



Public Trust Doctrine: An Evolving Legal Theory for an

Evolving Coastline

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Public Trust Doctrine

Overview, Application,
and Current Status

What We Talk About When We Talk About the Public Trust Doctrine

- The PTD has its roots at least as far back as Roman law as captured in the Institutes of Justinian, which provided that shorelands “cannot be said to belong to anyone as private property.”
- After the collapse of the Roman Empire, however, public ownership of tidal lands devolved under the rise of private fiefdoms, and in English feudal law the Crown claimed ownership that it granted out to private subjects for their exclusive ownership and use.
- Opposition to the Crown’s absolute power to grant private rights to the shore—particularly in interference with free navigation and fishing necessary for the developing commercial class—was one of the pressures that led to the Magna Carta.
- Following the Magna Carta, the Crown’s ownership of land below the high water mark included a governmental *jus publicum*, by which the king (and, subsequently, Parliament) held the land as the sovereign, but in trust for all the people.

Roots of the Public Trust Doctrine in U.S. Law

- This concept of the jus publicum made its way into U.S. law through English common law and then to each of the states under the Equal Footing Doctrine.
- The U.S. Supreme Court recognized the PTD as a fact of states' sovereignty in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 (1892), wherein it invalidated the sale of 1,000 acres of the harbor at Chicago to railroad interests.
 - "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, ... than it can abdicate its police powers in the administration of government and the preservation of the peace."
 - "We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the state, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated."

Codification of the Traditional Public Trust in Louisiana

- **Civil Code art. 450:** “... Public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.”
- **Civil Code art. 452:** “... Everyone has the right to fish in the rivers, ports, roadsteads, and harbors, and the right to land on the seashore, to fish, to shelter himself, to moor ships, to dry nets, and the like, provided he does not cause injury to the property of adjoining owners.”
- **La. Const. (1974) art. IX, § 3:** “The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion. This Section shall not prevent the leasing of state lands or water bottoms for mineral or other purposes. Except as provided in this Section, the bed of a navigable water body may be reclaimed only for public use.”

Constitutional Development of a More Expansive Public Trust in Louisiana

- States are not limited to exercising public trust over water bottoms and shorelands. As recognized by the Court in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988), once endowed with the basic public trust at statehood through the Equal Footing Doctrine, each state may make policy decisions concerning the refinement and definition of the public trust within that state.
- **La. Const. (1921) art. VI, § 1:** “The natural resources of the State shall be protected, conserved and replenished[.] ... The Legislature shall enact all laws necessary to protect, conserve and replenish the natural resources of the State, and to prohibit and prevent the waste or any wasteful use thereof.”
- **La. Const. (1974) art. IX, § 1:** “The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.”

Public Trust Doctrine Evolves Through Litigation: *Save Ourselves*

- *Save Ourselves, Inc. v. La. Env'tl. Control Comm'n*, 452 So. 2d 1152 (La. 1984) (Dennis, J.)
- Begins with citations to *Illinois Central* and art. VI, § 1 of the 1921 La. Constitution, then expressly links the public trust doctrine to art. IX, § 1 of the 1974 Constitution: “The public trust doctrine was continued by the 1974 Louisiana Constitution, which specifically lists air and water as natural resources”
- Examines interplay of constitutional, statutory, and regulatory requirements, noting that “the 1974 Louisiana Constitution imposes a duty of environmental protection on all state agencies and officials, establishes a standard of environmental protection, and mandates the legislature to enact laws to implement fully this policy.”

Save Ourselves: From “Duty of Environmental Protection” to “Balancing Process”

- Recognizing that the constitutional standard requires protection only “insofar as possible and consistent with the health, safety, and welfare of the people,” Judge Dennis held that art. IX, § 1 “is a rule of reasonableness which requires an agency or official, before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare.”
- “Thus, the constitution does not establish environmental protection as an exclusive goal, but requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors.”
- If it sounds a lot like NEPA, it is. Judge Dennis then engaged in a discussion of NEPA cases, including *Calvert Cliffs*. He held that the courts’ duty under the constitutional public trust was to “enforc[e] procedural rectitude.”

Oysters Enter the Fray; the Public Trust Evolves Further

- *Butler v. Baber*, 529 So. 2d 374 (La. 1988): Oyster lessees sue mineral lessees for damage to oyster leases from canal dredging.
- Majority held that mineral lessees could be liable to oyster lessees under nuisance and negligence articles of the Civil Code.
- Judge Dennis concurred, turning to the constitutional public trust doctrine to look to whether parties' rights could be informed by laws "enacted for the protection of the public interest. One such rule of law having a great potential for application is Article IX § 1 of the 1974 Louisiana Constitution which recognizes that the state is required to act as public trustee for its people for the protection, conservation and replenishment of all natural resources. ... Even if this constitutional environmental protection standard does not require nullification of a contractual provision in a particular case, **it contains important elements which should be considered by the courts in formulating the standard of liability...**"

Oysters, II: *Jurisich*

- *Jurisich v. Jenkins*, 749 So. 2d 597 (La. 1999): oyster lessees sued LDWF to enjoin insertion of clause making oyster lessees' rights subservient to "all normal, usual and permissible mineral and oil field activity" under existing mineral leases.
- LDWF argued that the public trust doctrine *required* the inclusion of such a clause to "promote[] further harmony between the oyster lessees and the oil and gas industry, thereby enhancing the State's natural resource as a whole."
- Court rejected this: "Although defendants posit their argument in terms of enhancement of the State's natural resources, they lose sight of the primary task the Legislature identified..."
- Court held that inclusion of clause "overlooks the importance of the oyster industry as a natural resource of the State and improperly equates environmental protection with the adjudication of correlative rights between co-equal stewards of natural resources."

Oysters, III: Avenal

- *Avenal v. State*, 886 So. 2d 1085 (La. 2004): Oyster lessees sued DNR for damages from changed salinity due to operation of Caernarvon Freshwater Diversion Structure; trial court entered judgment awarding up to \$21,345/acre, for class total more than \$1 billion. State 4th Circuit affirmed on a 3-2 decision, modifying judgment only to *increase* amount of named plaintiff's award.
- State Supreme Court reversed, on basis of hold-harmless clauses included in oyster leases for wetlands restoration activities, distinguishing *Jurisich*.
- “[T]he implementation of the Caernarvon coastal diversion project fits precisely within the public trust doctrine. The public resource at issue is our very coastline, the loss of which is occurring at an alarming rate. The risks involved are not just environmental, but involve the health, safety, and welfare of our people, as coastal erosion removes an important barrier between large populations and ever-threatening hurricanes and storms. Left unchecked, it will result in the loss of the very land on which Louisianians reside and work, not to mention the loss of businesses that rely on the coastal region as a transportation infrastructure vital to the region’s industry and commerce. The State simply cannot allow coastal erosion to continue; the redistribution of existing productive oyster beds to other areas must be tolerated under the public trust doctrine in furtherance of this goal.”

What About Coastal Land-Loss Claims?

- Pursuant to C.C. art. 645, pipeline servitudes are governed by both predial servitude and usufruct articles, known as “suppletive rules.”
- These suppletive rules include the obligations to not aggravate the servient estate, to exercise rights “in a way least inconvenient for the servient estate,” to “cause the least possible damage” to the servient estate, and to preserve the property subject to the use and restore it at the conclusion of the use, among others.
- “A suppletive rule ... applies only if those affected by it have not excluded its application.” *E.L. Burns Co. v. Cashio*, 302 So. 2d 297, 300 (La. 1974); *see also Rose v. Tenn. Gas Transmission Co.*, 2008 WL 11353629, *4 (E.D. La. 11/12/08).
- Under C.C. art. 729, regarding predial servitudes, “Legal and natural servitudes may be altered by agreement of the parties ***if the public interest is not affected adversely.***”
- The freedom to alter the rules of servitudes under C.C. art. 697 “is tempered by ***rules of public policy*** enacted in the general interest.” La. C.C. art. 697 Rev. Cmt. (b) .



The State's Perspective

Public Trust Doctrine

The State's Perspective

- **Machelle Hall**
Asst. Attorney General
State of Louisiana



Public Trust *and* Asset Retirement

Impacts on the Coast *and*
Coastal Resources

Abandoned and Orphaned Wells

The New York Times

Price to Plug Old Wells in Gulf of Mexico? \$30 Billion, Study Says.



Oil platforms near Port Fourchon, La. Decades of drilling has left 14,000 old, unplugged wells in the Gulf of Mexico. Chris Carmichael for The New York Times

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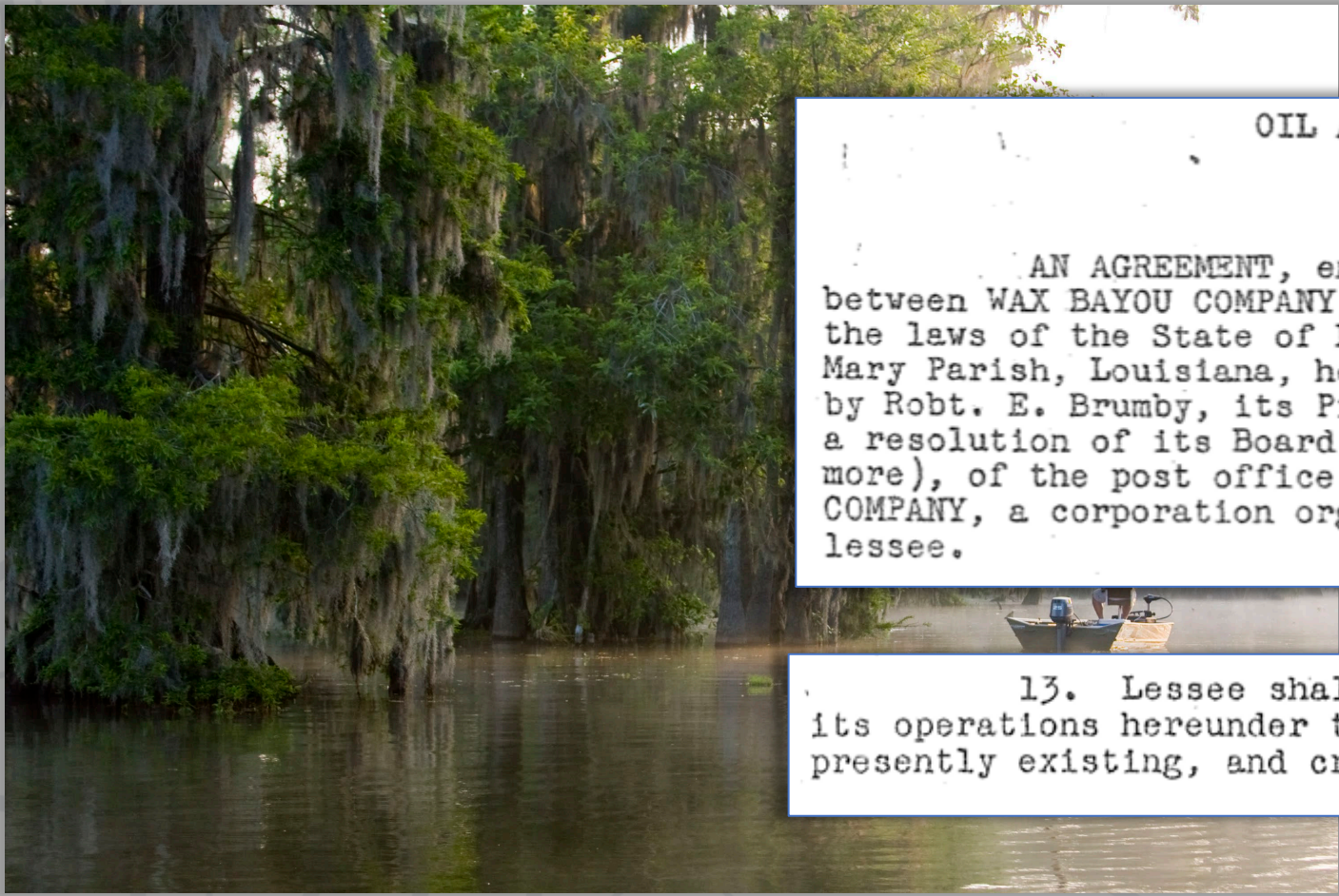


By
Robby Chavez

Leave your
feedback

In Louisiana, orphan wells seen as an 'accident waiting to happen'

Emerald Land Corporation v. Trimont Whitney, et al.



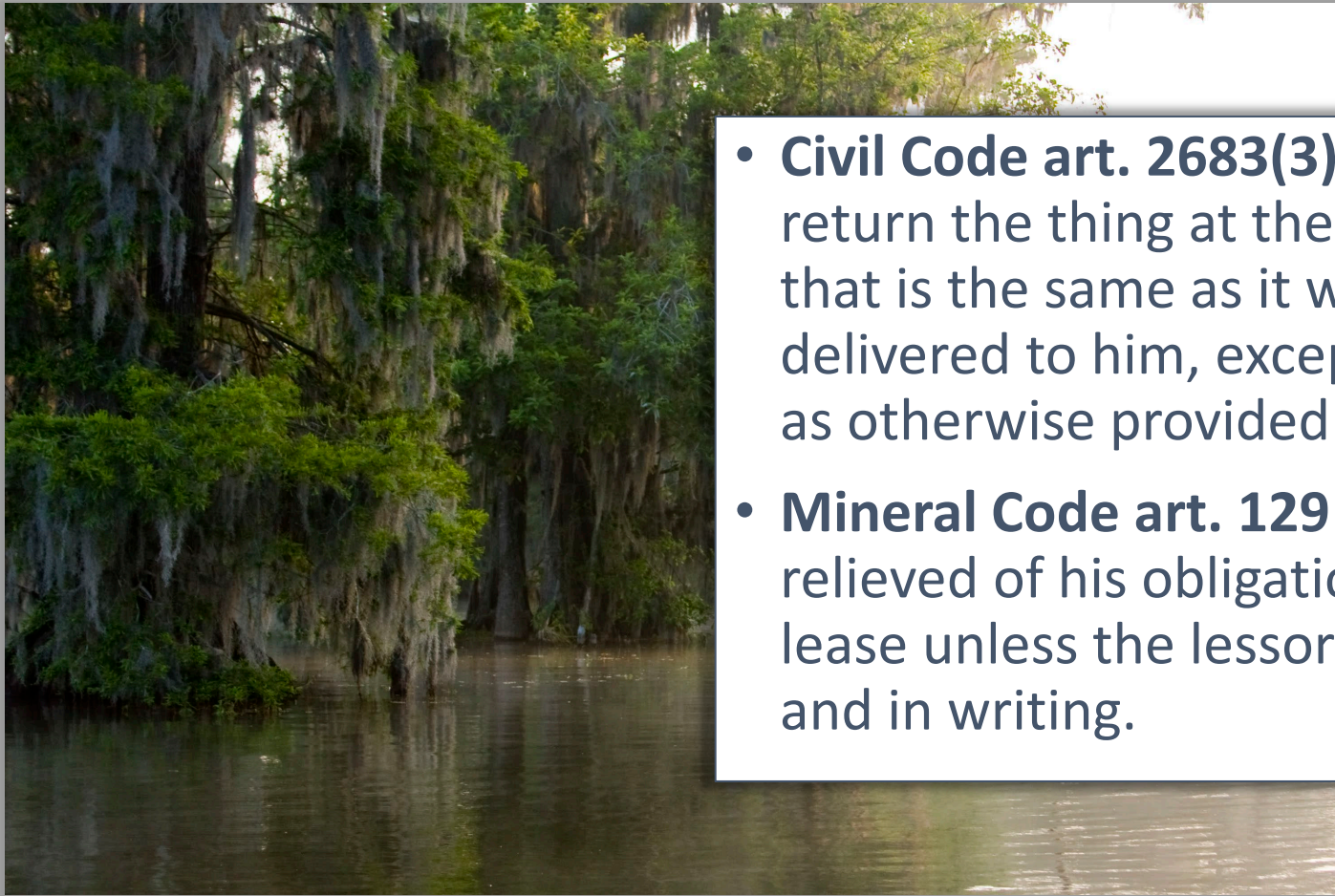
OIL AND GAS MINING LEASE

81123

AN AGREEMENT, entered into this 19th day of June, 1940, between WAX BAYOU COMPANY, INC., a corporation organized under the laws of the State of Louisiana, domiciled in Franklin, St. Mary Parish, Louisiana, herein appearing through and represented by Robt. E. Brumby, its President, duly authorized by virtue of a resolution of its Board of Directors, lessor (whether one or more), of the post office of Franklin, Louisiana, and THE TEXAS COMPANY, a corporation organized under the laws of Delaware, lessee.

13. Lessee shall pay all damages caused by it by its operations hereunder to the land, buildings and improvements presently existing, and crops now or hereafter planted.

Emerald Land Corporation v. Trimont Whitney, et al.



- **Civil Code art. 2683(3):** The lessee is bound ... [t]o return the thing at the end of the lease in a condition that is the same as it was when the thing was delivered to him, except for normal wear and tear or as otherwise provided hereafter.
- **Mineral Code art. 129:** An assignor or sublessor is not relieved of his obligations or liabilities under a mineral lease unless the lessor has discharged him expressly and in writing.

Prior Operators

- **La. R.S. 30:3:** “Owner” is defined as “the person, including operators and producers acting on behalf of the person, who has *or had* the right to drill into and to produce from a pool and to appropriate the production either for himself or others.”
- And under the Louisiana Oilfield Site Restoration Law, the Department of Conservation is authorized to recover costs for restoration of orphaned sites from past operators, if the costs exceed \$250,000, “in inverse chronological order from the date on which the oilfield site has been declared orphaned.” **La. R.S. 30:93(A)(3).**
- When combined with the constitutionally mandated public policy that “the natural resources of the state” be “protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people,” these laws show the manifested intent that assignment of oilfield assets should not prevent reaching back to prior operators to remove equipment that is no longer being used.

Bankruptcies and Retirement Obligations



Fieldwood Energy faces pushback to reorganization plan from oil producers

By Maria Chutchian ▾

June 3, 2021 4:45 PM CDT · Updated 2 years ago



REUTERS/Jessica Lutz

Oil firm's plan to abandon 1,700 Gulf of Mexico wells could mean 'environmental disaster,' say rivals

Responsibility for cast-off wells, pipelines could fall to other companies and taxpayers

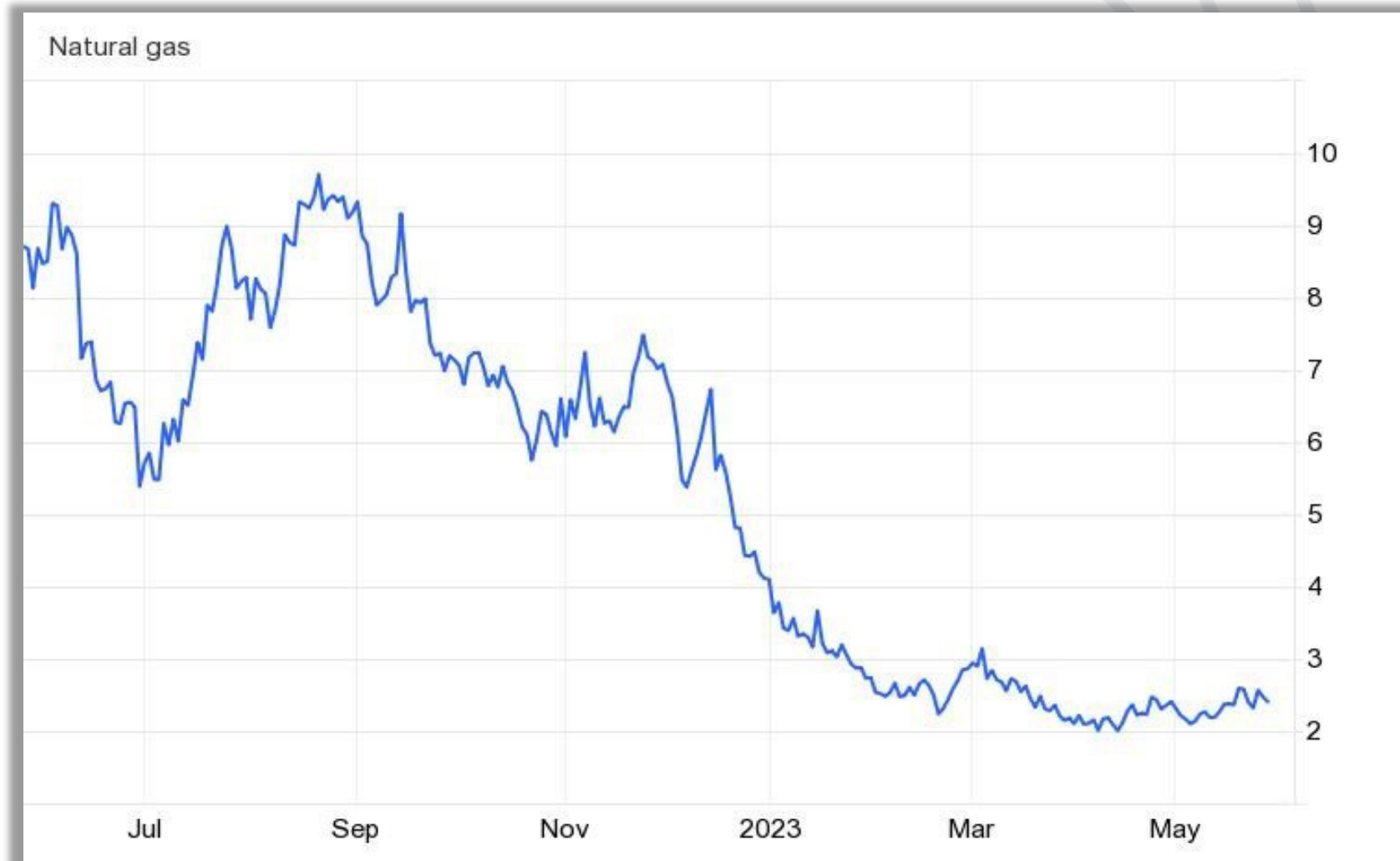
BY TRISTAN BAURICK | Staff writer

Jul 2, 2021



An oil platform sits in the Gulf of Mexico. (Photo courtesy of Fieldwood Energy)

Plummeting Prices for Natural Gas



Cox Operating Bankruptcy

May 15, 2023, 12:59 AM

Oil Producer Cox Operating Files for Bankruptcy in South Texas



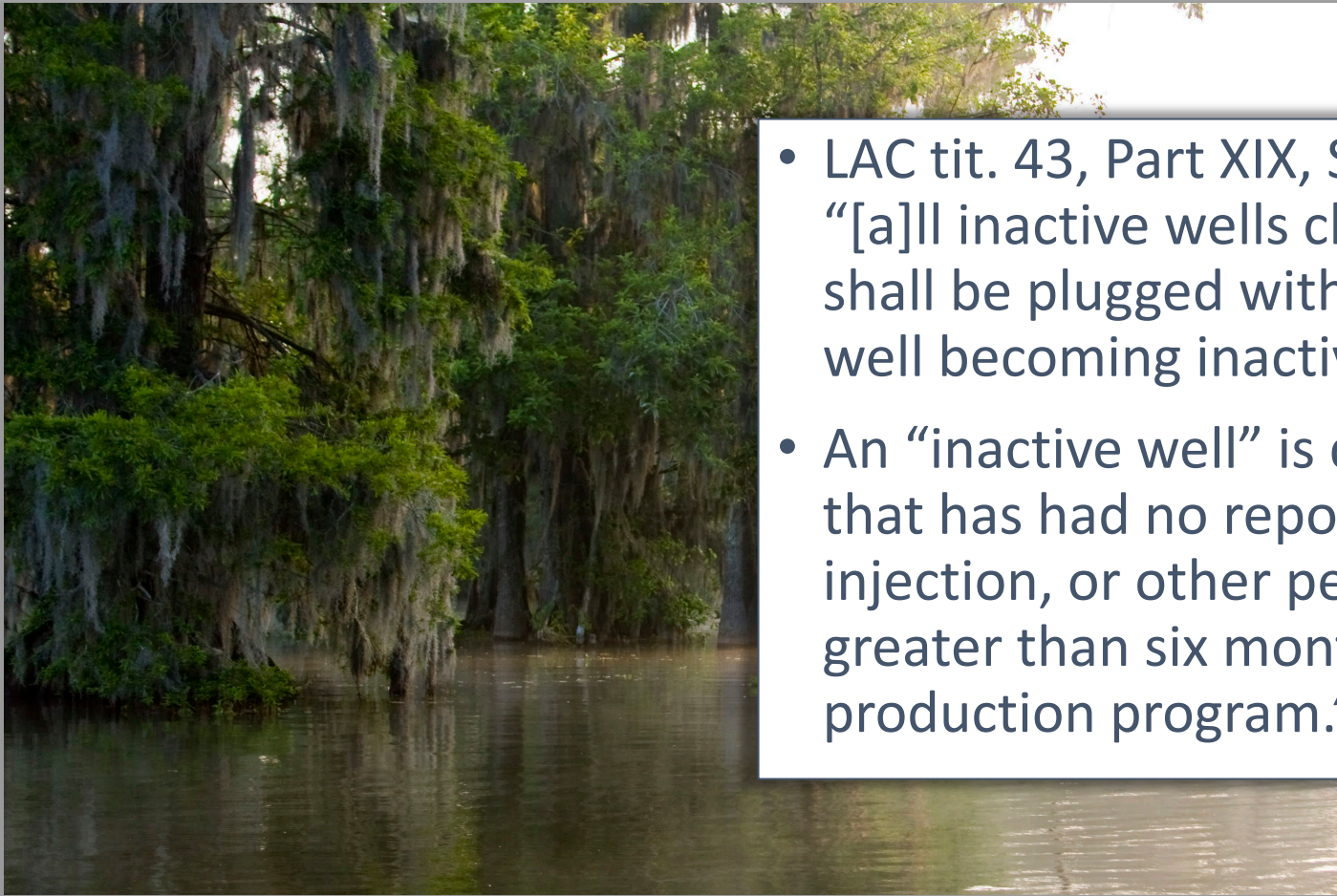
Divya Patil
Bloomberg News



“Cox’s assets are located in both the OCS in the Gulf of Mexico and the shallow waters off the coast of Louisiana.”

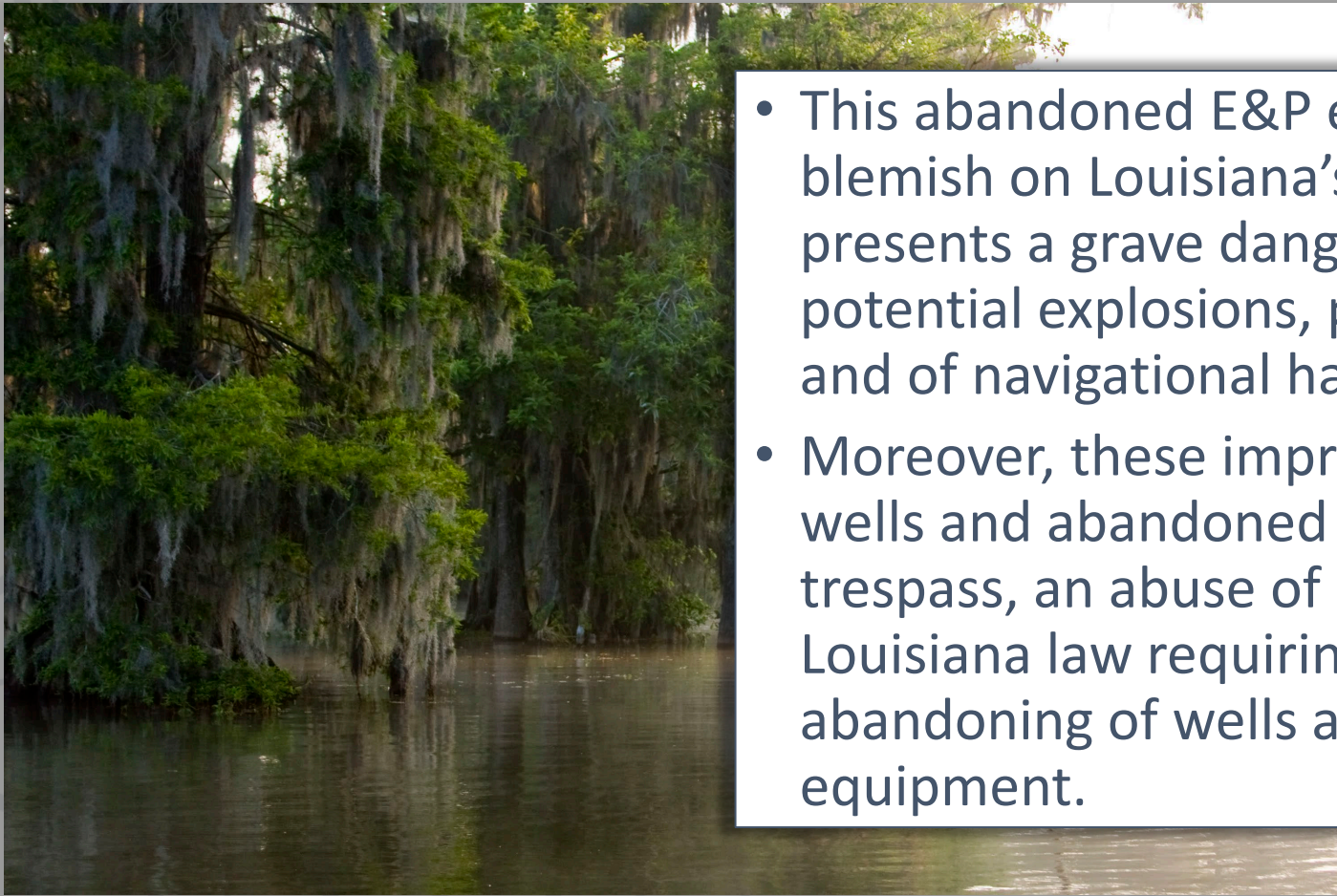
Cox “operate[s] more than 600 producing wells from approximately 500 structures over 66 fields.”

The Public Trust Potential



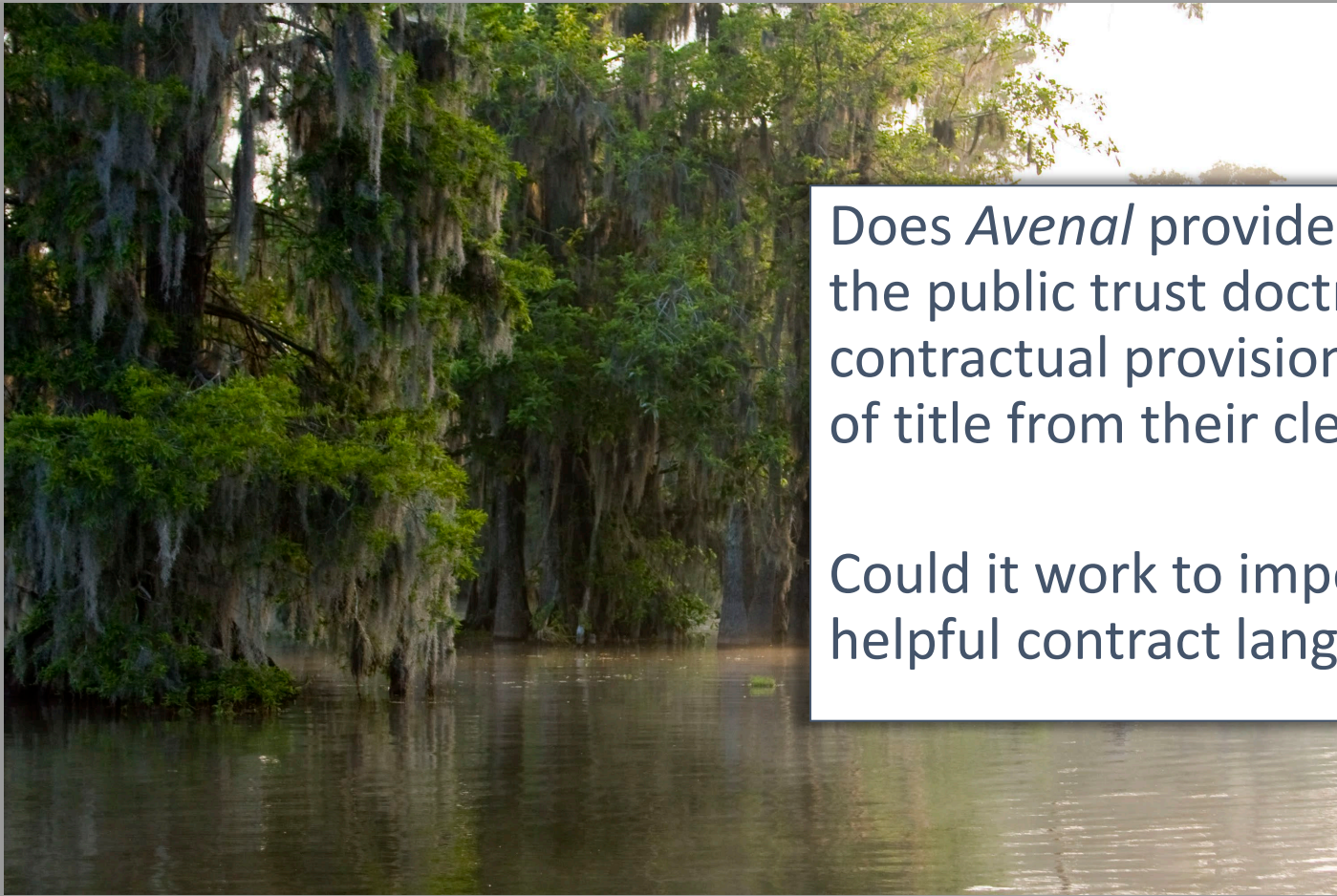
- LAC tit. 43, Part XIX, Section 127(A)(2) requires that “[a]ll inactive wells classified as having future utility shall be plugged within five years of the date of the well becoming inactive.”
- An “inactive well” is defined as “an unplugged well ... that has had no reported production, disposal, injection, or other permitted activity for a period of greater than six months and is not part of an approved production program.”

The Public Trust Potential



- This abandoned E&P equipment is an eyesore, a blemish on Louisiana's natural beauty, but it also presents a grave danger—of contamination; of potential explosions, property damage, and injury' and of navigational hazards.
- Moreover, these improperly plugged and abandoned wells and abandoned E&P equipment constitute a trespass, an abuse of right, and a violation of Louisiana law requiring the timely plugging and abandoning of wells and removal of associated E&P equipment.

The Public Trust Potential



Does *Avenal* provide a mechanism through which the public trust doctrine might invalidate contractual provisions releasing parties to the chain of title from their clean up obligations?

Could it work to impose cleanup obligations, absent helpful contract language like that in *Emerald*?



Public Trust *and* ESG

The Risk of Litigation

A Definition

E



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Pressure



- Regulatory pressure
- Investor pressure
- Consumer pressure
- Employee pressure

Regulatory Pressure



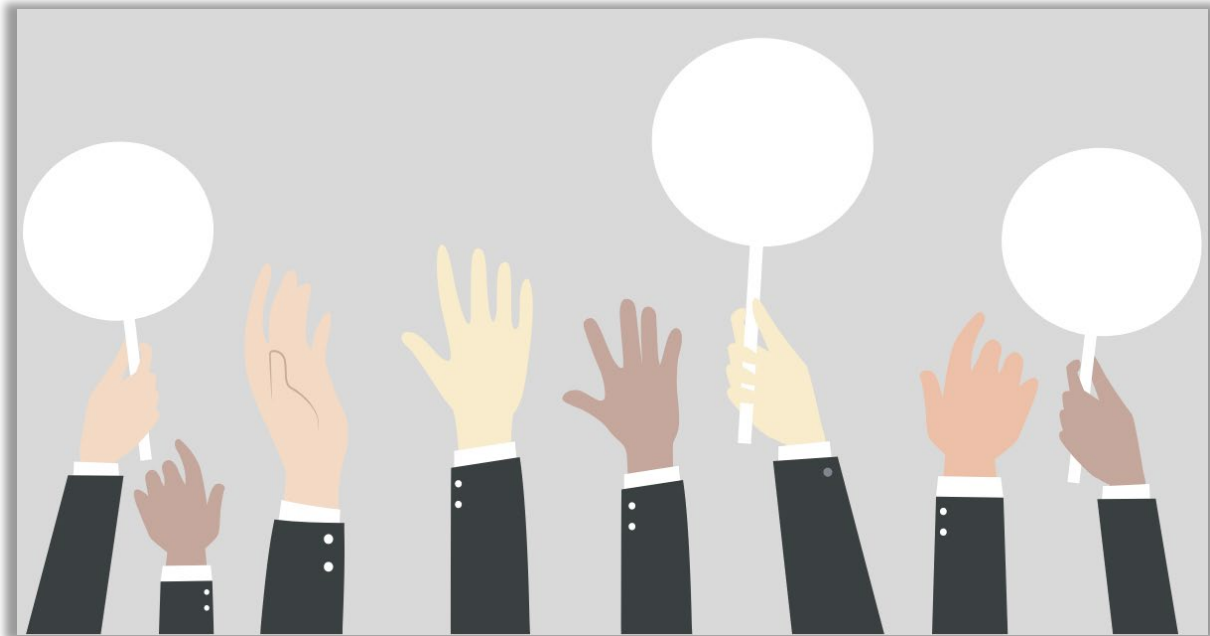
- **Biden** and the Paris Agreement
- **Biden** Executive Order on Tackling Climate Crisis at Home and Abroad
- **SEC** proposed rules on emissions and climate risk
- **EPA** rules and proposals, recent and ongoing
- **California** rules on emissions

Investor Pressure



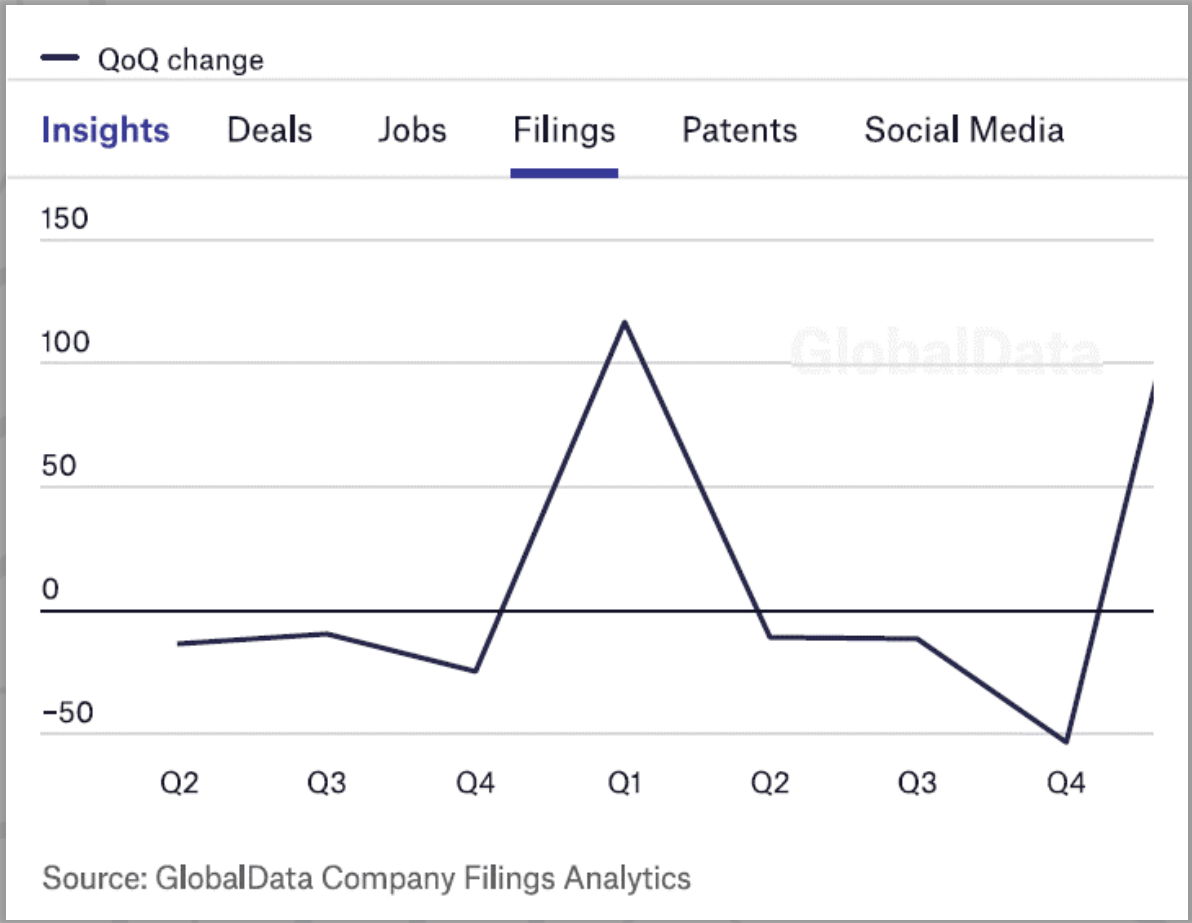
- **63% of 2022 proxy proposals** to financial institutions were ESG focused
- **Exxon/Engine No. 1** unseated board members over climate change

Consumer and Employee Pressure



- **76% of consumers** would discontinue their relationship with companies that treat the environment, employees, or the community poorly.
- **70% of employees** demand purposeful work.
- **86% of employees** would prefer to support or work for companies that actually care about the same issues they do.

ESG in O&G



- **83%** rise in mention of environmental sustainability in company filings in Q1 2023

Better do it Right



- Reputational risk
- Agency enforcement risk
- Litigation risk

Agency Enforcement



Consumer Litigation

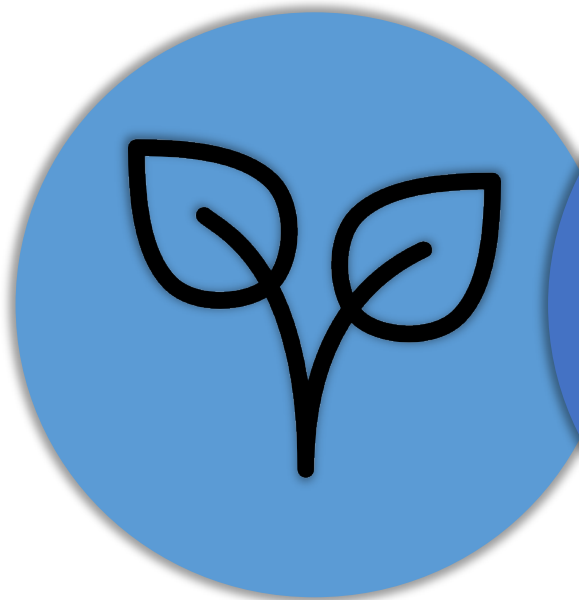


Securities Litigation

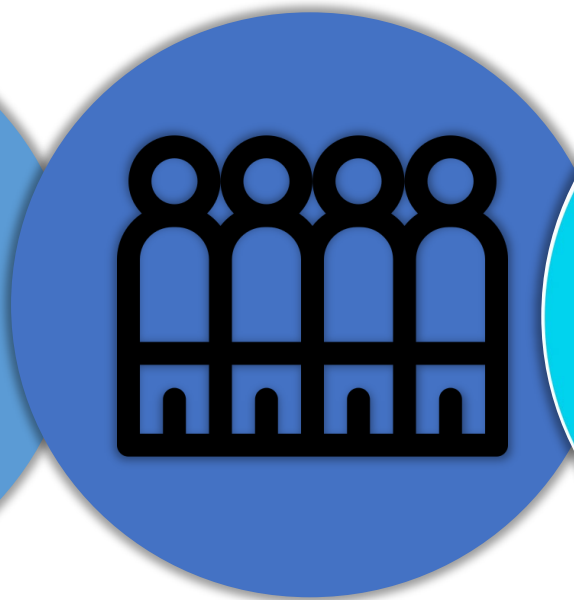


ESG and AROs

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An Act 312

For the Coast

Public Trust in Oilfield Contamination Cases

- The constitutional public trust doctrine is expressly incorporated into “Act 312,” Louisiana’s oilfield cleanup statute:
- **La. R.S. § 30:29(A):** “The legislature hereby finds and declares that Article IX, Section 1 of the Constitution of Louisiana mandates that the natural resources of the state, including ground water, are to be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people and further mandates that the legislature enact laws to implement this policy. It is the duty of the legislature to set forth procedures to ensure that damage to the environment is remediated to a standard that protects the public interest. To this end, this Section provides the procedure for judicial resolution of claims for environmental damage to property arising from activities subject to the jurisdiction of the [LDNR], office of conservation.”
- Requires formulation of regulatorily-compliance “most feasible plan” to address contamination; deposit of funds for MFP in registry of the court; and award of reasonable costs and attorneys’ fees.

Should Louisiana's Public Trust Mandate also Support a Coastal Restoration Act 312?

- Coastal land-loss cases face the same litigation and degradation pressures that oilfield contamination cases did: protection of Louisiana's constitutionally acknowledged natural resources (particularly in light of *Avenal*); need for funding to be dedicated to actual coastal restoration; financial protection to ensure competent and zealous representation for cases that are otherwise prohibitively expensive to bring.
- But land-loss is not exactly like contamination, particularly as to efficacy of remedies. What about land that is too far gone? What about restoration methods that may protect a hydrological basin but that do not take place on a plaintiff landowner's property? How does this interface with the Coastal Master Plan?
- In addition to resolving the duties of pipeline companies to landowners, does the public trust doctrine act on the remedy side to allow for a police-power-like mandate that some lost land won't be replaced, while remedial restoration work may be imposed on other property outside the zone of the litigation in order to be consistent with the Master Plan?



Q&A

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