

RECENT DEVELOPMENTS IN TEXAS, UNITED STATES, AND INTERNATIONAL ENERGY LAW

I. INTRODUCTION	399
II. RECENT DEVELOPMENTS IN TEXAS ENERGY LAW	399
A. Texas Oil, Gas, and Energy Case Summaries	399
B. Texas Acknowledgment Law and the Oil and Gas Industry	408
III. RECENT DEVELOPMENTS IN UNITED STATES ENERGY LAW	426
A. Federal Oil, Gas, and Energy Case Summaries	426
IV. RECENT DEVELOPMENTS IN INTERNATIONAL LAW	431
A. New Legal Framework for Oil Contracts in Mexico	431

I. INTRODUCTION

This edition of *Recent Developments in Texas, United States, and International Energy Law* is composed of selected discussions and articles regarding recent case law, legislation, and trends affecting the energy industry.¹ The first section focuses on Texas and gives short summaries of recent Texas appellate court decisions. It also includes an article by James W. Adams, Jr. and John C. Peissel on Texas acknowledgment law and its application to the oil and gas industry. The second section focuses on United States law and gives short summaries of three recent federal cases. Finally, the third section focuses on international law. It includes an article by Pedro Resendez that outlines the new legal framework for oil contracts in Mexico and the challenges the new framework will face.

II. RECENT DEVELOPMENTS IN TEXAS ENERGY LAW

A. Texas Oil, Gas, and Energy Case Summaries

1. Hunt Oil Co. v. Live Oak Energy, Inc., No. 05-07-01553-CV, 2009 WL 3337646 (Tex. App.—Dallas Oct. 19, 2009, no pet. h.).

Issue: When an oil company drills through another formation and fails to cement its wells, does the resulting “leaky bucket” fall under Texas’s

1. The content of the Recent Developments section is provided for general information purposes only. The case summaries and short articles may serve as a useful starting point in the legal research process but are not intended as a substitute for primary research of the laws of the jurisdictions discussed.

discovery rule and postpone the accrual of a cause of action for negligence?

In 2002 Live Oak Energy, Inc. (“Live Oak”) acquired a leasehold interest in the Pettit geological formation—located in the East Haynesville oil field in northwest Louisiana—from Story Oil & Gas Company. The formation is approximately 15 feet thick and has a depth of about 5,200 feet. Prior to this purchase, Hunt Oil Company (“Hunt”) had drilled around 50 wells through the formation to recover oil in formations below. After Live Oak bought the leasehold interest, Hunt drilled four additional wells through the formation. In 2005 Live Oak sued Hunt for damages alleging that these new wells, along with 30 of the old wells, were not properly cemented and allowed fluids to escape the Pettit formation. Live Oak called this a “leaky bucket.” Live Oak did not discover the leaky bucket until it purchased a well from Hunt in September 2004 and realized that its walls were not cemented. A Texas jury found in favor of Live Oak and awarded over \$5 million in damages.

On appeal, Hunt contended that Live Oak’s negligence action was barred by Texas’s statute of limitations. Live Oak argued that Louisiana’s statute of limitations applied but that its lawsuit was timely under either state’s statute. Because the cause of action arose in Louisiana but was brought in Texas, the Texas Court of Appeals in Dallas was bound to apply Louisiana law to substantive issues but Texas law to procedural issues. Citing *PennWell Corp. v. Ken Associates, Inc.*, the court stated that Texas law determines whether the choice between two states’ statutes of limitations is a matter of substantive or procedural law.² Under Texas law, the applicable statute of limitations is a matter of procedural law. Therefore, Hunt was correct and Texas’s two-year statute of limitations applied to Live Oak’s negligence claim.

The court went on to decide as a matter of law whether Live Oak’s claim fell within the two-year period dictated by Texas law. Live Oak brought its petition on June 23, 2005, over three years after it acquired its leasehold interest in the Pettit formation. However, Live Oak argued that the discovery rule should apply to its claim since the leaky bucket was “inherently undiscoverable.” According to Live Oak, the limitations period should not have begun until September 2004 when it purchased an improperly cemented well from Hunt.

After discussing *Wagner & Brown, Ltd. v. Horwood*³ and *HECI Exploration Co. v. Neel*,⁴ the court disagreed and noted that Hunt’s wells

2. 123 S.W.3d 756, 764 (Tex. App.—Houston [14th] 2003, pet. denied) (“Generally, what is a matter of substance and what is a matter of procedure is determined by the law of the forum state according to its own laws.”).

3. 58 S.W.3d 732 (Tex. 2001).

4. 982 S.W.2d 881 (Tex. 1998).

were obviously visible on the property and that it was not unreasonable to expect Live Oak to perform due diligence to inquire as to their nature. Before buying the leasehold interest, Live Oak simply assumed that there were no problems with Hunt's wells, but "Live Oak's obligation of due diligence 'went beyond mere passive visual observation.'"⁵ Thus, the two-year limitations period began when Live Oak purchased the leasehold interest in 2002 and had expired by the time Live Oak brought its petition on June 23, 2005. Accordingly, the court reversed the jury award and rendered judgment for Hunt.

2. FPL Farming Ltd. v. Environmental Processing Systems, L.C., No. 09-08-00083-CV, 2009 WL 3460710 (Tex. App.—Beaumont Oct. 29, 2009, pet. filed).

Issue: Does the migration of nonhazardous, wastewater injection to a neighboring property constitute trespass under Texas law when a permitting agency has given approval for the injection?

In 1996 the Texas Natural Resource Conservation Commission ("Commission") granted permission for Environmental Processing Systems, L.C. ("EPS") to construct and operate two nonhazardous, wastewater injection wells near two tracts of land owned by FPL Farming Ltd. ("FPL"). The wells were designed to inject commercial waste between 7,350 and 8,200 feet below the surface into the Frio saltwater formation. The wastewater was expected to migrate to the boundaries of FPL's land within ten years. FPL requested a hearing to contest EPS's permits but withdrew its request after a settlement of \$185,000.

In 1999 EPS applied to change its permits to allow a higher wastewater injection rate. FPL requested and received a contested case hearing to prevent this change. The administrative law judges found that FPL had no right to exclude others from the deep subsurface below its property and that FPL had no mineral rights in the land. The Commission adopted the judges' findings and approved EPS's application for the amended permits.

In 2006 FPL sued EPS for trespass, unjust enrichment, and negligence. The jury rejected all of FPL's claims, and FPL appealed. On appeal, the issues primarily concerned FPL's trespass claim. FPL argued (1) that the trial court should have granted its motion for a directed verdict on consent, (2) that the jury charge erroneously required FPL to prove that it had not consented, and (3) that the trial court erred by failing to instruct the jury that injury is not a necessary element of trespass.

5. 2009 WL 3337646, at *7 (quoting *Taub v. Houston Pipeline Co.*, 75 S.W.3d 606, 619 (Tex. App.—Texarkana 2002, pet. denied)).

The Texas Court of Appeals in Beaumont overruled these three issues on the basis that no trespass had occurred. The court looked to *Coastal Oil & Gas Corp. v. Garza Energy Trust*, where the Texas Supreme Court stated that land ownership does not necessarily extend deep into the earth, just as land ownership does not extend high into the sky.⁶ Like the *Garza* court, the court relied on *Railroad Commission of Texas v. Manziel*.⁷ In *Manziel* the Texas Supreme Court concluded that the subsurface migration of salt water injection to neighboring property did not constitute trespass in light of the Texas Railroad Commission's approval of the operation.⁸ The *Manziel* court also considered public policy reasons as well as societal and industry interests in making its determination.⁹ Thus, because the Commission granted permission for EPS to operate its nonhazardous, wastewater injection wells, and because chapter 27 of the Texas Water Code allowed for such permission in consideration of public and private interests including the benefit of the state and the preservation of natural resources, the court concluded that no trespass had occurred.

The remaining issue on appeal was whether the evidence supporting the jury's findings was factually sufficient. Because no trespass occurred, FPL's argument in this issue with respect to trespass was moot. FPL's complaint regarding unjust enrichment was not preserved, so the court did not consider it. Finally, because FPL failed to demonstrate that the trial court's rejection of its negligence claim was against the greater weight and preponderance of the evidence, the issue in its entirety was overruled. Having overruled all of FPL's issues, the court affirmed the trial court's decision.

3. Valence Operating Co. v. Anadarko Petroleum Corp., 303 S.W.3d 435 (Tex. App.—Texarkana 2010, no pet. h.).

Issue: Did a trial court err by submitting to the jury the question of whether an operator commenced work on four proposed wells within the time period specified by a joint operating agreement?

Valence Operating Company ("Valence") entered into a joint operating agreement with Anadarko Petroleum Corporation's ("Anadarko") predecessor, Union Pacific Resources Company, to develop oil and gas leases in Ballow Estate Gas Unit No. 1 in Rusk County. Anadarko owned 65.62% working interest in the unit and was designated as "Operator" in the agreement.

6. 268 S.W.3d 1, 11 (Tex. 2008).

7. 361 S.W.2d 560 (Tex. 1962).

8. *Id.* at 568–69.

9. *Id.* at 568.

The agreement contained a provision stating that a party desiring to drill wells other than the initially-contracted-for wells must give the other party written notice of the details, and the notified party has 30 days to respond whether it wants to participate in the cost of the proposed operation. Not responding is considered an election not to participate. If the other party does not participate, the proposing party has 60 days after the notice period to commence work on the operation and must complete it with due diligence, in order to get the other benefits of the agreement. Moreover, the non-consenting party does not receive payment from the operation until the consenting party recovers costs, and the consenting party receives an additional portion of revenue.

On December 14, 1999 Valence sent a letter to Anadarko proposing the immediate drilling of four wells. Anadarko did not consent to share the costs. Therefore, Valence had until March 17, 2000 to commence work on the wells. After this deadline passed, Anadarko sued Valence for breach of contract, negligence, declaratory judgment, quantum meruit, unjust enrichment, conversion, and an accounting, alleging that Valence failed to perform its obligation to commence work on the proposed wells before March 17, 2000.

At the trial level, the parties agreed that whether Valence “actually commenced work” and “completed it with due diligence” were matters of law. However, the trial court concluded that these were questions of fact and submitted them to the jury. The jury found that Valence failed to comply with the joint operating agreement with regard to both commencing work on the wells and completing the wells with due diligence. Valence appealed, raising 15 issues that can be divided into six general categories.

The first category of issues was, whether as a matter of law, Valence actually commenced work on the proposed wells and completed them with due diligence. There was no dispute as to the preparatory acts Valence performed before the deadline. While the Texas Court of Appeals in *Texarkana* recognized that actual drilling is not necessary to comply with the obligation to commence work, the preliminary activities conducted by Valence consisted mostly of acts that are often characterized in the industry as “backroom preparations” and securing drilling permits, with no on-site activity except a preliminary staking of wells. The court concluded that these were not sufficient to constitute actual commencement of work under the joint operating agreement as a matter of law. Accordingly, the jury could have found from the evidence that Valence’s preliminary activities did not show a bona fide intent to commence work on the wells before the deadline and to proceed with due diligence.

Second, Valence challenged the trial court's refusal to submit a number of instructions and definitions that Valence proposed to the jury. One such instruction added the language "no matter how slight" to the provision in the joint operating agreement that required Valence to commence work on the proposed wells before the deadline. The court determined that this added instruction would have exaggerated or minimized pertinent evidence. Consequently, it was within the trial court's discretion to deny this instruction.

Third, Valence contended that the trial court should have excluded the testimony of Anadarko's witness Barnhill who testified about the common understanding of the phrase "commence work on a proposed operation" in the oil and gas industry. Valence argued that Barnhill was unqualified to give such testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁰ because the testimony was not based on scientific principles and accepted scientific work. Because Barnhill is a certified professional landman with significant experience in the oil and gas industry, the court disagreed. Although Barnhill is a landman rather than a driller, the trial court did not abuse its discretion in allowing Barnhill's testimony because it was not about science but actual practice and the general understanding in the oil and gas industry as to what constitutes commencement of operations. Moreover, both parties produced several witnesses who discussed the common understanding of the phrase in the oil and gas industry.

Fourth, Valence argued that that the trial court should have granted its 2006 motion to dismiss the case for want of prosecution due to the lengthy delay in the case going to trial. Generally, the purpose of allowing a trial court to dismiss a lawsuit is to provide a penalty when a party seeks to take advantage of its opponent by deliberate neglect and delay and reluctance to have the merits of the case judged in a trial. Here, Anadarko attributed its two-year delay in taking any action in the case (from February 2004 to May 3, 2006) to its wait for the Texas Supreme Court to decide *Valence Operating Co. v. Dorsett*,¹¹ wherein the court was expected to define what constitutes "commencement of operations." For this reason, and because of the general principle that a just resolution of the case is better resolved by a trial on the merits rather than a dismissal, the trial court did not abuse its discretion in overruling the motion to dismiss for want of prosecution.

Fifth, Valence contended that Anadarko should not have been awarded prejudgment interest because this suit involved a title dispute under § 91.402 of the Texas Natural Resources Code. Because this was a

10. 509 U.S. 579 (1993).

11. 164 S.W.3d 656 (Tex. 2005).

breach of contract dispute and did not involve a legitimate title dispute as contemplated by the Texas Natural Resources Code, the trial court did not abuse its discretion in awarding prejudgment interest.

Finally, Valence argued that the prejudgment interest rate was too high. However, Valence did not raise this at the trial level, so the complaint was waived.

Ultimately, the trial court's judgment was affirmed in its entirety.

4. Shell Oil Co. v. Ross, No. 01-08-00713-CV, 2010 WL 670549 (Tex. App.—Houston [1st] Feb. 25, 2010, no pet. h.).

Issue: Did a trial court err in finding that an oil company's calculation of royalties from a weighted average price breached the company's lease with the royalty owners?

In 1961 Shell Oil Company ("Shell") entered into a mineral lease with G.T. Reuss and Gertrude Reuss ("Reuss lease"). Ralph Ross is the current owner of 1/3rd of the mineral rights in the lease. Under the lease, Shell is obligated to pay Ross, as a royalty, 1/8th of the market value of the natural gas realized at the mouth of the well. This royalty payment is divided between Ross and the State of Texas, so Shell ultimately pays Ross 1/16th of the amount realized at the well.

As lessee of the Reuss lease, in 1970, Shell entered into a pooling agreement with Forest Oil. Under the agreement, Shell received 62.5% of the gas from the well it shared with Forest Oil. Importantly, as part of the agreement, Shell based its royalty payments on gas produced from this well on the "weighted average price," which it calculated by weighting its sale price and Forest Oil's sale price, according to their respective shares of gas, and then averaging these weighted prices. Previously, Shell had based its royalty payments on gas produced from this well on its sale price alone. Shell stipulated that from 1988 to 1997 its use of the weighted average price resulted in paying Ross \$60,000 less than if it had continued to pay royalties based on its sale price alone. In 1995 Shell sent a letter to 2,246 royalty owners in Texas with an enclosed check for an amount to retroactively compensate for this underpayment. However, Shell continued to pay royalties based on a price less than what it sold the gas for on the market.

Based on the underpayment of royalties as a result of the pooling agreement with Forest Oil, Ross sued Shell for breach of contract, unjust enrichment, and fraud. Ross was not aware of the underpayment until 2002. His father, who had until then been administering the family's oil and gas interests, did not recall receiving Shell's letter regarding underpayment in 1995. The trial court found, as a matter of law, that Shell had breached its contract with Ross by paying royalties based on

the weighted average price. The jury found that Shell fraudulently concealed its failure to pay royalties between 1994 and 1997 for reasons other than the weighted average price issue and that Ross should have discovered this underpayment in the exercise of reasonable diligence in 2002. The jury also found that Shell fraudulently concealed its failure to pay royalties from 1988 to 1994 because of the weighted price issue and that Ross should have discovered this underpayment in the exercise of reasonable diligence in 2006. Based on these findings, the trial court ordered that Ross recover damages.

On appeal, the Texas First Court of Appeals agreed that Shell breached its contract with Ross by paying royalties based on an amount less than the price for which Shell sold the gas. Although Shell pointed out a provision in the Reuss lease that allowed Shell to “pool or unitize all or any part of [the Reusses’] land” to justify its actions, the court concluded that explicit language in the lease required Shell to make royalty payments based solely on the price of the amount of gas realized by Shell, not on the amount realized by any other working interest owner.

Ross also complained that the trial court erred in denying Shell’s motions for directed verdict and judgment notwithstanding the verdict. Shell argued that the evidence was legally insufficient to support the jury’s findings of fraudulent concealment as well as when Shell’s underpayment became discoverable. For instance, the court pointed out that the jury could have considered Shell’s 1995 letter as some evidence that it was underpaying royalties. In addition, the unit price that Shell provided in its royalty statements did not reflect the price of the gas sold according to any method of calculation, although Shell had a duty to provide a unit price that was not arbitrary. Thus, the court determined that there was sufficient evidence to support the jury’s finding of fraudulent concealment.

Shell further argued that Ross should have discovered Shell’s failure to pay proper royalties before 2002, and, therefore, Ross’s claims were barred by the four-year statute of limitations. Again, the court determined that there was sufficient evidence to support the jury’s finding of fraudulent concealment. First, there was no proof that Ross received the 1995 letter. Second, Ross had no way of knowing that the State of Texas’s royalties from production were calculated from a higher price. Third, Ross could have assumed that the price from which royalty payments were calculated was lower than other wells because of the quality of the gas.

Shell’s final contention was that the trial court erred in not including Shell’s proposed jury instruction on constructive notice, namely, that Ross could have acquired knowledge of Shell’s underpayment of royalties by examining public records. Because the cases Shell cited for creating

No. 2]

RECENT DEVELOPMENTS

407

constructive notice were very specific, and did not apply to the case at hand, the court overruled this issue.

Ultimately, the trial court's judgment was affirmed in its entirety.

B. TEXAS ACKNOWLEDGMENT LAW AND THE OIL AND GAS INDUSTRY

JAMES W. ADAMS, JR.* AND JOHN C. PEISSEL**

I. INTRODUCTION	408
II. ELEMENTS OF PROPER CERTIFICATES OF ACKNOWLEDGMENTS.....	410
III. STATUTORY CERTIFICATE FORMS	411
IV. THE SHORT FORMS FOR ACKNOWLEDGMENT.....	418
V. CERTIFICATE SUFFICIENCY: FATAL OR NOT FATAL	419
VI. THE TROUBLESOME MARRIED WOMAN'S ACKNOWLEDGMENT	420
VII. WHO MAY TAKE ACKNOWLEDGMENTS.....	422
VIII. BEWARE OF CURATIVE STATUTES.....	424
IX. CORRECTING ERRORS	424
X. SOME TROUBLE SPOTS FOR CONSIDERATION	425

I. INTRODUCTION

The law of acknowledgments is an often overlooked but vitally important area of Texas energy law. An acknowledgement, in its most basic sense, is the proceeding wherein a person executes an instrument by presenting him or herself before a qualified officer, and then signs the instrument in the presence of the officer. The officer executes the acknowledgment certificate and attaches the acknowledgment certificate to the instrument.

Among other important functions, the presence of an acknowledgement can dictate whether or not an instrument is legally binding. This critical transactional element is unfortunately illustrated in the 2008 Texas appellate case *Alpert v. Riley*.¹² In *Alpert* the First Court of Appeals held that a prospective trustee did not accept a trusteeship in accordance with the plain terms of a trust, which required him to execute an “acknowledged acceptance.”¹³ The court held that the mere

* James W. Adams, Jr. is presently Senior Counsel at Burleson Cooke, P.L.L.C. (Houston, Texas), where he practices oil, gas, and energy law, including issues related to land titles and title examination. Mr. Adams was named an Expert Commentator for LexisNexis in 2008, and is the author and editor of several reference volumes and treatises concerning energy, real estate, and litigation. He is a graduate of The University of Texas at Austin, B.S., and the University of Houston Law Center, J.D.

** John C. Peissel is an Associate Attorney with the Law Offices of Charles R. Peissel (Houston and Austin, Texas), where he practices oil, gas, and energy law. Mr. Peissel is a graduate of Stanford University, B.A., and the University of Houston Law Center, J.D.

12. 274 S.W.3d 277 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

13. *Id.* at 288–89.

acceptance in writing by the prospective trustee was not effective, notwithstanding that the Texas Trust Code required only a separate written acceptance, as the trust's directive concerning the method of acceptance prevailed over the statute.¹⁴

Assets in the oil and gas industry are often held in multimillion dollar trusts. In transactions dealing with purported trustees, or verifying the validity of instruments recently executed by trustees, counsel should be on their guard to see that the terms of the trust have been strictly complied with regarding the appointment of such trustees, including terms pertaining to execution and acknowledgement of the pertinent instruments empowering the trustees.

Instruments are acknowledged for a variety of reasons. Any instrument directly affecting land or affecting one of the bundle of rights incident to ownership of real estate must be properly acknowledged in order to be recorded.¹⁵ Certain contracts must be acknowledged,¹⁶ as must certain bills of sale,¹⁷ articles of banks,¹⁸ and articles of Texas trust companies,¹⁹ as well as election documents,²⁰ consents to marriage,²¹ documents dealing with assumed names,²² and many more instruments in other areas of law.

In Texas constructive notice of the conveyances is not imparted until the conveyance has been properly acknowledged and recorded in the property records of the situs county.²³

Also, the proper acknowledgment of an instrument may greatly aid trial attorneys litigating the execution and validity of instruments such as deeds, oil and gas leases, deeds of trusts, and other energy mortgage instruments.²⁴ Usually, a properly acknowledged instrument is admissible into evidence without further proof as to its execution.²⁵

14. *Id.* at 289.

15. TEX. PROP. CODE ANN. § 12.001 (Vernon 2004); *see also id.* § 12.006 (providing that a grant from the government "that is executed . . . under the law in effect at the time the grant is made may be recorded without further acknowledgment or proof").

16. TEX. CIV. PRAC. & REM. CODE ANN. § 16.036 (Vernon 2002).

17. TEX. AGRIC. CODE ANN. § 146.001(c) (Vernon 2004).

18. TEX. FIN. CODE ANN. § 32.002 (Vernon 1998 & Supp. 2005).

19. *Id.* § 182.002 (Vernon 2006 & Supp. 2007).

20. TEX. ELEC. CODE ANN. §§ 142.002(b), 145.001(b) (Vernon 2003).

21. TEX. FAM. CODE ANN. § 2.102(c) (Vernon 2006 & Supp. 2007).

22. TEX. BUS. & COM. CODE ANN. §§ 71.053(a), 71.104(b) (Vernon 2009).

23. TEX. PROP. CODE ANN. §§ 12.011(b), 13.001 (Vernon 2009); *see also* Stinnette v. Mauldin, 251 S.W.2d 186, 203–04 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.) (holding that constructive notice did not exist where an oil and gas lease purchase agreement was not recorded at the time another agreement was executed).

24. Foster v. Cumbie, 315 S.W.2d 151, 158 (Tex. Civ. App.—Dallas 1958, writ ref'd n.r.e.) ("It has been held that in the absence of evidence to the contrary . . . acknowledgment is a factor from which, with other circumstances, a finding of delivery may be made.")

25. Punchard v. Masterson, 100 Tex. 479, 481, 101 S.W. 204, 205 (1907).

It should be pointed out that an acknowledgment is usually not an indispensable element of a conveyance, insofar as the parties to an instrument are concerned—the exception being ancient documents wherein a married woman was a grantor (discussed below in Part VI). For the most part, unacknowledged instruments are valid as between parties to the instruments, their heirs, subsequent purchasers with knowledge, or subsequent owners who give no consideration.²⁶

If the conveyance or mortgage is not properly acknowledged and filed for record, however, such conveyances and mortgages are void as to creditors and as to subsequent purchasers of value without notice.²⁷

If a defectively acknowledged instrument is recorded by mistake, it will not constitute constructive notice to creditors and subsequent purchasers if the instrument shows on its face that it was defectively acknowledged (or if the certificate is otherwise fatally defective).²⁸

The situs of the land controls any conflict of laws concerning which state's acknowledgment certificate form is to be used.²⁹ Thus, a California limited partnership or New York corporation conveying land located in the State of Texas must acknowledge the conveyance in accordance with Texas law, not the laws of California or New York.

II. ELEMENTS OF PROPER CERTIFICATES OF ACKNOWLEDGMENTS

A certificate of acknowledgment in the State of Texas should contain the following elements:³⁰

- (1) the seal of the notary officer (the certificate is fatally defective if the seal is not present);³¹
- (2) the signature of the notary officer (the certificate is fatally defective if the signature is not present);³²
- (3) the recital of the official capacity of the notary (the certificate is fatally defective if such is not present);³³
- (4) the recital of venue showing the State of Texas (the certificate is fatally defective if such is not present);³⁴

26. *Clapp v. Engledow*, 82 Tex. 290, 297, 18 S.W. 146, 148 (1891); *see also* TEX. PROP. CODE ANN. § 13.001(b) (Vernon 2004); *Meuley v. Zeigler*, 23 Tex. 88, 93 (1859); *Thomason v. Pac. Mut. Life Ins. Co. of Cal.*, 74 S.W.2d 162, 165 (Tex. Civ. App.—El Paso 1934, writ ref'd); *McMurrey v. Lampkins*, 47 S.W. 2d 851, 854 (Tex. Civ. App.—Beaumont 1932, no writ).

27. TEX. PROP. CODE ANN. § 13.001(b).

28. *Gulf Prod. Co. v. Cont'l Oil Co.*, 139 Tex. 183, 194–95, 164 S.W.2d 488, 493–94 (1942).

29. *See, e.g., Norton v. Davis*, 83 Tex. 32, 18 S.W. 430, 431 (1892); *see also Cook v. Frazier*, 765 S.W.2d 546, 550 (Tex. App.—Fort Worth 1984, no writ).

30. Texas acknowledgement law is codified in TEX. CIV. PRAC. & REM. CODE ANN. ch. 121 (Vernon 2005).

31. *McDonald v. Stanfield*, 197 S.W. 892, 893 (Tex. Civ. App.—Beaumont 1917, writ ref'd).

32. *Guinn v. Musick*, 41 S.W. 723, 725 (Tex. Civ. App. 1894, writ ref'd).

33. *Coffey v. Hendricks*, 66 Tex. 676, 679, 2 S.W. 47, 48–49 (1886).

34. *First Nat'l Bank of Nacogdoches v. Hicks*, 24 Tex. Civ. App. 269, 272, 59 S.W. 842, 844 (Houston 1900, no writ).

- (5) the recital of the appearance before the notary (the certificate is fatally defective if such is not present);³⁵
- (6) the recital of the name of the acknowledgor, with usually no variance between the name in the instrument and the name in the certificate being permitted;³⁶
- (7) the recital that the notary has knowledge of the identity of the acknowledgor is required (the certificate is fatally defective if such is not present);³⁷
- (8) the recital of the fact of acknowledgment is required and omission of same renders the certificate fatally defective,³⁸ but a certificate is not fatal merely because it lacks “purposes and consideration;”³⁹
- (9) the recital of the fact of execution is required and omission of said recital renders the certificate fatally defective;⁴⁰
- (10) the date of the acknowledgment and the attestation claim is obviously important, but the absence of the attestation “given under my hand and seal” or the absence of the date does not make the instrument fatally defective if not present;⁴¹ and,
- (11) the recital of the capacity of the acknowledgor (it is unclear as to whether this makes the instrument fatally defective if omitted).

It should be noted that, under § 121.004(d) of the Texas Civil Practice and Remedies Code (“C.P.R.C.”), the application of an embossed seal is not required on an electronically transmitted acknowledgment certificate.

III. STATUTORY CERTIFICATE FORMS

Originally, there are several types of statutory acknowledgments shown in chapter 121 of the C.P.R.C. (taken from former articles 6607, 6607a, and 6611 in Vernon’s Annotated Revised Civil Statutes of the State of Texas (“V.A.T.S.”)).⁴² Some acceptable forms are shown below:

35. *Christy v. Romero*, 140 S.W. 516, 518 (Tex. Civ. App.—El Paso 1911, writ ref’d).

36. *Stephens v. Motl*, 81 Tex. 115, 119–20, 16 S.W. 731, 731 (1891).

37. *Salmon v. Huff*, 80 Tex. 133, 136, 15 S.W. 1047, 1047 (1891), *rev’g* 80 Tex. 133, 15 S.W. 257 (1891).

38. *Punchard v. Masterson*, 100 Tex. 479, 481–82, 101 S.W. 204, 205 (1907).

39. *Stephens*, 81 Tex. at 119, 16 S.W. at 731.

40. *Huff v. Webb*, 64 Tex. 284, 286–87 (1885).

41. *Webb v. Huff*, 61 Tex. 677, 679 (1884).

42. These articles were repealed, but the remaining statutory acknowledgment forms can be found in chapter 121 of the C.P.R.C. The short forms of acknowledgements may be used as alternatives to other authorized forms and may be referred to as “statutory forms of acknowledgement.” TEX. CIV. PRAC. & REM. CODE ANN. § 121.008(a) (Vernon 2005).

5. FOR A CORPORATION

(a) Long Form⁵²

The State of _____ §

§

County of _____ §

Before me, the undersigned authority, on this day personally appeared _____ President of _____, a corporation, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity stated, and as the act and deed of said corporation.

Given under my hand and seal this ____ day of _____, 20__.

[SEAL]

 Notary Public in and for
 The State of TEXAS
 My commission expires: _____

(b) Short Form⁵³

State of _____ §

§

County of _____ §

This instrument was acknowledged before me on (date) by (name of officer), (title of officer) of (name of corporation acknowledging) a (state of incorporation) corporation, on behalf of said corporation.

[SEAL]

(Signature of Officer)
 (Title of Officer)
 My commission expires: _____

52. Based on TEX. CIV. PRAC. & REM. CODE ANN. § 121.007.

53. Effective August 31, 1981 pursuant to former article 6607a and recodified in TEX. CIV. PRAC. & REM. CODE ANN. § 121.008(b)(4).

No. 2]

RECENT DEVELOPMENTS

417

6. FOR TRUSTEE, EXECUTOR, ADMINISTRATOR, GUARDIAN, AND OTHER FIDUCIARIES OR REPRESENTATIVES

(a) Long Form⁵⁴

The State of _____ §
County of _____ §

Before me, the undersigned authority, on this day personally appeared _____ independent executor of the Estate of _____, deceased, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, and in the capacity therein stated.

Given under my hand and seal this ___ day of _____, 20__.

[SEAL]

Notary Public in and for
The State of TEXAS
My commission expires: _____

(b) Short Form⁵⁵

State of _____ §
County of _____ §

This instrument was acknowledged before me on (date) by (name of representative) as (title of representative) of (name of entity or person represented).

SEAL]

(Signature of Officer)
(Title of Officer)
My commission expires: _____

54. Based on TEX. CIV. PRAC. & REM. CODE ANN. § 121.007.
55. Effective August 31, 1981 pursuant to former article 6607a and recodified in TEX. CIV. PRAC. & REM. CODE ANN. § 121.008(b)(5).

IV. THE SHORT FORMS FOR ACKNOWLEDGMENT

Effective August 31, 1981, the Texas Legislature enacted into law article 6607a in V.A.T.S. entitled “Short Forms for Acknowledgment,” and as noted above, these short forms are now codified in chapter 121 of the C.P.R.C.⁵⁶ These “new” forms apparently were an attempt to comply with the Uniform Acknowledgment Acts being placed into law in sister states. Section 121.008(a) of the C.P.R.C. authorizes the short forms to be used as “alternatives to other authorized forms.”⁵⁷ The C.P.R.C. specifically provides that the short forms may be altered, as circumstances require, although no acceptable alterations are pointed out.⁵⁸ The short forms are not to “prevent the use of other forms,” as is pointed out in the Code.⁵⁹

Another 1981 change, for use in the short statutory forms, included defining the word “acknowledged,” and expanding its scope of meaning.⁶⁰ Several legal requirements comprising essential elements of the acknowledgment certificate are now met by the use of “acknowledged” as follows:

- (1) when acknowledging a natural person, “acknowledged” means “that the person personally appeared before the officer taking the acknowledgment and acknowledged executing the instrument for the purposes and consideration expressed in [the instrument];”⁶¹
- (2) when acknowledging a person as principal by an attorney-in-fact for the principal, “acknowledged” means “that the attorney-in-fact personally appeared before the officer taking the acknowledgment and that the attorney-in-fact acknowledged executing the [acknowledged] instrument as the act of the principal for the purposes and consideration expressed in [the instrument];”⁶²
- (3) when acknowledging a partnership by a partner or partners acting for the partnership, “acknowledged” means “that the partner or partners personally appeared before the officer taking the acknowledgment and acknowledged executing the instrument as

56. TEX. CIV. PRAC. & REM. CODE ANN. § 121.008(b)(1)–(5) (now titled “Short Forms for Certificates of Acknowledgment”).

57. *Id.* § 121.008(a).

58. *See id.* § 121.006(a).

59. *Id.*

60. *Id.* § 121.006(b).

61. *Id.* § 121.006(b)(1).

62. TEX. CIV. PRAC. & REM. CODE ANN. § 121.006(b)(2).

the act of the partnership for the purposes and consideration expressed in [the instrument];”⁶³

- (4) when acknowledging a corporation by an officer or agent acting for the corporation, “acknowledged” means that the acknowledging officer or agent “personally appeared before the officer taking the acknowledgment and that the corporate officer or agent acknowledged executing the instrument in the capacity stated, as the act of the corporation, for the purposes and consideration expressed in [the instrument];”⁶⁴ and
- (5) when acknowledging as a public officer, trustee, executor, administrator, guardian, or other representative, “acknowledged” means that the public officer, trustee, executor, administrator, guardian, or other representative “personally appeared before the officer taking the acknowledgment and acknowledged executing the instrument by proper authority and in the capacity stated and for the purposes and consideration expressed in [the instrument].”⁶⁵

An important provision of former article 6607a found in V.A.T.S. § 4 was that the rules and definitions contained in article 6607a apply to all instruments executed or delivered on or after the effective date of the article, August 31, 1983.⁶⁶ Although this specific provision was not recodified in the C.P.R.C., the rule presumably carries forward.⁶⁷

V. CERTIFICATE SUFFICIENCY: FATAL OR NOT FATAL

Many acknowledgment errors and omissions have been analyzed and classified by Texas courts as “fatal” or “non-fatal” to the sufficiency of the certificate. Unfortunately, the recorded opinions interpreting Texas acknowledgment statutes are uneven in the application of definitive standards.

Thus, a certificate is fatally defective if the space provided for filling in a personal pronoun in a printed or typed form is left blank,⁶⁸ but not fatally defective if “he” (not “they”) is used when a group of people acknowledge.⁶⁹ It is fatal to an acknowledgment certificate to state that the notary merely saw the grantor sign the instrument, or that the grantor

63. *Id.* § 121.006(b)(3).

64. *Id.* § 121.006(b)(4).

65. *Id.* § 121.006(b)(5).

66. *See* Act of June 10, 1981, 67th Leg., R.S., ch. 338, § 1, art. 6607a(4), 1981 Tex. Gen. Laws 922, 923, *repealed by* Act of Sept. 1, 1985, 69th Leg., R.S., ch. 959, § 9(1), 1985 Tex. Gen. Laws 3242, 3322.

67. TEX. CIV. PRAC. & REM. CODE ANN. § 121.006 revisor’s note (Vernon 2005) (noting that the rules of article 6607a apply to all acknowledgments).

68. *See Huff v. Webb*, 64 Tex. 284, 287 (1885).

69. *Hughes v. Wright & Vaughan*, 100 Tex. 511, 514, 101 S.W. 789, 790–91 (1907).

signed it in the notary's presence, because these statements do not recite facts of execution,⁷⁰ but a recital to the notary that the grantor "acknowledged" an instrument, without the words "to me," is not fatal.⁷¹

For instruments recorded on or after September 1, 1989, a proper jurat may substitute for an acknowledgment under § 12.001(a) of the Texas Property Code.⁷² Further, an acknowledgment or jurat may be satisfied by the electronic signature of the notary public, so long as all required information is attached to or logically associated with the signature or record in accordance with § 43.011 of the Texas Business and Commerce Code.⁷³

VI. THE TROUBLESOME MARRIED WOMAN'S ACKNOWLEDGMENT

As stated previously, the married woman's acknowledgment is an exception to the rule that acknowledgments are not to be viewed as an element of most conveyances. Though no longer required of married women, the married woman's acknowledgment nevertheless figures into most Texas title histories and thus still impacts today's energy transactions. No distinction is made in today's acknowledgment law between married and unmarried women.⁷⁴

70. *McDaniel v. Needham*, 61 Tex. 269, 272 (1884).

71. *Delay v. Truitt*, 182 S.W. 732, 734 (Tex. Civ. App.—Amarillo 1916, writ ref'd).

72. TEX. PROP. CODE ANN. § 12.001(a) (Vernon 2003).

73. TEX. BUS. & COM. CODE ANN. § 43.011 (Vernon 2004).

74. *See* TEX. FAM. CODE ANN. § 5.001 (Vernon 2006).

No. 2]

RECENT DEVELOPMENTS

421

The following represents the usual form of the married woman's acknowledgment:⁷⁵

The State of _____ §
 _____ §
 County of _____ §

Before me, the undersigned authority, on this day personally appeared _____, wife of _____, known to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said _____, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal this ___ day of _____, 20__.

[SEAL]

 Notary Public in and for
 The State of TEXAS
 My commission expires: _____

The certificate of acknowledgment of married women (in addition to recitals of venue and of official character of the officer, his or her signature, and seal) must contain the following elements:

- (1) that she appeared in person before the notary, giving her name in the body of the certificate;
- (2) that she was known or made known to the notary;
- (3) that she was examined by the officer separate and apart from her husband;
- (4) that the officer taking the acknowledgment fully explained the instrument to her;
- (5) that she acknowledged such instrument to be her act and deed;
- (6) that she declared that she had willingly signed the same for the purposes and consideration therein expressed; and
- (7) that she did not wish to retract it.⁷⁶

75. Based on the requirements stipulated below.

76. See *Garner v. Black*, 95 Tex. 125, 131, 65 S.W. 876, 877 (1901); *Sun Oil Co. v. Rhodes*, 71 S.W.2d 413, 414-15 (Tex. Civ. App.—Beaumont 1934, writ ref'd); *Holland v. Votaw*, 62 Tex. Civ. App. 91, 96-97, 130 S.W. 882, 884 (Galveston 1910, writ denied); see also *Hayden v. Moffat*, 74 Tex. 647, 650, 12 S.W. 820, 821 (1889).

Each of the above is an essential part of the certificate; omission of any one element invalidates the certificate. The certificate was not required to contain the exact words set forth in the form prescribed by the statute, so long as it showed on its face that all essential prerequisites were complied with by the officer;⁷⁷ an obvious clerical error or omission of a word did not necessarily invalidate the certificate.⁷⁸ The former Texas statutes embodying the above requirements were repealed effective January 1, 1968, and married women's acknowledgments taken since August 22, 1963 have been expressly validated.⁷⁹ A comment to Texas Title Examination Standard 4.20 states that an instrument executed by a married woman prior to August 22, 1963, but not "privily and apart" acknowledged in the manner prescribed by the statute, was void as to her.⁸⁰

VII. WHO MAY TAKE ACKNOWLEDGMENTS

Section 121.001 of the C.P.R.C. sets out persons before whom acknowledgments may be made:

(a) An acknowledgment or proof of a written instrument may be taken in [the State of Texas] by:

- (1) a clerk of a district court;
- (2) a judge or clerk of a county court;
- (3) a notary public;
- (4) a county tax assessor-collector or an employee of the county tax assessor-collector if the instrument is required or authorized to be filed in the office of the county tax assessor-collector; or
- (5) an employee of a personal bond office if the acknowledgment or proof of a written instrument is required or authorized by Article 17.04, Code of Criminal Procedure.

(b) An acknowledgment or proof of a written instrument may be taken outside this state, but inside the United States or its territories, by:

77. *Hill v. Foster*, 143 Tex. 482, 486–87, 186 S.W.2d 343, 345 (1945).

78. *Belcher v. Weaver*, 46 Tex. 293, 297–98 (1876).

79. See TEX. REV. CIV. STAT. ANN. arts. 1300, 6605–08, *repealed by* Acts of 1969, 61st Leg., R.S., ch. 888, § 5.81 (effective Jan. 1, 1970); TEX. REV. CIV. STAT. ANN. art. 4618, § 1 (current version at TEX. FAM. CODE ANN. 5.001 (Vernon 2006)).

80. See Comment to Texas Title Examination Standard 4.20; see also TEX. REV. CIV. STAT. ANN. art. 1299, *repealed by* Acts of 1963, 58th Leg., R.S., ch. 473, § 1; *Humble Oil & Refining Co. v. Downey*, 143 Tex. 171, 183 S.W.2d 426 (1944); *Sun Oil Co. v. Rhodes*, 71 S.W.2d 413 (Tex. Civ. App.—Beaumont 1943, writ ref'd). The Texas Supreme Court ruled former article 1299 to be unconstitutional. *Wessely Energy Corp. v. Jennings*, 736 S.W.2d 624 (Tex. 1987) (affirming a married woman's pre-repeal conveyance despite its noncompliance with article 1299). However, this ruling was made prospective only. *Id.* at 629. Thus, attorneys examining a Texas married woman's acknowledgment—which pre-dates August 22, 1963, is executed by a married woman, but is not acknowledged "privily and apart"—are well advised to note the deficiency.

- (1) a clerk of a court of record having a seal;
- (2) a commissioner of deeds appointed under the laws of this state; or
- (3) a notary public.

(c) An acknowledgment or proof of a written instrument may be taken outside the United States or its territories by:

- (1) a minister, commissioner, or charge d'affaires of the United States who is a resident of and is accredited in the country where the acknowledgment or proof is taken;
- (2) a consul-general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul, or consular agent of the United States who is a resident of the country where the acknowledgment or proof is taken; or
- (3) a notary public or any other official authorized to administer oaths in the jurisdiction where the acknowledgment or proof is taken.

(d) A commissioned officer of the United States Armed Forces or of a United States Armed Forces Auxiliary may take an acknowledgment or proof of a written instrument of a member of the armed forces, a member of an armed forces auxiliary, or a member's spouse. If an acknowledgment or a proof is taken under this subsection, it is presumed, absent pleading and proof to the contrary, that the commissioned officer who signed was a commissioned officer on the date that the officer signed, and that the acknowledging person was a member of the authorized group of military personnel or spouses. The failure of the commissioned officer to attach an official seal to the certificate of acknowledgment or proof of an instrument does not invalidate the acknowledgment or proof.⁸¹

A notary is disqualified from taking an acknowledgment if he or she is:

- (1) a party to the instrument being acknowledged;⁸²
- (2) husband or wife of a party to the instrument;⁸³
- (3) agent or attorney of a party to the instrument having direct pecuniary interest in the transaction;⁸⁴ or
- (4) any person who has a direct pecuniary interest in the consideration for the instruments executed.⁸⁵

81. TEX. CIV. PRAC. & REM. CODE ANN. § 21.001 (Vernon 2005).

82. *Brown v. Moore*, 38 Tex. 645, 648 (1873); *see also* *Clements v. Tex. Co.*, 273 S.W. 993, 996 (Tex. Civ. App.—Galveston 1925, writ ref'd).

83. *Silcock v. Baker*, 25 Tex. Civ. App. 508, 509, 61 S.W. 939, 940 (San Antonio 1901, no writ).

84. *Kutch v. Holley*, 77 Tex. 220, 222–23, 14 S.W. 32, 34 (1890); *see also* *Daniels v. Larendon*, 49 Tex. 216, 218–19 (1878).

Recordation of an instrument showing on its face that the officer was disqualified does not constitute notice.⁸⁶ Moreover, notaries are subject to criminal⁸⁷ and civil⁸⁸ liability for failure to perform or comply with their statutory duties and requirements.

VIII. BEWARE OF CURATIVE STATUTES

Statutes pertaining to the general validation of defective acknowledgments have been enacted; the most important of these acts were found in former articles 3726, 3726(b), 5523(a), 6659, and 6660 of V.A.T.S. Some of these former articles have since been repealed and/or recodified and included in C.P.R.C. § 16.033⁸⁹ and Texas Property Code § 11.005.⁹⁰ There also exist other acts attempting to validate and cure the records of certain counties.⁹¹ However, standard 4.20 of the Texas Title Examination Standards requires that a seriously defective (meaning “substantial noncompliance”) acknowledgment contained in a recorded instrument be of record for at least 20 years, with no adverse claim appearing in the subsequent records; if not, standard 4.20 requires a corrected acknowledgment and re-recording of the instrument, or recording of a new, corrected instrument.⁹²

It is therefore urged that much caution should be utilized by practitioners having occasion to rely upon these curative statutes. Moreover, none of these statutes deal with the various married woman’s acknowledgment issues. Indeed, there is strong indication that curative statutes may never apply to acknowledgments for married women.⁹³

Also, an acknowledgment wholly void for failure to comply with statutory requirements is not validated by a curative law.⁹⁴

IX. CORRECTING ERRORS

Section 11.005 of the Texas Property Code authorizes correction of an acknowledgment that was properly administered by the acknowledging officer but bears a defective certificate.⁹⁵ If the acknowledgment was

85. *W. C. Belcher Land Mortgage Co. v. Taylor*, 212 S.W. 647, 650 (Tex. 1919).

86. *Titus v. Johnson*, 50 Tex. 224, 240 (1878).

87. TEX. PENAL CODE ANN. § 37.10 (Vernon 2003 & Supp. 2009).

88. *Id.* § 39.01.

89. TEX. CIV. PRAC. & REM. CODE ANN. § 16.033 (Vernon 2002) (incorporating TEX. REV. CIV. STAT. ANN. art. 5523).

90. TEX. PROP. CODE ANN. § 11.005 revisor’s note (Vernon 2004) (incorporating TEX. REV. CIV. STAT. ANN. arts. 6659, 6660).

91. TEX. PROP. CODE ANN. § 11.005 (relating to land titles in Archer County).

92. TEX. R. EVID. 803(16), 901(b)(8).

93. *Savage v. Rhea*, 33 S.W.2d 429, 431–32 (Tex. 1930).

94. *Holland v. Votaw*, 62 Tex. Civ. App. 91, 99, 130 S.W. 882, 886 (Galveston 1910, writ denied).

95. TEX. PROP. CODE ANN. § 11.005 (Vernon 2004).

properly made but the certificate was improperly executed and the grantor refuses to re-execute, a district court is empowered to order the correction to be made.⁹⁶

The following are suggestions for other cures:

- (1) The simplest and most effective way is to have the party who improperly acknowledged re-acknowledge the same instrument.
- (2) If the above is impractical (usually due to the fact that the instrument has already been recorded in the county clerk's office), one may simply execute a correction instrument with a proper certificate.
- (3) Have the officer who made the certificate amend or correct the error (for example, if the officer forgot to affix the seal or forgot to sign his or her name).

X. SOME TROUBLE SPOTS FOR CONSIDERATION

Many acknowledgment problems may be avoided by common sense application of statutory forms. Attorneys should be aware of taking shortcuts with complex acknowledgment law; a solid rule is *when in doubt, more is better*.

Use caution when examining or drafting acknowledgment certificates for corporations, joint ventures, and partnerships executing instruments as fiduciaries or in fiduciary capacities. Many times these entities will execute and acknowledge only in their non-fiduciary status.

Another frequently encountered problem occurs when instruments are acknowledged by individuals with no recitation in the certificate as to the individual's capacity, when the individual is attempting to effect a conveyance under a power conferred under an instrument such as a will, power of attorney, or trust instrument. Without a minimal recitation in the certificate stating that the instrument was executed for the purposes therein, these instruments, if very recently executed and filed of record, will fail to impart constructive notice.⁹⁷

96. *Id.*

97. See Comment to Texas Title Examination Standard 4.20.

III. RECENT DEVELOPMENTS IN UNITED STATES ENERGY LAW

A. *Federal Oil, Gas, and Energy Case Summaries*

1. NRG Power Marketing, LLC v. Maine Public Utilities Commission, 130 S.Ct. 693 (2010).

Issue: When the Federal Energy Regulatory Commission reviews wholesale electricity rates set by contract, is the Mobile-Sierra presumption limited to challenges brought by contracting parties, or does it also apply to non-contracting parties?

Under the Federal Power Act (“FPA”), the Federal Energy Regulatory Commission (“FERC”) is authorized to superintend the sale of electricity in interstate commerce, but all wholesale rates must be “just and reasonable.” The Supreme Court held in 1956—under the twin decisions of *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*⁹⁸ and *Federal Power Commission v. Sierra Pacific Power Co.*⁹⁹—that FERC must presume that a rate set by a freely negotiated wholesale-energy contract meets the “just and reasonable” requirement. This presumption (known as the *Mobile-Sierra* public interest standard) “may be overcome only if FERC concludes that the contract seriously harms the public interest.”¹⁰⁰

Because New England has had difficulties in maintaining the reliability of its energy grid, in 2006 FERC approved a comprehensive settlement agreement among 115 parties, establishing rate-setting mechanisms for sales of energy capacity and establishing the *Mobile-Sierra* doctrine as the governing standard. Eight parties objected to the settlement, six of which petitioned for review in the U.S. Court of Appeals for the D.C. Circuit. The D.C. Circuit agreed with the petitioners, holding that the *Mobile-Sierra* presumption does not apply when the rate challenge is brought by a non-contracting third party. The basis for this holding was that contracts only bind parties, not non-parties, and that holding third parties to this standard would overlook their rights under the FPA.

In an opinion written by Justice Ginsburg in January, the Supreme Court reversed the D.C. Circuit to the extent that it rejected the application of the *Mobile-Sierra* doctrine to non-contracting parties. The Court states that the public interest standard is not independent of the “just and reasonable” standard, as the D.C. Circuit suggested, but defines

98. 350 U.S. 332 (1956).

99. 350 U.S. 348 (1956).

100. 130 S.Ct. at 696 (quoting *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 128 S.Ct. 2733, 2734 (2008)).

what it means for a rate to satisfy the “just and reasonable” standard in the contract context. The *Mobile-Sierra* doctrine “holds sway . . . because well-informed wholesale-market participants of approximately equal bargaining power generally can be expected to negotiate just-and-reasonable rates, and because ‘contract stability ultimately benefits consumers.’”¹⁰¹ In fact, the Court states that the doctrine does not overlook third-party interests, but is actually framed with a view to their protection.

Therefore, the Court held that the *Mobile-Sierra* presumption does not depend on the identity of the complainant and is not limited to challenges brought by contracting parties, but applies to challenges initiated by third parties as well.

Justice Stevens wrote alone on dissent, arguing that a high standard for third-party challenges will hinder protection of the public interest. He describes the majority opinion as extending the *Mobile-Sierra* doctrine beyond its modest bounds, creating additional burdens for third parties exercising their right to object to unreasonable rates.

2. *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *en banc rev. granted*, 598 F.3d 208 (5th Cir. 2010).

Issue: Do class action plaintiffs who have had their property damaged by Hurricane Katrina have standing to sue oil companies for alleged emissions of greenhouse gases that may have contributed to global warming, thereby adding to the ferocity of the hurricane? Furthermore, are their claims nonjusticiable political questions?

Plaintiffs that own land along the Mississippi Gulf Coast brought a class action suit against oil and energy companies seeking damages arising from Hurricane Katrina. They alleged that the defendants’ emissions of greenhouse gases contributed to global warming, and that global warming is able to increase the destructive power of hurricanes. The class action sought compensatory and punitive damages based on state common-law actions of nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy. The district court dismissed the action based on the defendants’ motion that plaintiffs lacked standing and that the claims presented nonjusticiable political questions.

Recently, the U.S. Court of Appeals for the Fifth Circuit reversed and remanded the district court’s ruling, holding that the plaintiffs did not lack standing to bring the nuisance, trespass, and negligence claims, and that those claims did not present nonjusticiable political questions. The court analyzed standing under Article III of the U.S. Constitution. To

101. *Id.* at 700 n.4 (citation omitted).

have standing, a plaintiff must show injury in fact, that the injury is fairly traceable to the defendant's actions, and that the injury will likely be redressed by a favorable decision. With regard to the nuisance, trespass, and negligence claims, the court determined that the first and third standing requirements were clearly met. The second requirement was challenged by the defendants on the grounds that the connection between the companies' emissions, global warming, and the ferocity of the hurricane was too attenuated, but the court stated that the traceability requirement is not as strict as proximate causation, and "an indirect causal relationship will suffice, so long as there is 'a fairly traceable connection.'"¹⁰² The court went on to say that "fairly traceable" encompasses actions that "contribute to, rather than solely or materially cause" the injuries.¹⁰³

After finding that the plaintiffs had standing with regard to the nuisance, trespass, and negligence claims, the court turned to the question of whether these claims are justiciable. Whether a claim is justiciable depends on whether the question is constitutionally capable of being decided by a federal court. The court held that because the claims "do not present any specific question that is exclusively committed by law to the discretion of the legislative or executive branch," they are justiciable.¹⁰⁴ The court reasoned that these are tort claims, not political questions, and it is the duty of the judiciary branch to resolve tort claims.

The court noted that, in the future, there may be new laws or regulations enacted by Congress or federal agencies that the oil companies could argue preempt state common law tort claims with regard to greenhouse gas emissions. However, until such laws are enacted, the nuisance, trespass, and negligence claims remain justiciable under Mississippi tort law. Thus, the court reversed the trial court's judgment with respect to the plaintiffs' nuisance, trespass, and negligence claims, and remanded the case to the district court for further proceedings.

3. U.S. Commodity Futures Trading Commission v. Dizona, 594 F.3d 408 (5th Cir. 2010).

Issue: Did the district court err in setting aside a jury's verdict due to insufficient evidence to prove that a trader had attempted to manipulate the price of natural gas by knowingly delivering false data to reporting services?

102. 585 F.3d at 864 (quoting Toll Bros., Inc. v. Township of Readington, 555 F.3d 131, 142 (3d Cir. 2009)).

103. *Id.* at 866.

104. *Id.* at 869.

The Commodity Futures Trading Commission (“Commission”) sued Anthony Dizona, a commodities trader working at the West Trading Desk of Coral Energy Resources (“Coral”), alleging that he attempted to manipulate the market price of natural gas. The jury found that while Dizona did attempt to manipulate the market, he did not knowingly deliver false reports that tended to affect the market price. Subsequently, both parties filed motions for judgment as a matter of law, and the district court granted Dizona’s motion. On appeal to the U.S. Court of Appeals for the Fifth Circuit, the Commission argued that the district court erred in granting Dizona’s motion and asked the court to reinstate the jury’s attempted manipulation charge.

The Commission’s original claim was brought against six individuals, an analyst and five traders (including Dizona). The defendants would make physical trades of natural gas in interstate commerce, requiring the delivery of a specific amount of gas on agreed upon days during the following month. At the end of the month, during what is known as “bidweek,” the defendants’ duties were to report the price and volume of their trades to reporting services, which would analyze all of the data that they received and use it to determine an index price for the natural gas market. In its complaint, the Commission alleged that the defendants submitted price and volume data that were not based on actual trades in order to manipulate the natural gas price indices. The other five defendants settled with the Commission, leaving Dizona as the only remaining defendant.

Most of the Commission’s evidence was the product of a subpoena against Coral and was admitted at trial through the Commission’s investigator, Mary Kaminski, who summarized the various exhibits, some of which included spreadsheets that indicated the reported trades and their “marks” (each trader’s estimate as to what the price index would be the next month). The Commission also retained a finance professor as an expert witness in order to determine whether there was a bias in the traders’ reporting procedure. Finally, there were two audiotapes submitted by the Commission in which Dizona indicated that he would set the price at a certain level.

The court agreed with the district court’s decision to set aside the jury’s verdict and find for Dizona as a matter of law. The evidence did not prove that Dizona manipulated the market; it simply showed that Dizona was giving in-house estimates to his superiors. Moreover, the court determined that the spreadsheets admitted into evidence by the Commission should have been excluded because they did not meet the business records exception to the hearsay rule pursuant to Rule 803(6) of the Federal Rules of Evidence. Because the Commission did not call a Coral employee with personal knowledge, the spreadsheets could not

have qualified as business records. Kaminski was not a qualified summary witness because she could not explain Coral's record keeping system and vouch that the requirements of Rule 803(6) had been met. The court further concluded that the Commission's expert's "general finding of biased reporting" was not sufficient to prove that Dizona made false entries into the spreadsheets and that Dizona's incriminating audiotape was "too vague" to support the jury's finding.¹⁰⁵

Thus, without the inclusion of the hearsay evidence that described the actual trades, the court affirmed the district court's decision that there was simply not enough evidence to show that Dizona had knowingly delivered false reports that tended to affect the market price of natural gas. Ultimately, the problem for the court was not that the Commission's theory was invalid, but that there was simply not enough evidence in this particular case.

105. 594 F.3d at 418.

IV. RECENT DEVELOPMENTS IN INTERNATIONAL LAW

A. NEW LEGAL FRAMEWORK FOR
OIL CONTRACTS IN MEXICO

PEDRO RESENDEZ*

I. POLITICAL CONSTITUTION	432
II. THE REGULATORY ACT TO CONSTITUTIONAL ARTICLE 27 IN MATTERS RELATING TO PETROLEUM AND ITS REGULATION ...	432
A. The Regulatory Act.....	432
B. Regulation to the Regulatory Act	434
III. THE PETRÓLEOS MEXICANOS ACT AND ITS REGULATION	437
A. The Petróleos Mexicanos Act	437
B. The Regulation to the Petróleos Mexicanos Act	440
IV. ADMINISTRATIVE CONDITIONS OF HIRING	442
V. THE ENERGY REGULATORY COMMISSION ACT	445
VI. THE NATIONAL HYDROCARBONS COMMISSION ACT.....	446
VII. CHALLENGES FOR THE PETROLEUM REFORM	450

Major reforms to United States of Mexico's legal framework for oil contracts recently have been accomplished. The subsequent regulatory schemes and state interpretations and implementations of this new framework are in the process of unfolding, and many consequences of the new legal framework are yet to be seen. This article analyzes the new legal framework for contracting private entities to provide services in the petroleum industry in Mexico, applicable to Petróleos Mexicanos and its subsidiary organizations ("PEMEX"), the Mexican state-owned petroleum company. This analysis will focus on the consequences of the reforms and legal provisions recently approved, which will be examined more closely below ("The Petroleum Reform").

Insofar as the new regime's effect on PEMEX's hiring of service providers is concerned, the relevant Petroleum Reform legal orders are: (1) the Petróleos Mexicanos Act, (2) the Regulation to the Petróleos Mexicanos Act, (3) the National Hydrocarbons Commission Act, (4) the Regulatory Act to Constitutional Article 27 in matters relating to

* Mr. Resendez is an attorney at law at Gonzales Calvillo in Mexico City, Mexico, and has been a law practitioner for almost 20 years working for several national and international firms. He is also a professor at the Universidad Iberoamericana Law School. Mr. Resendez received his L.L.M. from New York University and is currently a candidate to receive the Doctoral Degree from the Legal Research Institute at the Universidad Nacional Autonoma de Mexico.

Petroleum, (5) the Regulation to the Regulatory Act to Constitutional Article 27 in matters relating to Petroleum, (6) the Energy Regulatory Commission Act, and (7) the Provisions of the PEMEX Administrative Council in matters relating to acquisitions, leases, and the rendering of services and work.

I. POLITICAL CONSTITUTION

In accordance with the provisions of article 27 of the Political Constitution of the United States of Mexico (“Mexican Constitution”), the Nation is granted direct dominion over oil and other hydrocarbons in national territory.¹⁰⁶ As such, article 27 provides that contracts or concessions may not be granted over oil and other hydrocarbons, as only the Nation may directly exploit such resources, under the terms prescribed by the Regulatory Act.¹⁰⁷

II. THE REGULATORY ACT TO CONSTITUTIONAL ARTICLE 27 IN MATTERS RELATING TO PETROLEUM AND ITS REGULATION

On November 28, 2008 the Ministry of Energy published various reforms to the Regulatory Act to Constitutional Article 27 in matters relating to Petroleum (“Regulatory Act”) in the Official Federal Gazette. The Regulatory Act was originally published in the Official Federal Gazette on November 29, 1958.

Then, on September 22, 2009 the Ministry of Energy published the Regulation to the Regulatory Act to Constitutional Article 27 in matters relating to Petroleum (“Regulation to the Regulatory Act”) in the Official Federal Gazette.¹⁰⁸

A. *The Regulatory Act*

Five issues stand out from the reforms to the Regulatory Act. First, the Regulatory Act defines “cross-border deposits” in two ways. Cross-border deposits are those found within national jurisdiction and that also physically extend beyond it.¹⁰⁹ Moreover, cross-border deposits are deposits or fields outside national jurisdiction that are shared with other nations in accordance with the terms of an international treaty to which

106. Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 27, Diario Oficial de la Federación [D.O.], 24 de Agosto de 2009 (Mex.).

107. *Id.*

108. By virtue of this Act, the Regulation to the Regulatory Act to Constitutional Article 27 in matters relating to Petroleum, published in the Official Federal Gazette on August 25, 1959, and the Petroleum Works Regulation, published on February 27, 1974, are abolished.

109. Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo [The Regulatory Act to Constitutional Article 27 in matters relating to Petroleum], *as amended*, art. 1, Diario Oficial de la Federación [D.O.], 28 de Noviembre de 2008 (Mex.).

Mexico is a party or under the terms of the U.N. Convention of the Law of the Sea.¹¹⁰

Second, the Regulatory Act creates a special regime for the exploitation of cross-border deposits, to be defined in the treaties to which Mexico is or becomes a party, and duly signed by the President and ratified by the Chamber of Senators.¹¹¹

Third, the Regulatory Act includes a general principle for contracting outside parties under which PEMEX may enter into contracts for works or services as deemed necessary to improve the quality of its services and activities (“Contracts for Works and Services”). Such contracts must be entered into with the understanding that the remuneration established in said contracts shall always be in cash and in no event transfer ownership over hydrocarbons.¹¹² Furthermore, shared production contracts may not be entered into, nor any contract that offers remuneration based on percentages of production, the value of the sale of hydrocarbons or their derivatives, or the profits of the contracting entity.¹¹³

Fourth, the Regulatory Act reiterates the principle stated in the Mexican Constitution that only the Nation may directly exploit hydrocarbons within national territory.¹¹⁴ The term “Oil Industry,” which is reserved to describe entities and activities of the Nation and performed through PEMEX, is defined in article 3 as:

- (1) The exploration, exploitation, refinery, transport, storage, distribution, and first-hand sales of petroleum and the products obtained from refining it;
- (2) The exploration, exploitation, elaboration, and first-hand sale of gas, as well as the transportation and storage indispensable and necessary to interconnect its exploitation and elaboration. Gas associated with deposits of mineral coal is excepted from the previous paragraph and the Mineral Act¹¹⁵ will regulate its recovery and exploitation; and
- (3) The exploration, transportation, storage, distribution, and first-hand sales of those products derived from petroleum and gas that can serve as basic industrial raw materials and that constitute basic petrochemicals, for the listed minerals: (i) Ethane, (ii) Propane, (iii) Butane, (iv) Pentane, (v) Hexane, (vi) Heptane, (vii) Raw materials for black carbon,

110. *Id.*

111. *Id.* art. 2.

112. *Id.* art. 6.

113. *Id.*

114. *Id.* art. 1.

115. Further, the transport, storage, and distribution of gas, including methane gas, may be carried out by social and private entities, with the prior authorization of the authority, who may construct, operate, and own pipelines, installations, and equipment under the terms of the applicable regulatory and technical provisions.

(viii) Naphthasm and (ix) Methane, when it is derived from hydrocarbons, obtained from deposits located in national territory, and is used as a raw material in petrochemical industrial processes.¹¹⁶

Fifth, in relation to the sale of gasoline, article 14 bis of the Regulatory Act establishes that the trade of gasoline and other liquid fuels refined in service stations with direct sale to the public or for self consumption shall operate under a franchise contract framework or another commercialization scheme entered into between PEMEX and individuals or corporations of Mexican nationality, not foreigners.¹¹⁷

Thus, the possibility of designing commercialization schemes distinct from the PEMEX brand franchises, which currently operate throughout the country, is expressly foreseen. An example of such a scheme is one where distributors purchase gasoline directly from PEMEX and distribute the product to businesses for their own consumption, without utilizing PEMEX service stations.

B. Regulation to the Regulatory Act

The Regulation to the Regulatory Act defines the extent of the business areas to which private investors may jointly participate with PEMEX. The following five items are worth highlighting.

First, the Regulation to the Regulatory Act defines “first-hand sales” as the first transfer of ownership in hydrocarbons, distinct from complex petrochemicals, which PEMEX makes to a third party other than one of the legal entities under its control (“First-Hand Sales”).¹¹⁸

Second, the Regulation to the Regulatory Act establishes a new regime of “permit holders,” who are defined as those individuals or corporations who hold a permit under their own name for the performance of activities including transportation, storage, or distribution, in accordance with the applicable legal provisions.¹¹⁹ In other words, the Regulation to the Regulatory Act suggests that the granting of permits for the aforementioned activities is not limited solely to natural gas (carefully regulated by the Natural Gas Regulation), but extends to any other hydrocarbon or its derivatives.

116. Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo [The Regulatory Act to Constitutional Article 27 in matters relating to Petroleum], *as amended*, art. 3, Diario Oficial de la Federación [D.O.], 28 de Noviembre de 2008 (Mex.).

117. *Id.* art. 14 bis.

118. Reglamento de la Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo [The Regulation to the Regulatory Act to Constitutional Article 27 in matters relating to Petroleum], *as amended*, ch. VII, art. 21, Diario Oficial de la Federación [D.O.], 22 de Septiembre de 2009 (Mex.).

119. *Id.* ch. VII, art. 2, § XI.

Third, certain restrictions pertaining to refinement, storage, transportation, and distribution activities, which were previously reserved to PEMEX in articles 24, 31, and 33 of the Regulation to the Regulatory Act of 1959, are eliminated by the 2009 reforms. Said eliminated articles used to say, in pertinent part, the following.

Article 24. Only the Nation, through the conduct of PEMEX, may perform operations relating to the refinement of petroleum, regardless of whether the refinement is of hydrocarbons of national or foreign origin or both, and of whether it is for national consumption or the exportation of its derivatives. When hydrocarbons of foreign origin are the property of third parties, *Petróleos Mexicanos* may perform the refinement, but only for the subsequent exportation of the products obtained.

Article 31. Transportation within national territory via pipelines of crude petroleum, the products and byproducts of refinement and of gas, may exclusively be made by PEMEX in pipelines that are its own property, subject to the terms of Article 35.

Article 33. Storage within petroleum fields and refineries shall be the exclusive privilege and responsibility of PEMEX.

Fourth, article 4 of the new Regulation to the Regulatory Act confirms that PEMEX may construct and operate systems, infrastructure, plants, installations, gas ducts, oil ducts, pipelines, and all other similar infrastructure to improve the performance of its activities related to the Oil Industry and its other responsibilities as set out in the Regulatory Act and in the *Petróleos Mexicanos Act*.¹²⁰ However, the above activities are not exclusively reserved for performance by PEMEX and can be outsourced to private companies. The foregoing is expressly reiterated in two articles of the Regulation to the Regulatory Act.

Article 28. PEMEX may enter into contracts for works or for the rendering of services with individuals or corporations required to improve the performance of its activities related to the National Oil Industry and other responsibilities provided in the Regulatory Act and in the *Petróleos Mexicanos Act*.

Article 29. The concessions, contracts, and other legal acts executed or entered into by the Decentralized Organizations shall be regulated in accordance with the relevant administrative orders and dispositions and when necessary other relevant legislation.¹²¹

To emphasize the previous point, article 4 of the Regulation to the Regulatory Act provides that PEMEX must comply with the assignments, permits, and authorizations granted by and within the

120. *Id.* ch. VII, art. 4.

121. *Id.* ch. VII, arts. 28, 29.

jurisdiction of the Ministry of Energy and the Energy Regulatory Commission (“ERC”).¹²² As such, the Regulation to the Regulatory Act regulates the activities and projects that PEMEX intends to carry out, whether directly or through third parties.

Fifth, chapter VII of the Regulation to the Regulatory Act proposes a new regulatory mechanism to promote a competitive market in transportation, storage, and distribution activities.¹²³ Said regulation, once it is issued by the Ministry of Energy and the ERC, shall apply solely to PEMEX when, in the judgment of the Federal Competition Commission, effective conditions for competition do not exist in the market.

According to chapter VII, in making First-Hand Sales destined for the national market, as well as in rendering transportation, storage, and distribution services, PEMEX shall abstain from imposing unlawful terms of agreement that limit, damage, impede, or hinder the competitive process of transferring and acquiring the aforementioned products.¹²⁴ Such practices include:

- (1) The sale of goods and provision of services conditioned upon the purchase, acquisition, sale, or provision of additional goods or services normally distinct or distinguishable;
- (2) The sale of goods and the provision of services subject to a condition not to use, acquire, sell, commercialize, or provide the goods or services produced, processed, distributed, or commercialized by a third party;
- (3) The unilateral act of refusing to sell or provide goods or services to certain persons, which are available and normally offered to third parties;
- (4) The granting of discounts or incentives to buyers with the requirement that they do not use, acquire, sell, commercialize, or provide goods or services produced, processed, distributed, or commercialized by a third party;
- (5) Subject a transaction to a requirement not to sell, commercialize, or provide to a third party, goods or services that would have been sold or provided to the third party;
- (6) The establishment of different prices or conditions of sale on goods and services for different vendors in the same condition; and
- (7) Any other acts similar in nature to those above.¹²⁵

122. *Id.* ch. VII, art. 4.

123. Reglamento de la Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo [The Regulation to the Regulatory Act to Constitutional Article 27 in matters relating to Petroleum], *as amended*, ch. VII, art. 21, Diario Oficial de la Federación [D.O.], 22 de Septiembre de 2009 (Mex.).

124. *Id.* ch. VII, art. 22.

125. *Id.*

Accordingly, PEMEX may refuse to make a First-Hand Sale or provide the aforementioned services, in whole or in part, only when a technical or commercial impediment exists that conforms to the administrative provisions within the jurisdiction of the Ministry of Energy or the ERC. Thus, PEMEX must guarantee public access to every contract for First-Hand Sales and provision of services to third parties by publicizing open bidding on its Internet webpage according to the terms of the Federal Transparency and Access to Public Governmental Information Act.

III. THE PETRÓLEOS MEXICANOS ACT AND ITS REGULATION

The *Petróleos Mexicanos Act* was published in the Official Federal Gazette on August 28, 2008. Its objective is to regulate the organization, operation, control, and accountability of PEMEX and its subsidiary organizations. On September 4, 2009 the Ministry of Energy published the Regulation to the *Petróleos Mexicanos Act* in the Official Federal Gazette. Its objective is to regulate the aforementioned Act.

A. *The Petróleos Mexicanos Act*

In relation to Contracts for Works and Services, the *Petróleos Mexicanos Act* includes the following six elements worth highlighting.

First, the Act reiterates the principle that PEMEX may enter into all types of agreements, contracts, letters of credit, and other acts with individuals or corporations, but it must ensure that the Mexican State maintains exclusive ownership and control over its hydrocarbons.

Second, the Act describes the policies with which Contracts for Works and Services must comply. Those policies are:

- (1) The Nation's direct dominion over hydrocarbons shall be maintained at all times;
- (2) No rights over petroleum reserves may be granted; thus providers or contractors may not register said reserves as their own assets and the Nation will register them as part of its patrimony;
- (3) Control and direction over the Oil Industry referred to in Article 3 of the Regulatory Act shall be maintained at all times;
- (4) The remunerations agreed to in said contracts shall always be in cash; as such, payment for services provided or works completed may never be contracted for as a percentage of the production or of the value of the sales of hydrocarbons, nor from its derivatives or the profits of the contracting entity . . . ;
- (5) No sort of preferential rights shall be granted for the acquisition of petroleum or its derivatives, or to influence sales to third parties; and

- (6) Contracts that contemplate shared production or joint venture schemes in the exclusive and strategic areas with which the nation is charged with according to Article 3 of the Regulatory Act shall not be entered.¹²⁶

Moreover, contracts may contain clauses whereby parties are permitted to modify projects for the incorporation of technological advances, for the variation of market prices for the consumable materials or equipment used in works, or for the acquisition of new information obtained during the execution of works or any other information that contributes to improving the efficiency of the project.¹²⁷

Third, the Act limits the remunerations that may be agreed upon in Contracts for Works or Services. The following conditions are established:

- (1) [Remunerations] [m]ust always be agreed to be in cash, be reasonable in terms of normal industry standards or uses, and be included in the budget authorized by *Petróleos Mexicanos* . . . ;
- (2) [Remunerations] [s]hall be established through fixed schemes or predetermined formulas, with which a specific price is determined in conformity with the applicable civil legislation;
- (3) Contracts for multi-year works may stipulate periodic reviews necessary for the incorporation of technological advances or the variation of market prices for consumable materials or equipment used in the corresponding works or others that contribute to improving the efficiency of the project, based on mechanisms for the adjustment of costs and the establishment of prices authorized by the *Petróleos Mexicanos* Administrative Council;
- (4) [Remunerations] must be established upon signing the contract;
- (5) Penalties shall be included that depend on the negative impact of the contractors' actions related to environmental sustainability and for non compliance with the indicators of opportunity, time, and quality; and
- (6) Additional compensation may only be included when:
 - (a) The contractee [who hires the service provider] obtains performance of the works in less time;
 - (b) The contractee [who hires the service provider] benefits from new technologies provided by the service provider; or
 - (c) Other circumstances attributable to the service provider that result in greater profits for *Petróleos Mexicanos* and a better overall result for the work or service,

126. *Ley de Petróleos Mexicanos* [The *Petróleos Mexicanos* Act], *as amended*, art. 60, *Diario Oficial de la Federación* [D.O.], 28 de Noviembre de 2008 (Mex.).

127. *Id.*

provided that percentages over the value of sales or production of hydrocarbons are not committed. Possible compensation must be expressly established upon signing the contract.¹²⁸

Fourth, the Act creates a special regime for hiring third party contractors in relation to acquisitions, leases, and services required by PEMEX for “Substantive Productive Activities,” defined as those activities that compromise the National Oil Industry.¹²⁹ In accordance with the terms of this special regime (“Special Hiring Regime”), the hiring of third parties for the purposes of the aforementioned Substantive Productive Activities shall not be governed by the federal legislation generally applicable to the acquisitions, leases, and services of the federal government, but rather, by the provisions issued by the PEMEX Administrative Council (“Administrative Conditions of Hiring”), which may be modified by the Council from time to time in accordance with common international practices.¹³⁰

Fifth, according to articles 56 and 57 of the Act, in order to select the companies with which PEMEX will enter into Contracts for Works and Services, one of the following methods must be followed: (1) public tender through a public announcement that will allow all interested parties who wish to make an offer and who meet PEMEX’s experience and capacity requirements to apply; (2) direct invitation addressed to at least three pre-selected companies; or (3) direct hire.¹³¹ These schemes are established so that PEMEX may obtain the best possible conditions of hire in terms of quality and price under any circumstance.

Sixth, the Act creates a new corporate governance structure, headed by the PEMEX Administrative Council,¹³² whose tasks include the approval of Contracts for Works and Services that exceed a certain amount, the PEMEX business plan, and the Administrative Conditions of Hiring for third party contractors.¹³³ The PEMEX Administrative Council will be aided by the following committees: the Audit and Performance Evaluation Committee, the Strategy and Investments Committee; the Remunerations Committee; the Acquisitions, Leases, Works, and Services Committee; the Environmental and Sustainable Development

128. *Id.* art. 61.

129. *Id.* art. 2, § 1.

130. *See generally id.*

131. *Id.* arts. 56, 57.

132. The Administrative Council is comprised of fifteen members: five who are designated by the PEMEX Workers’ Union, six who are representatives of the state and designated by the President, and four who are “professional advisors” and designated by the President with the final approval of the Senate. Ley de Petróleos Mexicanos [The Petróleos Mexicanos Act], *as amended*, art. 8, Diario Oficial de la Federación [D.O.], 28 de Noviembre de 2008 (Mex.).

133. *Id.* art. 19.

Committee; the Transparency and Accountability Committee; and the Technological Research and Development Committee.¹³⁴

B. The Regulation to the Petróleos Mexicanos Act

The Regulation to the Petróleos Mexicanos Act contains additional elements that further specify the scope of the content that clauses in Contracts for Works and Services may contain. In discussing the content of the clauses, various commentators have questioned the President and the Ministry of Energy's power to publish the Regulation to the Petróleos Mexicanos Act. These critics point out that the Regulation includes some contractual provisions for Contracts for Works and Services and a definition of Substantive Productive Activities that go beyond what is provided for in the Petróleos Mexicanos Act and the Regulatory Act. The Regulation's additional elements include at least the following.

First, "substantive projects" are defined as the group of activities and investments, including their design and planning, that are necessary for the completion of Substantive Productive Activities and the creation and preservation of economic value ("Substantive Projects").¹³⁵ In other words, all hiring necessary to execute Substantive Projects, not only what is necessary to complete Substantive Activities, shall, therefore, also be subject to the Special Hiring Regime.

Second, the Regulation to the Petróleos Mexicanos Act permits PEMEX to agree to remunerations based upon formulas or schemes that allow a set price to be obtained in cash in Contracts for Works and Services, as long as they conform with applicable law.¹³⁶

Third, remunerations for Contracts for Works and Services must be fixed in clear terms upon the signing of the contract and may be established based on the degree of compliance with specified goals or based upon explicit and quantifiable indicators, expressed in measurable units of common usage in the oil and gas industry.¹³⁷ Such quantifiable indicators include: productivity, capacity, reserves, recuperation of reserves, execution times, costs incurred or savings gained, economies of scale, and others that result in more efficient performance or greater profits for PEMEX or that contribute to improving the results of the projects referred to in said contracts.¹³⁸

134. *Id.* art. 22.

135. Reglamento de la Ley de Petróleos Mexicanos [The Regulation to the Petróleos Mexicanos Act], *as amended*, ch. 1, art. 2, § XVII, Diario Oficial de la Federación [D.O.], 4 de Septiembre de 2009 (Mex.).

136. *Id.* ch. IV, § II, part 6, art. 62.

137. *Id.*

138. *Id.*

Fourth, the remunerations for Contracts for Works and Services may be conditioned upon the generation of cash flow by the projects referred to in said contracts, but compensation and penalties agreed to between the parties must always form a part of the corresponding remunerations.¹³⁹

Fifth, in accordance with the terms set out in the Administrative Conditions of Hiring, Contracts for Works and Services must establish procedures for any necessary review and amendment of the remuneration terms.¹⁴⁰

Sixth, the Regulation to the *Petróleos Mexicanos Act* allows PEMEX to incorporate the best practices for the efficient administration of Contracts for Works and Services in the actual contract.¹⁴¹ These best practices provide the contractual mechanisms necessary to solve problems that may arise during the execution of the contract, including any differences and discrepancies that arise between the parties.¹⁴² Further, when dealing with differences of an exclusively technical nature, the Regulation allows the parties to submit such disputes to the judgment of experts directly appointed by the parties, who will be constrained by the terms and conditions agreed to in the contract.¹⁴³

Seventh, the Administrative Conditions of Hiring establish the causes, procedures, and effects of an “administrative rescission,” early termination, and the total or partial suspension of contracts to perform the acquisitions, leases, works, and services of the aforementioned Substantive Productive Activities.¹⁴⁴ “Administrative rescission” refers to the rescission procedure established by PEMEX, which does not require judicial or arbitral declaration to take effect.¹⁴⁵

Eighth, in the event an “administrative rescission” of a contract occurs, the Regulation to the *Petróleos Mexicanos Act* authorizes PEMEX to take control of the project and immediately continue its execution, either directly or through a separate contractor.¹⁴⁶ The Regulation to the *Petróleos Mexicanos Act* states that parties will then proceed to the evaluation and payment of expenses to which the contractor is entitled

139. *Id.*

140. *Id.*

141. Reglamento de la Ley de *Petróleos Mexicanos* [The Regulation to the *Petróleos Mexicanos Act*], as amended, ch. IV, § II, part 6, art. 63, *Diario Oficial de la Federación* [D.O.], 4 de Septiembre de 2009 (Mex.).

142. *Id.*

143. *Id.*

144. *Id.* ch. IV, § II, part 7, art. 64.

145. *Id.*

146. *Id.* ch. IV, § II, part 7, art. 65.

for its performance, provided that this party duly evidences that its actions have, albeit partially, complied with the terms of the contract.¹⁴⁷

Ninth, a concept of “settlement” upon the termination of Contracts for Works and Services is created in order to establish the level of performance of the reciprocal obligations between parties.¹⁴⁸ Faced with a conflict between parties, PEMEX is authorized to agree to any necessary adjustments, revisions, and concessions to reach a settlement. PEMEX must keep in mind all the arguments in favor and against each contested issue, as well as the agreements, compromises, or transactions agreed to in finalizing any pending disputes.

IV. ADMINISTRATIVE CONDITIONS OF HIRING

Under the terms of article 53 of the *Petróleos Mexicanos Act* and articles 48, 64, and 66 of the *Regulation to the Petróleos Mexicanos Act*, the *Administrative Conditions of Hiring* shall contain the following elements. The following is a summary of elements from article 53.

- (1) The terms by which public tenders, direct hires, and restricted invitations will be conducted.
- (2) The general requirements for announcing calls for tender and the terms of tender, such as the deadlines for each stage of the tender and the causes for declaring their nullity.
- (3) The mechanisms to determine prices and their adjustments, upon considering, among other things, the establishment of a price catalogue for the petroleum industry.
- (4) The mechanisms to adjust performance programs, critical deadlines, and date of completion.
- (5) The measures to ensure economic resources are administered with efficiency, efficacy, transparency, and in good faith.
- (6) In the hiring procedure, the principles of transparency, maximum publicity, equality, competition, simplicity, and expediency shall be emphasized.
- (7) Contracts entered into shall be published on the webpage of the relevant organization, under the terms of the *Federal Act on Transparency and Access to Public Governmental Information*.
- (8) The *Acquisitions, Leases, Works, and Services Committee*, or, where appropriate, the respective committee(s) of the PEMEX subsidiary organizations, shall decide to originate restricted invitation or direct hire procedures when appropriate, based upon the justification presented to it to grant that effect by the relevant area or committee.

147. *Reglamento de la Ley de Petróleos Mexicanos* [The Regulation to the *Petróleos Mexicanos Act*], *as amended*, ch. IV, § II, part 7, art. 65, *Diario Oficial de la Federación* [D.O.], 4 de Septiembre de 2009 (Mex.).

148. *Id.* ch. IV, § II, part 7, art. 66.

- (9) The application of the same requirements and conditions for all participants through public tender and restricted invitation.
- (10) The circumstances in which PEMEX will abstain from receiving proposals, making acquisitions or leases, or entering into contracts for works and services, among other things, are with persons who:
- (a) Have a conflict of interest with said organization(s);
 - (b) Are unable to perform the object of the agreement or their profession in general;
 - (c) Are disabled from performing owing to an order from the Ministry of Civil Service to such effect;
 - (d) Have outstanding nonperformances to resolve with said semi-public organizations;
 - (e) Are not licensed to make use of intellectual property rights or other exclusive rights related to the matters referred to in this article;
 - (f) Have unlawfully obtained privileged information; or
 - (g) Make use of third parties to avoid the provisions of this section.
- (11) In the hiring procedures, PEMEX must require minimum percentages of national participation in order to authorize the hiring decision, such as establishing preferences in qualification and selection in favor of the proposals that make use of human resources, goods, or services of national origin, in accordance with the guidelines issued by the Administrative Council.
- (a) The previous [clause shall be complied with] provided there is a sufficient supply of inputs and materials from the local market and such policy does not prejudice price, quality, financings, opportunity, and any other relevant circumstances.
 - (b) PEMEX shall give effect to the reserves and percentages for the energy sector as agreed in the treaties entered into by the State.
 - (c) In national public tenders, all other things equal, PEMEX shall decide in favor of small and medium-sized businesses in order to foment their development and participation.
- (12) The regulation of matters related to entering into multi-year contracts for public works and services, including:
- (a) The incorporation of technological advances;
 - (b) Changes in the cost of the works, in conformity with the changing market conditions of material inputs or equipment;
 - (c) Modification of the stipulations of the contract in relation to unforeseen events and the volume of the works contracted for; and

- (d) Recognition of duly justified expenses unspecified in the contract.
- (13) The causes and procedures for suspension, early termination, and the administrative rescission of contracts.¹⁴⁹

Continuing, the Administrative Conditions of Hiring shall also contain the following elements from articles 46, 64, and 66.

- (14) The rules that PEMEX must apply in relation to hiring procedures, such as:
 - (a) The performance of promotional acts within the market;
 - (b) Prequalification or prescreening mechanisms;
 - (c) Methods for the evaluation of proposals;
 - (d) Subsequent discounted offer mechanisms;
 - (e) Conditions for the substitution of bidders prior to the signing of the corresponding contract, in the case of joined proposals; and
 - (f) General rules to which the price negotiation phase shall be subject.
- (15) The contractual rules that PEMEX must apply, in relation to:
 - (a) Remunerations and additional compensations, as well as mechanisms to adjust the same;
 - (b) Modifications to contracts;
 - (c) Conventional penalties;
 - (d) Guarantees;
 - (e) Limits to liability;
 - (f) Subcontracts;
 - (g) Mechanisms to prevent and resolve disputes;
 - (h) Cession and transfers; and
 - (i) Settlement.
- (16) Rules that facilitate the implementation of competitive contracting procedures in terms of costs, permitting, and deadlines, comparable to the best practices at the international level.
- (17) Events in which social witnesses may participate in order to strengthen transparency, impartiality, and good faith in the hiring procedure.
- (18) Causes, procedures, and effects of an administrative rescission, early termination, and the total or partial suspension of Contracts for Works and Services for Substantive Productive Activities. The rescission procedure shall be of a purely administrative nature and shall not require a prior judicial or arbitral decision to such effect.
- (19) When a works contract has been administratively rescinded, PEMEX shall take possession of the same and immediately

149. See Ley de Petróleos Mexicanos [The Petróleos Mexicanos Act], *as amended*, art. 53, Diario Oficial de la Federación [D.O.], 28 de Noviembre de 2008 (Mex.).

continue with its execution, either directly or through a separate third party contractor. If relevant, it will proceed to evaluate and pay expenses incurred as a consequence of such rescission and that duly correspond to the contractor, provided these are duly proved and related with the, albeit partial, compliance of the relevant contract, and provided that such action is in PEMEX's best interests. It may at any time abstain from declaring an administrative rescission, for the effects of which it shall adopt the control and intervention measures necessary to guarantee the execution of the relevant contract.¹⁵⁰

The Administrative Council is currently analyzing various drafts of the Administrative Conditions of Hiring that contain the aforementioned elements. The power to approve and publish the Administrative Conditions of Hiring corresponds exclusively to the Administrative Council. The Administrative Conditions of Hiring are expected to be a document modeled upon current best practices in the outsourcing of petroleum sector projects.

While it is not anticipated that the Administrative Conditions of Hiring will contain an exhaustive list of the specific types of clauses and conditions to be contained in Contracts for Works and Services related to Substantive Productive Activities, they probably will include a general catalogue that will facilitate the implementation of the specific clauses and conditions. Having such a catalogue within the Administrative Conditions of Hiring will guarantee certainty to both PEMEX and its contractors that Contracts for Works and Services for Substantive Productive Activities will comply with a series of elements previously defined by the Administrative Council, which will recognize them as valid contracts and may demand their performance.

Additionally, the Administrative Conditions of Hiring will identify one more important element—the mechanism through which the Administrative Council will authorize the Contracts for Works and Services when express authorization is required.

V. THE ENERGY REGULATORY COMMISSION ACT

On November 28, 2008 the Ministry of Energy published certain reforms to the Energy Regulatory Commission Act (“ERC Act”) in the Official Federal Gazette. Based on these reforms, in article 2, the powers of the ERC were extended in relation to the granting of permits, terms and conditions to which the service providers shall be subject, the issuing of methodologies to calculate considerations, and the determination of

150. *See generally* Reglamento de la Ley de Petróleos Mexicanos [The Regulation to the Petróleos Mexicanos Act], *as amended*, arts. 48, 64, 66, Diario Oficial de la Federación [D.O.], 4 de Septiembre de 2009 (Mex.).

the exclusive geographical areas for the distribution of the following products and activities:

- (1) First-Hand Sales of gas, combustibles, and basic petrochemicals. First-Hand Sale shall be understood to mean the first transfer of ownership within national territory from PEMEX to a third party . . . ;
- (2) The transportation and distribution of gas, the products obtained from refining petroleum and basic petrochemicals through pipelines, as well as storage facilities directly linked to transport or pipeline distribution systems, or that form an integral part of the importation or distribution terminals of said products; and
- (3) The transportation and distribution of Biofuels via pipelines, such as their storage facilities directly linked to transport or pipeline distribution systems and importation or distribution terminals for such products.¹⁵¹

Under the terms of the reforms to the ERC Act, it is the ERC's responsibility to guide and monitor compliance with the general administrative provisions applicable to persons who engage in the regulated activities. As such, it is yet to be seen what parameters the ERC will use in granting permits, as well as the extent of the activities to be performed in accordance with those permits.

VI. THE NATIONAL HYDROCARBONS COMMISSION ACT

On November 28, 2008 the National Hydrocarbons Commission Act ("NHC Act") was published in the Official Federal Gazette, by which the National Hydrocarbons Commission ("NHC") was created as a decentralized branch of the Ministry of Energy.

Under article 3, the NHC must attempt to ensure that PEMEX's exploration and extraction projects are performed in accordance with the following principles.

- (1) Elevate the rate of recuperation and the obtaining of the maximum possible volume of crude oil and natural gas in the long term, in economically viable conditions, from wells, fields, and deposits that are abandoned, in the process of being abandoned and currently being exploited.
- (2) The repositioning of oil and gas reserves as guarantees of the Nation's energy security duly based upon the best available technology and in conformity with the economic viability of the projects.

151. Ley de la Comisión Reguladora de Energía, [The Energy Regulatory Commission Act], *as amended*, art. 2, Diario Oficial de la Federación [D.O.], 28 de Noviembre de 2008 (Mex.).

- (3) The use of the most adequate technology for the exploration and extraction of hydrocarbons, based on production and economic results.
- (4) The protection of the environment and the sustainability of natural resources in petroleum exploration and extraction [activities].
- (5) The realization of exploration and extraction of hydrocarbons, ensuring the existence of the conditions necessary to industrial security.
- (6) The reduction of burning and flaring gas and hydrocarbons to a minimum.¹⁵²

To achieve the aforementioned principles, under article 4, the NHC has been endowed with the authority to do the following:

- (1) Contribute to the technical elements for the design and definition of hydrocarbons policy in the country, to formulate sectoral programs in matters relating to the exploration and extraction of hydrocarbons, in conformity with the mechanisms established by the Ministry of Energy;
- (2) Participate with the Ministry of Energy in determining policy relating to the restoration of hydrocarbon reserves;
- (3) Establish the technical provisions applicable to the exploration and extraction of hydrocarbons where appropriate and verify its compliance;
- (4) Provide, where appropriate, the technical support requested by the Ministry of Energy to fulfill its function;
- (5) Establish the technical guidelines that must be observed in the design of oil and gas exploration and extraction projects, taking into account the opinion of PEMEX. These guidelines will state the specific elements that all exploration and extraction projects should generally follow, including:
 - (a) Exploration success and the incorporation of reserves;
 - (b) The technologies to be used to optimize exploitation in the various stages of the projects;
 - (c) The rate of extraction from fields;
 - (d) The recuperation rate of deposits;
 - (e) The technical evaluation of the project; and
 - (f) Technical references that conform with best practices.
- (6) Produce technical reports on hydrocarbon exploration and exploitation projects, prior to the grant of concessions and any substantive modifications made to the same by the Ministry of Energy;

152. Ley de la Comisión Nacional de Hidrocarburos [The National Hydrocarbons Commission Act], *as amended*, art. 3, Diario Oficial de la Federación [D.O.], 28 de Noviembre de 2008 (Mex.).

- (7) Formulate technical proposals to optimize the factors of recuperation in projects for hydrocarbon extraction;
- (8) Establish mechanisms to evaluate the operational efficiency of hydrocarbon exploration and extraction;
- (9) Obtain, analyze, and maintain up-to-date information and statistics related to:
 - (a) Crude oil and natural gas production;
 - (b) Proven, probable, and possible reserves;
 - (c) The relation between production and reserves;
 - (d) Prospective resources;
 - (e) Geological and geophysical information; and
 - (f) Other indicators necessary to perform its functions as established in this Act.
- (10) Perform evaluation, quantification, and verification studies of petroleum reserves;
- (11) Request and obtain from PEMEX, all the technical information required to perform its functions;
- (12) Issue the handbooks that must be followed by PEMEX in providing information regarding exploration and extraction projects, reports, and other data requested by the NHC;
- (13) Supervise, verify, monitor, and, where necessary, certify compliance with its resolutions;
- (14) Issue opinions regarding the assignment or cancellation of certain areas of exploration and assignment of exploitation of petroleum resources;
- (15) Issue opinions regarding permits for recognition and surface petroleum exploration in order to investigate possible petroleum resources;
- (16) Propose the establishment of petroleum reserve zones to the Ministry of Energy;
- (17) Establish and maintain a public Petroleum Registry that will be public and contain at least the following information:
 - (a) The resolutions and agreements of the NHC;
 - (b) The reports, orders, decrees, and standards that it issues;
 - (c) The agreements, contracts, and other legal acts that, [according to the relevant legal provisions], must be recorded in the Registry;¹⁵³
 - (d) The decrees for the provisional or definitive occupation or expropriation of lands required by the petroleum industry, as recorded in the Petroleum Land Registry;
 - (e) The assignments of areas . . . as recorded in the Petroleum Land Registry;

153. In this sense, article 60 of the *Petróleos Mexicanos Act* establishes the obligation for PEMEX to send the contracts it enters into to the NHC for their registration, in accordance with the relevant legislation in relation to the confidentiality and reservation of such information.

- (f) Presidential Decrees establishing areas of petroleum reserves that incorporate lands [to or dissolve lands from the same], as recorded in the Petroleum Land Registry; and
- (g) Other relevant documents as required by the applicable laws.¹⁵⁴

In relation to the additional powers granted to the NHC, the Regulation to the Regulatory Act creates the “National Hydrocarbon Information System.” The System’s purpose is to systemize and update all relevant information in the following declarative administrative registries:

- (1) The petroleum registry that will cover the NHC, in which the information and documents described in its constituting law shall be registered;
- (2) The Land Petroleum Registry, under the charge of the Ministry of Energy, in which information related to assignments, permits, authorizations, verifications, inspections, declarations of public utility to occupy and expropriate lands, decrees to establish Petroleum Reserves and technical reports incorporating lands to and dissolving lands from these, and all other relevant information as established in the respective agreement;
- (3) The Hydrocarbons Reserve Registry, under the charge of the Ministry of Energy, which shall consist of a database of information, documents, and statistics obtained through estimation reports of remaining proven, probable, and possible reserves by field, fluid type, and original volume, including related evaluation, quantification, or certification studies, based on the information provided by the NHC; and
- (4) The registry of geological information, which will cover the NHC, will contain studies of basins that have been explored or exploited, as well as petroleum systems, the geological information of exploratory wells, and updates of prospective resources.¹⁵⁵

The Ministry of Energy will establish the mechanisms and criteria necessary to provide the general public with access to the information and documentation in accordance with the terms of the Federal Transparency and Access to Public Governmental Information Act.

Also related to the NHC, the Regulation to the Regulatory Act grants the Ministry of Energy the authority to propose the establishment or

154. Ley de la Comisión Nacional de Hidrocarburos art. 4.

155. Reglamento de la Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo [The Regulation to the Regulatory Act to Constitutional Article 27 in matters relating to Petroleum], *as amended*, art. 5, Diario Oficial de la Federación [D.O.], 22 de Septiembre de 2009 (Mex.).

dissolution of Areas of Petroleum Reserves to the federal government. In these areas, exploration activities are restricted and exploitation activities are prohibited. Thus, PEMEX and its contractors must act in accordance with the restrictions imposed.

To conform with the above, the Regulation to the Regulatory Act details the procedures and requirements with which PEMEX must comply in order to obtain, modify, and maintain the Petroleum Concessions that allow it to undertake exploration and production activities.

VII. CHALLENGES FOR THE PETROLEUM REFORM

The Petroleum Reform is subject to many challenges. The favorable resolution of pending lawsuits is a critical step. Hopefully, the resolution of one of the suits filed before the Supreme Court will confirm that the new areas of business permitted under the terms of the Regulation to the *Petróleos Mexicanos* Act and the Regulation to the Regulatory Act can be performed by private entities in compliance with the terms of the Mexican Constitution. The resolution of another series of suits will hopefully clarify that the monopoly of petroleum resources set out in the Constitution refers solely to petroleum resources existing within Mexican soil, and not to the resources freely imported into Mexico for their commercialization within the country. Finally, favorable resolution of any future suits before the Supreme Court challenging the constitutionality of Contracts for Works and Services for Substantive Productive Activities is critical. In order to do this, it will be necessary to consult international practice and international judicial resolutions in the field, as well as to consider the market opening currently taking place in Mexico.

There is also a need for judicial action before Mexican courts where citizens can demand judicial intervention to ensure that: (1) the state makes efficient use of its petroleum resources to the benefit of the entire national economy, and (2) private investment options other than those dictated by the Congress will be allowed where Congress passes legislation restricting private investment or seeks a *sui generis* system for Mexico that is incompatible with international practices in the petroleum industry, and that model fails.

It will be equally important to gain the approval of the outstanding regulation that will define: (1) the issue of importing crude oil and refining it in Mexico for subsequent export or sale to PEMEX or for its unilateral consumption, and (2) the possibility of third parties' performance of activities relating to transport, storage, and distribution, not only as service providers to PEMEX, but also in association with other private entities that will use the resource for their own consumption. The ERC also must define the parameters it will use in

granting permits under the newly established regime. Similarly, as the new regulatory entity granted broad powers by the NHC Act, the NHC must set norms and resolutions to regulate the policies PEMEX and its contractors must follow in performing their activities in the petroleum industry.

The breadth that the scope of the Contracts for Works and Services for the completion of Substantive Productive Activities will have—based on the new parameters foreseen both in the Regulation to the *Petróleos Mexicanos* Act and in the Administrative Conditions of Hiring as approved by the Administrative Council—must be determined. The goal is to make such contracts more attractive to international petroleum companies, but at the same time to comply with the restrictions as foreseen in both the Constitution and the Regulatory Act.

It will be necessary to successfully attract interest from private investors to finance, construct, and operate petroleum refineries, storage facilities, and transportation and distribution facilities, as has been the case with regard to Liquefied Natural Gas (“LNG”). This also will require a permit issued by the ERC. Similarly, it will be important to make PEMEX’s identity as a public entity with private international petroleum companies viable under the scheme of Contracts for Works and Services for Substantive Productive Activities. However, PEMEX may not enter formal alliances, associations, or shared production schemes, which are expressly prohibited by the Regulatory Act. Finally, working within the boundaries of the applicable international treaties to agree on terms for the exploitation and production of hydrocarbons in cross-border deposits will be critical. Forming associations or entering shared production agreements, among other schemes, are permitted in this context.