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This article focuses on select cases relating to oil, gas, and mineral law in Texas during the year 2021.

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I. ROYALTY CALCULATION AND FREE USE CLAUSE

A. BLUESTONE NATURAL RESOURCES II, LLC V. RANDLE

This case addressed two separate issues: (1) whether the lessee could deduct postproduction costs from sales proceeds before calculating royalties where an addendum required royalties to be computed based on "gross value received," and (2) whether a lessee's use of gas as fuel in an off-lease processing plant fell within the scope of a free-use clause in the lease.[1]

The oil and gas lease at issue consisted of a two-page printed form lease and an attached addendum stating that it "supersedes any provisions to the contrary in the printed lease."[2] The royalty provision in the printed form called for royalties computed on the basis of "the market value at the well."[3] On the other hand, the addendum stated that the lessee must compute royalties on the "gross value received."[4]

For more than a decade, the original lessee paid gas royalties on the "gross value received" without deducting postproduction costs.[5] In 2016, BlueStone Natural Resources II, LLC (BlueStone) acquired the leasehold estate and began deducting postproduction costs.[6] That reduction in royalties prompted the lessors to file suit.[7]

BlueStone argued that the addendum set forth a yardstick for computing royalties, but that it was silent as to a valuation point.[8] Therefore, according to BlueStone, the valuation point from the base lease form remained applicable and was not superseded by the addendum, meaning that the royalty must be valued "at the well."[9] In other words, BlueStone suggested that the base lease form and the addendum could be harmonized, resulting in a royalty obligation equivalent to a "net proceeds calculation."[10]

The Texas Supreme Court rejected BlueStone's argument, reasoning that "'gross' and 'net' terms [could] not peaceably coexist."[11] The supreme court explained that "at the well" language appearing in the base lease was a "net proceeds equivalent."[12] Such language would conflict with the addendum calling for "gross" royalties.[13]

Stating the conflict another way, the phrase "gross value received" did suggest a valuation location, because "[w]hen proceeds are valued in

1. BlueStone Nat. Res. II, LLC v. Randle, 620 S.W.3d 380, 383 (Tex. 2021).
2. *Id.* at 384.
3. *Id.*
4. *Id.*
5. *Id.* at 385.
6. *Id.*
7. *Id.*
8. *Id.* at 387–88.
9. *Id.* at 388.
10. *Id.* at 391.
11. *Id.*
12. *Id.*
13. *Id.*

'gross,' . . . the valuation point is necessarily the point of sale because that is where the gross is realized or received."[14] Thus, the addendum conflicted with the base lease, resulting in a "royalty free of postproduction costs."[15]

A notable aspect of the *BlueStone* opinion is the supreme court's detailed summary of the law pertaining to postproduction deductions based on decades of precedent.[16] The *BlueStone* opinion also clarified the scope of the supreme court's prior holding in *Burlington Resources Oil & Gas Co. v. Texas Crude Energy, LLC*, which held that the phrase "amount realized" can be either "gross" or "net," and was therefore modified by the phrase "into the pipelines" to produce a "net amount realized" formula.[17] The *BlueStone* court rejected any contention that *Burlington* stood for the rule that "at the well" language supersedes all other language.[18] Instead, *Burlington* stands for "the unremarkable principle that contracts must be construed according to their terms."[19]

Turning to the free use clause, BlueStone argued that by allowing the free use of gas "in all operations which Lessee may conduct hereunder," that meant the lessee was permitted to use gas on or off the leased premises so long as the use "benefits" or "furthers" the lease operations.[20] The lessor, on the other hand, argued the clause only applied to on-lease uses.[21]

The supreme court noted that existing Texas case law on the issue was "not instructive."[22] Therefore, the supreme court reviewed case law from jurisdictions outside of Texas, which reflected two different approaches: a pragmatic approach and a textual approach.[23] Under the pragmatic cases, a free use clause allowing use for all operations "thereon" or "hereunder" allowed use on or off the leased premises so long as the use of the gas provided a benefit to the lessor.[24] Among other things, this approach was based on the rationale that it would be best for lessees to place facilities on economical locations, and that the more important factor was not where the gas was used but instead the purpose for the use and whether it was mutually beneficial to further the operations.[25]

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14. *Id.*
15. *Id.* at 393.
16. *Id.* at 386–91.
17. *Id.* at 392–93 (citing Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy, LLC, 573 S.W.3d 198, 211 (Tex. 2019)).
18. *Id.* at 392.
19. *Id.*
20. *Id.* at 393–94.
21. *Id.* at 394.
22. *Id.*
23. *Id.* at 395.
24. *Id.* at 395–97 (citing and discussing Bice v. Petro-Hunt, L.L.C., 768 N.W.2d 496 (N.D. 2009); ConocoPhillips Co. v. Lyons, 299 P.3d 844 (N.M. 2012); Anderson Living Tr. v. Energen Res. Corp., 886 F.3d 826 (10th Cir. 2018) (interpreting New Mexico and Colorado law)).
25. *Id.* at 395–96.

Under the textual approach, adopted in Colorado, the supreme court applied the ordinary meaning of words the words, noting that the free use clause was limited to use "for all operations *hereunder*," which meant "in accordance with the lease," and the granting clause, which stated the leased premises were granted for "the sole and only purpose" of conducting operations "thereon."[26] Given that language, the court concluded the parties intended for free use only on the leased premises.[27]

Ultimately, the *BlueStone* court held that the free use clause and the purpose clause in the lease at issue used language most similar to the Colorado lease.[28] The supreme court reasoned that "[g]iven the parties' chosen language, it is unlikely they intended a construction of the free use clause that would inject uncertainty and lead to a fact-finding mission to determine whether progressively more attenuated uses 'benefit' or 'further' the lease operations."[29] The supreme court further reasoned that BlueStone's approach had an "absence of any discernable limiting principle."[30]

This case is notable in terms of the supreme court's summary and clarification of royalty law as it pertains to postproduction cost deductions. As the supreme court seemed to admit, some of Texas jurisprudence on the subject is "less than precise in articulating some of these concepts."[31] It is also notable in its explanation of the much-discussed *Burlington* opinion, which some had taken to mean that phrases like "at the well" and "into the pipeline" were to be given controlling power over other language. Finally, the case is notable in that it is a case of first impression regarding free use royalty provisions.

II. RATIFICATION BY ACCEPTANCE OF ROYALTIES

A. BPX Operating Co. v. Strickhausen

In this case, the Texas Supreme Court addressed whether a lessor's acceptance of royalties from a pooled unit gave rise to an implied ratification of the pooled unit.[32] The underlying oil and gas lease indicated that the lessee was required to obtain the lessor's "express written consent" before pooling.[33] The lessor never provided written consent.[34] Nevertheless, the lessee contended that the lessor's acceptance of a significant amount of royalties impliedly ratified the lease.[35]

The lessor, Strickhausen, owned fifty percent of the minerals underly-

26. *Id.* at 397–98 (citing *Anderson Living Trust*, 886 F.3d at 846–50).
27. *Id.*
28. *Id.* at 398.
29. *Id.*
30. *Id.* at 398–99.
31. *Id.* at 391.
32. BPX Operating Co. v. Strickhausen, 629 S.W.3d 189, 195 (Tex. 2021).
33. *Id.* at 192.
34. *Id.*
35. *Id.*

ing a tract of land in La Salle County.[36] In 2009, Strickhausen leased her minerals, and the leasehold interest was later assigned to BPX.[37] The Strickhausen lease contained the following provision prohibiting pooling:

> Notwithstanding any provision or reference contained in this Lease agreement to the contrary, pooling for oil or gas is expressly denied and shall not be allowed under any circumstances without the express written consent of the Lessor named herein. Further, Lessee is denied the right to seek, or consent to, or participate in the forced pooling of any part of the Leased Premises under the Texas Mineral Interest Pooling Act and any and all amendments thereto or any other pooling or unitization statutes of the State of Texas without Lessor's written consent.[38]

Despite this restriction, BPX pooled the Strickhausen lease with several other tracts to create a pooled unit.[39] BPX sent a letter to Strickhausen requesting that she ratify the unit.[40] Strickhausen contacted her lawyer, and her lawyer spent the next several weeks working with BPX to negotiate a settlement over the issue and requesting calculations as to whether she did or did not ratify.[41]

Meanwhile, BPX began sending Strickhausen monthly royalty checks with a notation indicating they were for royalties from the unit.[42] Strickhausen eventually began depositing the monthly royalty checks.[43] By the time suit was filed, Strickhausen had cashed more than $700,000.00 in checks for royalties from the unit.[44]

The supreme court held that "parties seeking to establish implied ratification or ratification by conduct must point to words or actions that 'clearly evidenc[e] an intention to ratify.'"[45] Moreover, the supreme court concluded that the "[a]cceptance of benefits is a quintessential indicator of ratification" but specified that "implied ratification requires an examination of the totality of the circumstances, not a narrow focus on one fact to the exclusion of all others."[46] The supreme court rejected any "categorical rule" or "bright-line rule" that acceptance of royalties calculated on a pooled unit basis would always amount to ratification as a matter of law.[47]

The supreme court also held that Strickhausen's actions did not

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36. *Id.*
37. *Id.*
38. *Id.* at 193.
39. *Id.*
40. *Id.*
41. *Id.* at 193–94.
42. *Id.* at 194.
43. *Id.*
44. *Id.*
45. *Id.* at 197–98 (citing Chrisman v. Electrastart of Hous., Inc., No. 14-02-00516-CV, 2003 WL 22996909, at *5 (Tex. App.—Houston [14th Dist.] Dec. 23, 2003, no pet.) (mem. op.)).
46. *Id.* at 200 (internal quotations omitted).
47. *Id.* at 198.

"clearly" evidence an intent to ratify the unauthorized pooling.[48] The supreme court emphasized that Strickhausen's lawyer was consistently asserting her anti-pooling rights.[49] While Strickhausen did cash unit-basis royalty checks from BPX, she did so because she believed she was entitled to significant royalties with or without pooling.[50] The supreme court held that these actions, taken together, "do not amount to clear evidence of an intent to ratify sufficient to support a judgment of ratification as a matter of law."[51] The supreme court later stated that "the inference of consent to pooling from [Strickhausen's] acceptance of benefits is unusually weak . . . . She knew BPX owed her significant royalties regardless of whether she agreed to the pooling."[52] Moreover, "BPX could hardly have been under a misimpression about Strickhausen's intentions."[53]

The supreme court also emphasized that the lease provision prohibiting pooling without "express written consent cannot be ignored when determining [Strickhausen's] objective intent."[54] "On a question of contractual intent . . . words matter a great deal—especially words in a written agreement that disavows implied, unwritten agreements."[55] According to the supreme court, Strickhausen and BPX both knew all along about this "strong prohibition on pooling without her written consent."[56] While the supreme court did not rule that she could never waive her anti-pooling rights by conduct, the supreme court explained that her objective intent must be interpreted in light of that strong prohibition on pooling without written consent.[57]

This case is notable in its thorough analysis of several aspects of the law of ratification, as applied to the acceptance of royalties.

III. LEASE PERPETUATION AND TERMINATION DISPUTES

A. Sundown Energy LP v. HJSA No. 3, Ltd. Partnership

In this case, the Texas Supreme Court construed a continuous development provision to determine whether it required a lessee to timely spud in each new well to maintain a continuous drilling program, or whether the lessee could also maintain the program by timely commencing reworking or reconditioning operations.[58] More specifically, that issue turned on whether the parties' express definition of "drilling operations" applied throughout the lease or whether a different meaning applied in

48. *Id.* at 200.
49. *Id.*
50. *Id.*
51. *Id.* at 201.
52. *Id.*
53. *Id.* at 202.
54. *Id.* at 203.
55. *Id.*
56. *Id.*
57. *Id.*
58. Sundown Energy LP v. HJSA No. 3, Ltd. P'ship, 622 S.W.3d 884, 885 (Tex. 2021) (per curiam).

the specific context of the continuous development provision.[59]

The lessee spudded-in three development wells before the lease's primary term expired in 2006, and by 2015, the lessee had drilled a total of fourteen development wells.[60] In 2016, the lessor filed suit claiming the lease partially terminated in 2007 because on six different occasions the lessee failed to spud-in a new well within 120 days of the completion or abandonment of the prior well.[61]

The lessee counterclaimed, asserting that the continuous drilling program could be maintained by engaging in "drilling operations," which were specifically defined in the lease to include drilling, reworking, fracturing, and other operations not limited to spudding-in.[62]

The continuous drilling provision in the lease read as follows:

> The obligation. . . to reassign tracts not held by production shall be delayed for so long as Lessee is engaged in a continuous drilling program on that part of the Leased Premises outside of the Producing Areas. The first such continuous development well shall be *spudded-in* on or before the sixth anniversary of the Effective Date, with no more than 120 days to elapse between completion or abandonment of operations on one well and commencement of *drilling operations* on the next ensuing well.[63]

The lease also contained an express definition of "drilling operations," which read as follows:

> *Whenever used in this lease* the term "drilling operations" shall mean: [1] actual operations for drilling, testing, completing and equipping a well (spud in with equipment capable of drilling to Lessee's object depth); [2] reworking operations, including fracturing and acidizing; and [3] reconditioning, deepening, plugging back, cleaning out, repairing or testing of a well.[64]

The trial court concluded that the special definition of "drilling operations" applied in the context of the continuous drilling provision and, therefore, the lease had not partially terminated.[65] The appellate court reversed the trial court, holding that the continuous drilling provision reflected an intention to use a more restrictive definition of "drilling operations" that required spudding in a new well, and that the specific definition controlled over the general definition.[66] This appeal followed.

The supreme court noted that the parties expressly agreed that the express definition of "drilling operations" was to apply "whenever" that phrase is used in the lease.[67] Therefore, that definition applied in the con-

59. *Id.* at 886.
60. *Id.*
61. *Id.* at 887.
62. *Id.*
63. *Id.* at 886 (emphasis in original).
64. *Id.* at 886–87.
65. *Id.* at 887.
66. *Id.*
67. *Id.* at 888.

text of the continuous drilling provision as well.[68]

The lessor argued that a different meaning must be inferred in the continuous drilling clause and that the specific context of that clause should take precedence over the general definition.[69] The supreme court rejected that argument, reasoning that there was no textual basis for ignoring the parties' express definition.[70] Further, the supreme court noted that the continuous drilling provision expressly required "spudd[ing]-in" the first well and the timely commencement of "drilling operations" for subsequent wells.[71] According to the supreme court, "using different language in different parts of a contract means the parties intended different things," and the supreme court could not properly substitute "spudded-in" for the phrase "drilling operations" when the parties chose not to do so in their contract.[72]

This case is notable given its emphasis on the freedom of contract and enforcement of express agreed-upon definitions in the context of continuous development provisions. As the supreme court noted, "sophisticated parties have broad latitude in defining the terms of their business relationship" such that courts must enforce the language as written and "may not rewrite a contract under the guise of interpretation."[73]

B. PPC Acquisition Co. LLC v. Delaware Basin Resources, LLC

In this case, the El Paso Court of Appeals analyzed and construed three different retained acreage provisions from three different lease forms.[74] The lessors contended that the leases partially terminated based on a failure to timely establish proration units and based on reclassification of the well from gas to oil.[75]

The sole well produced continually since 2003.[76] The primary term expired in June of 2003, but the lessee failed to file a Form P-15 to designate a proration unit until September of 2003.[77] The well was recompleted as an oil well in 2010, and the lessee filed a new P-15 designating a 160-acre proration unit.[78] In 2017, the lessors learned of the reclassification and executed competing leases to a competitor.[79] This suit followed.

The court separately analyzed the retained acreage provision from each lease. The retained acreage provision in the "North Trust Lease" indi-

68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 889.
74. PPC Acquisition Co. LLC v. Del. Basin Res., LLC, 619 S.W.3d 338, 342 (Tex. App.—El Paso 2021, no pet.).
75. *Id.*
76. *Id.* at 343.
77. *Id.* at 347–48.
78. *Id.* at 343.
79. *Id.* at 343–44.

cated that, at the end of the primary term, "Lessee and/or its heirs, successors and assigns shall release all acreage not then dedicated to a proration unit designated by the appropriate regulatory body."[80] The court held that this provision was merely a covenant to release acreage rather than a special limitation that would automatically terminate the lease.[81] According to the court, this conclusion stemmed from a lack of "clear, precise and unequivocal" language that the lease "shall terminate" or "shall automatically terminate" upon a failure to timely designate a proration unit.[82] The lessor could have asserted a cause of action for breach of the lease of specific performance, but did not.[83]

The lessor also claimed that the North Trust Lease's retained acreage clause called for rolling terminations, as opposed to a one-time snapshot termination, and therefore, the lessor argued, the lease partially terminated in 2010 when the well was reclassified and given a 160-acre proration unit.[84] The court rejected that argument, holding that the lease called for a snapshot termination because it only specified one date upon which the clause would be triggered, and because it did not contain "clear and precise language" indicating an intent to provide for rolling terminations.[85]

The retained acreage clause in the "Lowe Lease" stated that at the end of the primary term of continuous development, "this lease shall terminate as to all of the leased premises except as to . . . 160 acres [for gas wells . . .] or, in each case, such larger areas as may be prescribed by the Railroad Commission of Texas . . . ."[86] The court held that this language created a special limitation because it expressly stated the lease "shall terminate."[87] The parties disputed whether the field rules "prescribed" a unit larger than the 160 acre default.[88] The court held that they did, as they set forth a "standard" proration unit of 640 acres, noting that it was immaterial that the field rules did not use the word "prescribe."[89]

The court found that the Lowe Lease called for "rolling" terminations because another subparagraph in the lease stated that "[t]hereafter operations on or production from . . . any [unit] will perpetuate this lease only as to that [unit]."[90] The court held that the clause was triggered by the reclassification in 2010.[91]

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80. *Id.* at 347.
81. *Id.* at 349–52.
82. *Id.* at 350–51 (citing Endeavor Energy Res., L.P. v. Discovery Operating, Inc., 554 S.W.3d 586, 606 (Tex. 2018); XOG Operating, LLC v. Chesapeake Expl. Ltd. P'ship, 480 S.W.3d 22, 28 (Tex. App.—Amarillo 2015, pet. denied), aff'd by XOG Operating, LLC v. Chesapeake Expl. Ltd. P'Ship, 554 S.W.3d 607 (Tex. 2018)).
83. *Id.* at 351.
84. *Id.* at 352.
85. *Id.*
86. *Id.* at 353.
87. *Id.* at 354.
88. *Id.*
89. *Id.* at 356.
90. *Id.* at 358.
91. *Id.* at 359.

Finally, the Colt Lease contained a retained acreage clause expressly stating that within thirty days of any termination of the lease, the lessee "shall . . . designate and be entitled to retain" a specified quantity of acreage.[92] The court held that this merely created a covenant to designate the retained acreage,[93] however, another provision created a special limitation because it said the lease "shall ipso facto terminate . . . except as to those portions . . . Lessee may be permitted to retain under" the retained acreage provision.[94] This second provision was triggered 120 days after the cessation of continuous operations, which in this case was September 29, 2003.[95] At that time, the well was classified a gas well, for which the field rules prescribed a 640-acre proration unit and the P-15 designated 640 acres.[96]

According to the court, the Colt Lease did not partially terminate in 2010 because its retained acreage provision only called for a "snapshot" termination.[97] The court declined to infer an intent for rolling terminations based on an alleged general intention under the lease to maximize production and continual development because that would not be the type of "clear, precise and unequivocal" language necessary to find a rolling termination.[98]

This case is notable for its detailed analysis of several aspects of multiple retained acreage provisions. It is also notable for the court's application of the "clear, precise, and unequivocal" standard to the issue of whether the clause called for "rolling" or "snapshot" terminations.

C. Tier 1 Resources Partners v. Delaware Basin Resources, LLC

This lease termination case[99] involved twelve virtually identical oil and gas leases covering two sections of land, referred to as "section 2" and "section 6."[100] The lessee drilled six wells on section 6 but drilled no wells on section 2.[101] After the primary term expired, the lessors took the position that the leases expired as to section 2, and they executed new leases in favor of a new lessee covering section 2.[102] The original lessee filed suit against the lessors and the new lessee, claiming the new leases created a cloud on title, and filed a counterclaim alleging the original lease automatically terminated as to section 2.[103] The trial court granted summary

92. *Id.*
93. *Id.* at 360.
94. *Id.*
95. *Id.* at 361.
96. *Id.* at 362.
97. *Id.* at 362–63.
98. *Id.* at 363.
99. Tier 1 Res. Partners v. Del. Basin Res. LLC, 633 S.W.3d 730, 733 (Tex. App.—El Paso 2021, pet. filed).
100. *Id.* at 733–34.
101. *Id.* at 735.
102. *Id.*
103. *Id.* at 735–36.

judgment in favor of the original lessee, and this appeal followed.[104]

On appeal, the dispute centered on whether Paragraph 11 within the addendum effectively created two separate leases on a single document, one covering section 6 and the other covering section 2.[105] Paragraph 11 read as follows:

> Notwithstanding any other provisions in this Lease or any wording contained herein . . . each of the separately designated tracts described shall be treated for all purposes as a separate and distinct Lease. All of the provisions contained in this Lease form shall be applicable to each such tract and be construed as if a separate Lease agreement had been made and executed covering each such tract.[106]

The parties disagreed as to the interpretation of the clause reading "each of the separately designated tracts described."[107] The original lessee argued that this clause merely referenced a possibility that the parties would exercise the "option" to designate separate tracts out of the leased premises, but the parties never did and so there were no separate leases.[108] The El Paso Court of Appeals disagreed, reasoning that the wording inherently implies that "those separately designated tracts are described somewhere within the lease."[109] Further, the court explained that no language suggested that Paragraph 11 was merely an optional or conditional term, and the court cannot rewrite the provision to achieve that result.[110] In the court's view, the word "tracts" in this context refers to "individual parcel[s] that do[ ] not share a common border."[111] Because section 2 and section 6 did not share a border, the court thus concluded they were separate tracts.[112] Therefore, they were to be "treated for all purposes as a separate and distinct Lease."[113]

Having determined section 2 was deemed to be covered by a separate lease, the court held that the leases terminated as to section 2 because no operations were conducted on section 2 during the primary term.[114]

This case is notable in its interpretation and application of a separate lease clause. Practitioners drafting leases with a separate lease clause would be wise to carefully spell out how and when the separate tracts are defined or designated.

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104. *Id.* at 736.
105. *Id.* at 739.
106. *Id.* at 734–35.
107. *Id.*
108. *Id.* at 741.
109. *Id.* at 740.
110. *Id.* at 742.
111. *Id.* at 741.
112. *Id.*
113. *Id.* at 742.
114. *Id.* at 742–43.

D. MRC Permian Co. v. Point Energy Partners Permian LLC

In this case, the El Paso Court of Appeals addressed whether a force majeure clause in an oil and gas lease was triggered by off-lease wellbore instability, whether the event needed to merely cause a delay or a missed deadline, and whether fact issues or a myriad of other issues precluded summary judgment.[115]

The lease at issue set forth a primary term that would expire on February 28, 2017.[116] By that date, MRC had successfully developed several wells on the leased premises and had plans to develop more.[117] The lease contained a retained acreage clause providing that the lease would partially terminate as to all lands not in a production unit as well as a continuous drilling clause allowing MRC to suspend that automatic termination by commencing "actual drilling" of a new well every 180 days.[118]

During the relevant time period in dispute, MRC's deadline to commence actual drilling on the next continuous development well was May 21, 2017.[119] Yet, between April 10 and 21, 2017, while MRC was drilling another well nearby but on a different lease, MRC experienced a delay when production casing on the other well was compromised, leading to unexpected wellbore instability.[120] MRC undertook measures to resolve that issue, which resulted in a thirty-hour delay.[121]

On June 13, 2017, MRC provided notice of these events to the lessors.[122] Notably, that letter was within the sixty-day notice window required by the force majeure clause, but was after the continuous drilling deadline of May 21, 2017.[123] The lessors granted new leases to a different lessee, Point Energy Partners Permian, LLC (Point).[124] Point sent MRC a letter claiming that the prior leases had partially terminated due to the missed continuous drilling deadline, denying that the force majeure provision applied.[125]

The force majeure clause at issue read as follows:

> When Lessee's operations are delayed by an event of force majeure, being a non-economic event beyond Lessee's control, if Lessee shall furnish Lessor a reasonable written description of the problem encountered within 60 days after its commencement, and Lessee shall thereafter use its best efforts to overcome the problem, this lease shall remain in force during the continuance of such delay, and Lessee shall have 90 days after the reasonable removal of such force

115. MRC Permian Co. v. Point Energy Partners Permian LLC, 624 S.W.3d 643, 651 (Tex. App.—El Paso 2021, pet. granted).
116. *Id.*
117. *Id.* at 652.
118. *Id.*
119. *Id.*
120. *Id.* at 653.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 653–54.
125. *Id.* at 654.

> majeure within which to resume operations; provided, however, this paragraph shall not extend this lease or relieve Lessee for liability for any breach thereof for a period in excess of 180 days, and Lessee's obligation to pay sums due hereunder shall not be affected by an event of force majeure.[126]

The court held that the triggering events covered by this clause were not limited to events that occurred on the leasehold estate.[127] The court reasoned that "courts cannot read into a contract a stipulation to which the parties did not agree."[128] This force majeure provision included several specific requirements, the court explained, but it "did not include an 'on-lease' condition."[129] "[I]f the parties had intended the force majeure clause to only cover on-lease delays, the provision would presumably have included requirements regarding where the location of the triggering event must occur."[130]

The court further held that the provision did not require a causal link between the event and the missed deadline.[131] The court reasoned that the provision indicated that it may be invoked when "operations are delayed by an event of force majeure."[132] The court said this language was "very general" and did not contain any language requiring that the event be the cause of a missed deadline, a substantial factor, or a direct link in MRC missing the deadline.[133] The court again indicated that it was bound by the lease language and refused to add conditions that the parties failed to include.[134] Moreover, even if there was a causal link requirement, summary judgment was improper because there was a genuine issue of material fact as to whether the missed deadline was caused by the off-lease delay or an admitted "calendaring error" by an MRC employee.[135]

The court held that there were genuine issues of material fact on several issues that precluded summary judgment, such as (1) whether the event was within MRC's control, (2) whether MRC's decision not to undertake other alleged options was driven by economic considerations, (3) whether MRC's notice letter contained a reasonable description of the event, and (4) whether the triggering event commenced when MRC first experienced wellbore instability or eleven days later when MRC claims the instability rose to the level of a force majeure delay.[136] The court provided a few example allegations and noted that "[t]he record is

126. *Id.* at 657.
127. *Id.* at 659.
128. *Id.* at 658.
129. *Id.* at 659.
130. *Id.*
131. *Id.* at 660.
132. *Id.*
133. *Id.* at 659.
134. *Id.*
135. *Id.* at 660.
136. *Id.* at 661–62.

fraught with conflicting evidence on these points."[137]

Finally, the court addressed Point's argument that Texas law implies a condition of foreseeability into all force majeure clauses.[138] The court explained the argument as "ask[ing the court] to write in yet another condition to the lease for which the parties did not agree."[139] Nevertheless, the court indicated that it would not decide whether Texas case law implies a foreseeability component in all force majeure clauses because conflicting evidence regarding foreseeability precluded summary judgment.[140]

This case serves as an illustration of a select number of the many issues that can arise in the context of a force majeure dispute and serves as an example of how those issues can be analyzed in the context of an off-lease event and the context of a missed continuous drilling deadline.

One notable aspect of the case is the court's repeated insistence that the force majeure clause should be interpreted solely, or at least mostly, in accordance with its express terms, and that Texas courts may not imply or add conditions not included in the written agreement.[141] A different approach was arguably taken in another recent oil and gas case where the Court of Appeals for the First District of Texas at Houston held that Texas courts "may consider common law rules to 'fill in the gaps' when interpreting force majeure clauses."[142] Specifically, that court implied a foreseeability limitation into the "catch-all" category of the force majeure clause and held that "fluctuations in the oil and gas market are foreseeable as a matter of law."[143] However, that case did not explain which other "common law notions" the court believed could be implied into a force majeure provision.

E. King Operating Corp. v. Double Eagle Andrews, LLC

This case addressed whether an oil and gas lease, which was effective as to some tracts and ineffective as to other tracts where the lessor only owned nonexecutive mineral interests, could not be maintained by production exclusively from the tracts where the lessor only owned nonexecutive mineral interests.[144] That issue turned on whether the phrase "leased premises" referred to the land itself, or the lessor's interest in the land.[145]

The Robisons owned a nonexecutive mineral interest in "Tract One" and varying percentages of mineral interests (with executive rights) in

137. *Id.* at 661.
138. *Id.* at 662.
139. *Id.*
140. *Id.*
141. *See id.* at 656, 659, 660, 662.
142. TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 181 (Tex. App.—Houston [1st Dist.] 2018, pet. denied.)
143. *Id.* at 184.
144. King Operating Corp. v. Double Eagle Andrews, LLC, 634 S.W.3d 483, 491 (Tex. App.—Eastland 2021, no pet.).
145. *Id.* at 493.

"Tract Two," "Tract Three," and "Tract Four."[146] In 2008, the Robisons granted a lease to Maddox Oil that defined all four tracts as the "leased premises."[147] Maddox Oil also obtained a lease from the owner of the executive rights in Tract One.[148] Maddox Oil's successor drilled a producing well on Tract One but did not drill any wells on the other three tracts.[149] King Operating later acquired working interest under the Robison lease.[150]

In 2016, the Robisons granted a new oil and gas lease to Double Eagle Andrews, LLC (DEA), covering Tract Two and Tract Three.[151] DEA filed suit contending that the 2008 Robison lease expired, arguing that because the Robisons could not effectively grant a lease covering Tract One, drilling and production on Tract One could not maintain the 2008 Robison lease.[152]

The Court of Appeals for the Eleventh District of Texas at Eastland framed the issue as "whether, by including Tract One in the description of "leased premises," the parties to the [2008 Robison lease] intended that production on Tract One under any lease would hold the [2008 Robison lease] as to Tracts Two, Three, and Four."[153]

King Operating and the other appellants argued that the term "leased premises" referred to the land itself, not an interest conveyed by the lease, and therefore production from Tract One would be sufficient to hold the 2008 Robison lease.[154]

The court disagreed with King Operating, reasoning that Texas courts "favor the consistent use of a term that is used more than once in a lease."[155] According to the court, the phrase "leased premises" could not be interpreted as referring to the land itself for purposes of the habendum clause because that interpretation would not make sense in the context of several other lease provisions that also used the phrase "leased premises."[156] For instance, other provisions in the lease used the phrase "leased premises" to refer to the right to access the land, the right to pool the land, and the right to drill, develop, and produce minerals on the land.[157] In the context of those provisions, the court reasoned that the phrase "leased premises" could only refer to mineral interests owned by the Robisons and granted to the lessee.[158]

Therefore, the court applied that definition to the habendum clause as

146. *Id.* at 487.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 488.
153. *Id.* at 491–92.
154. *Id.* at 492.
155. *Id.* at 491.
156. *Id.* at 492–93.
157. *Id.*
158. *Id.* at 493.

well.[159] Since the Robisons did not convey any interest in Tract One, the court held that Tract One was not part of the "leased premises."[160] As a result, the lease terminated.[161]

IV. TITLE DISPUTES AND DEED INTERPRETATION

A. Broadway v. Yates

In this case, the Texas Supreme Court construed Texas's correction deed statute and held that the original parties to the recorded deed could execute an effective correction instrument to make a "material correction" to the original recorded deed without the joinder of the successors in interest.[162]

The interest at issue was originally subject to a trust under which Broadway National Bank (Broadway) served as trustee.[163] In 2005, Broadway, as trustee, executed a mineral deed conveying trust property to all of the beneficiaries, including John Evers (John), in full fee simple.[164] Broadway later determined it made a mistake as the trust documents only entitled John to receive a life estate.[165] To correct the error, Broadway unilaterally executed and recorded a correction deed in 2006, purporting to change the prior conveyance to a life estate only.[166]

Several years later, in 2012, John executed a royalty deed conveying his interests to Yates Energy Corporation (Yates), which subsequently conveyed the interest to several others.[167] Subsequently, a title attorney questioned the effectiveness of the 2006 correction deed.[168] In 2013, Broadway and all the original grantees to the 2005 deed, including John (but not including Yates or Yates' grantees) executed another correction deed, again purporting to correct the 2005 conveyance to limit it to a life estate.[169]

Later, when John died, Broadway claimed that Yates and the Yates assignees only acquired John's life estate, and thus the interest had reverted to the remaindermen.[170] Yates and its assignees, on the other hand, claimed that Yates acquired full fee simple title to the interest and that a correction deed could not change that without their joinder.[171]

The dispute turned on the wording of Tex. Prop. Code § 5.029 (Material Correction Statute), indicating that a correction must be executed by

159. *Id.*
160. *Id.*
161. *Id.* at 493–94.
162. Broadway Nat'l Bank, Tr. of Mary Frances Ever Tr. v. Yates Energy Corp., 631 S.W.3d 16, 26 (Tex. 2021).
163. *Id.* at 18–19.
164. *Id.* at 19.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 20.
169. *Id.*
170. *Id.*
171. *Id.*

the parties to the original instrument "or, if applicable, a party's heirs, successors, or assigns."[172] The appellate court held that the "if applicable" clause was triggered by a conveyance to successors or assigns, after which the original parties could no longer correct their mistake without joinder of the successors in interest.[173]

The Texas Supreme Court reversed the appellate court, holding that the 2006 correction deed complied with the Material Correction Statute, and thus validly corrected the 2005 deed.[174] In the supreme court's view, "[n]othing in this text indicates that an assign must assent to a correction instrument when each party to the original conveyance is available to correct their mistake."[175] Rather, the supreme court held that when read along with the disjunctive "or," the phrase "if applicable" in the statute "simply emphasizes that the phrase 'party's heirs, successors, or assigns' may be relevant when the original party is unavailable and, in that case, may serve as a substitute."[176]

A strong, four-justice dissent raised concerns regarding notice to, and protection of, successors in interest. The majority believed that subsequent purchasers were protected by the subsequent provisions of the statute providing that correction instruments are subject to the interests of innocent, bona fide purchasers.[177] Because some of the Yates assignees claimed to be bona fide purchasers, the supreme court remanded the case to the court of appeals for consideration of that issue.[178]

This case is notable in its review of the Texas correction deed statute and in its holding that prior owners can effectively make a material correction to a prior instrument without the joinder of the current owners. This arguably deviates from custom and practice, as Standard 2.20 of the Texas Title Examination Standards indicates that "a correction instrument materially altering the effect of a prior conveyance or other instrument that it purports to correct should be considered effective only if joined by all parties whose interests are affect[ed]."[179]

B. Concho Resources, Inc. v. Ellison

In this case, the Texas Supreme Court held that a boundary line stipulation between neighboring mineral owners was effective to establish the boundary line between two tracts of land at a different location than was arguably established by an earlier deed, and that the lessee had effectively ratified the agreement.[180]

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172. *Id.* at 22 (citing Tex. Prop. Code Ann. § 5.029).
173. *Id.* at 18.
174. *Id.* at 29–30.
175. *Id.* at 25.
176. *Id.* at 25–26.
177. *Id.* at 26.
178. *Id.* at 29.
179. Tex. Title Examination Standards, Standard 2.20 (codified at Tex. Prop. Code Ann. tit. 2, app.).
180. Concho Res., Inc. v. Ellison, 627 S.W.3d 226, 228 (Tex. 2021).

A 1927 deed conveyed a part of a survey described as that land "located North and West of the public road which now runs across the corner of said Survey, containing 147 acres, more or less."[181] However, later surveys revealed that the actual acreage northwest of the road was 301 acres.[182] The actual acreage of the portion lying southeast of the road was 339 acres, not 493 acres.[183]

After many conveyances, the minerals in the northwest became vested in Carol Richey (Richey) and the mineral leasehold estate was vested in Jamie Ellison (Ellison).[184] The southeast tract became vested in the Farmar family and the mineral leasehold estate in Samson Resources Company (Samson), with Samson's lease purporting to cover "493 [acres]" in the "South part" of the section.[185]

In 2006, Samson's title lawyer pointed out the issue with the land descriptions, and Samson obtained a survey that placed the boundary line off of the road so as to give the northwestern tract 147 acres rather than 301 acres, consistent with the roadway boundary line.[186] Samson then prepared a boundary stipulation agreement for the mineral owners and attached its new survey.[187] The stipulation stated that "a question has arisen" among the owners as to the location of the tracts, and, therefore, the parties desired to "declare, stipulate, acknowledge, and establish" the location of the tracts.[188] The mineral owners signed the stipulation.[189] Samson sent the ratification to Ellison with a cover letter asking Ellison to countersign the letter to "signify [his] acceptance of the description."[190] Ellison countersigned the letter.[191]

Ellison's widow later filed suit claiming the boundary stipulation and the countersigned letter had no effect on title and that Ellison owned all of the 301 acres lying to the northwest of the road, not just the 147 acres reflected in Samson's plat.[192] Samson and Ellison settled, but Concho (who had acquired a portion of Samson's title) did not.[193]

The trial court held that the stipulation and letter were enforceable and established the boundary line.[194] The appellate court reversed, holding that the boundary stipulation was void, and therefore, the ratification letter was also void because a void instrument is incapable of ratification.[195] The appellate court reasoned that the metes and bounds description in

181. *Id.* at 228–29.
182. *Id.* at 229.
183. *Id.* (paraphrased for purposes of this article).
184. *Id.*
185. *Id.*
186. *Id.* at 229–30.
187. *Id.*
188. *Id.* at 230.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 231.
193. *Id.*
194. *Id.*
195. *Id.* at 232.

the 1927 deed controlled over the erroneous acreage description.[196] As a result, the road objectively established the boundary line; there was no ambiguity or error to correct, no "bona fide uncertainty or doubt" to clarify, and therefore, the stipulation was void.[197]

The supreme court reversed the appellate court and held that the boundary stipulation was enforceable and the letter was an effective ratification.[198] The supreme court reasoned that the appellate court's reasoning that there must be "objective uncertainty" as a prerequisite to an enforceable boundary stipulation "'would scuttle boundary agreements as a mechanism to avoid litigation' because parties will never know whether their [boundary] settlement . . . is effective until declared so by a court."[199] The supreme court acknowledged that the mineral owners could have gone to court to obtain a determination of the location of the boundary and that the supreme court may have concluded that the 1927 deed unambiguously placed the boundary line on the public road.[200] But they instead chose to resolve the "question" that had "arisen" by the boundary stipulation and the supreme court "s[aw] no reason to second-guess the owners' decision to bind themselves in that manner without resorting to litigation."[201]

Moreover, while the mineral owners could not retroactively bind Ellison's leasehold estate, Ellison countersigned the letter regarding the stipulation, "thereby confirming his acceptance of the boundary line agreed to in the stipulation as the leasehold boundary."[202] The supreme court further held that the record did not contain sufficient evidence of fraudulent inducement because there was no evidence of a misrepresentation regarding the ratification or the stipulation.[203]

C. Barrow Shaver Resources Co. LLC v. NETX Acquisitions, LLC

This trespass to try title case involved a 1963 deed with two granting clauses, one of which conveyed "all" of a tract of land described by metes and bounds, and the second of which indicated "[t]here is likewise conveyed to Grantees . . . one-eighth (1/8) of all Oil, Gas and Other Minerals."[204] The dispute turned on whether the deed conveyed one-eighth of the minerals or 100% of the minerals.[205]

The parties filed cross-motions for summary judgment, and the trial

196. *Id.*
197. *Id.* at 233–34.
198. *Id.* at 235.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 236.
203. *Id.*
204. Barrow Shaver Res. Co. LLC v. NETX Acquisitions, LLC, No. 06-20-00081-CV, 2021 WL 3571394, at *1 (Tex. App.—Texarkana Aug. 13, 2021, pet. denied) (mem. op.).
205. *Id.*

court held that the deed conveyed 100% of title to the tract.[206] The Texarkana Court of Appeals reversed the trial court, holding that the deed only conveyed a one-eighth interest in the minerals.[207]

The court noted the deed did not contain any language reserving any interest in the oil, gas or minerals, and therefore, the court indicated that the task was to determine the interest granted, not the interest excepted or reserved.[208] The court recited the rules of interpretation, relying heavily on *Piranha Partners v. Neuhoff*, summarizing the rules as requiring the court to "harmonize[ ] all parts of the deed," strive to "give[ ] effect to every clause, and give[ ] [the grantee] the greatest estate permissible under the language of the deed."[209] The court repeated that the supreme court has "rejected mechanical rules of construction, such as giving priority to certain clauses over others, or requiring the use of so-called 'magic words.' "[210]

According to the court, "[b]y expressly stating that they were 'likewise' conveying a one-eighth of the mineral estate, the grantors indicated their intent to convey something less than the fee simple estate in the initial portion of the granting clause."[211] The court further reasoned that "the only way that [the court] c[ould] give effect to both grants" was to construe the first provision as conveying the surface estate and the second grant as conveying one-eighth of the mineral estate.[212]

This case is notable in its interpretation of a deed with two grants as well as for construing the second grant as limiting the scope of the first grant.

D. Posse Energy, Ltd. v. Parsley Energy, LP

In this case, the El Paso Court of Appeals held that an assignment of working interest was limited to certain depths, where it assigned "all right, title and interest" in an oil and gas lease, but the exhibit describing the property indicated the interest was "INSOFAR AND ONLY INSOFAR" as the proration units for the listed wells, and where those proration units only covered certain depths.[213]

The dispute centered around a working interest in a 1974 oil and gas lease (the Morgan Lease).[214] By around 1979, Westland Oil Development Corporation (Westland) owned about a 25% interest in the shallow depths (between 7,194 feet and 8,900 feet below the surface) and about 73% interest in the deep depths (depths below 8,900 feet subsurface).[215]

206. *Id.* at *2.
207. *Id.* at *7.
208. *Id.* at *4.
209. *Id.* at *6 (citing Piranha Partners v. Neuhoff, 596 S.W.3d 740, 744 (Tex. 2020)).
210. *Id.* at *3 (citing Wenske v. Ealy, 521 S.W.3d 791, 794 (Tex. 2017)).
211. *Id.* at *5.
212. *Id.*
213. Posse Energy, Ltd. v. Parsley Energy, LP, 632 S.W.3d 677, 684 (Tex. App.—El Paso 2021, pet denied.).
214. *Id.* at 681.
215. *Id.* at 681–82.

In 1992, Westland executed an assignment of the Morgan Lease, along with several deeds of trust and other finance agreements to restructure Westland's debt.[216] The assignment conveyed "all right, title and interest" in the Morgan Lease and reserved a 50% reversionary interest which was triggered in 1998.[217] The assignment contained exhibits that described the property assigned, and the exhibit listed the Morgan Lease "INSOFAR AND ONLY INSOFAR" as it covered the proration units for five different wells.[218] Those proration units only covered the shallow depths.[219]

The successors to the assignee, Posse Energy, Ltd. (Posse), argued that the 1992 assignment covered all depths, generally arguing that the granting clause purported to convey "all right, title and interest," and that "all means all."[220] Posse also argued that the lack of any explicit depth limitation indicated the parties' intention to convey all depths.[221]

Westland's successors (the appellees, herein Parsley) argued that the 1992 assignment was limited to shallow depths, relying on the all-caps limiting language in the exhibit and the description of the proration units which only covered shallow depths.[222] Parsley also argued that the 1992 assignment must be interpreted together with the related Acquisition Agreement and several deeds of trust, all of which explicitly referenced one another and collectively handled the parties' restructuring of Westland's debt at the time.[223] According to Parsley, those other agreements revealed that the parties did not intend to include deep rights.[224]

The appellate court agreed that the instruments should be read together, noting that they referenced one another and provided "clarity and context" that aided in construing the intent but would "not alter the plain meaning of the agreement."[225]

The court reviewed both the Acquisition Agreement and the 1992 assignment and held that the language in both instruments reflected an intent to limit the assignment of the Morgan Lease to the shallow depths.[226] The court reasoned that the phrase "INSOFAR AND ONLY INSOFAR" is grant-limiting language.[227] Moreover, according to the court, where an assignment describes the property assigned by reference to an exhibit, the description in the exhibit "controls the scope of the grant regardless of the breadth of the granting language."[228] Thus, the assignment was limited to the property interests covered by the referenced proration units,

216. *Id.* at 689.
217. *Id.* at 684.
218. *Id.* at 685.
219. *Id.*
220. *Id.* at 687.
221. *Id.* at 689.
222. *Id.* at 691.
223. *Id.* at 690–91.
224. *Id.* at 690.
225. *Id.* at 692.
226. *Id.* at 691.
227. *Id.* at 693, 696.
228. *Id.* at 693, 696.

which undisputedly only covered the shallow depths.[229]

This case is notable in its reference to other related instruments to aid in the interpretation of the assignment, the court's rulings regarding the interplay between the granting clause and the property description in the exhibits, and the court's ruling that the assignment's reference to the proration unit was effective in limiting the assignment to shallow rights. Though the court held that the reference to a proration unit in this context limited the assignment to certain depths, careful practitioners would likely achieve more clarity by expressly making clear that the interest assigned is of limited depth.

E. Hoffman v. Thomson

In this deed construction case, the San Antonio Court of Appeals held that a deed reserving a nonparticipating royalty interest (NPRI) equal to "an undivided three thirty-second's (3/32's) interest (same being three-fourths (3/4's) of the usual one-eighth (1/8th) royalty)" was effective to reserve a floating three-fourths NPRI rather than a fixed three thirty-second NPRI.[230]

The dispute pertained to a 1956 deed that contained the following reservation provision: "[T]here is hereby expressly reserved . . . an undivided three thirty-second's (3/32's) interest (same being three-fourths (3/4's) of the usual one-eighth (l/8th) royalty) in and to all of the oil, gas and other minerals."[231]

A subsequent clause stated the grantor "shall receive a full three thirty-second's (3/32's) portion thereof as his own property," and another clause stated the grantor "shall own and be entitled to receive three thirty-second's (3/32's) of the gross production of all oil, gas and other minerals produced and saved."[232] No other provisions in the deed described the size of the interest reserved.[233]

According to the appellate court, the phrase "the usual one-eighth" in a royalty clause "typically indicates an intent to reserve a floating interest."[234] Also, in the court's view, several clauses in the deed "show a pattern of an introduction followed by a definition."[235] The appellate court held that, based on that pattern, the first portion of the first clause reading "undivided three thirty-second's (3/32's) interest" was a mere "placeholder or shorthand" that is actually defined by the subsequent language, reading "three thirty-second's (3/32's) interest (same being

229. *Id.* at 693–95.

230. Hoffman v. Thomson, 630 S.W.3d 427, 429 (Tex. App.—San Antonio 2021, pet. filed). *The author notes that other partners within the author's law firm represented the appellee at the trial and appellate level.

231. *Id.* at 432.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

three-fourths (3/4's) of the usual one-eighth (1/8th) royalty."[236] The court then reviewed the second and third clauses, "substituting" the phrase "three-fourths of the royalty" "in place of the 3/32" fraction.[237] In the court's view, that "substitution gives meaning to all the language in all three clauses and does not create any conflicts or render any provision meaningless."[238]

The court then did the opposite exercise, examining whether a fixed construct produced a harmonious result.[239] In the court's opinion, if the court ignored the "same being three-fourths" clause, then the entire deed is consistent without any conflict.[240] But, in the court's opinion, that reading was improper because it rendered meaningless the "same being three-fourths" clause.[241]

This case is notable in that it could be read as indicating that there is a well-established general rule that the phrase "the usual one-eighth" in a royalty clause reserves a floating royalty. The author notes that neither of the cases cited by the appellate court indicate that "the usual 1/8th" language will "typically" result in a floating NPRI.[242] The case is also notable in the court's strong reliance on a perceived term-then-definition structure in the document and interpretation of a royalty provision within that perceived structure, despite the fact that no language in the initial royalty clause expressly indicated that any phrase in the clause was merely intended to serve as a placeholder or for a phrase to define another phrase. This case is also notable in its application of the "estate misconception" or "legacy of the 1/8th" theory despite no clear conflict in the deed requiring "harmonizing."

V. SURFACE AND SUBSURFACE TRESPASS

A. Regency Field Services, LLC v. Swift Energy Operating, LLC

In this case, the Texas Supreme Court addressed a cause of action accrued for tort claims relating to the cross-boundary migration of a plume of hydrogen sulfide that was injected into a disposal well on a neighboring tract of land, migrated laterally and vertically, and injured a neighboring oil and gas lessee's well.[243]

Regency Field Services (Regency) owned and operated a disposal in-

236. *Id.* at 434.
237. *Id.*
238. *Id.* at 435.
239. *Id.* at 435–36.
240. *Id.* at 435.
241. *Id.*
242. *See* U.S. Shale Energy II, LLC v. Laborde Props., L.P., 551 S.W.3d 148, 153 (Tex. 2018); Medina Interests, Ltd. v. Trial, 469 S.W.3d 619, 623 (Tex. App.—San Antonio 2015, pet. denied).
243. Regency Field Servs., LLC v. Swift Energy Operating, LLC, 622 S.W.3d 807, 811 (Tex. 2021).

jection well in McMullen County."[244] The Railroad Commission granted Regency a permit to inject a hydrogen sulfide/carbon dioxide mix (injectate) into a "long-depleted gas field," "based on models predicting that the injectate 'plume' would take forty years to migrate 2,220 feet."[245] In 2012, the Railroad Commission issued an amended permit that allowed increased injection rates, based on new models from Regency "predicting that, at the increased injection rate, it would take thirty years to migrate 2,900 feet."[246] "About six months later, Layline Petroleum (Layline) discovered hydrogen sulfide in one of its wells located 3,300 feet from Regency's injection well," and studies confirmed that it came from Regency's well.[247]

Swift Energy Operating (Swift) holds several oil and gas leases "covering different depths underlying separate tracts near Regency's injection well."[248] In October of 2012, "Layline notified Swift that Layline had to plug [its well] because of the hydrogen sulfide contamination."[249] Studies reflected that Regency's "hydrogen sulfide may have crossed under" the boundary of Swift's leases as early as April of 2009.[250]

In July of 2014, the family that owned the ranch upon which Swift's leases were located filed suit against Regency, and other nearby property owners intervened the same month.[251] "Swift intervened in September of 2015, more than three years after Layline first discovered hydrogen sulfide [in its] well."[252] Regency settled with most of the owners and filed summary judgment on Swift's claims based on the statute of limitations.[253]

The supreme court noted that "the applicable limitations statute required Swift to file suit against Regency within two years after its claims accrued."[254] Under the "legal-injury rule" and "single-action rule," Swift was required to bring all its claims against Regency in one action, and limitations accrued as to all of the claims when the first of those legal injuries occurred.[255]

The supreme court began its analysis by noting that "[b]ecause a statute of limitations provides an affirmative defense, a defendant seeking summary judgment based on limitations must conclusively establish that the limitations period expired before the claimant filed suit."[256] That, in turn, requires a defendant to "conclusively establish when the action ac-

244. *Id.* at 812.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* at 813.
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* at 814 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a)).
255. *Id.* at 817.
256. *Id.* at 818.

crued."[257] Because Swift filed suit on September 24, 2015, to be entitled to summary judgment on limitations, Regency was required to conclusively prove, based on pleadings and summary judgment evidence, that Swift first suffered a legal injury on or before September 24, 2013.[258]

The supreme court first rejected the claim based on the 2009 initial migration.[259] The supreme court noted that a nuisance claim requires substantial interference with the use of the land by causing unreasonable discomfort and that "trespass to a mineral lessee's non-possessory rights occurs when wrongful conduct . . . interferes with the . . . legal rights to explore, obtain, produce, and possess the minerals."[260] Given those threshold issues, "the mere fact that contaminants have migrated into the subsurface space covered by a mineral lease does not itself establish that the lessee has sustained . . . legal injuries" for nuisance or trespass.[261]

The supreme court also held that the pleadings did not conclusively establish that the causes of action accrued in October of 2021 when Layline informed Swift of the contamination to its own property, or when Layline informed Swift that its wells "seem very near this injection well" and "could be affected."[262] As the supreme court explained, those allegations similarly failed to conclusively establish when the legal injury was sustained.[263]

The supreme court reversed the trial court's summary judgment based on limitations and remanded the case to the trial court for further proceedings.[264] The supreme court did not conclusively rule that the statute of limitations did not bar Swift's claims, rather that summary judgment on the issue was improper.[265] As the supreme court explained, the statute of limitations may very well have barred Swift's claims, and Regency may have had the opportunity to prove that at trial or a subsequent summary judgment after further pleadings and discovery.[266] Alternatively, it may have been discovered that Swift did not sustain any legal injury.[267] "But at this point, the pleadings and evidence d[id] not conclusively establish that Regency's alleged wrongful operation of the Tilden injection well caused Swift to sustain a legal injury before September 24, 2013."[268]

This case is notable for its analysis of several doctrines applicable to statute of limitations issues, specifically in the context of subsurface migration and non-possessory leasehold rights. This case is also notable in

257. *Id.*
258. *Id.* at 820.
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 821–22.
263. *Id.* at 822.
264. *Id.* at 824.
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*

its holding that a summary judgment on the statute of limitations can be based on evidence as well as the pleadings.

VI. DEAL AND JOINT OPERATIONS DISPUTES

A. Gary & Theresa Poenisch Family Ltd. Partnership v. TMH Land Services, Inc.

This case addressed whether an email exchange created an enforceable agreement to sell an overriding royalty interest.[269] Gary and Theresa Poenisch Family Limited Partnership (Poenisch) and TMH Land Services, Inc. (TMH), among others, jointly owned an overriding royalty interest."[270] To settle a prior dispute, all of the overriding royalty owners agreed with GulfTex Energy IV, LP (GulfTex) to reduce their interests.[271] However, Poenisch said he would do so only if he could also acquire one of the other overriding royalty shares.[272]

TMH's president sent an email to Poenisch stating, "I will sell my retained [overriding royalty interest] in the GulfTex proposed 300+ acre unit for $20,000."[273] Poenisch's counsel replied, stating, "[w]e have a deal" and indicating that he would send an assignment for review.[274] However, he never sent a draft assignment, and "no further steps were ever taken to consummate the sale."[275] Meanwhile, GulfTex and all overriding royalty interest owners, including Poenisch and TMH, executed an assignment that reduced their overriding royalty interests.[276]

About a year later, GulfTex began production under the lease, and Poenisch sent a letter to TMH seeking to enforce the email exchange.[277] TMH refused, and this lawsuit followed.[278] The trial court granted summary judgment in favor of TMH, determining that the email exchange was unenforceable.[279]

The San Antonio Court of Appeals held that the email correspondence was unenforceable under the statute of frauds because it did not contain a legal property description sufficient to satisfy the statute of frauds.[280] Poenisch argued that the land and the interest could be determined by reference to extrinsic evidence.[281] However, the appellate court disagreed, stating that extrinsic evidence may only be introduced to identify

269. Gary & Theresa Poenisch Family Ltd. P'Ship v. TMH Land Servs., Inc., No. 04-20-00300-CV, 2021 WL 4173309, at *2 (Tex. App.—San Antonio Sept. 15, 2021, pet. filed) (mem. op.).
270. *Id.* at *1.
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.* at *2.
278. *Id.*
279. *Id.*
280. *Id.* at *4.
281. *Id.* at *3.

the property if the writing itself supplies a "key or nucleus" description of the property.[282]

In the alternative, Poenisch argued that the email supplied a sufficient description by reference to the GulfTex assignment with all of the overriding royalty owners, which itself included a sufficient description.[283] The court disagreed, reasoning that the reference in the email to "the GulfTex proposed 300+ acre unit" was not a reference to the assignment or other agreement with GulfTex.[284] Moreover, the GulfTex assignment only covered 177.98 acres of land, whereas the email references a "300+ acre unit."[285]

This case reflects the continuing reliance upon email exchanges in oil and gas deals and a continuing flow of disputes as to whether an email exchange is enough to create a binding agreement. The 2020 Annual Review assessed two other oil and gas cases where parties disputed whether email exchanges created a binding agreement. These cases illustrate the importance of reaching clarity as to the binding, final nature of a deal and the benefits of reducing a deal to a final signed writing.

B. Apollo Exploration, LLC v. Apache Corp.

This case involved a dispute regarding "back-in" rights and reassignment obligations under four separate, but identical, purchase and sale agreements (PSAs).[286] Under these PSAs, the sellers each sold 75% of their combined 98% working interest in 120,000 acres of land in the Texas Panhandle.[287] In 2014, three of the sellers filed suit, alleging that Apache failed to comply with PSA provisions relating to the back-in interests and reassignment obligations.[288] The sellers also asserted an array of torts and sought declaratory relief and attorney's fees.[289] The trial court granted Apache summary judgment on all claims and awarded Apache $4.8 million in attorney's fees.[290]

One significant issue was how to properly calculate the Back-In Trigger. The PSAs each afforded the sellers the option to "back in" for up to one-third of the interest conveyed at a "Back-in Trigger," which was defined as "200% of Project Payout."[291] "Project Payout was defined as the first day of the next calendar month after certain defined revenues equaled certain defined costs."[292] Additionally, the sellers had the right at any time to pay Apache the remaining balance and receive the back-in

282. *Id.*
283. *Id.* at *4.
284. *Id.*
285. *Id.*
286. Apollo Expl., LLC v. Apache Corp., 631 S.W.3d 502, 512 (Tex. App.—Eastland 2021, pet. granted).
287. *Id.* at 512.
288. *Id.* at 513.
289. *Id.*
290. *Id.* at 512.
291. *Id.*
292. *Id.*

interest at that time.[293]

Apache argued that "Project Payout" included all actual costs incurred by Apache and that "200% of Project Payout" meant that Apache must receive a two-to-one return on all of those costs before the sellers could exercise their right to back in.[294] The Eastland Court of Appeals rejected that reading, noting that the definitions in the contract must control, and therefore the court could not rewrite the Back-In Triger to mean "200% of Apache's expenses" rather than "200% of Project Payout."[295] The court also held that "Project Payout" could not mean all of Apache's costs because the joint operating agreement (JOA) provided sellers a right to timely except to costs charged by Apache.[296] Therefore, there was a genuine issue of material fact as to whether any of Apache's costs should be excluded from the calculations, and thus summary judgment was improper.[297]

Apache also argued, in the alternative, that if "Project Payout"—defined as a day—did not mean when Apache had received a two-to-one return, then the Back-In terms were too indefinite to be enforceable.[298] The court rejected that argument, reasoning that courts avoid holding a contract unenforceable for uncertainty if possible, and further reasoning that the parties did not dispute the material and essential terms and instead merely disagreed about the meaning of those terms.[299]

Another significant issue was the scope of the reassignment obligation. The PSAs required Apache to provide annual written budgeted drilling commitments for the upcoming year, and Apache agreed to "make a good faith effort to comply with the . . . commitment in order to perpetuate the 'Leases,' as defined in the PSA[s]."[300] However, if any commitment would result in the loss of one or more of the "Leases," Apache was then required to reassign "all" of its interests in the "affected Leases" to the Seller "to provide Seller the option and ability to perpetuate all the Leases so offered" with a one-rig drilling program.[301]

The sellers alleged that, when one of the many leases expired, Apache was required to reassign that lease as well as all other leases held by Apache that covered the same acreage, regardless of whether they were subject to potential termination.[302] The sellers argued that this was necessary to provide the sellers sufficient interest in the acreage in order to economically perpetuate the lease.[303] The court disagreed, reasoning that the obligation was to offer to reassign "affected Leases," and the com-

293. *Id.*
294. *Id.* at 523.
295. *Id.*
296. *Id.* at 524–25.
297. *Id.* at 525.
298. *Id.* at 523.
299. *Id.* at 526.
300. *Id.* at 513.
301. *Id.*
302. *Id.* at 517.
303. *Id.*

mon meaning of "affected" is "to produce an effect upon."[304] Therefore, the court concluded that Apache was required to offer to reassign only the lease that was subject to being lost under a drilling commitment.[305]

A related issue arose because one of the four sellers, Gunn Oil, had previously sold all of its remaining interest to Apache.[306] Apache argued that it was not required to reassign the working interest originally owned by Gunn Oil.[307] Among other things, Apache argued it would be "impossible" to reassign "all" of its interest to three separate sellers.[308] The remaining sellers who filed suit disagreed, arguing that the requirement to reassign "all" the lease means "all," whereas Apache's construction would mean "less than all."[309]

The court agreed with the sellers, reversing the trial court's ruling in favor of Apache on the issue.[310] The court rejected Apache's impossibility argument, reasoning that it was not impossible under all circumstances.[311] For example, only one seller could accept an offered reassignment, or Apache could assign to all sellers collectively.[312]

Another significant dispute concerned the proper calculation of alleged damages attributable to the expiration of that lease.[313] The parties disagreed as to whether the lease at issue had expired on December 31, 2015 or January 1, 2016, which dictated whether the reassignment obligation upon Apache's annual drilling report was due on November 1, 2014 or November 1, 2015.[314] Because the value of that acreage significantly varied between those dates, that issue would affect the sellers' damage model by over $187,000,000.00.[315]

The appellate court reversed and remanded the trial court's summary judgment on the issue in favor of Apache, holding that there were genuine issues of material fact that precluded summary judgment.[316] The court pointed to a number of fact issues regarding when the lease expired, including that the lease suggested the primary term would expire three years after January 1, 2007, while the recorded memorandum indicated the lease expired on December 31, 2009;[317] differing facts surrounding several lease amendments and extensions that had the ability to impact when the lease expired;[318] and a release of the lease executed by Apache made effective on December 31, 2015, along with statements by a

304. *Id.* at 518.
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.* at 520.
309. *Id.* at 519.
310. *Id.* at 522.
311. *Id.* at 520.
312. *Id.*
313. *Id.* at 526.
314. *Id.*
315. *Id.*
316. *Id.* at 531.
317. *Id.* at 527.
318. *Id.* at 528.

landman in 2015 that lease expiration was possible "at the end of this year."[319]

Another significant issue was whether Apache owed fiduciary duties to preserve the leases that would be lost.[320] The court rejected the sellers' arguments that the PSAs created an express trust by separating legal title from a beneficial interest in the "ability to perpetuate" the leases, which would have allegedly required Apache to preserve the leases so that the sellers could have exercised their option and ability to perpetuate them.[321] Although Apache had a contractual obligation to offer to reassign a lease that would be lost, the court was unable to discern an intent to separate the legal title of the leases from any beneficial interest held by the sellers as well as an intent to create an express trust or fiduciary duty.[322]

This case illustrates the significant complexity and damages that can arise in disputes regarding development obligations, reassignment obligations, lease maintenance issues, back-in rights, and payout calculations. Further, these disputes can lead to significant expert witness issues. While easier said than done, oil and gas companies, landmen, and lawyers alike should be mindful of how such provisions will operate in practice and strive to seek out and eliminate wording that could lead to significantly differing interpretations.

C. Apache Corp. v. Castex Offshore, Inc.

In this case, the Houston Court of Appeals addressed the definition of "willful misconduct" in the context of an exculpatory provision in two separate joint operating agreements.[323] Operating agreements typically contain an exculpatory provision indicating the operator will not be liable to the non-operators for losses sustained or liabilities incurred in operations except those resulting from the operator's "gross negligence or willful misconduct." Of course, these provisions vary, but most will reference "gross negligence" and "willful misconduct" as the bar for holding the operator responsible.

Under these operating agreements, Apache Corporation (Apache) was the operator and Castex Energy Partners, LLC (Castex) was the non-operator.[324] One of the agreements concerned the expansion of a natural gas processing facility known as Belle Isle. The other disputed operating agreement pertained to an oil and gas lease called the Potomac lease.[325] Though both operating agreements covered property in Louisiana, the

319. *Id.* at 528–29.
320. *Id.* at 532.
321. *Id.* at 531.
322. *Id.* at 532.
323. Apache Corp. v. Castex Offshore, Inc., 626 S.W.3d 371, 376 (Tex. App.—Houston [14th Dist.] 2021, pet. filed).
324. *Id.* at 376–77.
325. *Id.* at 377.

Belle Isle agreement contained a Texas choice of law provision.[326]

Apache sued Castex for breach of the operating agreements after Castex failed to pay its proportionate share of costs incurred in expanding the Belle Isle facility and in drilling a well under the Potomac lease.[327] Castex counterclaimed, alleging that Apache mismanaged both projects, leading to gross cost overruns at Belle Isle and irreversible damage to the reservoir at Potomac.[328]

The jury found that Apache had not committed gross negligence but had engaged in willful misconduct in both projects.[329] Consistent with the Texas Pattern Jury Charges (Oil & Gas) § 305.28, the trial court did provide the jury with a definition of willful misconduct.[330] The jury awarded Castex damages totaling $5,566,577.00[331] The trial court rendered judgment based on those findings.[332]

On appeal, Apache argued that the trial court should have instructed the jury that "willful misconduct requires a subjective, intentional intent to cause harm."[333] To that end, Apache argued that the evidence was insufficient because Apache did not purposely increase its own costs and certain management allegedly did not have sufficient skills to appreciate the risks.[334]

The appellate court disagreed with Apache, reasoning that the ordinary definition of "willful misconduct" does not require an intent to cause the injury nor does it require knowledge that it is substantially certain to occur.[335] Instead, the court held that "a plaintiff can show that a defendant is liable for willful misconduct if the evidence establishes that the defendant intentionally or deliberately engaged in improper behavior or mismanagement, without regard for the consequences."[336] The court acknowledged that its sister court of appeals had previously recognized a meaning consistent with Apache's proposed definition in *IP Petrol. Co. v. Wevanco Energy, L.L.C.*[337] However, the *Apache* court rejected that definition, reasoning that the Texas Supreme Court had recently held that "willful misconduct is 'short of genuine intentional injury.'"[338]

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326. *Id.* at 380.
327. *Id*. at 377.
328. *Id.*
329. *Id.* at 380.
330. *Id.*
331. *Id.*
332. *Id.* at 377.
333. *Id.* at 380.
334. *Id.* at 383.
335. *Id.* at 381, n. 1.
336. *Id.* at 381.
337. *Id.* at 380 (citing IP Petrol. Co. v. Wevanco Energy, L.L.C., 116 S.W.3d 888, 898 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (holding that "a finding of willful misconduct required evidence of 'a specific intent by [the operator] to cause substantial injury to [non-operators]'")).
338. *Id.* at 381 (citing Mo-Vac Serv. Co., Inc. v. Escobedo, 603 S.W.3d 119, 125–26 (Tex. 2020)).

The court reviewed the evidence pertaining to the Belle Isle project against that standard and concluded that the evidence was legally and factually sufficient to support the jury's verdict.[339] Among other things, there was evidence at trial that Apache's project manager at the gas plant was aware of significant cost overruns for months, yet was consciously indifferent to them and deliberately ignored policies and restrictions on spending in excess of authorizations.[340] Though the initial authority for expenditure (AFE) was for about $17,000,000.00, spending ultimately surpassed $42,500,000.00.[341]

The operating agreement for drilling a well on the Potomac lease contained a Louisiana choice of law provision.[342] The court determined that Louisiana law would apply the same standard as Texas, meaning that "to support the finding of willful misconduct, there must [have been] some evidence that Apache intentionally or deliberately engaged in improper behavior or mismanagement, without regard for the consequences."[343]

The court reviewed the evidence pertaining to the drilling project on the Potomac lease against that standard and concluded that the evidence was insufficient to support the jury's verdict that Apache engaged in willful misconduct.[344] The evidence reflected that Apache encountered repeated difficulties in the original drilling operation and several subsequent sidetracking operations, each of which resulted in the loss of the wellbore, until the fifth operation (being the fourth sidetrack).[345] The court reasoned that, although Apache knew of these repeated difficulties and failures, the evidence reflected that Apache was concerned about the risks[346] and that Apache was actively trying to stop the issues.[347] The court explained that the evidence was "the opposite of willful misconduct."[348] Further, in the court's view, evidence that Apache had decided to offer its access for sale after the failed drilling operations was "no more than a scintilla" of evidence and would not support a finding of willful misconduct.[349] As the court noted, "drilling operations are risky, which explains why the model form joint operating agreement shields the operator with a broad exculpatory clause."[350]

This case is notable in its analysis of the meaning of "willful misconduct" in the context of an exculpatory clause of an oil and gas operating agreement, and for the court's detailed analysis of the evidence against that standard. While the supreme court has specifically addressed the

339. *Id.* at 383.
340. *Id.* at 381.
341. *Id.* at 383, n. 2.
342. *Id.* at 388.
343. *Id.* at 389.
344. *Id.* at 393.
345. *Id.* at 389–93.
346. *Id.* at 392.
347. *Id.* at 391.
348. *Id.*
349. *Id.*
350. *Id.* at 393.

meaning of "gross negligence" in this context,[351] there has been little guidance concerning the meaning of the phrase "willful misconduct" in this context.[352]

D. Big Hatchet, LLC v. Monadnock Resources, LLC

This case involved a dispute over the scope of interests covered by an area of mutual interest provision (AMI) contained in a joint exploration and development agreement (JDA) that covered the "acquisition" of certain interests including "infrastructure." Specifically at issue was whether this AMI covered a saltwater disposal (SWD) pipeline system one of the parties was constructing and the related rights-of-way the party had acquired.[353]

The JDA was entered into between Big Hatchet, LLC, as operator, and Monadnock Resources, LLC (Monadnock), as non-operator.[354] At issue was whether the AMI required the non-operator to offer the operator a share of the SWD pipelines the non-operator was itself constructing in the area.[355]

The JDA contained an AMI that defined a certain area of land as the AMI Area.[356] The AMI provision stated that if either party "directly or indirectly, acquires or seeks to acquire any AMI Interests that consist of or include rights or interests within the AMI Area, from any third party other than a Party hereto," then the acquiring party was required to give the other party notice and an opportunity to purchase a defined share of the "AMI Interests."[357] "[T]he JDA define[d] 'AMI Interests' to include various types of mineral interests and expressly provide[d] . . . 'any infrastructure related to the exploration, operation or development of the foregoing described leases, estates and interests.'"[358]

After the execution of the JDA, Monadnock (the non-operator) contracted with third parties for the construction of two SWD pipelines within the AMI area.[359] More than a year later, Big Hatchet demanded that Monadnock allow Big Hatchet to participate in the SWD pipelines.[360] The parties could not agree, and this suit followed.[361]

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351. Reeder v. Wood Cnty. Energy, LLC, 395 S.W.3d 789, 796 (Tex. 2012) (per curiam) (finding that a jury charge properly defined "gross negligence" as "that entire want of care which would raise the belief that the act or omission complained or [sic] was a result of a conscious indifference to the right or welfare of the person or persons to be affected by it").

352. *See, e.g.*, IP Petrol. Co. v. Wevanco Energy, L.L.C., 116 S.W.3d 888, 898 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

353. Big Hatchet, LLC v. Monadnock Res. LLC, No. 07-19-00261-CV, 2021 WL 2763108, at *1 (Tex. App.—Amarillo July 1, 2021, no pet.) (mem. op.).

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.* at *2.

359. *Id.* at *1.

360. *Id.* at *2.

361. *Id.*

According to the Amarillo Court of Appeals, the ultimate issue was whether "the SWD pipelines, or their component parts, [were] 'infrastructure' acquired from third parties."[362] Big Hatchet argued that they were "infrastructure" because Monadnock acquired the individual component parts from third parties.[363]

The court disagreed, holding that the AMI provision in the JDA was not "intended to cover unilateral operations in the development of interests in the AMI."[364] The court reasoned that a pipeline right-of-way itself could not meet the definition of "infrastructure" because it was "of little use and benefit to [hydrocarbon operations] without the accompanying use of the pipeline itself."[365] For the same reason, the court held that the other components (i.e., the pipeline, supplies, labor, and materials), in and of themselves, did not constitute "infrastructure" subject to the AMI.[366]

According to the court, once the SWD pipeline was a completed project, it would be properly considered "infrastructure."[367] However, the court noted that to trigger the AMI, the SWD pipeline also needed to be acquired from a third party.[368] The court held that because Monadnock acquired the individual components and contracted to build the SWD pipeline infrastructure, it did not "acquire" the SWD pipeline infrastructure from a third party, and therefore the AMI was not triggered.

This case is notable in its interpretation of the terms "infrastructure" and "acquired" in the context of an oil and gas AMI, and is illustrative of disputes that can arise regarding ownership of facilities supporting oil and gas development.

362. *Id.* at *3.
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.*