VOL. 1 | ISSUE 1

McGINNIS LOCHRIDGE

Producer's Edge

TEXAS OIL AND GAS LAW BULLETIN

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About the *Producer's Edge*

The McGinnis Lochridge Oil and Gas Practice Group is pleased to present this first edition of *Producer's Edge*. We aim to make *Producer's Edge* your home for keeping up to date on Texas oil and gas case law, regulatory updates, and insightful articles relevant to the oil and gas community.

In this first edition, we highlight several recent Texas oil and gas cases published in the last quarter of 2018. We also highlight Partner Donald D. Jackson, and his recent article, *Can A Driller Trespass While Fracking On Its Own Lease?* You'll also find our article listing a brief summary of several oil and gas cases pending in front of the Texas Supreme Court.

In the next edition of *Producer's Edge*, we will cover cases from the first portion of 2019. In addition, we will follow up on our Offset article with information from a regulatory perspective. We will also feature excerpts from our *Railroad Commission Update* paper, which will be presented on March 29, 2019, at the 45th Annual Ernest E. Smith Oil, Gas and Mineral Law Institute.

If your friends or colleagues would like to receive the *Producer's Edge*, please invite them to sign up for our alerts and updates here.

If you have any comments, questions, or concerns, please do not hesitate to reach out to authors directly, or send an email to oilandgas@mcginnislaw.com.

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EVENTS, PRESENTATIONS AND PAPERS:

UPCOMING

- TELJ 9th Annual Symposium, *Changing Environments: The Future of Natural Resource Law*, panel speaker, Of Counsel Bruce Kramer **— March 29, 2019**
- 45th Annual Ernest E. Smith: Oil, Gas and Mineral Law Institute, *Railroad Commission Update*, presented by Partner Tim George and Associate Ryan Lammert **— March 29, 2019**
- Oil, Gas and Mineral Law Section of the Austin Bar Association Luncheon, *Divided Surface and Mineral Estates*, presented by Partner, Austin Brister **— April 10, 2019**
- Permian Basin Landman Association, Spring Education Seminar, *Divided Surface and Mineral Estates*, presented by Partner Austin Brister **— April 17, 2019**
- Houston Association of Professional Landmen, 2019 Spring Seminar, *Update on Recent Texas Case Law, and Overview of Pending Cases*, presented by Partner Austin Brister and Associate Ana Navarrete **— May 4, 2019**
- McGinnis Lochridge Seminar, *Employment Law Initiatives — Now and Looking Ahead*, Austin, Texas, presented by the McGinnis Lochridge Employment, Labor and Employee Benefits Practice Group **— May 7, 2019**

RECENT EVENTS & PRESENTATIONS

- State Bar of Texas, Oil and Gas Disputes, Injunctive Relief in the Oil Patch by Partner Derrick Price and Associate Ana Navarrete **— January 10-11, 2019**
- Institute for Energy Law's Annual Oil & Gas Law Conference in Houston, Texas **— February 21-22, 2019**
- McGinnis Lochridge Seminar, *Employment Law Initiatives — Now and Looking Ahead*, Dallas, Texas — presented by the McGinnis Lochridge Employment, Labor and Employee Benefits Practice Group **— March 5, 2019**
- Houston Bar Association, *Production in Paying Quantities and Survey of Lease Termination Dispute*, presented by Partner Austin Brister **— August 16, 2018**

Four Recent Drainage and Offset Cases: A Texas Litigation Trend?

By: Austin Brister and Ana Navarrete

Three recent Texas cases have focused on the interpretation of express offset provisions in oil and gas leases. Over the last year, the Texas oil and gas industry has experienced what some commentators have called "Shale Boom 2.0," with increased drilling activity in South Texas and the Permian Basin, leading to some marketing bottlenecks and spikes in the number of drilled but uncompleted wells.

Whatever the cause, at least three reported appellate cases in the last 18 months have focused on the construction of express offset clauses in oil and gas leases. Oil and gas landmen and lawyers alike should take note of these decisions, as they each underscore that Texas courts do not interpret oil and gas leases merely by reference to the industry's general rules, but instead on a careful analysis of the actual language used by the parties in the lease. And as one recent case illustrates, the "surrounding circumstances" of the shale boom might lead to results some would not expect.

Murphy v. Adams: "offset well" did not mean well that would actually protect against drainage

Earlier this year, we summarized *Murphy Expl. & Prod. Co.-USA v. Adams*, 560 S.W.3d 105 (Tex. 2018). In that case, the Texas Supreme Court held that, in light of the "surrounding circumstances" of the Eagle Ford shale, the phrase "offset well" in that particular lease did not require the drilling of a well that would actually protect against drainage. Instead, the Court held that "offset well" merely referred to a well drilled anywhere on the leased premises, so long as it was drilled down to the depth required under the lease.

That case involved an "offset" clause in a 2009 oil and gas lease. The majority reached its conclusion based on interpreting that term in light of the "surrounding circumstances" evidence of the discovery of the Eagle Ford and drainage patterns of horizontal shale wells.

Four justices dissented in an opinion that, among other things, criticized the majority opinion for disregarding the commonly understood meaning of the phrase "offset well," which they described as being a well designed to protect the leasehold from drainage.

The clause at issue in the *Murphy v. Adams* case read as follows:

> ...in the event a well is completed as a producer of oil and/or gas on land adjacent and contiguous to the leased premises, and within 467 feet of the premises covered by this lease, that Lessee herein is hereby obligated to...commence drilling operations on the leased acreage and thereafter continue the drilling of such off-set well or wells with due diligence to a depth adequate to test the same formation from which the well or wells are producing from on the adjacent acreage.

When a well on a neighboring tract triggered this clause, Murphy drilled a well 1,800 feet from the lease line and 2,100 feet away from the triggering

well. Murphy argued that this well satisfied the offset well requirement because it was drilled on the leased premises and to the same depth as the neighboring well. The lessor argued the well did not qualify as an offset well because it was not designed to protect against drainage.

The majority noted that this offset clause did not expressly require that the offset well be drilled in any specific location. The majority's holding was largely founded on "surrounding circumstances" evidence - the fact that the leases were executed in 2009 and the leases were drafted with horizontal shale drilling in mind. The Court noted that "commentators have recognized" that "little or no drainage will occur between the two tracts" in a shale play, assuming one is drilled and the other is not. Based on this understanding, the Court concluded that the parties must have not intended for an offset well to be drilled in a location to protect against drainage, referring to any other conclusion as "illogical." The Court limited its holding to "the circumstances at hand, which involve unconventional production in tight shale formations."

Four justices dissented in an opinion that complained that the majority was "explaining on behalf of Murphy" why the parties who negotiated leases (which did not include Murphy) could not have intended for the phrase "offset well" to retain its traditional meaning. The dissent concluded that the phrase "offset well" required Murphy to drill its offset well at a location where a reasonably prudent operator would drill a well to protect the leasehold from actual or potential drainage, whether or not any was occurring. The dissent complained that the Court's holding effectively stripped the lessors of any leasehold protections that the offset clause could have been designed to protect and that the word "offset," as used in the lease, would have no meaning.

It should be noted that all parties agreed that this offset clause could be triggered regardless of whether there was actual drainage, thereby distinguishing this clause from the implied covenant to protect from drainage.

It is yet to be seen whether, and to what extent the Court's willingness to interpret leases through the lens of unconventional drilling will have on other lease provisions, and the role, if any, of expert engineering testimony in shaping what is seen through that lens.

Martin v. Newfield: Offset obligation not triggered due to separation by narrow strip of land

In another recent Texas case, *Martin v. Newfield Exploration Co.*, No. 13-17-00104-CV, 2018 Tex. App. LEXIS 2435 (App.—Corpus Christi Apr. 5, 2018), the Corpus Christi Court of Appeals held that another express offset clause was not triggered because the provision indicated that a triggering well must be located on an "adjoining" tract. In that case, a narrow strip of land separated the unit containing the nearby well and the unit that contained the plaintiff's lease. The defendant oil and gas company argued that, because the tracts of land were separated by this narrow strip of land, they were not truly "adjoining" and therefore the offset clause was not triggered.

In *Martin*, the clause at issue provided as follows:

> ...in the event a well is drilled on or in a unit containing part of this acreage or is drilled on acreage adjoining this Lease...the Lessee shall spud an offset well...

The Corpus Christi Court of Appeals began by indicating that whether this obligation was triggered was a matter of construing "the intention of the parties as it is expressed in the lease."

The court, in turn, concluded that question was resolved by the definition of the word "adjoining." The court reviewed a few cases that previously held that "adjoining" means "lying next to, adjoining to, uniting, being in contact" as well as "touching or sharing a common boundary." Based on these definitions, the *Martin* Court held that the two units were not "acreage adjoining" because they were separated by another strip of land. As a result, any "duty to prevent drainage and spud an offset well…was not triggered as a matter of law."

Mzyk v. Murphy: Offset obligation not triggered where reasonable prudent operator would not have drilled an offset well

In *Mzyk v. Murphy Expl. & Prod. Co.-USA*, No. 04-15-00677-CV, 2017 Tex. App. LEXIS 5930 (App.—San Antonio June 28, 2017), the San Antonio Court of Appeals analyzed whether an offset provision required the lessee to drill an offset well even if a reasonable prudent operator would not drill an offset well in similar circumstances. The landowner argued that Murphy had the obligation even if a prudent operator would not drill the well, and sought $11 million in compensatory royalties and attorney's fees.

The offset clause at issue read (in part) as follows:

> If…any new well or wells is drilled…on adjacent lands…and within four hundred sixty seven feet (467') from said lands, *Lessee agrees to drill such offset well or wells on said lands (or attempt to complete for production any existing offset well or wells drilled by Lessee on said lands) as a reasonably prudent operator would drill under the same or similar circumstances…*

The dispute focused on the effect of the emphasized language quoted above. Murphy argued that this language meant Murphy had no requirement to drill an offset well if a reasonably prudent operator under similar circumstances would not drill an offset well. The landowner, on the other hand, argued that the first part of the paragraph indicated when Murphy was required to drill an offset well, and the emphasized language merely dictated how Murphy was to drill that well.

The court of appeals interpreted the phrase as expressly adopting the reasonably prudent operator standard. The court further explained that, in the context of an offset obligation, the reasonably prudent operator standard also determines *whether* to drill an offset well, not merely *how* to drill an offset well.

The court of appeals rejected the lessor's arguments that the offset clause was drafted as a "modern lease that presumes drainage is occurring" if another well is drilled within 467 feet. The court noted that the modern clauses the landowner quoted were "substantially different," because the clause in this case "contains no language suggesting the parties agreed to a presumption of actual or substantial drainage."

The landowner also argued that Murphy should have paid compensatory royalties under another provision which specified that, if Murphy did not "build an offset well," then it had to either pay compensatory royalties or deliver a release of the lease. However, the court disagreed, reasoning that the reference to "offset well" in that provision refers back to the offset well clause, which had incorporated the reasonably prudent operator standard.

Bell v. Chesepeake

On March 13, 2019, the San Antonio Court of Appeals issued its opinion in *Bell v. Chesapeake* Energy, Cause No. 04-18-00129-CV (Tex.Civ.App.—San Antonio, 2019 no pet), involving a dispute as to whether a particular offset clause in that case adopted the reasonable prudent operator standard, and the calculation of compensatory royalties. This case will be discussed in Part Two of this article, which will be released in the next installment of Producer's Edge.

TAKEAWAYS AND INSIGHTS

The oil and gas industry can sometimes be heavy on jargon and the use of broad guiding principles. However, as these recent cases illustrate, Texas courts analyzing express offset provisions do not merely adopt the industry's general rules, but instead focus their analysis on the interpretation of the specific language utilized by the parties in the oil and gas lease.

These cases illustrate that companies examining their offset obligations or negotiating new leases should pay close attention to the wording of any offset provisions, including potential references to reasonable prudent operator standards, how the provision describes when the obligation is triggered, and the description of resulting obligation. Parties should also keep in mind potential arguments regarding how "surrounding circumstances" shed different light on the language. However, the sharp dissent in the Murphy v. Adams case is likely to motivate counter-arguments disputing the efficacy of such evidence in lease construction cases.

Texas Court Addresses the Use of Contract Operators

OBO, Inc. v. Apache Corp., 2018 Tex. App. LEXIS 8392, (Tex.Civ.App.—Houston [14th Dist.] 2018, no pet.)

By: Austin Brister

Parties to a joint operating agreement sometimes elect to have a non-owner serve as the operator. For example, interest owners may determine that they are unwilling or unable to perform the operator duties under the operating agreement, and will instead elect hire an unaffiliated contract operator. However, placing a non-owner in the position of operator is problematic for a number of reasons. For example, most model form operating agreements either directly or indirectly indicate that ownership is a condition precedent to serving as operator. Moreover, numerous obligations, protections, and other provisions of model form operating agreements may become confusing, unworkable, or even meaningless when applied to a non-owning operator.

Some of those issues are illustrated by the recent case *OBO, Inc. v. Apache*, involving the American Petroleum Institute's Model Form Unit Agreement and Model Form Unit Operating Agreement. In that case, the Houston 14th District Court of Appeals was faced with determining whether an elected Unit Operator is permitted to delegate operatorship duties to a contract operator, and whether that contract operator can be liable to non-operators for breach of any duties imposed on the operator under that Unit Operating Agreement.

PBJV (the owner of 81.4% interest) was designated as unit operator, but then PBJV entered into a contract with Apache to perform a number of those duties, including an obligation to submit JIBs on behalf of PBJV. OBO (a minority working interest owner), declined to pay a number of JIBs and Apache filed suit. OBO filed a counter-claim, alleging that Apache lacked standing because the API Unit Operating Agreement indicates that the "Unit Operator" must be a working interest owner.

OBO also filed a counterclaim against Apache for breach of an alleged duty under the API Unit Operating Agreement to act as a reasonably prudent operator, and claimed that the exculpatory clause did not serve to limit Apache's liability. The trial court granted summary judgment against OBO, and this appeal followed.

The Houston 14th District Court of Appeals indicated it was undisputed that only a working interest owner can be designated as the Unit Operator under the API Unit Operating Agreement. Instead, the Court framed the dispute as whether Apache was actually *acting* as the Unit Operator or was merely *delegated* operator duties. The Court concluded that Apache was merely delegated duties, based on its observations that PBJV never actually named or designated Apache as the "Unit Operator," but instead entered into a "Contract Services Agreement" and power of attorney with Apache under which PBJV contractually delegated certain operator duties to Apache. The Court also noted that the contract expressly indicated that Apache was "subject to the reasonable direction of PBJV."

OBO claimed that the API Model Form prohibited delegation of operator duties. OBO argued that allowing delegation of operator duties would render meaningless the definition of "Unit Operator," defining that term as the party "acting as operator and not as a Working Interest Owner." However, the court disagreed, explaining "it is not reasonable to interpret this sparse language as creating a prohibition against delegation." Instead, the court explained that a more reasonable explanation is that the definition is merely intended to differentiate between the Unit Operator's actions as operator and actions as owner.

OBO also argued that allowing delegation of operator duties would render meaningless the operator removal language in Section 6.2 of the API Model Form, which allows non-operators to vote among themselves to remove the operator. OBO argued that, if PBJV were allowed to delegate operator duties to Apache, then PBJV could nullify OBO's protection under Section 6.2 by voting its 81.4% interest in favor of keeping Apache. However, the Court disagreed with OBO, explaining that because PBJV was the Unit Operator, not Apache, this Section 6.2 was unaffected by PBJV's delegation of operator duties to Apache.

Finally, the Court also disagreed with OBO regarding its breach of duty claim against Apache. The court noted that, while the only duty OBO alleged was under the Unit Operating Agreement, Apache could not owe any duties under that agreement because Apache was not a party to that agreement. As the Court explained, "it is axiomatic that a contract between other parties cannot create an obligation or duty on a non-contracting party." As a result, the Court did not expressly address OBO's related claim that the exculpatory clause did not limit Apache's liability.

TAKEAWAYS AND INSIGHTS

As the *OBO* case illustrates, numerous issues can arise when parties elect to engage a non-owning operator. As a result, JOA parties seeking to appoint a non-owner as operator often expressly address the subject through custom provisions in the operating agreement or by separate written agreements. For example, some operating agreements include within their custom provisions a paragraph expressly granting the designated operator the right to delegate duties to a third party operator as an independent contractor, and addressing the non-operators' rights and obligations with respect that contract operator.

AAPL's Model Form-610 Operating Agreement itself was updated in 2015 to include a provision addressing the use of non-owner operators. The 2015 version of that form includes a new provision in article V.A. expressly allowing non-owning operators but expressly requires, as a condition precedent, the non-owner operator and the non-operators to first enter into a separate agreement governing their relationship. This "separate agreement" is a firm condition precedent under the 2015 form, as the provision goes on to explain that "the failure of a non-owning operator and Non-Operators to enter into such a separate agreement…shall disqualify said non-owning operator from serving as Operator, and a party owning an interest in the Contract Area must instead be designated as Operator."

The use of a non-owning operator involves numerous complicated and delicate issues, such as the relationship between the owners and the non-owning operator, the non-owning operator's tenure, compensation, authority, liability, and duties. Those issues should generally be addressed in an agreement between the JOA parties and the non-owning operator, such as the "separate agreement" contemplated within the new 2015 form. In fact, the new provision contained within the 2015 form is largely silent as to the parties' relationship, impliedly assuming the parties will address these issues within their separate agreement.

Highway to Oil: Strip-And-Gore Leads to 30-Acres of Minerals Underlying a Highway

Green v. Chesapeake Expl., L.L.C., No. 02-17-00405-CV, 2018 Tex. App. LEXIS 10307 (Tex. App.—Fort Worth Dec. 13, 2018, no pet.)

By: Austin Brister and Jordan Mullins

In urban oil and gas plays such as the Barnett Shale, horizontal drilling has "paved the way" for oil and gas operators to drill through and produce minerals underlying highways, streets, and roadways. Even in rural areas across Texas, numerous horizontal wells have been drilled underneath roads and highways. As a result, several reported cases in recent years have involved title to minerals underlying roadways. Landmen of the vertical era may have paid little attention to mineral title underlying roadway tracts. After all, one option may have been simply to drill the vertical well next to the road or to omit the roadway tract from the unit. However, horizontal drilling significantly altered this analysis, as geological implications and long horizontal laterals may dictate that the horizontal wellbore pass under the roadway, significantly increasing the odds that a roadway tract will be a "drillsite tract." The result is that mineral title and pooling issues are more likely of critical concern.

An important doctrine relating to roadways is the strip-and-gore doctrine and the centerline presumption. Some may (erroneously) think of the strip-and-gore doctrine as applying only to extremely small strips of land, such as when updated surveys slightly deviate from prior boundary lines. However, as was recently illustrated in *Green v. Chesapeake*, 2018 Tex. App. LEXIS 10307 (Tex.Civ.App.—Fort Worth 2018, no pet.), the strip-and-gore doctrine can actually apply to relatively large tracts of land.

In *Green v. Chesapeake*, the Fort Worth Court of Appeals analyzed the "strip-and-gore" doctrine in determining ownership of minerals underlying a 30-acre parcel underlying a Highway. The case involved two deeds: (1) a 1970 deed, conveying the eastern 30-acres of an 85-acre tract to the State of Texas for the highway, reserving all mineral rights, and (2) a 1972 deed conveying the remaining 55 acres to successors, with no mineral reservation, and with no mention of the 30-acre highway tract. Years later, the question arose as to whether the 1972 deed also conveyed the severed 30-acre mineral interest by way of the strip and gore doctrine.

The Fort Worth Court of Appeals held that the strip-and-gore doctrine does not require any showing of ambiguity, and held that there is no exact size ration that must be found for the doctrine to apply.

Instead, the court held that the strip-and-gore doctrine requires just three elements: (1) the adjoining land is of a certain character—relatively narrow, small in size and value in comparison to the expressly conveyed land, and no longer of importance or value to the grantor of the larger tract, (2) the adjoining land was not included in the property description in the deed at issue, and (3) no other language in the deed indicates that the grantor intended to reserve an interest in the adjoining land.

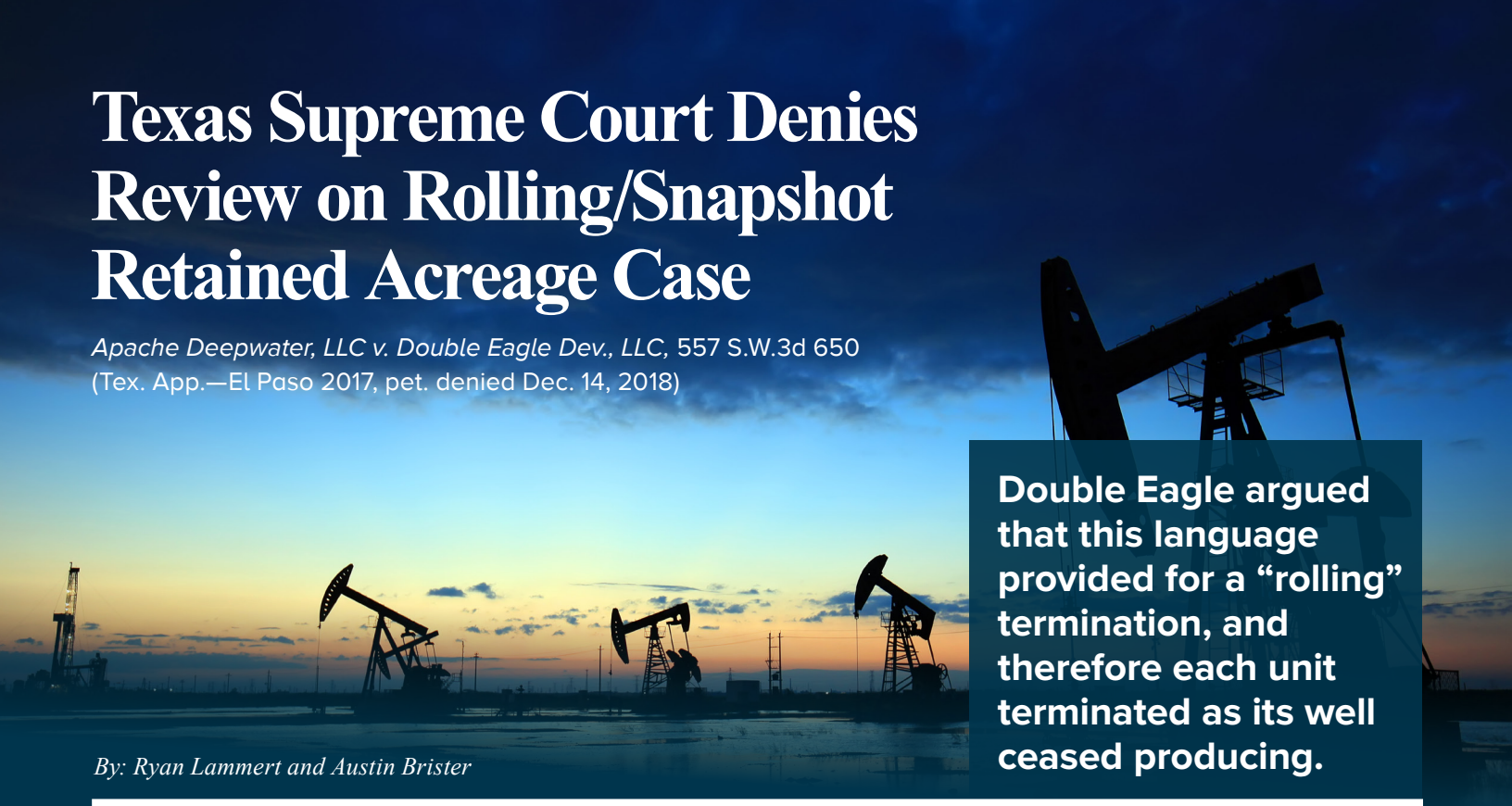
The court held that size is not an independent element, but rather an indicator of the value of the tract to the grantor, such as whether it was developable or useable.

The Green court focused its analysis on the value of the minerals underlying the highway, and noted that the 1970 deed waived all rights of ingress and egress. The court concluded that the minerals would be "wholly worthless if the owner...could not enter upon the land in order to explore for and extract them."

The Green court acknowledged that minerals underlying the highway may have significant value with today's horizontal drilling technology. However, the court noted that the strip-and-gore doctrine is an aid to determine the parties' intent, and the 1972 deed was executed during a time when vertical wells predominated Texas' oil and gas production. The Green court stated that it was not willing to "conclude that [the grantor] intended to retain ownership indefinitely in a property interest that to it was inaccessible and then undevelopable, with the future hope that one day it would benefit from that interest, either via pooling or the advent of technology."

Texas Supreme Court Denies Review on Rolling/Snapshot Retained Acreage Case

Apache Deepwater, LLC v. Double Eagle Dev., LLC, 557 S.W.3d 650 (Tex. App.—El Paso 2017, pet. denied Dec. 14, 2018)



Double Eagle argued that this language provided for a "rolling" termination, and therefore each unit terminated as its well ceased producing.

By: Ryan Lammert and Austin Brister

Retained acreage provisions continue to be a popular subject in Texas oil and gas law. The Texas Supreme Court recently denied a petition for review in the closely-watched case, *Apache v. Double Eagle*. In that case, the parties disagreed as to whether a retained acreage clause provided for a single partial termination at the end of the primary term (i.e., a "snapshot-in-time" termination), or a continuous partial release throughout the secondary term (i.e., "rolling termination"). This case bolsters the old adage: "say what you mean and mean what you say." Texas courts will not fill in the blank otherwise.

The facts of the *Apache* case are fairly straightforward. The dispute involved a 1975 lease covering 640 acres in Reagan county, which was divided up into four proration units, each with its own producing well. However, several years after the primary term had expired, three of the four wells ceased production. Apache later acquired that lease by assignment.

In 2012, Double Eagle acquired a lease covering the three sections where production had ceased. Apache balked, claiming that its one remaining well was sufficient to hold the entire 640-acre lease. The dispute turned on the retained-acreage clause, which read as follows:

> Notwithstanding anything to the contrary...Lessee covenants to release this lease after the primary term except as to each producing well on said lease, operations for which were commenced prior to or at the end of the primary term and the proration units as may be allocated to said wells...

Double Eagle argued that language provided for a "rolling" termination, and therefore each unit terminated as its well ceased producing. However, Apache argued that this clause provided for a single "snapshot" termination, essentially applying one time at the end of the primary term. Under Apache's reading, because all four wells were producing at the end of the primary term, there would be no partial termination later down the road as long as one well was producing in paying quantities.

The El Paso Court of Appeals held in favor of Apache, explaining (1) this is not the sort of "clear, precise, and unequivocal language" Texas courts require to limit a habendum clause, (2) this habendum clause broadly described that production would extend the entire "leased premises."

The court was not persuaded by Double Eagle's arguments that (1) the phrase "after the primary term" in the habendum clause means the same thing to the industry as "during the secondary term," or (2) that the phrase "notwithstanding" automatically shows that the parties intended the retained acreage provision to be contrary to the habendum clause.

The takeaway? Parties desiring a rolling termination should take care to draft "clear, precise, and unequivocal" language.

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Partner, Donald D. Jackson

Don Jackson has over 25 years of litigation experience, most particularly cases involving energy industry and intellectual property matters. His energy litigation experience includes disputes involving royalties, trespass, prudent operations, lease terminations, joint operating agreements, products liability, and removal of the operator. Don has successfully handled intellectual property litigation matters involving trade secrets, patents, copyrights, and trademarks. He also has extensive experience representing industry-leading companies in lawsuits involving business torts, eminent domain, and defamation.

Don is recognized in *The Best Lawyers in America*, Woodward/White, Inc., for his work in Product Liability Litigation, 2012-2018. He was selected for inclusion in Texas Super Lawyers, Thomson Reuters, in Energy & Natural Resources, Business Litigation, and Intellectual Property Litigation, 2013-2018. He has a peer rating of AV® Preeminent™ 5.0 out of 5 by Martindale Hubbell.

Before law school, Don was an Exxon engineer for over five years and developed oil and gas fields in Texas and Alaska. He received a Texas professional engineer's license, has degrees in Chemistry and Chemical Engineering, and is a registered patent attorney.

REPRESENTATIVE EXPERIENCE

- Defeated a temporary injunction application against a major oilfield service company sued for trade secret misappropriation.
- Defended a major Eagle Ford operator, obtained a take nothing judgment, and disqualified the opponent's engineering expert.
- Sued the operator of a S. Texas hazardous waste disposal well and its engineering company for underground trespass and obtained confidential settlements on behalf of an independent S. Texas operator.

Can a Driller Trespass While Fracking on Its Own Lease?

By Donald D. Jackson

Pennsylvania, the nation's second largest natural gas producing state after Texas,[1] may be poised to decide an important issue in the evolving law of trespass and hydraulic fracturing. In November 2018, the Pennsylvania Supreme Court granted review in Briggs v. Southwestern Energy Company[2] on the issue of whether a driller can be held liable in trespass for hydraulically fracturing a well located entirely on the driller's own lease. The first brief is currently due later this month.[3]

The issue in Briggs will be closely watched in the energy business, because hydraulic fracturing has been responsible for over half of current U.S. oil production[4] and two-thirds of U.S. natural gas production.[5] Since 2005, the majority of new natural gas wells in the U.S. have utilized horizontal drilling and hydraulic fracturing technology.[6]

Although hydraulic fracturing of oil and gas wells is now nearly ubiquitous in the nation's major oil and gas producing areas, and has been used commercially for 70 years,[7] few state supreme court cases have involved trespass based on hydraulic fracturing. Since the technology was introduced, the issue has been slowly evolving, with some seemingly disparate holdings among the handful of decisions that have analyzed hydraulic fracturing and trespass claims.

Earliest State Supreme Court Case Hints at Possible Trespass Liability

Nearly 60 years ago, during the infancy of this technology, the Texas Supreme Court, in Gregg v. Delhi-Taylor Oil Co.,[8] faced a claim of trespass by hydraulic fracturing. A.W. Gregg had drilled a well 37 feet from the Delhi-Taylor lease boundary and planned to hydraulically fracture the well. Delhi-Taylor sought an injunction to stop the alleged subsurface trespass.

In deciding a jurisdictional challenge, the Texas Supreme Court held that the trial court had inherent jurisdiction to decide the question of whether a trespass occurred, and stated: "While the drilling bit of Gregg's well is not alleged to have extended into Delhi-Taylor's land, the same result is reached if in fact the cracks or veins [from hydraulic fracturing] extend into its land and the gas is produced therefrom by Gregg." Although the statement is arguably not part of the holding and therefore not precedential, the opinion suggested that hydraulic fracturing could constitute a trespass if the induced fractures extend beyond the driller's lease boundary.

Texas Supreme Court Rejects Certain Trespass Claims Based on Rule of Capture

A little over 10 years ago, the Texas Supreme Court faced another claim of subsurface trespass from hydraulic fracturing, in Coastal Oil and Gas v. Garza Energy Trust.[9] Coastal had drilled a well on its property 467 feet from the adjoining tract boundary, and hydraulically fractured the well. The lessors of the adjoining tract sued for trespass. The lessors' expert opined that the length of the fractures extended into the lessors' property. The expert also calculated a range of damages based on expected drainage from the lessors' lease by the hydraulically fractured well.

Under the rule of capture, a mineral owner is given title "to the oil and gas produced from a lawful well bottomed on the [owner's] property, even if the oil and gas flowed to the well from beneath another owner's tract." The Coastal Oil court declined to decide the broader issue of whether hydraulic fracturing can give rise to an action for subsurface trespass, but the court did hold that a lessor suing in trespass could not claim damages for mere drainage of oil and gas from the lessor's property through hydraulic fracturing of a neighboring well.

The Coastal Oil court reasoned that the rule of capture precluded such damages by a lessor. And without cognizable damages, the lessors' trespass claims failed.

Critics say Texas Misapplied Rule of Capture

Some have strongly criticized the Coastal Oil opinion. The Coastal Oil dissent argued that the rule of capture should not apply when "a party

1 See Natural Gas Gross Withdrawals and Production, Marketed Production, U.S. Energy Information Administration.
2 *Briggs v. Southwestern Energy Co.* , No. 443 MAL 2018, 2018 Pa. LEXIS 6025 (Pa. Nov. 20, 2018) (per curiam) (case has been transferred to No. 63 MAP 2018).
3 Docket Sheet for No. 63 MAP 2018.
4 Hydraulic fracturing accounts for about half of current U.S. crude oil production, U.S. Energy Information Administration.
5 Hydraulically fractured wells provide two-thirds of U.S. natural gas production, U.S. Energy Information Administration.
6 Natural Gas Explained, Where Our Natural Gas Comes From, U.S. Energy Information Administration.
7 See G.C. Howard & C.R. Fast, Society of Petroleum Engineers of AIME, Hydraulic Fracturing 5-8 (1970) (detailing development of the first hydraulic fracturing operations).
8 *Gregg v. Delhi-Taylor Oil Co.* , 344 S.W.2d 411 (Tex. 1961).
9 *Coastal Oil and Gas v. Garza Energy Trust* , 268 S.W.3d 1 (Tex. 2008).

effectively enters another's lease without consent, drains minerals by means of an artificially created channel or device, and then 'captures' the minerals on the trespasser's lease." The dissent further argued that a well illegally drilled into a neighbor's lease can drain the adjoining lease similar to a hydraulic fracture that extends across a lease boundary.

Commentators have lodged similar criticisms of the Coastal Oil majority opinion, with one protesting that the majority "ignored 1000 years of the common law of trespass."[10]

Perhaps the harshest criticism of the Coastal Oil decision was by a federal judge in Stone v. Chesapeake Appalachia LLC,[11] who in 2013 applied West Virginia law, and soundly rejected the reasoning in Coastal Oil. In Stone, Chesapeake had drilled a horizontal well within "tens of feet" of the plaintiffs' 217-acre tract.[12] Chesapeake had no lease on the plaintiffs' property, and had allegedly used its neighboring well to hydraulically fracture "under [plaintiffs'] property without the authority to do so."

Chesapeake relied on West Virginia's rule of capture, and urged the court to adopt the reasoning in Coastal Oil. But the federal judge disagreed, stating: "the [Coastal Oil] opinion gives oil and gas operators a blank check to steal from the small landowner" and "the common law of capture is not a license to plunder."[13]

10 See, e.g., Bruce M. Kramer, Horizontal Drilling and Trespass: A Challenge to the Norms of Property and Tort Law, 25 Colo. Nat. Resources, Energy & Envtl. L. Rev. 291, 306 (2014); Bruce M. Kramer, Coastal Oil & Gas Corp. v. Garza Energy Trust: Some New Paradigms for the Rule of Capture and Implied Covenant Jurisprudence, 30 Energy & E. Min. L. Inst. 320, 349 (2009).
11 *Stone v. Chesapeake Appalachia LLC* , 2013 US Dist. LEXIS 71121 (N.D. W.V. Apr. 10, 2013), vacated, 2013 U.S. Dist. LEXIS 71121 (N.D. W.V. July 30, 2013).
12 2013 US Dist. LEXIS 71121 at *3.
13 Id. at *16, *18. Notably, the Stone case was subsequently settled and the court's order vacated by a joint motion. Stone v. Chesapeake Appalachia LLC, 2013 U.S. Dist. LEXIS 185857 (N.D. W.V. July 30, 2013).

Pennsylvania Takes up Hydraulic Fracturing Debate

Against this inconsistent backdrop, in mid-2018, an intermediate appellate court in Pennsylvania reversed summary judgment granted to a driller sued for hydraulic fracturing in Briggs v. Southwestern Energy Prod. Co.[14] The Briggs case pitted the owners of an 11-acre tract against a major gas producer based in Houston that operated hydraulically fractured wells in Pennsylvania's Marcellus Shale.

Some of Southwestern's wells were contiguous to the Briggs' property, prompting Briggs family members to sue for trespass and conversion. Southwestern contended that the rule of capture barred such claims, and convinced the trial court to grant summary judgment.

In reviewing the trial court decision, the appellate court in Briggs acknowledged that the rule of capture generally precludes liability for drainage of oil and gas from neighboring lands, and has been long recognized in Pennsylvania in connection with various methods of oil and gas extraction other than hydraulic fracturing. After analyzing the rule of capture's history in Pennsylvania and the rationale underlying it, the Briggs court concluded that only two cases, Coastal Oil and Stone, had considered whether the rule of capture applies to hydraulically fractured wells.

The court extensively cited the Coastal Oil majority and dissenting opinions, as well as the Stone opinion, ultimately deciding that "we are persuaded by the analysis in the Coastal Oil dissent and Stone, and conclude that hydraulic fracturing is distinguishable from conventional methods of oil and gas extraction." The Briggs court also broadly proclaimed that "the rule of capture does not preclude liability for trespass due to hydraulic fracturing."

14 *Briggs v. Southwestern Energy Prod. Co.*, 184 A.3d 153 (Pa. Super. Ct. 2018).

As mentioned above, the Pennsylvania Supreme Court recently granted review in Briggs. The order granting review framed the issue as:

Does the rule of capture apply to oil and gas produced from wells that were completed using hydraulic fracturing and preclude trespass liability for allegedly draining oil or gas from under nearby property, where the well is drilled solely on and beneath the driller's own property and the hydraulic fracturing fluids are injected solely on or beneath the driller's own property?[15]

One has to wonder if the last phrase portends a narrow decision based on the limited summary judgment record.

The Briggs intermediate appellate court noted the record contained no evidence or "even any estimate, as to how far the subsurface fractures extend from each of the wellbore[s] on Southwestern's lease."[16] Nevertheless, the intermediate court found that the Briggs' "allegations are sufficient to raise an issue as to whether there has been a trespass." Given this record, it is unclear if the Pennsylvania Supreme Court will ultimately issue a sweeping opinion regarding trespass liability, even when there is no evidence of a physical intrusion into a neighbor's property.

Continued on page 18.

15 *Briggs v. Southwestern Energy Prod. Co.*, No. 443 MAL 2018, 2018 Pa. LEXIS 6025 (Pa. Nov. 20, 2018) (per curiam order granting petition for allowance of appeal).
16 184 A.3d at 164

"Accumulation" Clause in Continuous Development Provision Only Extended the Next 150-Day Term

Endeavor Energy Res., L.P. v. Energen Res. Corp., No. 11-17-00028-CV, 2018 Tex. App. LEXIS 8705 (Tex.App.—Eastland Oct. 25, 2018, pet. filed

By: Austin Brister

The Eastland Court of Appeals recently issued its opinion in *Endeavor v. Energen* adopting a limited interpretation of an "accumulation" clause within a continuous development provision. The Court held that the clause only allowed the lessee to extend the "next" 150-day term, not to be accumulated and used on any well.

The lease at issue included a 150-day continuous development provision and the following "accumulation clause" (sometimes called a "banking" provision):

> Lessee shall have the right to accumulate unused days in any 150-day term during the continuous development program in order to extend the next allowed 150-day term between the completion of one well and the drilling of a subsequent well.

The lessee drilled 12 timely wells under the continuous development provision. However, the lessee waited 321 days to spud the thirteenth well. The lessee asserted that its thirteenth well was drilled timely because it had accumulated enough unused days in all of its previous wells (227 days) that it was permitted to wait 377 days to commence operations on the thirteenth well (150 + 227). The lessee analogized the accumulation provision to accumulating "pennies in a jar to be used whenever it chose to use them."

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Shortly before the lessee drilled its thirteenth well, the lessor executed a new lease in favor of a new lessee, Energen. Energen filed suit alleging that the prior lessee's thirteenth well was not drilled on time and, as a result, partially terminated. Energen argued that the accumulation provision only allowed the prior lessee to accumulate days to extend the 150-day term for drilling the next well. Energen argued that, as a result, the prior lessee only had 186 days to spud the thirteenth well—not 377.

The Eastland Court of Appeals focused on the phrase "next allowed" in the accumulation clause, and held that it reflected the parties' intent to limit the use of unused days to extend the 150-day term applicable to the "next" well. The Court also found that the phrase "150-day term" had significance, rather than merely serving as a label for the continuous development term.

The prior lessee asserted that Energen's interpretation rendered the word "accumulate" meaningless, and that it required the Court to rewrite the lease to say that unused days are lost if not used. The Court disagreed, indicating that the prior lessee's interpretation allowed it to "accumulate" unused days only to extend the "next" well's period.

The prior lessee also argued that its interpretation promoted efficient development by providing the lessee flexibility in development decisions. However, the court of appeals took the opposite view, holding that an interpretation that would permit the lessee to cease drilling for over a year would be in conflict with the purpose of a continuous-development clause, which is to promote full development of leased acreage.

Disclosure: *McGinnis Lochridge represents Endeavor Energy in this case.*

Correction Mineral Deed Ruled Ineffective Under "Material Correction" Statute

Yates Energy Corp. v. Broadway Nat'l Bank, No. 04-17-00310-CV, 2018 Tex. App. LEXIS 10517 (App.—San Antonio Dec. 19, 2018, no pet.)

By: Austin Brister

The San Antonio Court of Appeals recently analyzed the Texas Correction-Instrument Statutes in *Yates v. Broadway.* The court held that, if a grantor or grantee have conveyed their interests to heirs, successors, or assigns, then those heirs, successors, or assigns must sign a correction instrument in order for it to effectively correct the original instrument. For many practitioners, this was the expected outcome; however, the case provides an interesting example of complexities that can be involved when attempting to correct an instrument years after it is executed.

In 2005, Broadway Bank, acting as trustee of a trust, executed a Mineral Deed which conveyed unto John Evers an undivided 25% interest in certain mineral interests. However, in 2006, Broadway learned that it had made a mistake, intending only to convey to Evers a life estate in the minerals. Broadway Bank executed a Correction Mineral Deed, *without Evers' signature*, purporting to correct the 2005 Mineral Deed to convey only a life estate to John, and added an additional provision conveying the remainder interest to several other trust beneficiaries.

In 2012, Evers executed multiple instruments in favor of Yates Energy Corporation, conveying interests in those mineral interests. Yates then conveyed several further undivided interests to EOG and numerous other assignees.

In 2013, EOG raised concerns that Evers did not sign the 2006 Correction Mineral Deed. As a result, Broadway Bank executed yet another Amended Correction Deed, but this time obtained Evers' signature. However, a critical issue was that this 2013 Amended Correction Deed was not signed by Evers' successors and assigns (i.e., Yates Energy Corporation and its numerous assignees).

In 2014, after Evers died, a dispute unraveled as to whether any of the correction instruments were effective to limit John's interest to a life estate and grant interests to the remaindermen, or whether all the corrections were ineffective such that Yates and its assignees were vested with the interests in full fee simple.

The case turned on an analysis of the 2011 Correction-Instrument Statutes (Texas Property Code §§ 5.027-5.030). The signatures required under these statutes depend on whether the corrections are "nonmaterial" or "material." A nonmaterial correction can be executed by any person with personal knowledge of the facts relevant to the correction of an original instrument. However, under §5.029(b)(1), a material correction (such as adding or removing interests) must be executed by each party to the recorded original instrument "***or***, if applicable, a party's heirs, successors, or assigns."

Broadway Bank argued that the word "or" illustrated that a correction deed can be signed *either* by the original parties *or* their heirs, successors, or assigns. However, Yates and its assignees argued that, because Evers had assigned interests, the "if applicable" language was triggered and a correction required the signature of the heirs, successors, or assigns. Yates also argued that, as a matter of policy, any contrary ruling would harm subsequent purchasers and cause title instability by divesting subsequent purchasers of property.

The San Antonio Court of Appeals agreed with Yates, holding that "a correction instrument making a material change must be executed by a party's heirs, successors, or assigns, as opposed to the original parties of the recorded instrument, if the property interest conveyed in the original instrument has been assigned or conveyed by an original party to that party's heirs, successors, or assigns." Accordingly, Evers received a fee simple interest in the disputed mineral interests by way of the 2005 Mineral Deed, and subsequently conveyed full fee simple royalty interests to Yates. And, by failing to include all required signatures on the correction deeds, the correction deeds were not effective to replace the 2005 Mineral Deed.

The practical takeaway is that, while the Correction Instrument Statute provides statutory power to execute correction instruments to correct errors, parties must carefully ensure all necessary parties have executed the instrument. This is not the first Texas case analyzing whether all necessary parties have executed a correction as required under the Correction Instrument Statute, and it likely will not be the last.

Ratification Issue Did Not Provide Path to Attorneys' Fees

M & M Res., Inc. v. DSTJ, LLP, 2018 Tex. App. LEXIS 9331 (Tex.Civ.App.—Beaumont 2018, no pet.)

By: Ryan Lammert and Austin Brister

Plaintiffs in title disputes sometimes will allege a claim under the Declaratory Judgment Act in order to seek attorneys' fees. In this case, the court held that the claim could only be asserted as a trespass to try title claim, where attorneys' fees are not recoverable.

Here, an oil and gas company hired landmen to acquire oil and gas leases in Jefferson County. Landmen acquired 22 leases and assigned them to the oil and gas company using a form that included an overriding royalty reservation and a provision indicating the assignment would terminate upon any late royalty payments. The landmen allegedly recorded the assignment without giving the oil and company an opportunity to review or approve the form. Years later, the landmen claimed royalty payments were untimely and sought termination of the assignment. The landmen claimed that, even though the oil and gas company had not reviewed or accepted the assignment, it ratified the assignment by its conduct.

At the trial court, the oil and gas company complained that the landmen's complaint was really a trespass to try title claim (attorneys fees are generally not recoverable) and that the landmen were improperly attempting to couch their lawsuit as a claim for declaratory relief in order to seek attorneys' fees. The court stated that "if a disputed involves a claim of superior title and the determination of possessory interests in property, it must be brought as a trespass-to-try-title action....a party may not proceed alternatively under the Declaratory Judgments Act to recover their attorneys' fees." While ratification was also an issue in the suit, which may also involve separate fact questions, the Court held that "it is an issue within the context of a trespass to try title case, adjudicating which party holds superior title to the mineral estates."

As a result, the court held that the ratification issue did not negate the requirement the case be pleaded and litigated as a trespass to try title action.

SCOTX Applies Discovery Rule to Breach of Pref Right Despite Disclosure in Deed Records

Carl M. Archer Tr. No. Three v. Tregellas, Nos. 17-0093, 17-0094, 2018 Tex. LEXIS 1153 (Tex. 2018)

By: Ryan Lammert

Rights of first refusal (sometimes called preferential rights to purchase, or "pref rights") are routinely found in oil and gas title, joint operating agreements, farmout agreements, and other instruments common to the industry. Even AAPL's Model Form-610 Operating Agreement includes an optional pref right provision. Pref rights can destroy pending deals, or even unravel deals after they have already closed.

Oil and gas companies should exercise care in evaluating rights of first refusal burdening their interests or prospective interests, including analysis of the triggering conditions and notice provisions. Otherwise, as was recently illustrated in the Texas Supreme Court case, *Carl M. Archer Tr. No. Three v. Tregellas*, Nos. 17-0093 ~, 17-0094, 2018 Tex. LEXIS 1153 (Tex. 2018), limitations defense may not be available.

In 2003, the Cook family sold the surface estate of a tract of land to the Archer Trusts, reserving the minerals. In a separate transaction, the Cooks conveyed to the Trusts a right of first refusal to purchase the reserved minerals, if and when the Cooks decided to sell. In relevant part, the right of first refusal stated:

> ...in the event that [the grantors]... desire to sell any or all of the above described property, [Trustees]...shall have the right to purchase the property, at the same price and on the same

terms and conditions as offered by any other bona fide buyer.

In 2007, two members of the Cook family sold their interests, but failed to provide any notice to the Trusts. In 2011, the Trusts discovered the sale and immediately filed suit against the purported purchasers (the Tregellas family), seeking specific performance consistent with the right of first refusal agreement.

The Tregellas asserted multiple defenses, including a limitations defense. In analyzing that defense, the Court focused on two issues: accrual of the cause of action and the discovery rule. The Court concluded that the accrual date for limitations purposes occurred on the date the Cook's conveyed the minerals, and therefore the claims were time-barred unless the discovery rule applied to postpone the accrual date.

The Court indicated that the discovery rule applies "when the nature of the injury is inherently undiscoverable." Here, the Court indicated that the standard for determining whether the breach of the right of first refusal was "inherently undiscoverable" was whether the Trusts' injury could have been discovered through the exercise of reasonable diligence. While the injury could have been discovered from a review of the deed records, the Court rejected the notion that the Trusts had a duty to "continually monitor public records for evidence" of a sale violating the terms of the agreement. Instead, the Court concluded that without the notice required under the right of first refusal provision, the Trusts had no reason to suspect that the right had ever been breached. The Court concluded that the discovery rule applied, deferring the accrual date of the cause of action.

SCOTX Tracker

Below are very brief summaries of several oil and gas cases currently pending before the Texas Supreme Court. We have organized them by the status of their appeal, as of the date of this newsletter. We will follow these cases in future editions of *Producer's Edge*.

By: Austin Brister

Oral Argument Completed, Decision Pending

Pathfinder Oil & Gas v. Cathlind Energy

Dispute regarding participation agreement for leases in the Permian Basin.

Petition Filed, Full Merits Briefing Requesting

Tel Olmos, LLC v. ConocoPhillips Company

Whether Texas law requires that a force majeure event be unforeseeable, even where the force majeure clause is silent on the issue of foreseeability?

Sandel Energy v. Armour Pipe Line Company

Whether foreign entity's forfeiture of certificate of authority to do business in Texas causes forfeiture of claim to payments of overriding royalty interest. The Court of Appeals previously held that Section 11.359(a) of the Tex. Bus. Org. Code (extinguishing claims where an entity fails to reinstate their certificate within three years) does not apply to foreign entities.

Creative Oil & Gas v. Lona Hills Ranch, LLC

Lease termination case, focused on Tex. Citizens Partic. Act, including whether the "clear and specific evidence" burden was met, whether the TCPA is limited to First Amendment rights, and whether a non-beneficiary to a contract may rely upon it's terms as a defense to TCPA.

William Paul Gips v. ConocoPhillips Company

Title case involving partition deed signed by less than all parties and the effect of related stipulation of interest.

Chalker Energy Partners v. Le Norman Operating, LLC

Whether email communications regarding proposed deal terms, without a definitive agreement, create a fact issue re: whether the parties entered into a binding contract, even where the parties agreed in an LOI that there would be "no contract or agreement" unless and until a "definitive agreement" is reached?

Don A. Janssen v. RG Family Trust

Whether the language of a particular "subject to" clause served to merely limit the warranty clause, or whether it served to limit the granting clause.

Virtex Operating Co., Inc. v. Robert Leon Bauerle

Accommodation doctrine issue, involving conflict regarding overhead power lines the mineral lessee intended to install, which the surface owner contended would interfere with its use of helicopters in hunting operations. Lessee contends that the accommodation doctrine should not allow a hunter's occasional helicopter use for hunting to require the lessee to use allegedly "expensive, impractical, contingent, and novel alternatives."

Anglo-Dutch Energy v. Crawford Hughes Operating

Oil and gas joint account audit led to litigation that involved various damage claims and counterclaims. Petition solely focused on attorney's fees.

ConocoPhillips v. Ramirez

Trespass-to-try-title suit involving interpretation of grandmother's will and cotenancy accounting.

Central Petroleum Limited v. Geoscience Resource Recovery

Does a foreign entity purposefully avail itself of Texas by attending two global conventions in Houston in a search for a global partner able to develop vast mineral properties in central Australia?

Ambrose Claybar v. Samson Exploration, LLC

Whether an indemnity agreement between an oil company and a landowner only obligates the oil company to reimburse the landowner for third-party claims, or whether it also requires the oil company to reimburse the landowner for its own costs.

EP Energy v. Fairfield Industries

Breach of contract case regarding seismic data and license agreement. Issues revolve around whether a $21 Million fee is due under the contract every time EP's parent company experiences a change in control, given that EP's already waived the license rights and returned all data, and given EP's arguments that the fee represents an unenforceable penalty provision.

Energy Transfer Partners v. Enterprise Products Partners

Whether partnership was created, the role of profit in partnership formation, the scope of a partner's statutory duty of loyalty, and the role of waiver in the partnership-formation test.

Petition Filed, Response Requested

CCI Gulf Coast Upstream LLC v. Circle X Camp Cooley, Ltd.

Whether "free-gas clause" is sufficiently definite to be enforceable, where it allows the lessor to take free gas for domestic or agricultural purposes, but does not specify any limit on the volume of gas the lessor may take or the geographic area where it may be used. Petitioner argued that the lessor could potentially take all the gas, causing the lease to fail to produce in paying quantities.

Tommy Yowell v. Granite Operating Company, et al.

Whether an anti-washout clause requires that the interest "re-vest" upon execution of a new lease, thereby potentially violating the Rule Against Perpetuities? Also involves questions as to whether an indemnity of "any adverse consequences arising out of or in connection with" a pending lawsuit, would include a future lawsuit regarding that same interest.

XTO Energy, Inc. v. Reilly McNeel Dillon

Whether a 1928 transaction involving 1,653 acres of mineral interests, was intended to be sold free of a Deed of Trust and Vendor's Lien, interpretation of a "disposition" clause, and whether the court was required to construe all the document in the context of all other contemporaneous transactions.

Crimson Exploration, Inc. v. Magnum Producing, L.P.

Whether a LOI, contemplating a mineral interest transfer and farmout, formed an enforceable contract and an immediate conveyance of title. The Corpus Christi-Edinbburg Court of Appeals previously held that it was effective to convey title, noting that there are no technical or formal requirements to be effective, and noting that the other party had relied on the instrument for several years.

Eagle Oil v. TRO-X

Whether res judicata barred a claim for damages for royalties under a 2005 agreement for developing oil and gas interests in Pecos and Reeves Counties. The issue, in essence, turns on whether the claims at issue arise out of the same transaction as the prior suit or whether they turn on conduct that purportedly occurred after that prior trial had already concluded.

HRB Oil & Gas v. Peregrine Oil

Whether an operator can require a non-operator to repay allegedly overpaid revenues. The petition argues that the non-operator cannot be charged for overpaid revenues because the operating agreement did not have a provision expressly addressing overpaid revenues.

Templeton v. Lackey

Whether a mineral title dispute, focused on the construction of a single warranty deed, may properly proceed as a Declaratory Judgment Action, or whether it must exclusively be brought under the Trespass to Try Title Statutes.

Petition Filed, No Response Yet Requested

Crimson Exploration v. Allen Drilling

In a case involving several overlapping agreements covering differing but overlapping lands and depths, whether a merger clause in the later document was effective to preclude liability for breach of the earlier agreement.

MISCELLANEOUS ADDITIONAL CASE HIGHLIGHTS

By: Austin Brister, Ryan Lammert, and Ana Navarrete

In re Kinder Morgan: Ad Valorem Taxes and Negligent Valuation

In re Kinder Morgan Prod. Co., LLC, No. 05-18-00834-CV, 2018 Tex. App. LEXIS 10378, Memorandum Opinion, (Tex.Civ.App.—Dallas Dec. 17, 2018). Case evaluated whether Texas common law recognizes a right for counties to sue commercial appraisal firms for negligent valuation in assessing ad valorem taxes, which allegedly lead to a loss in tax revenue. Extensive discovery was sought at trial court level, and this issue lead to a jurisdictional question. The Dallas Court of Appeals held that there is no such cause of action under Texas law and directed the trial court to vacate its orders.

Endeavor and *XOG:* Interpretation of Proration Units and Retained Acreage Clause

Endeavor Energy Res., L.P. v. Discovery Operating, Inc., 554 S.W.3d 586, 590 (Tex. 2018) and *XOG Operating, LLC v. Chesapeake Expl. Ltd. P'ship*, 554 S.W.3d 607, 608 (Tex. 2018). Cases each evaluated different retained acreage provisions in oil and gas leases, in conjunction with different field rules, and determined whether the field rules, the railroad commission, or the operator determine the quantity of acres applicable under the retained acreage provision.

Clearpoint v. Chambers: Scope of Express Easement

Clearpoint Cross Prop. Owners Ass'n v. Chambers, 2018 Tex. App. LEXIS 8727. Deed interpretation dispute regarding the scope of an express easement, and whether easement can be used to access different tract located in the middle of the easement.

Seeligson and *Boytim:* Two Recent Oil and Gas Class Certification Cases

Seeligson v. Devon Energy Prod. Co., L.P, No. 17-10320 (5th Cir. 2018). Oil and gas royalty dispute, focused on analysis of prerequisites for class action certification under Fed. R. Civ. P. 23.

Boytim v. Brigham Expl. Co., No. 03-17-00722-CV, 2018 Tex. App. LEXIS 10834 (App.—Austin Dec. 28, 2018). Case analyzed a class certification issue with respect to a dispute arising out of Statoil purchasing Brigham.

Two Oilfield Trade Secrets Cases Meet the Texas Citizens Participation Act

McDonald Oilfield Operations, LLC v. 3B Insp., LLC, No. 01-18-00118-CV, 2018 Tex. App. LEXIS 10036 (App.—Houston [1st Dist.] Dec. 6, 2018, no pet.). Case involved defamation, business disparagement, and trade secrets issues. Party claimed that communications were protected speech and filed claim under Texas Citizen's Participation Act. As a result, plaintiff had the burden to show, by clear and specific evidence, a prima facie case for each essential element of their claims.

Morgan v. Clements Fluids S. Tex., Ltd., No. 12-18-00055-CV, 2018 Tex. App. LEXIS 9061 (App.—Tyler Nov. 5, 2018, no pet.). Case involved alleged trade secrets violations arising out of an allegedly confidential and proprietary system for addressing the loss of circulation during well completion and production, referred to as "salt systems." The defendants invoked the Texas Citizens Participation Act, and case focused on analysis of whether

the company established its burden under the TCPA.

In re Wood Group: Dimmit County sues oil companies for damage to roadways

In re Wood Grp. PSN Inc., 2018 Tex. App. LEXIS 8030 (Tex.Civ.App.—San Antonio 2018, no pet.). Dimmit County filed suit against twenty-nine oil and gas companies, alleging that they negligently and intentionally damaged a 6.9 mile portion of road by driving oilfield trucks and equipment on the road during severe rain events. The San Antonio Court of Appeals analyzed whether they had a duty to exercise reasonable care to protect the County's road from injury other than by ordinary wear and tear. The Court concluded that there were only conclusory allegations of "abnormal" use, no allegation that the road was only intended for passenger vehicles, and no allegation that the County posted any notice that heavy vehicles could not use the road during rain. Moreover, the court held that use of the road during a rain event simply shows the degree or quantity of use, but not an unusual use in a legal sense. As a result, the San Antonio Court of Appeals concluded that the trial court erred by not granting the companies' Rule 91 motions to dismiss.

Carrizo v. Barrow-Shaver: Use of "surrounding circumstances" evidence in construing consent to assignment provision

Carrizo Oil & Gas, Inc. v. Barrow-Shaver Res. Co., 516 S.W.3d 89 (Tex. App.—Tyler 2017, pet. granted). Case evaluated whether the holder of a consent right had the unqualified right to withhold consent to a proposed assignment, where the consent provision did not express any standard (such as reasonableness or good cause) and evidence reflected that the parties struck language from prior drafts indicating that "consent shall not be unreasonably withheld." Court determined that prior drafts constituted admissible "surrounding circumstances" evidence, rather than inadmissible parol evidence. Court acknowledged that industry custom was that consent may not be unreasonably withheld, but found that the contract was not silent on the issue since the parties actually elected to delete the "unreasonably withheld" language from prior drafts. Petition for Review was granted by the Texas Supreme Court, and oral arguments were held December 4, 2018.

ConocoPhillips v. Koopman: Term royalty interests under the Rule Against Perpetuities

ConocoPhillips Co. v. Koopman, 547 S.W.3d 858 (Tex. 2018). This much discussed case out of the Texas Supreme Court discusses the validity of a term NPRI interest under the Rule Against Perpetuities. The Texas Supreme Court found the NPRI did not breach the Rule. The Court also held that Section 91.402(b) of the Texas Natural Resources Code does not bar a claim of breach of lease regarding payment of royalty.

Apache v. Wagner: Enforceability of arbitration provision in dispute regarding so-called "royalty lease"

Apache Corp. v. Bryan C. Wagner, Nos. 02-18-00132-CV, 02-18-00135-CV, 2018 Tex. App. LEXIS 9766 (Tex. App.—Fort Worth Nov. 29, 2018, no pet.). This is a dispute involving a so-called "royalty lease" which was, in fact, a conveyance of a term non-participating royalty interest. However, the case turned on an unusual arbitration clause. After a thorough review, the Court held that there was a valid agreement to arbitrate and that the case fell within the scope of that arbitration provision.

Brooks v. Bowerman: dismissal for want of prosecution pending related heirship action

Brooks-PHS Heirs, LLC v. Bowerman, No. 05-18-00356-CV, 2019 Tex. App. LEXIS 968 (Tex. App.—Dallas Feb. 11, 2019). Title dispute between parties claiming to have inherited royalty interests, which was dormant pending an heirship action in probate court. Meanwhile, the trial court dismissed the case for want of prosecution. Dallas Court of Appeals held that this was an abuse of discretion, because the heirship action was pending and, therefore, the plaintiffs' failure to pursue their quiet title action was not intentional or due to conscious indifference as required by Tex. R. Civ. P. 165a(3).

Attorney Spotlight continued, page 11

If the Pennsylvania Supreme Court issues a broad opinion that hydraulic fracturing can or cannot support trespass liability, such a decision could influence future oil and gas development in many areas, and potentially unleash a number of lawsuits in Pennsylvania's Marcellus Shale, the largest shale gas producing region in the nation.

Fittingly, the supreme courts of the two states with perhaps the most at stake in hydraulic fracturing will have faced the issue first. Both pro- and anti- energy development factions will be keenly interested to see whether the Coastal Oil majority opinion will be persuasive in the Pennsylvania Supreme Court's decision, or if Pennsylvania will decide differently than Texas.

About McGinnis Lochridge

McGinnis Lochridge is a highly experienced, multi-practice Texas law firm with more than 60 lawyers. Founded in 1927, McGinnis Lochridge has for over 90 years maintained strong ties to its judicial and legislative traditions. The Firm has been fortunate to count among its lawyers distinguished leaders in judicial and governmental positions, including state and federal trial judges, a Texas Supreme Court justice, a Fifth Circuit justice, state and federal legislators, a past president of the Texas Bar, and even a governor of Texas. The Firm has continued to grow and adapt to meet clients' needs in a changing and increasingly complex business environment.

Today, from offices in Austin, Houston, Dallas, and Decatur, the Firm's attorneys represent energy clients throughout the country in complex litigation and arbitration. We have proven skills handling sophisticated disputes involving geology, geophysics, and petroleum engineering. Several of our lawyers have professional backgrounds and credentials in those areas. Because of the Firm's long history in handling energy disputes, the Firm's Oil & Gas Practice Group includes lawyers with a deep understanding of hydrology, seismic interpretation, log analysis, drilling, completions, hydraulic fracturing, reservoir engineering, production, transportation, hydrocarbon processing, and other related technical areas.

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