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OIL, GAS, AND MINERALS

by
*Eric T. Laity**

THIS Article surveys the significant developments of the past year in the Texas law of oil, gas, and minerals.[1] The scope of this Article is limited to decisions by Texas and federal courts, enactments of the Texas Legislature, and rules and regulations promulgated by Texas administrative agencies. This Article does not cover developments in the taxation or federal regulation of oil, gas, and minerals, nor does the Article cover developments in international energy law.

I. CASE LAW

A. Surface Deposits of Minerals

In *Moser v. United States Steel Corp.*[2] the Texas Supreme Court abandoned the surface destruction test developed in *Acker v. Guinn*[3] and *Reed v. Wylie*.[4] Instead, the court held that ownership of near-surface minerals depends on whether the substances are deemed to be minerals.[5] The court further held, however, that a surface owner is entitled to damages from the owner of the mineral estate for any destruction of the land's surface caused in recovering near-surface minerals.[6] A motion for rehearing is pending before the supreme court at the time of this writing, and the court's response may clarify a number of problems left unresolved by the court's initial opinion.

The Mosers owned the surface estate of a small tract of land and the Gefferts owned the mineral estate. The tract in question was less than seven acres in size. United States Steel Corporation, the Gefferts' lessee, was mining uranium on the tract by an in situ leaching process.[7] The ura-

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1. The law of oil, gas, and minerals has historically focused on the exploration for and production of minerals and hydrocarbons. By tradition, the law of oil, gas, and minerals has not included the legal aspects of the transportation, refining, and marketing of minerals and hydrocarbons. Neither have the organization and financing of the enterprises conducting these various activities been considered to be within the ambit of oil, gas, and mineral law. This Article preserves the traditional focus on the activities of exploration and production.
2. 26 Tex. Sup. Ct. J. 427 (June 8, 1983).
3. 464 S.W.2d 348, 352 (Tex. 1971).
4. 597 S.W.2d 743, 747 (Tex. 1980).
5. 26 Tex. Sup. Ct. J. at 429.
6. *Id.*
7. The Gefferts had a second mineral lessee, N.M. Uranium, Inc. In addition, Atlantic Richfield Company owned an overriding royalty interest in the uranium. The facts of the *Moser* case have been simplified for this discussion.

nium lay at varying depths and came as close as 193 feet to the surface. The Mosers brought suit against the mineral owners and their lessees to quiet title to the uranium, alleging that it was part of their surface estate and relying on the surface destruction test enunciated in *Reed v. Wylie*. In *Reed* the supreme court stated that any mineral found at or near the surface is deemed part of the surface estate if any reasonable method of recovery would destroy or deplete the surface of the land, unless the mineral had been specifically conveyed to or reserved by the mineral estate owner.[8] The court further held that any mineral found within 200 feet of the surface was "near surface" for purposes of the surface destruction test.[9] Relying on these standards, the court of civil appeals in *Moser* first found that although some of the uranium was within 193 feet of the surface, the greatest concentration was at a depth of 325 feet. Consequently, the uranium was not near the surface and, therefore, was part of the mineral owner's estate.[10] The court further held that at the time of trial the only reasonable method of mining the uranium on the *Moser* tract was the in situ leaching process actually in use, and that this method did not result in substantial destruction of the land's surface.[11] United States Steel Corporation, therefore, could continue to mine the uranium as the lessee of the mineral estate owner.

The supreme court agreed with the result reached by the court of civil appeals but differed in its reasoning. The court initially stated that the surface destruction test had led to title uncertainty, since ownership of near-surface minerals depended upon determinations of fact in the absence of a specific grant or reservation of such minerals.[12] Because of this uncertainty, the supreme court abandoned the surface destruction test and held instead that the ownership of a substance depends on whether the substance is classified as a mineral by law.[13] Substances held to be minerals are part of the mineral estate, regardless of their proximity to the surface.[14] A grant of "oil, gas, and other minerals" thus conveys all minerals lying under the tract of land covered by the grant.[15] The supreme court concluded that uranium is a mineral and thus part of the mineral estate.[16]

The supreme court noted, however, that exploitation of a near-surface mineral by the mineral owner might result in damage to or destruction of the surface estate. The court also noted that if a mineral was not specifically mentioned in a landowner's grant of mineral rights, the surface owner might not have bargained for compensation in return for the destruction of the surface. The court therefore held that a surface estate owner has a right to damages from the mineral estate owner for any destruction of the

8. 597 S.W.2d at 747.
9. *Id.* at 748.
10. 601 S.W.2d 731, 734 (Tex. Civ. App.—Eastland 1980).
11. *Id.*
12. 26 Tex. Sup. Ct. J. at 428.
13. *Id.*
14. *Id.*
15. *Id.* at 429.
16. *Id.*

surface occurring during the course of mining a mineral unspecified in the mineral grant or reservation.[17] In the event that a mineral owner destroyed the land's surface while mining a mineral that was mentioned by name in the mineral grant or reservation, however, the surface owner's remedy would be limited to damages for excessive or negligent use or destruction of the surface.[18]

A motion for rehearing is pending in the *Moser* case.[19] This motion gives the supreme court an opportunity to consider several problems raised by its initial opinion.[20] First, the *Moser* court provided that contracts, leases, and deeds executed between February 10, 1971, and June 8, 1983, would continue to be governed by the law in effect at the time of their execution.[21] The court provided this window period to protect the rights of contracting parties who relied on the court's holdings in *Acker* and *Reed*.[22] The window period, however, raises several problems. For example, the ownership of surface minerals is unclear if the mineral estate is severed prior to the window period and the surface owner subsequently executes a surface mineral lease during the window period. Under *Moser*, the lessee of the surface owner has a protected claim to the minerals, since the lease was executed during the window period.[23] *Moser* also suggests, however, that the chain of title culminating in this protected lease must

17. *Id.*

18. *Id.* The actions of the mineral owner remain limited by the accommodation doctrine announced in Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971), regardless of whether the mineral being mined was mentioned by name in the grant or reservation. 26 Tex. Sup. Ct. J. at 430. Furthermore, the mineral owner will remain subject to the Uranium Surface Mining and Reclamation Act, TEX. NAT. RES. CODE ANN. §§ 131.001-.270 (Vernon 1978). 26 Tex. Sup. Ct. J. at 429 n.4. Presumably the mineral owner will also be subject to the companion statute, the Surface Mining and Reclamation Act, TEX. REV. CIV. STAT. ANN. art. 5920—11 (Vernon 1964). This companion statute now applies to iron ore, in addition to coal. *See infra* notes 98-99 and accompanying text.

19. Until the supreme court's final opinion in *Moser* is delivered, the court may delay ruling on the application for writ of error filed in Storm Assocs. v. Texaco, 645 S.W.2d 579 (Tex. App.—San Antonio 1982). *Storm Assocs.* deals with royalty interests and the surface destruction test. The supreme court's treatment of *Storm Assocs.* may affect the application of Martin v. Schneider, 622 S.W.2d 620 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.). Assuming the supreme court does not abandon the window period enunciated in *Moser* on rehearing, *see infra* notes 21-25 and accompanying text, the court will have to choose between *Martin* and *Storm Assocs.* to govern royalty interests created during the window period.

20. In informal discussions with the author, several members of the Texas bar expressed another concern regarding the supreme court's initial opinion. These attorneys argued that the surface owner's right to damages is inadequate compensation for having his agricultural acreage strip mined. Because of the legal requirements bearing on reclamation efforts, they contend that the surface estate may be more valuable after strip mining than before. The surface owner would be unable to recover damages, although his agricultural operations had been displaced for a period of time. This worry might best be left to future case law, however, when specific remedies could be fashioned under the facts presented. The surface owner would presumably be entitled to lost profits, as well as compensation for his cooperation in obtaining the necessary mining and reclamation permits.

21. 26 Tex. Sup. Ct. J. at 430. The earlier date is that on which Acker v. Guinn, 464 S.W.2d 348 (Tex. 1971), was decided. *Acker* was the first pronouncement of the surface destruction test. The latter date is that of the initial *Moser* opinion.

22. 26 Tex. Sup. Ct. J. at 430.

23. *Id.*

also be valid. The surface owner's estate, created by a severance of the mineral estate occurring before the window period, would thus have to have included the surface minerals. The mineral estate owner, on the other hand, received his property interest prior to the window period. He might rightfully argue, therefore, that under *Moser* his reservation of minerals included near-surface minerals. Thus, both the mineral estate owner and the surface mineral lessee arguably have valid claims to the surface minerals.

The *Moser* window period raises a second problem. Under the surface destruction test of *Acker* and *Reed*, ownership of a near-surface mineral can be determined only by geological testing of near-surface mineral deposits.[24] One of the virtues of the *Moser* opinion is that the ownership of such minerals can be determined by inspection of documents. This holding was intended to reduce the amount of litigation regarding the fact-finding necessary for application of the *Acker* and *Reed* surface destruction test. Since *Moser* is not completely retroactive in application, however, the liklihood of litigation is not reduced. In examining title records after June 8, 1983, one must still determine whether the surface owner or the mineral owner held title to an unspecified surface mineral immediately prior to that date. This determination is required in order for a title examiner to select either the chain of title out of the surface owner or the chain of title out of the mineral owner in his tracking of title after June 8, 1983.[25]

B. Executive Right to Lease

In *Manges v. Guerra*[26] the supreme court was asked to determine the remedies available to a mineral interest owner for a breach of the standard of care incumbent upon an executive in its exercise of the executive right to lease. Various members of the Guerra family sold surface acreage in Texas to Clinton Manges. Manges also purchased a slight majority of the underlying mineral interests and the executive right to lease all of the min-

24. *Id.* at 428.

25. A number of members of the Texas bar have informally suggested a two-pronged solution to the problem of the *Moser* window period. First, these members suggest that the window period created in *Moser* be eliminated. In order to protect the sizeable investment in East Texas lignite fields and power generating stations, however, these lawyers suggest that the supreme court should rule, in an appropriate case, that lignite is not a mineral. The lignite would then belong to the surface estate owner. These attorneys contend that Heinatz v. Allen, 147 Tex. 512, 217 S.W.2d 994 (1949), is authority for their approach. In *Heinatz* the supreme court held that building stone and limestone are not minerals as a matter of law. *Id.* at 1000. Although these substances were within the geological definition of a mineral, the *Heinatz* court reasoned that they gave structural support to the surface and thus were not within the common meaning of a mineral. *Id.* at 997.

This suggested solution offers no help, however, to those with investments in surface deposits of uranium, iron ore, or coal. Furthermore, the suggested solution would require courts to distinguish between lignite, on the one hand, and the harder forms of coal, such as anthracite and bituminous coal, on the other. The need to distinguish lignite from the softer varieties of bituminous coal might cause the courts to resort to the types of fact determinations that the *Moser* holdings were designed to avoid.

26. 26 Tex. Sup. Ct. J. 430 (June 8, 1983). The facts of this case have been simplified for purposes of the following discussion.

eral interests underlying the surface lands. Manges subsequently leased part of the Guerra mineral interests to himself and successfully obtained production. The Guerras brought suit, claiming that Manges had breached his duty as executive by leasing the mineral interest to himself at less than prevailing market terms. The trial court agreed that Manges had breached his duty of utmost fair dealing toward the Guerras, and ordered that (1) Manges be removed as holder of the executive rights to the Guerras' mineral interests; (2) the lease to Manges be cancelled as of the date of execution, and the Guerras receive an accounting from Manges for the proceeds from production reflecting the Guerras' status as co-tenants;[27] (3) the Guerras be awarded approximately $380,000 as compensation for the consideration they would have received if their remaining mineral interests had been timely leased to a third person by Manges; (4) the Guerras be awarded $500,000 in exemplary damages; and found that (5) various deeds of trust and contracts executed by Manges did not cover the Guerras' mineral interests. The court of civil appeals affirmed the trial court's judgment in all respects.[28]

On appeal the supreme court held that the duty of utmost fair dealing is an implied covenant, and that Manges's breach of this duty constituted a breach of contract.[29] A majority of the supreme court evidently did not believe that a separate tort had been alleged and proved by the Guerras, however, and therefore denied the award of exemplary damages.[30] The Texas Supreme Court further found that cancellation of Manges's executive right by the trial court was an overly drastic remedy, and that an award of damages for failure to lease the Guerras' remaining mineral interests was adequate.[31] The supreme court also concluded that cancellation of the lease to Manges was unjustified, and instead determined that the Guerras were entitled to additional actual damages to compensate them for the differences in the terms of the Manges lease compared to the likely terms of a third-party lease, as determined by the jury.[32] The supreme court awarded the Guerras approximately $422,000 in lost bonuses, an accounting for past production to reflect a royalty to the Guerras increased from one-eighth to one-sixth, and future payments from leasehold production in accordance with a one-sixth royalty interest.[33] In effect, the supreme court reformed the lease to Manges insofar as the bonus

27. This amount was approximately $932,000. We are told that "over $2,000,000" had been produced from the leased tract, 26 Tex. Sup. Ct. J. at 431, and that the Guerras owned 46.58375% of the mineral estate, *id.* at 434 n.6.

28. 621 S.W.2d 652, 658 (Tex. Civ. App.—Waco 1981).

29. 26 Tex. Sup. Ct. J. at 433-35. The supreme court's discussion of the duty of utmost fair dealing followed Kimsey v. Fore, 593 S.W.2d 107 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.), *discussed in* Diem & Laity, *Mineral Resources, Annual Survey of Texas Law*, 35 Sw. L.J. 177, 180-82 (1981).

30. 26 Tex. Sup. Ct. J. at 435-38. Chief Justice Pope discussed this point in his separate opinion, in which he concurred in part and dissented in part. *Id.* at 437-38. Justices Campbell and Wallace joined in this opinion.

31. *Id.* at 433.

32. *Id.* at 434.

33. *Id.*

and royalty provisions were concerned.[34] The supreme court did not address any other terms of the lease to Manges that might have been deficient. The supreme court, for example, made no mention of adding a Pugh clause to the Manges lease. Such a clause would discourage the operator from relaxing its efforts to develop the leased mineral estate, without requiring the Guerras to resort to litigation based upon an implied covenant of reasonable development.

C. Operating Agreements

Decided cases interpreting operating agreements are few in number, so the case of *Hamilton v. Texas Oil & Gas Corp.*[35] is especially welcome. The operating agreement in *Hamilton* contained two provisions by which working interest owners could elect to participate in the costs of a new well. The first election was to participate in the drilling of a new well, and the second was to participate in the completion of the new well. A working interest owner could therefore elect to participate in the drilling of a new well without necessarily having to participate in that well's completion.[36] Each of these elections provided that a nonconsenting party would receive no revenues from the new well until the consenting working interest owners received, among other amounts, an amount from the revenues of the new well equal to 400% of the nonconsenting party's share of the drilling or completion costs, as the case might be.[37]

Texas Oil & Gas Corporation operated a unit in which defendant Hamilton was a nonoperator working interest owner. Texas Oil & Gas gave notice to Hamilton of a proposed well, and Hamilton elected to participate in the drilling of the new well. After Hamilton's election, the operator shifted the site of the proposed well from the announced location to a point 630 feet distant from the original site. Despite Hamilton's inquiries, the operator gave no reason for the change of site. Hamilton then notified Texas Oil & Gas that he would bear no further expenses in connection with the new well. The operator interpreted this message to mean that Hamilton was not consenting to participate in the completion costs of the new well. In the litigation that ultimately arose, Hamilton chose to ratify his election to participate in the drilling of the new well. When production from the new well began, Texas Oil & Gas withheld Hamilton's revenues from the well in order to recoup 400% of Hamilton's share of completion costs. The operator also sued Hamilton for his share of the drilling costs of the new well.

34. *See id.* at 437 (Pope, C.J., concurring in part and dissenting in part).

35. 648 S.W.2d 316 (Tex. App.—El Paso 1982, no writ). This case also involved matters other than the interpretation of the operating agreement. These issues are not discussed in this Article.

36. The industry's standard form of operating agreement also contains these two elections if the parties choose Option No. 2 in article VII.D.1 of the American Association of Petroleum Landmen Form 610-1982, Model Form Operating Agreement.

37. The analogous provision in the industry's standard form may be found in article VI.B.2 of the American Association of Petroleum Landmen Form 610-1982, Model Form Operating Agreement.

The case was tried to a jury, which found that Texas Oil & Gas (1) was liable for gross negligence; (2) had failed to perform its operator duties in a good and workmanlike manner; (3) had pursued an unconscionable course of action against Hamilton; and (4) was not entitled to recover any additional drilling costs for the new well. The court awarded Hamilton $5000 in actual damages for the difference in preparation costs between the two sites, $10,000 in exemplary damages, and attorneys' fees.

Hamilton appealed the trial court's ruling that he was not entitled to recover the amount withheld by Texas Oil & Gas equal to 400% of his share of the new well's completion costs. Hamilton in effect advanced three arguments in support of his claim to his contractual risk percentage. First, Hamilton contended that the operator's breach of the joint operating agreement released him from the obligation of bearing the 400% contractual risk percentage. Second, Hamilton argued that Texas Oil & Gas owed a fiduciary duty to him and that this duty had been breached. The proper measure of damages for this breach, he argued, should be the amount withheld as the contractual risk percentage. Third, Hamilton argued that the provision of the joint operating agreement calling for the contractual risk percentage was an unenforceable penalty provision rather than a valid liquidated damages provision.

The court of appeals first determined that the drilling cost provisions of the joint operating agreement were divisible from the completion cost provisions.[38] Thus, the election by a working interest owner as to drilling was distinct from his election as to completion. Since the operator had not breached the agreement's provisions concerning completion of the new well, the court reasoned that Hamilton was properly held to his obligations under those provisions.[39] Second, the court of appeals found that Texas Oil & Gas did not owe a fiduciary duty to Hamilton because a fiduciary relationship exists between operator and nonoperator, on the basis of authority cited by Hamilton, only if they are engaged in a joint venture.[40] A joint venture can exist between two parties, according to the cited authority, only if the parties share the control or management of the enterprise.[41] The court of appeals found that Texas Oil & Gas had full control of all operations and, therefore, owed no fiduciary duty to Hamilton.[42] Finally, the court of appeals rejected Hamilton's third challenge to the enforceability of the contractual risk percentage by resorting to industry standards and painting a bleak picture of the alternative. "To declare these provisions void as a penalty," the court wrote, "would permit non-consenting parties to participate in the venture risk free."[43] In addition, evidence at

38. 648 S.W.2d at 320.

39. *Id.*

40. *Id.* Hamilton had cited the case of Rankin v. Naftalis, 557 S.W.2d 940, 943 (Tex. 1977).

41. 648 S.W.2d at 321 (*citing* Ayco Dev. Corp. v. G.E.T. Serv. Co., 616 S.W.2d 184, 185 (Tex. 1981)).

42. 648 S.W.2d at 321. The court of appeals found persuasive the fact that Hamilton and Texas Oil & Gas were severally, rather than jointly, liable. *Id.*

43. *Id.*

trial showed that contractual risk percentages between 200% and 500% were standard in the industry. The court of appeals also pointed out that the contractual risk percentage was payable only out of production. The court of appeals therefore denied Hamilton's claim for payment of the withheld multiple of his share of completion costs.[44]

II. LEGISLATION

The Texas Legislature was active in the oil, gas and mineral area during the survey period. The more significant legislation enacted can be placed in four categories: (1) statutes enhancing the rights of royalty and mineral interest owners as creditors; (2) statutes increasing the flexibility of public leasing bodies; (3) enactments dealing with water quality and conservation; and (4) statutes affecting regulatory jurisdiction.

A. *Rights of Royalty and Mineral Interest Owners as Creditors*

First purchasers of production from oil and gas wells must now observe statutory deadlines for making payment to persons legally entitled to proceeds from the sale of oil or gas from Texas wells.[45] Moreover, late payments will accrue interest at a floating federal rate.[46] The well operator may also be subject to these deadlines if the first purchaser makes all payments to the operator pursuant to an agreement that the operator then pay the interest and royalty owners their respective shares.[47] The statute includes a de minimis provision[48] as well as notice requirements that must be observed by an interest or royalty owner prior to instituting a lawsuit for late payment.[49] The statute also provides exceptions to the requirement that interest be paid on late payments,[50] and royalties payable to certain state bodies are specifically exempt from coverage by the statute.[51]

The addition of section 9.319 to the Texas Uniform Commercial Code[52] also strengthens the position of oil and gas interest owners as creditors. This new section grants a security interest, perfected automatically without filing, to an interest owner in oil and gas production, which secures the first purchaser's obligation to pay the purchase price of the production.[53] The security interest continues in the proceeds of the oil and gas production.[54]

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44. *Id.*
45. TEX. NAT. RES. CODE ANN. § 91.402 (Vernon Supp. 1984). Some of these deadlines may be varied by contract. *See id.*
46. *Id.* § 91.403. Subsection (a) provides that a different rate of interest may be specified by contract.
47. *Id.* § 91.401(2).
48. *Id.* § 91.402(b). If the total amount owed is $2500 or less, payments can be remitted annually to the payee.
49. *Id.* § 91.404(a).
50. *Id.* § 91.403(b).
51. *Id.* § 91.405 (covers Board of Regents of University of Texas and General Land Office).
52. TEX. BUS. & COM. CODE ANN. § 9.319 (Tex. UCC) (Vernon Supp. 1984).
53. *Id.* § 9.319(a).
54. *Id.* § 9.319(c).

The section also creates a statutory lien in favor of an interest owner who fails to qualify for the security interest created by the section due to one of a specified set of reasons.[55] A statutory lien is also created to secure the payment of taxes that should be withheld or paid by the first purchaser.[56] The statute does not specify the type of property that these liens encumber, but presumably the liens attach to oil and gas production as well as to the proceeds of such production.[57]

A security interest created by section 9.319 will be deemed a purchase money security interest for purposes of determining priorities under section 9.312 of the Texas Uniform Commercial Code.[58] The holder of such a security interest, however, is relieved from the written notice requirements of section 9.312(c).[59] The statutory liens created by the new section are subordinate to all perfected chapter 9 security interests, but are superior to all unperfected chapter 9 security interests as well as to the interests of the lien creditors, buyers, and transferees listed in section 9.301 of the Texas Uniform Commercial Code.[60] For this reason, oil and gas interest owners are now in a stronger position than the trustee in bankruptcy as to their first purchaser of production.[61]

The new section 9.319 also specifies the priorities among the security interests and statutory liens created by the section itself.[62] An interest owner's operator apparently does not fall within the definition of a first purchaser.[63] The section does, however, permit a first purchaser to make payment for gas production jointly to an operator and an interest owner as a means of terminating the interest owner's security interest in the production.[64] Such joint payment will not terminate an interest owner's security interest in oil production, however, unless the interest owner has agreed to such an arrangement.[65] The new section also provides ways in which a buyer may purchase from a first purchaser free of the security interests and statutory liens created by the new section.[66] Remedies available to interest owners under this section include replevin, garnishment, and attachment, as well as the chapter 9 remedies generally available to secured parties.[67] Also, the security interests defined by the new section may be assigned.[68] The final subsections define the principal terms used in the section.[69] Finally, the legislature made conforming changes to sections 9.302(a) and

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55. *Id.* § 9.319(d).
56. *Id.*
57. *See id.*
58. *Id.* § 9.319(f)(1).
59. *Id.*
60. *Id.* § 9.319(f)(2).
61. *See id.* § 9.301(c).
62. *Id.* § 9.319(g).
63. *See id.* § 9.319(q)(3).
64. *Id.* § 9.319(*l*)(1).
65. *Id.* § 9.319(*l*)(2).
66. *Id.* § 9.319(m).
67. *Id.* § 9.319(n).
68. *Id.* § 9.319(j).
69. *See id.* § 9.319(q).

9.312(c) of the Texas Uniform Commercial Code.[70]

B. *Increased Flexibility of Public Leasing Bodies*

A new section of the Natural Resources Code provides that the mineral reservation for lands dedicated to the permanent school fund and subsequently sold now consists of a mineral interest rather than a royalty.[71] These reserved interests, which will be defined by the School Land Board, are no less than one-eighth for sulphur and no less than one-sixteenth for all other minerals.[72] In addition, leases covering public school land, gulf land, and riverbeds and channels that belong to the State of Texas may now be made for a primary term of less than five years.[73] The Board for Lease of University Lands is now authorized either to stipulate the royalty to be paid under a proposed oil and gas lease covering Permanent University Fund lands and to receive competitive bids on the bonus payable for the lease, or to stipulate the bonus and take bids for the royalty.[74] The legislature separately repealed the provisions of the Natural Resources Code dealing with permits for prospecting for and development of oil and gas on certain public lands, and for leasing such lands for oil and gas.[75]

C. *Water Quality and Conservation*

The enactments during the survey period in this area address the problems of plugging oil and gas wells and maintaining the state's supply of fresh water. The legislature created a well plugging fund and placed the fund under the control of the Texas Railroad Commission.[76] The fund will be financed through drilling permit fees,[77] penalties and bonds associated with state plugging requirements, and plugging expenses recovered by the commission from interest owners.[78] Legislative appropriations may supplement the fund.[79] The commission is to use the fund to plug abandoned wells and to enforce laws and regulations relating to pollution.[80] Landowners will no longer be liable for the costs of plugging an abandoned well on their property.[81] Also, the commission may now take steps, without a hearing, to plug an abandoned well if the well poses a serious threat of pollution or injury to the public health.[82] The Texas Railroad Commission's enforcement authority for matters concerning pollution has

70. *See id* §§ 9.302(a), .312(c).
71. TEX. NAT. RES. CODE ANN. § 51.054(a) (Vernon Supp. 1984).
72. *Id.*
73. *Id.* § 52.082.
74. TEX. EDUC. CODE ANN. § 66.65(a) (Vernon Supp. 1984).
75. TEX. NAT. RES. CODE ANN. §§ 52.221-.252 (Vernon 1978), *repealed by* Act of Feb. 1, 1983, ch. 1, § 1, 1983 Tex Gen. Laws 1.
76. TEX. NAT. RES. CODE ANN. § 89.151 (Vernon Supp. 1984).
77. *Id.* § 85.2021 (drilling permit fee will be $100 for each drilling permit application filed with the commission).
78. *Id.* § 89.152.
79. *Id.*
80. *Id.* § 89.151.
81. *See id.* §§ 89.081, .083, .042-.043, .045.
82. *Id.* § 89.043(b).

also been strengthened.[83] The legislature increased significantly various penalties for pollution and liberalized venue provisions for recovering civil penalties.[84] The commission was also given increased access to private property and records to aid in its regulation of pollution in the state.[85]

D. *Statutes Affecting Regulatory Jurisdiction*

Saltwater disposal pits are now under the jurisdiction of the Railroad Commission and include those pits used to store or evaporate oilfield brines.[86] Saltwater pits that do not conform to regulations to be issued by the commission are prohibited.[87] The commission may enjoin the operation of a nonconforming saltwater pit and may close it at the pit operator's expense.[88] The operator of a nonconforming pit may also be subject to civil and criminal penalties.[89] The legislature also created a saltwater disposal pit fund, which will be financed with penalties and costs recovered from operators of nonconforming pits.[90] The commission will use the fund to close saltwater disposal pits.[91] In addition, the legislature amended the Water Code to discourage the use of fresh water in injection wells used for enhanced recovery of oil.[92]

The legislature gave the Texas Water Commission jurisdiction to regulate mining shafts.[93] Permits are now required for all shafts, whether mined or drilled, if the primary purpose of the shaft is to transport workers and materials for specified purposes.[94] Shafts that do not penetrate the base of the uppermost water-bearing strata, however, are excluded from regulation.[95] The statute also provides for both civil and criminal penalties.[96] A second amendment to the Water Code transferred jurisdiction over injection wells used for the in situ recovery of tar sands from the Water Commission to the Railroad Commission.[97] In addition, the Railroad Commission has been given exclusive jurisdiction over iron ore and iron ore gravel mining and reclamation operations.[98] The commission is to regulate these operations in the same manner that it regulates surface coal mining and reclamation.[99] The Texas Legislature also created a means by which surface owners may restrict the mineral use of suburban

83. *See id.* §§ 88.135, 91.351, 91.352, 141.101, 141.102.
84. *Id.* §§ 85.351, 85.381, 85.382, 86.222, 86.223, 87.241, 88.131.
85. *Id.* §§ 91.1012, 141.013.
86. *Id.* §§ 91.453, .451.
87. *Id.* § 91.452.
88. *Id.* §§ 91.456-.457.
89. *Id.* §§ 92.458-.459.
90. *Id.* § 91.458.
91. *Id.*
92. TEX. WATER CODE ANN. § 27.0511 (Vernon Supp. 1984).
93. *Id.* § 28.021.
94. *Id.*; *see id.* § 28.001(5). Various information is required in connection with a permit application. *See id.* §§ 28.023, .033, .034, .035.
95. *Id.* § 28.001(5).
96. *Id.* §§ 28.061, .065.
97. *Id.* § 27.035; *see* Act of May 20, 1983, ch. 184, § 2, 1983 Tex. Gen. Laws 754, 755.
98. TEX. REV. CIV. STAT. ANN. art. 5920—11, § 4 (Vernon 1964 & Supp. 1984).
99. *Id.*

subdivisions.[100] Under rules to be issued by the Railroad Commission, a surface owner of a suburban tract of land may create an area of up to 160 acres in size, with at least two operations sites and appropriate road and pipeline easements.[101] Commercial, industrial, and residential subdivisions may qualify under the statute.[102] Owners of possessory mineral interests within such a qualified subdivision will be required to use only the surface contained in the operations sites, and to use the designated easements.[103]

III. RULES AND REGULATIONS

The Railroad Commission amended its rules to prohibit, except in specified circumstances, the use of gas line manifolds that permit bypassing of gas production meters.[104] The amendments clarify the requirement that gas be measured separately from each completion.[105] Other amendments to the commission's rules specify in greater detail the technical requirements for the casing and cementing of oil, gas, and other wells,[106] and for the plugging of inactive oil and gas wells.[107] These technical requirements are designed to protect fresh water from pollution and to prevent the uncontrolled escape of oil and gas either to the surface or to other strata.[108] The Railroad Commission has also amended its rules to require a $100 fee for each application or materially amended application to drill, deepen, plug back, or reenter a well.[109] This amendment conforms the commission's rules to recent legislation enacted by the Texas Legislature.[110]

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100. TEX. NAT. RES. CODE ANN. §§ 92.001-.007 (Vernon Supp. 1984).
101. *Id.* § 92.003; *see id.* § 92.002(3).
102. *See id.* § 92.002(3)(B).
103. *Id.* § 92.005.
104. Tex. R.R. Comm'n, 8 Tex. Reg. 1019 (1983) (amending 16 TEX. ADMIN. CODE § 3.27).
105. *Id.*
106. Tex. R.R. Comm'n, 8 Tex. Reg. 3982 (1983) (amending 16 TEX. ADMIN. CODE § 3.13).
107. Tex. R.R. Comm'n, 8 Tex. Reg. 3989 (1983) (amending 16 TEX. ADMIN. CODE § 3.14).
108. Tex. R.R. Comm'n, 8 Tex. Reg. 3982, 3989 (1983) (preambles).
109. Tex. R.R. Comm'n, 8 Tex. Reg. 2324 (1983), *adopted*, 8 Tex. Reg. 3184 (1983) (amending 16 TEX. ADMIN. CODE § 3.5).
110. *See supra* note 77 and accompanying text.