

# The Texas Lawbook

Free Speech, Due Process and Trial by Jury

## Impressions from the TRRC's Historic Decision Against Prorating

MAY 22, 2020 | J. DENMON SIGLER AND SCOTT SHELTON

The Texas Railroad Commission dismissed a motion by Pioneer Natural Resources U.S.A. Inc. and Parsley Energy Inc. requesting that the TRRC order prorating in Texas. Texas has not prorated oil production since 1972, and for now that streak will continue.

### How We Got Here

The TRRC's historic decision caps off a five-week effort which included several key milestones: a March 30 motion by Pioneer and Parsley requesting the TRRC consider prorating, an initial hearing April 14, an interim hearing April 21 and a May 5 final hearing and decision by the TRRC to dismiss the motion.

Pioneer and Parsley kick started their efforts March 30 by filing a motion with the TRRC requesting that it (1) determine the reasonable market demand for oil, (2) consider whether "waste" was occurring or is reasonably imminent, and (3) if appropriate, issue a proration order to prevent such "waste." The TRRC has authority to rule on these matters under several sections of the Texas Natural Resources Code, including Sections 85.046, 85.051, 85.054, and 85.058. Under these sections, if the TRRC determines "waste" (production in excess of reasonable market demand) is occurring or is imminent, then the TRRC must take any action it considers reasonably required to correct, prevent or lessen the "waste."

The motion by Pioneer and Parsley set off a firestorm of debate across the oil and gas industry over how to respond to the demand reductions and oil price collapse brought

about by COVID-19 and oversupply, focusing on whether free markets should be allowed to adjust on their own or whether unprecedented times warrant extraordinary intervention by the TRRC.

In advance of the initial April 14 virtual hearing, over 200 individuals, companies and groups submitted public comments to the TRRC. At the hearing, more than 50 individuals and groups presented to the three commissioners over a period of 10 hours, with over 20,000 virtual attendees watching the event. Following the hearing, Commissioner Ryan Sitton released a draft prorating order proposing a 20% oil production cut across Texas (approximately 1 million barrels per day) until global demand exceeded 85 million barrels per day. The draft order was contingent on other states and countries collectively reducing their own production by 4 million barrels per day, and would have exempted small operators in Texas producing less than 1,000 barrels per day. At the TRRC's April 21 hearing, the commissioners did not vote on prorating but rather requested more time to review the legal ramifications of a potential prorating order to ensure any such order could withstand legal scrutiny. Chairman Christian also sought additional time to liaise

with other states' oil and gas regulatory bodies, as well as other oil producing countries. Finally, Chairman Christian assembled a Blue Ribbon Task Force of key industry participants to generate ideas and recommendations to assist Texas' oil and gas industry during the current crisis.



J. Denmon Sigler



Scott Shelton

# The Texas Lawbook

## Historic Decision

At the May 5 hearing, the commissioners again did not vote on prorationing, but instead dismissed the March 30 motion by Pioneer and Parsley, putting an end to the matter.

Each of the Commissioners spoke on the issue. Commissioner Sitton noted that he did not put the matter up for a vote because he felt the support was not there. Chairman Wayne Christian described his conversations with other states and countries regarding their production levels and their unwillingness to respond with production cuts at the current time. He then focused on the need for free markets and operators to act independently in their best interests. Additionally, Chairman Christian expressed his view that it would be inappropriate to order prorationing simply because such a remedy exists, and pointed to the Blue Ribbon Task Force as evidence that the TRRC was taking other proactive steps to address the crisis. Commissioner Christi Craddick engaged in a brief dialogue with the TRRC's General Counsel, Alex Schoch, during her limited remarks.

Commissioner Sitton closed by explaining that in his assessment, the TRRC did not effectively determine whether “waste” was occurring under the Code. While noting that proration may not necessarily be the right answer, Commissioner Sitton expressed that he would have preferred a more analytical versus philosophical approach to the proceedings. Chairman Christian responded that the significant public hearings provided the Commissioners ample opportunity to make the necessary “waste” determination under the Code. With that, Chairman Christian and Commissioner Craddick dismissed the motion with their two votes.

While the TRRC stopped short of ordering statewide production cuts, the commissioners instituted a number of alternative measures at the hearing intended to provide temporary relief to the Texas oil and gas industry, including the following: waiving certain permit application fees for the remainder of 2020, authorizing oil storage in non-salt formations upon application, lifting mandatory hearing requirements for the construction of underground facilities (the facilities must still be administratively approved and follow established safety and environmental requirements), extending plugging and abandonment requirements, allowing certain exceptions to statewide rules related to pits and alternate casing/tubing programs, and allowing the TRRC's legal enforcement division to waive penalties for certain violations.

***J. Denmon Sigler**, a partner at Baker McKenzie's Houston office, chairs the firm's North American energy transaction practice. She advises clients on complex, frequently cross-border, transactions involving oil and gas, midstream, refining, chemical and petrochemical companies and assets.*

***Scott Shelton**, an associate at Baker McKenzie's Houston office, represents oil and gas clients in a range of acquisitions, divestitures, and transactional matters.*

***Baker McKenzie** partner **Luis F. Gomar** and associate **Andrew Ketner** also contributed to this article.*