Oil, Gas and Mineral Law

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I. INTRODUCTION

This article focuses on the interpretations of, and changes relating to, oil, gas, and mineral law in Texas from November 2, 2002 through November 1, 2003. The cases examined include decisions of courts of the State of Texas and the Fifth Circuit Court of Appeals.1

II. OIL, GAS AND MINERAL LEASES

A. LEASING

Amoco Production Co. v. Wood2 holds that a receiver’s lease does not convey any right to prior production. The Dewese unleased mineral interest of 23.145 mineral acres was described as included in the Richardson gas unit in 1954. The gas unit produced for many years, and no

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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.

payment was made to the unleased Dewese interest. In 1999, the court appointed a receiver under Texas Civil Practices and Remedy Code Ann. Section 64.091 (Vernon 1997). The receiver leased the mineral interest, and the receiver’s lessee attempted to recover for prior production. Recovery was denied because (1) the statute does not authorize the receiver to convey any rights to personal property (severed minerals), and (2) a non-wellsite tract owner is not entitled to royalties accruing prior to ratification.3

In re Bass, discussed below under Section IV on Seismic, is also a significant case on the duty to develop and the duty an executive rights holder owes to the nonexecutive in leasing minerals.

B. Royalty Clause

Union Pacific Resources Group, Inc. v. Hankins4 denies class certification to a putative class of gas royalty owners in Crockett County. They alleged that Union Pacific sold gas to affiliated companies at preferential index prices, and that the affiliates then sold the gas to third parties at higher prices. For a small number of plaintiffs to act as class representatives and bring a class action, the class representatives must establish that they are indeed representative as required by Texas Rule of Civil Procedure 42. Rule 42 requires that the plaintiffs prove (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. This case was focused on “commonality,” and the differences in the marketing obligation under proceeds leases and market value leases.5

The class certified by the trial court and affirmed by the court of appeals alleged that Union Pacific breached an implied duty to “obtain the best current price reasonably obtainable.”6 The Texas Supreme Court reversed the certification because the plaintiffs failed to prove “commonality.” The issues were not common because some of the leases were proceeds leases and some were market value leases. “Market value is generally determined by comparing the sale price to other sales ‘comparable in time, quality, quantity, and availability of marketing outlets.’”7 “The implied covenant to reasonably market, by contrast, 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.’”8 Market value lessors are paid at a price fixed by the market regardless of the lessee’s success or failure in beating the market. Proceeds lessors share in whatever the lessee manages to obtain. Market value lessors must base their claim on breach of the express covenant to pay based on market value. Proceeds lessors

3. Id. at 464-68.
5. Id. at 70, 72.
6. Id. at 70.
7. Id. at 71.
8. Id.
must base their claim on breach of the implied covenant to reasonably market oil and gas.\(^9\)

The Texas Supreme Court concluded that determining whether the lessees paid market value and whether proceeds actually received were a fraud or a sham were fundamentally different inquiries. Therefore, the commonality requirement was not met.\(^{10}\) The case reflects the court's continuing hostility to the use of the class action to resolve marketing claims based on both proceeds and market value lease. The supreme court has now resolved a series of cases that make it very unlikely that a class action will ever be certified on a marketing claim when these two forms of leases are mixed.\(^{11}\)

**Phillips Petroleum Co. v. Bowden**\(^{12}\) is another case denying class certification, primarily because common issues of law and fact do not predominate when different lease royalty clauses form the basis of suit. This was the second appeal in the case. In Bowden I,\(^{13}\) the Fourteenth District Court of Appeals in Houston reversed a class certification because market value and proceeds lessors had distinct legal claims, which meant that the class representative's claims were not typical of the class as a whole.\(^{14}\)

In Bowden II, the court of appeals reversed class certification again. This time the trial court's certification of three subclasses failed. Most of the trial court's analysis turned on the differences in the royalty clauses as raising different liability issues. The individual issues regarding duty and breach would predominate over the common issues. The putative class representatives had attempted to save their class by amended pleadings designed to improve their chances to establish commonality. The court of appeals found that the willingness of the class representatives to abandon claims for the sake of achieving commonality indicated that the class representatives could not adequately represent the subclasses.\(^{15}\)

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9. *Id.* at 71-72.
10. *Id.* at 75.
11. See *Yzaguirre v. KCS Res., Inc.*, 53 S.W.3d 368 (Tex. 2001) (Market value may be wholly unrelated to the price the lessee receives as the proceeds of a sales contract, and under a market value lease the producer need not attempt to obtain the best price available.); *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000) (holding that the trial court must perform a rigorous analysis before ruling on class certification to determine that all the prerequisites have been met and how the claims will likely be tried); *Amoco Prod. Co. v. First Baptist Church*, 611 S.W.2d 610 (Tex. 1980) (There is no absolute duty to sell gas at market value under a proceeds lease.). *See also*, *Phillips Petroleum Co. v. Bowden*, 108 S.W.3d 385 (Tex. App.—Houston [14th Dist.] 2003, pet. filed) [hereinafter *Bowden II*].
15. *Id.* at 402-04.
C. ASSIGNMENTS

Geodyne Energy Income Production Partnership I-E v. Newton Corp.\(^\text{16}\) considers the liability of a nonoperator and the nonoperator's assignee for a proportionate part of plugging and abandoning a well at a cost of $742,409.67. The well ceased production in paying quantities on December 10, 1997, and never again produced oil or gas in paying quantities. On December 10, 1996, Geodyne was a ten percent working interest owner. On December 10, 1997, Geodyne sold its interest through a third-party auctioneer to Newton for $300.00. The sale documents provided that Geodyne made no representations or warranties regarding oil and gas production; marketable title; condition; quality; fitness for general or particular purpose; merchantability; accuracy of interest; or accuracy or completeness of any data, information, or material supplied to Newton. Newton took the conveyed property "as is."\(^\text{17}\)

A nonoperator is liable for the plugging expenses if it owned the interest at the time the well was "required to be" or "should have been" plugged.\(^\text{18}\) The statutory scheme requires an operator to begin plugging operations on a dry or inactive well within one year after drilling or "operations" cease. Geodyne contended that various operations undertaken by the operator to restore operations after December 10, 1996, pushed the one-year window to some date after the transfer from Geodyne to Newton. The Texas Court of Appeals in Dallas rejected Geodyne's argument and held that "operations" in this context meant producing oil or gas, not mechanical operations on the well itself. Therefore, a nonoperator is liable for its proportionate share of the plugging costs if it owned the interest at the time the well ceased operation (production). Geodyne owned the nonoperating interest when operations ceased and for the one-year period during which the operator was required to begin plugging operations.\(^\text{19}\)

Newton also prevailed in the trial court on Newton's contention that the sale was a violation of the Texas Securities Act ("TSA").\(^\text{20}\) Newton complained of Geodyne's failure to disclose that the lease had terminated. An interest in an oil and gas lease is a security. To recover under the TSA, a buyer must prove a security was sold by means of (1) an untrue statement of material fact or (2) an omission to state a material fact that is necessary in order to make the statements made in light of the circumstance under which they are made not misleading.\(^\text{21}\) An omission or misrepresentation is material "if there is a substantial likelihood that a

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17. Id. at 782-83.
18. Id. at 788 (citing TEX. NAT. RES. CODE ANN. §§ 89.002(a)(3), 89.083(g)(2) (Vernon Supp. 2003)).
reasonable investor would consider it important in deciding to invest." 22

Geodyne relied upon the sales documents and the "as is" sale to avoid liability under the TSA. Geodyne first contended that the facts showed that Newton did not rely upon any misrepresentation or omission by Geodyne, but the court held that the TSA does not require the buyer to prove reliance. Geodyne next contended there was no causation because the sale was "as is," and therefore no misrepresentation or omission by Geodyne caused Newton to purchase the security. The court held this was an impermissible attempt to re-introduce reliance, which is not required under the TSA. Similarly, the TSA does not require a buyer to show causation as to damages. However, because Newton still owned the security, Newton's only remedy was rescission.

Notwithstanding the terms of the auction, under the TSA, the buyer is not required to do any due diligence, and any waiver of compliance with the TSA is void. The buyer was only required to prove a misrepresentation or an omission by the seller. Geodyne represented it was selling a ten percent interest in an oil and gas lease, when in fact the lease had terminated. 23

D. Surface Damages

_OXY USA, Inc. v. Cook_ 24 holds that a claim for damages based on a failure to remove oil field junk is a contractual claim and not a nuisance claim. OXY or its predecessors operated on a large 1930 lease for decades, until it plugged out and abandoned the wells on plaintiffs' 81-acre tract. Plaintiff acquired his interest in 1988. Plaintiff successfully obtained a jury finding on nuisance, but no contractual claim was tried. The Texas Court of Appeals in Tyler found that the only source of OXY's duty was the lease contract, and therefore the action was one for breach of contract only. The jury's finding of nuisance failed as a matter of law. 25

_Exxon Corp. v. Tyra_ 26 is another case in which a successor surface owner complained of oil field clean up issues that arose prior to the time the successor surface owner first acquired title. The Texas Court of Appeals in Tyler followed existing case law in holding that the successor surface owner was without standing to sue for prior damages because the injury to the property occurred prior to purchase and there was no assignment of claims to the successor surface owner. That is, the cause of action for such damages, if any, belongs to the owner of the land at the time the injury occurred. The court went on to hold _in dicta_ that, under the terms of the lease, the remaining structures became the property of the

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22. _Id._
23. _Id._ at 783-87.
25. _Id._ at *1, 3.
surface owner when Exxon failed to remove them.27

The lease contained a typical clause that gave the lessee the right, but not a duty, to remove improvements. The jury specifically found that Exxon did not fail to meet its obligation to remove its property, so there was no breach of contract. However, the jury did give the surface owner a verdict on his nuisance theory.28 The court cited its recent opinion in OXY USA, Inc.,29 discussed above, and held that the only cause of action was for contract and that Exxon should have been given judgment notwithstanding the verdict.30

E. Termination

The Texas Supreme Court issued a very important opinion in Natural Gas Pipeline Co. of America v. Pool.31 After a lease termination by cessation of production, a lessee can reacquire ownership of the lease by adverse possession, simply by continuing operations. This opinion consolidated two separate cases involving three oil and gas leases executed in 1926, 1936 and 1937. The 1926 lease and the 1936 lease were consolidated into one lease called the Pool 1 lease, and the 1937 lease was called the Pool 2 lease.32

Each lease experienced multiple intervals in which no production occurred, but the cessations occurred long before suit was filed. The last interval in which Pool 1 had no production was fourteen years prior to the filing of suit, and the last interval in which Pool 2 had no production was twenty-nine years prior to the filing of suit. The lessors ("Pool") claimed that the leases had terminated due to cessation of production. Pool brought suit to quiet title, for trespass, conversion, and fraud. The lessees ("NGPL") responded that there was production in paying quantities at all times, or that during any period of non-production, production was restored within a reasonable time under the temporary cessation of production doctrine. NGPL also claimed that even if the leases had terminated, NGPL obtained a fee simple determinable in the mineral estate by adverse possession.33

The lower courts terminated the leases and awarded damages and attorney's fees. The Texas Supreme Court did not address the application of the temporary cessation of production doctrine. Rather than address the difficult lease termination issues, the supreme court simply assumed (without deciding) that the leases terminated. If the leases terminated, the mineral interest then would revert back to Pool, and the critical question would become whether NGPL reacquired some interest by adverse possession. Because NGPL continued operations on the leases long after

27. Id. at *1.
28. Id. at 2-3.
29. OXY USA, Inc., 2003 WL 21499383.
32. Id. at 190.
33. Id. at 190-91.
the leases reverted to the lessors, the supreme court held that NGPL acquired a fee simple determinable lease of the mineral estate by adverse possession as a matter of law.34

A mineral estate may be adversely possessed. It requires actual possession (severance) of the minerals. Acquiring oil and gas by adverse possession requires the drilling and production of oil or gas. Adverse possession requires that all of the elements of either the three-, five-, ten-, or twenty-five-year statute of limitations be met. In this case, the supreme court looked to the ten-year limitations period because both Pool 1 and Pool 2 had been continuously operated by lessees for fourteen years and twenty-nine years respectively since the last cessation of production. Thus, the most recent time the lease could have terminated and reverted to the lessors was more than ten years prior to the date suit was filed.35

The ten-year statute requires “suit to be brought within ten years ‘to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property.’”36 “Peaceable possession” is possession “not interrupted by an adverse suit to recover the property.”37 “Adverse possession” is the actual, visible, and continuous appropriation of real property under a claim of right that is inconsistent with and is hostile to the claim of another person.38

In Pool, the supreme court held that NGPL satisfied these requirements as the adverse possessor. The supreme court assumed (without deciding) that the leases terminated due to non-production, and thus, Pool became fee simple absolute owner of the mineral interests through the reversion of title. NGPL then became the adverse possessor by continuing to produce oil and/or gas from a mineral estate in which NGPL no longer had a legal interest and which was no longer under lease. The production was actual, visible, continuous, and—assuming the leases had terminated—certainly inconsistent and hostile to Pool’s rights in the mineral estate after reversion.39

Perhaps the most critical issue in the case was whether some actual notice of the adverse nature of NGPL’s claim was required. The lower court had held that because NGPL had entered under a valid claim of right (original lease), it could not become an adverse possessor without somehow giving notice of its adverse claim. The supreme court held that actual notice of lease termination was not required. Notice can be inferred, or there can be constructive notice. Notice will be presumed where the facts show that the adverse occupancy and claim of title to the land has been long continued, “‘open, notorious, exclusive and inconsis-

34. Id. at 192-93.
35. Id. at 193.
36. Id.
37. Id.
38. Id.
39. Id. at 194-98.
tent with the existence' of title’ in another.40 The “extended period of possession” that will constitute such notice must have occurred before the applicable statute of limitations begins to run.41 However, that notice occurred as a matter of law “when the lessees continued to operate the leases, produce oil or gas, sell it, and pay only a royalty to the lessors.”42 The supreme court ruled that it did not matter that both Pool and NGPL thought the lease was still in effect. The intent of the parties does not matter. NGPL’s possession was inconsistent and hostile to Pool’s rights, and thus the time period for adverse possession began to run upon termination of the lease, more than ten years prior to the filing of suit. The supreme court said:

A record titleholder’s ignorance of what it owns does not affect the running of limitations. The lessees’ [NGPL’s] possession of the mineral estates in the cases before us today was adverse, and all the requirements of the three-, five-, and ten-year statutes of limitations were met.43

The supreme court’s decision was also very significant in characterizing the interest in the minerals that was adversely possessed by NGPL. The supreme court ordered that NGPL be awarded a fee simple determinable defined by the terms of the original lease, because this was the interest that NGPL adversely possessed. An adverse possessor acquires no greater interest than that claimed. The supreme court also expressly stated that NGPL was not entitled to a fee simple absolute in the mineral estate. Thus, NGPL effectively reacquired its terminated leasehold estate by adverse possession, and Pool, by Pool’s failure to act, lost the leasehold estate which had reverted to Pool. Notwithstanding NGPL’s adverse possession, Pool did not lose Pool’s fee mineral interest (subject to the NGPL lease), nor did Pool lose Pool’s interest as a lessor under the NGPL lease. For the parties, the effect of the decision is to place the parties in the same position they would be in if the cessation of production had never occurred.44

In this opinion, the Texas Supreme Court continues its recent history of demonstrating little patience with stale claims and parties who sit on their rights. The significance of the case is to confirm that lessors may not simply ignore a cessation of production on their lease with impunity. It has generally been accepted that a lease once terminated was almost certainly terminated forever, and that it was very difficult to “revive” a terminated lease by waiver, estoppel, laches, amendment, or ratification. There was also considerable doubt that a lessee who entered into possession under a permissive and legitimate right (original lease) could ever become an “adverse” possessor without some clear and demonstrable ev-

40. Id. at 195.
41. Id. at 200.
42. Id. at 201.
43. Id. at 198.
44. Id. at 199.
idence of notice that the lessee's possession had become adverse. Here the supreme court sweeps all of that away and holds that title reacquired by reversionary right may be promptly lost when the first statute of limitations runs its course.

Finally, the case is also very significant for what it does not decide. Many cases have been filed (particularly in the Texas Panhandle) for lease termination based on cessations of production which occurred long before suit was filed. There are many unresolved questions in such cases about the burden of proof; the application of defensive issues such as waiver, estoppel, laches, amendment, and ratification; and the fundamental nature and scope of the doctrine of temporary cessation of production. The supreme court, for now, has avoided resolving any of these questions. The application of the statute of limitations will make many of these old claims moot. The economic shift and the impact on the parties can be quite extraordinary. In Pool, terminated leases with producing wells are found to be still in effect, and millions of dollars awarded for damages and attorney's fees are reduced to zero.

III. OPERATING AGREEMENT AND OPERATIONS

A. Operations

Primrose Operating Co. v. Jones holds that the standard form drilling contract used by the parties did not provide that all operations conducted after the well exceeded the footage contract were to be conducted on a day work basis. The contract provided that "all drilling below the . . . specified contract depth shall be on a day work basis as defined herein." Under the terms of the contract, the drilling contractor had control over operations when operations were on a footage basis, and the operator had control over operations when operations were on a day work basis. It was undisputed that an employee of the drilling contractor was injured while operations were being conducted after the well exceeded the contract depth. There was no evidence to show at what depth operations were being conducted when the injury occurred.

Judgment in excess of $3,000,000 for the injured worker was reversed and rendered because the worker failed to establish whether the operator or the drilling contractor was in control over the operations at the time of the accident. On appeal, the worker argued that once the well exceeded the contract depth, all operations were conducted on a day work basis, and therefore the operator was liable. The Texas Court of Appeals in Amarillo disagreed after analyzing other parts of the drilling contract and

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46. Natural Gas Pipeline Co. of Am., 124 S.W.3d at 201.
48. Id. at 196.
49. Id. at 196-67.
finding provisions which appear to shift control (and thus liability) back and forth between the operator and the drilling contractor, depending upon the depth of the operations then being conducted.\textsuperscript{50}

Although the court never identifies the form drilling contract, its provisions appear similar to forms commonly used in the industry. The significance of the case is the holding that control and liability for operations is not transferred when the contract depth is reached. Control (and thus liability) is determined by the depth at which operations are being conducted when the accident occurs.

\textit{Mata v. Brooks Petroleum Co.}\textsuperscript{51} holds that the degree of control the lease operator exercised over the well service company in a routine workover may subject the operator to liability for the injuries suffered by the well service company’s employee. Brooks Petroleum Company (“BPC”) owned and operated an oil lease. BPC hired Turman Well Service to pull a downhole pump and to replace it with a new one. There was a paraffin problem on the well which prevented the immediate replacement of the old pump because the new pump got stuck in the hole. While pulling the new pump back out of the hole, there was an accident, the rig overturned, and Mata, Turman’s derrick man, was severely injured. At various times during the day of the accident, principals of BPC discussed the problems and directed Turman’s tool pusher as to what course to follow.\textsuperscript{52}

The court found that “BPC had a dual role as owner of the lease, and as the operator-general contractor who hired the independent contractor, Turman Well Service.”\textsuperscript{53} This was not a premises defect case, but a negligent activity case. Ordinarily, an owner “has no duty to insure that an independent contractor performs its work in a safe manner.”\textsuperscript{54} However, such a duty “may arise where the owner retains 'some control over the manner in which the independent contractor's work is performed.'”\textsuperscript{55} For the general contractor to be liable for negligence, its control must relate to the injury-causing condition or activity. The plaintiff can prove “right of control” either by evidence of a contractual agreement or by evidence that the owner or general contractor actually exercised control over the job. Control by contract is a question of law for the court, but control by the actual exercise of control is a question of fact for the jury. There was sufficient evidence that BPC exercised some degree of control for the court to reverse and remand the summary judgment to try the fact question.\textsuperscript{56}

\begin{itemize}
\item \textsuperscript{50} Id.
\item \textsuperscript{52} Id. at *1-2.
\item \textsuperscript{53} Id. at *2.
\item \textsuperscript{54} Id. at *3.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Id. at *2-4, 6.
\end{itemize}
The significance of the case is that it highlights the differences between a negligent activities case and a premises liability case. The latter requires that the plaintiff establish not only the right of control, but also a breach of duty according to the traditional elements of a premises defect. The facts recited in the case as to the degree of control exercised by BPC do not appear to be unusual in the industry, which suggests that summary judgment in a negligent activities case may be very hard to obtain.

_Coastal Oil & Gas Corp. v. Francis_ holds that Chapter 95 of the Civil Practices and Remedies Code protects the operator from ordinary negligence claims by employees of independent subcontractors on the operator’s well. Francis was an employee of a subcontractor who was injured on Coastal’s well. The case was submitted under three theories of liability against Coastal as the operator: (1) Chapter 95 of the Civil Practices & Remedies Code, (2) common-law negligence, and (3) premises liability. The jury did not find against Coastal under Chapter 95, but found against Coastal under both common-law negligence and premises liability. The trial court set aside the verdict and rendered a take-nothing judgment in Coastal’s favor in accordance with Chapter 95. The First District Court of Appeals in Houston affirmed.

The central question was whether Chapter 95 applied so as to bar the other claims raised by Francis. The court rejected Francis’ contention that Chapter 95 did not protect negligent owners, and it expressly held that an operator is a “property owner” within the meaning of Chapter 95, when the operator is also a lessee. A well is an “improvement to real property.” Cleaning the well was “construction, repair, renovation or modification of an improvement.” Thus, the conduct of operations on the lease fell within the meaning of Chapter 95. Chapter 95 preempts all common-law negligence claims against the operator Coastal under the circumstances of this case, and therefore, Chapter 95 was Francis’ exclusive remedy against Coastal.

The significance of the case is that the operator is given the protections of Chapter 95. That is, the operator will not be liable for failure to provide a safe workplace, unless the operator had (1) control over the manner in which the work was performed, and (2) actual knowledge of the danger or condition that resulted in the injury and failed to warn. This statutory liability supplants common law negligence actions and is the sole source of potential liability for the property owner.

_Union Pacific Resources Co. v. Cooper_ holds that a nuisance-in-fact

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57. _Id._ at *6.
60. _Francis_, 2003 WL 21233564 at *1-3.
61. _Id._ at *4, 6, 9.
cannot be based upon fear, apprehension, or other emotional reactions that result from the lawful operation of industries in Texas. Union Pacific drilled a well on a unit which included the Cooper lease. Union Pacific's well was in an area where it was common to encounter hydrogen sulfide gas ("sour gas"), which is poisonous and can cause death. Texas Railroad Commission Statewide Rule 36 requires an evacuation plan for members of the general public who are located within a certain radius of a sour gas well. The Cooper home was included within the affected area and Union Pacific's evacuation plan.63

Cooper voluntarily moved out of the home while the well was being drilled. There was no sour gas, the well was a dry hole, and Cooper moved back into the home. The jury awarded Cooper $85,000.00 on a nuisance claim. The Texas Court of Appeals in Tyler reversed, holding that fear of the unknown from the lawful operations of industries in Texas cannot be the basis of a cause of action.64

In re SWEPI L.P.65 allows the defendant entry onto a third party lease to conduct a directional survey and a bottom hole pressure test. SWEPI ("Shell") drilled wells on adjacent property while holding acreage belonging to Casas under lease. After Shell's lease expired, Casas leased to Camden, which drilled a producing well on the Casas lease. Casas sued Shell for failing to drill a well on their property resulting in drainage. Casas relied upon well tests and production from the Camden well in asserting their claim. There were issues about the location of the bottom of the Camden well and the existing bottom hole pressure test. Shell sought entry under Texas Rule of Civil Procedure 196.7 governing discovery, which must be made by entering into the land of another to inspect, measure, survey, photograph, test, or sample the property. Shell offered to bond against any losses or potential damages.66

On appeal, the Texas Court of Appeals in San Antonio ordered that the testing should proceed. The court found that the testing was relevant because part of Shell's defense was predicated on the location of the Camden well, and the bottom hole pressure test available to Casas had been performed without any opportunity for Shell to participate. In addressing the "good cause" required for a discovery order allowing entry onto land, the court found no prior authority. It concluded that "good cause" required that the movant establish "(1) the discovery sought is relevant and material, that is, the information will in some way aid the movant in the preparation or defense of the case; and (2) the substantial equivalent of the material cannot be obtained through other means."67

The court found that to effectively refute the Casas well tests, Shell was entitled to conduct its own well tests. There was no real issue as to

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63. Id. at 558-59.
64. Id. at 560-62.
66. Id. at 581-83.
67. Id. at 584.
whether the tests proposed were the least intrusive means, and Shell's offer to bond against costs and losses made it easy for the court to find that the tests were not unduly burdensome.  

The significance of the case is that it requires testing of a third party's well who has no interest in the pending litigation. The court may have been a little quicker to grant discovery then it would have been in the usual case, because in this case, Camden had been under scrutiny by the Railroad Commission. Although the Commission had refused to order a directional survey or to shut-in the Camden well, it gave the Camden well a zero allowable.  

B. Operating Agreements

_El Paso Production Co. v. Valence Operating Co._ holds that the nonconsent penalties under a joint operating agreement ("JOA") can be triggered only by the required notice of proposed operations. The particular form of JOA construed by the court is never identified, but it follows the usual pattern of the A.A.P.L.'s form agreements. The JOA covered a 680-acre Contract Area and a producing well, the Holmes A-1. The JOA included a written notice provision for proposed operations and a 400% nonconsent penalty provision. The nonoperator Sonat made an unusual agreement in 1993 with Houston Lighting & Power Company ("HL&P"), by which Sonat conveyed to HL&P the right to the surface in a 91-acre tract included in the Contract Area. The conveyance was made subject to the JOA and subject to the leases then in effect. The opinion is silent, but the surface conveyed was presumably some part or all of the surface of the leasehold estate contributed to the JOA by Sonat. The agreement also authorized HL&P to cause or authorize the plugging and abandonment of the Holmes A-1 at any time after 1995. In 1996, the operator, Valence, decided to rework the well. Because Valence believed that the HL&P conveyance effectively eliminated Sonat's interest in the well, Valence intentionally refused to give Sonat the notice of proposed operations specified in the JOA.

Valence's theory of the case was that Sonat was contractually precluded from giving effective consent. Question six submitted to the jury "asked, 'Did Sonat fail to consent to the 1996 workover operations at the Holmes A-1 well?' The jury answered 'Yes.'" The trial court then applied the nonconsent penalty in determining the interest of Sonat. On appeal, the First District Court of Appeals in Houston reversed and held that even if Valence's contention was correct, Sonat's failure to consent to the rework operation cannot result in the imposition of any of the con-

68. _Id._ at 585-86.
69. _Id._ at 582.
71. _Id._ at 618-21.
72. _Id._ at 623.
tractual penalties. The nonconsent penalties do not apply because the obligation to give timely notice of consent is triggered *only* by the required notice of proposed operations. There was no provision in the JOA for the imposition of the penalty if the initial required notice was not given.  

The significance of the case is its holding that strict compliance with the notice provision in the JOA as to subsequent operations is a required condition precedent to the imposition of the nonconsent penalties. The opinion does not address any limitation on the time period within which the nonoperator must challenge the sufficiency of the notice and the application of the nonconsent penalty or any affirmative defenses to the lack of notice.

*Dorsett v. Valence Operating Co.* construes the notice and nonconsent provisions applicable to subsequent operations under the A.A.P.L. Form 610-1977 Model Form Operating Agreement ("JOA"), as primarily determined by the notice provision found in Article VI.B.(1) of the JOA. The key holding in the case is that notice of proposed operations must be given thirty days *before* operations are commenced, or the nonconsent penalty provisions do not apply. Valence, as operator, proposed drilling a series of wells over time under various notices, none of which were given thirty days prior to the commencement of operations. Valence argued that the operator could commence operations at anytime, and that Article VI.B.(1) requires only that the operator allow the nonoperator thirty days to elect to participate, regardless of the timing of the commencement of operations.

The Texas Court of Appeals in Texarkana first acknowledged that the nonconsent penalty is generally enforceable, and it is not an unenforceable liquidated damages clause. The nonconsent "penalty" is a mechanism through which consenting parties are compensated for assuming the financial risks associated with exploration and development. However, the court relied upon the recent case of *El Paso Production Co. v. Valence Operating Co.*, discussed above, for the premise that, without proper notice, the nonconsent penalty will not apply to the nonoperating party. The nonoperator will, under those circumstances, receive his share of the revenues without penalty as soon as his share of expenses is recouped. The nonconsent penalty is never triggered and is not enforceable against the nonoperator.

The court defined the "commencement" of operations very broadly, so that many activities which occur prior to the actual spudding of a well could qualify as the date operations commenced. Ordinarily the date operations commenced would be a fact question, which (if contested) would

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73. *Id.* at 623.
75. *Id.* at 226-28, 231, 235.
77. *Dorsett*, 111 S.W.3d at 229, 235.
preclude summary judgment. In this case, Valence did not really contest the issue and the court accepted the dates found by the trial court. One example given as a commencement date was the date Valence paid contractors for site preparation and cleanup.78

The court relied upon authority from other jurisdictions and secondary authority to conclude that the JOA establishes a fixed timeline for proposals and elections, which string together in a logical sequence, including a thirty-day election period prior to the commencement of operations. The court was persuaded that the consenting parties must know who is participating and to what extent before the project begins. At the end of the thirty-day election period, there is another election to participate at the original interest level, or to pick up proportionately the nonconsenting parties’ interest. There is then an opportunity for the proposing party to withdraw the proposal, followed by a sixty-day window in which the operator must commence work.79

As the court notes, decisions in Texas and elsewhere appear to enforce the nonconsent penalties but require moderately strict adherence to the notice provisions before they do so.80 The significance of the case is the clear holding that a thirty-day window to elect is not enough; the window must open and close prior to the date any operations commence. Failure to comply with this provision may give the nonoperator a “free look” before insisting on participating in the proposed operation. It is quite common in the industry for the operator (particularly in a hot area) to undertake some of the preliminary tasks before getting the notice out. This case is silent on how far back the nonoperator may go in contending that the notice did not comply, and therefore the nonconsent provisions did not apply. Some of the notices in this case were served in 1996. Future litigation may be expected on limitations and the usual defensive issues such as waiver, ratification, and estoppel.

Mobil Producing Texas & New Mexico, Inc. v. Cantor81 holds that an operator who continues to pay a nonconsenting nonoperator may only recover for overpayments made in the two years prior to filing suit. Cantor went nonconsent on a workover in 1992. Mobil continued to pay Cantor, although the operating agreement ("JOA") provided that Cantor should not have received revenues on production until Mobil had recovered from Cantor's share of production its proportionate share of the reworking costs and operating expenses, plus the nonconsent penalty. Mobil sued for breach of contract and, in the alternative, unjust enrichment. Mobil was granted summary judgment, but damages were limited

78. Id. at 230.
80. Id. at 233.
81. Mobil Producing Tex. & N.M., Inc. v. Cantor, 93 S.W.3d 916 (Tex. App.—Corpus Christi 2003, no pet.).
to $6,000 for the last two years, rather than $200,000 for the last four years. The trial court applied the two-year statute of limitations applicable to claims for unjust enrichment,82 rather than the four-year statute of limitations applicable to breach of contract claims,83 in limiting Mobil’s recovery.84

The Corpus Christi Court of Appeals found that although Mobil plead breach of contract, there was no evidence of a breach. There is nothing in the JOA that requires the nonconsenting party to take any action in order to suspend the nonconsenting party’s payments. Cantor merely received monies Cantor was not entitled to receive under the JOA, which is unjust enrichment. Mere receipt of money to which Cantor was not entitled is not a breach of contract. Therefore, the four-year breach of contract statute could not apply. Because Mobil recovered on unjust enrichment, rather than breach of contract, Mobil could not recover attorney’s fees. Because Mobil’s pleading for prejudgment interest was only with respect to breach of contract, Mobil also could not recover prejudgment interest. The court’s award of court costs against both sides was not disturbed on appeal. The standard of review is “abuse of discretion,” and neither side was completely successful.85

IV. SEISMIC

In re Bass86 holds that geological seismic data can be trade secrets protected from discovery, and the case further defines the duty a mineral owner owes to a non-participating royalty owner. The original McGill family ranch was partitioned between three brothers. Although both surface and minerals were partitioned, each brother retained a non-participating royalty interest in the tracts owned by the other two brothers. Bass acquired one of the tracts (the 22,000 acre LaPaloma Ranch) by a general warranty deed out of bankruptcy. It was uncontroverted that Bass’ interest in the minerals in the LaPaloma Ranch was subject to the outstanding non-participating royalty interests held by the other brothers and their heirs. Bass contracted with Exxon to run seismic over the entire LaPaloma Ranch. However, Bass never leased to anyone. Some of the McGill heirs, as non-participating royalty owners, sued Bass. They claimed that by refusing to lease and thus develop the land, Bass had breached an implied duty to the non-participating royalty owners. To prove that claim, the McGills sought production of Bass’ seismic data. The trial court ordered production, and Bass brought this mandamus proceeding to avoid production.87

84. Cantor, 93 S.W.3d at 918-19.
85. Id. at 920-22.
87. Id. at 737-38.
In determining whether seismic data constitute trade secrets, the Texas Supreme Court relied heavily on its prior opinion in *In re Continental General Tire, Inc.*,88 which established a two prong inquiry: "[w]hen trade secret privilege is asserted as the basis for resisting production, the trial court must determine whether the requested production constitutes a trade secret; if so, the court must require the party seeking production to show reasonable necessity for the requested materials."89

The supreme court drew upon a list of critical factors (previously found in the Restatement of Torts) as a non-exclusive list of the factors to be considered by the trial court in determining whether the requested production constitutes a trade secret. The six-factor test to be applied includes the following:

1. the extent to which the information is known outside of his business;
2. the extent to which it is known by employees and others involved in his business;
3. the extent of the measures taken by him to guard the secrecy of the information;
4. the value of the information to him and to his competitors;
5. the amount of effort or money expended by him in developing the information;
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.90

However, the party claiming a trade secret is not required to satisfy all six factors, and other circumstances could also be relevant to the trade secret analysis. The court will weigh the factors in the context of the surrounding circumstances to determine whether geological seismic data qualifies as trade secrets.91

The supreme court first determined that seismic data generally is treated as trade secrets both in the industry and in the courts of other jurisdictions. The supreme court then reviewed the Bass 3-D geological seismic data specifically under the six-factor test and held that the data and its interpretations were trade secrets protected by Texas Rule of Evidence 507.92

The second inquiry under *In re Continental* is to determine if discovery is necessary for a fair adjudication. The supreme court held that the data was not material because there was nothing in the record to show a breach of duty. McGill claimed there was a breach of the duty to reasonably develop and a breach of fiduciary duty. The supreme court reviewed the implied covenant to develop as found in connection with oil and gas leases and refused to extend that duty into general warranty deeds subject to outstanding non-participating royalty interests.93

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89. *In re Bass*, 113 S.W.3d at 738 (quoting *In re Cont'l Gen. Tire, Inc.*, 979 S.W.2d at 611).
90. *In re Bass*, 113 S.W.3d at 739.
91. *Id.* at 739-40.
92. *Id.* at 740-42.
93. *Id.* at 743-44.
In response to the McGills' fiduciary duty claim, the supreme court significantly narrowed and limited two of its prior decisions involving the duty owed to the non-executive interest owner by the holder of the executive right. *Schlittler v. Smith* held that there must be "utmost fair dealing on the part of the" holder of the executive rights. The *In re Bass* opinion limits this duty to protecting the amount of the non-executive's royalty. Similarly, in *Manges v. Guerra* the court said "[a] fiduciary duty arises from the relationship of the parties . . . [t]hat duty requires the holder of the executive right, Manges in this case, to acquire for the non-executive every benefit that he exacts for himself." The *In re Bass* opinion agrees that Bass owes the McGills a duty to acquire every benefit for the McGills that Bass acquires for himself. However, there is no lease, no evidence of self-dealing, and therefore no duty has been breached.

The significance of the case is that, for the first time, the Texas Supreme Court finds 3-D seismic data to be trade secrets. The case resolves the factors to be considered in determining whether trade secrets exist and adopts a balancing test for applying those factors. The case is also significant because the court limits the scope of the duty owed by an executive rights owner to the non-executive rights owner. In the usual case, there is no implied duty to develop, and the duty is limited to protecting the non-executive's share by acquiring equal benefits for the non-executive.

V. RAILROAD COMMISSION

*Railroad Commission of Texas v. WBD Oil & Gas Co.*, holds that an aggrieved party may lose the right to challenge Railroad Commission field rules by failing to act within thirty days after the Commission's decision. WBD sued the Railroad Commission in 1995, challenging the validity and applicability of the 1989 Panhandle Field Rules, and alleging that the Commission should not be permitted to change the completion requirements for existing wells. The Commission filed a plea to the jurisdiction, arguing that WBD was too late and improperly attempting to circumvent the requirements of the Administrative Procedure Act ("APA") for obtaining judicial review of a Commission order. The issue was whether field rules determined under "contested case" procedures could be judicially reviewed as "rules" and under "rule making" procedures under Section 2001.028 of the APA. The Texas Supreme Court agreed with the Commission that field rules may only be reviewed through the adjudication provisions of the APA.

96. In re Bass, 113 S.W.3d at 744-45.
98. See 16 TEX. ADMIN. CODE § 3 (West 2002).
99. Railroad Comm'n of Tex., 104 S.W.3d at 71-73.
In determining the 1989 Panhandle Field Rules, contested case procedures were used, including giving notice to all operators, so that production rights in the field could be determined. Thus, like a judgment in a class action, the Commission’s decision adjudicated the rights of those who chose to participate in the proceeding and all others similarly situated, which would include all operators in the Panhandle Fields, including WBD. In the context of the APA as a whole, the supreme court held that field rules clearly are not rules of “general applicability,” but are rather an adjudication of the individual interests principally affected. In Railroad Commission v. Torch Operating Co., the Texas Supreme Court had previously held that field rules are not adopted under the rulemaking provisions of the APA, but are promulgated through the adjudication provisions of the APA. Field rules concern a specific field and a specific group of operators and do not affect the statewide oil and gas industry as a whole.

Therefore, the supreme court held in WBD that the Commission’s field rule orders cannot be challenged in a declaratory judgment action under Section 2001.038 of the APA. The significance of WBD is that it upholds the method of judicial review for contested case decisions to include Commission orders regarding field rules. Thus, once the Commission has adopted field rules, any challenge to them must be immediate. An operator may not wait years, or even months, after the adoption of field rules to challenge their applicability. Indeed, to obtain a review of a contested case proceeding, an aggrieved party must, among other requirements, file a petition with the court within thirty days of the Commission’s decision.

Geodyne Energy Income Production I-E v. The Newton Corp., discussed above under Section II.C on Assignments, is also a significant case on plugging liabilities.

VI. LEGISLATION

A. EXPLORATION AND PRODUCTION


   Issue: Relating to the practice of law.

   Summary: This Act creates an exception to the practice of law for petroleum and mineral land services. It provides that the definition of the practice of law does not include acts related to the lease, purchase, sale,

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100. R.R. Comm’n of Tex. v. Torch Operating Co., 912 S.W.2d 790 (Tex. 1995).
101. Id.
102. Id. at 71, 78-79.
103. Id. at 79.
104. Id. at 74-75.
or transfer of a mineral or mining interest in real property or an easement or other interest associated with a mineral or mining interest in real property if the acts are performed by a person who does not hold himself or herself out as an attorney and is not a licensed attorney.

Effective: June 20, 2003.


Issue: Relating to the continuation and functions of the Texas Board of Professional Engineers and to the regulation of the practice of engineering.

Summary: This Act provides an exemption from licensing requirements for engineers who are full-time employees of private corporations or business entities, under direct supervision and control of the business entity, who perform activities which might be considered to be in line with the practice of engineering. Individuals involved in the production, exploration, and transportation of oil and gas are covered by the exemption.

Effective: September 1, 2003.


Issue: Relating to the acceptance of organization reports and permit applications and approval of certificates of compliance by the Railroad Commission.

Summary: This Act extends to seven years the look-back period for determining compliance of an organization and its officers with statutes and RRC rules, orders, licenses, permits, and certificates (relating to safety or prevention and control of pollution) as a condition of accepting an organization report or approving a permit application or certificate of compliance.

Effective: June 20, 2003.

B. ENVIRONMENTAL


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108. Codified as amendments to TEX. NAT. RES. CODE § 91.114(a) (Vernon Supp. 2003).

Issue: Relating to liens on stored hydrocarbons at sites and facilities that have not been timely cleaned up.

Summary: This Act gives the State a first lien on any hydrocarbons stored at a site or facility that has ceased oil and gas operations and has not been cleaned up by the responsible person by the date required by law, rule, or Commission order.

Effective: September 1, 2003.

C. TAXES


Issue: Relating to technical changes to taxes, fees, and penalties administered by the comptroller of public accounts.

Summary: This Act repeals the expiration dates from the law regarding the high-cost gas tax incentive program and the enhanced oil recovery program, thus making each tax incentive program permanent.

Effective: September 1, 2003.


110. Codified as amendments to TEX. INS. CODE ANN. art. 1.16(b), § 1, art. 4.10, § 13, art. 4.10, § 8, art. 4.11, art. 4.17(a), § 7, art. 9.59, art. 20A.33, §§ 101.053(b), 912.002(b) (Vernon Supp. 2003); TEX. OCC. CODE §§ 2153.153(a) (Vernon Supp. 2003); TEX. TAX CODE §§ 111.0046, 113.006(b), 151.0035, 151.0035, 151.005, 151.313(a), 151.314(e), 151.319(f), 151.323, 151.355, 152.086(a), 155.002, 156.051(a), 156.102(b), 171.001(a), 171.001(b)(2), 171.052, 171.084(c), 171.102(b), 171.1051(c), 171.110(a)-(c), 171.751(1), 171.753, 171.803, 171.804(b), 171.853(c), 201.057(c), 202.054(c), 321.203(j), 322.001(a), 322.002(1), 323.203(j), 351.101(a), 351.102(c), 162.405(a) & (d) TEX. CODE CRIM. PROC. ANN. §§ art. 42.12 § 14(e), art. 42.12 § 19(f), art. 45.048, art. 45.049(e), art. 102.014(e) (Vernon Supp. 2003); TEX. GOV'T CODE ANN. §§ 51.702(d), 51.703(d), 51.704(c), 51.941, ch. 319 heading, 319.001 - 319.004, TEX. LOC. GOV'T CODE §§ 118.015(b), 118.018(c), 118.022(a), 334.256(a) (Vernon Supp. 2003); TEX. TRANSP. CODE ANN. §§ 621.506(g), 706.006(a), 706.007(a)-(c) (Vernon Supp. 2003); and adding TEX. HEALTH & SAFETY CODE ANN. §§ 161.122(f) (Vernon Supp. 2003); TEX. INS. CODE ANN. §§ 151.0056(f), 151.3501, 152.106, 156.104, 171.106(i), 171.109(a-1), 171.110(k)-(l), 171.203(f), 171.731, 171.751, 171.7541, 171.802(d)-(e), ch. 171 subch. U, 321.107, 151.025(d), 351.006(g), 352.007(g), 171.8015 (Vernon Supp. 2003); TEX. CODE CRIM. PROC. §§ art. 102.004(c), art. 102.011(j) (Vernon Supp. 2003); TEX. TRANSP. CODE ANN. §§ 542.043(c), 621.506(h) (Vernon Supp. 2003); TEX. GOV'T CODE ANN. §§ 51.607, subch. A & B, 2303.406(e) (Vernon Supp. 2003); repealing TEX. TAX CODE ANN. §§ 151.0056(f), 151.3501, 152.106, 156.104, 171.106(i), 171.109(a-1), 171.110(k)-(l), 171.203(f), 171.731, 171.751, 171.7541, 171.802(d)-(e), ch. 171 subch. U, 321.107, 151.025(d), 351.006(g), 352.007(g), 171.8015 (Vernon Supp. 2003); TEX. TRANSP. CODE ANN. §§ 542.043(c), 621.506(h) (Vernon Supp. 2003); TEX. LOC. GOV'T CODE ANN. §§ 376.470(d), ch. 133 subtitle C Title 4 (Vernon Supp. 2003); TEX. TAX CODE ANN. §§ 151.0056(f), 151.3501, 152.106, 156.104, 171.106(i), 171.109(a-1), 171.110(k)-(l), 171.203(f), 171.731, 171.751, 171.7541, 171.802(d)-(e), ch. 171 subch. U, 321.107, 151.025(d), 351.006(g), 352.007(g), 171.8015 (Vernon Supp. 2003); TEX. CODE CRIM. PROC. §§ art. 102.004(c), art. 102.011(j) (Vernon Supp. 2003); TEX. TRANSP. CODE ANN. §§ 542.043(c), 621.506(h) (Vernon Supp. 2003); TEX. GOV'T CODE ANN. §§ 51.607, subch. A & B, 2303.406(e) (Vernon Supp. 2003); repealing TEX. TAX CODE ANN. §§ 171.754, art. 9.59 § 16 (Vernon Supp. 2003); TEX. CODE CRIM. PROC. §§ 56.55-57, 56.59, 102.011(f)-(h), 102.019, 102.075 (Vernon Supp. 2003); TEX. GOV'T CODE ANN. §§ 51.107, 51.921, 56.001(b)-(h) (Vernon Supp. 2003).

111. Codified as amendments to TEX. CIV. PRAC. & REM. CODE § 103.051(a) (Vernon Supp. 2003); TEX. CODE CRIM. PROC. ANN. art. 42.12 § 14(e), art 42.12 § 19(f) (Vernon Supp. 2003); TEX. EDUC. CODE ANN. §§ 42.259(c)-(d) & (f), 44.901, 51.927, 53.33, 53.34, 53.35(b), 53.48, 54.624, 55.1731(a) (Vernon Supp. 2003); TEX. GOV'T CODE ANN. §§ 403.016(f), 403.020, 403.027(g), 403.054(b), 403.092(a) & (b), 403.1042(b), (c), (e), (f), 403.401(c), 403.403(d), 403.406(a), 403.413(b) & (e), 404.024(b), 404.102(a), 404.107(b), 404.123(b), 447.001 et seq., 659.102(c), 659.104(a), 659.110, 659.131(b), 659.146(c), 659.150(b), 659.253, 659.255, 659.260, 661.152(d), 661.152(e), 661.202(b), 661.206(b), 662.010, 813.104, 832.002, 2101.0115(a) & (b), 2113.205(b), 2162.001, 2166.406, 2201.002, 2201.003(b), 2251.025(b), 2305.012, 2305.032(a), 2305.033(b) & (d), 2305.034, 2305.039(b),
Issue: Relating to state fiscal matters.

Summary: Among many other tax code revisions, this Act retains a four-year limitation period to apply for high-cost gas tax refunds. However, the refund for taxes on gas produced prior to filing a high-cost gas application with the Railroad Commission is limited to the taxes paid on gas produced in the twenty-four calendar months preceding the month the application is filed.

Effective: September 1, 2003.


Issue: Relating to certain bond requirements for persons engaged in certain activities under the jurisdiction of the Railroad Commission other than the ownership or operation of wells.

Summary: This Act defines the financial security requirements, regarding the Financial Assurance/Oil Field Cleanup Fund, for a person involved in activities other than the ownership or operation of wells who has to file or renew an annual organization report (Form P-5) with the Railroad Commission. No bond, letter-of-credit, or cash deposit is required if the person is a local distribution company, gas marketer, crude oil nominator, first purchaser, well servicing company, survey company, salt water hauler, gas nominator, gas purchaser, or well plunger.

Effective: September 1, 2003.

2306.783(a) (Vernon Supp. 2003); TEX. INS. CODE ANN. §§ arts. 4.51(2) & (13), art. 4.52, art. 4.65(a), art. 4.66(a), 4.67(b), art. 4.68(c), art. 4.73(a), 101.215(b), (g), (i), & (j) (Vernon Supp. 2003); TEX. LOC. GOV'T CODE ANN. §§ 302.002-302.005 (Vernon Supp. 2003); TEX. TAX CODE ANN. §§ 111.104(b) & (c), 111.105(a), 111.107, 111.206(b)-(d), 111.207(a) & (b); 112.058(a), 142.002(1)-(4) & (6), 151.011(a), 151.152(b), 151.314(c), (e), (f), & (g), 151.317(a), 151.317(c), 151.318(b) & (s), 153.119(d), 153.222(d), 201.057(i), 201.101, 201.102, 313.021(2), 321.003, 321.023(b)-(e) & (g), 322.107, 323.003, 323.203(b)-(e) & (g) (Vernon Supp. 2003); TEX. TRANSP. CODE ANN. § 256.009. Adding TEX. EDUC. CODE ANN. §§ 53.02(14), 54.619(j) (Vernon Supp. 2003); TEX. GOV'T CODE ANN. §§ 403.054(i), 403.413(h), 404.024(l), 404.102(c), 609.014, 659.102(d), 659.1031, 659.2531, 659.262, 811.007, 811.008, 813.104(e), 814.010, 815.103(f), 2162.102(d), 2252.903(e)(4) (Vernon Supp. 2003); TEX. INS. CODE ANN. §§ 101.251(k), 141.008(a-1) (Vernon Supp. 2003); TEX. LOCAL Gov'T CODE ANN. § 430.003 (Vernon Supp. 2003); TEX. PROP. CODE ANN. §§ 74.103(d), 74.501(d) & (e) (Vernon Supp. 2003); TEX. TAX CODE ANN. §§ 111.1042(d), 111.105(e), 142.002(3-a)-(3-c), 142.005(c), 142.0055, 142.011, 151.012, 151.025(d), 151.103(d), 151.202(c), 151.314(c-1)(c-3), 151.318(q), 151.318(h), 321.203(g-1)-(g-3), & (l), 323.203(g-1)-(g-3), & (l) (Vernon Supp. 2003). Repealing TEX. EDUC. CODE ANN. §§ 44.901, 51.927 (Vernon Supp. 2003); TEX. FIN. CODE ANN. § 395.103 (Vernon Supp. 2003); TEX. GOV'T CODE ANN. §§ 403.351, 403.403, 403.408, 403.413, 609.515, 659.131, 659.146, 659.152, 815.211, 840.210, 2166.406, 2305.025, 2305.032, 2305.033, 2305.073, 2305.074, 2305.076 (Vernon Supp. 2003); TEX. INS. CODE ANN. §§ art. 4.74 (Vernon Supp. 2003); TEX. INS. CODE ANN. § 1551.054 (Vernon Supp. 2003); TEX. LOCAL GOV'T CODE ANN. § 302.003 (Vernon Supp. 2003); TEX. TAX CODE ANN. §§ 111.207, 112.058, 151.025, 151.326, 326.001-326.004 (Vernon Supp. 2003); TEX. TRANSP. CODE ANN. §§ 256.003 (Vernon Supp. 2003); TEX. GOV'T CODE ANN. §§ 403.1042, 403.092 (Vernon Supp. 2003).

112. Codified as amendments to TEX. NAT. RES. CODE ANN. §§ 91.104(b), 91.109(b), 91.142(g) (Vernon Supp. 2003) and adding TEX. NAT. RES. CODE ANN. § 91.109(c) (Vernon Supp. 2003).

Issue: Relating to the period for the redemption of a mineral interest sold for unpaid ad valorem taxes at a tax sale.

Summary: This Act authorizes the owner of a mineral interest sold at a tax sale to a purchaser, other than a taxing unit, to redeem the property on or before the second anniversary of the date on which the purchaser's deed is recorded in the same manner as a homestead sold at a tax sale.


D. PIPELINES


Issue: Relating to pipeline safety emergency response plans and the requirements governing notification of pipeline construction and operation.

Summary: This Act repeals the requirement for pre-construction notice and an opportunity for public comment on a permit for construction of a pipeline that crosses more than three counties. It clarifies that a pipeline operator has to use only one (rather than all) of the communication options to set up a meeting to communicate and conduct liaison activities with fire, police, and other appropriate public emergency response officials. It further clarifies that use of only one (rather than all) of the optional methods to make arrangements to conduct community liaison activities by means of a telephone conference call will satisfy state requirements.

The owner or operator of an intrastate hazardous liquid or carbon dioxide pipeline facility, any part of which is located within 1,000 feet of a public school or public school facility where students congregate, is required, upon request from the school district, to provide specified information on the pipeline facility operation and relevant parts of the pipeline emergency response plan. A representative of the pipeline operator is required to appear at a regularly scheduled meeting of the school board to explain the pipeline operation and emergency response plan if requested by the school board or school district.

This Act prohibits a person from building, repairing, replacing, or maintaining a construction (building, structure, driveway, roadway, or other construction) on, across, over, or under the easement or right-of-way for a pipeline facility, unless notice of the construction is given to the pipeline facility operator and (1) the operator of the pipeline facility de-

113. Codified as amendments to TEX. TAX. CODE ANN. §§ 34.21(a)-(c) & (e) (Vernon Supp. 2003).
terminates that the construction will not increase the risk to the public or increase the risk of a break, leak, rupture, or other damage to the pipeline facility; if the pipeline facility operator determines that the construction will increase risk to the public or the pipeline facility, the constructor shall pay the cost of additional fortifications, barriers, conduits, or other changes or improvements necessary to protect the public or the pipeline facility from that risk before proceeding with construction; (2) the building, repair, replacement, or maintenance is conducted under an existing written agreement; or (3) the building, repair, replacement, or maintenance is required to be done promptly by a regulated utility company because of the effects of a natural disaster. There are exemptions from the rule.

Effective: June 20, 2003.


Issue: Relating to classification of certain exemptions from requirements of pipeline assessment and testing.

Summary: This Act exempts rural gathering lines from Railroad Commission requirements regarding assessment and testing.


Issue: Relating to the construction and maintenance of utility, common carrier, cable operator, and energy transporter facilities along, over, under, or across a railroad right-of-way.

Summary: This Act authorizes an entity (utility, common carrier, cable operator, or energy transporter) to acquire an easement by eminent domain along, over, under, or across a railroad or railroad right-of-way in order to maintain, operate, or upgrade its facilities consistent with preexisting licenses or agreements. The entity is required to provide notice to the railroad within a reasonable period of any proposed activity relating to the construction, maintenance, or operation of the facilities and prohibits unreasonable interference with railroad operations.

The compensation due to the railroad under an eminent domain proceeding, for the perpetual use of the interest obtained, to be the fair market value of the real property interest to be used and damages, if any, to the railroad's remaining property. The railroad may also recover the cost to repair any damage to its facilities caused by the construction, maintenance, operation, or upgrade of the entity's facilities, as well as reasonable costs and expenses for interference with railroad operations.

Effective: September 1, 2003.


in the TTC reasonable access to operate and maintain the owner’s public utility facility.

The Commission may acquire, by condemnation or by purchase under any terms or conditions it deems proper, an interest in real property or a property right, that may be necessary or convenient for the construction or operation of any facility that is part of the TTC. The owner of a public utility shall not be required to pay a fee as a condition for crossing the TTC, for placing a facility along or within the TTC pursuant to an obligation as a provider of last resort, or for the use of the TTC by a facility in existence before TTC establishment or a replacement for such facility. This Act provides that nothing in the statute creating and defining a Regional Mobility Authority supercedes or renders ineffective any provision of any other law applicable to the owner or operator of a public utility facility, including any provision of the utilities code regarding the licensing, certification, and regulatory jurisdiction of the Public Utility Commission or the Railroad Commission.

The Act gives a utility the same right to place its facilities, lines, or equipment in, over, or across a right-of-way that is a part of a state-owned rail facility as the utility has with respect to the right-of-way of a state highway. TxDOT may designate the location in the right-of-way where the utility may place its facilities, lines, or equipment. TxDOT may also require a utility to relocate the utility’s facilities, lines, and equipment if TxDOT considers the relocation necessary. The relocation will be at TxDOT’s own expense if the owner timely relocates the facilities as requested.

Effective: September 1, 2003, except Articles One, Two, Four, Six, Fifteen, and Eighteen, effective immediately. Article 8 effective June 1, 2005. Article 9 effective September 1, 2005. Article 5 effective when H.J.R. 28 approved.