Doing Business in the New Louisiana

First, I want to thank you for inviting me to speak at this prestigious event. It is a great honor, and I hope my remarks do it justice. Second, I would like to thank Lanny for his kind words of introduction.

Moving to the substance of my talk, I admit that I have had some difficulty selecting a topic because of all the excellent presentations previously made by the various speakers at this seminar which covered a wide variety of sometimes esoteric legal concepts. I therefore concluded that the most interesting thing I could do would be to initially bypass the law and first speak to you as a native of Louisiana about my perception of what is going on in Louisiana today, and its potential impact on the oil and gas business. I know that many of you have been wrestling with the idea of doing business in Louisiana, because you may perceive it to be an unfriendly business environment, but the message I want to bring to you today is that I and many other Louisianans believe Louisiana can and will do better.

First, as many of you know, Louisiana, on January 14, 2008, inaugurated Bobby Jindal as its 55th Governor. Governor Jindal is at this time the youngest serving governor in the United States and is the first individual of Indian [India] descent to be elected as a state governor. While a four-year member of Congress and during his campaign for Governor, he has embraced a decidedly conservative and pro-business attitude. For example, on February 10 of this year, he called a special session of the Louisiana Legislature to amend and strengthen the ethics laws for public officials which

hopefully will help to change the perception in some quarters that Louisiana is rampant with corrupt public officials who have their public hands out for private gain. Governor Jindal has also indicated that he will request a repeal of several burdensome taxes on businesses, such as the current one-cent utility tax. As an aside, radio talk show host and ultra-conservative commentator, Rush Limbaugh, several weeks ago announced that Governor Jindal would make an excellent Vice Presidential candidate on John McCain's ticket. Governor Jindal, however, expressed no interest in that position.

The editors of the Times-Picayune on the morning of Governor Jindal's inauguration I believe expressed the collective view of the majority of Louisianans when they labeled the Jindal administration as one of "Great Expectations." This was based in large part on his pre-election commitment to concentrate on such major social issues as a better public health system, better public schools, reduction of crime and intensive coastal restoration. All of those are certainly laudable goals which relate to the quality of life for Louisiana citizens, but unless I miss my guess, this audience is principally interested in hearing what the Governor has in mind for business, and the oil and gas business in particular.

With that subject in mind, I asked my former law partner and good friend, Clancy DuBos, to bring me up to date. For those of you who do not know Clancy, he is a highly regarded political pundit located in New Orleans who is very familiar with state and local issues. Clancy in turn put me in touch with Chris John's office; Mr. John is a former representative from Louisiana to the U.S. Congress who has recently accepted the position as President of the Louisiana Mid-Continent Oil & Gas Association. Here is

what Clancy and Congressman John, through his Public Relations Coordinator, Larry Wall (who can be contacted at "wall@images.com" or by telephone at (225)387-3205, or fax (225)344-5502), advised me we can look forward to in the coming months:

> The ethics reform package being pushed by Governor Jindal will include such things as:
>
> 1) Greater financial disclosures by legislators and other elected officials. There is some question about how far into non-statewide elected public officials this will apply. For example, Governor Jindal wants the financial disclosure provisions to apply to all elected officials, including judges, and that is being resisted by many Louisiana judges, who argue that they have their own Cannon of Ethics, promulgated by the Louisiana Supreme Court and that if changes are to be made their own cannon of ethics should be changed. This issue has been and is being hotly debated.
>
> 2) There will be proposed limits on legislators and their families doing business with the State. This is being resisted as unfair to family members in the instance of public bid contracts where a family corporation might submit the lowest bid.
>
> 3) There will be more detailed reporting required of lobbyists; and their reports are to be filed electronically.
>
> 4) There will be a broad prohibition against contingency fee contracts for lobbyists working to pass or defeat a particular bill and a restriction will be put on free gifts from lobbyists to elected officials. For example, Jindal has proposed no meals can be paid for by lobbyists in excess of $50.00 per person, but the Baton Rouge Restaurant Association is asking that the limit be raised to $100.00 per person.
>
> 5) Many of the existing exemptions in the current ethics code will also be eliminated.

6) Elected public officials will not be permitted to lobby state agencies.

7) A super majority of the legislature will be required to again amend the ethics code, making it difficult to eliminate the changes to be made this year.

8) Governor Jindal also has issued an executive order that requires all of his Cabinet secretaries to make the same financial disclosures beginning in 2009 as are required of the Governor.

As I understand the situation, there are some 60+ items of reform included in the call of the current special session which is scheduled to end on March 1.[1]

On a sour note, unfortunately, the Governor's staff apparently inadvertently forgot to include a $118,000 contribution from the Republican Party in the Governor's own recently filed financial disclosure statement, but he has rectified that omission and hopefully that will not adversely affect the passage of his ethics reform package.

On the issue of tax relief, the Governor is expected to call a special session of the Legislature to deal with tax issues immediately after his ethics reform package is acted on. If the entire package is not enacted in the current special session scheduled to end on March 1, he is expected to call another and possibly a third special session until the entire package is enacted or rejected.[2] The Governor has stated that the recommended tax relief is to be funded in part by the large state surplus which exists in

---

[1] This information was reported by correspondent, Ed Anderson, in the Times-Picayune newspaper of Saturday, February 9. Mr. Anderson can be reached by email at eanderson@timespicayune.com or by telephone at (225)342-5207 for an update.

[2] As of February 27, 2008, many of the core changes proposed by Governor Jindal have been enacted by the Legislature, and the Governor has declared the first special session of the Legislature a huge success.

post-Katrina Louisiana because of the surge in oil and gas prices and additional tax revenue.

Some tax issues which are presently on the table are:

1) An accelerated phase-out of the current tax on debt which is used to calculate the state franchise tax on business entities.

2) A similar phase-out of current taxes on manufacturing materials and equipment.

3) Total elimination of the one (1%) percent tax on utilities.

4) A dedication of recurring transportation taxes such as truck and trailer registration fees, vehicle sales and parts taxes in order to clear the backlog of construction of road projects in the State.

Of further note for the oil and gas business, the Governor has stated publicly that his administration will seek to streamline all governmental operations, including the permitting of oil and gas operations. Governor Jindal has also pledged to oppose any type of oil and gas processing tax which has been a threat hanging over the head of the oil and gas industry for at least the past 15 years.

There obviously is no assurance that all or any part of the Governor's program will be implemented by the Legislature, but it is encouraging to say the least to hear that kind of talk from an elected Louisiana Governor.[3] Moreover, this is a unique time in the history of Louisiana when, because of term limits enacted several years ago,

---

[3] See footnote 2 *supra*.

more than fifty (50%) percent of the Legislature is comprised of "new faces" who hopefully will be persuaded by a strong reform Governor.

I thought it might also be interesting to hear from a Louisiana lawyer who I regard as the best contact person in some of the Louisiana governmental departments with whom you will likely interface if you elect to do business in Louisiana, as I hope you will.

1) For example, if I have a problem with the acquisition, operation or ownership of a State Lease granted by the Office of Mineral Resources of the Department of Natural Resources, better known as the Mineral Board, I always start with ***Rick Heck***. Rick is an attorney for the Board located in Baton Rouge and acts more or less as the Board's chief landman. Moreover, he is an integral part of the staff of the Mineral Board and, as those of you who deal with the Mineral Board know, ninety percent of the battle is getting the staff to support your proposition. He can be reached at (225)342-6122.

2) Another member of the staff of the Department of Natural Resources ("DNR"), of which the Mineral Board is a division, with whom you will likely interface is ***Ike Jackson***. Ike is an attorney employed by the Attorney General's Office who is assigned to the DNR to give advice on specific legal issues. He can be reached at (225)342-2710.

3) And, if neither Rick nor Ike are available, I suggest you contact ***Mary Beth Kling***, telephone (225)342-4606, formerly a secretary and now a special administrative assistant, who has worked for the Board for many years and is very knowledgeable about staff responsibilities and things of that kind.

4) Moving up the ladder a bit, if you have a matter which involves policy issues, I suggest that you go directly to ***Scott Angelle***, telephone (225)342-2710, who has been

retained by Gov. Jindal as the Secretary of Natural Resources. Mr. Angelle, a landman by training, has made a concerted effort to create a more business friendly attitude in the enforcement of regulations adopted by the Office of Conservation, which is responsible for regulating the location, drilling, production and abandonment of oil and gas wells drilled in Louisiana.

5) A currently in vogue investment in Louisiana is the creation of storage caverns for natural gas in salt domes, and the individual I have dealt with in the office of Conservation is ***Evans McIntyre***, particularly as to the permitting and drilling of injection wells. Evans' boss is ***Joe Ball***, and he has been equally helpful. Evans' telephone number is (225)342-5581.

6) Assuming your drilling ventures are successful, which I hope they will be, you will inevitably be faced from time to time with unitization and forced pooling issues, which means you or your company will appear before the Commissioner of Conservation for unit hearings. There are a number of knowledgeable unitization lawyers in Louisiana, and I would be happy to give you some names off the record. Additionally, you should know the name, ***James Welsh***, who is the current Commissioner of Conservation. Commissioner Welsh can be contacted by telephone at (225)342-5500. Other names you should know are ***Todd Keating***, who is the Director of Engineering, and ***Dr. M.D. Kumar***, who is the Director of Geology. These are individuals on whom the current Commissioner is expected to rely, just as prior commissioners relied on Joe Hecker and Arnold Chauvier. You cannot go wrong asking for guidance from either Todd or Dr. Kumar, who can be reached by telephone at (225)342-5507 and (225)342-5501, respectively.

7) Another name worth mentioning is ***Victor Vaughn***, who is the nominal head of the technical staff of the Mineral Board. He can be contacted by telephone at (225)342-4615.

8) An additional name to remember is ***Marjorie McKeithen***, telephone (225)342-4607, who presently is the Assistant Secretary who heads the Mineral Board.

9) Another person who should be mentioned is ***Lisa Liles***, a lawyer who has been appointed the Texas-Louisiana liaison counsel by the DNR to handle related problems. Lisa is a graduate of the University of Houston and was formerly in-house counsel at Anadarko Petroleum. If you have a problem with some DNR regulations, she can be contacted by email at lisa.liles@la.gov or by telephone at (832)465-7534.

10) As many of you know, well drilling permitting is typically handled at the district office level of the Office of conservation, and the names you need to remember are (1) ***Richard Hudson***, (337)262-5777, the District Manager of the Lafayette District, whose office is located in Lafayette, Louisiana, (2) ***Ace Chandler***, (318)362-3611, the District Manager of the Monroe District, whose office is located in Monroe, Louisiana, and (3) ***Jim Broussard***, (318)676-7585, the District Manager of the Shreveport District, whose office is located in Shreveport, Louisiana.

A point which you may also want to remember is the current "*ex parte*" rule which is in effect at the Office of Conservation. I want to thank my partner, Bob Duplantis, for this particular information. This rule is that once a unitization proceeding has been initiated, there can be no *ex parte* communication with the Commissioner or the members of his staff (*see* La. R.S. 49:960). But before any formal filing is made, you are free to talk to the staff or the Commissioner about the proposed proceeding.

Another item worth mentioning, for which I am again in Bobby's debt, is that the current Commissioner is very interested in encouraging CO_2 tertiary recovery

projects. If you have a project which may lend itself to tertiary recovery, it is worth considering because under La. R.S. 47:633.4, the severance tax payments on recovered oil and gas need not be paid until the project has paid out. That could represent a substantial savings. It may also be possible to obtain royalty relief on state-owned lands for tertiary recovery (*see* La. R.S. 30:127).

Consistent with the idea that Louisiana is making an effort to become more business friendly is Act 312 of 2006 (La. R.S. 30:29), which became effective when signed by Governor Blanco on June 8, 2006. This Act was essentially a legislative response to a decision by the Louisiana Supreme Court in the case of *Corbello v. Iowa Production Co., et al*, 850 So.2d 686 (La. 2003), which many people consider to be the genesis of the so-called "legacy lawsuits" which in recent times have plagued the exploration and production business in Louisiana. In these cases, which are promoted by a relatively small segment of the plaintiffs' bar, typically a landowner or a mineral servitude owner, or a group of such plaintiffs, will assert a claim for environmental damages to their property allegedly caused by oil and gas operations conducted on or near the property in question. And, if you or your company, appear in the chain of title pursuant to which the allegedly offending operations were conducted, or if you operated the property and your name appears in the related Office of Conservation records, you can be certain that you or your company will be named as a defendant.

In *Corbello*, after a lengthy jury trial, the plaintiff was awarded $33 million in so-called "restoration damages" based on an obligation to restore included in a surface lease, consisting of $5 million of surface damages and $28 million for "groundwater

contamination" for property that had a total fair market value of $108,000. Moreover, the court in *Corbello* allowed the plaintiff to recover for both "public" and "private" restoration damages under a lease clause requiring same without any corresponding requirement to engage the regulatory jurisdiction or the expertise of the Louisiana Department of Natural Resources ("DNR"). Nor did the court impose a requirement that any of the restoration damages recoverable, including the "public" portion, be used to "remediate the damage." This ruling, in effect, allowed the plaintiffs and their attorneys to pocket the entire award if they chose to do so, plus the award of generous attorneys' fees.

The potential adverse impact of *Corbello* was somewhat lessened in the subsequent case of *Terrebonne Parish School Board, et al v. Castex Energy, Inc.*, 893 So.2d 789 (La. 2005), where the Louisiana Supreme Court ruled, among other things, that restoration damages claimed under Article 122[4] of the Louisiana Mineral Code could not be recovered if the use of the leased property had been a "reasonable use." The basic issue in *Castex* was a claim that canals dredged on the leased premises should be back-filled even though the lease in question did not contain express restoration language requiring that the surface be restored to pre-lease conditions. The Court rejected the Article 122 claim on the ground that dredging the canals was a "reasonable use" and that the lessee had no obligation to restore the leased premises to pre-lease conditions under the circumstances.

---

[4] Article 122 of the Louisiana Civil Code (La. R.S. 31:122) obligates an oil and gas lessee to act as a prudent administrator for the mutual benefit of lessor and lessee.

The filing of legacy lawsuits was not, however, abated as the result of *Castex*, which caused Governor Blanco and the Louisiana Legislature to propose and enact Act 312 of 2006 (La. R.S. 30:29). The Act is specifically stated to be applicable to all lawsuits filed after its effective date, June 8, 2006, and to all then pending cases in which a trial date had been fixed on or before March 27, 2006, no matter if the trial had been continued. It is beyond the scope of this limited lecture to discuss in complete detail the projected impact of Act 312 on the legacy litigation, but for a thorough discussion of that topic, you are referred to an article by my partner, Loulan Pitre, now an ex-member of the Louisiana Legislature, which was published in 20 Tul. Envir. L. Journal 347 (2007).

For present purposes, suffice it to say that Act 312 contains seven (7) major components intended to protect the "public interest" in any litigation claiming environmental damage arising from an "oil field operation." First, Act 312 requires that timely notice of the litigation be given to the DNR and the Attorney General of the State of Louisiana. Second, the Act stays such litigation until thirty (30) days after such notice to the State is given. Third, the State is allowed to intervene in the litigation. Fourth, the Act provides that an initial hearing be held by the district court to determine if any party or person is responsible for the environmental damages in question, and if there is such finding, the party or parties found responsible must submit a remediation plan to the Office of Conservation within the Department of Natural Resources for review and a public hearing at which other plans can be considered. The Office of Conservation then decides which is the "most feasible" plan and submits that plan to the district court. The

Act also allows the plaintiff to submit a response to the proposed plan and a public hearing is then held by the court with input from the DNR on the relative merits of the competing plans. The court will then enter judgment ordering that the recommended plan be implemented unless it decides another plan is more feasible. The court will also order the responsible defendants to deposit the cost of implementing the chosen plan into the registry of the court. The deposited funds are then used to fund the remediation of the damage. Any money left over after the remediation is funded is restored to the defendant or defendants who deposited same. Fifth, as noted previously, the Act provides that the Office of Conservation within the DNR has the right to play a role in determining the most feasible plan for evaluation and/or restoration of environmental damage. Sixth, the Act provides that both the court and the Office of Conservation must oversee the actual implementation of the plan which, as noted, has been determined by the court, after a full hearing, to be the "most feasible plan." Additionally, the Act allows the plaintiff landowners and the State to recover attorneys' fees and costs from the parties which the court finds to be the "party or parties responsible" for the environmental damages. Seventh, the Act also provides that if a private party has a private contractual right to a claim for restoration of the damaged property, nothing in the Act is intended to restrict that private right. So that if a private lease, for example, includes an obligation to restore the premises to its pre-drill condition, nothing in the Act will impact or diminish that right.[5]

[5] The Act also provides that if a case which is subject to the Act is settled, the settlement must be approved by the court, unless the settlement is for a "minimal" amount. The Act does not, however,

As you can imagine, the plaintiffs' bar was not and is not enamored of Act 312, and they accordingly have asserted in several cases that the Act is unconstitutional on a number of grounds, including a claim that the Act divests the plaintiffs of a vested property right and also improperly divests the district court of its jurisdiction to deal with claims based on environmental damages. Once again, it is beyond the scope of this lecture to consider the various constitutional challenges asserted by plaintiffs in legacy lawsuits relative to Act 312, but you are referred to the case of *M. J. Farms, Ltd. v. ExxonMobil, et al*, now pending in the Louisiana Supreme Court under Docket No. 2007-CA-2371, on appeal from a ruling by the district court which, without full explanation, found that the Act was unconstitutional on several grounds. Oral argument was held by the Supreme Court on February 27th. It would be inappropriate for me to comment on the arguments made in a pending case in which my firm is representing several defendants, but I recommend that you obtain and read the briefs filed in the Supreme Court by all parties. At a minimum, I recommend that this case be monitored by you or your attorneys if you are currently a named defendant in a pending Louisiana legacy lawsuit or if you have had or plan to have substantial oilfield operations in Louisiana.

Before leaving Act 312, it is also important to note that the office of Conservation has created a new Environmental Division to manage the issues of oil field site cleanup and closure, the disposal of E&P waste and the administration of the requirements of Act 312. ***Gary Snellgrove***, telephone (225)342-7222, an environmental

---

define "minimal" which causes some uncertainty.

scientist, has been named the Director of the new division, and you should add his name to the list of individuals for contact purposes.

A further indication of Louisiana's new business-friendly attitude is the decision recently made by the newly elected Attorney General, ***Buddy Caldwell***, to stay and/or dismiss several legacy lawsuits previously filed by the State alleging environmental damage to state-owned property covered by State oil and gas leases and the related announcement that no such suits would be filed in the future because he feels that the State and the producers can work things out within the framework of existing regulations. Notice of this decision will be furnished to all existing defendants. The source of this information is Don Briggs of the Louisiana Oil and Gas Association (LIOGA), another good information source.[6]

I also want to briefly mention the fact that an encounter with Louisiana law may not be avoidable even if you are committed to the concept of not conducting operations, *etc.* within the boundaries of the State of Louisiana. I have in mind operations conducted on leases located on the Outer Continental Shelf, Offshore Louisiana. As most of you are aware, the Outer Continental Shelf Lands Act (43 U.S.C. §§ 1331-1356, the "OCSLA") provides that if such operations or ownership give rise to disputes offshore of a particular state, and if there is no controlling federal law to the contrary, the law of the "adjacent state" will apply as surrogate federal law. That is a

---

[6] It should be noted that LIOGA has scheduled its annual meeting in Baton Rouge on March 3-5, 2008, while the Legislature may be in its special session. You can contact LIOGA at telephone (800)443-1433 or *via* email at www.loga-la.com to register for this meeting,

fairly well established principle which has been in effect for many years. *See, e.g., Rodrigue v. Aetna Casualty Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969).

What some of you may or may not know, however, is that there is also a mandatory choice of law provision in the OCSLA (43 U.S.C. ' 1333(a)(2)(A)) and that even if you include a choice of law clause in your contract selecting the law of another state as dispositive, the law of the "adjacent" state will nonetheless be deemed applicable as surrogate federal law. *See*, *e.g., Union Texas Petroleum Corp. v. P.L.T. Engineering, Inc.*, 895 F.2d 1043 (5th Cir. 1990); *Texaco Expl. And Prod., Inc.. v. Am Clyde Engineering Products Co., Inc., et al*, 448 F.3d 760 (5th Cir. 2006); and *Exley v. Superior Energy Servises, et al*, 2007 WL 805794 (E.D. La.). Thus, if you choose to operate offshore Louisiana, it is probable that the law of Louisiana will be imposed to determine your rights and obligations. I note this point because Louisiana law is different in some important particulars. For example, liberative prescription of a contractual claim (civil law statute of limitations) in Louisiana is ten (10) years, whereas a similar claim governed by Texas law is subject to a statute of limitations of only four (4) years.

I also point out that it is not always easy to determine which state is the adjacent state when the location of your operations or property is near a state boundary. Under the OSCLA, the President of the United States is authorized to fix the Gulf of Mexico boundaries of the various states bordering the Gulf, but has not done so to date. Accordingly, the courts have been obligated to perform that task. *See, e.g.*, *Snyder Oil Corp. v. Samedan Oil Corp.*, 208 F.3d 521 (5th Cir. 2000); *Pittencrieff Resources, Inc. v. Firstland Offshore Expl. Co.*, 942 F.Supp. 271 (E.D. La. 1996), and *Reeves v. B&S*

Welding, Inc., 897 F.2d 178 (5th Cir. 1990). Based on these cases, you should be prepared to offer ***all*** available evidence to support the adjacency of the state which you select. This, for the various reasons previously stated, can be an important threshold issue. The message here is that, if you intend to conduct operations offshore Louisiana, which appears likely based upon the results of the recent Central Gulf of Mexico lease sale conducted by the MMS, or offshore of any other state for that matter, it would behoove you to become familiar with the law or laws of the adjacent state.

I see that my time is running out, and I want to leave you with this thought. Don't forget about us in Louisiana because I believe our climate for transacting business fairly and expeditiously is on the verge of dramatic improvement. We believe there are substantial additional reserves to be discovered, and we look forward to your participation in that effort.

Thank you for your kind attention.