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Oil, Gas, and Mineral Law

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OIL, GAS, AND MINERAL LAW

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This article focuses on the interpretations of and changes relating to oil, gas, and mineral law in Texas from December 1, 2019, through November 30, 2020. The cases examined include decisions of state and federal courts in the state of Texas and the U.S. Court of Appeals for the Fifth Circuit.

I. DISPUTES CONCERNING CONTRACT FORMATION, PARTNERSHIP FORMATION, AND CONTRACTUAL CONDITIONS PRECEDENT

A. *CHALKER ENERGY PARTNERS III, LLC v. LE NORMAN OPERATING LLC*

In this case, the Texas Supreme Court was tasked with determining whether a series of email exchanges was sufficient to form a binding contract for the purchase and sale of \$230 million in oil and gas assets.¹ That issue ultimately turned on the impact of a “No Obligation” provision in a confidentiality agreement the parties executed prior to bidding, which the supreme court found to supply binding conditions precedent to subsequent contract formation.²

The sellers were eighteen working-interest owners in approximately seventy oil and gas leases in the Texas panhandle.³ The sellers conducted a sale with bidding procedures that required all bidders to sign a confidentiality agreement prior to gaining access to a virtual data room.⁴ The confidentiality agreement contained a “No Obligation” provision, indicating that, “unless and until a definitive agreement has been executed and delivered, no contract or agreement providing for a transaction between the Parties shall be deemed to exist.”⁵

Pursuant to the bidding procedures, Le Norman emailed a bid of \$332 million for 100% of the assets, along with a proposed Purchase and Sale

1. *Chalker Energy Partners III, LLC v. Le Norman Operating LLC*, 595 S.W.3d 668, 670 (Tex. 2020).

2. *Id.* at 673.

3. *Id.* at 670.

4. *Id.*

5. *Id.*

Agreement (PSA), and a sentence indicating the bid was “subject to the execution of a mutually acceptable [PSA].”⁶ Another bidder, Jones Energy, submitted a higher bid, and then Le Norman increased its bid to \$345 million.⁷ The sellers refused to accept any of the existing bids for 100% of these assets, and Le Norman declined further bidding.⁸

The sellers reached out to the bidders and sought bids for 67% of the assets.⁹ Le Norman emailed a bid for \$230 million and stated, “PSA similar to what we returned.”¹⁰ The email also indicated Le Norman would not consider any counterproposals.¹¹ The sellers accepted Le Norman’s offer by email but stated it was “subject to a mutually agreeable PSA.”¹² Hours later, the sellers returned a revised PSA to Le Norman and invited further discussion.¹³ The sellers sent Le Norman’s private equity investor a congratulatory email, and Jones Energy emailed the sellers stating it “heard that we lost the deal again.”¹⁴

However, a few days later, Jones Energy presented the sellers with a new offer, which the sellers accepted.¹⁵ But, Le Norman was not informed of this.¹⁶ About a week later, the sellers and Jones Energy executed a definitive PSA.¹⁷ “That same day, unaware of what had happened, [Le Norman’s] general counsel sent the sellers a redlined PSA.”¹⁸

Le Norman sued the sellers for breach of contract, contending that their email exchange constituted an enforceable agreement.¹⁹ The trial court held in favor of the sellers, and the First Houston Court of Appeals reversed and remanded, holding that there was a fact issue as to whether the parties intended to be bound by the emails.²⁰

The Texas Supreme Court reversed the court of appeals and rendered judgment in favor of the sellers.²¹ The supreme court held that, by agreeing to the “No Obligation” provision in the confidentiality agreement, the parties had agreed upon an enforceable condition precedent to contract formation.²² As the supreme court acknowledged, most sophisticated transactions are now conducted by email, and parties often protect themselves by stipulated conditions precedent to contract formation.²³ “A

6. *Id.* at 671.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 671–72.

16. *See id.* at 672.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 678.

22. *Id.* at 673.

23. *Id.* at 672.

party seeking to recover under a contract bears the burden of proving that all conditions precedent have been satisfied.”²⁴

The supreme court also rejected Le Norman’s argument that the emails raised a fact issue as to whether a definitive agreement existed.²⁵ The supreme court acknowledged that some cases can present a fact question regarding whether parties intend for a definitive document to be a condition precedent or merely a “memorial of an already-enforceable contract.”²⁶ However, the “No Obligation” provision in this case precluded such a treatment.²⁷

The supreme court also rejected Le Norman’s argument that the “No Obligation” clause only applied to the formal bidding for 100% of the assets and not to the subsequent informal emails regarding the sale of 67% of the assets.²⁸ The supreme court disagreed because the subject line “Counter Proposal” in that subsequent email chain indicated that the negotiations were a continuation of the prior negotiations, and because the confidentiality agreement was still in effect.²⁹

This case underscores the controlling impact that preliminary agreements can sometimes have over subsequent contract formation. Purchase and sale transactions in the oil and gas industry often begin with a number of preliminary agreements, such as confidentiality agreements. While those preliminary agreements may sometimes seem perfunctory or like mere gateways to initial bidding or due diligence, they may serve a much more critical and controlling role if they contain applicable conditions precedent to contract formation.

B. *ENERGY TRANSFER PARTNERS, LP V. ENTERTAINMENT PRODUCTS PARTNERS, LP*

In this case, the Texas Supreme Court addressed “whether Texas law permits parties to conclusively agree that, as between themselves, no partnership will exist unless certain conditions are satisfied.”³⁰

Energy Transfer Partners, LP (ETP) claimed that a partnership had been formed between ETP, Enterprise Products Partners, LP, and Enterprise Products Operating, LLC (collectively, Enterprise) to place into operation an oil pipeline from Cushing, Oklahoma, to the Texas Gulf Coast.³¹ Under that partnership theory, ETP claimed that Enterprise breached its duty of loyalty when Enterprise ended its relationship with ETP and pursued a project with Enbridge instead.³²

24. *Id.* at 673.

25. *Id.* at 676.

26. *Id.* at 673.

27. *Id.*

28. *Id.* at 676.

29. *Id.*

30. *Energy Transfer Partners v. Enter. Prods. Partners*, 593 S.W.3d 732, 734 (Tex. 2020).

31. *Id.*

32. *Id.* at 736.

Enterprise claimed that preliminary agreements between ETP and Enterprise disclaimed the formation of a partnership and set forth certain conditions precedent to the formation of a partnership.³³ For instance, the parties entered into a confidentiality agreement that referred to the pipeline as a “possible transaction involving a joint venture,” and stated that “unless and until a definitive agreement . . . has been executed and delivered . . . no Party hereto will be under any legal obligation of any kind whatsoever”³⁴ The “Letter Agreement” between the parties similarly called the project a “proposed joint venture” and explained that no binding obligations existed unless and until the parties entered into definitive agreements.³⁵ And in their agreement to reimburse ETP for half the cost of the engineering work, the parties indicated that they were “in the process of negotiating mutually agreeable definitive agreements,” and that the agreement did not create a partnership or joint venture.³⁶ The parties later formed an integrated team that sought shipping commitments from shippers, prepared engineering plans for the project, and explored whether to retrofit an existing pipeline or to build a new pipeline from scratch.³⁷

However, after three rounds of failing to obtain sufficient commitments, Enterprise ended its relationship with ETP and began negotiating with a different company (Enbridge) to pursue the project.³⁸ Enterprise and Enbridge eventually entered into agreements, finished the project, and enjoyed financial success.³⁹

ETP sued, claiming that a partnership was formed between ETP and Enterprise and that Enterprise breached the duty of loyalty owed to ETP under that alleged partnership.⁴⁰ At trial, ETP obtained a verdict for over \$500 million that was later overturned and reduced to zero by the court of appeals.⁴¹

ETP argued that parties cannot, through contract language, preclude the creation of a partnership until expressed conditions precedent are established.⁴² Instead, ETP argued that under § 152.051(b) of the Texas Business Organizations Code (TBOC), a partnership is established through the parties’ conduct, regardless of whether they intend to form a partnership and even if they express a subjective intent not to do so.⁴³ ETP argued that the “totality-of-the-circumstances” test under the Texas

33. *Id.* at 740.

34. *Id.* at 734–35.

35. *Id.* at 735.

36. *Id.*

37. *Id.*

38. *Id.* at 736.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 740.

43. *Id.* at 737–38 (first citing TEX. BUS. ORGS. CODE ANN. § 152.051(b) and then citing UNIF. P’SHIP ACT § 202 cmt. 1 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1997)). Section 152.051(b) indicates that a partnership can be created “regardless of whether . . . the persons intend to create a partnership, and a comment to the Revised Uniform Part-

Business Commerce Code “controls partnership formation to the exclusion of” common law tests and that the parties’ intent is merely “one factor” to be considered.⁴⁴ Thus, the jury’s verdict that the parties formed a partnership should have been controlling.⁴⁵

The Texas Supreme Court ultimately held that Texas law allows parties to override the default statutory test for the formation of a partnership by agreeing that they will not form a partnership until certain conditions precedent are satisfied.⁴⁶ The supreme court further held that the preliminary agreements in this case between ETP and Enterprise did exactly that—they set forth conditions precedent to the unintentional formation of a partnership.⁴⁷

The supreme court rejected ETP’s additional claim that Enterprise had waived those conditions precedent.⁴⁸ The supreme court held that “only evidence directly tied to the condition precedent is relevant,” and evidence probative of the statutory factors for formation of partnership under TBOC § 152.051(a) “is not relevant.”⁴⁹ Therefore, the only evidence ETP pointed to in this case—the parties holding themselves out as partners in marketing efforts and working closely together on the project—was not relevant to the issue of waiver of definitive, board-approved agreements.⁵⁰ Accordingly, the supreme court held that no partnership had been created, the appellate court had properly found that that the trial judgment should be reversed, and ETP should take nothing on its claims.⁵¹

The significance of this case is the supreme court’s holding that the statutory test for formation of a partnership was overridden by the parties’ agreement that no partnership would be formed until certain conditions precedent were satisfied. Another notable aspect of this case is the holding that evidence probative of an intent to form a partnership is not relevant to the question of whether the condition precedent had been waived. This is one of two cases in 2020 whereby the Texas Supreme Court enforced conditions precedent in preliminary agreements, with the other case being *Chalker Energy Partners III, LLC v. Le Norman Operating LLC*,⁵² discussed herein. Together, these cases reflect the critical, enforceable role that express conditions precedent contained within preliminary agreements play and the extent to which Texas courts will enforce those conditions precedents—at least under these circumstances.

nership Act expressly states that “parties ‘may inadvertently create a partnership despite their expressed subjective intention not to do so.’”

44. *Id.* at 740.

45. *Id.*

46. *Id.* at 740–41.

47. *Id.* at 740.

48. *Id.* at 741.

49. *Id.*

50. *Id.* at 741–42.

51. *Id.* at 742.

52. 595 S.W.3d 668 (Tex. 2020).

C. *COPANO ENERGY, LLC v. BUJNOCH*

In this case, the Texas Supreme Court held that a series of emails relating to the purchase of an easement did not form an enforceable contract because they did not satisfy the statute of frauds.⁵³ The plaintiffs were landowners in Lavaca and Dewitt Counties.⁵⁴ “In 2011, the [l]andowners granted easements to Copano[] for the construction, operation, and maintenance of a [twenty-four]-inch pipeline on their properties.”⁵⁵ In 2012, Copano approached the landowners, seeking to obtain another easement to construct an additional pipeline.⁵⁶

A Copano landman later contacted the landowners’ attorney, Marcus Schwartz, “to discuss the proposed second easement.”⁵⁷ Schwartz’s assistant then emailed the landman to schedule a meeting between the two and discuss the size of the proposed timeline and the type of gas it would transport.⁵⁸ Notably, the subject line of the email thread was “Meeting with Schwartz.”⁵⁹

Following the date of the proposed meeting, the landman emailed Mr. Schwartz directly for the first time, copying Copano’s attorney.⁶⁰ That email stated:

Pursuant to our conversation earlier, Copano agrees to pay your clients \$70.00 per foot for the second [twenty-four]-inch line it proposes to build. In addition to this amount Copano agrees to address and correct the damages to your client’s property caused due to the construction of the first [twenty-four]-inch line.⁶¹

Schwartz responded, “[i]n reliance on this representation we accept your offer and will tell our client you are authorized to proceed with the survey on their property. We would appreciate you letting them know a reasonable time before going on their property.”⁶² Copano was in the midst of a sale to Kinder Morgan, and “[t]he second pipeline was never built.”⁶³ The landowners sued Copano and Kinder Morgan for breach of contract, claiming that the email exchanges collectively formed an enforceable contract to sell an easement for \$70 per foot.⁶⁴

The Texas Supreme Court acknowledged that the emails “surely contain an offer and an acceptance” but ultimately held that they did not form an enforceable contract because they did not satisfy the statute of frauds.⁶⁵ The supreme court explained that essential terms, such as the

53. *Copano Energy, LLC v. Bujnoch*, 593 S.W.3d 721, 723–24 (Tex. 2020).

54. *Id.* at 724.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 726–27.

64. *Id.* at 727.

65. *Id.* at 728.

easement's location and size, were not present in the emails in a form sufficient to demonstrate the parties' intent to be bound by those essential terms.⁶⁶ While the initial emails did discuss the location and size of the pipe, the supreme court held that those emails could not supply the essential terms because those emails were in anticipation of a future, in-person meeting.⁶⁷ According to the supreme court, these emails were nothing more than requests to negotiate at a future meeting.⁶⁸

The supreme court stated that, in some circumstances, communications in advance of a meeting could conceivably supply essential terms if a later writing confirmed that the parties subsequently agreed to the terms set forth in the earlier, forward-looking writing.⁶⁹ However, in this case, the lawyer's follow-up email did not set forth the essential size and location terms, and it did not otherwise evidence an intent to be bound by the terms contained in the earlier forward-looking emails.⁷⁰ Thus, the landowners could not satisfy the statute of frauds.⁷¹

Copano serves as a reminder of the risks inherent in attempting to rely upon a series of email threads to collectively form a binding contract, particularly when some emails may be characterized as a forward-looking request to discuss proposed terms. Pipeline negotiations are sometimes fast-paced, and it is not uncommon for deals to be negotiated over a series of meetings and email exchanges. *Copano* illustrates the importance of confirming all essential terms in a final writing once a deal has been struck.

D. *GREAT WESTERN DRILLING, LTD. v. PATHFINDER OIL & GAS, INC.*

In this case, the Eleventh Eastland Court of Appeals was tasked with determining whether a faxed offer letter could form a binding contract for the sale of an undivided 25% interest in oil and gas leases, despite the offeror's contention that certain conditions precedent in the letter were not fulfilled by the recipient.⁷²

On June 1, 2004, Great Western faxed Pathfinder a letter (Letter) in which it offered to sell to Pathfinder a 25% interest in the Labor 1 and 10 leases.⁷³ This 25% was "inclusive of any interests which [Pathfinder] may be obligated to convey" to third parties with which Great Western knew Pathfinder had a relationship.⁷⁴ The Letter further provided that Great Western would bill Pathfinder for 25% of its acquisition costs and that the

66. *Id.*

67. *Id.* at 729.

68. *Id.*

69. *Id.* at 730.

70. *Id.*

71. *Id.* at 731.

72. *Great W. Drilling, Ltd. v. Pathfinder Oil & Gas, Inc.*, No. 11-14-00206-CV, 2020 WL 373096, at *2, *5 (Tex. App.—Eastland Jan. 23, 2020, pet. dismiss'd) (mem. op.).

73. *Id.* at *2.

74. *Id.*

parties would work on the details of a participation agreement “as soon as reasonably possible.”⁷⁵ Pathfinder executed the Letter and faxed it back to Great Western within forty-eight hours, thus confirming its intent to participate.⁷⁶

After signing the Letter, Pathfinder requested an additional 3% interest in the leases.⁷⁷ In September 2004, Great Western sent Pathfinder a proposed Joint Operating Agreement (JOA) providing Pathfinder’s share of the lease acquisition costs and each parties’ respective ownership percentages.⁷⁸ However, the parties had difficulty reaching an agreement on certain terms of the JOA.⁷⁹ Great Western consequently withdrew its offer in a letter dated October 29, 2004.⁸⁰ That letter also contended that the June 2004 offer was contingent upon Pathfinder’s payment of 25% of the lease acquisition costs and the execution of the JOA.⁸¹ That same day, Pathfinder mailed signed copies of the JOA and a check for the lease acquisition costs.⁸²

After Great Western completed a successful well, Pathfinder claimed a 25% ownership stake, which prompted Great Western to file suit.⁸³ A jury found that the Letter was a valid agreement, and that Pathfinder did not fail to comply with its terms.⁸⁴ Great Western argued that the trial court should have granted its motion for judgment notwithstanding the verdict because its offer letter contained two conditions precedent to contract formation: (1) the execution of a JOA, and (2) the inclusion of Pathfinder’s third-party participants.⁸⁵ In return, Pathfinder argued that those terms were covenants, not conditions.⁸⁶

The court held that the Letter offered 25% “inclusive” of the third-party interests, but that it did not have any language such as “if” or “subject to” that would indicate the third-party interests were a condition precedent.⁸⁷ Therefore, the court held this was not a condition precedent.⁸⁸

Further, although the Letter recognized a need to negotiate a participation agreement “as soon as reasonably possible,” the Letter did not specifically indicate that Pathfinder’s ability to elect to participate was conditioned on the execution of such an agreement.⁸⁹ Further, the court noted that “[P]arties may agree upon some of the terms of a contract, and understand them to be an agreement, and yet leave other portions of an

75. *Id.*

76. *Id.* at *3.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at *4.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at *8.

86. *Id.*

87. *Id.* at *9.

88. *Id.*

89. *Id.* at *10.

agreement to be made later.”⁹⁰ The court also reasoned that there was evidence that Great Western intended Pathfinder to be immediately bound by the offer Letter because the Letter stated that Pathfinder was required to make an election within forty-eight hours of receipt.⁹¹ The court concluded that the Letter was a binding agreement between the parties and that it was not effectively revoked by Great Western.⁹²

The significance of this case is the holding that an offer letter formed a binding agreement even though it recognized a need to negotiate a further agreement to govern the subject matter between the parties.

E. *McGehee v. Endeavor Acquisitions, LLC*

In this contract formation case, the Eighth El Paso Court of Appeals held that an enforceable PSA was formed when a buyer received a signed PSA from the sellers and attempted to tender payment, even though the buyer did not sign the PSA and there were repeated issues with completing that payment.⁹³

The buyer in this case sent a letter to two sellers, offering to purchase certain surface and mineral interests in Reeves County, Texas, for \$185,000.00.⁹⁴ The letter included a form PSA and general warranty deeds.⁹⁵ The letter instructed the sellers that they could accept the offer by executing the documents and returning them to the buyer.⁹⁶

The sellers each crossed out the purchase price in the PSA, wrote in \$200,000.00 instead, and initialed their changes.⁹⁷ The sellers executed and returned the modified PSA and deeds with no further changes.⁹⁸ The buyer did not return a signed PSA, but the buyer carried forward with the title review permitted under the PSA and notified the sellers of a proposed closing date.⁹⁹

After the buyer finished its title review, the buyer sent each seller a check in the amount of \$100,000.00.¹⁰⁰ The sellers refused to accept the checks, contending that the PSA required payment of \$200,000.00 each, not total.¹⁰¹ The buyer disagreed, contending that the PSA defined “Seller” by reference to both sellers.¹⁰² The buyer sent the sellers a second round of checks for \$100,000.00 each.¹⁰³ Both sellers attempted to deposit their second checks but they were returned due to a stop payment

90. *Id.* at *9 (citing *Scott v. Ingle Bros. Pac., Inc.*, 489 S.W.2d 554, 555 (Tex. 1972)).

91. *Id.* at *10.

92. *Id.*

93. *McGehee v. Endeavor Acquisitions, LLC*, 603 S.W.3d 515, 527–28 (Tex. App.—El Paso 2020, no pet.).

94. *Id.* at 519.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 519–20.

101. *Id.* at 520.

102. *Id.*

103. *Id.*

order.¹⁰⁴ The buyer attempted to tender payment a third time by wire transfer but the sellers refused the wire.¹⁰⁵

The sellers filed suit seeking a declaration that there was no binding contract, and the buyer filed a counterclaim seeking a range of related declaratory relief.¹⁰⁶ The trial court held in favor of the buyer on all claims.¹⁰⁷ On appeal, the sellers argued that the PSA was not enforceable because the buyer failed to execute and deliver the PSA.¹⁰⁸ The court of appeals disagreed.¹⁰⁹ The court explained that while intent to be bound by a written agreement is ordinarily evidenced by signatures, such an intention may also be evidenced by conduct that reflects that the party was acting in accordance with the written contract.¹¹⁰ However, if the contract makes it clear that a signature is required, a failure to sign the agreement renders it unenforceable.¹¹¹

The court acknowledged that the buyer's cover letter instructed the sellers that they could accept the offer by returning signed and notarized originals, and found it was sufficient to require signatures to accept the offer.¹¹² However, the court noted that when the sellers changed the purchase price, they in effect delivered a counteroffer to the buyer.¹¹³ Because the sellers did not include a cover letter repeating the signature instruction, the buyer's cover letter could not provide that signature requirement.¹¹⁴ The sellers argued that the PSA itself indicated that it could only be accepted by signature because it indicated the PSA "has been duly executed and delivered on behalf of each of the parties and constitutes their legal and binding obligations."¹¹⁵ The court rejected that argument, characterizing this provision as stating that the PSA "has been" executed and that it "constitutes" binding obligations, not that it "must be executed . . . in order to constitute" a binding contract.¹¹⁶

The court then turned to whether the buyer's actions constituted an acceptance.¹¹⁷ Because the definition of "Seller" in the PSA included both sellers, the court held that the sellers' counteroffer required the payment of a sum of \$200,000.00 in total, not \$200,000.00 each.¹¹⁸ Therefore, when the buyer tendered the first round of checks for the \$200,000.00 purchase price, the buyer accepted the counteroffer, and the PSA became

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 521.

108. *Id.* at 522.

109. *Id.* at 524.

110. *Id.* at 522–23 (citing *Wright v. Hernandez*, 469 S.W.3d 744, 757–58, 760 (Tex. App.—El Paso 2015, no pet.)).

111. *Id.* at 523.

112. *Id.*

113. *Id.*

114. *Id.* at 524.

115. *Id.*

116. *Id.*

117. *Id.* at 524–25.

118. *Id.* at 525.

valid and enforceable.¹¹⁹ The court rejected the sellers' argument that the stop payment order on the second round of checks defeated the acceptance because a fully-formed contract already existed by that time.¹²⁰

The significance of this case is its analysis of the various stages of the transaction and the requirements for establishing a binding contract. It is not uncommon for mineral and royalty buyers to send a large volume of unsolicited purchase offers through the mail, complete with instructions for accepting the offer, an enclosed purchase agreement, and a deed. This case is notable for its holding that the buyer's instructions in its cover letter constituted a prescribed manner of acceptance, and that the repeated attempts to pay the purchase price constituted an acceptance despite the issues in completing that payment.

II. TITLE DISPUTES

A. *CRAWFORD V. XTO ENERGY, INC.*

In this case, the Second Fort Worth Court of Appeals held that the "strip-and-gore doctrine" applied to a 1984 conveyance of seventy-six acres, causing the conveyance to also include a severed mineral interest underlying an adjacent 8.235 acre strip of land.¹²¹ Note that this case was the subject of previous appeals through to the Texas Supreme Court on procedural grounds.¹²² Those prior appeals focused on whether other potential claimants were necessary parties.¹²³

Mary Ruth Crawford owned 145.99 acres of land in Tarrant County, Texas.¹²⁴ In 1964, she conveyed the surface of an 8.25 acre tract of land (Disputed Tract) to TESCO.¹²⁵ That 1964 deed contained a mineral reservation and surface waiver, reading as follows:

Grantors reserve unto themselves, and their heirs and assigns, the right to all oil and gas in and under the lands herein conveyed [the Disputed Tract] but expressly waive all rights of ingress and egress for the purpose of drilling for or producing oil and/or gas from the surface of the [Disputed Tract] *provided that* wells opened on other lands may be bottomed on [the Disputed Tract].¹²⁶

Subsequently, in 1984, Mary Ruth Crawford conveyed seventy-six acres of land to the north and south areas of the Disputed Tract without any mention of the 8.25-acre tract or the mineral reservation.¹²⁷

In 2007, Crawford executed an oil and gas lease covering the Disputed

119. *Id.*

120. *Id.*

121. *Crawford v. XTO Energy, Inc.*, No. 02-18-00217-CV, 2019 WL 6904298, at *1 (Tex. App.—Fort Worth Dec. 19, 2019, pet. filed) (mem. op.).

122. *See Crawford v. XTO Energy, Inc.*, 509 S.W.3d 906, 908 (Tex. 2017).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Crawford*, 2019 WL 6904298, at *2.

Tract.¹²⁸ XTO pooled the interest in a unit and drilled and completed four wells.¹²⁹ However, XTO's title opinion later indicated that Crawford did not own any interest because the strip-and-gore doctrine applied, causing the 1984 deed to also convey Crawford's interest in the narrow Disputed Tract.¹³⁰ Following that, Crawford filed suit.¹³¹

The Second Fort Worth Court of Appeals reviewed the underlying law and explained that while Texas courts construe deeds based on the parties' intent as expressed in the deed, the strip-and-gore doctrine can act as an "aid in determining a grantor's intent" regarding narrow adjoining strips of land not described in the deed.¹³² The court explained that the doctrine is merely a presumption and may be rebutted if "it clearly appears in the deed, by plain and specific language, that the grantor intended to reserve the strip."¹³³

The court held that the strip-and-gore doctrine applied in this case, causing the 1984 deed to convey the Disputed Tract.¹³⁴ The court focused its analysis on the requirement that the narrow strip of land must have ceased to be of any benefit or importance to the grantor at the time of the deed.¹³⁵ The court reasoned that the Disputed Tract was of no practical benefit to Crawford in 1984 because the 1964 deed had already waived Crawford's surface rights to the Disputed Tract.¹³⁶ As the court explained, prior to the advent of horizontal drilling around 2002, minerals were "wholly worthless" if the mineral owner could not obtain surface access.¹³⁷ The court also explained in a footnote that "there is no evidence that pooling with other mineral interest owners was a possibility in 1984."¹³⁸

Crawford argued that the surface waiver in the 1964 deed was conditional, pointing to the phrase immediately following the surface waiver reading: "provided that wells opened on other lands may be bottomed on the Disputed Tract."¹³⁹ Crawford argued that this meant the surface waiver would cease if at any time Crawford could no longer open wells on other lands that could be bottomed on the Disputed Tract.¹⁴⁰ The court acknowledged that "*provided that*" clauses can sometimes be interpreted as a condition or the "functional equivalent of *if*."¹⁴¹ However, the court rejected Crawford's argument, explaining that in the context of the remainder of the deed made, the parties' intent was clear that the "pro-

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at *3.

132. *Id.* at *4.

133. *Id.*

134. *Id.* at *7.

135. *Id.* at *5.

136. *Id.* at *7.

137. *Id.* at *5.

138. *Id.* at *5 n.9.

139. *Id.* at *6 (internal quotations omitted).

140. *Id.*

141. *Id.*

vided that” clause should reinforce the waiver: the only means of physical intrusion would be by slant drilling that would not invade the surface estate.¹⁴²

The strip-and-gore doctrine is sometimes (incorrectly) thought of as applying to thin, nominal, or negligible strips of land. The significance of this case is that the strip-and-gore doctrine applied to cause a deed to include a sizeable mineral interest that was not expressly described in the deed. In addition, this case is significant in its application of the strip-and-gore doctrine to an old deed by reference to drilling technologies that were available at that time period.

B. *PIRANHA PARTNERS V. NEUHOFF*

In this case, the Texas Supreme Court reviewed a dispute as to whether an assignment of overriding royalty interests conveyed an overriding royalty interest in an entire lease, limited the interest to a single well, or limited the interest to the lands identified in the assignment.¹⁴³ In doing so, the supreme court provided an analysis of several rules of construction.¹⁴⁴

In the 1970s, Neuhoﬀ owned a 3.75% overriding royalty interest in an oil and gas lease.¹⁴⁵ For twenty-four years, only one well was completed on the lease.¹⁴⁶ In 1999, Neuhoﬀ sold its interest to Piranha through an oil-and-gas auction.¹⁴⁷ The assignment contained multiple paragraphs describing the interest conveyed, most of which relied on the description provided in the attached Exhibit A.¹⁴⁸ The supreme court described Exhibit A as “not particularly helpful,” as it described the interest by reference to the well, by reference to the land, and by reference to the lease.¹⁴⁹

The supreme court indicated that Piranha erroneously relied upon a number of rules of construction that were not helpful or not applicable.¹⁵⁰ For instance, Piranha argued that the “greatest estate” canon should resolve this dispute because the assignment used the word “all.”¹⁵¹ The supreme court declined to determine whether the greatest estate canon is applicable to an unambiguous agreement.¹⁵² Regardless, the supreme court indicated that this rule would not resolve the dispute because the full phrase read “all . . . right, title, and interest *in and to the properties described in Exhibit ‘A’*,” meaning it would still be necessary to construe

142. *Id.*

143. *Piranha Partners v. Neuhoﬀ*, 596 S.W.3d 740, 742 (Tex. 2020).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 742–43.

148. *Id.* at 744.

149. *Id.* at 744–45.

150. *See id.* at 746.

151. *Id.* at 747.

152. *See id.*

Exhibit A.¹⁵³ Piranha also erroneously relied on rules regarding the clarity by which an instrument must describe a reservation or exception.¹⁵⁴ The supreme court indicated that these rules were not helpful because the issue in this case was the scope of the grant, not the scope or effect of a reservation or exception.¹⁵⁵ Additionally, Piranha erroneously relied upon the “construe against the grantor” canon, which the supreme court held did not apply here because this was an unambiguous assignment.¹⁵⁶

The Neuhooffs, on the other hand, primarily relied upon so-called “surrounding circumstances evidence,” including descriptions that appeared in the auction documentation.¹⁵⁷ The parties offered conflicting interpretations of these related auction documents.¹⁵⁸ The supreme court reviewed this conflicting evidence in detail but ultimately concluded that it failed to support either side because the documents contained provisions disclaiming any reliance on them, and the documents instead expressly directed the parties to review the assignment.¹⁵⁹

The supreme court ultimately held that the assignment included all overriding royalty in the lease, not just the wellbore.¹⁶⁰ The supreme court based its analysis on a “holistic and harmonizing approach” of construing the language within the assignment and its Exhibit A.¹⁶¹ Specifically, the supreme court based this conclusion on several provisions in the assignment that referenced an interest in the lease (as opposed to in a well or lands) and language describing the interest as all interests Neuhoff owned as of the effective date.¹⁶² The supreme court held that this reflected an intent to include all of the interests that were then owned by Neuhoff.¹⁶³

The supreme court also focused on another paragraph, which described the assignment as including “[a]ll presently existing contracts . . . to the extent they affect *the Leases*.”¹⁶⁴ The supreme court noted that this language limited the assignment to the well or the land, which “further indicates that Neuhoff Oil conveyed its entire interest under the Puryear Lease.”¹⁶⁵ Other provisions also referenced the lease, including a provision indicating that the overriding royalty was payable out of oil produced under the lease and pursuant to the terms of the lease.¹⁶⁶ The proportionate reduction clause also referenced the assignor’s interest in

153. *Id.* (internal quotations omitted).

154. *Id.* at 748.

155. *Id.*

156. *Id.* at 749.

157. *Id.*

158. *Id.* at 751–52.

159. *Id.* at 752.

160. *Id.* at 753.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* (emphasis added).

165. *Id.* at 754.

166. *Id.*

the lease.¹⁶⁷ As a result, the supreme court concluded that the assignment conveyed the overriding royalty interest as to all production under the lease, not just in the wellbore.¹⁶⁸

The significance of this case is the supreme court's analysis of auction assignments and related informational documents and listings, and the supreme court's ultimate decision to base its holding on an extraction of the parties' intent based upon the four corners of the document. Moreover, while another notable recent Texas Supreme Court case construed an oil and gas contract by reference to surrounding circumstances evidence,¹⁶⁹ the *Piranha* case is perhaps significant in its demonstration that surrounding circumstances evidence is not without its limits.¹⁷⁰

C. *WTX FUND, LLC v. BROWN*

This case involved a dispute as to whether a 1951 mineral deed conveyed the entire mineral interest without reservation, or whether it reserved a royalty interest in whole or in part.¹⁷¹ Ultimately, the Eighth El Paso Court of Appeals held that when the deed was properly construed under the holistic four-corners approach, the deed reserved the entirety of the royalty interest from the conveyance and thus conveyed only the other attributes of the mineral estate.¹⁷² The granting clause expressly conveyed "all of grantors' right, title, interest and estate in and to the leasing rights, bonuses and delay rentals in and to all the oil, gas and other minerals" ¹⁷³ The court explained that "[b]y naming all three interests individually—the leasing rights, bonuses and delay rentals—the grantors conveyed each of these attributes."¹⁷⁴

The deed also included an "intended clause," which indicated the parties' intent was to convey executive rights, bonuses, delay rentals, "and *benefits* on any future oil and gas leases."¹⁷⁵ The final sentence in that "intentions clause" expressed the intent to convey "the 7/8 leasing rights or working interest . . . with all bonuses, delay rentals, oil payments and *all other rights and benefits*" ¹⁷⁶ The court explained that by describing the leasing rights as a "working interest" and as a 7/8 interest (the lessee's historic share of production), this further reflected that the par-

167. *Id.*

168. *Id.* at 755.

169. *See, e.g.,* Murphy Expl. & Prod. Co.—USA v. Adams, 560 S.W.3d 105, 109 (Tex. 2018) (construing an express offset provision in a lease and concluding that surrounding circumstances of the Eagle Ford reflect that "offset well" did not refer to a well actually causing drainage).

170. *See also* Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc., 590 S.W.3d 471, 483 (Tex. 2019) (construing a consent-to-assign provision and refusing to consider surrounding circumstances evidence of the parties' contract revisions in negotiations).

171. *WTX Fund, LLC v. Brown*, 595 S.W.3d 285, 289 (Tex. App.—El Paso 2020, pet. denied).

172. *Id.* at 301–02.

173. *Id.* at 294.

174. *Id.*

175. *Id.* at 295 (emphasis added).

176. *Id.* at 296 (emphasis added).

ties did not intend to assign an interest in royalties.¹⁷⁷

The court explained that the sharpest points of contention in this case turned on the meaning of the phrase “benefits” from the “intentions clause” and the phrase “shall not affect” in a so-called shall-not-effect clause.¹⁷⁸ The shall-not-effect clause provided as follows:

[T]his conveyance shall not affect any interest which any grantors, heirs, or assigns, have or may have in the future to the non-participating 1/8th royalty in and under said land, but it shall never be necessary for grantors, heirs or assigns, to join in the execution of any instrument pertaining to any past or future oil and gas leases and the grantors, heirs or assigns, shall have no right to any bonuses, delay rentals, oil payments or other benefits under any oil, gas and mineral leases which have been made or which may hereafter be made by grantee¹⁷⁹

The successors to the grantee argued that the phrase “shall not affect” was too “unclear and ineffective to operate as a reservation of a non-participatory royalty. . . .”¹⁸⁰ The court disagreed, explaining that “shall not affect” was written as a mandate that the conveyance “did not act on” those ownership rights, and the court emphasized that no “magic words” are required to make a reservation.¹⁸¹ The court also refused to interpret the clause as a “subject to” clause, explaining that “rather than refer to the rights of another party, the deed’s language specifies that the conveyance to grantee shall not affect grantors’ own rights to the non-participating 1/8th royalty.”¹⁸²

The court also held that the term “benefits” did not equate with a conveyance of the grantors’ royalty interest, particularly when that word was harmonized with the remainder of the language in the deed.¹⁸³ The court explained that the word “benefits” did not have a well-understood meaning like “royalty” or “bonus”; rather, the word “benefits” was an interchangeable term that operated as a catch-all.¹⁸⁴ The court explained that, in this context, the term “benefits” appeared alongside the words “bonus” and “delay rental” and therefore represented the economic benefits of a mineral lessee, “but these benefits stand apart from the non-participatory royalty interest which was expressly reserved or excepted by other language.”¹⁸⁵ Therefore, the court concluded that the “deed conveyed the leasing rights, bonuses, delay rentals, and development rights in their entirety, but reserved the entire non-participating royalty interest as a floating royalty (rather than a fixed fraction or fixed royalty) in favor of

177. *Id.*

178. *Id.* at 297.

179. *Id.* at 296–97 (emphasis by court omitted).

180. *Id.* at 297.

181. *Id.*

182. *Id.*

183. *Id.* at 299.

184. *Id.*

185. *Id.* at 301.

the grantors.”¹⁸⁶

The significance of this case is its analysis of the term “benefits” in the context of rights to “bonuses,” “royalties,” delay rentals, and development rights, and the court’s rejection of the argument that the “shall not affect” clause was too unclear to reserve an interest.

D. *FIVE STAR ROYALTY PARTNERS, LTD. V. MAULDIN*

In this case, the United States Court of Appeals for the Fifth Circuit undertook the interpretation of a 1927 deed (Deed) to decide the nature and amount of interest purported to be conveyed.¹⁸⁷ Namely, the Fifth Circuit was tasked with determining whether the interest was a floating royalty interest or an interest in a fixed fraction of gross production.¹⁸⁸

In its analysis, the Fifth Circuit examined three specific parts of the Deed: the granting clause and the second and third paragraphs.¹⁸⁹ The granting clause conveyed “a royalty interest of three-eighths (3/8) of all . . . minerals.”¹⁹⁰ The second paragraph indicated the lands were currently leased and that the royalty interest conveyed was a “three-eighths (3/8) part of the royalty provided by said lease.”¹⁹¹ Likewise, the third paragraph stated the parties understood the royalty interest to be “three-eighths of one-eighth,” with the grantee receiving “three-eighths of one-eighth” in the event minerals were produced.¹⁹² The third paragraph also stated that the royalty interest conveyed would not include rentals, bonuses, or control over leasing, and that the original grantors would act as agents of the grantees.¹⁹³

The Fifth Circuit held that the granting clause, if viewed in isolation, appeared to convey a three-eighths fixed royalty.¹⁹⁴ However, the Fifth Circuit reasoned that the language of the second and third paragraphs, in addition to the Deed neglecting to absolve the grantee of production costs, suggested to the court that the parties did not intend to convey a fixed royalty interest, but rather, “a right to receive royalties proportionate to a held mineral interest.”¹⁹⁵

In addressing the issue of the amount of interest conveyed, the defendants argued in favor of the double fraction being construed literally, i.e., three-eighths of one-eighth, or three-sixty-fourths.¹⁹⁶ On the other hand, Five Star claimed the reference to “one-eighth” was “a proxy for whatever [royalty happened to] be provided [for by] a lease so that ‘three-eighths of one-eighth’ [was] synonymous with a right to receive

186. *Id.* at 303.

187. *Five Star Royalty Partners v. Mauldin*, 973 F.3d 367, 370 (5th Cir. 2020).

188. *Id.* at 372.

189. *Id.* at 373.

190. *Id.* at 370.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 373.

195. *Id.*

196. *Id.* at 376.

royalty proportionate to a [three-eighths] mineral interest.”¹⁹⁷

To resolve the issue, the Fifth Circuit referenced the Texas Supreme Court holding in *Dils Co.*¹⁹⁸ and held that because the Deed purported to convey “a royalty interest of three-eighths in the minerals,” combined with “an equivalent reversionary interest,” the grantee effectively received a mineral interest that included only a right to receive royalties, with all other components inherent in a mineral estate remaining with the grantor.¹⁹⁹ The Fifth Circuit noted that, based on the specific facts of this case, reference to one-eighth royalty was nothing more than a placeholder for the royalty interest of any applicable lease.²⁰⁰

The significance of this case is the Fifth Circuit’s recognition of the theory (sometimes called “estate misconception theory”) that when a deed references an interest using double fractions, the second of which is one-eighth, it sometimes means for the one-eighth fraction to refer to the royalty provided in an oil and gas lease rather literally a mathematical one-eighth.

E. *CONOCO PHILLIPS CO. v. RAMIREZ*

In this case, the Texas Supreme Court interpreted a specific devise in a will to “all . . . right, title and interest in and to Ranch ‘Las Piedras’” and held that it referred to an interest in the surface estate only and that it did not include a mineral interest.²⁰¹

This dispute pertained to a 7,016 acre tract of land in Zapata County, Texas, and a portion thereof containing 1,058 acres that was referred to in historical intra-family documents as the “Las Piedras Pasture” or the “Las Piedras Ranch.”²⁰² Following numerous conveyances over an eighty-year period, title was generally vested such that various members of the Ramirez family owned undivided mineral interests across the entire 7,016-acre tract, and the surface estate had been partitioned into smaller portions that were vested with different lines of the Ramirez family.²⁰³

At the time of her death in 1988, Leonor Ramirez owned an undivided one-half interest in the surface estate of the Las Piedras Ranch and an undivided one-fourth mineral interest in the entire 7,016 family tract.²⁰⁴ In her will, she included a specific devise of “all of [her] right, title and interest in and to RANCH ‘LAS PIEDRAS’” [sic] to her son, Leon Oscar, as a life estate, with the remainder to Oscar’s living children.²⁰⁵ Leonor then devised the residue of her estate to her three children, Leon

197. *Id.*

198. *Garrett v. Dils Co.*, 299 S.W.2d 904, 905 (Tex. 1957).

199. *Five Star Royalty*, 973 F.3d at 377.

200. *Id.*

201. *ConocoPhillips Co. v. Ramirez*, 599 S.W.3d 296, 297 (Tex. 2020).

202. *Id.* at 297–98.

203. *Id.*

204. *Id.* at 298.

205. *Id.* at 299.

Oscar, Ileana, and Rodolfo.²⁰⁶

After Leonor died in 1988, her son Leon Oscar treated the mineral interest as being shared with his siblings and joined with them in executing oil and gas leases.²⁰⁷ In other words, Leon treated Leonor's will as specifically devising only the surface in the Las Piedras Ranch to Leon, not the minerals and the surface.²⁰⁸ After Leon died, his children filed suit against EOG and ConocoPhillips, claiming that their remainder interests were never leased and that they inherited the entire interest previously vested in Leonor.²⁰⁹ The trial court entered judgment in favor of the children for almost \$12 million against ConocoPhillips.²¹⁰

The supreme court explained that, when construing a will, "the court's focus is on the testatrix's intent, which must be ascertained from the language found within the four corners of the will, if possible, and determined as of the time the will is executed."²¹¹ However, "[w]hen a term in a will is open to more than one construction, a court can consider the circumstances existing when the will was executed."²¹²

In the supreme court's view, the fact that Leonor's will capitalized "RANCH 'LAS PIEDRAS'" [sic] and placed its name in quotation marks signified that the term had specific meaning to Leonor and her family.²¹³ That specific meaning was revealed, in the supreme court's view, by a 1975 partition agreement and a 1978 exchange agreement that were executed by Leonor and her children. Both agreements referred to the 1,058 tract by the name "Las Piedras" and both were limited to the surface estate only, thereby leaving unchanged the ownership of the minerals underlying the larger 7,016-acre family tract.²¹⁴ In the supreme court's view, these documents "clearly designate the 1,058-acre tract of land known as Las Piedras Ranch and Las Piedras Pasture as a surface estate only."²¹⁵ The fact that the Ramirez family history of conveyances since 1941 had separated the surface estate while expressly declining to separate the minerals was "strong evidence that the family intended that their ownership of all the estate minerals be joint."²¹⁶

The significance of this case is that the Texas Supreme Court held that a devise was limited to the surface estate only, despite the fact that the mineral estate was not expressly excepted or carved out anywhere within the four corners of the will. The *Ramirez* opinion does not contain any analysis or explanation of how Leonor's will may have been open to more

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 300.

210. *Id.*

211. *Id.* at 301 (internal quotations and citations omitted).

212. *Id.* (internal quotations omitted) (quoting *Hysaw v. Dawkins*, 483 S.W.3d 1, 8 (Tex. 2016)).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

than one explanation—the supreme court’s condition for considering surrounding circumstances evidence. If this case is to be understood in the abstract as holding that an unambiguous devise or conveyance of a tract of land can be limited to the surface estate only, without any express exception or limitation in the instrument for the minerals, then such a holding may arguably favor upholding intent but could cause uncertainty in land titles.

III. LEASE TERMINATION

A. *ENDEAVOR ENERGY RESOURCES, LP v. ENERGEN RESOURCES CORP.*

In this case, the Texas Supreme Court analyzed a continuous development provision that allowed the lessee to “bank” or “accumulate” the number of days a well was commenced ahead of schedule and apply those days to extend the deadline to drill the “next” continuous development well.²¹⁷

This dispute involved an oil and gas lease covering 11,300 acres in Howard County, Texas.²¹⁸ The lease contained a continuous development provision featuring the following “accumulation clause”: “Lessee shall have the right to accumulate unused days in any 150-day term during the continuous development program in order to extend the next allowed 150-day term between the completion of one well and the drilling of a subsequent well.”²¹⁹

The lessee, Endeavor Energy Resources, LP (Endeavor), drilled twelve timely wells under the continuous development provisions.²²⁰ Endeavor then waited 320 days to spud the thirteenth well.²²¹ Endeavor asserted that this thirteenth well was drilled timely because Endeavor had accumulated enough unused days in all of its previous wells to allow for that period.²²² Endeavor argued that it had accumulated 227 unused days over the life of the lease, bringing its total permitted timeline for the thirteenth well to 377 days.²²³

Shortly before Endeavor drilled its thirteenth well, the lessor executed a new lease in favor of a new lessee, Energen Resources Corp. (Energen).²²⁴ Energen filed suit alleging that Endeavor’s thirteenth well was not timely, and therefore Endeavor’s prior lease partially terminated and Energen’s new lease became the valid and effective lease.²²⁵ Energen argued that unused days earned in a given term only served to extend

217. *Endeavor Energy Res., LP v. Energen Res. Corp.*, 615 S.W.3d 144, 146 (Tex. 2020).

218. *Id.*

219. *Id.* at 147.

220. *Id.*

221. *Id.*

222. *See id.*

223. *Id.*

224. *Id.*

225. *Id.*

Endeavor's immediately following term.²²⁶ Endeavor had drilled the twelfth well thirty-six days earlier than the 150-day deadline, and therefore Energen argued the deadline for the thirteenth well was 186 days.²²⁷

The trial court held in favor of Energen, and the appellate court affirmed, focusing on the phrases "next allowed" and "150-day term" as pointing to an individual next well rather than the entire continuous development term.²²⁸ The Texas Supreme Court reversed the court of appeals, holding that the accumulation clause was ambiguous, and therefore it was unenforceable as a special limitation (i.e., unenforceable to bring about an automatic termination).²²⁹

The supreme court walked through the potential interpretations of the provision and concluded that an analysis of the text itself was "inconclusive."²³⁰ For instance, neither side interpreted the phrase "150-day term" to mean precisely what it says.²³¹ The supreme court acknowledged the court of appeals' holding that the phrase "next . . . term" indicated that only a singular term was extended,²³² but the court also acknowledged Endeavor's "forceful rebuttal" that unused days from one term became part of the "next" term, and because there will always be a "next" term for unused days to roll into, that meant unused days may be carried forward indefinitely.²³³ The supreme court indicated the phrase "accumulate" was inconclusive because it could reference both a gradual accumulation over time or increases in general, whether sudden or incremental.²³⁴ Ultimately, the supreme court called the textual interpretations "too close to call."²³⁵

The supreme court also analyzed the parties' non-textual arguments and determined that both "advance plausible understandings of the provision's commercial purpose," but concluded that neither pointed to a single objectively correct construction.²³⁶ For instance, Endeavor contended that its construction represented a more sensible bargain, allowing Endeavor to receive the benefits of exceeding the drilling timelines, while still averaging about one well every 150 days.²³⁷ However, the supreme court acknowledged Energen's argument that the purpose of a continuous development clause is not to achieve an "average" duration of gap but rather to ensure there are no excessively long gaps.²³⁸ The supreme court concluded that neither interpretations were "sufficient to break the

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 155.

230. *Id.* at 152.

231. *Id.* at 151.

232. *Id.*

233. *Id.*

234. *Id.* at 152.

235. *Id.* at 151.

236. *Id.* at 154.

237. *Id.* at 153.

238. *Id.* at 154.

tie created by the Lease's ambiguous language.”²³⁹

Ultimately, the supreme court concluded that the description of the drilling schedule required to avoid termination was reasonably susceptible to more than one meaning, and therefore it was legally ambiguous.²⁴⁰ The supreme court indicated that “it has long been the rule that contractual language will not be held to automatically terminate the leasehold estate unless that ‘language . . . can be given no other reasonable construction than one which works such result.’”²⁴¹ “Because the disputed provision is ambiguous, it cannot operate as a special limitation under these circumstances.”²⁴²

The significance of this case is that the supreme court declared that the continuous development provision was legally ambiguous. This is notable given Texas courts' reluctance to declare that contracts are ambiguous. Another notable aspect of this case is that, even though ambiguity generally opens the door to admission of extrinsic evidence, the supreme court held that there was no need for extrinsic evidence here because this case was resolved by the rule that ambiguous contractual terms may not operate as a special limitation.²⁴³ In addition, this case clarifies that the rule regarding the clarity required to impose a special limitation applies not only to the issue of whether a provision, when triggered, is intended to impose a partial termination, but more broadly applies to also require clarity in the drilling deadlines that trigger the clause allegedly calling for a termination.

B. *SAMSON EXPLORATION, LLC v. MOAK*

In this case, the Ninth Beaumont Court of Appeals held, among other things, that land associated with pooled mineral interests did not remain in a unit after the leases terminated via foreclosure.²⁴⁴

T.W. Moak and Moak Mortgage and Investment Co. (Moak) filed suit against Samson Exploration, LLC (Samson), Lucas Petroleum Group, Inc. (Lucas), Bold Minerals II, LLC, and ETOCO, LP (collectively Bold), alleging to be record owners of undivided mineral and leasehold interests that entitled Moak “to participate in production of oil, gas, and other minerals therefrom or from lands pooled therewith, or proceeds from the sale thereof.”²⁴⁵ Moak further alleged that Samson, Lucas, and Bold operated a pooled unit in which Moak was a record owner but that they failed to account to Moak for production attributable to its share.²⁴⁶ “Moak asserted claims for an accounting, conversion, unjust enrichment,

239. *Id.*

240. *Id.* at 155.

241. *Id.*

242. *Id.*

243. *Id.* at 153 n.5.

244. *Samson Expl., LLC v. Moak*, No. 09-18-00463-CV, 2020 WL 238538, at *1 (Tex. App.—Beaumont Jan. 16, 2020, no pet.) (mem. op.).

245. *Id.*

246. *Id.* at *2.

negligence, and to quiet title.”²⁴⁷

Moak’s claims centered on the allegation that the defendants failed to share revenue, royalty, and production from the unit with respect to six tracts.²⁴⁸ Moak contended that because the pooling provisions in the prior leases pooled the *land*, rather than merely the *lease*, the termination of the prior leases did not terminate Moak’s participation in the pooled unit.²⁴⁹ Thus, Moak contended that the pooling agreement in the leases was independent of the life of the leases and outlived the foreclosure of the leases.²⁵⁰

In deciding the issue, the Ninth Beaumont Court of Appeals focused on the prior lessor’s ability to authorize pooling of its reversionary interests.²⁵¹ The court explained that, when the prior lease was granted, the six tracts were already encumbered by deed of trust liens.²⁵² As such, even if the pooling provision purported to include the land together with any reversionary rights of the lessor, the lessor never acquired any reversionary rights because the properties were foreclosed upon.²⁵³ Thus, because the original lessors never acquired any reversionary rights due to foreclosure and because the foreclosure terminated the leases, the original lessees had no authority to pool any interest in the land post-foreclosure.²⁵⁴ The court also noted that pooling is usually a matter of contract, yet there was no evidence of any agreement between Moak and the mortgagees of the tracts, and there was no contractual relationship between Moak and Samson, Lucas, and Bold.²⁵⁵

The court acknowledged that in *Wagner & Brown, Ltd. v. Sheppard*,²⁵⁶ the Texas Supreme Court held that an interest remained subject to a pooled unit despite the termination of the underlying lease. However, the Ninth Beaumont Court of Appeals held that *Wagner* is distinguishable on the basis that Moak was not a party to the original lease which authorized pooling.²⁵⁷ The significance of this case is that a lessor and lessee do not have the power to commit land to a pooled unit beyond the foreclosure of a prior mortgage interest.

C. *WHEELER V. SAN MIGUEL ELECTRIC COOPERATIVE, INC.*

In this case, the Fourth San Antonio Court of Appeals reviewed, among other things, whether a partition agreement altered the general rule that coal and lignite ownership is held by the owner of the surface

247. *Id.*

248. *Id.*

249. *Id.* at *3 (emphasis added).

250. *Id.*

251. *Id.* at *7.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at *6 (citing *Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 420 (Tex. 2008)).

257. *Id.* at *7.

estate and whether a coal and lignite lease had expired for lack of rental payments.²⁵⁸

In 1954, a coal and lignite lease was executed covering the 2,210-acre San Miguel Ranch.²⁵⁹ San Miguel Electric succeeded as lessee to this lease.²⁶⁰ Through a series of conveyances, which included a Partition Agreement (Agreement) at the center of this controversy, Wheeler acquired ownership of the entire surface estate of the San Miguel Ranch.²⁶¹

In 2017, Wheeler filed suit seeking to have the 1954 lease declared invalid.²⁶² The terms of the lease indicated that, even if no minerals were produced in a relevant period, the lease would “remain in force so long as the [delay] rentals hereinafter provided for are paid.”²⁶³ Wheeler argued that, pursuant to the Agreement, Wheeler acquired title to the coal and lignite interests by way of partition of the surface estate and that San Miguel’s failure to pay Wheeler delay rentals terminated the lease.²⁶⁴

The court held that the Agreement unambiguously excepted the “oil, gas and minerals” from the effect of the partition.²⁶⁵ As such, the court examined whether the Agreement contained a provision which established whether the coal and lignite would be considered part of the surface or mineral estates.²⁶⁶ Absent an express provision stating to the contrary, Wheeler argued that a general rule, based upon the surface destruction test, states that coal and lignite within 200 feet of the surface are considered part of the surface estate.²⁶⁷ The court held that the surface destruction test was not dispositive in this case because the Agreement provided an express definition of “oil, gas and minerals,” which expressly included, among other substances, coal and lignite.²⁶⁸ Because the Agreement did not affect the interests in coal or lignite, the court held that Wheeler was not entitled to payment of delay rentals.²⁶⁹

The court went on to uphold the trial court’s directed verdict against the plaintiff’s contentions that the required delay rentals were not made according to the lease.²⁷⁰ The lessee had made payments consistent with alternative means that were proper under the lease, including continuing to pay a deceased owner until proper notice of the change in

258. *Wheeler v. San Miguel Elec. Coop., Inc.*, 610 S.W.3d 60, 61 (Tex. App.—San Antonio 2020, pet. denied).

259. *Id.* at 63.

260. *Id.*

261. *Id.*

262. *Id.* at 64.

263. *Id.* at 69.

264. *Id.* at 64.

265. *Id.* at 65–66 (“The parties hereto desire to partition and/or exchange *the surface estate* . . . and desire to *except* the oil, gas, and mineral estate . . .”) (Paragraph 2 was labeled “Partition of *Surface Estate Only*”) (emphasis added).

266. *Id.* at 66.

267. *Id.* (citing *Reed v. Wylie (Reed II)*, 597 S.W.2d 743, 747–48 (Tex. 1980)).

268. *Id.*

269. *Id.* at 67.

270. *Id.* at 73.

ownership.²⁷¹

The significance of this case is the court's interpretation that coal and lignite were components of the mineral estate on the basis of the parties' express, agreed-upon definition of "oil, gas and minerals," as opposed to basing ownership on the surface destruction test.

IV. LESSEE'S EXPRESS AND IMPLIED OBLIGATIONS

A. *MARTIN V. ROSETTA RESOURCES OPERATING, LP*

This case involved a dispute regarding the interpretation of an express offset provision in an oil and gas lease.²⁷² There were two leases (the Martin Leases) involved, each of which contained the following identical offset provision within the addendum:

Notwithstanding anything contained herein to the contrary, it is further agreed that in the event a well is drilled on or in a unit containing part of this acreage or is drilled on acreage adjoining this Lease, the Lessor [sic], or its agent(s) shall protect the Lessee's [sic] undrilled acreage from drainage and in the opinions of reasonable and prudent operations, drainage is occurring on the un-drilled acreage, even though the draining well is located over three hundred thirty (330) feet from the un-drilled acreage, the Lessee shall spud an offset well on said un-drilled acreage or on a unit containing said acreage within twelve (12) months from the date the drainage began or release the acreage which is un-drilled or is not a part of a unit which is held by production.²⁷³

Rosetta Resources Operating, LP (Rosetta) and Newfield established the Martin Unit, which contained a portion of the Martin Leases, and drilled the "GU-1 Well."²⁷⁴ Newfield later established the unrelated nearby "Simmons Unit" and drilled the "Simmons-1 Well."²⁷⁵ Martin filed suit against both Newfield and Rosetta, arguing that each of these wells triggered the offset obligations under the Martin Leases.²⁷⁶ In 2018, the claims against Newfield made their way up to the Thirteenth Corpus Christi-Edinburg Court of Appeals.²⁷⁷ In that prior case, the court held that this offset provision was not triggered by Newfield's drilling of the nearby Simmons-1 Well because the Simmons Unit was not "adjoining" the Martin leases.²⁷⁸ The Martins amended their petition against Rosetta to claim that Rosetta's obligations were triggered not by the Simmons-1 Well, but instead, by the drilling of the GU-1 Well in the Martin Unit.²⁷⁹

271. *Id.*

272. *Martin v. Rosetta Res. Operating, LP*, No. 13-19-00431-CV, 2020 WL 5887566, at *1 (Tex. App.—Corpus Christi—Edinburg, Oct. 1, 2020, pet. filed).

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Martin v. Newfield Expl. Co.*, No. 13-17-00104-CV, 2018 WL 1633574, at *1 (Tex. App.—Corpus Christi—Edinburg Apr. 5, 2018, pet. denied).

278. *Id.* at *3.

279. *Martin*, 2020 WL 5887566, at *2.

The trial court held in favor of Rosetta and this appeal followed.²⁸⁰

Rosetta argued that all of its obligations under this express lease provision were triggered only if and when two conditions both occur: (1) a well is drilled on or in a unit containing the lease or on adjoining lands, and (2) that same well must also be causing drainage as determined by “the opinions of reasonable and prudent operations.”²⁸¹ Rosetta argued that, though the GU-1 well satisfied the first condition, it did not satisfy the second because there was no allegation that the GU-1 was causing drainage.²⁸²

The court disagreed, construing the provision as imposing two independent obligations: a general duty to “protect” from drainage and an additional duty to “spud an offset well.”²⁸³ The court construed the first obligation as being triggered only by the drilling of a well within the defined proximity to the Martin leases.²⁸⁴ The court held that the presence of drainage is irrelevant under the lease with respect to that general duty.²⁸⁵ Unlike the prior case, it was undisputed that the GU-1 well was located “on or in a unit containing part of” the Martin Leases.²⁸⁶ Therefore, the court held that this general duty to protect was triggered when the GU-1 Well was drilled within the Martin Unit.²⁸⁷

The court then turned to the additional independent express duty to spud an offset well.²⁸⁸ The court rejected Rosetta’s interpretation that the duty to spud an offset well is limited to situations where “in the opinions of reasonable and prudent operations, drainage is occurring.”²⁸⁹ As the court explained, this phrase does not itself contain conditional language, such as “if” or “in the event.”²⁹⁰ Regardless, the court pointed out that it was undisputed that the Simmons-1 Well was draining the undrilled portions of the Martin Leases.²⁹¹ The court held that it was immaterial that the general duty to protect and the independent duty to spud an offset well were triggered by different wells.²⁹² Therefore, the court held that Rosetta was obligated to either spud an offset well or release the undrilled acreage.²⁹³

It is difficult to define a narrow and clear abstract significant point of law from this case. Indeed, the court pointed out that the provision at issue “suffers from both a lack of accuracy and a lack of clarity.”²⁹⁴ At

280. *Id.*

281. *Id.* at *3.

282. *Id.* at *5.

283. *Id.* at *3, n.5.

284. *Id.* at *4.

285. *Id.* at *5.

286. *Id.* at *4.

287. *Id.* at *5.

288. *Id.*

289. *Id.*

290. *Id.* at *3.

291. *Id.* at *5.

292. *Id.*

293. *Id.* at *6.

294. *Id.* at *3.

any rate, the case serves as a cautionary reminder to lessees that, just because an express offset provision references the standard of a reasonable prudent operator, that does not necessarily serve as a significant limitation or condition precedent to the lessee's obligations.

V. EXECUTIVE RIGHTS AND DUTIES

A. *GEARY V. TWO BOW RANCH LTD. PARTNERSHIP*

In this case, the Fourth San Antonio Court of Appeals addressed the nature of a deed provision giving the grantee of the property the power to "control the executory rights pertaining to the minerals" and whether the grantee's successor could be held liable for a claim for breach of duties owed by the holder of executive interests.²⁹⁵

This case involved a 1981 warranty deed that conveyed both 100% of the surface estate and an undivided one-half interest in the minerals, and expressly reserved and excepted an undivided one-half of the minerals.²⁹⁶ The deed also contained what the court labeled a "[p]rovisional [a]uthority" clause, stating the "Grantee may control the executory rights pertaining to the minerals provided the Grantors and Grantee share equally in any and all proceeds related thereto."²⁹⁷ Several years later, the grantee sold its interest to a purchaser, and that purchaser later sold its interest to Two Bow Ranch.²⁹⁸

Two Bow Ranch executed an oil and gas lease in 2011 in exchange for a lease bonus of \$174,498.00.²⁹⁹ The grantors of the 1981 deed contended that Two Bow should share that bonus payment with them pursuant to the "provisional authority" clause.³⁰⁰ The grantors asserted multiple theories they contended reached that result, including breach of contractual and breach of duties allegedly owed by the holder of executive rights.³⁰¹ They argued that if the 2011 lease covered only Two Bow's interest, then Two Bow breached a duty to lease the grantors' interests as an executive owner. But, if the 2011 lease covered the entire mineral estate, then Two Bow breached a duty to share the lease bonus payment with them.³⁰²

The Fourth San Antonio Court of Appeals held that the deed did not convey an "ownership" interest in the executive estate relating to the grantors' reserved minerals.³⁰³ The appellate court first noted that the deed described "the property" being conveyed as one-half of the minerals "and related executory rights and interests associated therewith"³⁰⁴

295. *Geary v. Two Bow Ranch Ltd. P'ship*, No. 04-18-00610-CV, 2020 WL 354763, at *1 (Tex. App.—San Antonio Jan. 22, 2020, pet. filed).

296. *Id.*

297. *Id.*

298. *Id.* at *1–2.

299. *Id.* at *2.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at *5.

304. *Id.*

The court explained that this language meant that the only executive rights being conveyed were the one-half executive rights that were “related” to the one-half mineral interest being conveyed.³⁰⁵ Next, the court noted that the 1981 deed also expressly reserved and excepted a one-half mineral interest and its “related” executive rights.³⁰⁶ The court indicated that these provisions collectively meant that the grant did not include the executive interest covering the grantors’ one-half mineral interest.³⁰⁷ Instead, the court characterized the provisional authority clause as providing the grantee a “conditional permission” to exercise the executive rights, but no obligation or duty to do so.³⁰⁸ As a result, the grantee had the contractual power to grant a lease covering only its one-half interest, or it could lease the entire mineral interest provided that it shared in the benefits.³⁰⁹

The court then turned to whether the “provisional authority” passed with the property to subsequent grantees.³¹⁰ The court held that the successors and assigns forever provision was not applicable because it expressly pertained to “the Property,” whereas the provisional authority was a contractual authority.³¹¹ Moreover, “the Property,” as defined in the deed, did not include the grantor’s reserved interest, and therefore, it could not be interpreted as including the provisional authority.³¹² Also, the provisional authority clause itself did not indicate that the optional power was assignable.³¹³ The grantors argued that the provisional authority passed to the successors because contract rights are generally assignable.³¹⁴ The court held there was no need to decide that issue because, even if the provisional authority was assignable as a contract right, the assignments from Two Bow’s predecessors did not assign that right.³¹⁵

Finally, the court held that Two Bow was not obligated to share its lease bonus with the grantors.³¹⁶ First, Two Bow could not lease a greater mineral estate than it owned.³¹⁷ Further, the lease Two Bow executed contained a lesser interest clause (or proportionate reduction clause), meaning the lease expressly only covered Two Bow’s interest, and therefore, the bonus paid to Two Bow was attributable only to Two Bow’s one-half mineral interest.³¹⁸

The significance of this case is the court’s analysis of the nature of the alleged executive rights and the court’s rejection of the related claims for

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* at *8.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* at *10.

317. *Id.* at *9.

318. *Id.* at *10.

breach of the alleged duties owed by an executive to non-executive interests. Executive rights can place significant duties on their holder with the potential for significant liability for breach.³¹⁹

VI. ROYALTY DISPUTES

A. *DEVON ENERGY PRODUCTION CO., LP v. SHEPPARD*

This case involves “highly unique royalty provisions” in lease forms prevalent during the shale boom in the Eagle Ford area.³²⁰ The leases contained the following “add to proceeds” provision:

If any disposition, contract or sale of oil or gas shall include any reduction or charge for the expenses or costs of production, treatment, transportation, manufacturing, process or marketing of the oil or gas, then such deduction, expense or cost shall be added to the market value or gross proceeds so that Lessor’s royalty shall never be chargeable directly or indirectly with any costs or expenses other than its pro rata share of severance or production taxes.³²¹

Another provision in the addendum indicated that royalties “shall never bear or be charged with, either directly or indirectly, any part of the costs or expenses of” several enumerated categories of postproduction costs.³²²

The royalty owners argued that these lease provisions required the lessee to add any “reduction or charge” that was included in any “disposition, contract or sale of oil or gas” to the lessee’s gross proceeds before calculating royalties.³²³ The lessors argued that a wide variety of the lessee’s purchase agreements, purchase statements, processing arrangements, and other instruments reflected reductions or charges, and therefore, they should have been added to the lessee’s gross proceeds prior to calculating the lessors’ royalties.³²⁴

The lessees argued that the controlling language in the leases was the royalty provision indicating that royalties were to be paid on the basis of “gross proceeds at the point of sale.”³²⁵ The lessees argued that this phrase established a valuation point at the point of sale, and that the reductions or charges at issue in this case were irrelevant because they were incurred downstream of the point of sale.³²⁶

319. See, e.g., *Tex. Outfitters Ltd., LLC v. Nicholson*, 534 S.W.3d 65, 70 (Tex. App.—San Antonio 2017) *aff’d*, 572 S.W.3d 647 (Tex. 2019); *Lesley v. Veterans Land Bd.*, 352 S.W.3d 479, 491 (Tex. 2011); *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 81–82 (Tex. 2015).

320. *Devon Energy Prod. Co., LP v. Sheppard*, No. 13-19-00036-CV, 2020 WL 6164467, at *1 (Tex. App.—Corpus Christi–Edinburg Oct. 22, 2020, pet. filed) (author Austin Brister represented the appellees in this case at the trial court and appellate court levels and is continuing representation of the appellees at the Texas Supreme Court where petition for review has been filed).

321. *Id.* at *2.

322. *Id.*

323. *Id.* at *3.

324. *Id.*

325. *Id.*

326. *Id.*

The lessors and lessees submitted a joint stipulation to the court, identifying twenty-three different scenarios for the court's consideration.³²⁷ The trial court granted summary judgment in favor of the lessors, and this appeal followed.³²⁸

The appellate court reviewed the "highly unique royalty provisions" in the underlying leases and concluded that it was "exceptionally broad, and there [was] nothing in the leases suggesting that [it] [was] limited to pre-point-of-sale expenses."³²⁹ The court further explained that the initial royalty clause indicated that "royalty [was] to be initially based on the [lessees'] gross proceeds (before [this unique additional provision was] applied)."³³⁰ The court explained that, if it were to hold that royalties were due only on gross proceeds, then the court would be rendering this additional "add to proceeds" provision meaningless.³³¹

The court also explained that this unique provision differs "significantly" from a mere "no-deducts" clause, as it does not concern deductions made to the royalty; rather, it focuses on the dispositions and sales contracts, and it applies if they contain a "reduction or charge" for such expenses.³³² Moreover, the phrase indicating that the royalty shall never be "directly or indirectly" charged with such costs reflected an intent that the royalty should not be reduced where "a downstream sales price is reduced to account for costs incurred or anticipated by the purchaser."³³³

Ultimately, the court concluded that this unique language reflected the parties' intent to base the royalty on more than mere gross proceeds.³³⁴ The court coined this a "proceeds plus" royalty.³³⁵ The court held that this language requires the lessee to add to its gross proceeds any reduction or charge that is included in a disposition, contract, or sale of oil and gas, so long as the charge is for one of categories enumerated within the lease addendum.³³⁶

The significance of this case is the court's analysis of a unique form of oil and gas lease that appeared in the Eagle Ford area around 2011, the court's treatment of the valuation point and royalty base concepts, and the court's analysis of the so-called "add back" provision.

B. *BLUESTONE NATURAL RESOURCES II, LLC v. NETTYE ENGLER ENERGY, LP*

This case involves a dispute determining whether a deed granting a non-participating royalty interest (NPRI) was properly construed as al-

327. *Id.*

328. *Id.* at *4.

329. *Id.* at *12.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.* at *13.

334. *Id.* at *14.

335. *Id.*

336. *Id.*

lowing the deduction of a proportionate share of post-production costs.³³⁷ The owner of an NPRI contended that a 1986 deed creating the NPRI interest contained language that prohibited the deduction of post-production costs.³³⁸ The 1986 deed contained the following language:

Grantor . . . shall be entitled to receive . . . a free one-eighth (1/8) of gross production of any such oil, gas or other mineral said amount to be delivered to Grantor's credit, free of cost in the pipe line, if any, otherwise free of cost at the mouth of the well or mine . . .³³⁹

In 2004, BlueStone's predecessors leased the tract and drilled numerous producing wells.³⁴⁰ BlueStone's predecessors incurred a number of post-production costs, but that predecessor did not pass those costs onto the NPRI owner.³⁴¹ In 2016, BlueStone acquired these leasehold interests and began to deduct from the NPRI a share of BlueStone's post-production costs for transportation, gathering, and compression.³⁴² The NPRI owner filed suit.³⁴³ The trial court granted the NPRI owner's motion for summary judgment, and this appeal followed.³⁴⁴

On appeal, BlueStone argued that the 1986 deed's use of the phrase "in the pipe line" indicated that the royalty was to be valued at the pipeline and therefore, was subject to post-production costs.³⁴⁵ BlueStone cited the recent Texas Supreme Court case, *Burlington Resources Oil & Gas Co. LP v. Texas Crude Energy, LLC*,³⁴⁶ which held that the phrase "into the pipelines . . . with which the wells may be connected" was tantamount to the phrase "at the well," thereby establishing a valuation point that requires a royalty interest owner to bear post-production costs.³⁴⁷

The NPRI attempted to distinguish *Burlington*, arguing that *Burlington* did not broadly hold that "into the pipeline" sets a valuation point at the wellhead.³⁴⁸ The NPRI owner instead argued that the controlling factor in *Burlington* was the fact the instrument referenced pipelines that are "connected" to the well.³⁴⁹ The *Bluestone* court disagreed, stating *Burlington* "did in fact focus heavily on the singular phrase 'into the pipeline.'"³⁵⁰

The NPRI owner also argued that omitting the phrase "connected to the well" reflects that the parties to the 1986 deed were referring to a

337. *BlueStone Nat. Res. II, LLC v. Nettey Engler Energy, LP*, No. 02-19-00236-CV, 2020 WL 3865269, at *1 (Tex. App.—Fort Worth July 9, 2020, pet. filed).

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* at *2.

343. *Id.*

344. *Id.*

345. *Id.* at *4.

346. 573 S.W.3d 198, 199 (Tex. 2019).

347. *BlueStone Nat. Res. II*, 2020 WL 3865269, at *4 (citing *Burlington Res. Oil & Gas Co. LP v. Texas Crude Energy, LLC*, 573 S.W.3d 198 (Tex. 2019)).

348. *Id.*

349. *Id.*

350. *Id.* at *5.

major pipeline downstream, not merely a gathering system connected to the well.³⁵¹ The *Bluestone* court rejected that argument as well, pointing to multiple resources indicating that a gathering system is a type of pipeline.³⁵²

Additionally, the NPRI owner argued that, because the two phrases “free of cost in the pipe line” and “free of cost at the mouth of the well” are separated by the word “otherwise,” they are mutually exclusive.³⁵³ The NPRI owner further argued that the second phrase refers to gas with a valuation point at the mouth of the well, and therefore, the first phrase must refer to oil and a valuation point somewhere other than the well-head.³⁵⁴ The *Bluestone* court rejected that interpretation.³⁵⁵ Instead, the court construed the word “otherwise” as simply meaning that the valuation point is at the pipeline if there is a pipeline, otherwise the valuation point is at the mouth of the well.³⁵⁶

The NPRI owner also attempted to draw several analogies between the 1986 deed and the *Hyder* case.³⁵⁷ The NPRI owner cited *Hyder* in arguing that the phrase “cost free” in the 1986 deed means free of post-production costs.³⁵⁸ The appellate court rejected that comparison, noting that *Hyder* was not based solely on the phrase “cost free” but was instead “focused specifically” on the parenthetical that followed, which read “cost-free (except only its portion of production taxes).”³⁵⁹ Because that parenthetical did not appear in the 1986 deed, the phrase “cost free” was given its ordinary meaning, being that the royalty is to be free of production costs but subject to a proportionate share of post-production costs.³⁶⁰

The *BlueStone* court also rejected the argument that the 1986 deed’s use of the phrase “a free one-eighth (1/8) of gross production” brought the 1986 deed in line with *Hyder*.³⁶¹ The court explained that *Hyder* held that the phrase “free” in a royalty provision typically refers only to production costs and not post-production costs.³⁶² The *BlueStone* court explained that the 1986 deed did not express a contrary intent, as the word “free” appeared in multiple other locations in the context of production costs, not post-production costs.³⁶³ Moreover, in the phrase “free of cost at the mouth of the well,” the reference to the mouth of the well suggests the word “free” is used in its standard nature, in reference to production costs.³⁶⁴

351. *Id.*

352. *Id.*

353. *Id.* at *4.

354. *Id.*

355. *Id.* at *5.

356. *Id.*

357. *Id.* (citing *Chesapeake Expl., LLC v. Hyder*, 483 S.W.3d 870, 872 (Tex. 2016)).

358. *Id.* (citing *Chesapeake Expl.*, 483 S.W.3d at 872).

359. *Id.* at *6.

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

The significance of this case is its interpretation and extension of the holding in *Burlington Resources Oil & Gas Co. LP v. Texas Crude Energy, LLC*³⁶⁵ in relation to the phrase “into the pipeline” in a royalty provision. This case is also notable given its discussion of *Chesapeake Exploration, LLC v. Hyder*.³⁶⁶

VII. EVIDENCE AND PROCEDURE

A. *JATEX OIL & GAS EXPLORATION LP v. NADEL & GUSSMAN PERMIAN, LLC*

In this case, the Eleventh Eastland Court of Appeals held that the Property Owner Rule did not extend to the valuation of mineral reserves because such a valuation is based on matters of a technical or specialized nature.³⁶⁷ As such, valuation of mineral reserves generally requires expert testimony under Rule 702 of the Texas Rules of Evidence.³⁶⁸

Jatex was a non-operator and Nadel & Gussman Permian (NGP) was an operator.³⁶⁹ The parties were subject to a joint operating agreement (JOA).³⁷⁰ Jatex alleged that NPG improperly included Jatex in a deepening project and NPG erroneously assessed charges to Jatex’s account for the project.³⁷¹ Jatex argued that this was improper because Jatex did not elect to participate in that project, and under the JOA, a written consent election was required to include a non-operator in the operation.³⁷² Jatex alleged that those erroneous charges caused a bank to foreclose on Jatex’s mineral leasehold interests, which the bank purchased at the foreclosure sale for \$1.5 million.³⁷³

Jatex filed suit against NGP, claiming that NPG breached the parties’ JOA by failing to act as a reasonably prudent operator.³⁷⁴ Jatex filed a motion for summary judgment supported by a declaration signed by its owner, John A. Truitt, attesting that he believed the properties foreclosed upon were worth closer to \$12 million.³⁷⁵ The trial court denied Jatex’s motion, excluded Mr. Truitt’s declaration, and granted NPG’s cross-motion for summary judgment.³⁷⁶

On appeal, Jatex asserted that Mr. Truitt’s opinion regarding the value of the mineral estate was admissible under the “Property Owner Rule.”³⁷⁷ The court explained that, under the Property Owner Rule, a

365. 573 S.W.3d 198, 199 (Tex. 2019).

366. 483 S.W.3d 870, 872 (Tex. 2016).

367. *Jatex Oil & Gas Expl. LP v. Nadel & Gussman Permian, LLC*, No. 11-17-00265-CV, 2020 WL 4873836, at *5 (Tex. App.—Eastland, Aug. 20, 2020, no pet.).

368. *Id.*

369. *Id.* at *1.

370. *Id.* at *2.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.* at *1.

375. *Id.* at *2–3.

376. *Id.* at *2.

377. *Id.* at *4.

property owner is generally qualified to testify as to the value of his property even if he is not an expert and would not otherwise be qualified to testify to the value of other property.³⁷⁸ “The rule is based on the presumption that an owner will be familiar with his own property and know its value.”³⁷⁹ Entities can prove the value of their property through officers or employees.³⁸⁰

However, the appellate court held that the Property Owner Rule does not extend to matters that are of a technical or specialized nature.³⁸¹ The court held that valuation of mineral reserves in this case constituted expert opinion evidence because it requires a “technical, specialized nature of . . . valuation” that “is based on special knowledge, skill, experience, training, or education in a particular subject.”³⁸² The court also reasoned that Mr. Truitt’s written opinion itself was in the nature of alleged expert opinion testimony, as it was highly technical: he claimed he possessed “expertise,” the testimony criticized the valuations performed by NPG’s expert, and he cited to technical publications for a variety of technical acronyms.³⁸³

Because Mr. Truitt’s opinions constituted expert testimony, they should have been disclosed in discovery.³⁸⁴ To the contrary, prior to the motions for summary judgment, Jatex actually “undesignated” Mr. Truitt as an expert in valuation and during his deposition, Mr. Truitt testified that he had not performed a valuation of the mineral interests.³⁸⁵ The court also held that Mr. Truitt’s testimony failed to provide a sufficient description of his analysis so the court could determine reliability, and the explanations he gave reflected too great of an analytical gap.³⁸⁶ For instance, Truitt’s opinion was devoid of supporting data for his calculations, and his entire opinion was set out in just two pages that were largely filled by just two charts.³⁸⁷ Accordingly, the court held that his opinion testimony was not admissible as expert testimony, and the trial court did not abuse its discretion by striking Truitt’s valuation from summary judgment evidence.³⁸⁸

The significance of this case is the court’s rejection of the plaintiff’s attempt to use the Property Owner Rule to offer lay testimony regarding valuation of mineral reserves. Another notable aspect is the court’s holding that, even if the Property Owner Rule was applicable, the testimony would still need to meet the requirements for expert opinion testimony. It

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.* at *5.

382. *Id.* (citing Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd., 337 S.W.3d 846, 850 (Tex. 2011)).

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.* at *6.

is not uncommon for mineral and royalty owners to attempt to use the Property Owner Rule in connection with evidence of the alleged value of the underlying minerals. Going forward, parties seeking to rely upon the Property Owner Rule in oil and gas cases may claim this case was limited to the nature of opinions offered by Mr. Truitt. On the other hand, opponents seeking to defeat the use of the Property Owner Rule may seek to characterize this case as holding that valuation of mineral reserves is always a matter of expert testimony.

VIII. SURFACE USE, ACCOMMODATION, AND DAMAGES

A. *EVANS RESOURCES, LP v. DIAMONDBACK E&P, LLC*

This case addressed whether a lessee was required to pay “location damages” for horizontal well locations under an oil and gas lease and related surface use agreement when the lessee conducted a survey and placed stakes on the land but did not actually commence drilling or conduct any further operations for the wells.³⁸⁹

The oil and gas lease and related surface agreement at issue required the lessee to pay the lessor location damages “prior to commencing drilling operations” for seven pre-identified vertical wells.³⁹⁰ A subsequent amendment to the surface agreement allowed the drilling of “extended length horizontal wells” with surface locations on the land at issue.³⁹¹ The amendment stated that, “for each [horizontal well] constructed on the [l]and,” the lessee was required to pay location damages “in advance” in the amount of \$500,000.00 each.³⁹²

The Eleventh Eastland Court of Appeals held that, under the terms of the surface agreement and its amendment, the location damages were not due upon execution of the agreement, but rather “in advance” of the “purpose requiring payment,” being when the lessee “utilized” the land for the “construction” of a horizontal well location.³⁹³ Because the amendment did not define “construction,” the court looked to the “common, ordinary meaning,” which is “to make or form by combining or arranging parts or elements.”³⁹⁴ The appellate court held that this meant the lessee was only required to pay the “location damages” once the lessee “moved the necessary parts or elements of the [horizontal well] on to the [l]and.”³⁹⁵ The court held that the lessee’s action of conducting a survey and laying stakes on the ground did not trigger this payment obligation.³⁹⁶ Further, the agreements did not define “utilize,” and the court indicated the common meaning of the term is “to make use of: to turn to

389. *Evans Res., LP v. Diamondback E&P, LLC*, No. 11-18-00128-CV, 2020 WL 2838529, at *1 (Tex. App.—Eastland May 29, 2020, pet. denied).

390. *Id.* at *2.

391. *Id.*

392. *Id.*

393. *Id.* at *6.

394. *Id.*

395. *Id.*

396. *Id.* at *8.

practical use or account.”³⁹⁷ The court held that surveying and placing stakes was not utilizing the land for the purpose of construction.³⁹⁸ Therefore, no “location payment” was due under these agreements when the lessee surveyed and staked the horizontal wells.³⁹⁹

The court made some reference to the underlying oil and gas lease, which provided a narrow, express definition of “commencement of a well,” defined as the spudding in of a well with a drilling rig capable of drilling to a depth of 10,000 feet below the surface.⁴⁰⁰ In a footnote, the court noted that “instruments pertaining to the same transaction may be read together to ascertain the parties’ intent . . . [t]herefore, we may look to the Lease to ascertain the parties’ agreement.”⁴⁰¹

The significance of this case is the analysis of a provision requiring payment upon “utilizing” land for “construction” of a horizontal well. Leases and other agreements in oil and gas commonly define deadlines and conditions by reference to the commencement of certain phases of drilling operations, such as “commence drilling operations” or “operations for drilling.”⁴⁰² This case adds to that body of law, most obviously with respect to the terms “construction” and “utilize.” Parties seeking to argue for a later deadline may argue that this case holds that the terms “construction” and “utilize” refer to operations going beyond preparatory activity, whereas opponents to that viewpoint may argue that this holding was limited to the facts of this case, including the fact that the underlying oil and gas lease provided a narrow definition of “commencing of drilling operations.”

IX. EASEMENTS AND CONDEMNATION DISPUTES

A. *ATMOS ENERGY CORP. v. PAUL*

In this case, the Second Fort Worth Court of Appeals held that a “blanket easement” for multiple pipelines did not require the grantee to lay

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.* at *5.

401. *Id.* at n.4 (internal citations omitted).

402. See, e.g., 3 WILLIAMS & MEYERS, OIL AND GAS LAW § 618 (2020) (discussing disputes regarding the meaning of phrases such as “drilling operations,” “commencement of drilling operations,” “commencement of a well,” and the like); see also Andrew J. Cloutier & Jeremy Webb, *Ready, Set, Commence: Commencement Clauses in the 21st Century*, 64 ROCKY MT. MIN. L. INST. 28-1 (2018) (discussing variations on commencement provisions in oil and gas leases); *Valence Operating Co. v. Anadarko Petroleum Corp.*, 303 S.W.3d 435, 441–42 (Tex. App.—Texarkana 2010, no pet.) (discussing whether a lessee’s activities preliminary to actual drilling was sufficient to meet to the obligation to “actually commence work on the proposed operation”); *Gulf Oil Corp. v. Reid*, 337 S.W.2d 267, 272 (Tex. 1960) (holding that “the commencement of the well does not mean actual drilling. It is sufficient if preparations to drill are being made, such as making and clearing a location and delivering equipment to the well site.”); *Bargsley v. Pryor Petroleum Corp.*, 196 S.W.3d 823, 826 (Tex. App.—Eastland 2006, pet. denied) (holding that long-stroking an existing well, laying pipeline, doing electrical work, installing flow lines, and replacing a tank “were not preliminary to the actual work of drilling”).

the additional pipelines along the same route as the initial pipeline, but rather the grantee was permitted to lay the additional pipeline anywhere upon the entire tract so long as its location does not unreasonably interfere with grantor's property rights.⁴⁰³

The dispute stems from a right-of-way and easement granted in 1960 on a 137-acre tract for the purpose of "construct[ing], maintain[ing] and operat[ing] *pipe lines*."⁴⁰⁴ Soon after the initial conveyance, the grantee constructed its initial line parallel to the southern border of the tract.⁴⁰⁵ Decades later, in 2017, Atmos Energy Corp. (Atmos)—the successor-in-interest of the 1960 grantee—intended to construct a second pipeline along a markedly different route on the other side of the property.⁴⁰⁶ However, Paul—the successor-in-interest of the 1960 grantor—denied Atmos access to the property.⁴⁰⁷ Atmos filed suit against Paul for breach of the right-of-way and easement agreement.⁴⁰⁸

At trial, Paul moved for summary judgment, arguing that the 1960 easement agreement only permitted the creation of "one 'right of way and easement'" that "allows for multiple pipelines, [but] not multiple easements."⁴⁰⁹ The trial court granted Paul's summary judgment motion and Atmos appealed.⁴¹⁰

The appellate court noted that the easement agreement was a "blanket easement" because the legal description only described a burdened tract but not a route for the easement.⁴¹¹ The court noted that the deed's granting clause used the plural form of the word "pipe lines."⁴¹² Paul relied on the prior Texas Supreme Court holding in *Houston Pipe Line Co. v. Dwyer*, which held that the route of a blanket easement is established by the construction of a pipeline.⁴¹³ The appellate court distinguished *Dwyer* because the deed in that case provided for the construction of a single pipeline, but *Dwyer* was not determinative of the location of subsequent pipelines such as in this case.⁴¹⁴ The court also rejected Paul's argument that the deed must expressly permit "multiple routes" in order to allow multiple routes.⁴¹⁵ The court explained that Texas law does not impose any such strict requirement to use that language.⁴¹⁶

403. *Atmos Energy Corp. v. Paul*, 598 S.W.3d 431 (Tex. App.—Fort Worth 2020, no pet.).

404. *Id.* at 438 (emphasis added).

405. *Id.*

406. *Id.* at 439.

407. *Id.*

408. *Id.*

409. *Id.* at 440.

410. *Id.* at 442.

411. *Id.* at 446.

412. *Id.* at 447.

413. *Id.* at 449–50 (citing *Hous. Pipe Line Co. v. Dwyer*, 374 S.W.2d 662, 665–66 (Tex. 1964)).

414. *Id.* at 451.

415. *Id.* at 452–53.

416. *Id.* at 456.

The court held that the easement agreement did not restrict the location of the second pipeline to the same route as the first pipeline.⁴¹⁷ However, the court stated the grantee's ability to construct the second pipeline on any part of the property was not without its limitations.⁴¹⁸ The court made note of the "reasonable necessity test" that applies to all such Texas easement cases.⁴¹⁹ Under Texas law, a grant or reservation of an easement in general terms implies a grant of unlimited "reasonable use," such as is "reasonably necessary and convenient and as little burdensome as possible to the servient owner."⁴²⁰

The significance of this case is the interpretation of "blanket easements" and the scope of a blanket easement with reference to a second pipeline, which the court held was not necessarily required to follow the same route as the first pipeline.

B. *DCP SAND HILLS PIPELINE, LLC v. SAN MIGUEL ELECTRIC COOPERATIVE, INC.*

San Miguel is an electric cooperative fueling its power plant by virtue of a lignite strip mine lease located on a 2200-acre tract in McMullen County.⁴²¹ This legal dispute arose when DCP Sand Hills Pipeline, LLC (DCP), a common carrier, negotiated a series of pipeline easements with the surface owners of the 2200-acre tract.⁴²² San Miguel argued that DCP's easement was void and that San Miguel's rights were superior because DCP's second pipeline on the 2200-acre tract would allegedly interfere with San Miguel's future mining obligations.⁴²³

San Miguel brought an action under the Uniform Declaratory Judgments Act (UDJA) seeking, among other things, a declaration that: (1) DCP's pipeline easement was void to the extent it interfered with San Miguel's rights under the lignite lease, and (2) San Miguel's rights under the lease were superior to DCP's easement rights.⁴²⁴ DCP asserted a counterclaim to condemn the land covered by its pipeline easement.⁴²⁵ DCP also argued that San Miguel's lignite lease was invalid and that San Miguel's attempt to seek attorney's fees under the UDJA was improper because San Miguel claims were really a trespass to try title claim.⁴²⁶

The court of appeals started by analyzing whether the UDJA was the proper vehicle to determine whether San Miguel's rights were superior to

417. *Id.* at 447.

418. *Id.*

419. *Id.* at 447–48.

420. *Id.* at 448.

421. DCP Sand Hills Pipeline, LLC v. San Miguel Elec. Coop., Inc., No. 04-19-00288-CV, 2020 WL 4607062, at *1 (Tex. App.—San Antonio Aug. 12, 2020) sub. op., op. withdrawn, *reh'g denied*, No. 04-19-00288-CV, 2020 WL 4607062, at *1 (Tex. App.—San Antonio Nov. 18, 2020).

422. *Id.* at *2.

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

DCP's rights.⁴²⁷ DCP argued that determining the superiority of rights required the court to determine title to real property and, as such, required the claim to be brought under the trespass to try title statute.⁴²⁸ The court disagreed.⁴²⁹ While trespass to try title is the proper statute to determine the validity or superiority of possessory rights in real property, it does not apply when a claimant seeks to establish the validity of an easement, which is a non-possessory interest in real property.⁴³⁰

DCP also argued that San Miguel failed to establish the validity of its lignite lease because it failed to present evidence of delay rentals for one period of time and the evidence showed underpayments of delay rentals for another period of time.⁴³¹ The court rejected this argument, holding that San Miguel presented evidence that explained the underpayments, and DCP failed to present any evidence.⁴³² Rather, DCP merely cited its own pleadings, to which the court noted "[p]leadings are not proper summary judgment evidence."⁴³³

Turning to DCP's condemnation counterclaim, where San Miguel argued condemnation was not available because the land had already been devoted to a public use—San Miguel's use as a lignite mine to fuel its power plant—and therefore, under the "paramount importance doctrine," DCP could not condemn the land for a different public use.⁴³⁴

The court explained that the paramount importance doctrine prevents condemnation by a common carrier when it is shown that: (1) the property is already devoted to a public use, and (2) the condemnation would practically destroy or materially interfere with the use to which it has been devoted.⁴³⁵ As for the first prong, the court found that a fact issue existed as to whether the pipeline would materially interfere with San Miguel's existing public use.⁴³⁶ The evidence showed that San Miguel was not actually mining the 2200-acre tract when DCP acquired its easements, and though San Miguel had conducted numerous studies of the land in 1975, San Miguel had not applied for a permit to mine the area where the easement would be located until after DCP installed the pipeline.⁴³⁷ Thus, San Miguel did not prove, as a matter of law, that it had an "existing" use.⁴³⁸

Regarding the second prong, the court held that San Miguel did not prove, as a matter of law, that DCP's condemnation would practically destroy or materially interfere with San Miguel's strip mining opera-

427. *Id.* at *3.

428. *Id.*

429. *Id.* at *4.

430. *Id.*

431. *Id.*

432. *Id.* at *5.

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.*

tion.⁴³⁹ The court noted that the summary judgment evidence reflected that DCP's pipeline would only sterilize between 10–14% of San Miguel's lignite.⁴⁴⁰ When considering practical destruction or material interference, the court looks to the entire use of the affected property, not a portion of its use.⁴⁴¹

The significance of this case is the analysis of the paramount importance doctrine in relation to a dispute between an oil and gas pipeline and a lignite mining operation by an electric cooperative.

C. *SOUTHWEST ELECTRIC POWER CO. v. LYNCH*

In this case, the Texas Supreme Court addressed a dispute as to whether a utility easement was limited to a fixed width of thirty feet, or whether it was limited to a reasonably necessary width.⁴⁴² Southwestern Electric Power Company (SWEPCO) claimed that, because the instrument granted a general easement with no fixed width, no width restrictions could be placed on their allowed use of the land.⁴⁴³ The landowner argued that SWEPCO's historical use of the easement fixed the width at thirty feet.⁴⁴⁴

The landowners sought declaration from the court that the width of the easement be fixed to thirty feet based on SWEPCO's historical use of the easement.⁴⁴⁵ Rather than construing the easement as a general easement, intentionally omitting a defined width, both the trial court (having allowed extrinsic evidence of SWEPCO's historical use) and the appellate court held that SWEPCO's historical use fixed the easement at thirty feet.⁴⁴⁶

The supreme court held that, because the instrument granted a general easement, the grantee was entitled to access, in a reasonable manner, as much of the property as reasonably necessary to maintain the transmission line.⁴⁴⁷ The court held that the lack of a specified width in the instrument did not mean the instrument was ambiguous, and that it did not open the door to the admission of extrinsic evidence of historical use.⁴⁴⁸

The supreme court emphasized the utility of general easements for purposes of contracting around anticipated developments in technology and accounting for such changes by not fixing a specific easement width.⁴⁴⁹ Doing so is a strategic decision made between the parties, which should not be disturbed by the admission of extrinsic evidence showing historical

439. *Id.*

440. *Id.*

441. *Id.* at *5.

442. *Sw. Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 680 (Tex. 2020).

443. *Id.*

444. *See id.*

445. *Id.* at 681.

446. *Id.* at 682.

447. *Id.* at 690.

448. *Id.*

449. *Id.*

use, and was improperly admitted by the lower courts.⁴⁵⁰

The court noted that, although the width of the easement was not fixed, the landowner was not without recourse because the grantee could only use the property in a reasonable manner and only to an extent that is reasonably necessary to enjoy its rights under the easement.⁴⁵¹

The significance of this case is the supreme court's analysis of so-called "general easements," which do not express a fixed width; its holding that a general easement is not ambiguous merely for omitting a width from the instrument; and its holding that the permissible width of a general easement is that which is reasonably necessary for the permissible use of the easement. Further, this case is interesting in its explanation of the utility of general easements, in that they allow for changes in technology.

X. CONTRACTOR/SUBCONTRACTOR DISPUTES

A. *PEARL RESOURCES, LLC v. CHARGER SERVICES, LLC*

In this case, the Eighth El Paso Court of Appeals upheld a quantum meruit award for emergency work performed by a dirt work company.⁴⁵² Pearl Resources and Pearl Operating were affiliated companies that owned working interests in an oil and gas property in Pecos County, Texas.⁴⁵³ They entered into a Turnkey Drilling Contract with PDS Drilling.⁴⁵⁴ Shortly after drilling began, a blowout occurred, causing fresh-water, hydrogen sulfide, and other contaminants to begin erupting out of the well and migrating towards a significant irrigation system.⁴⁵⁵

An employee for PDS's drilling subcontractor, Bison Drilling, called a dirt work company, Charger Services, LLC (Charger), informed Charger of the emergency need to contain the runoff, and asked Charger to begin work immediately.⁴⁵⁶ Charger mobilized equipment and a foreman the same night.⁴⁵⁷ Not long after the emergency clean-up began, Pearl's drilling contractor, PDS, left the site.⁴⁵⁸ During the containment efforts, the Railroad Commission assumed control while Pearl's representatives served as the Commission's "eyes and ears," which included attending remediation meetings.⁴⁵⁹

Charger initially sent its invoice to the drilling contractor, PDS, rather than to Pearl.⁴⁶⁰ After Charger's invoices remained unpaid for nearly a year, Charger sent a demand for payment directly to Pearl.⁴⁶¹ Ultimately,

450. *Id.*

451. *Id.*

452. *Pearl Res., LLC v. Charger Servs., LLC*, No. 08-19-00096-CV, 2020 WL 4251373, at *1 (Tex. App.—El Paso July 24, 2020, pet. denied).

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.* at *2.

460. *Id.*

461. *Id.*

Charger filed a lawsuit against Pearl.⁴⁶² After a bench trial, the trial court entered judgment in favor of Charger based on quantum meruit.⁴⁶³

On appeal, Pearl raised numerous arguments. First, Pearl argued that an implied contract existed between Charger and PDS, which precluded a quantum meruit claim against Pearl.⁴⁶⁴ Pearl argued this implied contract was created when PDS's subcontractor, Bison was hired by PDS and acted as its agent in procuring Charger's services.⁴⁶⁵ The appellate court acknowledged that, if an implied contract was formed between Charger and PDS for the work performed, Charger would be precluded from seeking quantum meruit against Pearl because a party generally cannot recover in quantum meruit when a valid contract covers the same transaction.⁴⁶⁶ However, the court rejected Pearl's implied contract defense in this case because there was no evidence of an implied contract between Charger and PDS.⁴⁶⁷ In reaching that conclusion, the court held that there was no evidence that Bison was acting as an agent for PDS, no evidence that Bison had the authority to extend an offer on behalf of PDS, and no evidence regarding the essential terms of any purported contract between Charger and PDS.⁴⁶⁸

Pearl argued that there was not sufficient evidence that it was on reasonable notice that Charger expected to be paid by Pearl.⁴⁶⁹ The court rejected that argument, pointing to testimony from two of Charger's owners that they believed it is customary in the industry for emergency subcontractors to look to the operator or lessee for payment.⁴⁷⁰ The appellate court pointed to precedent holding that evidence of industry custom can be relevant in a quantum meruit case to imply that the owner should have known that payment was expected.⁴⁷¹ The court also explained that industry custom was not being used in this case to alter the terms of a contract between Pearl and PDS but rather, to address the separate rights and obligations between Pearl and Charger.⁴⁷² The court also noted evidence that Pearl took over operations after the blowout, Pearl was a sophisticated mineral company, and there was no evidence of a reason for Pearl to believe Charger was doing the work for free.⁴⁷³

Pearl also argued Charger provided the services for the benefit of PDS and not for the benefit of Pearl.⁴⁷⁴ The court rejected that argument, explaining that the evidence showed that Charger knew that Pearl was the

462. *Id.*

463. *Id.*

464. *Id.* at *4.

465. *Id.* at *6.

466. *Id.* (citing *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005)).

467. *Id.* at *8.

468. *Id.* at *7.

469. *Id.* at *11.

470. *Id.* at *9.

471. *Id.* at *12 (citing *R & M Dev., Inc. v. Howard Lumber Co., Inc.*, No. 08-00-00337-CV, 2001 WL 1429420, at *3-5 (Tex. App.—El Paso Nov. 15, 2001, no pet.)).

472. *Id.* at *14.

473. *Id.* at *12.

474. *Id.* at *10.

operator prior to arriving at the site and the services provided a value to Pearl.⁴⁷⁵ Pearl also pointed out that Charger first sought payment from PDS rather than Pearl.⁴⁷⁶ The court rejected that argument, explaining that did not mean Charger did not provide the services for Pearl's benefit.⁴⁷⁷

Pearl also argued that there was no sufficient evidence that Pearl accepted Charger's services.⁴⁷⁸ Pearl argued that the evidence merely showed that Pearl was on site and that Pearl did not object.⁴⁷⁹ The court rejected those arguments, pointing out that acceptance can be proven in quantum meruit cases by presenting evidence that the defendant knew of the services and did not object.⁴⁸⁰ The court pointed to evidence in the record that Pearl had representatives on site providing regular updates regarding remediation effort and that Pearl was required to take over operations following the blowout.⁴⁸¹

The significance of this case is the holding that industry custom is admissible for purposes of reflecting that emergency services subcontractors customarily look to the owner for payment. This case also serves as an illustration of the complexities that can arise in oil and gas quantum meruit cases, given the number of parties and complexities in relationships that can arise.

475. *Id.*

476. *Id.*

477. *Id.*

478. *Id.* at *11.

479. *Id.*

480. *Id.*

481. *Id.*