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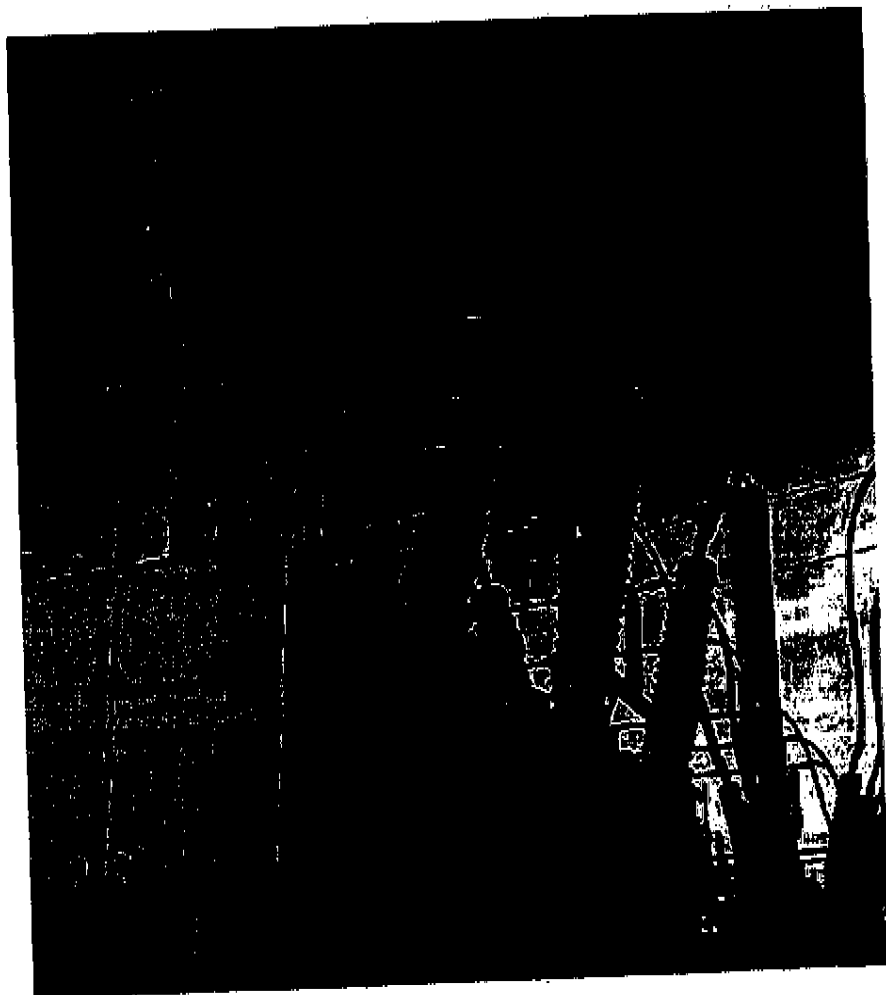
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OIL, GAS AND ENERGY RESOURCES LAW



SECTION REPORT

OFFICIAL PUBLICATION OF THE OIL, GAS AND ENERGY RESOURCES LAW SECTION OF THE STATE BAR OF TEXAS

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Perfection of Federal Offshore Mineral Liens

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The path to perfecting a mineral lien on leasehold interests or leasehold property located in federal waters generally requires three steps: (1) confirm the location of the leasehold in federal waters, (2) comply with the mineral lien law of the closest state(s), and (3) conform the lien affidavit to the peculiarities of federal offshore leases. This article addresses this path and the pitfalls that may arise on that path.

I. LOCATION IN FEDERAL WATERS

An offshore leasehold may be in state waters or in federal waters. The federal government exercises ownership and comprehensive regulation over the federal waters covering the Outer Continental Shelf ("the OCS"). *EP Operating Limited Partnership v. Placid Oil Co.*, 26 F.3d 563, 566 (5th Cir. 1994). The OCS covers the waters beyond the territorial waters of Texas, Louisiana, Mississippi, Alabama and Florida. *Demette v. Falcon Drilling Company, Inc.*, 280 F.3d 492, 495-496 (5th Cir. 2002). The OCS begins three geographic miles seaward from the coastlines of Louisiana, Mississippi and Alabama, or three seaward leagues from the coastlines of Texas and Florida, and extends to the end of the continental shelf. *U.S. v. Louisiana*, 363 U.S. 121 (1960).

The Mineral Management Service ("MMS") maintains a map of the federal leaseholds. This map provides the easiest method to locating a leasehold in federal waters.

II. THE MINERAL LIEN LAW OF THE CLOSEST STATE(S)

The location of federal offshore leaseholds on the OCS informs the controlling effect of the Outer Continental Shelf Lands Act ("OCSLA"). *Union Texas Petroleum Corporation v. PLT Engineering, Inc.*, 895 F.2d 1043, 1046 - 1050 (5th Cir. 1990); *World Hospitality, Ltd. v. Shell Offshore, Inc.*, 699 F.Supp. 111, 113 (S. D.

Tex. 1988). Under the OCSLA, the law of the closest state(s) supplies a surrogate federal law for the perfection of a mineral lien. *Id.* The *World Hospitality* case represents a case where the courts applied this principle without discussion. *World Hospitality*, 699 F. Supp. at 113. It simply concluded that "... Texas law applies to the perfection of a lien claim on the [OCS] adjacent to Texas, ..." based upon a citation to the OCSLA.

Actually there is a controlling three-part test that, under most if not all circumstances, supports such a rote conclusion. "... [F]or adjacent state law to apply as surrogate federal law under the OCSLA, three conditions are significant: (1) the controversy must arise on a situs covered by OCSLA (*i.e.* the seabed, 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." *Union Texas*, 895 F.2d at 1047.

A situs covered by the OCSLA includes pipelines connected to a platform, production equipment, the drilling platform, a drilling rig or any other item respectively attached to, erected on or buried in the seabed for the purpose of developing oil and gas from the OCS. *Union Texas*, 895 F.2d at 1047-1048; *Demette*, 280 F.3d at 497-500. It even includes a jack-up or similar rig that is only temporarily attached to the seabed. *Demette*, 280 F.3d at 497-500.

Activities involved in the construction or conduct of normal oil and gas exploration and production activities are usually considered oil and gas activities and are not considered maritime activities to which maritime law applies. *Union Texas* at 1049 - 1050; *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 955 (5th Cir. 1988). The fact that the oil and gas activity may involve a boat or vessel, maritime operations or work on the waters

does not necessarily transform normal oil and gas activities into maritime activities. *Id.* The scope of non-maritime oil and gas operations includes all operations normally associated with oil and gas operations and includes the stoppages associated with such operations. *EP Operating*, 26 F.3d at 567-568.

There is an inconsistent trend of cases that hold that the drilling for oil and gas on a vessel in navigable waters is a form of maritime commerce. *E.g. Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538-539 (5th Cir. 1986). In the perfection of a mineral lien context, the *Theriot* line of cases have been found to be inapposite because (1) these cases are personal injury or indemnity cases, (2) these cases rely upon too expansive a definition of a maritime contract, (3) these case are contract construction cases and the mineral lien arises from the provision of goods or services, or (4) the gravamen of any mineral lien is oil and gas operations and not the operation of a vessel. *Union Texas*, 895 F.2d at 1050; *Gardes Directional Drilling Co. v. U. S. Turnkey*, 98 F.3d 860, 865 (5th Cir. 1996); *Thurman*, 836 F.2d at 955; *Sea Robin Pipeline Co. v. Red Sea Group, Ltd.*, 919 F.Supp. 991, 996-997 (W.D. La. 1996). Of these distinctions, the most persuasive distinction is that the perfection of mineral liens relates to a basic non-maritime activity. *Thurman*, 836 F.2d at 957-958.

The *Demette* case is a recent application of the *Theriot* line of cases. *Demette*, 280 F.3d 492. It is a construction of a contractual indemnity case involving a jack-up rig. *Id.* at 494. It found that a jack-up rig is a vessel on the OCS, but it nevertheless found that maritime law applies. *Id.* at 495-501. Although *Demette* is inapposite in the perfection of mineral lien cases, as discussed above, it provides the framework to argue that state mineral lien law should not apply to jack-up and other vessel-type drilling rigs if a mineral lien claimant seeks to avoid some dimension of an adjacent state mineral lien law.

The perfection requirements under state mineral lien laws are generally not inconsistent with federal law. *Gardes*, 98 F.3d at 865; *Genina Marine Services, Inc. v. Mark Production Co.*, 490 So.2d 1158, 1159-1162

(La. App. 3rd Cir 1986, writ den'd). The fact that state mineral lien laws would require the filing of liens in one or more of the many coastal counties and parishes along the Gulf of Mexico rather than in a centralized office, such as the MMS, is not a basis to find a conflict between state mineral lien laws and federal law. *World Hospitality*, 699 F.2d at 114. Under the three-part test, most, if not all, activities supporting a mineral lien will be related to normal oil and gas operations on a pipeline or structure erected or buried on or in the OCS and therefore the mineral lien law of the adjacent state controls. Under the OCSLA, the parties to a contract cannot, through a choice of law provision, provide otherwise and agree that maritime law controls. *Union Texas*, 895 F.2d at 1050.

III. HOW TO DETERMINE WHICH STATE IS CLOSEST?

There is no simple, normative formula to determine which state is the closest or adjacent state. The President, through the MMS, was supposed to devise such a formula, but, in the absence of the MMS's formulation of such a formula, each determination is a distinct fact intensive determination. *Snyder v. Samedan Oil Corporation*, 208 F.3d 521, 522-525 (5th Cir. 2000)

Relevant factors include: how do the MMS and other governmental agencies characterize the area of the leasehold as being adjacent to one Gulf state or another, how do the charts created by the parties, if any, characterize the area of the leasehold as being adjacent to one Gulf state or another, how have prior courts characterized the area of the leasehold as being adjacent to one Gulf state or another and what are the various distances from the drilling rig to the coastlines of each nearby Gulf state. *Snyder*, 208 F.3d at 523, *Reeves v. B & S Welding, Inc.*, 897 F.2d 178, 179-180 (5th Cir. 1990). It is not necessary to recreate the projected boundaries of the Gulf states to determine the closest adjacent state. *Id.* The decision must be based upon all relevant factors, with no one factor having controlling weight. *Id.*

Until the MMS publishes a definite formula, it is impossible to determine which state is the closest adjacent state. The *Reeves* and *Snyder* cases demonstrate that leasehold interests respectively thought to be adjacent to the state of Louisiana were really adjacent to the states of Texas and Alabama.

IV. THE PRACTICAL

Once the appropriate adjacent state is determined, then perfection of a mineral lien follows the specific requirements of the mineral lien law of that state. The details of perfection under each mineral lien law of each Gulf state is beyond the scope of this article. However, there are some practical matters to keep in mind.

Where do you find descriptions for your leases? You will need to determine the Federal Lease No. and the Block No. or portion thereof covered thereby. The MMS can provide that information. Oilfield Publications, Ltd. or other publishers also publish offshore maps with this information. Your clients should include this information in the credit application, purchase order or similar documents.

Where do you file your lien affidavit? In the County or Parish Clerk's office that is due north in a straight line from the particular Block Involved. For example Block A241, Galveston South Addition is due south of Galveston, Texas. What if your line drawn due north falls between Jefferson County and Chambers County to such a degree that it is impossible with accuracy (or upon the great expense of trying to satisfy the *Reeves-Snyder* factors) to determine the appropriate county? File in both counties. What do you do when you cannot determine whether or not your filing is in Texas or Louisiana? File in Texas under the Texas statute, and file in Louisiana under its Lien Act.

Should One File as a Contractor or a Subcontractor? In Texas, a distinction is made between a Mineral Contractor and a Mineral Subcontractor in that a mineral subcontractor must give a ten day notice to the property owner in writing that a lien is claimed before a lien affidavit is filed. Since it is

sometimes difficult to determine whether or not your person fits under a particular provision, then give the ten day notice.

What About the Differences in Mineral Lien Laws? Because it may be difficult or impossible to determine whether to file in Texas or Louisiana, please keep the differences in the mineral lien laws in mind. The scope of each state's mineral lien laws is beyond the scope of this article, but there are fundamental differences between the mineral lien laws of the various Gulf states. For example, in Louisiana a distinction is made between a gathering line and a transmission line with the transmission line being not subject to the Louisiana Lien Act. In Texas, the statute merely states an oil and gas pipeline.

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