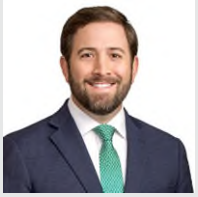
Energy Litigation 2023 Outlook

January 2023

For clients and friends of the firm, the Baker Botts Energy Litigation team has identified some key issues and trends in the energy sector that we think you should know about. Please feel free to reach out to the relevant team members if you have any questions about any of the issues and trends discussed below.

KEY ISSUE	CONTACT
1. **The Battle of State v. Municipal Regulation of Oil and Gas Operations.** In response to local laws attempting to limit or bar oil and gas development, several states in recent years have adopted laws substantially narrowing the ability of municipalities to regulate oil and gas operations. For example, Texas adopted Texas Natural Resource Code § 81.0523, which vests in the state of Texas exclusive jurisdiction over oil and gas operations and preempts local regulation of oil and gas operations except for limited circumstances. Similarly, Oklahoma adopted 52 O.S.Supp.2015 § 137.1, which confines local regulation of oil and gas operations to three specified areas. We have begun to see initial tests of these laws, including in *City of Port Arthur v. Thomas*, ---S.W.3.---, No. 09-21-00111-CV, 2022 WL 3868106 (Tex. App.—Beaumont Aug. 31, 2022, no pet.), and *Magnum Energy, Inc. v. Bd. of Adjustment for the City of Norman*, 510 P.3d 818 (Okla. 2022). We fully expect the battle over state v. local regulation of oil and gas operations to continue with municipalities testing the limits of their authority and oil and gas operators asserting that the local actions are preempted under these recently adopted state laws.	 **Tina Q. Nguyen** Partner tina.nguyen@bakerbotts.com
2. **Pricing Disputes.** Fueled by volatile markets, inflation, interest rates, and supply chain disruption, parties across the energy chain are facing pricing changes that depart from original projections and expectations. In 2023, we expect to see an uptick in parties negotiating (and litigating) pricing provisions in the oil and gas, power, and renewables sectors. These challenges will be most pressing in the renewable space as offshore wind projects ramp up and the IRA spurs additional investment.	 **Louie Layrisson** Partner louie.layrisson@bakerbotts.com

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3. **Acquisition Related Disputes.** Companies are buying and selling oil and gas assets with more frequency given a recent spur in the market, but price volatility can result in disputes as buyers get cold feet. In 2023, we expect to see more of these disputes as prices continue to swing up and down, with buyers using every option at their disposal to seek a purchase price reduction.	 **Jason Newman** Partner jason.newman@bakerbotts.com  **Chauntelle Wood** Senior Associate chauntelle.wood@bakerbotts.com
4. **Loan Financings and Energy Boycotts.** Rising inflation, interest rates, and pressure from regulators are causing banks and other debt providers to tighten requirements for loan extensions, refinancings, and restructuring requests, making it more difficult for borrowers seeking new loans and other sources of financing. At the same time, some states are beginning to enact and enforce boycott policies on lenders who adopt policies that supposedly discriminate against oil and gas production. We are working with our finance and project lawyers on finding solutions for our clients on all of these problems, from both the debtor and lender perspective, and getting prepared to be ready to assist clients who need immediate help on default, foreclosure, and other critical situations.	 **Bill Kroger** Partner bill.kroger@bakerbotts.com  **Paul Landen** Partner paul.landen@bakerbotts.com
5. **Public Utilities & Energy Company Considerations for Political Activity.** More than a year after First Energy agreed to pay a $230 million fine for its role in a scheme that funneled millions of dollars to state officials, the Ohio utility is still dealing with increased scrutiny and litigation. While First Energy is an extreme example, public utilities and other energy companies face unique considerations when weighing whether and how to engage in a range of political activity at the federal and state levels. We will identify these unique risks, and ways to mitigate them, and identify key lessons learned from the First Energy litigation.	 **Sterling Marchand** Partner sterling.marchand@bakerbotts.com

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6. **Hydrogen.** As the world catapults toward a clean energy transition, hydrogen as a fuel source will become increasingly common, with Texas as the frontrunner in that transition. With hydrogen pipelines already built along the Texas coast, and hydrogen projects continuing to be announced all over Texas, we expect new transactions, regulations, and litigation to follow. Texas courts will have to apply existing case law—such as pore space ownership, storage ownership and liability, deduction of post-production costs, and leasing arrangements—to this new energy framework that is sure to present its own challenges and nuances.	 **Laura Shoemaker McGonagill** Senior Associate laura.mcgonagill@bakerbotts.com
7. **Ongoing effects of the war in Ukraine.** The coming year is likely to see an escalation in legal disputes arising out of Russia's invasion of Ukraine and the resulting geopolitical fallout, especially in the energy sector. Both Uniper (Germany's largest importer of Russian gas) and Dutch operator RWE have recently announced that they have initiated commercial arbitrations against Gazprom for its failure to deliver gas in recent months, in Uniper's case claiming at least €11.6 billion in damages. Eni similarly announced in May 2022 that it was commencing arbitration against Gazprom in relation to Russia's demand that payment for gas supplies be made in roubles. Other European energy companies may well follow suit. Investment treaty claims in relation to foreign-owned energy assets located in Russia also seem likely: ExxonMobil has reserved the right to bring a treaty claim against Russia in relation to the forced transfer of its stake in the Sakhalin-1 project in Russia's Far East to Rosneft, while Shell has also seen its interest in the Sakhalin-2 project transferred to the Russian state. Treaty claims may also be brought by Ukrainian investors against Russia with respect to assets located inside Russian-occupied Ukraine (at least 12 treaty claims have already been brought by Ukrainian investors since 2014 in relation to assets located in Crimea). Finally, Russian investors, including Russian-state owned energy companies, could potentially bring claims in relation to the confiscation of Russian assets by Western governments: the German state, for example, has recently taken control of Gazprom Germania (now known as Securing Energy For Europe, or "SEFE") and three German refineries owned by Rosneft. As the war in Ukraine drags onwards, the legal skirmishes are likely only getting started.	 **Johannes Koepp** Partner johannes.koepp@bakerbotts.com  **David Turner** Senior Associate david.turner@bakerbotts.com
8. **Environmental Reviews & Energy Infrastructure.** The National Environmental Policy Act (NEPA) requires federal agencies to assess the environmental impacts of major federal actions. In 2022, the Council on Environmental Quality (CEQ) issued the "NEPA Phase 1 Rule," which expanded the scope of agency reviews to include "indirect effects" and "cumulative effects," while also expanding the breadth of the "purpose and need" statement, which is the critical starting point for NEPA review. By early 2023, CEQ is expected to propose a "Phase 2 Rule," which will further reverse Trump-era NEPA changes and likely increase the burdens, delays, and costs associated with the NEPA process. Separately, congressional efforts to accelerate federal environmental reviews for energy projects – including some legislative attempts by Senator Joe Manchin (D-WV) – have not resulted in meaningful new reforms, at least not yet. As these and other efforts continue into 2022, many observers note that the Biden Administration's ambitious clean energy goals largely hinge on the ability of the private sector to reliably and efficiently deploy new energy infrastructure, creating at least some incentive for federal agencies to try to find ways to improve environmental permitting and reviews. Separately, the Trump-era reforms to the Section 401 water quality certification procedures are likely to remain in effect far into 2023 (and perhaps beyond) due to a recent Supreme Court order.	 **Jeffrey H. Wood** Partner jeffrey.wood@bakerbotts.com

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9. **LNG Outlook.** Seven LNG terminals are operating in the United States, five are under construction, and eleven more have received FERC approval. The increasing availability of LNG export facilities opens opportunities for upstream developers to respond to global gas demands, which have surged in recent months in part because of the war in Ukraine. Exploration companies should consider revisiting longstanding leases and crafting language in new leases to ensure that lease terms, including for the calculation of royalties and post-production cost deductions, allow for and are favorable to potential LNG sales.	 **Elizabeth Furlow Malpass** Associate elizabeth.malpass@bakerbotts.com
10. **Coal Combustion Residuals Enforcement and Regulation.** Coal-fired power plants manage coal combustion residuals (CCR, or coal ash) in landfills and surface impoundments. EPA released its first federal regulations addressing CCR in 2015 and has revised the regulations several times since with more rulemakings still pending. In 2022, EPA entered into its first enforcement orders for alleged non-compliance with the federal CCR regulations, while advising numerous other companies through "Part A" decisions of various perceived compliance issues. We expect EPA's implementation and enforcement efforts to continue through 2023. At the same time, EPA is continuing to revise and expand the federal CCR regulations, resulting in a dynamic regulatory landscape that can be difficult to navigate. We are working with clients to develop short-term and long-term solutions that navigate these litigation and enforcement risks, ensure regulatory compliance, and align with business planning.	 **Martha S. Thomsen** Partner martha.thomsen@bakerbotts.com
11. **Ethylene Oxide (EtO) Litigation.** Over the past several years, there has been increased regulatory scrutiny at the state and federal levels of EtO emissions and that is expected to continue in 2023. For example, in August 2022, the EPA announced that it was launching additional community engagement efforts to "engage and inform communities, states, Tribes, Territories, and stakeholders about up-to-date information on the risks posed by air emissions" associated with EtO. According to the EPA, these efforts will include both national and community-specific outreach. In light of these ongoing regulatory activities and recent, high-profile verdicts and settlements in EtO exposure litigation related to sterilization facilities, we expect to see more of these lawsuits being filed in 2023 with respect to both sterilization operations and EtO production and manufacturing more generally.	 **Benjamin Gonsoulin** Senior Associate benjamin.gonsoulin@bakerbotts.com
12. **The Role of Greenhouse Gas Emissions in FERC's Certificate Process.** FERC will continue working to flesh out and finalize how greenhouse gas emissions should impact its decisions on certificate applications under the Natural Gas Act. A number of issues are under consideration in what is now a draft policy statement, including: (1) how the Commission will evaluate climate change impacts in its National Environmental Policy Act reviews and (2) how FERC will integrate climate considerations into its public interest review under the Natural Gas Act. Among the most controversial issues are whether and to what extent climate change mitigation and indirect greenhouse gas emissions should factor into FERC's analyses. Given strong diverging viewpoints on these issues, we expect ongoing litigation, irrespective of how FERC ultimately rules.	 **Michelle Boudreaux** Partner michelle.boudreaux@bakerbotts.com

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13. Accidental Chemical Releases Likely to Receive Increased Scrutiny. The U.S. Chemical Safety and Hazard Investigations Board (CSB), charged with investigation of accidental chemical releases under the Clean Air Act, finally received Senate confirmation of a quorum of members for the first time in over a decade. 2022 marked all-time lows in deployments for the agency, but with the back end of the year featuring a push to close files, eliminate the investigative backlog, and hire new investigative staff, industry can expect a trend upwards on both full deployments and subsidiary products from the CSB in 2023.	 **David LaCerte** Special Counsel david.lacerte@bakerbotts.com
14. Preparing for Shareholder, Consumer, and Other Private Litigation over ESG Disclosures. This year, the SEC will finalize regulations that put climate change risk assessment front and center in a registrant's disclosures. It includes governance of climate-related risks and relevant risk management processes; how climate-related risks have or will materially impact its business and finances; and the impact of climate-related events. Additionally, the climate disclosure rules will require quantifying and disclosing Scope 1, Scope 2, and in some instances, Scope 3 emissions. Climate change already underpins a growing number of cases across the country, with litigation targeting a wide variety of industries, invoking claims based on torts, false advertising, consumer protection, fraud, misrepresentation, and deceptive business practices. With the newest SEC disclosure requirements, companies can be sure that shareholder and securities-based litigation are to follow. We will discuss the strategies for preparing climate disclosures to mitigate against the risk of potential enforcement and litigation. We will also explore and discuss the processes that companies should develop now to best ensure that the climate, and other ESG, reporting processes are protected by the attorney-client privilege.	 **Sterling Marchand** Partner sterling.marchand@bakerbotts.com  **Amy Hefley** Partner amy.hefley@bakerbotts.com
15. SEC ESG-Related Enforcement. In addition to the climate disclosure rules proposed by the SEC, and regardless of whether (and to what extent) those rules are ultimately enacted, the SEC's Enforcement Division will continue to utilize its existing authorities to pursue climate and ESG-related investigations and enforcement actions. The Enforcement Divisions Climate and ESG Task Force, established in 2021, brought several actions in 2022, one case against an issuer over alleged misstatements about safety on a project in South America, another case against an issuer involving disclosures around the financial risks concerning the discharge of mercury, and two against investment advisers for allegedly failing to follow their own ESG-related policies or investment criteria. The cases against the issuers were brought under Section 10(b) of the Exchange Act and/or Sections 17(a)(2) and (a)(3) of the Securities Act, both of which prohibit misstatements in connection with securities transactions. The cases against the advisers were brought under Investment Advisers Act provisions requiring advisers to adopt policies to prevent violations of the Act. We expect the Enforcement Division to continue to use these existing authorities to "make" ESG-themed cases and to ramp up the penalties sought in ESG-themed actions. In light of this, issuers, advisers, and other market participants must keep in mind that, even if they are not required to speak on an issue, if they ***do*** choose to speak on ESG (or any other issue), those disclosures must be fully complete in order to not be later judged as materially misleading.	 **Brendan F. Quigley** Partner brendan.quigley@bakerbotts.com

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16. ***Helix v. Hewitt.*** In 2022, the US Supreme Court heard argument on *Helix v. Hewitt*, a case from the Fifth Circuit that stands for the idea that a day rate does not meet the salary basis test to be exempt from overtime under the Fair Labor Standards Act (FLSA) even though the workers at issue were highly compensated. We are also watching to learn how this issue will be resolved at the high court and whether common sense will win over the byzantine rules established by the FLSA, a law from a different era. We will discuss how to evaluate exempt versus non-exempt status, or whether a worker is an independent contractor under the current legal tests.	 **Jennifer M. Trulock** Partner jennifer.trulock@bakerbotts.com
17. **The Uncertain Future of the Energy Charter Treaty.** The Energy Charter Treaty ("ECT"), an international agreement signed by 53 countries that has protected qualifying energy investments since the early 1990s, has recently come under fire from certain nations alleging that its terms interfere with their climate change goals. France, the Netherlands, Poland, and Spain have signaled their intention to leave the treaty, while Italy formally withdrew from the ECT in 2016. The European Commission has contemplated modernizing the ECT with revisions that could include, among other changes, phasing out protections for fossil fuel projects. In November 2022, however, four unnamed European Union member states blocked an effort to keep the modernization plan on track, which some see as a sign of weakening support for the ECT as a whole. Adding to these concerns, some have voiced the possibility that withdrawing countries could seek to abolish the ECT's 20-year sunset clause, which provides existing energy investments with continued treaty protections after the date of withdrawal. These developments are likely to create a gap in treaty protections for both inward and outward investment with respect to certain EU jurisdictions. As a result, the bilateral investment treaties applicable to those jurisdictions could become more relevant for treaty protections. Although less likely, there could be legal debates surrounding the effectiveness of eventual side-agreements among former ECT contracting parties seeking to curtail the ECT's sunset clause. Energy investments in the territories once encompassed by the ECT therefore need to consider with additional caution the available legal protections against political risk.	 **Alejandro A. Escobar** Partner alejandro.escobar@bakerbotts.com  **Dustin Appel** Senior Associate dustin.appel@bakerbotts.com
18. **New Criteria for Transmission Lines in Texas.** In the past, Texas has been successful in building electric transmission infrastructure. More recently, however, many wholesale power market participants have identified a growing need for even more transmission capacity to reduce rising levels of congestion, including generic transmission constraints or GTCs, across the Electric Reliability Council of Texas (ERCOT) system. In 2021, the Texas Legislature passed a bill that required the Public Utility Commission of Texas (PUCT) to revise its rule setting the standards for approving new transmission lines that could provide economic benefits and reduce congestion on the system. On December 7th, 2022, the PUCT approved the revised rule establishing new criteria to evaluate the economic benefit of a transmission line. The revised rule now provides for two categories of cost-benefit analysis that ERCOT must perform to establish the need for certain new transmission lines: a congestion cost savings test and a production cost savings test. A project can qualify for approval under either test. In addition, to the extent a proposed transmission project does not qualify under either economic test and is not needed to address reliability issues, the project may still be approved if it addresses a resiliency issue. Baker Botts will be monitoring the effect of these rule changes to see whether they succeed in spurring construction of additional transmission lines in ERCOT.	 **Andrea Moore Stover** Partner andrea.stover@bakerbotts.com

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19. Ownership of Pore Space. The issue of pore space ownership—control of the empty spaces in underground formations that house gases and liquids—is becoming increasingly important. As businesses look for places to store the salt water produced with hydrocarbons or to sequester captured carbon dioxide to reduce CO2 emissions, there is increasing need for clarity on who owns the empty pore space in underground formations. In many states, the law is unsettled on this point. While Texas law is not entirely settled, there is recent case law holding that the surface owner owns the pore space; but there is relatively little guidance on when and how the pore space owner, or one granted rights by the owner to use the pore space, must accommodate others holding underground rights, particularly mineral owners, who have a sometimes competing right to produce minerals from formations above, below, or adjacent to the empty pore space formations. We believe the Texas Legislature, the Texas Railroad Commission, or both may provide additional guidance on this issue in 2023. Other states may see similar clarifications.

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20. Crypto Mining in ERCOT. In June 2021, Texas Governor Greg Abbott endorsed two Texas House Bills—HB 1576 and HB 4474—advocated by virtual currency and blockchain businesses. Following the Governor's endorsement, the Texas grid operator (the Electric Reliability Council of Texas, or ERCOT) began to see an influx of crypto miners seeking to build new mining facilities and connect them to the ERCOT grid. Historically, there have been no special requirements for large loads to connect to the ERCOT grid. However, in light of concerns about grid stability after Winter Storm Uri, ERCOT established a task force to develop policy recommendations and an interconnection process for the integration onto the ERCOT grid of large "flexible" loads—loads over 75 MW that are able to reduce or stop their power consumption on short notice. Despite increased energy costs and the recent financial losses associated with Bitcoin and other cryptocurrencies, ERCOT has seen no material decrease in flexible large loads seeking to connect to the ERCOT grid over the past few months. As of November 2022, there were approximately 1,500 MWs of flexible large load on the ERCOT grid, but approximately 90 sites representing 37,000 MWs seeking connection in ERCOT's flexible large load interconnection queue. In November 2022, the Texas Senate's Business and Commerce Committee met to discuss the integration of flexible large loads on the ERCOT grid. We expect additional discussion and legislation relating to crypto mining and other flexible large loads in the 88th Legislative Session that began on January 10, 2023.

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21. BLM Venting & Flaring Rules. On November 30, 2022, the Bureau of Land Management proposed new regulations to address venting and flaring activities on federal and tribal lands. The proposal, which comes after years of back-and-forth rulemakings and court rulings, would require operators to use "all reasonable precautions to prevent waste of oil or gas developed from [leases]," submit "waste minimization plans" with all drilling permit applications, restrict the amount and duration of methane venting and flaring activities, and require further upgrades to production sites, among other things. The proposal also states that BLM could block drilling permits if "available gas capture infrastructure" is not adequate to service production capacity. In terms of specific equipment changes, the proposal would ban the use of natural-gas-activated pneumatic controllers or pneumatic diaphragm pumps with a bleed rate that exceeds 6 scf per hour; require oil storage tanks with vapor recovery systems where "technically and economically feasible"; and require use of leak detection and repair programs. The proposal, if/when finalized, would replace the existing BLM venting and flaring requirements found NTL-4A. Legal challenges are likely. While BLM's prior efforts to impose similar

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regulations were blocked by the courts, BLM asserts that this proposal is supported by new statutory authorities found in the Inflation Reduction Act (IRA), such as IRA provisions allowing BLM address "gas lost during emergency situations, gas used for the benefit of lease operations, and gas that is 'unavoidably lost.'" A final rule is scheduled for later in 2023.

22. **Federal Power Act Section 203.** In two orders issued in October of this year, FERC has changed its policy concerning changes in control and affiliations under Section 203 of the Federal Power Act. In *Evergy Kansas Central, Inc., et al.*, 181 FERC ¶ 61,044 (2022) and *TransAlta Energy Marketing (U.S.) Inc., et al.*, 181 FERC ¶ 61,055 (2022), FERC determined that when an investor's non-independent director is appointed to the board of directors of a public utility, or a public utility holding company that owns public utilities, such transaction will require prior FERC approval under section 203(a)(1)(A). This requirement will apply even if the investor is acquiring less than 10% of the outstanding voting interests of the public utility or public utility holding company. FERC's recent orders upend longstanding FERC policy and precedent, effectively rebutting the presumption of a lack of control due to less than 10% ownership of the outstanding voting interest of the entity. Expect public utility investors to challenge the application of these cases to existing public utility holdings and contemplated future transactions, both in the coming year and beyond.

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23. **The Shifting Landscape of Texas Tax Incentives in Energy Development.** The expiration of Texas Tax Code Chapter 313 on December 31, 2022 prompted a flurry of emergency litigation against the Texas Comptroller in late December, after it became clear that the Comptroller would have insufficient time to approve many of the local tax incentive agreements between energy developers and school districts submitted for approval before the statute expired. The Texas Supreme Court denied relief, telling the parties that their grievance is really with the Legislature, which can replace Chapter 313 with a different incentive program if the necessary support exists. Despite strong support from the energy sector and taxpayer advocates, no proposed replacement is before the Legislature this session. That has not stopped opponents of energy development projects in Texas from continuing to attack the validity of existing tax incentive agreements via litigation as a way of trying to stymie those projects. Although that approach has been generally unsuccessful, we anticipate that opponents of energy development projects will continue to use it.

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24. **Texas Electric Market Redesign.** After Winter Storm Uri in 2021, the Texas Legislature passed a number of statutes calling for changes to the Texas power market, especially the Electric Reliability Council of Texas (ERCOT) market. The Public Utility Commission of Texas (PUCT), ERCOT, and a broad array of stakeholders are now grappling with how best to design and implement changes to meet the legislative mandates. As "Phase I" of this effort, the PUCT overhauled ERCOT's governance structure, dramatically lowered the price cap for wholesale power in ERCOT, created new ancillary service and reliability products, and created a new firm fuel supply service. For "Phase II," the PUCT commissioned a study of market redesign options to spur development of new generation to be available when the grid is most strained. These reforms could dramatically alter the economics of the Texas power market. The PUCT has indicated it would like to

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adopt one of the proposed market redesign options that awards credits to generators for running during critical periods and requires those selling electricity at retail to purchase credits based on their customers' proportionate share of demand during those periods. Key legislators have stated that the PUCT should not adopt a market reform without that body's input. We expect that during the 88th Legislature, which convened on January 10, 2023, state leaders will propose several bills promoting competing market redesign options.

25. Energy Trading Misconduct & CFTC Enforcement. Energy trading misconduct is expected to remain a top CFTC enforcement priority in 2023. While the growth of digital asset markets has shifted some CFTC attention to investigations involving bitcoin trading and other digital asset market activity, the CFTC is expected to remain highly focused on manipulative and deceptive conduct in the energy markets—including conduct relating to energy benchmark manipulation, foreign corruption, misappropriation of material non-public information, and spoofing. Significant enforcement actions in 2022 involving energy commodities and related activity demonstrate that the CFTC will impose substantial and robust sanctions against those energy market participants who engage in trading-related misconduct, no matter where it occurs. We expect the CFTC to continue to credit those with effective compliance programs and to impose compliance undertakings and mandated consultants on those who do not. Attention to maintaining and improving robust energy trading compliance policies, procedures, and training can help mitigate these enforcement risks and facilitate effective trading operations.

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26. *Negotiorum Gestio* and The Deduction of Post-Production Costs from Unreleased Mineral Interest Owners. Recently, federal courts have wrestled with the question of whether an operator can deduct post-production costs from the proceeds of unreleased mineral owners. In two class action suits considered in the U.S. District Court for the Western District of Louisiana, unleased mineral owners (UMOs) alleged that operators had improperly deducted post-production costs from the UMOs' production proceeds. These two suits are *Self v. BPX Operating, Co.*, 2022 WL 989345 (W.D. La. Mar. 31, 2022) (Hicks, CJ) and *Johnson v. Chesapeake Louisiana, LP*, 2022 WL 989341 (W.D. La. Mar. 31, 2022) (Hicks, CJ). Both cases involved the interplay between Louisiana Revised Statute 30:10, also known as the Risk-Fee Statute, and Louisiana Civil Code, Article 2292 et eq., involving *negotiorum gestio* or the management of another's business or property. In March 2019, looking at only Section 30:10, the Court held in *Johnson v. Chesapeake* that an unleased mineral owner is not subject to post-production costs. Chesapeake filed a motion for reconsideration and combined its argument with BPX's Rule 12(b)(6) hearing. Both issues were heard separately, and opinions in both cases were issued on the same day in March 2022. Upon reconsideration, the Court ruled that the doctrine of *negotiorum gestio* could be read in harmony with Section 30:10 to provide a "mechanism for an operator to recover post-production costs from UMOs," as owners must reimburse managers for all "necessary and useful" expenses. The UMOs appealed the *Self* decision to the Fifth Circuit, where oral argument was heard on December 6, 2022. This will be an important issue to watch for all oil and gas professionals.

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KEY ISSUE	CONTACT
27. Behind-the-Meter Power Arrangements. In 2022, we continued to see "behind-the-meter" generation arrangements proliferate throughout Texas, particularly in remote portions of the Permian Basin. Placing generation "behind" an existing consuming facility (on the other side of the facility from the electric meter) can offer various operational, engineering, and cost advantages, including the avoidance or reduction of transmission charges. As these arrangements have grown in popularity, we have seen consumers use increasingly complex arrangements involving multiple retail electric providers, multiple generation companies, or multiple customers behind a single meter. We have also seen the emergence of companies offering turnkey behind-the-meter power for industrial customers. We expect rapid growth in behind-the-meter arrangements to continue in 2023, and we also expect that as these arrangements become more common, they will attract increased legislative and regulatory scrutiny.	 **Landon Lill** Senior Associate landon.lill@bakerbotts.com
28. Off-Channel Communications. Government regulators will increasingly expect companies, including issuers, to have policies for preserving and collecting "off-channel" communications, i.e., those on personal cellphones and on third-party messaging applications. 2022 saw the SEC and CFTC collectively impose almost $2 billion in penalties on financial institutions based on those institutions' failure to preserve communications their employees had made on personal cellphones and via non-organizational message platforms such as WhatsApp. While these initial settlements were based on record-keeping requirements for broker-dealers and registrants under SEC and CFTC rules, these settlements have set an expectation that all kinds of companies, including issuers, will have lines of sight into what types of communications their employees are using for business-related communications and will have in place procedures for monitoring, preserving, and collecting that data. For example, following the SEC/CFTC settlements, in a speech at the University of Texas Law School, the head of DOJ's Criminal Division stated that "companies must ensure that they can monitor and retain" communications on personal devices and third-party messaging systems "as appropriate" and that DOJ would be issuing guidance on best practices related topic. Thus, compliance and legal departments should spend time reviewing (and perhaps updating or developing) policies regarding the use of personal devices and third-party apps for work-related communications and the procedures for preserving and collecting any such communications.	 **Brendan F. Quigley** Partner brendan.quigley@bakerbotts.com  **Michael L. Loesch** Partner michael.loesch@bakerbotts.com
29. David-Bacon Act Updates. The Inflation Reduction Act requires employers to comply with federal prevailing wage requirements and hire apprentices in order to receive federal tax credits. As the Davis-Bacon Act's regulations are being revised and new guidance is being issued through the Treasury Department, we are working to help clients understand where the requirements are headed.	 **Jennifer M. Trulock** Partner jennifer.trulock@bakerbotts.com

KEY ISSUE	CONTACT
30. 88th Texas Legislative Session. The Texas Legislature convened for its 88th Legislative Session on January 10, 2023. Energy issues remain prominent this session as legislators continue addressing Winter Storm Uri, evaluating options to redesign Texas's electricity market, and reviewing transmission-planning processes. Legislators have already filed numerous bills relating to oil and gas activities, renewable energy development, energy efficiency promotion, interconnection of the Texas electrical grid with other grids, and severance tax incentives. Before the bill-filing deadline (March 10, 2023), legislators will file thousands of additional bills. By the end of session (May 29, 2023), over 1,000 of those bills will likely pass. Additionally, The Texas Sunset Advisory Commission (Sunset), Texas's agency-review commission, recently completed its reviews of the Public Utility Commission of Texas (PUCT), Electric Reliability Council of Texas (ERCOT), and Office of Public Utility Counsel (OPUC). During this session, legislators will consider bills to implement Sunset-recommended changes at these agencies and continue the PUCT and OPUC for up to 12 years.	 **Jimmy Skipton IV** Associate jimmy.skipton@bakerbotts.com
31. Sales Tax Exemption for Mineral Extraction. The Texas Comptroller has long held the position that equipment and supplies used in oil and gas production can never qualify for a processing exemption from sales tax. This position was first tested in *Southwest Royalties v. Hegar*, 500 S.W.3d 400 (Tex. 2016), although the Texas Supreme Court did not reach the issue squarely. In 2022, however, the Third Court of Appeals expressly disagreed with the Comptroller in *Hegar v. Texas Westmoreland Coal Co.*, 636 S.W.3d 61 (Tex. App.—Austin 2021, pet. denied), allowing the exemption for purchases of excavators used to extract and break apart lignite coal. The Texas Supreme Court's denial of review has prompted producers to take a fresh look at whether their equipment might qualify for the processing exemption. Because the Comptroller continues to deny these exemptions, we anticipate litigation will be necessary to further define the limits of the sales tax exemption for equipment used in processing.	 **Ali Andrews** Special Counsel ali.andrews@bakerbotts.com  **Ben Geslison** Senior Associate ben.geslison@bakerbotts.com
32. Benefits Litigation and Related Issues. Recently, there has been a proliferation of lawsuits against 401(k) plans, including those sponsored by energy companies, related to alleged violations of the Employee Retirement Income Security Act of 1974 (ERISA) based on excessive fees, costs of investment options, and concentration of investments in one industry offered within the plan. Recent market volatility will likely continue to fuel such claims.	 **Travis J. Sales** Partner travis.sales@bakerbotts.com  **Matthew G. Sheridan** Senior Associate matthew.sheridan@bakerbotts.com