



**GRAVES DOUGHERTY HEARON & MOODY**

A Professional Corporation

**John B. McFarland**  
Board Certified, Oil, Gas & Mineral Law  
Texas Board of Legal Specialization

512.480.5618  
512.480.5818 (fax)  
jmcfarland@gdhm.com

MAILING ADDRESS:  
P.O. Box 98  
Austin, TX 78767-9998

November 21, 2018

The Honorable Blake A. Hawthorne, Clerk  
Supreme Court of Texas  
201 West 14th Street, Room 104  
Austin, TX 87701

Re: Case No. 17-0332, *Barrow-Shaver Resources Company v. Carrizo Oil & Gas, Inc.*

To the Honorable Court:

Texas Land and Mineral Owners Association ("TLMA") submits this letter as a friend of the Court to urge affirmance of the Tyler Court of Appeals' decision. TLMA is a statewide advocacy association whose members are farmers, ranchers, and mineral owners. TLMA's interests are in promoting a business and legal environment that accommodates the continued exploration for and production of oil and natural gas and that also protects the property rights of land and mineral owners.

The only issue in this case is the meaning and effect of the consent requirement in a farmout agreement. The issue is important to members of TLMA because it may also have important implications for similar consent requirements commonly included in oil and gas leases. Because not all oil and gas operators exercise the same level of diligence, many land and mineral owners view restrictions on assignability as a very important issue in their oil and gas lease negotiations, especially if the lessor is also the owner of the surface estate of the leased premises. Although an oil and gas lease is considered in Texas to be a conveyance of the mineral estate for a term, it is also a contract that imposes obligations and limitations on the lessee's use of the surface estate. It is therefore important for the landowner to know who will be operating on its property and to have some say in assignment of those rights and liabilities to another operator.

Consent provisions in oil and gas leases take various forms; some provide that the lessor's consent may not be unreasonably withheld, some do not. Unless the provision imposes some limitation on the lessor's right to grant or deny consent, landowners consider the requirement to be a "hard consent" - meaning that the landowner does not have to justify its refusal to grant consent. The landowner may have had a bad experience with the proposed assignee, or may not consider that the proposed assignee has sufficient financial stability or resources to carry out the

lessee's obligations under the lease. The landowner may have granted its lease to its lessee based on the lessee's particular ability and reputation. If a landowner has to justify withholding consent even though the lease does not expressly require it, the landowner's lease bargain is substantially impaired. The landowner could be faced with a claim, like that in this case, that it is responsible for substantial consequential damages for refusing to grant consent, even though the lease it bargained for did not require it to justify withholding consent to the requested assignment.

It is also not unusual or unreasonable for a lessor to bargain for compensation in return for granting consent to assign. If the lease reserves the right to grant consent to assignment without qualification, that right has value to the landowner and was agreed to by his lessee. There are many types of compensation that might be obtained in exchange for the consent: for example, requiring that defaults in the lessee's obligations under the lease be cured, or requiring the assignee to agree to certain additional obligations regarding protection of the surface estate, or payment of cash consideration.

Lessees who agree to hard-consent provisions in an oil and gas lease also understand the implications of that agreement and voluntarily enter into such contracts in exchange for the value of rights conveyed therein. Such provisions may substantially impair a lessee's ability to assign the lease, and the lessee understands that it will be its burden to convince its lessor that consent to a proposed assignment is in the lessor's best interest. Like Barrow-Shaver in the case before the Court, the lessee understands that its lessor may insist on sharing in the benefit redounding to the lessee from the proposed assignment. That is part of the bargained-for consideration in the agreement.

Both parties in this appeal agree that the consent provision being construed is not ambiguous. Industry custom and usage cannot be used to interpret a contract in a way that contradicts its express language. TLMA requests that the Court affirm the decision of the Court of Appeals.

No fees were paid for the preparation of submission of this letter. A copy has been served on all counsel of record.

Very truly yours,

/s John B. McFarland

John B. McFarland

State Bar No. 13598500

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 20, 2018, a true and correct copy of this filing was served via e-services on all counsel of record.

*/s/ John B. McFarland*

John B. McFarland

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