, 745 F.3d at 163.
[117] *See in re DEEPWATER HORIZON*, 745 F.3d 157 (holding that statutory claims for injury to wildlife arose out of the OCSLA operation when the injury was wholly situated in state territorial waters); *see, e.g., Hufnagel v. Omega Serv. Indus., Inc.*, 182 F.3d 340, 350 (5th Cir. 1999) (finding federal jurisdiction where worker fell from stationary drilling platform); *Tenn. Gas Pipeline Hous. Cas. Ins. Co.*, 87 F.3d 150, 155 (5th Cir. 1996) (finding federal jurisdiction in boat accident case where there was no connection to the underlying minerals).
[118] *Brooklyn Union Exploration Co., Inc. v. Tejas Power Corp.*, 930 F. Supp 289, 291 (S.D. Tex. 1996) ("Since the rendering [of] Laredo and [Amoco], the Fifth Circuit has decided all jurisdictional issues concerning contractual disputes under Section 1349(b)(1)(a) strictly through application of the principles established in those opinions.")
[119] *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1225 (5th Cir. 1985).
[120] *Id.* at 1226-27.
[121] *Id.* at 1226-28.
[122] *See Amoco Production*, 844 F.2d at 1210.
[123] *Id.*
[124] *Id.*

federal jurisdiction can fashion an argument that the action involves the OCS directly (personal injury on OCS) or indirectly (post-production breach of contract that threatens the future flow of production), the broad grant of jurisdiction will be controlling.

2. When is the OCSLA unavailable to confer federal jurisdiction?

As explained above, courts have broadly applied the jurisdictional provision of the OCSLA in support of federal subject matter jurisdiction. For those wishing to defeat federal jurisdiction, it would be necessary to rebut at least one prong of the two-prong test; that is, one must show that the activity causing the injury was not an operation on the OCS that involved the exploration, development or production of minerals, or show that the action did not arise out of the operation. The cases where the courts were found not to have jurisdiction are generally contractual actions where the underlying breach was merely connected to the OCS operation rather than one arising from it.[125]

In *Plains Gas Solutions v. Tennessee Gas Pipeline*, the district court granted plaintiffs' motion to remand on the basis that the alleged activities causing the injury did not constitute an operation on the OCS.[126] In that case, plaintiff brought suit in state court, complaining of defendants' breach of a gas-processing contract.[127] The plaintiff claimed that its plants were deprived of natural gas when the defendant pipeline company assigned its contract to another pipeline company.[128] The court remanded the case to state court because the actions complained of were not "operations" as they did not constitute physical acts.[129] The only physical act, the court explained, was the closure of a gas valve, which occurred on-shore, long after the gas was extracted from the OCS.[130] In ruling, the court noted the broad application of the OCSLA was not limitless.[131]

Similarly, a court will not have federal jurisdiction in an action under the OCSLA if resolution of the matters does not implicate the exploitation of minerals on the OCS. In *Brooklyn Union Exploration v. Tejas Power*, for example, the underlying dispute that formed the basis of the lawsuit concerned price recalculation provisions in an expired contract for the sale of gas.[132] In dismissing the case for lack of subject matter jurisdiction, the court noted that resolution of the pertinent issues in the lawsuit would not alter the flow of production of federally owned minerals because the contract at issue had expired three years earlier.[133] This finding precluded jurisdiction on the basis that Congress did not intend for the OCSLA to cover matters that would have no bearing on production on the OCS.[134]

3. OCSLA's Choice of Law Provision

Perhaps the more interesting section of the OCSLA is the choice of law provision found in 43 U.S.C. § 1333. Section 1333(a)(1) extends the Constitution and laws

[125] *See Brooklyn Union Exploration Co., Inc. v. Tejas Power Corp.*, 930 F. Supp 289, 291–92 (S.D. Tex. 1996); *see also Plains Gas Solutions, LLC v. Tennessee Gas Pipeline Co., LLC*, 46 F. Supp. 3d 701, 705-06 (S.D. Tex 2014).
[126] *Plains Gas Solutions*, 46 F. Supp. 3d at 706.
[127] *Id.* at 705-06.
[128] *Id.*
[129] *Id.* at 706.
[130] *Id.*
[131] *Id.* at 704-05 (citing *In re DEEPWATER HORIZON*, 745 F.3d at 163 ("[O]ne can hypothesize a 'mere connection' between the cause of action and the OCS operation too remote to establish federal jurisdiction.")). It is worth noting that while this case is instructive, it is not binding precedent in the Fifth Circuit.
[132] *Brooklyn Union*, 930 F. Supp. at 291-92.
[133] *Id.*
[134] *Id.*

of the United States to the subsoil and seabed of the OCS, and to "all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources."[135] To account for gaps in federal law, Section 1333(a)(2)(A), borrows state law as surrogate federal law, assuming the state is not in contravention to federal law.[136]

> The purpose of the [OCSLA] was to define a body of law applicable to the seabed, the subsoil, and the fixed structures…on the outer Continental Shelf. That this law was to be federal law of the United States, applying state law only as federal law and only when not inconsistent with applicable federal law, is made clear by the language of the Act.[137]

To determine if state law is to be borrowed, a three-part analysis occurs: "(1) [t]he controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artificial structures permanently or temporarily attached thereto); (2) federal maritime law must not apply of its own force; and (3) the state law must not be inconsistent with federal law."[138]

a. OCSLA situs requirement

The first requirement, the situs requirement, dictates that the action causing injury, at least in a tort case, occurs on a platform or other OSCLA covered situs (as opposed to on a ship traveling in navigable waters) as enumerated in § 1333 (a)(2)(A).[139] In satisfying the situs requirement in contract matters, the Court will look to "where the work under the contract was performed."[140]

b. Application of maritime law

The second determination requires the underlying activity to be non-maritime.[141] "In a definition highly oversimplified which would exclude a myriad of contracts obviously maritime, one authority stated, '[t]he only question is whether the transaction relates to ships and vessels, masters and mariners, as the agents of commerce…'[142] In *Laredo*, the court stated that a "significant relationship to traditional maritime activities" was necessary to invoke admiralty jurisdiction.[143] There is, however, no test. In contract actions, for example: "What constitutes maritime character is not determinable by rubric. The Supreme Court has resorted to the observation that a contract is maritime if it has a 'genuinely salty

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[135] OCSLA, § 1333(a)(1).

[136] *Id.* § 1333(a)(2)(A); *In re DEEPWATER HORIZON*, 745 F.3d at 165; *Gulf Offshore Co.*, 453 U.S. 473.

[137] *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 355-56 (1969).

[138] *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043, 1047 (5th Cir. 1990) (citing *Rodrigue*, 395 U.S. at 1839). The choice of law provision in the OCSLA controls, regardless of contrary contractual choice of law provisions. *Snyder Oil Corp. v. Samedan Oil Corp.*, 208 F.3d 521, 524 (5th Cir. 2000).

[139] *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 784 (5th Cir. 2009). If the tort were to occur on navigable waters, maritime law, not state law would apply. *Id.*

[140] *Id.* at 785. This is true even when the contractual claim is based on an underlying tort. *See Id.* (discussing confusion from court opinions that base contractual situs on the situs of the underlying, this is especially important in indemnity cases).

[141] *Union Texas Petroleum Corp.*, 895 F.2d at 1048.

[142] *Id.* at 1048 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 736 (1961)).

[143] *Laredo Offshore Constructors*, 754 F.2d at 1231.

flavor.'"[144] In *Davis & Sons*, the court classified the determination of the contract as a "fact-specific inquiry" and considered six factors:

> 1) what does the specific work order in effect at the time of injury provide? 2) what work did the crew assigned under the work order actually do? 3) was the crew assigned to work aboard a vessel in navigable waters; 4) to what extent did the work being done relate to the mission of that vessel? 5) what was the principal work of the injured worker? and 6) what work was the injured worker actually doing at the time of injury?[145]

c. State v. federal law

The third and final condition for the borrowing of state law is whether the state law conflicts with federal law.[146] Assuming the state law does not conflict, the analysis is complete and the adjacent state law becomes federal law for the specific OCSLA action pursuant to 43 U.S.C. § 1333.[147]

d. Other considerations – what state law to follow?

To determine which state law to "borrow," courts consider four types of evidence: "(1) geographic proximity; (2) which coast federal agencies consider the subject platform to be 'off of'; (3) prior court determinations; and (4) projected boundaries."[148] When the action is based in tort, the location of the tort controls. When the action is based in contract, however, this analysis is less clear. It is unclear if the "location" of the contract should be determined by looking to the specific provision breached, the site where the performance is to take place, or some other metric.[149]

4. Selected Cases

In one Louisiana federal district court case, federal jurisdiction was not proper under the OCSLA when the complained of actions occurred in Louisiana coastal waters, instead of on the OCS.[150] In *Board of Commissioners v. Tennessee Gas Pipeline Co.*, the State flood control agency sued 92 oil and gas companies for causing erosion and other damage to coastal lands, as a result of their dredging activities in coastal waters.[151] The court used the two-prong analysis from *Deepwater* and determined that there was no OCSLA operation when all of

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[144] *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990).
[145] *Id.*
[146] *Union Texas Petroleum Corp.*, 895 F.2d at 1047.
[147] For an in-depth discussion of the OCSLA choice of law provisions, *see* Gerald F. Slattery, Jr., *Contractual Choice of Law Principles on the Outer Continental Shelf*, 49 TEX. TECH L. REV. (forthcoming Spring 2017).
[148] *Snyder Oil Corp. v. Samedan Oil Corp.*, 208 F.3d 521, 524 (5th Cir. 2000). The President is supposed to publish projected boundary lines seaward pursuant to OCSLA § 1333(a)(2)(A). "He" has not yet done so (the term he is meant to be defined as Presidents Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford, Carter, Reagan, Bush Sr., Clinton, Bush Jr., Obama, and now, Trump).
[149] "Choice of Law on the Outer Continental Shelf: Is There Any Choice at All?" Richard E. Chandler Jr., Elizabeth G. Meyers, Christopher H. Domingo, State Bar of Texas, *Corporate Counsel Section Newsletter* (2011).
[150] *Board of Com'rs of the Southeast Louisiana Flood Protection Authority-East v. Tennessee Gas Pipeline Co., LLC*, 29 F. Supp. 3d 808, 836-37 (E.D. La. 2014).
[151] *Id.* at 816.

the activities occurred in Louisiana coastal waters.[152]

One of the defendant companies even argued that federal jurisdiction was proper because the activities at issue affected the production of federal minerals, similar to the prevailing argument from *Amoco Production*.[153] The court was not persuaded because the connection with mineral production on the OCS was too attenuated.[154] The court did find that federal jurisdiction was proper, however, because a substantial federal issue was raised regarding the Clean Water Act, River and Harbors Act, and the Coastal Zone Management Act.[155] This case was later dismissed for failure to state a claim.[156] It is currently on appeal.

Numerous other federal district courts in Louisiana have also ruled that the OCSLA does not confer jurisdiction in the so-called "coastal erosion" cases.[157] These cases have similarly held that there is no federal jurisdiction under the OCSLA because the injuries and actions at issue occurred in the coastal waters of Louisiana.[158] The opinion in *Defelice Land Company, LLC v. ConocoPhillips Company, et al.*, lists a number of those opinions.[159]

In *Dominion Exploration & Production, Inc. v. Ameron Intern. Corp.*, the federal district court for the Eastern District of Louisiana had to consider whether federal jurisdiction was proper under the OCSLA.[160] The case involved claims arising out of the breach of a paint contract that provided for the painting of an offshore production facility (or a "spar") that would be located on the OCS.[161] Despite the fact that the spar would be located on the OCS, the court ruled that federal jurisdiction was not proper because the "painting" of the spar was not related to the construction of the platform, did not occur on the OCS, and would not impede production of minerals on the OCS.[162]

B. Natural Gas Act ("NGA")

The Natural Gas Act was enacted in 1938 to regulate the sale of natural gas in interstate commerce. [163] In part, the NGA was enacted to ensure that the interstate commerce of natural gas was subject to standard price provisions and other requirements.[164]

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[152] *Id.* at 836.
[153] *Id.* at 836-37.
[154] *Id.*
[155] *Id.* at 853, 869.
[156] *See Board of Com'rs of the Southeast Louisiana Flood Protection Authority East v. Tennessee Gas Pipeline Co., LLC*, 88 F.Supp.3d 615 (E.D. La. 2015).
[157] *See Defelice Land Company, LLC v. ConocoPhillips, LLC, et al.*, 2015 WL 3773034 (E.D. La. 2015); *see also Parish of Plaquemines v. Total Petrochemical & Refining USA, Inc., et al.*, 64 F. Supp. 3d 872 (E.D. La. 2014); *see also Jefferson Parish v. Exxon Mobile Corp., et al.*, 2015 WL 4097111 (E.D. La. 2015); *see also Parish v. BEPCO, L.P., et al.*, 2015 WL 4097062 (E.D. La. 2015); *see also Plaquemines Parish v. Hilcorp Energy Co., et al.*, 2015 WL 1954640 (E.D. La. 2015); *see also Plaquemines Parish v. Rozel Operating Co., et al.*, 2015 WL 403791 (E.D. La. 2015).
[158] *See id.*
[159] *See Defelice Land Company, LLC*, 2015 WL 3773034, at *1 ("Judge Zainey found that the Court did not have jurisdiction based on diversity, the [OCSLA], admiralty, or any federal question. Other judges have reached the same result.").
[160] *Dominion Exploration & Production, Inc. v. Ameron Intern. Corp.*, 2007 WL 4233562 (E.D. La. 2007).
[161] *Id.* at *3.
[162] *Id.* at *4.
[163] 15 U.S.C. § 717 et seq; "Regulation by Federal Energy Regulatory Commission of gas sale" Nancy Saint-Paul, 4 Summers Oil and Gas § 52:3 (3d ed.) (2016).
[164] "Jurisdiction of the Federal Power Commission Under the Natural Gas Act-Commingled Gas" David S. Bell, 24 LA. L. REV. 3 (1964).

Under the NGA, much power is placed in the Federal Energy Regulatory Commission ("FERC"), which administers the NGA by issuing certificates required for various operations, monitoring environmental impact, and setting prices for the sale of natural gas.[165]

Unlike the OCSLA, the Natural Gas Act provides a stricter grant of federal subject matter jurisdiction. One of the reasons for this is the NGA's careful attention to the relationship between state and federal governments regarding the regulation of natural gas. Section 717(b) for example, excludes from the NGA the production and gathering of natural gas, choosing instead to leave those issues to the states.[166] This provision, and other provisions allowing state regulations of NGA operations to remain has led courts to be careful in disrupting the state/federal balance related to the regulation of natural gas markets.[167] Courts have explicitly discussed this balance in narrowly applying the NGA's jurisdictional grant: "the Natural Gas Act 'was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.'"[168]

1. NGA's Conferral of Federal Jurisdiction

In terms of federal subject matter jurisdiction, Section 717(u) of the NGA provides in part:

> The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder…[169]

In addition to federal subject matter jurisdiction for violations of the NGA, there are two jurisdictional grants, one relating to FERC's ability to enjoin violators of the NGA and the other relating to condemnation actions. Those will be briefly discussed.

a. Violations of the NGA

The first option is to seek federal jurisdiction pursuant to NGA Section 717(u), which provides jurisdiction in matters directly related to violations of the NGA.[170] In *Clark v. Gulf Oil Corp.*, the Third Circuit ruled that the federal district court had jurisdiction when the complaint sought relief as a result of direct violations of the NGA.[171] The underlying dispute, while contractual in nature, arose out of Gulf's failure to

[165] "The Natural Gas Act, State Environmental Policy and the Jurisdiction of the Federal Circuit Courts" Channing Jones, 42 COL. J. ENVTL. L. 163 (2016).
[166] 15 U.S.C. § 717b
[167] *See Enable Mississippi River Transmission*, 844 F.3d at 500.
[168] *Oneok, Inc. v. Learjet, Inc.* 135 S.Ct. 1591, 1599 (2015) (quoting *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n*, 332 U.S. 507, 517-18 (1947)).
[169] 15 U.S.C. § 717(u). Despite the term "exclusive jurisdiction," state courts are not excluded from enforcing common law rights arising out of the sale of Natural Gas. *Pan American Petroleum Corp. v. Superior Court of Del. In and For New Castle County*, 366 U.S. 656, 664 (1961).
[170] *See* 15 U.S.C. § 717(u).
[171] *Clark v. Gulf Oil Corp.*, 570 F.2d 1138, 1144 (3rd Cir. 1977); *but see Superior Oil Co. v. Pioneer Co.*, 706 F.2d 603 (5th Cir. 1983) (finding no jurisdiction because Superior's claims were simple breach of contract claims, and federal issue did not appear on face of complaint).

prospectively comply with a NGA certificate regarding the under-deliveries of natural gas.[172] In ruling, the court stated that the complaint raised "serious questions under the Natural Gas Act" that Congress clearly intended to be subject to federal jurisdiction.[173] The Third Circuit was able to make this determination because the breach at issue and the failure to comply with the FERC certificate was the same action (or inaction).[174] This can be compared with the other opinions, discussed below, where the contractual breach merely implicated NGA violations.

Unfortunately for those seeking federal jurisdiction pursuant to 717u of the NGA, if the cause of action complained of is not also a violation of the NGA, as was the case in *Clark*, courts will be reluctant to confer federal jurisdiction as explained below.

b. Condemnation Actions

The second string of NGA actions where federal jurisdiction is proper are condemnation actions under NGA Section 717f.[175] Section 717f(h) confers federal jurisdiction in condemnation actions where: (1) a holder of a certificate of public convenience (2) is unable to agree or cannot acquire by contract the compensation to be paid for the necessary right of way (3) when the amount claimed by the owner of the property exceeds $3,000.[176]

Requirements one and three are fairly straightforward. The second requirement has been the subject of some legal discourse with the main issue concerning whether good faith negotiations are required prior to the failure of an agreement between the parties, despite that language not appearing in the statute. Some courts have required good faith negotiations as a prerequisite to the "unable to agree" portion of the 717f(h), while others have not.[177] This matter has not yet been ultimately settled, and a party resisting jurisdiction should insist that good faith negotiations be required.

c. FERC Power

It should be noted that a third line of NGA cases relates to FERC's ability to bring a federal action to enjoin violations of the NGA.[178] As those cases mainly concern

[172] *Id.* at 1142.
[173] *Id.* at 1144.
[174] *Id.*
[175] 15 U.S.C. § 717f(h).
[176] "When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000." 15 U.S.C. § 717f(h).
[177] Good faith negotiations were required in *Transwestern Pipeline Co. v. 17.19 Acres of Property*, 530 F.3d 770, 776 (9th Cir. 2008), but not in *Maritimes & Northwest Pipeline, L.L.C. v. Decoulos*, 146 Fed. Appx. 495, 498 (1st Cir. 2005) (unpublished) (discussing the absence of any credible authority imposing requirement of good faith negotiations).
[178] *See Columbia Gas Transmissions*, 707 F.3d at 588; 15 U.S.C. § 717s(a) ("Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may

federal administrative law, this paper will not address them.

2. When does the NGA not confer jurisdiction?

In numerous opinions, courts across the country have refused to hold that federal subject matter jurisdiction exists when the underlying claim is not explicitly a violation of the NGA.

In *Columbia Gas Transmissions, LLC v. Singh*, Columbia Gas sued to enjoin the defendants from engaging in activity that *could* lead to violations of its duties under the NGA.[179] The underlying dispute involved the Singhs' (defendants) wishes to develop property that was subject to a pipeline easement held by Columbia Gas.[180] The development threatened Columbia's responsibilities under the Natural Gas Act, so Columbia sued to enjoin the behavior.[181] In a jurisdictional battle, Columbia argued that the federal court had jurisdiction because its complaint properly alleged that the dispute "arose under" the NGA.[182] In finding that the federal court did not have jurisdiction, the Third Circuit considered the statutory language of the NGA: "[i]f Congress had intended for private actors […] to have broad enforcement powers under the Natural Gas Act, Congress could have easily given private actors such powers."[183] The court was further persuaded by the fact that the underlying claim was a state law claim, that is, an Ohio claim for easement interference.

A similar question was posed to the Fifth Circuit in *Enable Mississippi River Transmission, L.L.C. v. Nadel & Gussman, L.L.C.* There, Enable owned and operated a gas processing facility and interstate natural gas pipeline system pursuant to a certificate issued by FERC.[184] The dispute arose when Enable discovered that Nadel was producing gas from Enable's storage facility.[185] Enable sued to enjoin the production and recover damages for Nadel's production of the gas from Enable's facility.[186]

Enable filed suit in federal district court pursuant to the Natural Gas Act; Enable did not assert a specific state law claim.[187] In ruling on a motion to dismiss, the district court found that Nagel was not subject to the NGA.[188] The Fifth Circuit affirmed on the basis that there was no serious federal interest.[189] The Fifth Circuit explained that Enable's allegations were essentially a civilian conversion claim under Louisiana law, and the defendant's alleged wrongful conduct was not a violation of the NGA, even if the conduct was related to the subject matter of the NGA.[190]

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in its discretion bring an action in the proper district court of the United States, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.").

[179] *Columbia Gas Transmission, LLC v. Singh*, 707 F.3d 583, 585 (6th Cir. 2013).

[180] *Id.* at 586.

[181] *Id.*

[182] *Id.*

[183] *Id.* at 587.

[184] *Enable Mississippi River Transmission, L.L.C. v. Nadel & Gussman, L.L.C.*, 844 F.3d 495, 497 (5th Cir. 2016).

[185] *Id.* at 496-97.

[186] *Id.*

[187] *Id.* at 498.

[188] *Id.*

[189] *Id.* at 500.

[190] *Id.*

Other courts have echoed the holdings of *Columbia Gas Transmission* and *Enable Mississippi River Transmission* based on two primary rationales.[191] The first rationale is that there is no private right of action under the NGA.[192] This means that to sustain federal jurisdiction, the moving party must rely on the substantial-federal-question doctrine as enumerated in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*[193]

This plays into the hand of the second rationale, that courts are cognizant of the NGA's balance between federal and state regulation of natural gas, which was previously discussed above. This balance has led courts to narrowly construe and apply the NGA's jurisdictional grant, making federal jurisdiction rare in NGA-related matters.

3. Selected Cases

In *Henry J. Ellender Heirs, LLC v. Exxon Mobil Corp.*, the Ellender plaintiffs sued Exxon and other defendants, complaining of contaminated land that plaintiffs argued was caused by defendants' production activities.[194] The defendants sought federal jurisdiction pursuant to the NGA because the matter involved operations of natural gas companies certificated by FERC.[195] The court was not persuaded by the fact that the defendants' defenses implicated the NGA, and declined to extend federal jurisdiction.[196] The court's decision turned on the fact that the underlying claims were state law claims, instead of claims based on NGA violations which would have conferred federal jurisdiction as we have previously discussed.[197]

IV.
COMITY

Despite the jurisdictional analysis discussed above, both state and federal courts may decide that the other is a more proper forum to adjudicate the dispute at issue.

The doctrine of comity imposes a duty on both state and federal courts to respect the sovereignty of each other and avoid exercising jurisdiction merely because one has it.[198] In many instances, comity will require a federal court to abstain from hearing an issue prior to the resolution of that issue in state courts.[199] Comity considerations may also be particularly important when a federal court has the opportunity to review a matter within the legitimate interests of the states, but declines out of deference to the state courts.[200]

Comity concerns have led to the creation of federal abstention doctrines that dictate federal restraint in the adjudication of

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[191] *See Great Lakes Gas Transmission Limited Partnership v. Essar Steel Minnesota, LLC*, 843 F.3d 325 (8th Cir. 2016) (declining to extend federal jurisdiction pursuant to NGA on breach of contract claim related to tariff payments because it did not substantially concern federal law); *see also Henry J. Ellender Heirs, LLC v. Exxon Mobil Corp.*, 42 F. Supp. 3d 812 (E.D. La. 2014) (no jurisdiction when defenses implicated NGA).

[192] *See, e.g.*, *Columbia Gas Transmissions*, 707 F.3d at 587.

[193] *Id.*; *see Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 308 (2005) ("Instead, the question is whether the state-law claim necessarily stated a federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing a congressionally approved balance of federal and state judicial responsibilities.").

[194] *Henry J. Ellender Heirs, LLC v. Exxon Mobil Corp.*, 42 F. Supp. 3d 812 (E.D. La. 2014).

[195] *Id.* at 820-21.

[196] *Id.*

[197] *Id.*

[198] "Principle of comity between state and federal courts" Elizabeth M. Bosek et al., 1 Cyc. of Federal Proc. §2:186 (3d ed.).

[199] *See, e.g.*, *Rhines v. Weber*, 544 U.S. 269, 273-74 (2005).

[200] *See Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 421-22 (2010).

matters with proper jurisdiction. *Pullman* abstention, for example, dictates that federal courts should refrain from ruling on the constitutionality of a state law question until the state courts have an opportunity to decide the issues in question.[201]

A second doctrine, *Younger* abstention, bars federal courts from hearing constitutional challenges to state action when federal resolution of the pertinent matters would intrude on the states' ability to enforce its laws.[202]

When state courts are likely to have greater expertise in a complex area of state law, *Burford* abstention allows a federal court to dismiss the matter if the matter concerns difficult questions of state law, or if federal adjudication of the matter would disrupt the states' ability to establish a coherent policy regarding a matter of public concern.[203]

Lastly, *Colorado River* abstention is invoked when parallel litigation is being carried out in both federal and state court, regarding the same questions of law.[204] The general concern of *Colorado River* abstention is not necessarily deference to state sovereignty, but instead, the desire to avoid unnecessarily duplicative litigation.[205]

While the comity doctrine will not divest a court of proper jurisdiction, it may lead to a federal or state court allowing its counterpart to hear certain matters. These concerns should be considered.

CONCLUSION

As not every matter can be brought in federal court, it is important to remember the considerations that can affect the outcome of federal subject matter jurisdiction disputes. Whether you are trying to bring a case in federal court, or hoping to avoid federal court at all costs, these considerations affect availability of the federal forum. No matter which side you find yourself on, hopefully this analysis can be used to assist in navigating the jurisdictional battles common to oil and gas matters.

[201] *See Railroad Commission of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *Porter v. Jones*, 319 F.3d 483, 491-92 (9th Cir. 2003).
[202] *Younger v. Harris*, 401 U.S. 37, 44 (1971).
[203] *Burford v. Sun Oil Co.*, 319 U.S. 315, 333-34 (1943)
[204] *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-18 (1976).
[205] *Id.*