SMU | Dedman School of Law

SMU Law Review

Volume 61
Issue 3 *Annual Survey of Texas Law*

Article 19

January 2008

Oil, Gas and Mineral Law

Richard F. Brown

Laura L. Burke

OIL, GAS AND MINERAL LAW

*Richard F. Brown**
*Laura L. Burke***

TABLE OF CONTENTS

I. INTRODUCTION

THIS article focuses on the interpretations of, and changes relating to, oil, gas, and mineral law in Texas from November 2, 2006 through November 1, 2007. The cases examined include decisions of state and federal courts in the State of Texas and the Fifth Circuit Court of Appeals.[1]

II. TITLE AND CONVEYANCING ISSUES

Ford v. ExxonMobil Chemical Co.[2] examines whether limitations should bar an equitable action to quiet title. Five years after signing an amendment granting a pipeline easement across three tracts of land, Ford sued ExxonMobil for real estate fraud and to quiet title by a removal order.[3] Ford alleged that he only signed the amendment because ExxonMobil represented that the original pipeline easement covered all three tracts; but in actuality, it only covered one tract.[4] The Texas Supreme Court held that the statute of limitations precluded both Ford's fraud claim and his equitable claim for quiet title.[5]

* Attorney at Law, Brown & Fortunato, P.C., Amarillo, Texas.
** Attorney at Law, Brown & Fortunato, P.C., Amarillo, Texas.

1. This article is devoted exclusively to Texas law. Cases involving questions of oil, gas and mineral law, decided by courts sitting in Texas but applying laws of other states, are not included.
2. 235 S.W.3d 615 (Tex. 2007).
3. *Id.* at 616-17.
4. *Id.* at 616.
5. *Id.* at 619.

The parties agreed that the fraud claim should have been brought within four years of when a person exercising reasonable diligence should have discovered the fraud, but they disagreed as to when the fraud should have been discovered.[6] The supreme court recognized the general rule that not all public records establish an irrebuttable presumption of notice, but when the recorded instrument is in the grantee's chain of title, public records generally do establish an irrebuttable presumption of notice.[7] In the present case, Ford's fraud claim was based on recorded instruments in his chain of title, which were recorded prior to the amendment he executed.[8] Therefore, the statute of limitations began to run no later than the moment when Ford signed the amendment, because the recorded instruments in his chain of title placed him on constructive notice of the alleged fraud. Ford did not claim, plead, or try to prove that there was a fiduciary relationship with ExxonMobil.[9]

In holding that the suit to quiet title was also barred, the Texas Supreme Court first pointed out that Ford did not plead quiet title as an independent cause of action. Therefore, "[h]aving asserted limitations against Ford's fraud claim, ExxonMobil did not have to assert limitations against each item of legal or equitable relief that stemmed from it."[10]

But even if Ford had pled quiet title as an independent cause of action, it still would have been barred. Although it is true that "an equitable action to remove cloud on title is not subject to limitations if a deed is void or has expired by its own terms,"[11] this rule does "not apply when a deed is voidable rather than void."[12] When a deed is voidable, the claimant has an adequate remedy at law, and equity will not intervene.[13]

In this case, Ford claimed that the deed was obtained by fraud. "Deeds obtained by fraud are voidable rather than void, and remain in effect until set aside."[14] Once limitations expired for setting aside the deed allegedly obtained by fraud, Ford could not simply evade this bar by asserting the claim in equity. The supreme court recognized that if it were to hold otherwise, virtually every real estate case "could be recast as an action to remove cloud on title," and limitations would rarely apply.[15]

Hamilton v. Morris Resources, Ltd.[16] is a mineral/royalty deed-construction case. The case examines a series of original deeds, leases, and a correction deed, which can be simplified for purposes of review as: (1) an original deed executed in 1926 subject to an existing lease providing for a

6. *Id.* at 617.
7. *Id.* at 617.
8. *Id.* at 616, 618.
9. *Id.* at 618.
10. *Id.* at 618-19.
11. *Id.* at 618 (citing Watson v. Rochmill, 155 S.W.2d 783, 785 (Tex. 1941); Tex. Co. v. Davis, 254 S.W. 304, 309 (Tex. 1923)).
12. *Id.* (citing Pure Oil Co. v. Ross, 111 S.W.2d 1076, 1078 (Tex. 1938)).
13. *Id.*
14. *Id.* (citing Nobles v. Marcus, 533 S.W.2d 923, 926 (Tex. 1976)).
15. *Id.*
16. 225 S.W.3d 336 (Tex. App.—San Antonio 2007, pet. denied).

1/8 royalty (the Original Deed); (2) a correction deed, executed in 1932 to clarify "ambiguities" in the Original Deed (the Correction Deed), and (3) a new lease providing for a 1/4 royalty.[17] In the 1926 Original Deed, John and Matilda Richardson granted to George H. Coates the following:

> . . . 1/4th interest in and to all the oil, gas, and other minerals in and under and that may be produced from the following described lands. . .
> [t]ogether with the right of ingress and egress at all times for the purpose of mining, drilling, and exploring said lands for oil, gas and other minerals, and removing the same therefrom.
> And said described lands being now under an oil and gas lease . . ., it is understood and agreed that this sale is made subject to said lease, but covers and includes 1/4th of all the oil royalty and gas rental or royalty due and to be paid under the terms of said lease.
> It is agreed and understood that 1/32 of the money rentals which may be paid to extend the term within which a well may be begun under the terms of said lease is to be paid to the said [Coates], and in the event that the said above described lease for any reason becomes cancelled or forfeited, then and in that event, the lease interests and all future rentals on said land, for oil, gas, and mineral privileges shall be owned jointly by the undersigned [Richardson] owning 31/32 and [Coates] owning 1/32 interest . . . in all oil, gas and other minerals in and upon said land, together with their interest in all future rentals.[18]

The Correction Deed provided:

> [T]he mineral deeds in favor of [Coates] executed by [the Richardsons] are hereby amended such that said mineral deeds cover and include an undivided one-fourth (1/4th) interest in the minerals under the above described property, being one-thirty-second (1/32nd) of the gross production for a perpetual term, which interest, however, shall not be participating as to delay rentals payable under the outstanding lease nor as to delay rentals or cash bonuses payable under the future leases . . . .
> It is further . . . agreed . . . that the joinder of . . . [Coates] . . . shall not be necessary in future leases, provided, however, that . . . [the Richardsons] . . . shall execute no oil, gas and mineral leases on the above described land providing for a royalty of less than one-eight [sic] (1/8th). . . .[19]

In 1999, the property was leased for a one-fourth royalty.[20] Richardson claimed Coates was entitled to receive one-fourth of any royalty payments under the leases in effect at the time of the Original Deed, but that Coates had a lesser interest in future leases.[21] Richardson interpreted the deeds as conveying to Coates: (1) a one-fourth royalty interest and one-

17. *Id.* at 340.
18. *Id.* at 341 (quoting the Original Deed) (court's alteration).
19. *Id.* at 342 (quoting the Correction Deed).
20. *Id.* at 340.
21. *Id.* at 342.

thirty-second of all delay rentals under the leases in effect at the time of the original grant and (2) a one-thirty-second possibility of reverter.[22] Richardson also claimed that because Coates was not expressly granted the right to receive royalties under future leases, Coates's royalty interest must be commensurate with his mineral interest, one-thirty-second.[23] Thus, Richardson maintained that under the most recent lease, Coates owned a one-thirty-second mineral interest (1/128th of production), or, alternatively, a fixed one-thirty-second nonparticipating royalty (one-thirty-second of production).[24] Coates claimed a one-fourth mineral interest (one-sixteenth of production).[25]

The court gave weight to the language in the Original Deed that the interest conveyed was a one-fourth interest "in and under and that may be produced."[26] The "in and under" language usually refers to a mineral interest.[27] The Correction Deed recited that the intention of the parties was to convey a "one-fourth (1/4th) interest in the minerals."[28]

The court held that "no language in any of the deeds divest[ed] Coates of his ¼ [sic] mineral interest."[29] Further, the provision in the Correction Deed prohibiting Richardson from entering into any lease for less than a one-eighth royalty ensured Coates that his interest would never fall below a minimum of one-thirty-second of gross production.[30] The court said that interpreting Coates's interest as a fixed one-thirty-second of production would render the restriction placed on Richardson meaningless.[31]

Richardson also argued that the Correction Deed transformed Coates's mineral interest into a royalty interest.[32] Coates had the right to receive delay rentals under the Original Deed, but the Correction Deed provided for no delay rentals or bonuses.[33] Richardson claimed that this change transformed Coates's present possessory interest into a non-participating royalty interest.[34] The court concluded, however, that if Richardson had intended to transform Coates's mineral interest into a fixed royalty interest, it would have been unnecessary for Richardson to reserve the right to receive delay rentals and bonuses.[35] The grant of a fixed royalty interest does not convey an interest in delay rentals, bonus payments, or executive rights.[36] Thus, the court held that Richardson conveyed to Coates a

22. *Id.* at 342-43.
23. *Id.* at 343.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 344.
32. *Id.*
33. *Id.* at 344-45.
34. *Id.* at 345.
35. *Id.* at 345.
36. *Id.* (citing French v. Chevron U.S.A., Inc., 896 S.W.2d 795, 798 (Tex. 1995)).

one-fourth mineral interest, not a fixed royalty interest.[37]

The significance of the case is the continuing trend to reject the "two-grant theory" in favor of a "four corners" construction harmonizing instruments in which multiple fractions are used. While any particular case may be difficult to harmonize, the reality is that rarely would any party to these kinds of deeds intend anything other than a simple, single grant. That is, while rights to delay rentals, bonus, access, and to lease have been frequently negotiated, the quantum of interest is generally not expressed as a present interest and as a future interest with a different magnitude.

Hamilton v. Hamilton[38] held that a grant conveying fifteen percent of "all rights" owned, save and except listed burdens, was not free from unlisted burdens.[39] Richardson conveyed land to George Hamilton reserving a non-participating royalty interest. George and Sharon Hamilton, while married, conveyed the same interest to Hamilton-Encinos Minerals, Ltd., a partnership owned by the couple.[40] The deed conveyed ". . . all rights, title and interest in our oil, gas, other minerals, royalties, rentals and executive leasing privileges in, on, and under and appurtenant to [the real property] *subject to all valid and subsisting restrictions, conditions, easements, mineral reservations, leases and other documents of record* . . . ."[41] Later in the same year, George and Sharon divorced.[42] Per the divorce settlement agreement, Hamilton-Encinos conveyed to Sharon:

> . . . subject to the reservations herein after set out, an undivided fifteen (15%) percent of all of the mineral interests (including delay rentals, royalties and other benefits hereafter accruing under each currently existing, valid and subsisting Oil, Gas and/or Mineral Lease) conveyed to Hamilton-Encinos Minerals, Ltd . . . save and except all executive leasing rights which are reserved by Grantor. . . .[43]

George claimed that Sharon's interest was limited by all restrictions, exceptions, and reservations burdening the Hamilton-Encinos interest, including Richardson's non-participating royalty interest. He argued that because the Hamilton-Encinos interest was burdened by all documents of record, Sharon's interest was similarly burdened. Sharon argued that because her deed did not expressly subject her interest to other interests of record, and because the only exception related to the executive rights, she held a net fifteen percent interest, not restricted by other reserved interests.[44]

---

37. *Hamilton*, 225 S.W.3d at 345.

38. No. 04-06-00046-CV, 2006 WL 3612876 (Tex. App.—San Antonio Dec. 13, 2006, pet. denied) (mem. op.).

39. *Id.* at *1-2.

40. *Id.* at *1.

41. *Id.* (quoting the deed language) (court's alteration with emphasis added by author).

42. *Id.*

43. *Id.* at *1-2 (quoting the divorce agreement).

44. *Id.* at *3.

The court held: "In its plainest terms, the Divorce Deed language grants Sharon an undivided [fifteen percent] of whatever mineral interests Hamilton-Encinos received under the 2000 conveyance from George and Sharon."[45] Therefore, Sharon only received fifteen percent in the mineral interest actually owned by Hamilton-Encinos.[46] The opinion is silent, but presumably the Divorce Deed was without warranty. Even if the Divorce Deed was with warranty, the same result may have followed, because fifteen percent of "all rights owned" is not a conveyance of a specific fixed interest.

The significance of the case is that a conveyance of fifteen percent of "all rights owned," save and except listed rights, does not make the grant free of its proportionate part of unlisted burdens.

Moon Royalty, LLC v. Boldrick Partners[47] held that a conveyance of the wells and lands described in an attachment to the assignment labeled "Exhibit A" included two wells which were not listed in the exhibit but were located on the lands described therein.[48] Statewide, as assignor, executed an assignment and an amended assignment to Moon, as assignee, which provided:

> Assignor does hereby Transfer, Assign, Convey, and Deliver unto Assignee all of Assignors royalty, overriding royalty and associated mineral interests as specifically described on Exhibit "A" (hereinafter called "Interests") in and to the oil and gas wells described therein (hereinafter called "Properties") *and in and to the lands (hereinafter called "Lands")*. It is specifically understood between Assignor and Assignee that Assignor may own other interest in the Properties which are not intended to be covered by this Assignment and such Interest are specifically excluded herefrom.[49]

The italicized language did not appear in the original assignment. Exhibit A to the assignment consisted of a table with the following headings: Assignor; Assignee; Date; Description; County; State; Well; Name; RI; ORRI; Book; Page.[50]

As to each listed interest in the Statewide to Moon assignment, there was also a description of the conveyance into Statewide.[51]

The dispute involved two wells which were not listed by name on Exhibit A, but the land on which the wells were located was listed on Exhibit A.[52] Statewide argued that no interest was conveyed in the two wells and contended that the additional language in the amendment was only added to address Moon's concern that the assignment could be con-

45. *Id.*
46. *Id.*
47. 244 S.W.3d 391 (Tex. App.—Eastland 2007, no pet.).
48. *Id.* at 396.
49. *Id.* at 392-93 (quoting the assignment) (court's emphasis).
50. *Id.* at 393.
51. *Id.*
52. *Id.*

strued as a borehole assignment.[53] Moon agreed that the concern over a borehole assignment was an issue, but argued that Statewide represented that the assignment included all revenues attributable to the lands covered by any listed interest.[54]

The Eastland Court of Appeals held that the assignment was not ambiguous, ignored parole evidence, and construed the assignment.[55] Statewide contended that because the granting clause was limited to the interests "as specifically described on Exhibit 'A'" and because the clause referenced the possibility that Statewide might own other interest in "the Properties which are not intended to be covered by this Assignment," the amended assignment covered only royalty interests in the listed wells.[56] Statewide argued that "if the assignment covered all of its interests in a particular tract, then there would be no reason to describe the specific fractional interests Moon was to receive or to describe the specific wells included."[57]

The court held that Statewide's interpretation would render meaningless the additional language in the amended assignment defining "Lands."[58] The court noted that the granting clause originally contained two defined terms: "Interests" and "Properties."[59] "Because Lands was a separately defined term, and because Statewide conveyed its interests in both the Properties and the Lands, the term Lands must refer to something other than the listed wells to have any meaning."[60] Thus, "utilizing the plain meaning of the word land, and looking at the four corners of the corrected assignments, this term necessarily refers to the tracts described by block and section in Exhibit A."[61] Therefore, Statewide conveyed a royalty interest in the listed acreage, whether a well was present or not.[62]

"The reference [in the assignment] to other interests Statewide might own was limited to other interests Statewide might own in the 'Properties.'"[63] Thus, because "'Properties' was defined as the oil and gas wells listed on Exhibit A, the reference to other interests owned simply indicated that Statewide might own other interests in the described wells."[64] The court held that the provision therefore had "no bearing on the meaning of the term Lands."[65]

Statewide also argued that it would be impossible to determine what fractional interest Moon received under the court's interpretation of the

53. *Id.* at 394 n.3.
54. *Id.*
55. *Id.* at 394-95.
56. *Id.* at 395.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*

assignment. But the court rendered judgment that Moon acquired Statewide's interest in the two wells to the extent of the fractional interest listed for the tracts upon which the wells were located. However, the interest was limited to the extent that the interest was acquired by Statewide in a conveyance listed on Exhibit A to the amended assignment and by the percentage of ownership listed on Exhibit A for that conveyance.[66]

Broesche v. Jacobson[67] held that "working interest" and "leasehold interest" did not necessarily have the same meaning.[68] In this case, the text described the interest to be transferred as "[o]ne-half of all oil and gas interests of the parties as described on Exhibit A."[69] The parties then described fifty wells on Exhibit A to their agreement in a format similar to the following:[70]

County	*Well*	*WI%*	*NRI%*	*Status*
Calhoun	Fredrich #1	0.333333	0.249998	A

It was undisputed that "WI%" meant working interest percentage, but the parties disputed whether the interest to be conveyed was an interest in the fifty specific wells listed in Exhibit A, or in the underlying leasehold.[71]

Although the Fourteenth District Houston Court of Appeals noted there was strong authority holding that the term working interest when used in its technical sense refers to a leasehold interest,[72] terms such as "working interest" are used loosely and inaccurately.[73] Sometimes "working interest" denotes merely an interest in mineral rights, or a percentage of the mineral interest granted. Under the facts of this case, the court held that it could not determine whether the parties intended to use the term in its technical sense or more loosely, and that the description was ambiguous, even though the parties were both geologists.[74]

Exhibits similar to the one in this case, either in chart form, or as a computer printout, are common. This case highlights the importance of the text of the agreement or deed in defining the interest to be conveyed, when the property description on the attached exhibit is limited. The text of an agreement or deed usually has an elaborate description of the property rights to be conveyed. This almost always includes (as a minimum) a conveyance of property rights expressly described as "the leases on Exhibit A" or as a "leasehold interest in the leases on Exhibit A." *Broesch* held that "working interest" alone is not necessarily a definitive term.

66. *Id.* at 396.
67. 218 S.W.3d 267 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).
68. *Id.* at 273.
69. *Id.* at 272 (quoting the divorce decree document governing the transfer).
70. *Id.* at 272 n.1.
71. *Id.* at 272.
72. *Id.* at 273 n.3.
73. *Id.* at 273 (internal citation omitted).
74. *Id.*

Moon Royalty held that an assignment of a royalty interest in the "lands" described on Exhibit A will also catch any wells on the lands, whether the wells are listed or not.

Bowers v. Taylor[75] held that the terms of a mineral deed convey a presently vested interest in the possibility of reverter under an oil and gas lease, rather than a springing executory interest that would violate the rule against perpetuities. Both the lease and the mineral deed were executed about eighty years ago, when the fundamental nature of property rights in oil and gas were not fully developed and certainly not fully understood as it is today. The lease and the deed (which incorporated the lease) were created by the same parties. "When two instruments involve the same parties and relate to the same transaction, [the court] read[s] the documents together in order to ascertain the parties' intent."[76] In 1919, Taylor's predecessors in interest, as lessor, granted the lease to Bowers's predecessors in interest, as lessee. The lease provided that it would last "so long as such mineral or minerals can be produced in paying quantities."[77]

In 1927, Taylor's predecessors, as grantor, conveyed a mineral interest to Bowers' predecessors, as grantee. The conveyance provided that "if said lease should be forfeited, then . . . [Bowers] is to become vested with one-third (1/3) interest in the fee title in and to the oil, gas and minerals in all portions of said above described tracts . . . ."[78]

Production under the lease ended in 1988, but in 2002 production was obtained under new leases from Taylor and Bowers.[79] Taylor and Bowers disputed the allocation of production between them based on the 1927 conveyance. Taylor asserted that the purported transfer of a one-third interest to Bowers violated the rule against perpetuities. Taylor asserted alternatively that the lease was never "forfeited," but terminated for lack of production, and thus the condition precedent to Bowers's ownership had not occurred.[80]

The court held that the deed conveyed a one-third interest in the possibility of reverter under the lease, which was a present conveyance that did not violate the rule against perpetuities, and that by the use of the word "forfeiture," the parties intended to include the termination of the lease due to cessation of production.[81] "An oil and gas lease is not a typical lease . . . [because] the lessor (actually a grantor) grants a mineral interest in fee simple determinable to the lessee (actually a grantee)."[82] "[U]pon termination of the 'lease,' the mineral estate reverts to the grant-

75. No. 01-05-00667-CV, 2007 WL 1299440, at *3 (Tex. App.—Houston [1st Dist.] May 3, 2007, no pet.).
76. *Id.* at *4.
77. *Id.* at *1 (quoting the lease language).
78. *Id.*
79. *Id.*
80. *Id.* at *2 (quoting the conveyance language).
81. *Id.* at *5, *7.
82. *Id.* at *4 (citing Natural Gas Pipeline Co. of Am. v. Pool, 124 S.W.3d 188, 192 (Tex. 2003)).

ors of the lease, their heirs, or their assigns," which is the possibility of reverter.[83] The lessor, or grantor, "may sell or assign the possibility of reverter."[84]

As applied in Texas, the rule against perpetuities provides that "an interest is not valid unless it must vest, if at all, within [twenty-one] years after the death of some life or lives in being at the time of the conveyance."[85] The court compared and distinguished between two leading Texas Supreme Court opinions. In *Peveto v. Starkey*,[86] the supreme court held that a conveyance violated the rule which provided: "This grant shall become effective only on the expiration of the above described Royalty Deed."[87] In *Jupiter Oil v. Snow*,[88] the supreme court held that a conveyance did not violate the rule which provided: "[I]n the event the lease now on said land is forfeited or terminated withou[t] producing mineral of any kind, then . . ." and "it is the intention of the grantors herein that in the event said lease is forfeited, then . . . ."[89] In *Bowers*, the supreme court found that *Peveto* was distinguishable because in *Peveto*, the conveyance itself was delayed and there was no further explanation of grantors' intent.[90] To the contrary, the Taylor-to-Bowers deed was a present conveyance, the *habendum* clause included an expression of intent, and the *habendum* clause did not mention any delay. Applying the "four corners" rule and construing the lease and deed together, there was no violation of the rule against perpetuities.[91]

Again guided by the intent of the parties and construing both instruments together, the court found the term "forfeit" should be read broadly to include automatic termination.[92] Thus, the parties intended "to transfer a possibility of reverter, which takes effect at the termination of the lease for any reason, including cessation of production."[93]

The significance of the case is that once again, *Peveto* is distinguished and found not to be controlling. In the context of an industry accustomed to dealing with interests which revert after decades, parties generally do not expect that their property rights will be derailed by a rule that is rarely given serious thought. The case also illustrates a serious trend to reinvigorate the "four corners" rule and to consider multiple documents together when they constitute a single transaction. Under today's practice of complex purchase and sale agreements, this suggests that unless limited by agreement to the contrary, deeds may be construed by refer-

83. *Id.*
84. *Id.* (citing Jupiter Oil Co. v. Snow, 819 S.W.2d 466, 468 (Tex. 1991)).
85. *Id.* at *3.
86. 645 S.W.2d 770 (Tex. 1982).
87. *Id.* at 771 (quoting the *habendum* language).
88. 819 S.W.2d 466 (Tex. 1991).
89. *Id.* at 468 (quoting the *habendum* language).
90. *Bowers*, 2007 WL 1299440, at *5.
91. *Id.*
92. *Id.* at *7.
93. *Id.*

ence to other documents that have not been carefully considered as to how they might relate to deed construction.

III. LEASE AND LEASING ISSUES

Humble Woods, L.L.C. v. Petrohawk Energy Corp.[94] held that a Texas court did not have subject matter jurisdiction to determine rights to an oil and gas lease in Louisiana.[95] The core issue in the lawsuit was the ownership of a mineral servitude, which is "the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership."[96] The court held that:

> Texas courts may not adjudicate title to realty in another state or country; they do not have subject matter jurisdiction over property outside the state. . . . The general prohibition against determining rights in real property located in other states or countries extends to rights in oil and gas leases in other states or counties. . . . It follows that the prohibition also extends to mineral servitudes.[97]

Sun-Key Oil Co. v. Whealy[98] held that lease which is void because of an inadequate legal description can be neither revised or ratified.[99] Gray leased land described as "'150 acres of land out of the S/2 of the John Hibbins Survey'" to Sun-Key (the Gray Lease). Whealy acquired Gray's mineral interest by a deed "subject to" the Gray Lease. Whealy filed suit for a declaratory judgment that the Gray Lease was void due to an inadequate legal description. Gray and Sun-Key then amended the Gray Lease to correct the legal description. Sun-Key contended the amended lease description was good and that Whealy could not contest the validity of the Gray Lease under the doctrines of revivor and ratification.[100]

The Fort Worth Court of Appeals concluded that the description in the lease identifying the leased property as some of the acreage out of a larger tract did not comply with the statute of frauds and was void.[101] Further, because the lease amendment was executed by Gray after the conveyance of Gray's interest to Whealy, it was therefore not binding on Whealy.[102] A revivor may save a terminated lease, but only when there is a termination of a grant which was originally effective.[103] Revivor did

94. No. 05-06-01623-CV, 2007 WL 3072908 (Tex. App.—Dallas Oct. 23, 2007, no pet.) (mem. op.).
95. *Id.* at *2.
96. LA. REV. STAT. ANN. § 31:21 (2000).
97. *Humble Woods, L.L.C.*, 2007 WL3072908, at *2 (quoting Trute Oil & Gas, Inc. v. Atlas Int'l Inc., 194 S.W.3d 580, 583 (Tex. App.—Houston [14th Dist.] 2006, no pet.)).
98. No. 2-06-198-CV, 2006 WL 3114466 (Tex. App.—Fort Worth, Nov. 2, 2006, no pet.) (mem. op.).
99. *Id.* at *3.
100. *Id.* at *2.
101. *Id.* at *3.
102. *Id.* at *4.
103. *Id.*

not apply here because the Gray Lease was void from its inception.[104]

The court determined that Sun-Key's defense could only be ratification and not revivor.[105] A recital that a deed is "subject to" some other document (here the Gray Lease) limits the grantor's warranty and makes the grant subservient to the document named, but does nothing to create affirmative rights.[106] If the Gray Lease had been valid, then Whealy would take subject to whatever limitation the Gray Lease imposed on the title.[107] Here, the question was whether Whealy ratified the void lease by accepting the deed "subject to" the Gray Lease.[108] The court held Whealy could not have ratified the Gray Lease by accepting the deed because, at the time of the conveyance, the legal description was a violation of the statute of frauds and was thus void.[109]

The significance of the case is the holding that neither revivor nor ratification will save a lease which is void because of a defective legal description; it is still void. A description of an unidentified portion of a larger, identifiable tract, is void as a matter of law.

Migl v. Dominion Oklahoma Texas Exploration & Production, Inc.,[110] examined royalty requirements under implied and express covenants of a gas lease and a long-term gas purchase contract. Lessor filed suit against lessee for underpayment of royalties. The principal claims were for (1) breach of the express covenant in the royalty clause requiring lessee to account for gas sold off the lease at market value and (2) breach of the duty obligating lessee to obtain the best price reasonably possible under the implied covenant to manage and administer the lease (duty to market).[111]

The lease royalty clause provided:

> On gas, including casinghead gas or other gaseous substance, produced from said land and *sold or used off the premises* or for the extraction of gasoline or other product therefrom, the market value at the well or one-eighth of the gas so sold or used, provided that *the gas sold at the wells* the royalty shall be one-eighth of the amount realized from such sale.[112]

The uncontroverted evidence showed that all gas was sold at a meter on the lease, which is a sale "at the wells," and lessee paid royalties based on proceeds.[113] Because the royalty provision required only an amount realized or proceeds-based calculation for at-the-well sales, the court held

104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at *4-5.
110. No. 13-05-589-CV, 2007 WL 475318 (Tex. App.—Corpus Christi Feb. 15, 2007, no pet.) (mem. op.).
111. *Id.* at *2.
112. *Id.* (quoting the lease) (court's emphasis).
113. *Id.* at *5 n.4 (citing Exxon Corp. v. Middleton, 613 S.W.2d 240, 243 (Tex. 1981) as authority for lease sales being sales "at the wells").

that lessee did not breach the express lease covenant to pay royalty.[114]

The Corpus Christi Court of Appeals identified the specific implied lease covenant at issue as an alleged breach of the duty to reasonably market, which is included within the broader duty expressed as the implied covenant to manage and administer the lease.[115] The duty is applicable to amount-realized (proceeds) based royalty clauses, but not to "market value" royalty clauses.[116] The royalty clause at issue here was the proceeds clause, and lessor's evidence showed only that the contract price was below the current market price.[117] Citing the Texas Supreme Court's holding in *Yzaguirre v. KCS Resources, Inc.*,[118] that the amount realized from sale proceeds may be unrelated to market value, the court held that lessee did not breach the reasonably prudent operator standard because evidence of current market value was not evidence that lessee failed to act as a reasonably prudent operator.[119] "An action based on the implied covenant to reasonably market focuses on the behavior of the lessee rather than on evidence of other sales, and asks whether the lessee acted as 'a reasonably prudent operator under the same or similar facts and circumstances.'"[120]

The summary judgment for lessee was affirmed because the lessor offered no evidence of negligence or self-dealing.[121] The only evidence was that the current market price was *higher* than the contract price.[122]

The significance of the case is that *Migl* complements *Yzaguirre*, by confirming the principle that evidence of current market value will not be conclusive, and may not even be relevant, in determining whether a lessee did or did not breach the implied covenant to reasonably market under a proceeds lease royalty clause.

Chesapeake Exploration Limited Partnership v. Corine Incorporated[123] construed a shut-in royalty clause to determine whether the point in time when the shut-in well must be "capable of producing in paying quantities" was (1) at the moment when the well was shut-in, or (2) at the end of the primary term of the lease.[124] While the lease was in its primary term, an off-lease well was drilled on property adjacent to the lease. In

114. *Id.* at *5-6.
115. *Id.* at *6.
116. *Id.*
117. *Id.*
118. 53 S.W.3d 368, 370-73 (Tex. 2001). The court of appeals found *Yzaguirre* as similar and controlling (though inverse) to *Migl*. *Yzaguirre* involved a claim for breach of implied covenant when gas was sold off the lease under a contract price higher than market value, but lessee accounted to lessor based on the lower market value. The court denied the lessors' contention that the lessee should have accounted for royalty at the above-market contract price. *Id.*
119. Migl v. Dominion Ok. Exploration & Prod., Inc. No. 13-05-589-CV,, 2007 WL 475318, at *6 (Tex. App.—Corpus Christi Feb. 15, 2007, no pet.) (mem. op.).
120. *Id.* (quoting Union Pac. Res. Group, Inc. v. Hankins, 111 S.W.3d 69, 71 (Tex. 2003)).
121. *Id.* at *2.
122. *Id.* at *6.
123. No. 10-06-00265-CV, 2007 WL 2729576 (Tex. App.—Waco Aug. 29, 2007, no pet.).
124. *Id.* at *1, 2.

2002, the well was completed, shut-in, and a gas unit formed which pooled lessor's property into the unit. The primary term expired on September 4, 2003. There was no activity on the unit well until September of 2004. Lessor sued for declatory judgment that the lease terminated at the end of the primary term.[125] The lease provided:

> *If at the end of the primary term* or any time thereafter one or more wells on the leased premises or lands pooled therewith are capable of producing oil or gas or other substances covered hereby in paying quantities, but such well or wells are either shut in or production therefrom is not being sold by Lessee, such well or wells shall nevertheless be deemed to be producing in paying quantities for the purpose of maintaining this lease.[126]

Lessee argued that the trial court erred in finding the lease had terminated because the court failed to consider whether the well was capable of producing in paying quantities at the time the well was shut-in.[127] The Waco Court of Appeals held that the intent of the parties could be easily ascertained.[128] "If at the end of the primary term," were words that manifested the intent that "the time to determine whether the well at issue was capable of production in paying quantities was at the end of the primary term."[129] Lessee relied on a case decided by the Amarillo Court of Appeals which held that "for a well to be maintained by the payment of shut-in royalties, it must be capable of producing gas in paying quantities *at the time it is shut-in.*"[130] However, the Waco Court of Appeals pointed out that the Amarillo Court of Appeals was not deciding the same issue. The Amarillo Court of Appeals was focused on the meaning of the phrase "capable of producing in paying quantities," and it was not addressing the moment in time when the capability to produce was to be gauged.[131] Moreover, the well in the Amarillo case had been shut in during the secondary term and not in the primary term, which made the two cases factually distinguishable.[132]

Having decided that the end of the primary term was the appropriate time to determine whether the well was capable of production in paying quantities, the Waco Court of Appeals then examined whether the well was capable of producing in paying quantities at that time. The court followed the reasoning of the Amarillo Court of Appeals. "A well is capable of production if it is capable of producing in paying quantities without additional equipment or repairs."[133] If the well is turned "on," and it

125. *Id.* at *1.
126. *Id.* at *2 (quoting the lease) (court's emphasis).
127. *Id.*
128. *Id.* at *3.
129. *Id.* at *2-3.
130. *Id.* at *2 (quoting Hydrocarbon Mgmt. v. Tracker Exploration, 861 S.W.2d 427, 432-33 (Tex. App.—Amarillo 1993, no writ)) (court's emphasis).
131. *Id.* at *2.
132. *Id.*
133. *Id.* at *3 (citing Anadarko Petroleum Corp. v. Thompson, 94 S.W.3d 550, 558 (Tex. 2002)).

begins to flow without additional equipment or repairs then it is capable of producing in paying quantities.[134] However, if the well is turned "on," and the well does not flow because of mechanical problems, or, as in this case, because the well needed rods, tubing, or pumping equipment, then the well is not capable of producing in paying quantities.[135]

The significance of the case is that it defines the moment in time when (under this particular common form of shut-in royalty clause) a shut-in well must be capable of producing in paying quantities. It does not address whether the shut-in well must continue to be or continuously be capable of producing in paying quantities. More fundamentally, the case highlights the principle that to preserve the lease under a shut-in royalty clause, lessee must have not only a lease clause and a well which could produce if fully equipped, but a well capable in fact of producing in paying quantities at the very moment specified in the lease.

In re Nueces Petroleum Corp.[136] is a production in paying quantities case in which the United States Bankruptcy Court for the Southern District of Texas held that the lease could only be extended under three conditions: production in paying quantities, excused performance under force majeure, or continuous drilling or reworking operations.[137] However, the court held that none of these three conditions were met and the lease terminated.[138]

Analyzing the production in paying quantities issue, the court upheld the lessor's method of cumulating production revenues less operating costs over multiple months as a reasonable period of time.[139] The lessee contended that the analysis should be monthly, but there was no explanation as to how this could possibly help lessee's case. There were many months (approximately twenty out of thirty-six) in which there was either no production or no production in paying quantities.[140]

The lease was located in wetlands on the banks of the Lavaca River. The land could be flooded by high tides, southerly winds, releases from spillways, and hurricanes. The *force majeure* clause in the lease extended to various events such as storm, flood, or other act of God.[141] Lessee put on some evidence of the difficulties caused by Hurricane Claudette, although other leases in the area did not suspend operations. The court held that the burden of proof was on lessee, and that lessee failed to present any evidence that should have excused performance under *force majeure*, except with respect to Hurricane Claudette.[142] The court allowed a brief suspension of lessee's obligations during the period after

134. *Id.*
135. *Id.*
136. No. 05-44617, 2007 WL 418889 (Bankr. S.D. Tex. Feb. 2, 2007) (mem. op.).
137. *Id.* at *4.
138. *Id.* at *5.
139. *Id.* at *3.
140. *Id.* at *3-4.
141. *Id.*
142. *Id.* at *4.

the hurricane but no other suspensions were allowed.[143]

Finally, the court held that lessee's claimed continuous operations were also not enough to preserve the lease as the defendants could not prove that the operations had been conducted in "good faith and in a workmanlike manner" as required by the lease.[144] There was some conflicting witness testimony, but there was evidence that defendant had halted drilling operations on a well to avoid paying overtime (resulting in a lost well) and that forty of the forty-two wells on the lease were noncompliant with Texas Railroad Commission requirements. Furthermore, there was photographic evidence of multiple well-site deficiencies (including missing equipment). The court found the work was neither "workmanlike" nor competent.[145]

El Paso Production Oil & Gas v. Texas State Bank[146] refused to imply a horizontal severance into a continuous development clause, after considering the relationship between the continuous development clause, the Pugh clause, and other lease clauses.[147] Under two identical leases, lessee formed four separate pooled units for gas. Each of the pooled gas units were depth-limited by references to specified top and bottom depth limits. It was uncontroverted that the leases were in effect as to the depths set out in the four designated gas units. The dispute was centered upon whether the leases expired as to those depths lying within the surface boundaries of the gas units, but not included within the specified depths.[148]

Lease paragraph fifteen was an addendum to the printed form which contained a continuous development clause, and a Pugh-type clause subsumed within the continuous development clause. In summary, paragraph fifteen provided that upon cessation of continuous operations, the leases would terminate

> *except as to lands covered by this lease which are then allocated to a production unit or included in a pooled unit for a well capable of producing oil and/or gas in paying quantities (which lands herein shall be referred to as developed acreage).* For the purposes of this paragraph, a production unit is defined as an area consisting only of lands covered by this lease and allocated or dedicated to a well in accordance with the Rules and Regulations of the Railroad Commission of the State of Texas and shall contain only such number of acres as permitted herein for pooled oil units or pooled gas units.
> This lease shall remain in effect as to all depths as to all developed acreage so long as there is production of oil and/or gas in paying quantities from said developed acreage.[149]

143. *Id.* at *5.
144. *Id.* at *5 (quoting the lease).
145. *Id.*
146. No. 04-05-00673-CV, 2007 WL 752209 (Tex. App.—San Antonio Mar. 14, 2007, pet. denied) (mem. op.).
147. *Id.* at *6.
148. *Id.* at *1.
149. *Id.* at *3 (quoting the lease) (court's emphasis).

The parties agreed that the Pugh-type clause within paragraph fifteen did not by itself effect a horizontal severance.[150] However, the lessor contended that after the lessee created the gas units through the unit declarations, production from those units had to come from the depths set forth in lease paragraph thirteen.[151] Lease paragraph thirteen was another addendum paragraph to the printed lease form. It was a variety of a relatively common lease clauses that limits acreage that can be pooled for gas, so that the permitted size of the unit varies by depth. The clause provided for units of 160 acres from the surface to 6000 feet below the surface, 320 acres from 6,000 feet below the surface to 10,000 feet below the surface, and 640 acres below 10,000 feet below the surface.[152] Therefore, lessor argued that there could be no well on the 640-acre unit capable of producing from horizons shallower than 10,000 feet below the surface.[153]

The court found *Friedrich v. Amoco Prod. Co.*[154] to be the only Texas case on point. In *Friedrich*, the lessee pooled from the surface to a depth of 1,298 feet. The lessor sued to terminate the lease as to the deep rights, arguing that the Pugh-type clause in his lease effected both a vertical and horizontal severance of the leasehold estate. The *Friedrich* court refused to imply a horizontal severance, reasoning that the pooling clause preserved the lease as to the "land" included in the pooled unit, and that the word "land" was used throughout the lease to refer to surface acreage.[155]

The court in *El Paso Production* followed the reasoning of the court in *Friedrich* and reached the same result.[156] Paragraph fifteen of the leases excluded from the operation of the Pugh-type clause the "lands" in a pooled unit. The leases used the term "land" or "said lands" in the granting clause, the habendum clause, the pooling clause, the delay rental clause, and in other paragraphs in the printed lease form—in each instance referring to surface acreage. The court held that a term is ordinarily considered to have been used in the same sense in different parts of the same instrument, and that the phrase "all depths," as used in lease paragraph fifteen, would have been unnecessary if "developed acreage" was intended to be limited to the gas unit as designated by lessee.[157]

The significance of the case is that it illustrates the possible result of the interaction between a pooling clause and a Pugh clause. It is common for leases to have some provision which loosely provides that the pooling clause trumps the Pugh clause. This is generally driven by the need to harmonize different lease forms and lease provisions in the event that the leases are pooled. From the lessor's perspective, harmony may not be a

150. *Id.* at *5 n.5.
151. *Id.* at *4.
152. *Id.* at *3.
153. *Id.* at *4.
154. 698 S.W.2d 748 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).
155. *El Paso Prod.*, 2007 WL 752209 at *5 (citing to *Friedrich*, 698 S.W.2d at 753-54).
156. *Id.*
157. *Id.* at *6.

desired goal, particularly if the pooling does not cross property lines so as to include other owners with divided interests within the pooled unit.

IV. INDUSTRY CONTRACTS

Boldrick v. BTA Oil Producers[158] held that an overriding royalty interest subject to a joint operating agreement ("JOA") and burdening a non-consenting interest is not payable until costs are recouped under the JOA. Paragraph 31(b) of the JOA provided that any "subsequently created interest" would be subject to all the terms and conditions of the JOA, and it defined a subsequently created interest to include "an overriding royalty created by a working interest owner out of its working interest."[159] BTA, a non-operator subject to the JOA, assigned an overriding royalty to Boldrick, and the assignment provided that the overriding royalty interest "shall be free and clear of all costs of development and operation" and "[t]his Assignment shall not imply any leasehold preservation, drilling or development obligation on the part of Assignor."[160] It was apparently uncontested that Boldrick had notice of the JOA.[161] BTA then elected to go non-consent on the Stallings Gas Unit 2H Well, which was drilled and completed.[162] Paragraph 31(b) of the JOA further provided that subsequently created interests were "chargeable with a pro rata portion of all costs and expenses chargeable under the [JOA] against a non-consenting interest in the same manner as if it were a working interest."[163] The operator stopped paying Boldrick, and Boldrick sued BTA for Boldrick's share of production "free and clear of all costs" on theories of breach of contract, unjust enrichment and conversion.[164]

The Eastland Court of Appeals held that Boldrick's overriding royalty was created out of BTA's working interest subsequent to the JOA and the overriding royalty was subject to all the terms and provisions of the JOA.[165] Because BTA went non-consent, Boldrick's overriding royalty interest was chargeable like a working interest as mandated by the JOA. Such a use could not constitute a breach of contract between Boldrick and BTA when that contract was subject to the JOA and it could not constitute unjust enrichment or conversion.[166] However, the court was not required and did not address whether BTA would have such a liability in the future after all non-consent penalties had been paid and BTA and Boldrick were receiving payments for their respective interests.[167]

158. 222 S.W.3d 672 (Tex. App.—Eastland 2007, no pet.).
159. *Id.* at 674.
160. *Id.* at 673.
161. *Id.* at 675.
162. *Id.* at 673 (quoting the assignment) (court's alteration).
163. *Id.* at 674.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 674, 675.

The court reasoned that BTA had no present obligation to pay Boldrick for his overriding royalty interest which was currently being used to discharge the non-consent penalty under paragraph 31(b) of the JOA.[168] The court rejected Boldrick's argument that the overriding royalty was not a subsequently created interest.[169] The overriding royalty was not included in Exhibit A to the JOA, and it was assigned after the JOA was executed.[170] Boldrick pointed to the exception in paragraph thirteen of the JOA for overriding royalty interests, but the court rejected this distinction because paragraph thirteen pertains to the right to take production in-kind and only pertains to overriding royalty interests scheduled on Exhibit A.[171] Moreover, paragraph 31(b) was applicable "[n]otwithstanding anything herein to the contrary."[172] Boldrick argued that even if the interest BTA relinquished to the operator during payout under the JOA included Boldrick's overriding royalty interest, BTA was nevertheless bound by the specific language of its overriding royalty grant to Boldrick.[173] The court was unmoved. BTA had no duty to pay anything, because under the JOA, BTA was getting nothing. Regardless of the ownership or continuing rights of Boldrick in the production, nothing could change the fact that Boldrick's interest was expressly chargeable with a pro rata share of all costs and expenses until payout.[174]

The significance of the case is that an assignment of a cost-free overriding royalty subject to a JOA may assign nothing, if the assignor then goes non-consent under the JOA. The significance of the case may be limited, because it does not appear that the JOA litigated was one of the common American Association of Petroleum Landmen ("AAPL") model form operating agreements. For example, the AAPL 610-1982 Model Form Operating Agreement generally requires disclosure of all overriding royalties, fixes a minimum net revenue interest as to all leases subject to the JOA, and fixes liability for "excess" burdens. Undisclosed and subsequently created burdens must be borne by the party contributing the lease or creating the interest, which is supported by an indemnity.[175] Article VI of the model form then provides that "[d]uring the period of time Consenting Parties are entitled to receive Non-Consenting Party's share of production . . . Consenting Parties shall be responsible for the payment of all . . . overriding royalty . . . applicable to Non-Consenting Party's share of production not excepted by Article III.D.[176]

EOG Resources, Inc. v. Killam Oil Co., Ltd.[177] held that the individual-

168. *Id.* at 675.
169. *Id.*
170. *Id.* at 673, 676.
171. *Id.* at 675.
172. *Id.* at 676 (quoting the JOA) (court's alteration).
173. *Id.*
174. *Id.* at 677.
175. AAPL FORM 610-1982 MODEL FORM OPERATING AGREEMENT, Art. III, 7 WEST'S TEX. FORMS, MINERALS, OIL & GAS § 13.2 (3d ed. 2007).
176. *Id.* at Art. VI.
177. 239 S.W.3d 293 (Tex. App.—San Antonio 2007, pet. denied).

loss provision of a JOA operated against the party losing title, regardless of whether the party acquiring title was a third party or another party to the JOA.[178] The San Antonio Court of Appeals applied the test adopted in *Anadarko Petroleum Corp. v. Thompson*[179] for determining whether a well is capable of producing in paying quantities, when the issue arises under a retained acreage clause.[180] EOG and Killam were parties to a JOA governing multiple zones. EOG lost title to some of those zones under its farmout from Killam. EOG argued that the continuing JOA (by allocating the right to share in production) created a contractual right in EOG to share in production from those zones which EOG may have lost under the applicable farmout agreement.[181]

The court recognized that this typical JOA identified the parties' interests and provided that those interests would continue for so long as any of the leases subject to the JOA and included in the Contract Area continued in force.[182] Therefore, the JOA did unambiguously provide that each party's share of production was based on the percentage of its fractional interest as shown in the JOA.[183] However, the JOA also contained a typical individual loss provision which provided:

> The party whose oil and gas lease or interest is affected by the title failure shall bear alone the entire loss . . . and . . .
> the interests of the parties shall be revised on an acreage basis . . . so that the interest of the party whose lease or interest is affected by the title failure will thereafter be reduced in the Contract Area by the amount of the interest lost . . . .[184]

EOG argued that the failure of title provisions should be interpreted as only applying to failures of title in favor of a third party who was not a party to the JOA. EOG pointed to certain provisions of the article on failure of title which were expressly addressed to third parties. The broad provisions quoted above were not expressly limited to third parties, and the court refused to read such a limitation into the JOA. The court concluded that when the failure of title is in favor of any party or a non-party to the JOA, then such "loss [of title] results in a reduction of [the party or parties] interest from that shown on Exhibit 'A.'"[185]

EOG also raised as a fact issue the application of the retained acreage clause in the applicable farmout agreement. The clause preserved 640 acres surrounding each well "which is producing or capable of producing."[186] None of the wells were producing, and the issue played out on the construction of competing expert witness affidavits and the proper

178. *Id.* at 300.
179. 94 S.W.3d 550 (Tex. 2002).
180. *EOG Res., Inc.*, 239 S.W.3d at 302-03.
181. *Id.* at 297.
182. *Id.* at 298.
183. *Id.* at 299.
184. *Id.* (quoting the JOA).
185. *Id.* at 300 (quoting the JOA) (court's alteration).
186. *Id.* at 301 (quoting the JOA).

standard for determining whether any of the wells were "capable of producing." EOG contended that the proper standard for analyzing "capable of producing" could change depending upon the context in which the phrase is used.[187] The court disagreed and held that the test articulated in *Anadarko Petroleum Corp.*[188] applied.[189] Because Killam's expert affidavit carefully tracked the requirements of the *Anadarko* test (the well will not flow when the well switch is turned "on"), the wells in this case were, as a matter of law, not capable of producing in paying quantities.[190]

The significance of the case is that the very common individual-loss provision found in many form JOA's is likely to be held to change the contractual split of the production revenues, even if the person who has the better title is another party to the JOA. Moreover, this court seems to hold that unless and until a different standard is articulated for determining when a well is "capable of producing," the *Anadarko* standard will be given universal application.

V. PIPELINES

SouthTex 66 Pipeline Co., Ltd. v. Spoor[191] held that a pipeline easement acquired by WesTTex Pipeline Company by condemnation could be leased by WesTTex to another pipeline company, SouthTex.[192] The landowner contended that a lease is not an "assignment," and that a condemned easement cannot be leased to others.[193] The easement originally awarded by the trial court to WesTTex was based on WesTTex's statement that, "[t]he pipeline and any replacement pipeline will be utilized by WesTT[e]x, and its successors and assigns, as a common carrier pipeline transporting crude oil and refined petroleum products. . . ."[194]

Pipeline easements are assignable in Texas.[195] Therefore, unless there is something specific to establish that an easement cannot be assigned, Texas law will allow it.[196] In this case, the court held that the "successors and assigns" language was evidence that the easement was assignable.[197]

The landowner argued that a lease was not an assignment. The court relied upon Black's Law Dictionary[198] for definitions of "lease," "convey," "transfer," and "assignment" to conclude that an assignment is ultimately *any* mode of disposing of or parting with an asset or an interest in an asset.[199]

187. *Id.* at 302.
188. 94 S.W.3d 550, 558 (Tex. 2002).
189. *EOG Res., Inc.*, 239 S.W.3d at 303.
190. *Id.*
191. 238 S.W.3d 538 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).
192. *Id.* at 548-49.
193. *Id.* at 546-47, 547.
194. *Id.* at 541.
195. *Id.* at 546.
196. *Id.*
197. *Id.*
198. (8th ed. 2004).
199. *Id.* at 547-48.

The court distinguished *Calcasieu Lumber Co. v. Harris*[200] which held, in part, that an easement acquired for a railroad did not include the right to lease the land.[201] The *Southtex* court construed that prohibition as limiting the right to lease so as to prohibit a lease for an independent use not contemplated by the condemnation.[202] Here, the lease was valid because WesTTex leased the easement to SouthTex for the same purpose as the original easement as condemned.

Bagley v. Centana Intrastate Pipeline, L.L.C.[203] held that a pipeline can be relocated, notwithstanding that the easement granted was an "easement along a route," with the route defined as the location of the pipeline "as constructed," and that the route of the pipeline as depicted on Exhibit A to the easement was the route of the pipeline as constructed in 1987.[204] The pipeline company had multiple easements and pipelines crossing landowner's tract. Line 27 and Line 17 both crossed landowner's tract. Line 17 entered the processing plant on lands adjacent to landowner's tract. Line 27, from offshore, did not. To get the offshore gas from Line 27 into the processing plant, the pipeline company cut off part of Line 17, extended Line 17 by a 105-foot section of new twelve inch pipe to Line 27, and connected Line 27 to Line 17. The landowner sued for injunction, declaratory relief, and damages for trespass.[205]

The document originally creating the easement in 1987 for Line 17 granted:

> . . . a right of way and easement along a route (the location of the pipelines, as constructed, to evidence such a route) to construct . . . operate . . . alter, replace, but not enlarge the size of . . . pipelines . . . as depicted on Exhibit A for the transportation of . . . gas . . . through a pipeline . . . through and within that certain pipeline right-of-way and easement hereinafter set forth across, under and upon the lands of G[rantor] . . . as hereinafter described.
> There is included in this grant the right, from time to time, to . . . alter, . . ., change the size of, but not enlarge the size of the line. The pipeline to be constructed will be no larger than 12 [inches] in diameter.[206]

Exhibit A as attached to the 1987 easement depicted the original pipeline installed in 1987.

The Beaumont Court of Appeals held that the pipeline company could not alter the "size" of the line to something larger than twelve inches, but that there was no restriction barring the pipeline company from lengthening the pipeline within the landowner's tract.[207] It reasoned that the 105-

200. 13 S.W. 453 (1890).
201. *Calcasieu*, 13 S.W. at 454-55.
202. *SouthTex 66 Pipeline Co.*, 238 S.W.3d at 547.
203. No. 09-06-063-CV, 2007 WL 846554 (Tex. App.—Beaumont Mar. 22, 2007, pet. denied) (mem. op.).
204. *Id.* (quoting the agreement).
205. *Id.* at *1
206. *Id.* (quoting the agreement) (alteration by author).
207. *Id.* at *4.

foot section was "entirely within the easement."[208]

The concurring opinion argued that the easement granted was along a "route" that the existing pipeline followed "as depicted" on Exhibit A to the easement.[209] Given that the easement did not expressly grant the right to lay additional lines, the court should not imply such rights.[210] However, because the landowner's only issues preserved on appeal concerned the trespass claim, and the case was properly in contract and not in tort, this justice concurred in the judgment.[211]

The concurring opinion is well-reasoned, and better for Texas and the industry. There are thousands of easements of record that are similar to the one in this case. At the time those easements were granted, neither the landowner nor the pipeline company may have known exactly how the easement would actually turn out "as constructed." The bargained for consideration generally would have involved one pipeline across Blackacre, and the landowner may not have particularly cared to exactly define the location before it was built. The pipeline company did not want to have to amend all of its easements after construction to reflect the specific path taken by the pipeline. Many of these easements effectively grant an easement along a route defined by the pipeline as constructed. But after the pipeline is actually constructed, all parties have an interest in knowing exactly where that easement is located. The pipeline company would not have wanted anything to harm or interfere with its pipeline. The landowner wants to be free to enjoy the rest of Blackacre without having to assume the pipeline may be relocated. This particular case would have been more interesting if an intervening bona fide purchaser for value, perhaps a retired appellate judge, had constructed a $1,000,000 house with a large and deep swimming pool on the site of the proposed 105-foot "extension."

VI. REGULATIONS

City of Mont Belvieu v. Enterprise Products Operating, LP[212] held that the Legislature did not intend to fully preempt a municipality's authority to regulate underground salt dome hydrocarbon storage facilities.[213] Absolute preemption was not intended because it would have given the Texas Railroad Commission ("TRRC") exclusive authority over these facilities and barred enforcement of city permit ordinances in the district court.[214] Enterprise was granted a permit to operate an underground hydrocarbon storage facility by the TRRC, after a lengthy process in which the City of Mont Belvieu (the "City") participated. The TRRC then granted Enterprise a permit to drill a well to access the facility. Enter-

208. *Id.*
209. *Id.* at *5.
210. *Id.*
211. *Id.*
212. 222 S.W.3d 515 (Tex. App.—Houston [14 Dist.] 2007, no pet.).
213. *Id.* at 521.
214. *Id.*

prise began drilling operations without obtaining a drilling permit from the City.[215] The City brought claims for temporary and permanent injunction for damages against Enterprise, alleging Enterprise's drilling violated city ordinances and constituted a nuisance.[216]

The Fourteenth District Houston Court of Appeals first held that the City's enforcement of its ordinances requiring a permit to drill was not a collateral attack on the validity of the TRRC permits because the City did not seek to contradict or overturn them; the City sought to impose additional requirements.[217]

The court then addressed the extent to which Chapter 211 of the Texas Natural Resources Code might preempt a municipality's authority regarding salt dome storage facilities, or limit the district court's subject matter jurisdiction. Chapter 211 of the Code, under jurisdiction provides in part: "[TRRC] has jurisdiction over all salt dome storage of hazardous liquids and over salt dome storage facilities used for the storage of hazardous liquids."[218] Furthermore, under "Powers of Local Governments," the code provides:

(a) This chapter does not reduce, limit, or impair the authority provided by law to any municipality, except as provided by Subsection (b) of this section.
(b) A municipality or county may not adopt or enforce an ordinance or other regulation that establishes safety standards or practices applicable to hazardous liquid salt formation storage facilities that are subject to regulation by federal or state law.
(c) "Safety standards or practices" means any regulation of an activity or facility covered by this chapter or that is incompatible with the safety standards or practices enacted or adopted by federal or state government pursuant to The Hazardous Liquid Pipeline Safety Act of 1979, as amended.[219]

"For a state statute to preempt a subject matter usually encompassed by municipal authority, the statute must do so with unmistakable clarity."[220] Notwithstanding Chapter 211's reservation of certain powers to the TRRC, section 211.002 of the Natural Resources Code specifically preserves a municipality's authority. Also, the phrase "safety standards or practices" has a specific, limited meaning in chapter 211, which "does not include all actions a municipality might take regarding a salt dome or even all matters related to safety."[221]

Thus, the City's permit process was not preempted by TRRC's permit process. The grant of jurisdiction to the TRRC in section 211.011 merely

215. *Id.* at 517.
216. *Id.* at 517-18.
217. *Id.* at 519.
218. *Id.* at 521 (quoting TEX. NAT. RES. CODE ANN. § 211.011 (Vernon 2001)).
219. TEX. NAT. RES. CODE ANN. § 211.002 (Vernon 2001).
220. *City of Mont Belview*, 222 S.W.3d at 520.
221. *Id.* at 521.

gives the TRRC jurisdiction, not exclusive jurisdiction.[222] "Accordingly, this case does not present an issue of forum preemption, but instead a question of choice of law preemption, which does not operate as a jurisdictional bar to the City's claims."[223] The district court, having general jurisdiction, could "determine whether, and to what extent, the ordinances at issue are preempted by the Legislature's grant of regulatory authority to TRRC."[224]

As municipalities continue to expand, and oil and gas operations encroach on urban areas, mixed land use controversies and conflicts in regulatory powers are bound to increase. An increasingly urbanized Texas, combined with a decrease in the relative economic importance of the oil and gas industry in Texas, suggest that the trend is likely to be toward more regulatory restrictions on operations.

In re Discovery Operating, Inc.[225] held that the TRRC does not have exclusive or primary jurisdiction over claims for negligence, negligence *per se*, or common law and statutory waste.[226] The claims arose from defendant BP America Production Company's ("BP") use of two saltwater injection wells in the vicinity of Discovery's oil and gas lease. The trial court abated the judicial proceeding and referred the matter to the TRRC.[227]

"[W]hether an agency has exclusive or primary jurisdiction is a question of law."[228] "An agency has exclusive jurisdiction when the legislature has granted to it the sole authority to make an initial determination in a dispute, [i.e.], when a pervasive regulatory scheme indicates that the legislature intended for the regulatory process to be the exclusive means of remedying the problem."[229] BP relied upon the Texas Natural Resources Code and the Texas Water Code in claiming that the TRRC had exclusive jurisdiction over underground injection control.

There are provisions in the Texas Natural Resources Code that preserve a private cause of action:

> § 85.321. Suit for Damages
> A party who owns an interest in property or production that may be damaged by another party violating the provisions of this chapter that were formerly a part of Chapter 26, Acts of the 42nd Legislature, 1st Called Session, 1931, as amended, or another law of this state prohibiting waste or a valid rule or order of the railroad commission may sue for and recover damages and have any other relief to which he may be entitled at law or in equity. Provided, however, that in any action brought under this section or otherwise, alleging waste to have been caused by an act or omission of a lease owner or

222. *Id.* at 522.
223. *Id.*
224. *Id.*
225. 216 S.W.3d 898 (Tex. App.—Eastland 2007, orig. proceeding).
226. *Id.* at 901, 903-04.
227. *Id.* at 901.
228. *Id.* at 902.
229. *Id.*

> operator, it shall be a defense that the lease owner or operator was acting as a reasonably prudent operator would act under the same or similar facts and circumstances.
>
> § 85.322. Proceedings Not to Impair Suit for Damages
>
> None of the provisions of this chapter that were formerly a part of Chapter 26, Acts of the 42nd Legislature, 1st Called Session, 1931, as amended, no suit by or against the railroad commission, and no penalties imposed on or claimed against any party violating a law, rule, or order of the commission shall impair or abridge or delay a cause of action for damages or other relief that an owner of land or a producer of oil or gas, or any other party at interest, may have or assert against any party violating any rule or order of the commission or any judgment under this chapter.[230]

Although the Texas Natural Resources Code does provide a pervasive regulatory scheme, the court found these specific provisions preserving the private cause of action to be more persuasive.[231] The court reached the same conclusion as to the Texas Water Code.[232]

The primary jurisdiction doctrine allocates power between courts and agencies.[233] Courts will defer to the administrative agency when "(1) an agency is typically staffed with experts trained in handling the complex problems in the agency's purview; and (2) great benefit is derived from an agency's uniformly interpreting its laws, rules, and regulations."[234]

The court held that the primary jurisdiction doctrine does not apply to actions or disputes that are "inherently judicial in nature."[235] The causes of action asserted in this case—negligence, negligence per se, and waste—were inherently judicial in nature.[236] In addition, the court was persuaded that applying the judicially created doctrine of primary jurisdiction would be in direct contravention of the specific language in Texas Natural Resource Code section 85.322, as quoted above, that a cause of action for damages or other relief shall not be impaired, abridged, or delayed.[237]

The significance of the case is that the court gives strong deference to the statutory provisions preserving the right to litigate, rather than to the administrative expertise of the Railroad Commission of Texas (the "TRRC").

Seagull Energy E&P, Inc. v. Railroad Commission of Texas[238] held that a mineral owner's property right to commingled oil or gas or both extends collectively to the commingled whole rather than separately to each

230. TEX. NAT. RES. CODE ANN. §§ 85.321, 85.322 (Vernon 2001).
231. *Discovery Operating Inc.*, 216 S.W.3d at 903.
232. *Id.*
233. *Id.* at 904.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. 226 S.W.3d 383 (Tex. 2007).

commingled deposit.[239] The TRRC's field rules are not applied separately to each strata (or sand) in a commingled field, and an operator can prove an unconstitutional taking only by proving confiscation (drainage) from the reservoir as a whole, rather than from an individual, commingled sand.[240]

"[C]ommingling occurs when one or more otherwise separate strata or accumulations of hydrocarbons are simultaneously produced through the same string of pipe in the well[ ]bore."[241] A "sand" in oil and gas usage loosely refers to an area known to contain oil or gas or both.[242] "When sands are discontinuous it is difficult to correlate the distinct zones throughout the area, meaning that a producer may be able to complete a well into a particular sand that its adjacent neighbors cannot and vice-versa."[243] Multiple sands might or might not be in communication and thus might or might not be a single reservoir.[244] Sands which do not naturally communicate with each other may be treated as one reservoir when the TRRC authorizes commingled production.[245] Commingling may be beneficial by extending the life of sands too small to justify separate wells or whose pressure is too low to support extraction.[246]

In this case, involving the Waskom (Cotton Valley) Field, there were twelve commingled sands, and a producer could complete a well in any number of sands found on its property.[247] The field rules required eighty acres for one well and at least 1,320 feet between wells completed in or drilling to the same reservoir on the same lease.[248]

Seagull owned a 115.64 acre lease in the Waskom Field. Beneath Seagull's lease were three vertically separate sands: the "Stroud," the "C," and the "Taylor." Seagull completed one well into the C Sand in 1991, and in 2000, Seagull was granted a permit to complete a new well in all three sands.[249] Because Seagull did not have sufficient acreage to support two wells, and because its two wells were only 1,200 feet apart, Seagull could not produce both wells without an exception to spacing and density rules.[250] Because concurrent production would violate the Waskom special field rules, Seagull shut-in the first well before production began from the new well. Although the new well was successfully completed in the Stroud and Taylor sands, it was not successfully completed in the C Sand. Seagull then sought a permit from the TRRC to reopen the first well, so it could produce from the C Sand. The TRRC denied the

239. *Id.* at 387-88
240. *Id.* at 388.
241. *Id.* at 384 n.1.
242. *Id.* at 385 n.4.
243. *Id.* at 385 n.2.
244. *Id.* at 385 n.4.
245. *Id.*
246. *Id.* at 390 n.11.
247. *Id.* at 385 n.2.
248. *Id.* at 385 n.5.
249. *Id.* at 384-85.
250. *Id.* at 385 n.5.

permit after concluding that Seagull was not entitled to an exception from the special field rules, because Seagull had not shown confiscation or drainage from the commingled reservoir as a whole.[251]

Seagull argued that the TRRC's refusal to allow it to produce from the C Sand amounted to an unconstitutional taking of Seagull's gas. Seagull claimed it had a vested property right in each gas deposit under its land.[252] The TRRC responded that there was not a taking because the three gas deposits were commingled into one common reservoir in which Seagull had a permitted and producing well. The confiscation must be from the whole reservoir, and not from an individual sand.[253]

The issue was whether a property owner's right to commingled oil and gas extends separately to each deposit or to the commingled whole.[254] The Texas Supreme Court acknowledged that while "a mineral owner has the right to its fair share of the minerals on and under its property, the right does not extend to specific oil and gas beneath the property."[255] Based on the record before it, the supreme court determined that the TRRC's actions did not amount to a taking because Seagull failed to show that concurrent production from both wells was necessary to prevent drainage to the common reservoir.[256]

The significance of the case is the holding that within a commingled field there can be no confiscatory taking unless there is a showing that there is drainage to the common reservoir. Proof of drainage of a particular sand within that reservoir will not suffice. The TRRC may consider the commingled deposits as though they are one reservoir when regulating drilling and production in the commingled field.

VII. ETHICS

Robertson v. ADJ Partnership, Ltd.[257] held that an attorney and landman had to disgorge profits in the form of money and overriding royalties obtained in breach of fiduciary duty.[258] Attorney Bill McGraw had a long history of representing his wife's family and doing deals with his wife's family. This included representing and doing various oil and gas deals with his father-in-law, David Henderson, and brother-in-law, Abel Adams; eventually probating his father-in-law and mother-in-law's estates; and representing his sister-in-law, Virginia Adams, after she was widowed.[259] The family had a history of keeping their properties together in partnerships. This suit was brought by Virginia Adams and a related partnership against her brother-in-law attorney Bill McGraw,

251. *Id.* at 385.
252. *Id.* at 387.
253. *Id.*
254. *Id.*
255. *Id.* at 388-89.
256. *Id.* at 390.
257. 204 S.W.3d 484 (Tex. App.—Beaumont 2006, pet. denied).
258. *Id.* at 495.
259. *Id.* at 486-87.

landman John L. Robertson, and McGraw and Robertson's affiliated entity, Sibling "A", Inc.[260]

McGraw and Robertson had known each other for a long time. In 1993, McGraw helped Robertson form several entities that Robertson could use to conceal his identity when acquiring leases for clients who wanted to conceal their involvement. One of those entities formed was the defendant, Sibling "A." McGraw was the president of Sibling "A." No leases were ever run through Sibling "A," except the leases granted by the Henderson Family Partnership involved in this suit.[261]

Robertson was leasing independently as a broker for Marathon Oil Company. His supervisor at Marathon was Wayland Crawley.[262] Robertson sometimes paid Crawley to make it appear Marathon was interested in a lease when Marathon was not, which assisted Robertson in selling the lease to another party. "Some of the money was paid to Crawley's teen-aged [sic] daughter, who did nothing for the money."[263]

The series of transactions involved in this case began with a Marathon deal and varied in the details, but followed a similar pattern. The general pattern was that McGraw secured his sister-in-law's commitment to a specific bonus and royalty. Robertson then found a better deal. The leases were then run through Sibling "A" at the lower consideration, and McGraw and Robertson captured the higher bonus and overriding royalties through Sibling "A." McGraw did not disclose to his sister-in-law (Adams) that he was the president of Sibling "A" or that he was receiving more than her. The transactions included a "commission" to Wayland Crawley and the documents and manipulating of documents to conceal the relationships of the parties. Crawley's daughter eventually received some of the funds, and when the transactions moved on from Marathon to other oil companies, Crawley continued to get a cut.[264]

Adams sued for fraud and breach of fiduciary duty and won a jury verdict. McGraw settled; but Robertson appealed.[265] Robertson contended that there was insufficient evidence to support the jury's finding that a relationship of trust existed between McGraw and Adams. He contended that Adams' 1990 letter to McGraw (after a fee dispute) that McGraw must notify her in advance of any fees to be charged and Adams' limited use of McGraw after Abel's death on a few unrelated matters, showed that there was no fiduciary relationship.[266] The Beaumont Court of Appeals first noted that a "fiduciary duty arises as a matter of law in formal attorney-client and trustee relationships."[267] Therefore, to the extent McGraw represented Adams on these transactions, a fiduciary

260. *Id.* at 487.
261. *Id.*
262. *Id.*
263. *Id.* at 487-88.
264. *See id.* at 490-91.
265. *Id.* at 486.
266. *Id.* at 487, 492.
267. *Id.* at 491.

relationship existed, and to the extent McGraw acted as escrow agent, a formal duty of disclosure arose.[268] The court did not seem sure whether McGraw did or did not represent Adams, but Adams had no other counsel and McGraw made it appear their interests were identical.[269] It was clear on the record that the funds were generally run through McGraw's escrow account.[270]

Moreover, the court was strongly persuaded that the evidence supported a finding of a fiduciary relationship based on personal relationships. The court found that the relationship in this case met the test that "the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit."[271] The court pointed to McGraw's own perception of the relationship by referring to a letter McGraw wrote. "The letter referred to McGraw's promise that he made to his [father-in-law Henderson], on Henderson's death bed, invoking the same promise made by Henderson to Henderson's own father, 'that I would, as he did, look after the family properties to the benefit of all concerns. This I have done.'"[272]

The court also summarily dismissed Robertson's contention that the evidence was insufficient to show that Robertson and Sibling "A" aided and abetted McGraw in the breach of fiduciary duty.[273] Likewise, the court rejected Robertson's contention that he could not have committed fraud because he never had any direct communication with Adams.[274] The court cited to the recent well-known case of *In re Arthur Anderson LLP*[275] for the principle that "each party to a fraudulent scheme is responsible for the acts of the other participants done in furtherance of the scheme and is liable for fraud."[276]

The court confirmed that disgorgement of profits was the appropriate remedy for fraud and breach of fiduciary duty.[277] Robertson was required to give up his cash compensation and his overriding royalties.[278]

The significance of the case is that, notwithstanding the egregious facts, the lawyer who represents family members always assumes a larger risk, and a lawyer who uses his escrow account to facilitate a transaction assumes a duty of disclosure. For a landman working with an attorney, the case illustrates how the attorney's more onerous duty may extend to the landman who knowingly works with the attorney on a transaction ultimately found to be in breach of that duty.

---

268. *Id.*
269. *Id.* at 492.
270. *Id.* at 491.
271. *Id.* at 491-92 (quoting Associated Indem. Corp. v. CAT Contracting, Inc., 964 S.W.2d 276, 288 (Tex. 1998)).
272. *Id.* at 492 (quoting the letter).
273. *Id.* at 493.
274. *Id.* at 493-94.
275. 121 S.W.3d 471 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).
276. *Robertson*, 204 S.W.3d at 494 (quoting *Anderson*, 121 S.W.3d at 481).
277. *Id.* at 495.
278. *Id.*

VIII. LEGISLATION

Act: Act of May 8, 2007, 80th Leg., R.S., ch. 210, §§ 1-3, 2007 Tex. Gen. Laws 297 (Vernon).[279] (HB 630)

Issue: Relating to notice to a surface owner by an oil or gas well operator of the issuance of a permit for certain oil and gas operations.

Summary: This act requires the operator of an oil or gas well to give written notice to the surface owner of the tract of land on which a well is (or is proposed to be) located no later than the fifteenth business day after the date the TRRC issues the permit to drill a new oil or gas well or reenter a plugged and abandoned oil or gas well. The act defines a "surface owner" as the first person shown on the appraisal roll of the appraisal district for the county in which a tract of land is located as owning an interest in the surface estate of the land.

The applicability of the act is limited to the drilling of a new oil or gas well or the reentry of a plugged and abandoned oil or gas well. The act does not extend to the plugging back, reworking, sidetracking, or deepening of an existing oil or gas well that has not been plugged or abandoned or the use of a surface location that is the site of an existing oil or gas well that has not been plugged or abandoned to drill a horizontal well.

Under the act, operators are not required to give notice to a surface owner if the operator and surface owner have entered into an agreement which contains alternative notice provisions or the surface owner has waived his right to notice in writing.

An operator's failure to give notice under the act does not affect any existing or future permit(s) issued by the TRRC nor does it affect the operator's right to develop the mineral estate in the land.

Effective: September 1, 2007.

2. **Act:** Act of May 25, 2007, 80th Leg. R.S., ch. 523, §§ 1-2, 2007 Tex. Gen. Laws 925 (Vernon).[280] (S.B. 714)

Issue: Relating to reports regarding certain water wells required by a groundwater conservation district.

Summary: This act provides that a Groundwater Conservation District ("GWCD") may require that records are kept and reports are prepared regarding the drilling, equipping, and completing of water wells and the production and use of groundwater.

The act authorizes a GWCD to adopt rules that require an owner or operator of a water well which is required to be registered with or permitted by the district to report groundwater withdrawals using appropriate reporting methods. The act allows reporting exemptions for owners or

---

279. Codified as an amendment to subch. P., ch. 91 Tex. Nat. Res. Code, adding §§ 91.701, 91.702, 91.703, 91.704, and 91.705 (Vernon Supp. 2008).

*Portions of the legislative section of this Article were supplied to the author by Ben Sebree, Vice-President for Governmental Affairs, Texas Oil & Gas Association, Austin, Texas.

280. Codified as an amendment to TEX. WATER CODE § 36.111(a), adding § 36.111(b) (Vernon 2008 & Supp. 2008).

operators of a well used solely for domestic use or for wells providing water for livestock or poultry on a tract of land larger than ten acres that is either drilled, completed, or equipped so that it is incapable of producing more than 25,000 gallons of groundwater a day.

Effective: June 16, 2007.

3. **Act:** Act of May 26, 2007, 80th Leg., R.S., ch. 1321, §§ 1-3, 2007 Tex. Gen. Laws 4471 (Vernon).[281] (S.B. 1383)

Issue: Relating to district hearings and citizen suits for illegally drilling or operating a water well.

Summary: This act declares that drilling or operating well(s) without a required permit or producing groundwater in violation of a GWCD's rule is deemed illegal, wasteful per se, and a nuisance.

This act provides that a landowner or other person rightfully producing groundwater from land that is adjacent to the land on which well(s) are drilled or operated without the necessary permit(s); from which groundwater is produced in violation of GWCD rules, or who own the right to produce groundwater from land lying within one-half mile of the well(s), may sue the owner of the well(s) in a court of competent jurisdiction to restrain the illegal drilling, operating, or both. The aggrieved party may also sue the owner of the water well(s) for damages and injuries suffered as a result of the illegal operation or production and other relief for which the party may be entitled. The existence of well(s) drilled without a required permit or the operation of well(s) in violation of GWCD rules is prima facie evidence of illegal drainage.

The act requires the aggrieved party to file a written complaint with the GWCD having jurisdiction over the well(s) drilled or operated without a permit or in violation of a GWDC rule before filing suit in court. According to the act, the GWCD having jurisdiction over the matter shall investigate the complaint and after notice and a hearing, which must occur no later than the 90th day after the date the written complaint was received by the GWCD, shall determine whether a GWCD rule has been violated. The act states that an aggrieved party may only file suit on or after the ninety-first day after the date the written complaint was received by the GWCD.

The act allows an aggrieved party to sue a well owner or well driller to restrain the drilling or completion of an illegal well after filing the written complaint with the GWCD without the need to wait for a hearing concerning the matter.

Effective: June 15, 2007.

4. **Act:** Act of May 25, 2007, 80th Leg., R.S., ch. 1201, §§ 1-7, 2007 Tex. Gen. Laws 4072 (Vernon).[282] (H.B. 1495).

---

281. Codified as amendments to TEX. WATER CODE §§ 36.119(a), 36.119(b), 36.119(c), adding §§ 36.119(g), 36.119(h) (Vernon 2008 & Supp. 2008).

282. Codified as an amendment to TEX. GOV'T CODE ANN. ch. 402, adding § 402.031 (Vernon Supp. 2008), amending TEX. PROP. CODE ANN. § 21.012, adding § 21.0112 (Vernon 2004 & Supp. 2008).

Issue: Relating to a bill of rights for property owners whose property may be acquired by governmental or private entities through the use of eminent domain authority.

Summary: The act requires the Attorney General to prepare an easily understood written statement that includes a bill of rights for a property owner whose real property may be acquired by a government or private entity through the use of the entity's eminent domain authority. The statement must be available to the public on the Attorney General's website.

The Attorney General's statement must include the title, "Landowner's Bill of Rights" and a description of the following items:

(1) the condemnation procedure provided in the Property Code (chapter 21),
(2) the condemning entity's obligations to the property owner, and
(3) the property owner's options during a condemnation, including the property owner's right to object to and appeal the amount of damages awarded.

The landowner's bill of rights must notify each property owner that the owner has the right to:

(1) notice of the proposed acquisition of the owner's property,
(2) a bona fide good faith effort to negotiate by the entity proposing to acquire the property,
(3) an assessment of damages to the owner that will result from the taking of the property,
(4) a hearing, including a hearing on the assessment of damages, and
(5) an appeal of a judgment in a condemnation proceeding, including an appeal of an assessment of damages.

The act requires a government entity or private entity with eminent domain authority to send a landowner's bill of rights statement by first class mail or otherwise provide the statement before it begins the negotiation process with a property owner to acquire real property. The statement must be provided to the person whose name is listed on the most recent tax rolls of any appropriate taxing unit authorized to levy taxes against the property.

Effective: February 1, 2008.

5. **Act:** Act of May 23, 2007, 80th Leg., R.S., ch. 696, §§ 1-3, 2007 Tex. Gen. Laws 1321 (Vernon).[283] (H.B. 1920)

Issue: Relating to the remedies available in connection with certain disputes between producers of natural gas and persons who gather or transport the gas.

Summary: This act provides that a producer is entitled to submit a written request for an explanation of any loss or inability to account for

283. Codified as amendment to subch. C, ch. 85, TEX. NAT. RES. CODE, adding § 85.065 (Vernon Supp. 2008).

the gas tendered from a person who gathers or transports gas for the producer. The act specifies what the producer may ask how and when a response should be made by the gas gatherer or transporter, and what should be included in the response.

The act provides that a producer may file an informal complaint with the TRRC against a person who gathers or transports gas for the producer if the gatherer or transporter provides an inadequate explanation of any loss or inability to account for the gas or fails to provide an explanation for lost or unaccounted gas. The act specifies the requirements for an informal complaint by a producer and states that an informal complaint may not be filed by a producer before the thirtieth day after the end of the production period covered by the complaint. The act also establishes a fourteen day deadline for the person who gathered or transported the gas to provide to the producer and the TRRC an accounting of the gas tendered during the production period covered by the complaint. The act states how the accounting may be provided and the elements that should be included in the accounting.

The act authorizes the Railroad Commission to grant a time extension for the required accounting from a person who gathered or transported the gas. However, the extension may not permit the accounting to be provided later than the forty-fifth day after the date the informal complaint was filed.

The act states that if the person who gathered or transported the gas does not have the necessary information for the required accounting, the person must supply a written explanation to the producer and the TRRC regarding the reason the gatherer or transporter does not possess the necessary information.

The act makes it clear that if a person who gathered or transported the gas fails to provide the required accounting, the informal complaint filed by the producer will be considered valid.

If a producer's complaint is considered valid or the TRRC determines the gas gatherer or transporter committed waste, the act authorizes the TRRC to take any action it considers appropriate to prevent waste.

The act only applies to a producer and a person who gathers or transports gas for the producer under a contract entered into or renewed between the parties on or after September 1, 2007.

The act authorizes a producer, upon written request, to audit the books and records of the person who gathers or transports gas for the sole purpose of verifying whether the lost or unaccounted gas has been allocated to the volume of gas tendered as required under the contract. The producer is limited to one annual audit.

Effective: September 1, 2007.

6. **Act:** Act of May 23, 2007, 80th Leg., R.S., ch. 757, §§ 1-2, 2007 Tex. Gen. Laws 1566 (Vernon)[284] (H.B. 3273)

Issue: Relating to the powers and duties of the TRRC of Texas; providing an administrative penalty.

Summary: This act authorizes the TRRC, after notice and opportunity for a hearing, to impose an administrative penalty against a purchaser, transporter, gatherer, shipper, or seller of natural gas, or any other entity under the jurisdiction of the TRRC which the TRRC determines has (1) violated a TRRC rule adopting standards or a code of conduct for entities in the natural gas industry prohibiting unlawful discrimination, or (2) unreasonably discriminated against a seller of natural gas in the purchase of natural gas.

This act also authorizes the TRRC, after notice and opportunity for a hearing, to impose an administrative penalty against a purchaser, transporter, or gatherer of natural gas if the TRRC determines the person engaged in prohibited discrimination against a shipper or seller of natural gas because of a formal or informal complaint filed with the TRRC by the shipper or seller.

Under the act, the TRRC has the authority, after notice and opportunity for a hearing, to impose an administrative penalty against a purchaser, transporter, gatherer, shipper, or seller of natural gas who is a party to an informal complaint resolution proceeding and has failed to participate in the proceeding or failed to provide the information requested by the mediator of the proceeding.

The act clarifies that any administrative penalty imposed under this section may not exceed $5,000.00 a day for each violation.

As long as there is notice and opportunity for a hearing, this act authorizes the TRRC to issue any necessary order to prevent an entity from engaging in continued discrimination.

The act allows the TRRC to appoint a commission staff member as the mediator of an informal complaint with the TRRC. The act also states the parties may agree to employ and pay an independent mediator to mediate the complaint. The act does not prohibit the TRRC from requiring parties to participate in a formal complaint resolution proceeding, and on an annual basis, the TRRC must notify producers of the existence of the informal complaint resolution process.

The act provides that a confidentiality provision may not be required in a contract in which a producer is a party for the sale, transportation, or gathering of natural gas entered into on or after September 1, 2007.

The act authorizes the TRRC to set a transportation or gathering rate in a formal rate proceeding if TRRC determines the rate is necessary to remedy unreasonable discrimination in transportation or gathering ser-

284. Codified as an amendment to TEX. NAT. RES. CODE ch. 81, adding §§ 81.058, 81.059, 81.060, 81.061 (Vernon Supp. 2008).

vices. The TRRC may use a cost-of-service method or a market-based rate method in setting a rate in a formal rate proceeding.

Effective: September 1, 2007.

7. **Act:** Act of May 25, 2007, 80th Leg., R.S., ch. 911, §§ 1-6, 2007 Tex. Gen. Laws 2297 (Vernon)[285] (H.B. 2982)

Issue: Relating to the ad valorem tax appraisal of oil or gas interests.

Summary: This act modifies the existing act by adding a new market condition factor to acknowledge the Comptroller's current year price forecast for oil and gas in the current year of a property tax appraisal. The current year appraisal will reflect the price of oil or gas in the prior year multiplied by the new market condition factor. The act states the Comptroller will calculate the market condition factor by dividing the statewide average price for the severance tax revenue estimate for the current year by the statewide average price for severance tax in the prior year. The act also states that the Comptroller must calculate the actual statewide average prices for oil and gas and the market condition factors for oil and gas for the prior year, and publish the information for ad valorem tax appraisal purposes concurrently with the forecasted average oil and gas prices for the current year.

For property tax purposes, this act allows an owner of portable drilling rigs to have the equipment's situs be the location of the equipment on January 1, if the owner elects to render the portable drilling rig to the appraisal district for that particular location. If the owner makes this election, then the owner's portable drilling rigs will be taxable at their location as of January 1. If the owner does not have a place of business in Texas, the portable drilling rig is taxable by each taxing unit in which the rig is located on January 1.

Effective: January 1, 2008.

8. **Act:** Act of May 21, 2007, 80th Leg., R.S., ch. 816, §§ 1-8, 2007 Tex. Gen. Laws 1691 (Vernon)[286] (S.B. 1670)

Issue: Relating to certificates of compliance issued by the TRRC to owners or operators of certain wells subject to the jurisdiction of the commission.

Summaries: This act expands the statutes, rules, orders, permits, or certificates for which an owner or operator of any well subject to the jurisdiction of the TRRC must certify compliance to get a TRRC certificate of compliance to include Section 26.131 of the Water Code (protection of surface and subsurface water), and Subchapter C, Chapter 27 of the Water Code (oil and gas waste).

The act also provides that an operator of a pipeline cannot connect with any well under the jurisdiction of the TRRC until the well owner or

285. Codified as amendments to TEX. TAX CODE §§ 21.02(e), 23.175(a), adding § 162.227 (Vernon 2008 & Supp. 2008).

286. Codified as an amendment and redisignated as subch. P, ch. 91, Tex. Nat. Res. Code, adding §§ 91.701, 91.702, 91.703, 91.704, 91.705, 91.706, 91.707, amending §§ 85.3855, 86.004, 91.111, 91.114, 91.142, 101.003 (Vernon 2001 & Supp. 2008).

operator furnishes a certificate from the TRRC that the owner or operator has complied with the necessary rules, orders, licenses, or permits.

The act states that if an operator uses or reports use of a well for production, injection, or disposal, for which the operator's certificate of compliance has been cancelled, the TRRC may refuse to renew the operator's organization report until the operator pays the required fees for reissuance of the certificate and the TRRC issues the necessary certificate of compliance required for the well.

Effective: September 1, 2007.

9. **Act:** Act of May 17, 2007, 80th Leg., R.S., ch. 305, §§ 1-2, 2007 Tex. Gen. Laws 581 (Vernon)[287] (H.B. 1787)

Issue: Relating to the determination of title to real property through a declaratory judgment.

Summary: This act provides that a person may obtain a declaratory judgment relating to lands, tenements, or other real property when the sole issue regarding the title to real property is the determination of the proper boundary line between adjoining properties, notwithstanding the property code provision that a trespass to try title action is the method of determining title to lands, tenements, or other real property.

Effective: June 15, 2007.

10. **Act:** Act of May 21, 2007, 80th Leg., R.S., ch. 819, §§ 1-2, 2007 Tex. Gen. Laws 1695 (Vernon)[288] (S.B. 1781)

Issue: Relating to technical defects in instruments conveying real property.

Summary: This act provides that a person with a right of action for the recovery of real property or an interest in real property conveyed by an instrument with certain defects must bring suit no later than two years after the day the instrument was filed of record with the county clerk of the county where the property is located. The act modifies the time period in which a suit must be brought from four to two years.

The act also provides that an instrument affecting real property and containing a ministerial defect, omission, or informality in the certificate of acknowledgment will be lawfully recorded and the public will be on notice of the existence of the instrument on and after the date the instrument is filed as long as the instrument has been filed of record for longer than two years in the county where the property is located.

Effective: June 15, 2007.

287. Codified as an amendment to TEX. CIV. PRAC. & REM. CODE § 37.004, adding § 37.004(c) (Vernon 2008).

288. Codified as an amendment to TEX. CIV. PRAC. & REM. CODE §16.033(a), adding § 16.033(c) (Vernon 2002 & Supp. 2008).