SMU Annual Texas Survey

Volume 9 Article 9

2023

Oil, Gas & Mineral Law

Austin W. Brister
McGinnis Lochridge, LLP

Logan Jones
McGinnis Lochridge LLP

Oil, Gas & Mineral Law

*Austin W. Brister**
*Logan Jones***

TABLE OF CONTENTS

DOI: https://doi.org/10.25172/smuatxs.9.1.9

* Partner, Oil and Gas Litigation, McGinnis Lochridge LLP, Houston, Texas (mcginnislaw.com).

** Associate, Oil and Gas Practice Group, McGinnis Lochridge LLP, Houston, Texas (mcginnislaw.com).

ABSTRACT

This Article summarizes, sorts, and discusses the most impactful cases relating to oil, gas, and mineral law in Texas decided by the Texas Courts of Appeals and the Texas Supreme Court during the Survey period.

I. ROYALTY CALCULATION & FREE USE CLAUSES

A. Nettye Engler Energy, LP v. BlueStone Natural Resources II, LLC

This royalty case involves a nonparticipating royalty interest (NPRI), with the dispute focusing on whether and to what extent the NPRI bears a proportionate share of postproduction costs.[1] The NPRI was reserved in a 1986 special warranty deed which required delivery of the NPRI-owner's fractional share of production "free of cost in the pipe line, if any, otherwise free of cost at the mouth of the well or mine[.]"[2]

The primary argument was whether the deed's reference to the "pipe line" included an on-site gathering system that was connected to the wells, or whether it instead referred to an offsite major transportation pipeline.[3]

1. Nettye Engler Energy, LP v. BlueStone Nat. Res. II, LLC, 639 S.W.3d 682 (Tex. 2022).
2. *Id.* at 684.
3. See *id.*

This dispute extends out of the 2019 Texas Supreme Court precedent in *Burlington Resources Oil & Gas Co. v. Texas Crude Energy, LLC*, which held that a royalty provision providing for delivery to a "pipeline" established a valuation location at the "pipeline" for treatment of post-production costs.[4] Under that prior case, post-production costs prior to that valuation location could not be netted, whereas post-production costs after that valuation location generally could be netted in determining the prior royalty base.[5]

In applying that 2019 holding to the subject case, BlueStone contended that the "pipe line" under the 1986 special warranty included the on-site gathering line that was connected to the wellhead, and therefore BlueStone concluded that the NPRI was be subject to a proportionate share of post-production costs incurred after the gas entered that line.[6] On the other hand, under Engler's interpretation, the 1986 deed's reference to "pipe line" could only refer to an offsite, downstream transportation pipeline, such that the NPRI would be subject to post-production costs incurred between the wellhead and that downstream pipeline.[7]

The Texas Supreme Court held that word "pipe line" as used in the 1986 deed, includes an onsite gathering system.[8] The supreme court explained the basis for its holding as follows:

> (1) a gathering pipeline is a pipeline in the ordinary, industry, and regulatory meaning of the term; (2) case law confirms that it is not uncommon for delivery of a royalty interest to be made into a "pipeline . . . to which the well is connected," rather than a downstream location; (3) the deed does not exclude such a pipeline from the usual meaning of the term or specify any particular type of pipeline; and (4) the inclusion of a default delivery location at or near the wellhead does not negate a wellsite delivery point but, instead, confirms it.[9]

The supreme court explained that, because the deed did not include a special definition of "pipe line," the supreme court looked to ordinary and industry definitions to aid in interpretation.[10] The supreme court surveyed a few dictionary definitions of "pipeline," including definitions from *Williams & Meyers*, which expressly included gathering lines.[11] The supreme court also referenced several statutes and regulations which also treated "gathering pipelines" as a type of pipeline, and which used the word "pipeline" to describe gathering systems.[12]

---

4. Burlington Res. Oil & Gas Co., LP v. Tex. Crude Energy, LLC, 573 S.W.3d 198, 200 (Tex. 2019).

5. *See id.* at 211.

6. *Nettye Engler Energy, LP*, 639 S.W.3d at 684–85.

7. *Id.* at 685.

8. *See id.*

9. *Id.* at 691.

10. *See id.* at 691–92.

11. *Id.* at 692 (citing 8 Howard R. Williams & Charles J. Meyers, Oil and Gas Law 766 (Patrick H. Martin & Bruce M. Kramer eds., 2021)).

12. *Id.* at 692–93 (citing 16 Tex. Admin. Code §§ 8.110, 3.13; Tex. Nat. Res. Code Ann. § 111.084; Tex. Tax Code Ann. § 171.1012(k-2); Tex. Health & Safety Code Ann. §

The supreme court also pointed to case law which, in the supreme court's view, reflects that deeds and leases requiring delivery "into the pipeline" will "often" go further and limit the scope specifically to a pipeline "to which the lessee connects his wells."[13] According to the supreme court, this demonstrates that it is not uncommon for a "pipeline" to be connected to the well or for delivery to occur on the wellsite.[14] The supreme court explained that the absence of the phrase "into which the lessee connects his wells" from the 1986 deed actually makes the 1986 deed's reference to "pipe line" even broader.[15]

Further, the supreme court reasoned that the 1986 deed does not identify any particular pipeline, type of pipeline, or delivery point or pipeline location, and to limit the phrase "pipe line" to a specific pipeline or location would impermissibly require the supreme court to rewrite or add words to the instrument.[16]

The supreme court also rejected Engler's argument that the word "otherwise" in the deed "contemplates a dichotomy between two potential delivery points—offsite and onsite."[17] In Engler's view, these two locations cannot be the same or similar, and therefore the "pipeline" must refer to an off-premises transportation pipeline.[18] The supreme court disagreed, explaining that the word "otherwise," when considered with the immediately preceding phrase "pipe line, if any," is better interpreted as creating a "preferential delivery point" if a pipeline exists, and a "default delivery point at the mouth of the well" if there is no pipeline or if the particular mineral produced is incapable of delivery into a pipeline.[19]

The supreme court also upheld the rejection of Engler's offered expert testimony from an oil and gas attorney, who opined that the 1986 deed's reference to a "pipe line" refers to a main transportation pipeline or where title transfers to a third-party purchaser.[20] The supreme court rejected this testimony explaining that it "would impermissibly add words of limitation to modify the deed's terms."[21] Further, the supreme court explained that the expert's testimony did not elucidate the meaning of the 1986 deeds words, because it "merely discusses how 'most' gas was 'usually' processed and sold under 'traditional' gas gathering agreements [in 1986]."[22]

This case is notable for its application and discussion of the Texas Supreme Court's prior opinion in *Burlington*. The *BlueStone* supreme court

---

756.121(3); TEX. UTIL. CODE § 121.451(3)).

13. *Id.* at 693 (citing several cases, including Burlington Res. Oil & Gas Co., LP, v. Tex. Crude Energy, LLC, 573 S.W.3d 198 (Tex. 2019)).

14. *Id.*

15. *Id.*

16. *Id.* at 694–95.

17. *Id.* at 695.

18. *Id.*

19. *Id.* at 695.

20. *Id.* at 687.

21. *Id.* at 691.

22. *Id.*

explained that its holding in *Burlington* was not one of establishing rules that apply when a word or phrase appears in a royalty agreement, to wit:

> The court of appeals reached the correct result but misconstrued our opinion in *Burlington* . . . as establishing a rule that delivery 'into the pipeline,' or similar phrasing, is always equivalent to an 'at the well' delivery or valuation point. Rather, the opinion merely emphasized that all contracts, including mineral conveyances, are construed as a whole to ascertain the parties' intent from the language they used to express their agreement.[23]

The *BlueStone* supreme court went on to explain that, while the *Burlington* opinion held that the language in that case equated the phrase "into the pipeline" delivery point with "at the mouth of the well" valuation in that particular case, that does not necessarily dictate a conclusion in other cases, to wit:

> We did not fashion a rule to that effect. To the contrary, we explained that 'the decisive factor in each [contract-construction] case is the language chosen by the parties to express their agreement.' Just as in *Burlington Resources*, our analysis here turns not on an immutable construct but on the parties' chosen language.[24]

B. Devon Energy Products Co., L.P. v. Sheppard

In this case, the Texas Supreme Court reviewed a "bespoke" oil and gas lease,[25] and held that its "unique,"[26] "unusual,"[27] and "broad lease language,"[28] provided for a "proceeds plus" royalty base.[29] The supreme court indicated that this broad and unusual language unambiguously called for a royalty base that may exceed the lessee's gross proceeds, because it "plainly requires the producers to pay royalties on the gross proceeds of the sale *plus* sums identified in the producers' sales contracts as accounting for actual or anticipated postproduction costs, even if such expenses are incurred only by the buyer after or downstream from the point of sale."[30]

The supreme court generally noted that, though leases operate against a backdrop of jurisprudence regarding "usual" rules, "we have consistently recognized that parties are free to make their own bargains."[31] One "usual" rule is that royalties are free of production costs, but not free of postproduction costs.[32] However, "[l]andowners and producers can 'agree

---

23. *Id.* at 685.
24. *Id.* at 696.
25. Devon Energy Production Company, L.P. v. Sheppard, 668 S.W.3d 332, at 335 (Tex. 2023).
26. *Id.* at 348.
27. *Id.* at 338.
28. *Id.* at 336.
29. *See id.* at 348.
30. *Id.* at 336.
31. *Id.*
32. *Id.*

on what royalty is due, the basis on which it is to be calculated, and how expenses are to be allocated.'"[33]

The unique leases at issue in this case included a gas royalty provision on "gross proceeds realized from the sale, free of all costs and expenses, to the first non-affiliated third party purchaser under a bona fide arms length sale or contract."[34]

The leases also contained two "more unconventional" provisions, including a Paragraph 3(c) reading as follows:

(c) 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[ing] or marketing of the oil or gas, then such deduction, expense or cost shall be added to . . . 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.[35]

The lease also contained a unique Addendum L, which read as follows:

L. ROYALTY FREE OF COSTS:

Payments of royalty under the terms of this lease shall never bear or be charged with, either directly or indirectly, any part of the costs or expenses of production, gathering, dehydration, compression, transportation, manufacturing, processing, treating, post-production expenses, marketing or otherwise making the oil or gas ready for sale or use, nor any costs of construction, operation or depreciation of any plant or other facilities for processing or treating said oil or gas. Anything to the contrary herein notwithstanding, it is expressly provided that the terms of this paragraph shall be controlling over the provisions of Paragraph 3 of this lease to the contrary and this paragraph shall not be treated as surplusage despite the holding in the cases styled "*Heritage Resources, Inc. v. NationsBank*", 939 S.W.2d 118 (Tex. 1996) and "*Judice v. Mewbourne Oil Co.*", 939 S.W.2d [133,] 135-36 (Tex. 1996).[36]

The lessees sold the oil and gas production to unaffiliated third parties at various downstream sales points.[37] The lessees then paid royalties on the basis of their gross proceeds, without any deduction of expenses the lessee's incurred to ready the production for sale.[38] The lessees did not, however, include any post-sale costs incurred by the third-party buyers after the point of sale.[39]

The lessors contended that this was a breach of the unique royalty provisions.[40] The lessors contended that the unique leases require the lessee to "add to" the "gross proceeds" any "reductions or charges" in the

33. *Id.*
34. *Id.* at 337.
35. *Id.* at 337–38.
36. *Id.* at 338.
37. *See id.* at 338–39.
38. *See id.* at 339.
39. *See id.* at 339–40.
40. *See id.* at 339–40.

lessee's sales contracts, so that the landowners' royalty is never burdened by postproduction costs, not even "indirectly."[41] The lessors contended that the language was written to unburden the royalty interests from postproduction costs, irrespective of the lessee's unilateral choices about where and in what condition to sell production, to the extent that "the royalty calculation [is made] consistent no matter where the producers choose to sell production."[42]

The lessees, on the other hand, argued that these unique provisions were "mere surplusage that emphasizes the cost-free nature of a 'gross proceeds' royalty by requiring them to 'add back' only pre-sale postproduction costs that may have diminished the sales price."[43] The lessees characterized the lessor's interpretation as "untenably contrary to the industry's expectation that a royalty free of postproduction costs means only those costs incurred up to the point of sale."[44]

The supreme court rejected the lessee's construction, reasoning that "[a] reasonable person would not read [these] words" to "construe 'added to . . . gross proceeds' as the equivalent of 'gross proceeds.'"[45] Instead, in the supreme court's view, the unique provisions in these leases "plainly require certain sums to be 'added to' gross proceeds."[46] The supreme court indicated that "parties to a mineral lease could unquestionably make [an] agreement" to "require[e] producers to pay royalty on postproduction costs incurred downstream from the point of sale."[47] The supreme court reasoned that it would not be unreasonable for Texas lessors to negotiate lease terms that provide something similar to the "marketable product" rule in other jurisdictions—where a producer is required to pay royalties on the value of the product in a commercially usable condition and in a commercial marketplace, regardless of where and in what condition the product is actually sold.[48]

Ultimately, the supreme court held that the "inescapably broad language" in these unique provisions is "clear" in that "[i]t requires 'any reduction or charge' for postproduction costs that have been included in the producer's disposition of production to be 'added to' gross proceeds so that the landowners' royalty 'never' bears those costs even 'indirectly.'"[49] The supreme court went on to say, "Paragraph 3(c) is not textually constrained to the expenses incurred by the seller or prior to the point of sale."[50] Further, "Paragraph 3(c) unambiguously contemplates royalty payable on an amount that may exceed the consideration accruing to the producers."[51]

41. *Id.* at 342.
42. *Id.* at 340.
43. *Id.*
44. *Id.*
45. *Id.* at 346.
46. *Id.* at 344.
47. *Id.*
48. *Id.*
49. *Id.* at 345.
50. *Id.*
51. *Id.*

The supreme court agreed with the lessees that courts construe commonly used terms in a uniform and predictable way in order to assure continuity and predictability in oil and gas law.[52] "But there is nothing common, usual, or standard about the language in Paragraph 3(c), which is quite clear in expressing the intent to deviate from the usual expectations regarding the allocation of postproduction costs" in two ways: (1) by requiring royalties on gross proceeds, which departs from the general rule that a lessor bears a proportionate share of post-production costs; and (2) "by requiring an *addition* to gross proceeds for the stated purpose of freeing the landowners' royalty from 'any costs or expenses other than its pro rata share of severance or production taxes."[53]

Finally, the supreme court turned to the lessee's contention that, even if some post-sale postproduction costs must be included in the royalty base, expenses for "transportation and fractionation" (T&F) are not among them.[54] The supreme court disagreed, reasoning that T&F is a term of art referring to transporting raw gas downstream for fractionation to separate raw gas into purer products.[55] Because the unique royalty provisions in these leases expressly included expenditures to "process" production, that included "T&F" fees.[56]

This case is notable in its discussion of decades of case law regarding deduction of post-production costs, and the supreme court's framing of the law in this area as one of determining the parties' intent. This case is also notable in that it is the supreme court's first impression regarding so-called "add to proceeds" or "add back" royalty provisions. While the supreme court called this language unique and unusual, the petitioners' briefing and amicus briefing both referred to this language as an "add back clause," and claimed that add-back clauses have become common.

C. EnerVest Operating, LLC v. Mayfield

In this case, the San Antonio Court of Appeals construed and harmonized an oil and gas lease containing both a "free use" clause and an "at the well" royalty provision, and held that the lessee was not required to pay royalties on gas used offsite in compressors.[57]

At issue was EnerVest's use of some of the gas produced from the leases as "fuel gas" to power off-site compressors and dehydrators, necessary to meet quality and pressure specifications prior to delivery to processing plants or downstream pipelines.[58] EnerVest did not pay royalties on the gas

52. *See id.* at 346.
53. *Id.*
54. *Id.* at 348.
55. *See id.*
56. *Id.* at 348–49.
57. *See* Enervest Operating, LLC v. Mayfield, No. 04-21-00337-CV, 2022 WL 4492785, at *1 (Tex. App.—San Antonio Sep. 28, 2022, no pet. h.).
58. *Id.*

it used as fuel.[59] The lessors contended that this was a breach of the leases and filed suit.[60]

The underlying leases required that the lessee pay royalties "on gas . . . produced . . . or used off the premises, the market value at the mouth of the well of one-eight of the gas so sold or used . . . ."[61] The court of appeals pointed out that, when royalty is to be calculated on "market value at the well," that generally means the royalty owner must share in post-production costs, and that an "at the well" royalty base may be calculated by subtracting post-production costs from the lessee's downstream sales price.[62] The court concluded that, because fuel gas is a post-production cost, the lessors must bear their share of that post-production cost, and EnerVest did not owe a royalty on fuel gas.[63]

Interestingly, the court did not discuss the language in the royalty provision indicating that royalties were due not only on gas *sold*, but also expressly indicated that royalty was due on gas "*used* off the premises."[64]

The leases also contained a "free-gas" clause, which indicated "[l]essee shall have free use of oil, gas, and water . . . for all drilling operations hereunder . . . . "[65] The lessors argued that this clause only allowed free use for drilling operations on the leased premises, and did not extend to use in compressors or dehydrators off the leased premises.[66] For support, the lessors relied on the *BlueStone*[67] case, where the Texas Supreme Court analyzed a free-use clause and held that it was limited to the free use of gas "in all operations which lessee may conduct hereunder," which the supreme court construed to mean gas used on the leased premises, but not off-lease uses.[68]

The court of appeals disagreed with the lessors regarding the free-use clause, calling their interpretation an "isolated reading" that ignores that the lease calls for royalties on "market value at the mouth of the well."[69] The court explained that "at the well" royalty language is a "critical clause" in calculating gas royalty which must be given meaning.[70] The court distinguished *BlueStone* as "not instructive," pointing out that *BlueStone* did not involve a royalty provision that required the operator to deduct post-production costs.[71]

---

59. *See id.*
60. *See id.*
61. *Id.*
62. *Id.* at *4.
63. *Id.*
64. *See id.* at *1 (emphasis added).
65. *Id.* at *2.
66. *See id.* at *4.
67. *See generally* BlueStone Natural Resources II, LLC v. Randle, 620 S.W.3d 380, 387 (Tex. 2021).
68. *Enervest Operating, LLC*, 2022 WL 4492785, at *4 (internal citations omitted).
69. *Id.*
70. *Id.*
71. *Id.* (citing *BlueStone Natural Resources II*, 620 S.W.3d at 387).

Finally, the court of appeals held that the conduct of EnerVest's predecessors-in-interest—who agreed with the lessors' interpretation and paid royalties on fuel gas—was not binding on EnerVest because it did not alter the plain language of the leases, and unambiguous leases are construed and enforced as written.[72]

This case is notable in its interpretation and application of the Texas Supreme Court's recent, first-impression case on free use provisions in oil and gas leases, *BlueStone Natural Resources II, LLC v. Randle*, 620 S.W.3d 380, 387 (Tex. 2021). This case is also notable in holding that the "at the well" royalty language was sufficient to materially distinguish the lease from the holding in *BlueStone*.

D. Devon Energy Products Co., LP v. Enplat II, LLC

In this case, the El Paso Court of Appeals construed a 1940 deed in order to determine whether it reserved a fixed royalty interest, or a mineral interest that would be subject to the lease royalty rate.[73] The 1940 deed contained the following reservation:

However, this conveyance is made with the express understanding that there is reserved to the Grantors, their heirs and assigns an undivided one-sixteenth (1/16) of any and all oil, gas or other mineral produced on or from under the land above described. John Lopoo [Grantee], or his heirs and assigns shall have the right to lease said land for mineral development without the joinder of Grantors or their heirs and assigns, and to keep all bonus money, as well as all delay rentals, but when, if and as Oil, Gas or other mineral is produced from said land, one-sixteenth (1/16) of same, or the value thereof, shall be the property of Grantors, their heirs and assigns.[74]

The court noted that the property was at that time subject to an oil and gas lease providing for a one-fifth royalty.[75] Prior owners treated the 1940 deed as reserving a one-sixteenth nonexecutive mineral interest.[76] Enplat acquired two-thirds of the interest in 2017, and claimed that the deed reserved a fixed one-sixteenth royalty in all production, rather than a one-sixteenth mineral interest (i.e., five times the amount the grantors had been receiving).[77]

The court noted the lack of the term "royalty" in the deed, and indicated that was a factor in determining the grantor's intent, but was not dispositive.[78]

Devon contended that the phrase "on or from under the land" should be interpreted similarly to various cases that have held that phrases "in and under" and that "may be produced" refer to a mineral interest, not a

72. *See id.* at *5.

73. *See* Devon Energy Prod. Co., LP v. Enplat II, LLC, No. 08-21-00217-CV, 2023 WL 362014, at *3 (Tex. App.—El Paso Jan. 23, 2023, no pet. h.).

74. *Id.*

75. *See id.*

76. *See id.*

77. *See id.*

78. *Id.* at *3.

royalty.[79] Enplat, on the other hand, argued that the 1940 deed reserved a royalty interest, focusing on the language describing the reservation as one in minerals "*produced* on or from the land."[80] Enplat also argued that the lack of language describing this interest as being "in and under" meant it was a royalty, and that the phrase "on or from under" was too dissimilar.[81]

The court rejected Enplat's argument, reasoning that cases determining an interest was a royalty have focused on the phrase "produced and saved," or "produced, saved and made available for market,"[82] which it described as a "material distinction."[83] Further, in the trial court's view, the phrase "on or from under" was similar to the language "in and under" traditionally associated with a mineral interest.[84]

The court of appeals further held that the additional language regarding future development "without joinder" and regarding bonus and rentals, was not language indicative of a royalty interest, but instead was indicative of a mineral interest stripped of certain attributes.[85]

E. Hahn v. ConocoPhillips Co.

In this case, the Corpus Christi Court of Appeals held that, when the owner of a fixed NPRI ratified an oil and gas lease, that did not have the effect of converting the fixed NPRI into a floating NPRI.[86] Instead, the court held that the NPRI owner's ratification only extended to the pooling provision.[87]

In 2002, a grantor (Kenneth) conveyed to the Gipses his interest in a tract of land.[88] That instrument also included the following reservation in favor of Kenneth:

[A]n undivided one-half (1/2) non-participating interest in and to all of the royalty [Kenneth] now owns, (same being an undivided one-half of [Kenneth's] one-fourth (1/4) or an undivided one-eighth (1/8) royalty) in and to all of the oil royalty, gas royalty and royalty in other minerals in and under and that may be produced from the herein described property.[89]

Subsequently, the Gipses (as the executive rights holder) entered into an oil and gas lease with Conoco, containing a one-fourth royalty provision.[90] The lease also contained a pooling provision permitting Conoco to pool the

79. *Id.*
80. *Id.* at *4.
81. *Id.*
82. *Id.* at *5 (citing Grissom v. Guetersloh, 391 S.W.2d 167, 170–71 (Tex. App.—Amarillo 1965, writ ref'd n.r.e.)).
83. *Id.* (citing Grissom, 391 S.W.2d at 169).
84. *Id.*
85. *See id.* at *7.
86. *See* Hahn v. ConocoPhillips Co., No. 13-21-00310-CV, 2022 WL 17351596, at *1 (Tex. App.—Corpus Christi–Edinburg Dec. 1, 2022, pet. filed)
87. *See id.*
88. *See id.* at *2.
89. *Id.*
90. *See id.*

property with surrounding property, and indicating that Conoco would pay the Gipses' royalty based on a share of production development allocated on a pro rata acreage basis.[91]

In 2011, Kenneth signed a document ratifying that lease. Specifically, that ratification provided that Kenneth agreed to "ADOPT, RATIFY, and CONFIRM the Lease in all of its terms and provisions . . . ."[92] A tract at issue, covered by the subject lease, was later pooled into a 307.41 acre unit.[93]

Kenneth initially filed suit in 2015 arguing that he reserved a one-eighth fixed fractional royalty and not a one-eighth fraction of royalty (floating).[94] The trial court ruled that Kenneth reserved a floating fraction of royalty, and this case made its first pass up to the court of appeals.[95] The court of appeals held that the underlying deed reserved a fixed one-eighth NPRI, and remanded to the trial court.[96]

Upon remand, Conoco argued that, even if the deed reserved a fixed NPRI interest, Kenneth's 2011 ratification of the lease allegedly included a ratification of the provisions regarding calculation of royalty payments, thereby converting the fixed NPRI into a floating one-eighth interest in lease royalty.[97]

Kenneth disagreed, contending that his royalty interest in the pooled unit was to be calculated by as a full one-eighth fixed royalty out of the production attributable to his tract out of the pooled unit.[98]

The court of appeals rejected Conoco's argument. The court reasoned that an NPRI owner is unable to execute his own lease, and an NPRI owner's ratification is only necessary to effect a pooling of production.[99] Similarly, Conoco had no reason to seek Kenneth's ratification other than for purposes of pooling.[100] Moreover, ratification in this context has been interpreted as an offer to pool by the lessor, with the royalty owner accepting that offer through ratification.[101] In essence, the court construed both the offer, and the ratification, as being limited to the issue of pooling, and nothing more.[102]

The court concluded that the NPRI owner's ratification was binding only with respect the pooling provision in the lease.[103] This case is potentially notable with respect its interpretation of the limited scope of an

---

91. *See id.*
92. *Id.* at 3.
93. *Id.*
94. *See id.*
95. *See id.* at *4.
96. *See id.* at *5.
97. *See id.* at *6.
98. *See id.* at *5.
99. *See id.* at *4–5.
100. *See id.* at *9.
101. *See id.* at *10 (citing Verble v. Coffman, 680 S.W.2d 69, 70 (Tex. App.—Austin 1984, no writ)).
102. *See id.* at *15.
103. *See id.*

NPRI-owner's ratification of an oil and gas lease, particularly given some of the broad ratification language that appeared in the documents at issue.

F. Brooke-Willbanks v. Flatland Mineral Fund, LP

In this case, the Eastland Court of Appeals reviewed a 2016 deed from Brook-Willbanks to Flatland, conveying "an undivided Seventy-Two (72) Net Mineral Acres" in a 320 acre tract of land in Martin and Howard Counties, Texas.[104] The dispute focused on whether outstanding NPRI interests burdened solely the interest of the grantor (Brook-Willbanks), or whether they proportionately burdened the grantor and grantee (Flatiron).[105]

The dispute largely centered on a subject-to clause in the deed, which read as follows:

This conveyance is made subject to the terms of any valid and subsisting oil, gas and other mineral lease or leases on said land; and Grantor's [sic] have granted, transferred, assigned and conveyed, and by these presents do grant, transfer, assign and convey unto the Grantee, their heirs, successors and assigns, the above stated interest of Grantor's interest in and to the rights, rentals, royalties and other benefits accruing or to accrue under said lease or leases from the above described land.

. . . .

Notwithstanding, it is the specific intent of this instrument to convey to Grantee the right to receive all bonuses, rents, royalties, production payments, or monies of any nature, including those in suspense, accrued in the past or in the future, associated with the undivided interest herein conveyed.[106]

The court first discussed the meaning of the term "net mineral acres."[107] The court found two recent CLE papers persuasive, one of which indicated "one net mineral acre is typically considered to equal the fee-simple mineral estate in one gross acre of land."[108] The other paper explained that, when "net mineral acres" are used, the numerator will stay constant even though the denominator may change upon resurvey.[109]

Turning to the "subject to" clause, the court held that it clarified what Flatland took was taking its interest subject to the outstanding oil and

104. Brooke-Willbanks v. Flatland Min. Fund, LP, 660 S.W.3d 559, 561 (Tex. App.—Eastland 2023, no pet. h.).

105. *See id.* at 562–63.

106. *Id.* at 561–62.

107. *Id.* at 564.

108. *Id.* (citing Clifton A. Squibb, III. Title Defect Provisions and Issues, State Bar of Tex., TXCLE Oil, Gas and Min. Title Examination Course 13-III, 2020 WL 3978553 (2020)).

109. *Id.* (citing Ethan M. Wood, III. Some Scenarios Where On-The-Ground Surveys Matter, State Bar of Tex., TXCLE Oil, Gas and Min. Title Examination Course 6-III, 2022 WL 3162027 (2022)).

gas lease, and that Flatland was receiving the same interest the grantor possessed.[110]

The court of appeals quoted the Texas Supreme Court's opinion in *Wenske v. Ealy*, stating "'a severed fraction of the royalty interest-like [an] NPRI-generally would burden the entire mineral estate . . . .'"[111] In the court of appeal's view, nothing in the deed at issue expressed any contrary intent.[112] Instead, the court held that the subject-to clause expressed an intent to follow this principle because it stated the intent was to convey "'*the above stated interest of Grantor's interest in and to the . . . royalties* . . . accruing or to accrue under said lease or leases.'"[113] The court further emphasized that the subject-to clause expressed an intent for the grantee to receive royalties "'associated with the undivided interest herein conveyed,'" meaning the interest as existed at the time of the conveyance, which was burdened by previously received NPRIs.[114]

The court ultimately held that the outstanding NPRI proportionately burdened the grantor and grantee's interests.[115] This case is potentially notable with respect the court's discussion of the meaning and intent underlying a "net mineral acre" conveyance. However, the case did not go into great detail on that topic and instead focused more on the subject-to clause.

II. EXPRESS & IMPLIED OBLIGATIONS

A. Rosetta Resource Operating, LP v. Martin

This case involved an express drainage provision in an oil and gas lease.[116] The Texas Supreme Court analyzed what it described as a "unique and mistake-ridden lease addendum," that "expressly limits the location of wells that may trigger the lessee's obligation to protect against drainage."[117] However, the supreme court found that the provision does not directly address the location of wells that may cause drainage and found the provision to be ambiguous because the interpretation advanced by the lessors and the lessee were both reasonable.[118]

The lessors entered into separate lease agreements in 2001 and 2006.[119] The leases contain key provision related to drainage.[120] In 2006, the parties agreed to various amendments and extensions, including an Addendum that

110. *Id.* at 565–66.
111. *Id.* at 565 (citing Wenske v. Ealy, 521 S.W.3d 791, 797 (Tex. 2017)).
112. *Id.*
113. *Id.*
114. *Id.* at 566.
115. *See id.*
116. *See* Rosetta Res. Operating, LP v. Martin, 645 S.W.3d 212 (Tex. 2022), *reh'g denied* (June 17, 2022).
117. *Id.* at 216.
118. *See id.*
119. *See id.*
120. *See id.*

altered the original drainage provision contained in the base leases.[121] The supreme court noted that there were grammatical and typographical errors in the Addendum language, which also "lacked helpful punctuation."[122] With a little help from the supreme court, the Addendum provides:

Notwithstanding anything contained herein to the contrary, it is further agreed that [(1)(a)] 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, [(b)] the Lessor [read "Lessee"], or its agent(s) shall protect the Lessee's [read "Lessor's"] undrilled acreage from drainage and [(2)] in the opinions of reasonable and prudent operations [read "operators"], [(a)] 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, [(b)] 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.[123]

Two wells were drilled, one on third-party lands (the Simmons Well) that was not adjoining the Martin lease, and a second that was located on leased acreage and in a unit containing part of the lease (the Martin Well).[124] The Martins alleged that both wells triggered the Addendum's requirement for a new well and Rosetta (who acquired the lease by assignment) alleged that neither well triggered the provision.[125]

Although stating that the Addendum provision "lacks a coherent structure and helpful punctuation, the supreme court found that many of the substantive portions were unambiguous."[126] First, although a covenant to protect against drainage is usually triggered by drilling on adjoining or nearby acreage, the supreme court found that this "non-typical" clause could be triggered by a well on the leased acreage, a well drilling in a unit containing leased acreage, or a well on acreage adjoining the leased acreage.[127] The supreme court found that the Simmons Well was not a triggering well, but that the Martin Well did trigger the provision.[128]

The crux of the dispute was whether Rosetta's duty to protect against drainage was triggered only the existence of a triggering well (as described in the provision) or whether it could be triggered by any potential drainage.[129] If Rosetta's obligation was limited, then it would have no obligation to protect the lease for potential drainage from the Simmons well because it was not a type of well described in the Addendum.[130] On

121. *See id.* at 216–17.
122. *Id.* at 216.
123. *Id.* at 216–17.
124. *See id.* at 217.
125. *See id.*
126. *Id.* at 220.
127. *Id.* at 221.
128. *See id.*
129. *See id.* at 222.
130. *See id.*

the other hand, if Rosetta's obligation was not so limited, then Rosetta may have an obligation to protect the lease from drainage from the Simmons Well, which is what was argued by the Martins.[131]

The supreme court concluded that the provision was ambiguous because both sides provided reasonable interpretations of the disputed provisions.[132] Although the supreme court found that some results may be counterintuitive, parties are free to enter into agreements that others may find odd.[133] And just because the supreme court may find the result odd does not preclude it from also finding the contract interpretation reasonable.[134] The supreme court remanded the case for further proceedings.[135]

This case, and its predecessor cases, are notable in their review of Texas law regarding express drainage and offset provisions in oil and gas leases, as well as for their discussion and application of that law to unique circumstances and lease language. Ultimately, the case is perhaps most notable for the supreme court's conclusion that the provision was ambiguous—a conclusion that is arguably rare for Texas courts reviewing oil and gas instruments.

B. TotalEnergies E&P USA, Inc. v. Dallas/Fort Worth International Airport Board

In this memorandum opinion, the Fort Worth Court of Appeals held that a drilling commitment under an oil and gas lease could be satisfied by drilling either vertical or horizontal wells, rejecting the lessor's argument that it could only be satisfied by drilling horizontal wells.[136]

The lease (as amended by the parties) contained a drilling commitment providing that the lessees could maintain the lease by drilling "fourteen new wells" over a two-year period.[137] After a drop in gas prices in 2015, the lessees determined that any further drilling would not likely be profitable.[138] As a result, the lessees decided to only drill vertical wells to satisfy the remainder of the fourteen-well commitment.[139]

The lessor sued the lessees, asserting that the drilling commitment either required the drilling of horizontal wells or could not have been satisfied by vertical wells.[140] The trial court granted summary judgment in favor of the lessor and this appeal followed.[141]

---

131. *See id.*
132. *See id.* at 225.
133. *See id.* at 220.
134. *See id.* at 224–25.
135. *See id.* at 228.
136. *See* TotalEnergies E&P USA, Inc. v. Dall./Fort Worth Int'l Airport Bd., No. 02-20-00054-CV, 2022 WL 872476, at *1 (Tex. App.—Fort Worth Mar. 24, 2022, pet. denied).
137. *Id.* at *2.
138. *See id.* at *3.
139. *See id.*
140. *See id.* at *4.
141. *See id.*

The court noted that the lease provided a definition for both "vertical well" and "horizontal well," but sometimes the lease used the word "well" without any modifier.[142] In the court's view, this structure reflected that the parties used a modifier of "vertical" or "horizontal" when they intended to refer to a specific type of well.[143] However, in the drilling commitment provision, the parties used only the word "well" without specifying "vertical well" or "horizontal well."[144]

Therefore, in the court's view, "the parties' intent as manifested by the plain language of the lease did not limit the drilling commitment to horizontal wells."[145]

The lessor also argued that the implied covenant to reasonably develop the leasehold required horizontal wells.[146] The court disagreed, noting that the express terms of the lease were not silent regarding reasonable development, because the lease had a continuous development section, as well as the express drilling commitment provision in dispute.[147] Therefore, the implied covenant to reasonably develop could not supersede these express lease provisions.[148]

This case is potentially notable in its review of a claim that an express development covenant required horizontal drilling as opposed to vertical drilling. Ultimately, the court's analysis was largely focused on an interpretation of express language used in the specific underlying document.

III. LEASE PERPETUATION & TERMINATION DISPUTES

A. Thistle Creek Ranch, LLC v. Ironroc Energy Partners, LLC

This lease termination dispute turned on whether the underlying lease could be maintained by any production, or whether the lease as a whole required production in paying quantities in order to maintain the lease.[149] The case also looked at a unique claim for statutory attorney's fees under the Texas Natural Resources Code, which were allegedly intertwined with the related title ruling.[150]

At issue was a 1989 lease with an unusual habendum clause consisting of a secondary term that continued "as long thereafter as operations, as hereinafter defined, are conducted upon said land with no cessation for

142. *Id.* at *7.
143. *Id.*
144. *Id.*
145. *Id.* at *9.
146. *See id.* at *10.
147. *See id.*
148. *See id.*
149. Thistle Creek Ranch, LLC v. Ironroc Energy Partners, LLC, No. 14-20-00347-CV, 2022 WL 1310957, at *2 (Tex. App.—Houston [14th Dist.] May 3, 2022, no pet. h.).
150. *See id.*

more than ninety (90) consecutive days."[151] The lease defined "operations" as including "production . . . whether or not in paying quantities."[152]

It was undisputed that production had not been profitable for years.[153] The lessor contended that the lease terminated for lack of production in paying quantities, arguing that the word "produced" has been settled by case law as meaning produced "in paying quantities."[154] The Houston Court of Appeals rejected that argument because the habendum clause in this lease does not use the word "produced," but instead uses the word "operations" and gives a definition that specifically includes "production . . . whether or not in paying quantities."[155]

The lessor relied on other lease provisions that they contended incorporated a paying quantities yardstick, including a purpose clause indicating the lease was granted for the purpose of producing oil and gas, and another indicating the lessee must "use reasonable diligence to produce" minerals.[156] The court refused to read those provisions as adopting a "paying quantities" yardstick, explaining that the court must give meaning to the words in the contract and cannot rewrite the contract to ignore the definition of "operations" that expressly states production need not be in paying quantities.[157]

The lessor also claimed that, even if production need not be in paying quantities, to be entitled to summary judgment the lessee had the burden to conclusively establish that a "reasonably prudent operator would, for the purpose of making a profit and not merely for speculation, continue to operate the well as it had been operated."[158] The court rejected that argument, reasoning that this is part of the two-pronged test for determining whether a well is producing in paying quantities.[159] Since the habendum clause here does not require production in paying quantities, that test was inapposite.[160]

The court then turned to the lessor's claim for statutory attorney's fees and damages under Texas Natural Resources Code §§ 91.404 and 406, in relation to another lease called the "Grotte Lease."[161] At trial both parties conceded that no proceeds were owed under the Grotte Lease because the well under that lease had not generated any revenues.[162] The trial court granted the lessor's claim to remove a cloud on title relating to the Grotte

151. *Id.*
152. *Id.*
153. *See id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at *2–3.
158. *Id.* at *3 (citing BP Am. Prod. Co. v. Laddex, Ltd., 513 S.W.3d 476, 483 (Tex. 2017).
159. *See id.* (citing *BP Am. Prod.n Co.*, 513 S.W.3d at 482–83).
160. *See id.* (citing *BP Am. Prod. Co.*, 513 S.W.3d at 483).
161. *See id.* *3.
162. *See id.* at *4.

Lease but ordered that the lessor take nothing on its claim for statutory damages and attorney's fees.[163]

On appeal, the lessor contended that it was entitled to statutory damages and attorney's fees because they were "intertwined" with the favorable title ruling.[164] The court disagreed, ruling that the favorable judgment related only to the quiet title action.[165] Further, the court held that to receive statutory damages and interest under Texas Natural Resources Code §91.406, the plaintiff must receive a favorable judgment on the "suit . . . to collect proceeds and interest."[166] "It is not enough that a party allege a Section 91.404 claim in their petition and then obtain a favorable judgment on some other claim, as here."[167]

IV. TITLE DISPUTES & DEED INTERPRETATION

A. Van Dyke v. Navigator Group

In this landmark case, the Texas Supreme Court reaffirmed its recognition of the so-called "estate misconception theory," and created a new rebuttable presumption governing so-called "double fraction" deed interpretation cases.[168] Under this new rebuttable presumption, any time an "antiquated" mineral instrument uses the term "1/8" in a double fraction, there is a rebuttable presumption that "1/8" was used as a term of art that refers to the entire mineral estate, and not merely to a mathematical one-eighth.[169] The case is also notable in its discussion of what might rebut that presumption, and its discussion of the presumed-grant doctrine.[170]

The basic facts of this case are that, in 1924 the Mulkeys signed a deed conveying their ranch and the underlying minerals to Mr. White and Mr. Tom (White and Tom).[171] That deed contained the following reservation: "It is understood and agreed that one-half of one-eighth of all minerals and mineral rights in said land are reserved in grantors . . . and are not conveyed herein."[172]

The supreme court held that this language did not use the double fractions in a rote mathematical sense, where they would be multiplied together resulting in a one-sixteenth interest.[173] Instead, the supreme court held that this language objectively referred to "1/8" as a synonym for the entire

163. *See id.*
164. *See id.*
165. *See id.*
166. *Id.*
167. *Id.*
168. Van Dyke v. Navigator Grp., 668 S.W.3d 353, 357 (Tex. 2023), *reh'g denied* (June 16, 2023).
169. *Id.* at 359.
170. *See id.* at 358.
171. *See id.* at 357.
172. *Id.*
173. *See id.* at 359.

mineral estate.[174] The supreme court provided three primary rationales that, in its view, supported the adoption of this new presumption.[175]

First, the supreme court emphasized that the proper focus is on determining the original meaning of the text when it was drafted in 1924, not the meaning the text would have if written today.[176] The supreme court also indicated that the proper analysis is an *objective* inquiry confined to an interpretation of the four corners of the text, not on a *subjective* inquiry into extrinsic evidence of what the parties may have "secretly or unusually" intended.[177] The supreme court approved the use of dictionaries in this endeavor, explaining that "they convey objective and generally available–not subjective or bespoke–guides to meaning."[178]

As the supreme court put it, this form of inquiry "is always to determine what a text could reasonably have meant to an informed but disinterested speaker at the time the text was written," and that such an inquiry "is designed to confine courts to the four corners of the document and is a proper part of interpretation."[179]

Next, the supreme court relied on the so-called "estate misconception theory" and the "historical use of 1/8 as the standard royalty" as two "historical features" that, in the supreme court's view, provide "objective indication of what parties meant by using 1/8 within a double fraction."[180] In the supreme court's view, based on those theories, there is a "now-familiar observation that, at the time the parties executed this deed, '1/8' was widely used as a term of art to refer to the total mineral estate."[181]

According to the supreme court, the so-called "estate misconception theory" is a theory that "reflects the prevalent (but, as it turns out, mistaken) belief that, in entering into an oil-and-gas lease, a lessor retained only a 1/8 interest in the minerals, rather than the entire mineral estate in fee simple determinable with the possibility of reverter of the entire estate."[182] According to the supreme court, "for many years, lessors would refer to what they *thought* reflected their entire interest in the 'mineral estate' with a simple term they understood to convey the same message: '1/8.'"[183] The supreme court quoted a popular commentator on this subject, with approval, saying "the very use of 1/8 in a double fraction 'should be considered patent evidence that the parties were functioning under the estate misconception'" and reasoning "there is 'little explanation' for the use of double fractions to express a fixed interest absent a misunderstanding

174. *See id.*
175. *See id.*
176. *See id.*
177. *Id.* at 361.
178. *Id.* at 362.
179. *Id.*
180. *Id.* at 362–63.
181. *Id.* at 362.
182. *Id.* at 363.
183. *Id.*

about the grantor's retained ownership interest or use of 1/8 as a proxy for the customary royalty."[184]

The second historical theory relied upon the supreme court is the so-called "legacy of the 1/8 royalty," or "historical standardization" of a one-eighth royalty in historical oil and gas leases.[185] According to the supreme court, lease royalty rates were so standardized at one-eighth for a period of time that "parties mistakenly assum[ed] the landowner's royalty would always be 1/8."[186] In the supreme court's view, there is "no doubt" that this mistaken belief "influenced the language used to describe the quantum of royalty in conveyances of a certain vintage."[187]

The supreme court concluded that those two historical principles, working in tandem, "provide objective indications about what the parties to this deed meant by deploying a double fraction.[188] At that time, the fraction one-eighth had various meanings that linked to the landowner's conception of the entirety of the estate."[189]

Rather than issue a narrow holding limited to the specific facts of this case, the supreme court adopted a broad "rebuttable presumption," which it described as follows:

Antiquated instruments that use 1/8 within a double fraction raise a presumption that 1/8 was used as a term of art to refer to the "mineral estate." That presumption is readily rebuttable, however. If the text itself has provisions—whether express or structural—illustrating that a double fraction was in fact used as nothing more than a double fraction, the presumption will be rebutted.[190]

However, the supreme court rejected a "one-size-fits-all arithmetical solution" or "bright-line rule" that all deeds of that era could "inexorably be treated as referring to the entire mineral estate."[191] Instead, the supreme court indicated that "a full contextual analysis of an instrument" is required."[192] On that note, the supreme court provided the following discussion of what may be sufficient to rebut this new presumption:

[C]ourts should be ready to find not just confirmation but contradictions of [this] presumption. A rebuttal could be established by express language, distinct provisions that could not be harmonized if 1/8 is given the term-of-art usage (the mirror image of *Hysaw*), or even the repeated use of fractions *other* than 1/8 in ways that reflect that an arithmetical expression should be given to all fractions within the instrument.

. . . .

184. *Id.* (quoting Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S.TEX. L. REV. 73, 88 (1993)).
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 363–64.
189. *Id.* at 364.
190. *Id.* at 359.
191. *Id.* at 364.
192. *Id.*

The key point is that there must be some textually demonstrable basis to rebut the presumption.[193]

On the other hand, the supreme court indicated there could be a middle ground, resulting in ambiguity.[194] As the supreme court described:

[A]n instrument may have enough textual evidence to drain confidence in the presumption yet insufficient evidence for a court to conclude that a reasonable reader at the time would have understood the instrument to require mere multiplication. In such a case, and if our ordinary rules of construction are incapable of generating a single answer, then our case law involving inescapable ambiguity—including the authorized but reluctant recourse to extrinsic evidence—provides the next step. When that happens, a factfinder may be needed to finally resolve the text's meaning.[195]

The supreme court rejected the court of appeals' analysis as being "backwards" and "misapprehend[ing] how the estate-misconception theory affects the reading of instruments."[196] The court of appeals refused to apply the estate misconception theory, reasoning that two conditions were missing: (1) "the deed did not contain conflicting provisions that require harmonization," and (2) there was no evidence that "the subject property was burdened by a lease at the time of the conveyance (or before then)."[197] The supreme court held that the estate misconception theory does not depend on either of those considerations, and rather than focusing on identifying a lack of inconsistent provisions that require harmonization, the analysis should be on the lack of anything rebutting the presumption.[198]

The supreme court then turned to the second justification for its holding: the presumed-grant doctrine.[199] After the 1924 deed, for approximately 90 years, the parties, their assignees, and various third parties engaged in numerous transactions that repeatedly reflected that each side of the original conveyance owned an equal one-half interest in the minerals.[200] That included further conveyances, leases, division orders, probate inventories, and other recorded documents.[201]

The supreme court specifically described a letter the Mulkeys' daughter wrote in 1946 to her brother, in which she indicated that one of the grantees of the 1924 deed (Mr. White) had entered into a contract with some heirs of the grantors (the Mulkeys), under which the Mulkeys would receive "one half of the mineral rights on the old ranch land."[202] There was no evidence that any such contract was ever entered into, nor why they would

193. *Id.* at 364–65 (citing Hysaw v. Dawkins, 483 S.W.3d 1 (Tex. 2016)).
194. *See id.*
195. *Id.* at 365.
196. *Id.*
197. *Id.* at 359.
198. *See id.* at 365–66.
199. *See id.* at 366.
200. *See id.* at 358.
201. *See id.*
202. *Id.*

enter into such a contract, or if it was even a true "contract" or merely a "clarification."[203]

That same week, the Mulkey parties executed an "Agreement for Division of Rentals and Royalties," with multiple recitals indicating that they owned "an undivided one-half interest in said minerals . . . ."[204] Around that same time, both parties also entered into mineral leases that again reflected that each party owned one-half of the minerals.[205] The White parties also filed a stipulation regarding the amount of delay rentals they were each entitled to receive, which again was consistent with ownership of just a one-half interest.[206] Apparently similar transactions occurred again in the 1950, and a "series of conveyances in 1973 revealed the same thing."[207]

According to the supreme court, there were no exceptions to that consistent treatment until 2012 when an oil and gas company drilled a well and then began paying royalties and the White heirs filed suit.[208]

The supreme court held that, under these facts, "the record conclusively establishes that [the Mulkey] parties acquired the other 7/16 interest through the presumed-grant doctrine."[209]

The supreme court held that the presumed-grant doctrine requires three elements: "(1) a long-asserted and open claim, adverse to that of the apparent owner; (2) nonclaim by the apparent owner; and (3) acquiescence by the apparent owner in the adverse claim."[210] The supreme court rejected a fourth element that was described by the court of appeals: a gap in the title.[211] According to the supreme court, "[s]atisfying the doctrine is properly difficult . . . ."[212]

The supreme court held that these elements were conclusively established based on the parties' ninety-year history of "repeatedly acting in reliance on each having a 1/2 mineral interest."[213]

Interestingly, the supreme court indicated that its presumed-grant analysis required analysis of "extrinsic evidence . . . [that] is *not* probative in the [rebuttable presumption analysis] . . . because it would go beyond the text."[214] On the other hand, the supreme court also indicated in a footnote that if the presumed-grant doctrine were "clearly implicated, a court could dispense with the deed-construction analysis," which could ultimately "cut either way—in favor of or contrary to the party invoking the double-fraction presumption."[215]

---

203. *Id.*
204. *Id.* at 367.
205. *See id.*
206. *See id.*
207. *Id.*
208. *See id.* at 367–68.
209. *Id.* at 366.
210. *Id.*
211. *See id.*
212. *Id.*
213. *Id.*
214. *Id.* at 368 n.9.
215. *Id.* at n.11.

This case is notable as to the supreme court's (1) broad recognition of the so-called "estate misconception theory"; (2) adoption of the rebuttable presumption governing double fraction deed cases where one of the fractions is one-eighth; (3) discussion of how that rebuttable presumption should be applied; and (4) discussion of how and when it might be rebutted. The case is also notable in its discussion of the "presumed grant" doctrine, and the supreme court's rejection of any "gap in the title" element as part of that doctrine.

B. Bridges v. Uhl

In this case, the El Paso Court of Appeals examined a 1940 warranty deed containing a reservation of a non-participating royalty interest, and addressed a dispute as to whether the deed was a product of the so-called "estate misconception theory."[216] It should be noted that this opinion was issued prior to the Texas Supreme Court's opinion in *Van Dyke v. Navigator Group*, and therefore this opinion does not discuss the "rebuttable presumption" that was subsequently adopted in the *Van Dyke* case.[217]

The reservation provision in the 1940 deed at issue in this case described the reserved interest as: "an undivided one-half (1/2) of the usual one-eighth (1/8) royalty . . . if, as and when production is obtained, grantors, their heirs and assigns, shall receive one-half (1/2) of the usual one-eighth (1/8) royalty, or one-sixteenth (1/16) of the total production[.]"[218]

In 1975, the grantors conveyed their reserved royalty in a royalty deed which described the interest as "an undivided 1/2 of the usual 1/8 royalty interest, and being all of [the grantors'] royalty interest."[219]

The court provided an overview of the so-called "estate misconception theory" and the "legacy of the 1/8 royalty" theory.[220] In the court's view, several features of the reservation indicated that the reservation was a floating one half of future royalty, including (1) the use of double fractions, (2) the use of one-eighth within each double fraction, and (3) repeated reference to the "usual" one-eighth royalty, which the court construed as relating to the estate misconception or the then-standard one-eighth royalty as a proxy for the landowner's royalty, and (4) a "prospective contemplation of the royalty taking effect at a later time [as] reflected by the phrase, 'if, as and when production is obtained.'"[221]

The court acknowledged that the final phrase of the reservation used the fraction one-sixteenth.[222] The court held that "no emphasis should be placed on such a clause" because, in the court's view, the use of a

---

216. Bridges v. Uhl, 663 S.W.3d 252, 257 (Tex. App.—El Paso 2022, no pet. h.).
217. *See Van Dyke*, 668 S.W.3d 353.
218. *Bridges*, 663 S.W.3d at 258.
219. *Id.*
220. *Id.* at 264 (citing U.S. Shale Energy II, LLC v. Laborde Props., L.P., 551 S.W.3d 148, 151 (Tex. 2018); Hysaw v. Dawkins, 483 S.W.3d 1, 14 (Tex. 2016)).
221. *Id.* at 265.
222. *See id.* at 264–65.

comma offsetting the clause and the word "or" rendered the clause a "nonrestrictive dependent clause."[223] In the court's view, such a clause merely "gives additional description or information that is incidental to the central meaning of the sentence, but it could be taken out of the sentence without changing its essential meaning," and therefore should receive "no emphasis."[224]

The case is potentially notable in its treatment of the parenthetical as being nonessential descriptive text that was to receive "no emphasis."[225] That approach is of note given that Texas courts often repeat the rule that a proper construction of a deed should not render any provision meaningless, and that courts should presume that the parties intended for each provision to be given effect.[226] However, in another recent nonparticipating royalty deed case, the Texas Supreme Court held that the way a comma offset a clause "indicat[ed the clause was] a nonrestrictive dependent clause" that "gives additional description or information that is incidental to the central meaning of the sentence" and "could be taken out of the sentence without changing its essential meaning."[227] In that context, this recent case is arguably notable in its extension of that logic to certain parentheticals.

C. Davis v. COG Operating, LLC

In this case, the El Paso Court of Appeals reviewed two deeds with conflicting fractions, and held that parties to each were operating under the "estate misconception."[228] It should be noted that this opinion was issued prior to the Texas Supreme Court's opinion in *Van Dyke v. Navigator Group*, and therefore this opinion does not discuss the "rebuttable presumption" that was subsequently adopted in the *Van Dyke* case.[229]

The Sesslers owned the surface and minerals underlying a section of land in Upton County, Texas.[230] In 1926, the Sesslers executed a mineral deed (that was, peculiarly, titled a "Royalty Deed") in favor of the Hauns, conveying a fractional interest in the minerals.[231] The deed contained

223. *Id.* at 265.
224. *Id.* at 265.
225. *Id.*
226. *See*, *e.g.*, Nettye Engler Energy, LP v. BlueStone Nat. Res. II, LLC, 639 S.W.3d 682, 689–90 (Tex. 2022) ("When construing an oil-and-gas deed . . . we consider the entire writing and attempt to harmonize the provisions so all are given effect and none are rendered meaningless. We do this because we presume the parties intended every clause to have some effect.").
227. U.S. Shale Energy II, LLC v. Laborde Props., 551 S.W.3d 148, 154 (Tex. 2018) (reviewing a dispute regarding a non-participating royalty interest, and holding that the way a comma offset a clause) (citing Bryan A. Garner, The Redbook: A Manual on Legal Style § 1.6(a), at 6 (3d ed. 2013)).
228. Davis v. COG Operating, LLC, 658 S.W.3d 784 (Tex. App.—El Paso 2022, pet. denied).
229. *See* Van Dyke v. Navigator Grp., 668 S.W.3d 353 (Tex. 2023), *reh'g denied* (June 16, 2023).
230. *See Davis*, 658 S.W.3d at 787.
231. *See id.* at 788.

conflicting provisions describing what was conveyed.[232] The first clause described the interest as a "1/32 interest in and to of the oil, gas, and other minerals."[233] Another provision described the interest including "1/4 of all of the oil royalty and gas rentals, or royalty" under an existing lease.[234] Another indicated that it included "1/4 of the money rentals" to extend the existing lease.[235] Yet another provision indicated that, once the lease terminated, the grantee would own a "1/4 interest in all oil, gas and other minerals."[236] A final provision indicated that a prior version of the deed mistakenly described the interest as "1/8 of said oil, gas and royalty," but was being corrected to convey "1/4."[237]

In 1939, the Sesslers executed another deed to the Roberts.[238] The granting clause in the 1939 deed conveyed all of the property, but the deed also contained the following exception clause: "It is understood, however, that 1/32 of the oil, gas and other minerals has heretofore been conveyed to W. H. Haun, and this conveyance does not include such mineral interests so conveyed."[239]

The deed also contained a reservation clause, reading as follows:

[O]ne-fourth (1/4) of the 1/8 royalty usually reserved by . . . oil and gas leases, so 1/4 of the 1/8 royalty [is] to be paid to us, our heirs or assigns . . . [and] in the case of production, we are to receive 1/4 of the 1/8 royalty, and this conveyance is executed subject to the mineral interest theretofore conveyed to W. H. Haun, and also to the 1/4 royalty interest reserved by us as hereinbefore stated.[240]

Haun and his successors-in-interest have been paid one-fourth of all royalties since 1926.[241] Haun's successors were not made a party to the suit, and no one argued that Haun's successors were vested with anything different.[242]

Following the 1939 deed, the remaining three-fourths of royalties were paid to Roberts (and her successors including the Neals who were parties to the suit), and no royalties were paid to the Sesslers.[243]

In 1984, several Sessler descendants sent demand letters to the lessee at the time, asserting claims to a royalty under the 1939 deed, the lessee responded disputing the claims, and the Sesslers never pursued legal

232. *See id.* at 787.
233. *Id.* at 792.
234. *Id.*
235. *Id.*
236. *Id.* at 792.
237. *Id.* at 793.
238. *See id.* at 794.
239. *Id.*
240. *Id.*
241. *Id.* at 788.
242. *Id.*
243. *See id.*

action.[244] In 2018, the Sessler successors filed suit against the Neals and the lessee, COG.[245]

The court provided a background review of the "estate misconception," as well as the standardization of a one-eighth royalty that the court described as continuing through the mid-1970s.[246] The court also gave background discussion of historical deeds that would sometimes describe the interest conveyed or reserved in two or more provisions, often containing conflicting fractions.[247] The court cited the *Concord* case, where the Texas Supreme Court reviewed a so-called "two-grant" deed that contained multiple provisions describing the interest, one of which described it as a one-ninety-sixth interest in the "estate," and another indicating that the interest includes a one-twelfth interest in all rentals and royalties.[248] In *Concord*, the supreme court recognized the "estate misconception," and reasoned that it was "helpful and instructive" in understanding parties' intent in using conflicting fractions.[249]

Turning first to the 1926 deed, the court of appeals held that its structure and pattern was similar to the deed in the *Concord* case, because the one thirty-second fraction is exactly one-eighth of the one-fourth interest used in the rest of the deed, and the one-fourth fraction is used in the remainder of the deed to describe (1) all oil royalty and gas rentals, (2) money rentals, (3) interest in all oil, gas and other minerals, and (4) interest in all future rents.[250] For that reason, the appellate court held that the 1926 deed conveyed just a single interest, being a one-fourth interest in the mineral estate.[251]

Turning to the 1939 deed, the dispute primarily centered on the meaning of the second paragraph's use of the one thirty-second fraction to describe the interest previously conveyed to Haun.[252]

The Sesslers argued that one thirty-second referred to Haun's outstanding interest (which was one-fourth), and that one thirty-second was intended to refer to a multiple of the once-common one-eighth royalty, not a literal one thirty-second interest.[253] The Neals, on the other hand, argued that it was intended as a literal one thirty-second fraction, and that its purpose was to describe the size of the excepted mineral interest, not merely to give notice of Haun's existing interest.[254] The court agreed with the Sesslers, holding that the parties were operating under the estate-misconception,

244. *See id.*
245. *See id.*
246. *Id.* at 790–91.
247. *See id.*
248. *Id.* at 793 (citing Concord Oil Co. v. Pennzoil Expl. & Prod. Co., 966 S.W.2d 451, 457 (Tex. 1998)).
249. *Id.* (citing *Concord Oil Co.*, 966 S.W.2d at 460).
250. *See id.*
251. *See id.*
252. *See id.* at 794.
253. *See id.*
254. *See id.*

and intended to place the grantee on notice of a prior conveyance of one-fourth of the minerals.[255]

The court gave three reasons for its holding.[256] First, in the court's view, 1939 was "during the height of the period when the estate-misconception was prevalent," and was just three years after a case was issued by the Texas Supreme Court that sanctioned the multiplication of fractional minerals by one-eighth when subject to an oil and gas lease.[257] Second, one thirty-second is a product of multiplying one-fourth by one-eighth, and "use of 1/8 (or a multiple of 1/8) in some instruments undoubtedly embodies the expectation that a future lease will provide the typical 1/8th landowners' royalty."[258] Third, was the Texas Supreme Court's favorable linking of one-eighth in a double fraction to the estate misconception.[259]

Regarding the third paragraph, the court analyzed whether it reserved a separate and additional interest to the Sesslers, or whether it merely described the same interest already excepted under the second paragraph.[260] The court held that it reserved a different and separate interest in the form of a floating one-fourth NPRI interest.[261] According to the court, this outcome was required because (1) while the 1926 deed described a mineral interest, the third paragraph in the 1939 deed reserved only an NPRI because it does not include rights to lease, receive bonus, or delay rentals, (2) the third paragraph begins with the phrase "[i]t is further understood," which the court stated showed that the paragraph deals with something different than what was described before, and (3) the end of the third paragraph reiterates that the conveyance is subject to both Haun's interest and the Sessler's NPRI.[262]

Finally, the court rejected a few other arguments advanced by the Neals.[263] For instance, the Neals argued that the *Duhig* doctrine applied, under which they argued that the reservation of a one-fourth NPRI was an over-conveyance because they already sold the same one-fourth interest to Haun.[264] The appellate court rejected that argument because, in the court's view, the 1939 deed does not purport to convey a three-fourths interest in future royalties, the 1939 deed expressly gave notice of Haun's one-fourth interest which is distinguishable from *Duhig*, and the NPRI is described as a further separate interest according to the deed's terms.[265]

---

255. *See id.* at 794–95.
256. *See id.* at 795.
257. *Id.* (citing Concord Oil Co. v. Pennzoil Expl. & Prod. Co., 966 S.W.2d 451, 464–65 (Tex. 1998); Tipps v. Bodine, 101 S.W.2d 1076, 1079 (Tex. App.—Texarkana 1936, no writ)).
258. *Id.* (citing Hysaw v. Dawkins, 483 S.W.3d 1, 10 (Tex. 2016)).
259. *See id.*
260. *See id.*
261. *See id.*
262. *See id.*
263. *See id.* at 795–97.
264. *See id.*
265. *See id.*

The court also rejected the Neals' argument that, because the Neals have asserted ownership of the interest for over eighty years, they are entitled to summary judgment based on the presumed-grant doctrine.[266] As the court explained, "there are no gaps in any party's title after [the 1939 deed] . . . [t]hus, the presumed grant doctrine has no applicability here . . . ."[267]

The court also rejected the Neals' argument that the Sesslers' claims were barred by limitations or laches.[268] According to the court, "[w]hile various statutes of limitation and the doctrine of laches may apply to some of the Sessler Successors' other claims, neither applies to a trespass-to-try-title action where the plaintiff's right is based on legal title."[269]

This case is potentially notable in that it addresses the estate misconception, but it did so before the Texas Supreme Court had adopted the "rebuttable presumption" under the *Van Dyke* case. It is also potentially notable in that, at least in part, it is based on the court's rejection of the presumed grant doctrine on the basis that it did not involve a sufficient gap in title. As noted above, the supreme court rejected any title gap requirement under the presumed grant doctrine. This case is currently before the supreme court on petition for review.

D. Endeavor Energy Resources v. Anderson Est

This case concerns the validity of a 2007 correction deed and title dispute over minerals in Martin County, Texas.[270] The correction deed was aimed at curing an alleged mutual mistake in the failure to reserve all mineral rights.[271] The trial court held that the correction deed was invalid because it failed to substantially comply with the statutory requirements under the Correction Deed statute, Texas Property Code § 5.029.[272]

The dispute centered around a 2003 transaction where the Holcombs agreed to sell a portion of the surface estate to their family ranch to Tom Anderson and his wife, Trudy.[273] Under the contract, the parties agreed that the Holcombs would reserve all of the minerals.[274] However, the general warranty deed the parties later executed did not reserve all minerals.[275] In 2007, the parties executed a correction deed.[276] The correction instrument

266. *See id.* at 796–97.
267. *Id.* at 797.
268. *See id.*
269. *Id.* In the author's view, this statement is perhaps a bit imprecise insofar as it relates to statutes of limitation, as adverse possession is expressed as a form of title by limitations as against an apparent record title holder. *See*, *e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 16.029.
270. Endeavor Energy Res. v. Anderson Est, 644 S.W.3d 212, 214 (Tex. App.—Eastland 2022, pet. denied).
271. *See id.*
272. *See id.* at 214–15.
273. *See id.* at 214.
274. *See id.*
275. *See id.*
276. *See id.* at 216.

was executed by the Holcombs, and by Mr. Anderson.[277] However, Trudy did not execute the correction deed because she had passed the prior year.[278] Trudy's will appointed Tom as executor, and all appointed Tom the trustee of a testamentary trust to which all of her real property interests were devised.[279]

In 2019, Tom filed a trespass to try title suit, claiming the correction deed was invalid.[280] The court disagreed, addressing each of Tom's arguments, and holding that the correction deed was valid and effective.[281]

First, Tom argued that the Correction Deed Statute requires the signature of all "successors" if one of the original parties is unavailable.[282] Tom argued that his children were to receive all of the trust estate upon his death, and therefore they were successors whose signatures were necessary for a valid correction deed.[283] The court disagreed, reasoning that Tom's children did not have a vested interest nor a remainder interest, because Tom was the sole beneficiary and was expressly permitted to deplete the entire estate during his lifetime.[284] Therefore, in the court's opinion, they were not successors under the Correction Deed Statute.[285] Instead, Tom, as the sole possessor of title and authority to manage the estate, was the sole successor under the Correction Deed Statute.[286]

Tom also argued that Trudy's will contained provisions prohibiting Tom from executing any "conveyance" without joinder of his children.[287] The court held that this limitation was not an impediment to the execution of a correction deed because "[t]he execution of a correction deed itself, without more, does not constitute a sale or conveyance."[288]

The court also rejected Tom's argument that the correction deed was limited to his individual interest because his signature line did not specifically recite his capacity as trustee.[289] The appellate court pointed to two prior cases that, in the court's view, held that whether a trust's interest passes when the trustee's capacity is omitted, is essentially a matter of deed construction.[290]

277. *See id.*
278. *See id.*
279. *See id.* at 216–17.
280. *See id.* at 217.
281. *See id.* at 220–24.
282. *See id.* at 217–18.
283. *See id.*
284. *See id.* at 221.
285. *See id.*
286. *See id.* at 222.
287. *See id.* at 221–22.
288. *Id.* at 222.
289. *See id.* at 223.
290. *See id.* (citing W. 17th Res., LLC v. Pawelek, 482 S.W.3d 690, 694 (Tex. App.—San Antonio 2015, pet. denied); Lockhart as Tr. of Lockhart Family Bypass Tr. v. Chisos Minerals, LLC, 621 S.W.3d 89 (Tex. App.—El Paso 2021, pet. denied)).

The court also examined the 2007 correction deed and noted that Tom signed on behalf of the plural "Grantees."[291] The court held that signing under these circumstances, in combination with the correction deed's recitals, reflected that he executed the correction deed in "every possible capacity."[292] The court reversed the trial court and rendered judgment for the appellants.[293]

This case is notable in that it discusses and applies a much-discussed 2021 Texas Supreme Court case concerning the Correction Deed Statute, *Broadway National Bank, Trustee of Mary Frances Evers Trust v. Yates Energy Corp.*, 631 S.W.3d 16 (Tex. 2021), *reh'g denied* (Sept. 24, 2021).

E. Yates Energy Corp. v. Broadway National Bank, Trustee of Mary Frances Evers Trust

In 2021, in *Broadway National Bank*, the Texas Supreme Court held that the wording of Texas Property Code § 5.029 (Material Correction Statute) allows the original parties to a recorded deed to execute an effective correction instrument to make a "material correction" to the original recorded deed, without the joinder of the successors in interest.[294] However, the supreme court reasoned that subsequent purchasers were protected by other provisions of the statute providing that correction instruments are subject to the interests of bona fide purchasers.[295] Therefore, the supreme court remanded the case back to the San Antonio court of appeals "to consider the parties' arguments in light of the summary judgment ruling that [none of the successors in this case] are bona fide purchasers."[296] This latest appellate opinion was issued on remand.[297]

The basic facts of the case are that Broadway was the trustee of a trust with significant mineral interests.[298] In 2005, Broadway executed a mineral deed to trust beneficiaries, including an interest to beneficiary John Evers, in full fee simple.[299] Broadway later determined that was a mistake because Broadway believed the trust documents only entitled John to a life estate.[300] Broadway attempted to correct the mistake by unilaterally signing a correction deed in 2006.[301] Broadway sent copies of that correction instrument to one of the lessees, Yates Energy.[302] In 2012, Yates

---

291. *See id.* at 224.
292. *See id.*
293. *See id.* at 225.
294. *See* Broadway Nat'l Bank, Tr. of Mary Frances Evers Tr. v. Yates Energy Corp., 631 S.W.3d 16, 18 (Tex. 2021), *reh'g denied* (Sept. 24, 2021).
295. *See id.*
296. *Id.* at 29.
297. *See id.* at 18.
298. Yates Energy Corp. v. Broadway Nat'l Bank, Tr. of Mary Frances Evers Tr., NO. 04-17-00310-CV, 2022 WL 3047107, at *1 (Tex. App.—San Antonio Aug. 3, 2022, pet. denied).
299. *Id.*
300. *See id.*
301. *See id.*
302. *Id.*

bought a royalty deed from John, and then Yates assigned various partial royalty interests to other parties.[303] In 2013, EOG's lawyer questioned the effectiveness of the 2006 correction instrument since it was only signed by Broadway and none of the grantees.[304]

Later in 2013, Broadway executed another correction deed, this time joined by John and the other original grantees to the 2005 original instrument.[305] Yates and Yates' grantees (who were at that time John's successors in interest) did not join in that 2013 correction instrument. John later died, and Broadway claimed that the interest conveyed was only a life estate, which terminated upon the death of John and vested in the remaindermen.[306] Yates and Yates' grantees disagreed, claiming they were vested with the full fee simple interest, and that the correction deed was invalid without their signature.[307]

This lawsuit followed and, as described above, the supreme court held that the correction instrument was valid, remanding the case to the court of appeals to determine if Yates and Yates' grantees were bona fide purchasers.[308] On remand, the appellants argued that the correction instrument was still invalid, even if signed by all necessary parties, because there was no material error to correct.[309] The appellants argued that the trust instruments actually did give Broadway the authority to convey a full fee simple to John, and therefore Yates could not have had notice of any claim or interest in the property to defeat its bona fide purchaser status.[310] However, in the court's view, the supreme court broadly held that the correction instruments were valid, which the court could not now run afoul.[311] Further, the court held that the trustee's authority was immaterial, as the bona fide purchaser defense looks to whether the purchaser has notice of a "claimed interest," not whether that claim is ultimately proved valid.[312]

The court then reviewed the summary judgment evidence pertaining to the bona fide purchaser defense, first looking at Yates.[313] The court held that the trial court did not err by granting summary judgment in favor of Broadway as against Yates because, in the court's view, the summary judgment evidence conclusively showed that Yates received actual notice of the remainderman's claim when Broadway sent Yates a copy of the original correction instrument which contained a recital describing the issue.[314] Yates argued that the original correction deed was void as it was

303. *See id.* at *2.
304. *See id.* at *1.
305. *Id.*
306. *See id.* at *2.
307. *See id.*
308. *Id.*
309. *See id.* at *3.
310. *See id.* at *5.
311. *See id.* at *4.
312. *Id.* at *5.
313. *See id.* at *6.
314. *See id.* at *8.

only signed by Broadway, and that a void correction deed provides notice of nothing.[315] The court disagreed in distinguishing from prior cases that only involved constructive notice and reasoned that Yates had actual notice of the issue in this case, and explaining "the validity of the remaindermen's claimed interest is irrelevant to the question of whether Yates had notice of that claim."[316]

The court then turned to an analysis of whether Yates' grantees were bona fide purchasers.[317] Broadway argued that, because Yates was not a bona fide purchaser and thus Yates was bound by the correction instrument, Broadway argued that means Yates' grantees should also bound by the correction instruments.[318] Broadway pointed to case law indicating "a grantor cannot convey to a grantee a greater or better title than he holds."[319] The court declined to apply that general rule, reasoning that it only applies where a grantee fails to show himself to be a bona fide purchaser.[320]

As to the other appellants, the summary judgment evidence was primarily confined to constructive notice through filing of the correction deed in the real property records.[321] The court held that a subsequent purchaser is only deemed on constructive notice of documents within its "direct chain of title."[322] The court explained that these appellants' direct chain of title did not include any correction instrument, because each of the correction instruments were executed by signatories that had already conveyed the property to someone else.[323] The court of appeals reversed the trial court's holdings that these appellants were not entitled to protection as bona fide purchasers, and that they were bound by the final correction deed.[324] The issues were remanded to the trial court for further proceedings.[325]

Finally, the court of appeals declined to consider arguments that § 5.029, as construed by the supreme court, is unconstitutional.[326] Appellants argued that the supreme court's construction of the statute "deprives them of a property interest without notice, a hearing, or compensation."[327] The court of appeals declined to consider these arguments, reasoning that it lacked the authority to review the constitutionality or validity of supreme court conclusions.[328]

---

315. *See id.* at *7.
316. *Id.*
317. *See id.* at *9.
318. *See id.*
319. *Id.* (citing Law v. State, 811 S.W.2d 265, 267 (Tex. App.—Houston [1st Dist.] 1991, no writ)).
320. *See id.*
321. *See id.* at *10–11.
322. *Id.* at *8.
323. *See id.*
324. *See id.* at *10–12.
325. *Id.*
326. *See id.* at *12.
327. *Id.*
328. *See id.* (citing Rice v. Rice, 533 S.W.3d 58, 62 (Tex. App.—Houston [14th Dist.] 2017, no pet.); Ramos v. Louisiana, 140 S. Ct. 1390, 1416 n.5 (2020)).

F. Myers-Woodward, LLC v. Underground Services Markham, LLC

This case concerns the ownership of subsurface caverns and the proper calculation of royalties for production of salt from the property (which turned on whether post-production costs were properly deductible).[329]

Myers owned all of the surface estate and a one-eighth non-participating royalty interest in salt and other minerals on 160 acres of property in Matagorda County.[330] Underground Services Markam (the Company) owned the executive mineral interest in the salt under the property.[331] The Company sought to produce salt and salt brine from under the property, and the Company had intensions of using the resulting underground cavern space to store oil, gas, and other gases or liquids.[332]

The Company filed a suit seeking declaratory relief indicating that it had attempted but failed to reach an agreement with Myers as to (1) the proper methodology for handling royalty obligations to Myers in relation to the salt production, (2) ownership of the resulting cavern space and rights of storage, and (3) whether Myers has royalty rights in any substances stored in the cavern space.[333]

Turning first to the calculation of royalties, the deed at issue indicated "that Myers is entitled to a 'royalty of 1/8 of all the gas or other minerals in, on, or under, or that may be produced from [Myers's property].'"[334] According to the appellate court's characterization of Myers' briefing, Myers contended that its royalty on the salt produced from the property should be calculated without deduction of post-production costs.[335] According to the court of appeals, Myers reasoned that it owned its royalty share of the salt-in-kind, and therefore if that royalty share was to be paid as monetary royalty, then it must be calculated as a net proceeds or amount realized royalty.[336] Instead, according to the appellate court, Myers argued that USM failed to calculate royalties on the basis of its actual sales, and instead calculated royalties on the basis of the alleged "comparable sales" evidence of other fixed-price royalty payments (which it alleged were not sales, nor comparable).[337]

The Corpus Christi–Edinburg Court of Appeals disagreed, reasoning that the deed did not include any proceeds or amount realized language.[338] In the court's view, the deed was silent as to where the royalties would

---

329. Myers-Woodward, LLC v. Underground Servs. Markham, LLC, No. 13-20-00172-CV, 2022 WL 2163857, at *1 (Tex. App.—Corpus Christi–Edinburg June 16, 2022, pet. filed), *reh'g denied* (Sept. 6, 2022).

330. *Id.*

331. *See id.*

332. *See id.*

333. *See id.*

334. *Id.* at *5.

335. *Id.* at *4.

336. *Id.* at *5.

337. *Id.* at *5.

338. *Id.* at *6.

be calculated, and, therefore, the general rule applied that royalties are measured at the wellhead, allowing for cost netting of post-production costs.[339] Further, in the court's view, the deed at issue did not contain any provisions giving the royalty owner the option to take the royalty in-kind.[340] In the court's view, the cases relied upon by Myers did not support a conclusion that an in-kind royalty clause mandates a proceeds-based or amount-realized royalty.[341] After disposing of related evidence and expert witness issues, the appellate court ultimately overruled Myers' issues relating to royalty payments.[342]

The court then turned to the issues relating to ownership of the subsurface caverns.[343] "Myers argues that as the surface owner, it owns all the physical land, which includes surface, subsurface, the matrix of the underlying earth, and the reservoir storage space beneath the surface."[344]

The court began by quoting the following background authority on the issue:

The surface overlying a leased mineral estate is the surface owner's property, and those ownership rights include the geological structures beneath the surface. *Humble Oil & Refining Co. v. West*, 508 S.W.2d 812, 815 (Tex. 1974). The surface owner, not the mineral owner, "owns all non-mineral 'molecules' of the land, i.e., the mass that undergirds the surface" estate. *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 630 F.3d 431, 442 (5th Cir. 2011). The conveyance of mineral right ownership does not convey the entirety of the subsurface. *Id.* Although the surface owner retains ownership and control of the subsurface materials, a mineral lessee owns a property interest—a determinable fee—in the oil and gas in place in the subsurface materials. *Brown v. Humble Oil & Ref. Co.*, 126 Tex. 296, 83 S.W.2d 935, 940 (1935).[345]

The court directly disagreed with, and declined to follow *Mapco, Inc. v. Carter*, which held: "[U]nder well-recognized, decisional law, the continued ownership interest in the mineral estate in an underground storage facility is acknowledged and harmonious with the decisional law of our state."[346]

Instead, the court concluded "[t]here is no case law that supports a conclusion that a mineral estate owner who does not own the surface estate owns the subsurface of the property and may then use the subsurface for its own monetary gain even after extracting all the minerals."[347]

---

339. *Id.*
340. *See id.* at *6.
341. *Id.* at *7.
342. *See id.* at *9.
343. *See id.* at *10.
344. *Id.*
345. *Id.* at *11.
346. *Id.* (citing Mapco, Inc. v. Carter, 808 S.W.2d 262, 278 (Tex. App.—Beaumont), *rev'd in part*, 817 S.W.2d 686 (Tex. 1991)).
347. *Id.* (citing XTO Energy Inc. v. Goodwin, 584 S.W.3d 481, 487 (Tex. App.—Tyler 2017, pet. denied)).

Turning, finally, to the issue of use of the resulting subsurface caverns (as opposed to ownership), the court characterized the Company's arguments as being premised on the Company's argument that it owned the caverns.[348] In the court's view, its holding that the Company does not own the subsurface storage space disposed of the "use" issue.[349] Some may find this quick dispensing of the issue a bit peculiar, as ownership and rights of use are sometimes analyzed as two different issues in split estates context.

This case is notable with respect to the discussion and analysis of subsurface storage ownership that is timely given the current interest in carbon capture, utilization, and sequestration (CCUS) operations. Also, the case is currently at the Texas Supreme Court on petition for review. The live briefing at the supreme court, which occurred at the time this article was drafted, presents forceful arguments on both sides. Of note is USM's argument that the court of appeals' reasoning was based on case law applying the rule of capture, which USM argues does not apply to hard minerals, like salt. Given the industry focus on CCUS operations, and its corresponding focus on subsurface storage rights, this case and its pending petition for review are of note in that this case could present the supreme court the opportunity to address subsurface storage rights.

G. Brown v. Underwood

This case involved an attempt to modify a 1985 royalty deed, with the plaintiff alleging that the original grantor had mistakenly conveyed his individual interest—as opposed to the interest he held as a trustee.[350]

In 1975, Smith acquired an undivided 35/960 non-participating royalty interest (NPRI) to certain land in Glasscock County.[351] Five days later, Smith signed an agreement, indicating that he would hold one-half of the interest he acquired (35/1920) in trust for the Underwoods.[352] About two years later, he assigned that one-half interest to himself as trustee for the Underwoods.[353]

The Underwoods divorced, Mrs. Underwood became Ms. Conaway, and Ms. Conaway received the interest in the royalty.[354] In 1985, Smith executed a royalty deed to Ms. Conaway, indicating that he was conveying an undivided 35/1920 interest.[355] Notably, that 1985 royalty deed did not indicate that Smith was signing the deed in his capacity as trustee.[356]

---

348. *See id.*
349. *See id.*
350. *See* Brown v. Underwood, No. 11-20-00138-CV, 2022 WL 1670693, at *1 (Tex. App.—Eastland May 26, 2022, no pet. h.).
351. *Id.*
352. *Id.*
353. *Id.*
354. *See id.*
355. *See id.*
356. *See id.* at *2.

Decades later, Smith's successor filed suit claiming that this was a mistake, and that Smith intended to convey only the interest he held as trustee.[357] Smith's successor executed and filed an "Affidavit of Clarification" in 2017, in which she attested that the 1985 royalty deed was intended to pertain to the interest held as trustee.[358] She also attested that "the 'problems' started with what is believed to be an incorrect RELEASE OF LIEN."[359] The affidavit ended with the following: "This is what all of the documentation would seem to indicate and what the LANDMEN have proved up."[360]

The successors of Ms. Conaway refused to participate in the affidavit of clarification.[361] Smith's successor filed suit primarily alleging a trespass to try title suit, along with other related claims.[362]

The Eastland Court of Appeals noted that, although Smith owned two interests, one individually and one as trustee for Conaway, the 1985 royalty deed was silent as to the capacity by which Smith signed the deed, and that it did not include any further description of the particular interest conveyed.[363] That, in the court's view, indicated that Smith conveyed his individual interest.[364]

The court summarized the alleged evidence of mistake: (1) evidence that Smith held the trustee interest by agreement, and (2) evidence that the wrong interest was purportedly released in 1984.[365] In the court's view, this was impermissible parol evidence because it was offered for the purposes of giving the 1985 royalty deed a meaning different from what it expresses.[366]

The court indicated that the affidavit was not based on personal knowledge but instead on a review of documents surrounding the transaction and reports by landmen that had evaluated the transaction.[367] Accordingly, it was not proper summary judgment evidence.[368] The appellant also submitted an affidavit of a title attorney.[369] However, the court held the affidavit was improper summary judgment evidence because it was not based on his personal knowledge but rather on his review of documents, and set forth his opinion as to what could be inferred.[370] The court also refused to treat the affidavit as a correction deed.[371]

The court acknowledged that Texas Property Code § 5.028 permits a single party to unilaterally execute a correction instrument to correct

357. *See id.*
358. *See id.*
359. *Id.*
360. *Id.*
361. *Id.*
362. *See id.*
363. *See id.* at *7.
364. *See id.*
365. *Id.* at *8.
366. *See id.*
367. *See id.* at *9.
368. *See id.* at *10.
369. *Id.* at *9.
370. *See id.* at *10.
371. *Id.* at *9.

a nonmaterial error, but the court held that the correction the appellant sought was a material correction that requires the signature of both parties to the original instrument or their heirs, successors, or assigns.[372]

H. McDuff v. Brumley

This is an adverse possession case involving competing claims to a tract of land containing 345.9 acres of land.[373] The adverse possessors were the Brumleys, who purchased a special warranty deed but lacked record title.[374] The McDuffs were the record title holders.[375] The land at issue was essentially land-locked, and fully encompassed within property owned by the McDuffs.[376] There was no paved public access, no one resided there, and there were no permanent improvements or structures save a few deer blinds and rudimentary deer feeders.[377]

The Brumleys' adverse possession evidence consisted of evidence of repair or maintenance of fences, grazing of livestock, hunting activities, and construction of minor improvements.[378] A jury returned a verdict in favor of the Brumleys.[379] On appeal, the McDuffs challenge the sufficiency of the evidence.[380] The majority opinion of the Amarillo Court of Appeals examined the evidence on each element of adverse possession and, ultimately, upheld the trial court's judgment.[381]

With respect the element of actual, visible, and hostile appropriation, the majority reasoned that there was evidence that the Brumleys communicated their ownership of the property and its disputed status on the day they acquired their special warranty deed.[382] In the court's view, this initiated the limitations period.[383] They also pointed to evidence that one of the McDuffs' employees was ejected from the disputed property by the Brumleys, and that the Brumleys sent a letter alleging trespass which the McDuffs ignored.[384] The majority also pointed to evidence that the Brumleys fenced the perimeter and placed no trespassing signs on the fence.[385] They also pointed to evidence that the Brumleys "made multiple

372. *See id.* (citing Endeavor Energy Res., LP v. Trudy Jane Anderson Testamentary Tr., by & Through Anderson, No. 11-20-00263-CV, 2022 WL 969542, at *5 (Tex. App.—Eastland Mar. 31, 2022, no pet. h.)).

373. *See* McDuff v. Brumley, No. 07-17-00248-CV, 2022 WL 3154818, at *1 (Tex. App.—Amarillo Aug. 8, 2022, pet. denied).

374. *Id.*

375. *See id.*

376. *Id.* at *10.

377. *Id.*

378. *See id.* at *2.

379. *Id.* at *1.

380. *Id.*

381. *Id.*

382. *See id.* at *6 (citing Commander v. Winkler, 67 S.W.3d 265, 270 (Tex. App.—Tyler 2001, pet. denied)).

383. *See id.*

384. *Id.*

385. *Id.*

visible improvements to the land: they grated roads; built a livestock corral; stored surplus irrigation pipe, large mining truck tires, and farm equipment; installed water tanks and water lines; built hunting blinds and game feeders and installed deer cameras; and annually planted wheat for cattle grazing."[386]

As to the element of "exclusivity," the majority rejected the McDuffs' claim that their occasional joint use destroyed the Brumleys' adverse possession claim.[387] The majority explained that "evidence of unilateral acts by the McDuffs does not conclusively show that use of the property was 'joint;' nor does it conclusively defeat the Brumley's evidence of exclusive possession in a manner hostile to the McDuffs' legal interests."[388]

In the majority's view, this evidence was also insufficient because it occurred after the parties exchanged verbal and written communications about the Brumleys claiming ownership of the land, instructing the McDuffs not to trespass, and inviting judicial determination of the issues.[389]

As to the element of continuous possession, the majority pointed to evidence that "on a daily or near-daily basis from February 2001 to the time of trial, the Brumleys were physically on the Disputed Property working, farming, caring for livestock, hunting, or recreating . . . for the requisite ten-year limitations period."[390] In addition, the majority pointed to evidence that the property had been "enclosed" as evidenced by testimony and a boundary description in the deed.[391]

The opinion included a strong dissent.[392] In the dissent's view, the evidence was far too light to support the judgment.[393] The dissent characterized the evidence as primarily grazing, with only occasional other uses. Under that view of the evidence, the dissent reasoned that it was critical to characterize the fence as either a designed enclosure or a casual fence.[394] In the dissent's view, the evidence reflected that the fence was a casual enclosure, which would not support a claim of adverse possession.[395] Further, because "[t]he record [was] silent as to the dates, duration, and intensity of these activities and amounts to nothing more than a scintilla of evidence regarding the character of their 'possession' . . . ,"[396] the dissent believed that "the majority opinion . . . perpetuate[d] an injustice foisted upon the Brumleys by a legal system that has failed them."[397]

386. *Id.*
387. *See id.*
388. *Id.*
389. *See id.*
390. *Id.* at *7.
391. *See id.*
392. *See id.* at *10–18 (Pirtle, S.J., dissenting).
393. *See id.* at *11.
394. *See id.* at *17.
395. *See id.*
396. *Id.*
397. *Id.* at *10.

Ultimately, the Texas Supreme Court denied petition for review. This case is notable in that it arguably—at least according to the dissent—presents a very minimal set of facts in support of adverse possession that were nevertheless sufficient to support the jury's verdict on adverse possession.

I. Haynes v. DOH Oil Co.

In this case, the Eastland Court of Appeals held that the statute of limitations under the Tax Code barred a mineral owner from bringing suit to (1) claim that two sheriff's deeds purporting to convey her interests pursuant to a tax foreclosure were allegedly void for lack of an adequate legal description, and (2) also barred her claims that the sheriff's deeds only pertained to royalty interest and not mineral interests.[398]

The original owner (the appellant) acquired the property by warranty deed in 1966.[399] Decades later, in 2005, judgment was entered authorizing the sale of the property to satisfy a tax lien by local taxing authorities.[400] The two resulting sheriff's deeds were recorded in 2009.[401] Three of the tracts were described similar to the following: "Tract 1: A .023438 Royalty Interest . . . Located in Block 35 T1N, Section 47, Martin County, Texas . . . ."[402] The fourth tract was described as follows: "Tract 4: Cline NP Block 35 T1S, Section 19, A-115 . . . Martin County, Texas."[403] It was undisputed that appellant did not pay taxes at any point after 2009.[404] In 2018, the grantees purported to lease the minerals to certain appellees.[405]

More than a decade after the deeds were recorded, in 2019, the appellant brought suit alleging (1) trespass to try title, claiming that the sheriff's deeds were void for lack of adequate property description, and (2) suit to quiet title, which the appellant styled as a question of interpretation, seeking a declaration that the sheriff's deeds only conveyed royalty interests and not mineral interests.[406] The trial court entered summary judgment against the appellant.[407]

The court of appeals began by conceding that a sheriff's deed must contain a sufficiently particular description of the property, otherwise it is void.[408] However, the appellate court emphasized that § 33.54 of the Texas Tax Code contains a specific statute of limitations, providing that an action "relating to the title to property sold at a tax sale" must be commenced

398. *See* Haynes v. DOH Oil Co., 647 S.W.3d 793, 796 (Tex. App.—Eastland 2022, no pet. h.), *reh'g denied* (Aug. 11, 2022).
399. *Id.*
400. *Id.* at 797.
401. *Id.*
402. *Id.*
403. *Id.*
404. *Id.* at 800.
405. *See id.* at 797.
406. *See id.* at 796.
407. *Id.*
408. *See id.* at 800.

within one year of recording of the sheriff's deed.[409] The possible means of tolling that period were inapplicable in this case.[410] The court emphasized that, after that statute of limitations expires, the purchaser at the tax sale obtains "full title to the property, precluding all other claims."[411] In the court's view, that barred the appellant's claims.[412]

The appellant argued that her quiet title action should not be barred because it was a question of interpretation rather than a collateral attack on the deed's validity, in essence merely seeking a declaration of the parties' rights resulting from the sheriff's deeds.[413] In the court's view, § 33.54 of the Texas Tax Code is not limited to any specific cause of action, as it broadly pertains to all actions "'*relating to* the title to property.'"[414] In the court's view, the phrase "*relating to* the title to property" is "quite sweeping" in scope, requiring "nothing more than a tangential relationship."[415] In the court's view, whether artfully pleaded as an attack on appellee's title, a request for declaration to limit the appellee's title, or to defend the appellant's own title, the suit would "relate to title to property" and is thus barred.[416]

The court then surveyed public policy concerns it believed justified its holding, such as policy favoring the finality of property sold at tax sales, and promoting certainty of full title so as to encourage buyers to purchase property at tax sales.[417]

This case is notable in its review of the special statute of limitations under the Tex. Tax Code, and its broad reading of the scope of claims that fall within that statute of limitations.

J. Smith v. Kingdom Investments, Ltd.

In this case, the Houston Court of Appeals held that a remainderman effectively "waived or abandoned" any claim he may have had to challenge a gift deed by the life tenant which purported to convey "perpetual" royalty interests even though she only possessed a life estate.[418]

The case provides a detailed overview of title history from the 1920s and 1930s.[419] In essence, W.H. and Annie Avitts conveyed an undivided interest to their son, Henry, which was not to pass until after both W.H. and Annie's deaths.[420] They entered into several intermediate transactions.[421] By 1936,

409. *Id.* at 799.
410. *See id.* at 799–800.
411. *Id.* at 800 (citing Tex. Tax Code Ann. § 33.54(c)).
412. *See id.* at 803.
413. *See id.* at 802.
414. *Id.* at 802 (citing Tex. Tax Code § 33.54(c)).
415. *Id.* at 803.
416. *Id.*
417. *See id.* at 803–05.
418. Smith v. Kingdon Invs., Ltd., No. 14-20-00447-CV, 2022 WL 3725070, at *6 (Tex. App.—Houston [14th Dist.] Aug. 20, 2022, pet. denied).
419. *See id.* at *4–6.
420. *Id.* at *2.
421. *See id.* at *2–3.

they were vested with the following interests: (1) Henry was fully vested with a one-fourth royalty interest as his separate property, and (2) W.H. and Annie were vested with a one-fourth royalty interest as life tenants, with the remainder interest being vested in Henry.[422]

In 1944, Annie executed a gift deed to each of her children, including Henry, purporting to convey a "perpetual" one twenty-eighth interest to each child.[423] The court noted that was not consistent with her title, as Annie only possessed a life estate.[424] According to the court, Henry could have challenged that gift and the ultimate probate disposition of his parents' estates, but he did not.[425] In the court's view, the deed being recorded creates a presumption that the deed was accepted by Henry.[426] Thus, the court concluded that "any claim Henry may have had to a greater share of the royalty interest was waived or abandoned by his acceptance of Annie's gift deed and the subsequent probate distribution of his parents' estate."[427]

An additional issue was whether a Trust Agreement, executed by Henry, included his separate property interest, or whether it was only limited to community property even though the court determined he possessed no community property.[428]

The court indicated that its duty was to ascertain the intent of the parties from the language of the trust instrument.[429] The trust agreement described the property interest of the trust, Henry's community property interest, and stated that "[t]he community property interest which is conveyed does not include the separate property interest owned solely by Henry . . . ."[430] It also indicated that the description "shall not be considered as complete conveyance of all mineral interests which are owned by the Trustors . . . ."[431]

Nevertheless, in the court's view, the trust agreement encompassed Henry's separate property interest.[432] The court explained that, because Henry only owned interests as his separate property, interpreting the trust agreement as being limited to his community property would render the entire trust agreement a nullity.[433] The court labeled that an absurd result, which it endeavored to avoid.[434] Instead, the court interpreted the trust agreement as transferring all of Henry's separate property into the trust, and characterized the trust agreement's labeling of the assets as community property as "an incidental factual matter that was intended to

422. *See id.* at *6.
423. *See id.*
424. *Id.*
425. *Id.*
426. *See id.*
427. *Id.*
428. *See id.* at *7.
429. *Id.*
430. *Id.*
431. *Id.*
432. *See id.* at *8.
433. *See id.*
434. *Id.*

describe the assets made the subject of the trust, not [intended to] govern their disposition."[435]

This case is potentially notable for its discussion of waiver of a remainder interest through the presumed acceptance of a deed in the subsequent chain of title that, in the court's view, was inconsistent with claiming a remainder interest. The case is also potentially notable with respect to the court's treatment of contrary language from the Trust Agreement as "an incidental factual matter" that, according to the court, did not govern the disposition of interests.

K. Citation 2002 Investment LLC v. Occidental Permian, Ltd.

In this permissive appeal, the El Paso Court of Appeals held that depth references, contained in an exhibit to an assignment of oil and gas leases, did not create a depth limitation.[436]

This appeal focused on an assignment from Shell to Citation in 1987.[437] The granting clause assigned all of assignor's right, title, and interest in and to the oil and gas leases described on an exhibit (Exhibit A) attached to the assignment.[438] Exhibit A included descriptions of various wells and leases, along with descriptions of various interests and agreements the wells or leases were subject to, a description of tracts associated with the leases, and an occasional description of depths such as "down to 8,393 feet."[439]

The appellees argued that, because the assignment's body referenced Exhibit A to describe the interests being conveyed, the assignment could only convey the interests to the extent they were described in Exhibit A.[440] Further, appellees argued, because Exhibit A only described certain interests down to a certain number of feet, that evidenced an intent to convey those interests only down to that depth, and that no other meaning could be given to the depth descriptions.[441]

The appellants, on the other hand, argued that the intent was to convey all of the assignor's interest in the wells and leases identified in the exhibit, and that the depth descriptions were merely descriptions of the portions that were subject to other contracts or agreements.[442]

The court explained that when a conveyance refers to an exhibit for property descriptions, "courts must harmonize the language of both the instrument and the exhibit . . . ."[443] The court noted its 2021 decision in

435. *Id.*
436. *See* Citation 2002 Inv. LLC, & Endeavor Energy Res., L.P. v. Occidental Permian, Ltd., 662 S.W.3d 550, 552 (Tex. App.—El Paso 2022, pet. granted).
437. *See id.*
438. *See id.* at 555–56.
439. *Id.* at 552.
440. *See id.* at 557.
441. *See id.*
442. *See id.*
443. *Id.* at 559 (citing Piranha Partners v. Neuhoff, 596 S.W.3d 740, 752–55 (Tex. 2020)).

Posse Energy, Ltd. v. Parsley Energy, LP.[444] In that case, the assignment contained a broad granting clause, with several broad subparagraphs, describing the interests as those "'specifically described in Exhibit A,'" and other "'related'" and "'appurtenant'" interests.[445] However, the exhibit described the assignor's interest in a lease at issue "'INSOFAR AND ONLY INSOFAR'" as it covered certain described proration units.[446] The El Paso Court of Appeals in *Posse* determined that this was "critical, limiting language" that limited the scope of the conveyance.[447]

Turning back to the case at hand, the court indicated that the Shell-Citation assignment was distinguishable from that at issue in *Posse*.[448] According to the court, the exhibit to the Shell-Citation assignment did not contain limiting language; instead, the court characterized the depth references as descriptive information.[449] The court pointed to a subparagraph of the granting clause that indicated that the assignment covered "rights above or below certain footage depths or geological formations, affecting the property described in EXHIBIT A."[450]

Further, although the granting clause pointed to the exhibit for the description of interests, the assignment also indicated that the intent was to assign "*all rights and interests now owned by [assignor] . . . regardless of whether same may be incorrectly described or omitted from Exhibit A* . . . ."[451] In the court's view, this meant that the exhibit provides relevant information, but was not intended to preclude a transfer of *all* of the assignor's interests.[452] The court interpreted this language to be a general granting clause, and rejected the appellees' argument that the clause was merely a "Mother Hubbard" clause.[453]

The case is notable in that it represents one more case in (1) a line of cases analyzing whether information in an exhibit is merely descriptive or whether it limits the scope of the assignment; and (2) a line of cases analyzing how to harmonize the body of an assignment with the exhibit.

L. Mark S. Hogg, LLC v. Blackbeard Operating, LLC

In this case, the El Paso Court of Appeals held that an assignment, which assigned "[l]ands," among other defined "[a]ssets," effectively assigned oil

444. *Id.* at 558 (citing Posse Energy, Ltd. v. Parsley Energy, LP, 632 S.W.3d 677, 693 (Tex. App.—El Paso 2021, pet. denied)).
445. *Id.* (citing *Posse Energy, Ltd.*, 632 S.W.3d at 688–89).
446. *Id.* (citing *Posse Energy, Ltd.*, 632 S.W.3d at 694).
447. *Id.* (citing *Posse Energy, Ltd.*, 632 S.W.3d at 694).
448. *Id.*
449. *See id.*
450. *Id.* at 559.
451. *Id.* at 558.
452. *Id.* at 558–59.
453. *See id.* at 560.

and gas leases expressly described in the assignment, as well as other leases covering the same lands which were not described in the assignment.[454]

This case involved two oil and gas leases executed by the Hoggs, covering lands in Winkler County, Texas.[455] One lease (the 1994 Lease) covered the "SE/4 of Section 24, Block B-10, Public School Lands."[456] Another lease (the 1998 Lease) covered a portion of that same acreage, "the SE/4 of SE/4 and the N/2 of the SE/4 of Section 24, Block B-10, Public School Lands."[457]

In 2005, the lessee executed an assignment of a number of oil and gas leases in favor of Standolind Oil and Gas Corporation.[458] Notably, an exhibit to that assignment specifically described several oil and gas leases being assigned.[459] That exhibit included a description of the 1994 Lease from the Hoggs, but it did not describe the 1998 Lease from the Hoggs.[460] The assignor argued that because the 1998 Lease was not described in the exhibit, it was not assigned under the 2005 assignment.[461]

The court held that the assignment was sufficiently broad to include the 1998 Lease, even though the lease was not specifically described in the exhibit.[462] The court reasoned that the assignment assigned all interests in specific identified leases (which it defined as the "Leases"), but it also contained even broader language, assigning all of the assignor's interest in "the lands covered by those Leases" and lands pooled therewith (which it defined as the "Lands").[463] In the court's view, because the assignment described the 1994 Lease, that meant the assignment covered all interests in the 160 acres covered by that lease.[464] The 1998 Lease covered 120 of those same acres.[465] Therefore, according to the court, by its plain terms, the assignment covered all of the assignor's interest in the 120 acres covered by the 1998 Lease.[466]

In addition, another subparagraph assigned "[a]ll leasehold interest in or to any pools or units that include any Lands . . . including, but not limited to, those pools or units shown on Exhibit 'A-1.'"[467] That exhibit identified a well which the parties agreed was drilled under the 1998 Lease.[468] According to the court, because that subsection included "all leasehold interest" in

454. *See* Mark S. Hogg, LLC v. Blackbeard Operating, LLC, 656 S.W.3d 671, 680 (Tex. App.—El Paso 2022, no pet. h.).
455. *Id.* at 673–74.
456. *Id.* at 674.
457. *Id.*
458. *Id.*
459. *See id.*
460. *Id.*
461. *Id.* at 675.
462. *See id.* at 679.
463. *Id.*
464. *See id.*
465. *Id.*
466. *See id.*
467. *Id.*
468. *Id.*

that identified well, the assignment transferred all of the assignor's interest in that lease and well.[469]

The assignor also argued that the assignment does not hold up under the statute of frauds.[470] The court disagreed, reasoning that the assignment identifies the county, survey, block, and section of the described land, which was sufficient to identify the property with reasonable certainty.[471]

This case is notable in that it represents another case in a line of cases analyzing the scope of an assignment that turns on harmonizing a broad granting clause in the body of the assignment with a more narrow description in the exhibit.

M. In re Estate of Renz

In this case, the El Paso Court of Appeals addressed a dispute as to whether a "Mineral Deed" was limited to a conveyance of mineral interests, or whether it also conveyed an interest in the surface of the land.[472]

The deed at issue in this case arose out of a settlement agreement executed after a challenge to a probate proceeding in Reeves County, Texas.[473] The settlement agreement called for the conveyance of "100% of the interest in the surface estate" in two tracts of land and another conveyance of "an undivided 25% interest in and to all the oil, gas or other minerals" in the name of the grantor's deceased husband.[474]

The mineral deed stated that it conveyed "the hereinafter described *surface*, mineral and royalty interest listed in Exhibit 'A.'"[475] Exhibit A contained the legal description of four tracts of land.[476] The deed then stated: "[t]he mineral interests herein conveyed is an undivided twenty-five percent (25% or 0.25) of all minerals in the name of Oliver Lee Renz, Deceased at the date of his death"; "any mineral interest conveyed" that was subject to lease would include twenty-five percent of the grantor's ownership; and the grantees would receive 25% of the "mineral interest in the total community property."[477]

On the other hand, the surface deed conveyed the grantees an undivided one-third interest in the surface of two specific tracts.[478] The parties disputed whether the mineral deed also included the surface estate.[479] Given that the mineral deed covered additional lands not described in the surface deed,

469. *Id.*
470. *Id.* at 680.
471. *See id.*
472. *See In re* Estate of Renz, 662 S.W.3d 531, 535 (Tex. App.—El Paso 2022, pet. denied).
473. *See id.* at 534.
474. *Id.*
475. *Id.* at 538 (emphasis added).
476. *Id.*
477. *Id.*
478. *See id.* at 538–39.
479. *See id.* at 539.

such an interpretation would have given the grantee additional surface interests.[480]

The court held that this mineral deed was only a mineral interest, and not a surface interest.[481] In the court's view, this was justified because, other than the one mention of "surface" in the first paragraph of the deed, the remainder of the deed indicates that it only deals with minerals.[482] For instance, the title of the instrument was "'Mineral Deed'" and the exhibit to the deed was titled "'Exhibit A to Mineral Conveyance.'"[483] Several other parts of the deed also indicated the deed dealt with minerals, including: a reference to "'mineral interests herein conveyed,'" a reference to "'[a]ny mineral interest conveyed . . . subject to oil, gas and mineral lease,'" and stating the grantee will receive "'only twenty-five percent . . . of the mineral interest in the total community property.'"[484] The court also indicated that its interpretation was confirmed by the Settlement Agreement and the Surface Deed.[485]

N. Armour Pipe Line Co. v. Sandel Energy, Inc.

In this case, the Houston Court of Appeals initially issued an opinion holding that a purported reservation of an overriding royalty interest in favor of a stranger of title was void, and rejected the stranger's argument that the reservation could be enforced under an "estoppel by deed" theory because the court held the there was no language in assignment or related release that would support an estoppel theory.[486]

However, the Houston Court of Appeals issued a new opinion on rehearing, withdrawing its prior opinion and instead holding that the purported reservation was binding and effective under an estoppel-by-deed doctrine, even if the assignor held no title to the extent that, as between the assignor, the assignee, and both of their successors, the assignor was entitled to a declaration that the assignor owns the disputed interest.[487]

At issue in *Armor II* was a 1999 assignment of seventy-six oil and gas leases and thirteen wells from Armour Pipe Line Company (Armour) and various affiliates of the Cashman family, in favor of Sandel Energy, Inc.[488]

---

480. *See id.* at 540.
481. *Id.*
482. *See id.*
483. *Id.*
484. *Id.*
485. *Id.*
486. *See* Armour Pipe Line Co. v. Sandel Energy, Inc. (*Armour I*), No. 14-20-00412-CV, 2022 WL 4542049, at *1 (Tex. App.—Houston [14th Dist.] Sept. 29, 2022, no pet. h.), *opinion withdrawn and superseded on reh'g*, 672 S.W.3d 505 (Tex. App.—Houston [14th Dist.] 2023, pet. filed).
487. *See* Armour Pipe Line Co. v. Sandel Energy, Inc. (*Armour II*), 672 S.W.3d 505, 510–11 (Tex. App.—Houston [14th Dist.] 2023, pet. filed).
488. *See id.* at 511.

The assignment purported to except and reserve an overriding royalty unto Armour.[489] However, at that time, Armour was a stranger of title.[490] Armour did not possess any title to the leases.[491] Instead, Armour had acquired a lien on the interests, but nothing was filed of record reflecting Armour's acquisition of the liens, and there was no evidence that Armour owned any interest in the liens, or that Armour had attempted to foreclose on the liens.[492]

At issue in this appeal was Armour's argument that, even if its purported reservation was void as an invalid reservation to a "stranger to title," it was nevertheless enforceable under the estoppel-by-deed doctrine.[493]

In the Houston Court of Appeals' initial opinion, the court rejected Armour's theory, holding that there were no recitals in any of the assignments that would support an estoppel-by-deed defense.[494] For instance, the court held the granting clause was not a statement that Armour owned interests in the leases because it only purported to assign "[a]ssignors' right, title and interest," meaning it only conveyed "whatever right, title and interest the Assignors may have had."[495] The court originally held that the reservation clause did not support Armour's claim because it was not a statement that Armour owns an overriding royalty interest, but instead was a reservation that purported to create a new right in favor of the grantor.[496]

However, in the opinion issued on rehearing, the Houston Court of Appeals took a different approach altogether. The court cited to Texas Supreme Court precedent, *Green v. White*, which states, "'[t]he general rule is that the grantee . . . is concluded by recitals in the deed and by reservations contained therein in favor of the grantor,'" and that "obligations undertaken by the parties to a deed are binding contractually . . . ."[497] Following that precedent, the court of appeals, on rehearing, essentially held that the reservation was binding on a contract theory because both sides were either parties to or successors to the assignor or assignee under the assignment containing the reservation at issue.[498]

On rehearing, the court also discussed the "stranger to title rule" and the "stranger to deed rule."[499] The court states:

Under the stranger to title rule, if a grantor in a deed owns no title to the property conveyed in the deed and thus is a "stranger to title," then

489. *See id.*
490. *See id.* at 512.
491. *Id.*
492. *See id.*
493. See *id.* at 511.
494. *See Armour I*, No. 14-20-00412-CV, 2022 WL 4542049, at *5 (Tex. App.—Houston [14th Dist.] Sept. 29, 2022), *opinion withdrawn and superseded on reh'g*, 672 S.W.3d 505, (Tex. App.—Houston [14th Dist.] 2023, pet. filed).
495. *Id.*
496. *See id.* at *6.
497. *Armour II*, 672 S.W.3d at 518 (citing Greene v. White, 153 S.W.2d 575, 583 (1941)).
498. *See id.* at 524–25.
499. *See id.* at 511.

any exception or reservation of real property in favor of the grantor is ineffective, inoperative, and conveys no title to this grantor.[500]

On the under hand:

Under the stranger to deed rule, if a grantor in a deed makes a reservation or exception of real property in favor of a person not a party to the deed and thus a "stranger to the deed," then this exception or reservation in favor of the stranger to the deed is ineffective, inoperative, and conveys no title to the stranger.[501]

The court referenced commentators' critiques of the "stranger to deed" rule as being "groundless, hyper-technical, and arbitrary," but nevertheless held that it was in applicable here because Armour was a party to the first assignment at issue.[502]

The court reviewed the "stranger to title" rule and held that "no binding precedent compels us to adopt the Stranger To Title Rule, and if we were to adopt this rule, our opinion would conflict with the binding precedent in *Greene*."[503] In the court's view, though the Sandall parties cited many Texas cases in support of their stranger to title arguments, "all but one of those cases applies the Stranger to Deed Rule, not the Stranger to Title Rule."[504] And regarding that one remaining case, the court noted that it did not address estoppel by deed or the *Greene* case.[505]

The court concluded that, under *Greene*, the question is not whether the reserving grantor had good title to reserve or convey, but rather whether the parties to that deed, "and those claiming under them," are bound "as between themselves" by the recitals and provisions of the deed.[506] In essence, under the estoppel-by-deed doctrine, as between the parties to the deed and those claiming under them, it is not necessary that good title be shown because the parties to the deed were bound to their contract to make the reservation effective in favor of the grantor and those holding under him, and against the grantee and those holding under him.[507]

The court held that Armour was a party to the assignment, that the Sandel parties were holding under Sandel, and that, under the estoppel-by-deed doctrine, notwithstanding whether Armour was a stranger to title, Armour was entitled to a declaration that, as between Armour and Sandel and their successors, Armour owned the reserved interest.[508]

This case is notable in its discussion of the "stranger to title" and "stranger to deed" rules and its discussion of the scope of both rules. The case is also notable in that it holds the reservation in favor of an alleged stranger to

500. *Id.* at 520–21.
501. *Id.* at 521.
502. *Id.*
503. *Id.* at 523.
504. *Id.* at 522.
505. *See id.*
506. *Id.* at 519 (citing Greene v. White, 153 S.W.2d 575, 583 (1941)).
507. *See id.*
508. *See id.* at 520.

title was nevertheless enforceable, as between the assignor and assignee, as well as their successors, under an estoppel-by-deed theory.

O. Balmorhea Ranches, Inc. v. Heymann

In this case, the El Paso Court of Appeals held that the presumed-grant doctrine was not available to an entity because, according to the court, the presumed-grant doctrine only applies where there is a "gap or defect" that is derived from sufficiently "ancient" documents.[509] Notably, the Texas Supreme Court subsequently held that the presumed grant doctrine does not require any "gap in title" element.[510] However, no petition for review was filed in the *Balmorhea* case.[511]

E.F. Rosenbaum acquired the 200 acres of land at issue, and other lands, by two deeds executed in 1917 and in 1919.[512] In 1926, E.F. Rosenbaum conveyed other lands to Balmorhea Livestock, but that deed did not include the 200 acres at issue in this dispute.[513] After that, not Rosenbaum nor his heirs and assigns made any assertion of ownership over the property for several decades until around the time of this dispute.[514]

On the other hand, Balmorhea claimed that it had established title under the presumed-grant doctrine.[515] The court noted evidence of a 1957 oil and gas lease that described the entire section, including the 200 acres at issue.[516] There were several other similar leases in the decades that followed, and another in 2015.[517]

The court rejected Balmorhea's presumed-grant theory, holding that there was no "gap" in title because the Rosenbaums could show a clear chain of title to the interest through a series of testate and intestate successions.[518]

The court also rejected Balmorhea's presumed-grant theory on the view that any gap or defect would not be sufficiently "ancient," noting that cases "usually" are based on gaps or defects from before the twentieth century.[519] In the court's view, there could be no "ancient" gap or defect in this case because the chain of title was undisputed up to at least 1919.[520]

The court also rejected the argument that the 200 acres were inadvertently excluded from the 1926 deed because, in the court's view, it was "apparent" from the language of the 1917, 1919, and 1926 deeds that the Rosenbaums

509. Balmorhea Ranches, Inc. v. Heymann, 656 S.W.3d 441, 450 (Tex. App.—El Paso 2022, no pet. h.).
510. Van Dyke v. Navigator Grp., 668 S.W.3d 353, 336 (Tex. 2023).
511. *See Balmorhea Ranches, Inc.*, 656 S.W.3d at 443.
512. *See id.*
513. *See id.*
514. *See id.* at 450.
515. *Id.* at 444.
516. *See id.*
517. *See id.*
518. *Id.* at 450.
519. *Id.*
520. *Id.* at 449.

"were sophisticated parties who took a detailed approach when conveying property."[521] The court also noted that Balmorhea did not give any reason for any alleged gap, yet, in the court's view, presumed-grant cases "usually involve some proposed reason for the gap."[522] The court acknowledged possible explanations and counter-arguments for a possible gap, but apparently found that Balmorhea did not meet its burden to provide a reason for the gap.[523]

The court acknowledged that the presumed-grant doctrine is usually a question of fact, and even acknowledged that "[t]he decades-long period of time during which no Rosenbaum heir asserted ownership over the property would likely be a relevant fact . . . ."[524] However, the court nevertheless held that Balmorhea did not raise a fact issue, calling the "ancient gap" issue a "threshold requirement."[525]

This case is notable in its discussion and application of a rule requiring a sufficiently "ancient" gap or defect as part of a presumed-grant doctrine and its arguably narrow view of what constitutes an "ancient" gap or defect. However, as noted above, the Texas Supreme Court, in *Van Dyke v. Navigator Group*, subsequently rejected any "gap in title" element as part of the presumed-grant doctrine.[526] No petition for review was filed in the *Balmorhea* case.

V. DEAL & JOINT OPERATIONS DISPUTES

A. Bachtell Enterprises, LLC v. Ankor E&P Holdings Corp.

In this case, the Houston Court of Appeals held that the exculpatory clause in a joint operating agreement was not applicable to exonerate an operator from claims that the operator knowingly assigned unauthorized charges to the nonoperators.[527] This case is notable in its analysis of the issue in light of *Reeder v. Wood County Energy, LLC*.[528] In the court's view, the case is one of first impression, addressing "whether 'activities' [in an exculpatory clause] is so broad as to protect an operator from any breach of contract so that the operator can have no liability for breach of any contractual provision, absent willfulness."[529] The court declined to extend the reach of *Reeder* that far.[530]

---

521. *Id.* at 449–50.

522. *Id.* at 449 (providing several "reasons" reflected in prior cases, including lost, destroyed, or stolen conveyances, destruction of deed records, fraud rendering the chain of title confusing, clerical errors or irregularities, and oral conveyances from the early 1800s).

523. *See id.*

524. *Id.* at 450.

525. *Id.*

526. Van Dyke v. Navigator Grp., 668 S.W.3d 353, 336 (Tex. 2023).

527. *See* Bachtell Enters., LLC v. Ankor E&P Holdings Corp., 651 S.W.3d 514, 517 (Tex. App.—Houston [14th Dist.] May 26, 2022, pet. denied).

528. *See id.* at 520–23 (citing Reeder v. Wood Cnty. Energy, LLC, 395 S.W.3d 789 (Tex. 2012)).

529. *Id.* at 521.

530. *See id.* at 521–22.

This case involves an operating agreement that appears to be similar to the AAPL 1989 Model Form (JOA).[531] The operator, Ankor E&P Holdings Corporation (Ankor), entered into a deal with a third party, CDM Max, for the construction of a gas production plant.[532] Ankor sent the nonoperators an AFE for $385,000.00 to purchase a plant site, but Ankor stated that CDM would then bankroll construction and own the gas plant.[533] Ankor said this structure would "'eliminate[] the need for the [nonoperators] to provide capital for construction.'"[534] The nonoperators approved and paid as requested.[535]

However, after the plant was constructed, Ankor informed the nonoperators that CDM would be retaining all plant revenue until the construction costs, operating costs, and fees were paid off, and then, Ankor billed the balance of $1.6 million to the non-operators.[536] The nonoperators refused to pay those costs and demanded to see the agreement between Ankor and CDM.[537] Ankor refused, claiming the agreement contained a confidentiality provision.[538] Ankor filed suit against the nonoperators for failure to pay, and the nonoperators "counterclaimed for fraud, money had and received, and breach of the JOAs."[539] A jury found that both Ankor and the nonoperators failed to comply with the JOA, that Ankor committed the first material breach, and that Ankor's breach was not the result of "willful misconduct."[540]

Ankor did not dispute that it had breached the single expenditure limit provision of the JOA, which required that Ankor obtain consent prior to undertaking any single project reasonably estimated to require expenditures in excess of $50,000.00.[541] However, Ankor argued that the exculpatory provision in the JOA exonerated it from any liability for that breach.[542] The exculpatory provision was largely similar to the version contained in the 1989 version of the AAPL Model Form Operating Agreement.[543] That is, it indicated that the operator was required to "conduct its activities under [the] agreement" as a reasonably prudent operator, but the operator would not be liable to the nonoperators "for losses sustained or liabilities incurred, except such as may result from willful misconduct."[544]

---

531. *See id.* at 517.
532. *See id.*
533. *See id.*
534. *Id.*
535. *Id.*
536. *Id.* at 518.
537. *See id.*
538. *See id.*
539. *Id.*
540. *Id.*
541. *See id.* at 517–18.
542. *Id.* at 518.
543. *Compare id.* at 517–18; *with Form 610 - 1989 Model Form Operating Agreement*, AM. ASS'N OF PRO. LANDMEN, https://www.e-education.psu.edu/ebf301/sites/www.e-education.psu.edu.ebf301/files/1989%20JOA%20%28Clean%29.pdf [https://perma.cc/2W2H-S2MN].
544. *Bachtell Enters., LLC*, 651 S.W.3d at 521.

The court disagreed with Ankor and held that the exculpatory clause did not relieve Ankor from liability for knowingly assigning unauthorized charges to the nonoperators.[545] The court acknowledged that *Reeder v. Wood County Energy, LLC* involved a similar exculpatory clause and that the Texas Supreme Court, in *Reeder*, held that the operator was exempt from liability for all of its "activities under th[e] agreement," including an alleged breach of the JOA for failure to maintain production in paying quantities.[546] However, the court of appeals held that it would not be proper to extend *Reeder* to this case because, in the court's view, *Reeder* "did not define the breadth of 'activities' and *Reeder* did not hold that 'activities' encompasses all intentional breaches" of the JOA.[547]

In the court's view, exculpatory clauses are intended to relieve the operator from liabilities "in the performance of the contract" but not "for offensive use to impose liabilities knowingly incurred without consent."[548] Also, in the court's view, exculpatory clauses are intended to cover liabilities caused by "ordinary negligence," and "[n]o precedent requires us to extend that protection further than negligent injury."[549] The court also noted its duty to construe contracts from a utilitarian standpoint and to avoid unreasonable constructions when possible and proper.[550]

The appellate court also explained (1) that the exculpatory clause must be read in light of other provisions of the JOA (briefly pointing to JOA provisions indicating that the parties are only responsible for their own obligations); (2) that the operator may not hold itself out as the agent of the non-operators; (3) that consent was required for a project of this magnitude; and (4) that Ankor was only permitted to withhold nonoperators' revenues upon notice of a delinquent payment of a billing.[551] Presumably, these clauses were referenced to reflect that the exculpatory clause should not be given so broad a reading as to render meaningless various JOA provisions governing the operator's accounting obligations.

Having found that the exculpatory provision did not relieve Ankor of its liabilities, the court held that the jury's affirmative finding against Ankor on first material breach excused the nonoperators from their obligation to make further contractual payments.[552]

This case is notable in its interpretation of an exculpatory clause similar to that found within the 1989 version of the Model Form 610 Operating Agreement, and its holding that it does not relieve the operator from liability for knowingly assigning unauthorized charges to the nonoperators in breach of the JOA. This case is also notable in its interpretation of

545. *See id.* at 522.
546. *Id.* at 521 (citing Reeder v. Wood Cnty. Energy, LLC, 395 S.W.3d 789, 795 (Tex. 2012)).
547. *Id.* (citing *Reeder*, 395 S.W.3d at 795).
548. *Id.* at 521–22.
549. *Id.* at 522.
550. *See id.*
551. *See id.* at 520–21.
552. *See id.* at 523.

much-discussed precedent from the Texas Supreme Court, in *Reeder v. Wood County Energy, LLC*,[553] which many commentators have construed as extending this exculpatory clause to cover intentional breaches of the JOA, including accounting obligations.

B. Giant Resources, LP v. Lonestar Resources, Inc.

In this case, two land brokers (Appellants) filed suit against Lonestar America (Appellees) under a theory of quantum meruit, seeking to recover the value of brokerage services allegedly rendered in connection with the acquisition of oil and gas leases in the Eagle Ford Shale.[554] The Fort Worth Court of Appeals rejected Appellants' claims on the basis that their underlying agreement indicated that there would be no transaction between the parties until they executed a "definitive agreement."[555] According to the court, given that provision, the broker's work could not have been performed on the expectation of payment, but was instead best characterized as services provided in anticipation of obtaining a future contract, which cannot form the basis of a quantum meruit claim.[556]

Appellants, Giant and Gutierrez, are in the business of brokering land deals and had worked together for years in acquiring leases to then package and market to producers.[557] One of Giant's prior deals was with Lonestar, in which Giant leased acreage and assigned the leases to Lonestar in exchange for a brokerage fee.[558]

In September of 2014, Giant and Lonestar entered into a confidentiality agreement.[559] Under that agreement, Giant would present lease opportunities to Lonestar, and if Lonestar did not have prior knowledge of the properties, the parties would acknowledge the lack of information by jointly signing the exhibit.[560] Lonestar agreed to keep the information confidential and not acquire any interest in the properties for one year.[561]

During the term of the agreement, Giant sent a map of lease opportunities to Lonestar, but Lonestar responded saying they were not interested because the properties did not fit their needs.[562] However, shortly after the term of the confidentiality agreement expired, one of Lonestar's affiliates leased that same acreage and surrounding acreage directly from the landowners, thereby bypassing the appellants.[563] The appellants filed suit

553. *See generally* Reeder v. Wood Cnty. Energy, LLC, 395 S.W.3d 789, 795 (Tex. 2012).
554. *See* Giant Res., LP v. Lonestar Res., Inc., No. 02-21-00349-CV, 2022 WL 2840265, at *1 (Tex. App.—Fort Worth July 21, 2022, no pet. h.).
555. *Id.* at *6.
556. *See id.*
557. *See id.* at *2.
558. *Id.*
559. *Id.*
560. *See id.*
561. *See id.* at *3.
562. *See id.*
563. *See id.*

for quantum meruit.[564] The trial court granted summary judgment in favor of Lonestar.[565]

In the court's view, the appellants "could have had no reasonable expectation of being compensated for its efforts by the express wording of the agreement."[566] The court emphasized that the agreement was not exclusive and merely facilitated bringing potential opportunities to the table that could potentially turn into a future contract.[567] The court also emphasized a provision of the agreement indicating that, unless and until the parties executed a "definitive agreement," there shall be no contract providing for a transaction between the parties.[568]

In the court's view, the confidentiality agreement setup a structure whereby Giant's work in acquiring the leases and in sending information to Lonestar was all for purposes of obtaining future business.[569] The court pointed to several cases and concluded that services provided in anticipation of obtaining a future contract cannot form the basis of a quantum meruit claim.[570]

While Gutierrez was not a party to the confidentiality agreement, he had formed a joint venture with Giant, which included an agreement to share profits and losses and a mutual right of control over marketing and leasing.[571] The court characterized Giant's actions as "acting on behalf of the joint venture," and "binding on the joint venture."[572] Thus, in the court's view, just as Giant had no basis to reasonably expect compensation without a definitive agreement, "neither did the joint venture."[573]

This case is notable in its discussion and application of a "definitive agreement" clause and its impact on a quantum meruit claim. Over the past several years, there have been a number of cases where a definitive agreement provision, or something similar, has had a material impact on the analysis of whether a contract has been formed. This case looks at that from a different angle, analyzing the impact of such a provision on a quantum meruit claim.

C. Rustic Natural Resources LLC v. DE Midland III LLC

This case concerns a trial court's decision to order parties to execute a joint operating agreement pursuant to a mediated settlement agreement (MSA).[574] The underlying litigation arose out of a title dispute over

564. *Id.*
565. *Id.*
566. *Id.* at *4.
567. *See id.*
568. *Id.*
569. *See id.*
570. *See id.* at *4–5.
571. *See id.* at *5.
572. *Id.* at *5.
573. *Id.*
574. *See* Rustic Nat. Res. LLC v. DE Midland III LLC, 669 S.W.3d 494, 497 (Tex. App.—Eastland 2022, pet. filed).

leasehold working interests subject to multiple farmout agreements and partial assignments of oil and gas leases executed in the 1960s and 1970s.[575] The parties brought competing motions for summary judgment on the merits.[576] Prior to the trial court ruling on those motions, the parties entered into the MSA in an attempt to resolve the dispute.[577]

In the MSA, the parties agreed to execute, among other things, a stipulation of interest and cross-conveyance and joint operating agreements "based on" the 2015 AAPL Model Form JOA (JOAs).[578] The parties disputed whether the MSA was a fully binding and enforceable agreement.[579]

After the Plaintiffs refused to execute the stipulation and JOAs, DE Midland and Endeavor brought a motion for summary judgment to enforce the MSA and require the appellants to execute the most recent version of the JOAs exchanged between the parties.[580] The trial court granted DE Midland and Endeavor's motion for summary judgment and this appeal arose.[581]

The Eastland Court of Appeals reversed the trial court, holding that there were fact issues as to whether the MSA was enforceable.[582] The court of appeals noted that "[a]n agreement to enter into contacts in the future is enforceable if the agreement addresses all its essential terms with 'a reasonable degree of certainty and definiteness.'"[583] According to the court, while the MSA indicated that the parties would execute JOAs "'based on'" the model 2015 Model Form JOA and set forth five specific conditions, the MSA did not provide all the essential terms of the JOAs.[584] In the court's view, the MSA could be interpreted as allowing one party to populate the required fields and select options, or it could also be interpreted as an unenforceable "'agreement to agree,'" raising a fact issue that precluded summary judgment.[585] The court of appeals remanded the case to the trial court to determine whether the JOAs were essential to the MSA's primary purpose of resolving the underlying title dispute.[586]

The court of appeals also concluded that the trial court exceeded its authority by ordering Appellants to execute a contract to which they had allegedly not agreed.[587]

VI. SERVICE COMPANY, CONTRACTOR & SUBCONTRACTOR DISPUTES

575. *See id.*
576. *Id.* at 499.
577. *See id.*
578. *Id.* at 499–502.
579. *See id.* at 502–03.
580. *See id.* at 499.
581. *See id.*
582. *See id.* at 503.
583. *Id.* at 501 (citing Fischer v. CTMI, L.L.C., 479 S.W.3d 231, 237 (Tex. 2016)).
584. *See id.* at 502.
585. *Id.*
586. *See id.* at 506.
587. *See id.* at 504.

A. Cimarex Energy Co. v. CP Well Testing, L.L.C.

This case involves a dispute regarding the Texas Oilfield Anti-Indemnity Act (TOAIA) and a question regarding the extent of insurance coverage and related cap on indemnity obligations.[588]

Cimarex Energy Company (Cimarex) and CP Well Testing, LLC (CP Well), were parties to a certain Master Services Agreement (MSA), pertaining to well services that CP Well was performing for Cimarex.[589] The MSA was subject to TOAIA, which, among other things, controls the extent to which parties to certain oilfield contracts can agree to indemnify each other.[590] Pertinent to this dispute, TOAIA voids indemnity agreements that to pertain to oil wells unless the indemnity agreement is supported by liability insurance, among other factors.[591]

In 2010, CP Well and Cimarex entered into a MSA that provided CP Well was obligated to obtain a "minimum" of $1 million in commercial general liability insurance and $2 million in umbrella (or excess) liability insurance.[592] CP Well, however, obtained more than the minimum amount of covered.[593] CP Well obtained a policy providing for $1 million in general liability covered, but excess coverage of $10 million.[594] This is $8 million above the minimum standard set in the MSA.[595]

On April 25, 2015, a flash fire occurred and an oilfield worker was injured.[596] The worker filed a lawsuit for his injuries against Cimarex, CP Well, and another company.[597] Cimarex and its insurers settled the lawsuit for $4.5 million in 2016.[598] After the settlement, Cimarex sought indemnity coverage from CP Well.[599] CP Well tendered $3 million pursuant to its indemnity obligation, but refused to tender the additional $1.5 million, claiming that it was not required to provide any indemnity above the minimum amount stated in the MSA.[600]

The primary dispute between Cimarex and CP Well was how much insurance CP Well obtained for the benefit of Cimarex.[601] TOAIA would void any purported indemnity obligation above the amount of insurance CP Well obtained to support the indemnity agreement.[602] Cimarex filed a lawsuit seeking a declaration that CP Well had an obligation to defend and

588. *See* Cimarex Energy Co. v. CP Well Testing, *L.L.C.*, 26 F.4th 683, 685 (5th Cir. 2022).
589. *See id.*
590. *See id.*
591. *See id.*
592. *Id.* at 685–86.
593. *See id.* at 686.
594. *Id.*
595. *Id.*
596. *Id.* at 685.
597. *Id.*
598. *Id.*
599. *Id.* at 686.
600. *See id.*
601. *See id.* at 686–87.
602. *See id.* at 685.

indemnify Cimarex up to $11 million, the total amount of coverage CP Well obtained.[603]

The U.S. Court of Appeals for the Fifth Circuit began by discussing Texas courts' interpretation of TOAIA when the parties' underlying agreement does not set a specified coverage amount or, as here, does not provide a ceiling.[604] When the parties obtain different amounts of coverage, the Fifth Circuit determined that the lesser amounts obtained by the two parties set the maximum amount of permissible liability coverage.[605]

Cimarex argued that the $11 million coverage amount was the lesser amount because Cimarex had obtained coverage up to $26 million, but language in CP Well's insurance document undercut Cimarex's argument, according to the Fifth Circuit.[606] In its agreement with its insurance provider, CP Well agreed the amount of coverage available for indemnifying third-parties would be limited to the lesser of the amount of coverage provided in the declaration, which was $10 million, or the minimum amount required by the third-party agreement.[607] The Fifth Circuit concluded that the MSA was an agreement that would be subjected to this insurance provision.[608] Because the MSA set a minimum indemnity coverage amount of $3 million, the Fifth Circuit concluded that this minimum amount was the total amount of coverage obtained by CP Well for Cimarex's benefit.[609]

The Fifth Circuit held that CP Well's indemnity obligation was capped at $3 million because that was the total amount of coverage obtained for Cimarex's benefit.[610] The additional $8 million in coverage was then for CP Well's sole benefit and could not be used to support an additional indemnity obligation under TOAIA.[611]

B. Pearl Resources Operating Co. LLC v. Transcon Capital, LLC

In this case, the El Paso Court of Appeals held that a mineral lien subcontractor claimant did not have a valid mineral lien because, at the time the subcontractor served notice of its lien, the lessee owed no further amounts to the original contractor under the prime contract between the owner and the original contractor.[612]

Following a wild-well incident, the turn-key drilling contractor hired several companies, including a water-hauling service, to aid in the clean-up.[613]

---

603. *Id.* at 686.
604. *See id.* at 688–89.
605. *See id.* at 690.
606. *See id.* at 688.
607. *See id.* at 687.
608. *See id.* at 691.
609. *See id.* at 690.
610. *See id.*
611. *See id.*
612. *See* Pearl Res. Operating Co. LLC v. Transcon Capital, LLC, 641 S.W.3d 851 (Tex. App.—El Paso 2022, no pet. h.).
613. *See id.* at 853.

The drilling contractor walked off the job, leaving several subcontractors unpaid and never completing the well.[614] One subcontractor was a water-hauling service that was hired to haul away accumulating water.[615]

The water-hauling subcontractor assigned its invoices to Transcon Capital, LLC (Transcon), and Transcon filed a mineral lien affidavit.[616] The trial court held that Transcon had a valid mineral lien and awarded attorney's fees.[617]

The court of appeals pointed to Texas Property Code § 56.043, which provides that a mineral owner is "not liable to the subcontractor for more than the amount that the owner owes the original contractor when the notice is received."[618] As the court explained, "when the owner has already paid its contractor all that is owed under a contract by the time the subcontractor serves the notice of its claim, the subcontractor is not entitled to a lien under Chapter 56."[619]

The court then turned to the drilling contract to determine whether the mineral lessee owed any amounts to the drilling contractor on the date the notice was served.[620]

The drilling contract provided for payment of thirty percent of the fee when the drilling rig was positioned at the well site and ready to spud.[621] The lessee had already paid that thirty percent payment to the drilling contractor.[622] However, the remaining seventy percent was not due to the drilling contractor until the completion of a "'successful well,'" as defined in the contract.[623]

In this case, the drilling contractor walked off the site after the wild-well incident and never finished the job.[624] As a result, there was never a "'successful well'" that would trigger the obligation to pay the other seventy percent.[625] The court rejected Transcon's argument that the seventy percent provision should be interpreted as a "reserv[ation] for final payment" that would leave funds to pay subcontractors.[626]

The court rejected that argument, explaining the argument overlooks that the drilling contract only requires payment of the seventy percent balance upon completion of a successful well, which never occurred.[627] Moreover, under the contract, the drilling contractor had the obligation to pay remediation costs and to indemnity against any liability for such

614. *Id.*
615. *See id.*
616. *See id.* at 854.
617. *Id.* at 855.
618. *Id.* at 857 (quoting TEX. PROP. CODE ANN. § 56.043).
619. *Id.* at 857–58.
620. *See id.* at 858.
621. *Id.* at 853.
622. *See id.* at 854.
623. *Id.* at 853.
624. *See id.* at 854.
625. *See id.*
626. *Id.* at 859–60.
627. *Id.* at 860.

costs.[628] Therefore, the court would have to rewrite the contract to make the lessee contractually obligated to pay any portion of the seventy percent or to make the lessee liable to compensate subcontractors.[629]

Transcon also argued that the lessee had responsibility for these invoices under the early termination provision of the drilling contract.[630] According to Transcon, the early termination provision was triggered when the drilling contractor walked off the job and required the mineral lessee to ensure that third parties were compensated.[631]

The court construed the terms of the drilling contract and disagreed with Transcon's analysis.[632] According to the court, the early termination provision only applied where there was notice of termination by a party not in breach, whereas in this case the drilling contractor breached the agreement and left the jobsite without written notice.[633] Also, the provision requiring payment of contractors only applied where the lessee directed the stoppage of work, which never happened in this case.[634]

The court of appeals reversed the trial court, rendered judgment that the mineral lien was invalid, and remanded the matter to the trail court for consideration of whether to grant attorney's fees to the mineral lessee.[635]

C. RKI Exploration & Production, LLC v. Ameriflow Energy Services, LLC

In this case, the Fort Worth Court of Appeals held that an indemnity clause in a master services agreement pertaining to claims "arising in connection herewith," meant the indemnity pertained to the subject of performance as defined by work orders, as opposed to more broadly reaching all activities reasonably incident to oil well operations.[636]

RKI Exploration & Production, LLC (RKI), was the operator. Ameriflow Energy Services, LLC (Ameriflow), and Crescent Services, LLC (Crescent), were service companies.[637] Their relationships were defined by master services agreements at the center of the dispute.[638]

This lawsuit arose after a sand separator provided by Ameriflow exploded at the wellsite and killed two people, injuring three others.[639] That accident led to a "maze" of multiple lawsuits, indemnity demands, and settlements.[640]

---

628. *See id.*
629. *Id.*
630. *See id.* at 858.
631. *See id.*
632. *See id.* at 858–59.
633. *See id.* at 859.
634. *See id.*
635. *See id.* at 861.
636. RKI Expl. & Prod., LLC v. Ameriflow Energy Servs., LLC, No. 02-20-00384-CV, 2022 WL 2252895, at *1 (Tex. App.—Fort Worth June 23, 2022, no pet. h.).
637. *See id.*
638. *See id.*
639. *See id.*
640. *Id.*

The primary issue in this appeal was whether the Master Services Agreement (MSA) with Crescent required RKI to indemnify Crescent in relation to these specific claims.[641] The MSA required RKI to indemnify Crescent against claims for injury or death "arising in connection herewith."[642] RKI argued the indemnity's scope was defined by work orders and that the indemnity goes no further than the scope of those work orders.[643] Crescent argued for the broader interpretation that the phrase "encompass[es] all activities reasonably incident to or anticipated by the principal activity of the MSA, which is oil well operations."[644]

The court gave a lengthy review of precedent regarding indemnity provisions and the meanings of various phrases.[645] Ultimately, the court concluded that the phrase "arising in connection herewith" in the indemnity provision means "originating from the document or writing in which the phrase is contained."[646] That scope, in turn, meant the work as agreed to in work orders.[647]

In the court of appeal's view, the trial court went too far when it held the phrase encompassed "all activities reasonably incident to or anticipated by the principal activity of the MSA, which is oil well operation."[648] The court explained that this is too broad because "it untethers the indemnity obligation from the contract containing the provision and brings activities independent of the contract within the scope of the indemnity provision simply because they relate to the general subject of the contract."[649] The court reasoned that this interpretation was too broad and placed RKI "on the line to indemnify a party with whom it has an MSA for that party's activities no matter whether RKI sought those services or not."[650] The court also reasoned that if Crescents argument were to prevail "[i]t could do work for anyone at the wellsite, in as slipshod a manner as it wished, and still claim that RKI owed it indemnity."[651]

The case was remanded to the trial court for further proceedings.[652]

VII. CONDEMNATION

A. Hlavinka v. HSC Pipeline Partnership, LLC

In this case, the Texas Supreme Court addressed several important eminent domain issues. HSC Pipeline filed suit to condemn an easement

641. *See id.*
642. *Id.* at *2.
643. *See id.*
644. *Id.*
645. *See id.* at *8.
646. *Id.* at *13.
647. *See id.* at *18.
648. *Id.* at *17.
649. *Id.*
650. *Id.*
651. *Id.* at *18.
652. *Id.* at *30.

out of the Hlavinkas' property, in Brazoria County, for the purpose of utilizing a pipeline owned by HSC Pipeline that transports polymer grade propylene (PGP).[653] The Hlavinkas initially raised two challenges to HSC Pipeline's use of eminent domain.[654] First, the Hlavinkas argued that Texas law does not support the use of eminent domain for the transportation of PGP.[655] Second, the Hlavinkas argued that HSC Pipeline had not established that the pipeline satisfied the "public use" requirements for a common carrier pipeline.[656]

The state district court rejected both arguments and the case went to trial.[657] During trial, the district court excluded the Hlavinkas' testimony regarding amounts that two other pipeline companies had recently paid to acquire easements across the property.[658]

The Hlavinkas appealed.[659] The Court of Appeals for the First District of Texas at Houston agreed with the trial court that eminent domain could be used for a PGP pipeline.[660] However, the court of appeals, disagreed with the trial court in holding that: (1) HSC Pipeline had not demonstrated as a matter of law that the pipeline satisfied the "public use" requirements for a common carrier; and (2) the Hlavinkas' testimony regarding amounts paid by other pipeline companies to acquire easements should have been admitted at trial.[661]

Following a petition for review from both HSC Pipeline and the Hlavinkas, the Texas Supreme Court issued a unanimous opinion clarifying three important issues that the case presented.[662] First, the supreme court held Texas Business Organizations Code § 2.105 bestows the power of eminent domain for common carrier pipelines carrying "oil products" and that PGP qualifies as an "oil product."[663] Next, the supreme court held that—because the evidence demonstrated that HSC Pipeline had a contract to transport the PGP for at least one unaffiliated customer—the lower courts should have decided as a matter of law that the pipeline served a public use.[664] Lastly, the supreme court agreed with the court of appeals in holding that the Hlavinkas' testimony regarding

653. *See* Hlavinka v. HSC Pipeline P'ship, LLC (*Hlavinka II*), 650 S.W.3d 483, 489 (Tex. 2022), *reh'g denied* (Sept. 2, 2022).

654. *See id.* at 487.

655. *See id.*

656. *See id.*

657. *See* Hlavinka v. HSC Pipeline P'ship, LLC (*Hlavinka I*), 605 S.W.3d 819, 825 (Tex. App.—Houston [1st Dist.] 2020), *aff'd in part, rev'd in part*, 650 S. W.3d 483 (Tex. 2022).

658. *See id.* at 824.

659. *See id.*

660. *See id.* at 835.

661. *Id.* at 835–42.

662. *See Hlavinka II*, 650 S.W.3d at 487–88.

663. *Id.* at 488.

664. *See id.*

amounts paid by other pipelines to acquire easements on the property should have been admitted at trial.[665]

All told, the Texas Supreme Court's opinion is a mixed bag for landowners and condemnors. The supreme court's first two conclusions were favorable to condemnors in clarifying that "oil products" (as used in Texas Business Organizations Code § 2.105) is broadly interpreted and that a single contract with an unaffiliated customer satisfies the evidentiary requirements for establishing that a pipeline serves a public use. These conclusions should give condemnors more confidence and certainty in exercising the power of eminent domain. The supreme court's last conclusion, however, breathes new life into the pipeline-corridor valuation theory and may make it more expensive for condemnors to acquire easements out of properties that are already encumbered with multiple pipelines.

VIII. EVIDENCE & TRIAL PROCEDURE

A. Ellison v. Three Rivers Acquisition LLC

In this case, the Corpus Christi Court of Appeals held testimony from an oil and gas company's reservoir engineer, as to alleged lost production damages, was inadmissible because he was not designated as an expert.[666] The court also held the "Property Owner Rule" did not provide an exception to allow non-expert testimony on the topic because the value of mineral reserves is a "technical or specialized" matter requiring expert testimony.[667]

This dispute was previously before the Texas Supreme Court in 2021, in which the supreme court held a boundary line stipulation was valid and enforceable and that a related letter agreement was a valid ratification of that stipulation.[668]

This latest appellate decision, on remand, addresses certain issues regarding counterclaims asserted by Concho, who was relying on the boundary line stipulation.[669]

After a motion for rehearing, the court of appeals issued a revised opinion that dispensed with several procedural and technical issues asserted by Ellison, largely because they were not properly before the court or had already been decided by the Texas Supreme Court.[670] The additional analysis and discussion added after rehearing is not addressed in this summary.

---

665. *See id.*

666. *See* Ellison v. Three Rivers Acquisition LLC, No. 13-17-00046-CV, 2022 WL 17663839, at *13 (Tex. App.—Corpus Christi–Edinburg Dec. 15, 2022, pet. filed) (mem. op.), *reh'g denied* (Mar. 27, 2023).

667. *Id.*

668. *See id.* at *1 (citing Concho Res., Inc. v. Ellison, 627 S.W.3d 226, 228 (Tex. 2021)).

669. *See id.* at *2.

670. *See id.* at *2 (citing Ellison v. Three Rivers Acquisition LLC, 609 S.W.3d 549, 565 (Tex. App.—Corpus Christi–Edinburg 2019) (mem. op.), *rev'd sub nom.*, *Concho Res., Inc.*, 627 S.W.3d 226 (Tex. 2021)).

The remainder of the opinion primarily focuses on Concho's argument that the trial court erred in its failure to award lost profits damages.[671] The jury awarded $492,551.39 in lost profits, but the trial court's final judgment omitted any lost profits damages notwithstanding the jury's verdict.[672]

Concho argued that there was sufficient evidence of lost profits damages to support the jury's verdict.[673] In support, Concho pointed to detailed testimony and historical written analysis of Concho's reservoir engineer.[674]

Ellison argued the testimony should have been excluded because the engineer was not designated as an engineer and his opinions were not disclosed in discovery.[675] In response, Concho argued that the "Property Owner Rule" affords an exception, allowing lay witnesses the ability to provide opinion testimony on the value of their own property.[676]

The court of appeals began by noting the Texas Supreme Court's holding in *Arkoma Basin Expl. Co., Inc. v. FMF Associates 1990-A, Ltd.*, that the value of mineral reserves is not a matter of common knowledge and, therefore, must be proven by expert testimony.[677]

However, according to the court of appeals, "the Property Owner Rule does not extend to matters 'that are of a technical or specialized nature' such as the value of mineral reserves."[678] Because Concho had no expert evidence on the issue of lost profits, the court of appeals held the trial court did not err in disregarding the jury's findings as to lost profits.[679]

The court of appeals then turned to pre-judgment interest.[680] Because the court had rejected Concho's lost profits damages, the only remaining damages award was $1,030.00 in reasonable and necessary expenditures in reliance on the agreement.[681] After a thorough discussion of the law as to pre-judgment interest, the court concluded that Concho was entitled to $120.17 in prejudgment interest, based on five percent interest over twenty-eight months on the $1,030.00 in damages.[682]

The court then turned to the issue of attorneys' fees in relation to the declaratory judgment.[683] The court noted that the Declaratory Judgments Act does not require an award of attorneys' fees and, in fact, an award of attorneys' fees is impermissible if the declaratory judgment claim is used

671. *See id.* at *2–10.
672. *See id.* at *12.
673. *See id.* at *13.
674. *See id.*
675. *Id.*
676. *See id.*
677. *See id.* (citing Arkoma Basin Expl. Co., Inc. v. FMF Assocs. 1990-A, Ltd., 249 S.W.3d 380, 388 (Tex. 2008)).
678. *Id.* (citing Wortham Bros., Inc. v. Haffner, 347 S.W.3d 356, 361 (Tex. App.—Eastland 2011, no pet.)).
679. *Id.*
680. *See id.*
681. *See id.*
682. *Id.* at *15.
683. *See id.*

solely as a vehicle to seek recovery of attorneys' fees that are otherwise impermissible.[684]

Here, the trial court concluded that the declaratory judgment claim was an attempt to recast the contract and title arguments to recover attorneys' fees under the Declaratory Judgments Act.[685] Concho argued that its declaratory judgment claim was not merely a recasting of its contrast claim because "the boundary dispute existed whether or not [Concho] had suffered damages from breach of contract."[686]

The court of appeals held that the trial court did not err in disregarding the jury's findings as to attorneys' fees under its declaratory judgment claim.[687] The court of appeals quotes from a series of transcripts from the trial court, which the court of appeals construed as Concho "clearly agree[ing] that the summary judgment [on the contract issue] resolved the boundary dispute" that was also addressed by the declaratory judgment claim.[688]

Finally, the court of appeals turned to the issue of appellate attorneys' fees.[689] Concho argued that the trial court erred in failing to disregard the jury's $0.00 finding as to appellate fees.[690]

The court of appeals noted that, under § 38.001 of the Tex Civil Practice and Remedies Code, a trial court has discretion to determine the amount of attorneys' fees, but has no discretion to deny attorneys' fees if there is evidence of reasonable attorneys' fees.[691] Further, if trial attorneys' fees are mandatory under § 38.001, then appellate fees are also mandatory when proof of reasonable fees is presented.[692]

Here, the jury awarded nearly $400,000.00 in attorneys' fees for Concho's breach of contract claim, yet awarded $0.00 for appellate fees.[693] The court of appeals held that, because Concho prevailed on its breach of contract claim, both trial fees and appellate fees were mandatory.[694] The court of appeals noted Concho presented uncontroverted evidence of appellate attorneys' fees at the trial court, and therefore, Concho conclusively established its entitlement to an award of conditional appellate attorneys' fees.[695] However, "because Concho was successful in defending against Ellison's appeal but only partially successful in its cross-appeal," the court of appeals "reverse[d] the award of no appellate attorneys' fees and remand[ed] to the trial court for a determination of reasonable appellate attorneys' fees to be awarded to Concho . . . ."[696]

---

684. *See id.*
685. *See id.*
686. *Id.*
687. *Id.* at *16.
688. *Id.*
689. *See id.* at *17.
690. *Id.*
691. *Id.*
692. *Id.*
693. *Id.*
694. *See id.*
695. *See id.*
696. *Id.* at *18.

IX. STATE REGULATION

A. Dyer v. Texas Commission on Environmental Quality

In this case, the Texas Supreme Court reviewed the Injection Well Act (IWA), as well as the powers granted under the IWA to the Texas Commission on Environmental Quality (TCEQ) to grant permits for wastewater disposal injection wells.[697]

The IWA requires an applicant to "'submit with the[ir] application'" for a disposal injection well a no-harm letter from the Texas Railroad Commission (RRC).[698] In addition, the IWA states that "'the commission may not proceed to hearing on any issues other than preliminary matters . . . until the [no harm] letter . . . is provided . . . .'"[699] In *Dyer*, the petitioners argued that, since the no harm letter at issue was later rescinded, the TCEQ's grant of a permit application to the applicant, TexCom, was void.[700]

Strictly interpreting the text of the statute, the supreme court held that rescission of a RRC no-harm letter, after the TCEQ had already issued a final order, did not void the TCEQ's decision nor nullify TCEQ's jurisdiction.[701] The supreme court also held TCEQ was "statutorily required to take into account" that the RRC's no harm letter had been rescinded, since it was aware of it.[702] However, the supreme court opined that "TCEQ could have reasonably concluded" a remand was not appropriate.[703] Thus, TCEQ had not abused its discretion.[704] Regarding the TCEQ's power to make retroactive changes to the orders it issues, the supreme court held that "[a]fter a TCEQ decision is memorialized in a written order, TCEQ's general counsel has the authority to make clerical changes to that order."[705]

Under the IWA, the TCEQ "shall" hold a hearing if one "is requested by a local government located in the county of the proposed disposal well site or by an affected person."[706] "These contested case hearings are formal, trial-like proceedings held before administrative law judges from the State Office of Administrative Hearings (SOAH)."[707] In *Dyer*, SOAH conducted a contested case hearing and issued a proposal for decision (PFD).[708] TCEQ "changed a number of SOAH's findings of fact, and made additional findings based on evidence in the record."[709]

---

697. *See* Dyer v. Tex. Comm'n on Env't Quality, 646 S.W.3d 498, 502 (Tex. 2022).
698. *Id.* at 506 (citing Tex. Water Code Ann. § 27.015(a)).
699. *Id.* at 507 (citing Tex. Water Code § 27.015(b)).
700. *See id.* at 506.
701. *See id.* at 507.
702. *Id.* at 508.
703. *Id.* at 509.
704. *See id.*
705. *Id.* at 510.
706. Tex. Water Code Ann. § 27.018(a).
707. *Dyer*, 646 S.W.3d at 502.
708. *See id.* at 503.
709. *Id.* at 510.

Petitioners first argued that TCEQ only has the statutory authority to amend technical errors or incorrect applications of law, relying on § 2001.058(e) of the Texas Administrative Procedure Act (APA).[710] They argued that, although Texas Government Code § 2003.047(m) expressly grants TCEQ the authority to change any finding of fact so long as it is based on the record, it is possible for TCEQ to comply with both provisions, and therefore, the provisions both must apply.[711] The supreme court disagreed and held "TCEQ cannot be subject to both—it possesses the broad authority that Section 2003.047(m) specifically grants to it, not the narrow authority of Section 2001.058(e)."[712] In addition, the supreme court opined that "[t]his grant of authority to 'amend' the PFD as a whole encompasses the ability to add to the PFD's constituent parts and authorizes TCEQ to make additional findings of fact based on the record."[713]

Petitioners next challenged TCEQ's explanation of its changes to the PFD.[714] Section 2001.058(e) requires an agency to "state in writing the specific reason and legal basis for a change made under this subsection."[715] The supreme court held that "[o]n its face, the explanation requirement of Section 2001.058(e)—which only applies to changes 'made under [Section 2001.058(e)]'—does not apply when the change is made under Section 2003.047(m) . . . TCEQ still must comply with Section 2003.047(m)."[716] But, "TCEQ's explanation satisfied Section 2003.047(m)'s explanation requirement."[717]

710. *See id.*
711. *See id.* at 511 (citing TEX. GOV'T CODE ANN. § 2003.047(m)).
712. *Id.* (citing TEX. GOV'T CODE §§ 2001.058(e), 2003.047(m)).
713. *Id.* at 513.
714. *See id.*
715. *Id.* (citing TEX. GOV'T CODE § 2001.058(e)).
716. *Id.* (citing TEX. GOV'T CODE §§ 2001.058(e), 2003.047(m)).
717. *Id.* (citing TEX. GOV'T CODE § 2003.047(m)).