VOL. 7 | ISSUE 1

McGINNIS LOCHRIDGE

Producer's Edge

TEXAS OIL AND GAS LAW BULLETIN

FEATURED ARTICLES:

IN THIS ISSUE

About the *Producer's Edge*

The McGinnis Lochridge Oil and Gas Practice Group publishes the *Producer's Edge* with the purpose of keeping our valued clients and contacts in the oil and gas industry updated and informed regarding interesting Texas case law and regulatory developments, as well as providing insightful articles relevant to the oil and gas community. In this print and digital publication, we also routinely welcome various other practice groups to share guest articles surveying other areas of the law important to the oil and gas industry.

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McGINNIS LOCHRIDGE

EVENTS, PUBLICATIONS, AND AWARDS

NEWS AND HONORS

- Partners Jonathan Baughman and Will Grubb successful $5.9 million jury verdict was featured in *The Texas Lawbook*. The article details the complex fiduciary duty and fraud case, which centered around a disputed transfer of 45 acres near Seabrook, Texas, where shareholders in a closely held corporation had alleged self-dealing by corporate officers.
- Austin Brister's article, "Drowning in Liability: Court Extends "Waste" Rule to SWD Operator; but preserves RPO defense," was featured in the publication *Breaking Energy*.
- Logan Jones published "An Overview of the Standard Measure of Damages Arising From Claims Associated With an Oil and Gas Lease", Journal of the Energy Law Practitioner, May 2025.
- McGinnis Lochridge has expanded its office footprint in Dallas, fostering a commitment to projected firm growth in the region.
- Alejandra Salas and Austin Brister published "COPAS Accounting Issues from a Litigation Perspective" in the Louisiana State University Journal of Energy Law and Resources, Volume XIII, Issue 1, Winter 2025 which subsequently has been republished in (1) Volume 62, No. 1 (2025) of *The Foundation Journal for Natural Resources and Energy Law*, and the Section Report for the OGERL Section of the State Bar of Texas, Summer Issue.

SPEAKING ENGAGEMENTS & PUBLICATIONS

- Bruce Kramer presented at LSU Law's 72nd Mineral Law Institute, on the topic of "CCS Legal Issues."
- Alejandra Salas presented on an attorney panel at the Travis County Women Lawyers' Association's Color of Justice program at The University of Texas School of Law.
- Bruce Kramer joined a panel discussion on "Lithium Development: Historical Underpinnings, Current Realities, and Future Aspirations" at the Institute for Energy Law's Lower Carbon Conference: Headwinds, Tailwinds, or Both?
- Alejandra Salas presented: "The End of Chevron Deference: Implications for the Oil & Gas Industry" at the 51st Annual Ernest E. Smith Oil, Gas and Mineral Law Institute presented by The University of Texas School of Law and The Oil, Gas and Energy Resources Law Section of the State Bar of Texas.
- Alejandra Salas and Austin Brister co-presented "2024 Oil and Gas Litigation Insights" at the 4th Annual U.S. Oil and Gas and Renewable Energy Law Seminar, sponsored by FNREL during NAPE 2025.
- Austin Brister presented "Drilling for Oil and Gas Damages" at the 17th Annual Damages in Civil Litigation Conference, hosted by the State Bar of Texas.
- Alejandra Salas and Austin Brister co-presented "Frequent Issues in Service Company Litigation" at the 76th Annual Energy Law Conference hosted by Institute for Energy Law (IEL).
- Derrick Price presented "Problems with Sharing: Pooling, Allocation, and PSAs" for the Energy Law Section of the Houston Bar Association.
- Paul Simpson testified before the Texas House Judiciary & Civil Jurisprudence Committee in spring 2025 on proposed amendments to the Texas anti-SLAPP law (the Texas Citizens' Participation Act).
- Austin Brister was elected Vice Chair of the Houston Bar Association's Energy Law Section (2025-2026)
- Travis Barton and Jonathan Baughman were selected as 2025 Litigation Stars by *Benchmark Litigation.*
- Austin Brister was named among Lawdragon 500 Leading Oil and Gas Litigation Lawyers for 2025
- McGinnis Lochridge was ranked Band 2 in the *Chambers USA* 2025 guide under Texas Energy: State Regulatory & Litigation (Oil & Gas)
- Tim George was ranked Band 1 in the *Chambers USA* 2025 guide under Energy: State Regulatory & Litigation (Oil & Gas)
- William Grubb, Jordan Mullins and Michael Kabat were recognized as 2025 Future Stars by *Benchmark Litigation*.
- McGinnis Lochridge was ranked a 2025 Tier 1 National Law Firm in Oil & Gas Law by U.S. News - Best Lawyers®
- 20 McGinnis attorneys awarded *The Best Lawyers in America®* for 2025.
- 5 McGinnis attorneys named *Best Lawyers: Ones to Watch® in America* for 2025.
- Austin Brister elected Council Member for the Oil, Gas and Energy Law Section (OGERL) of the State Bar of Texas.
- Paul Simpson re-appointed for a second term as Chair of the Oil and Gas Pattern Jury Charge Committee, State Bar of Texas, for 2025-26
- Austin Brister, Appointed as Member of the Oil and Gas Pattern Jury Charge Committee, State Bar of Texas.

Supreme Court of Texas Washes Out the "Anadarko Washout"

Cromwell v. Anadarko E&P Onshore, LLC, No. 23-0927, 2025 Tex. LEXIS 419 (May 23, 2025)

By: Derrick Price

The so called "*Anadarko* Washout" involves a washout of oil and gas leases on undivided working interests owned by non-operating mineral cotenants.

Two Lower Courts Create the So-Called "Anadarko Washout"

In *Cimarex Energy Co. v. Anadarko Petro. Corp.*, Cimarex Energy Company ("Cimarex") obtained a lease in December 2009 of an undivided 1/6th of the minerals in 440 acres located in Ward County, Texas. The lease was a Paid-Up lease with a five-year primary term. Anadarko Petroleum Corporation ("Anadarko") acquired the remaining 5/6ths of the minerals in the same property by assignment from prior lessees. During the five-year primary term of Cimarex's lease, Cimarex did not commence drilling any wells on the property. Cimarex instead chose to rely on production from several wells Anadarko drilled in 2011 and 2012. Anadarko failed to account to Cimarex for its 1/6th share of production, and Cimarex brought suit in February 2013. The resulting settlement agreement required Anadarko to pay Cimarex for its 1/6th co-tenant share of the value of production, less Cimarex's 1/6th share of the reasonable drilling completion and operations costs. It also required Anadarko to account to Cimarex on a go forward basis for its monthly share of production, less deductions for Cimarex's share of ongoing operations costs. Anadarko continued to make production payments to Cimarex until December 2014, and thereafter ceased making any payments to Cimarex.

In August 2011, Cimarex's lessors granted a top-lease covering the 1/6th interest to Petro-Land Group. Anadarko subsequently acquired the top-lease in June 2012. Once the primary term of Cimarex's lease expired in December 2014, Anadarko took the position that Cimarex's lease expired because it required Cimarex drill or operate a well on the property prior to the expiration of the primary term, and Cimarex failed to do so. Both the trial court and the El Paso Court of Appeals agreed with Anadarko that Cimarex's lease had terminated under these facts. Those courts were not persuaded by Cimarex's arguments that it had perpetuated its lease by paying royalties to its lessors on its share of production from Anadarko's wells, or that Anadarko's co-tenancy accounting to Cimarex under the terms of their settlement agreement was the equivalent of participation in joint development under the terms of a Joint Operating Agreement ("JOA").

In a similar case, *Cromwell v. Anadarko E & P Onshore, LLC*, Cromwell obtained leases covering a small fractional interest in multiple sections in Loving County, Texas. Anadarko owned substantial leasehold interests in the same land. Prior to Cromwell's acquisition of his leases, Anadarko had already established production, and was the designated Operator pursuant to a JOA with other non-operating working interest owners. After acquiring his leases, Cromwell made multiple requests that Anadarko send him a JOA so that he could participate in Anadarko's development. Anadarko never sent Cromwell a JOA, but it did account to Cromwell as co-tenant once its wells paid out. After payout, Anadarko sent Cromwell joint interest invoices showing Cromwell's revenues and deducted costs. Anadarko even sent Cromwell an authorization for expenditure for a new compressor on one well, which Cromwell consented to and paid. Nevertheless, years after the primary terms of Cromwell's leases expired, Anadarko took the position that Cromwell's leases had terminated. Anadarko subsequently acquired new leases from Cromwell's lessors. Once again, both the trial court and the El Paso Court of Appeals sided with Anadarko. Those courts held that Cromwell's leases terminated because Cromwell had failed to drill any wells or obtain production, and Cromwell had not participated in joint development of the property pursuant to the terms of a JOA. In deciding both *Cimarex* and *Cromwell*, the El Paso Court of Appeals relied on its prior decision in *Hughes v. Cantwell*, 540 Sw.2d 742, 743-44 (Tex. Civ. App.—El Paso, 1976, writ ref'd n.r.e.) and *Mattison v. Trotti*, 262 F.2d 339 (5th Cir. 1959), both of which held that a typical habendum clause requires the lessee named in the specific lease (or presumably, the original lessee's successor) to personally produce oil or gas to perpetuate the lease.

Spreading Threat to Title Stability

The holdings of these cases threatened to destabilize the title of many oil and gas lessees that relied on production operated by third-parties to maintain their leasehold rights. Relying on this line of cases, the United States District Court for the Southern District of Texas went so far as to state "Texas law does not allow a lessee to rely on a co-tenants production of oil to extend the term of a lease." *Fort Apache Energy, Inc. v. Short Og III, Ltd.*, 20922 U.S. Dist. Lexis 130625 (S.D. Tex., July 21, 2022) (emphasis added). This led many commentators and practitioners to advise clients that their non-operated leasehold interests were at risk in absence of a Joint Operating Agreement or pooling agreement.

Supreme Court Restores Legal Certainty

On May 23, 2025, the Supreme Court of Texas issued its opinion in *Cromwell*, reversing the El Paso Court of Appeals, and expressly disapproving *Cimarex*, *Hughes* and *Mattison*. The Court's reasoning was simple, and firmly rooted in Texas oil and gas jurisprudence. First, the Court rejected Anadarko's argument that the passive-voice habendum clauses in Cromwell's leases required Cromwell to personally produce because the clauses did not say that, and courts are not at liberty to rewrite agreements. Further, the Court stated that

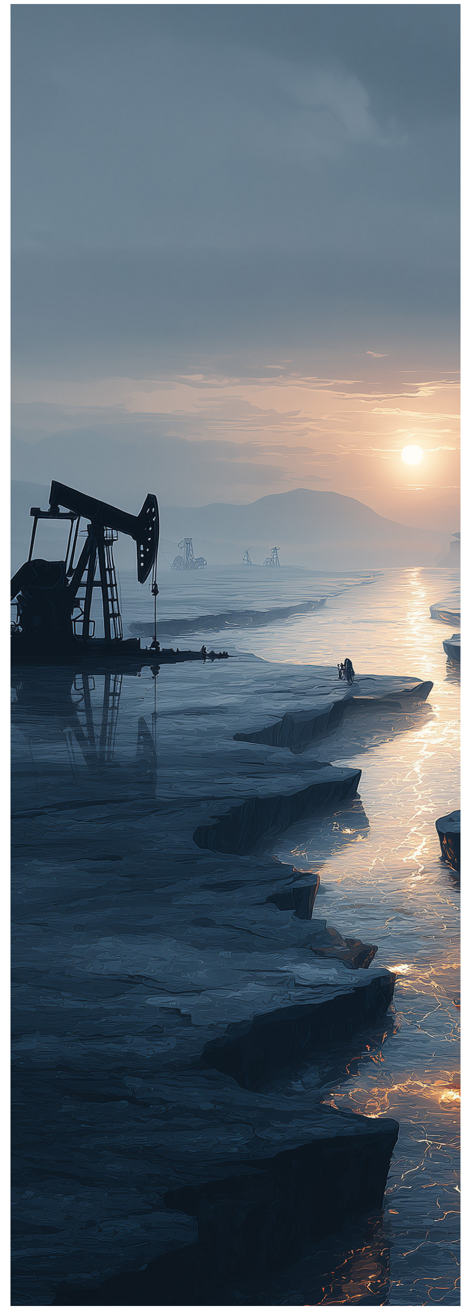
> "[n]either habendum clause 'clear[ly], precise[ly], and unequivocal[ly]' requires Cromwell to produce, so we will not imply such a requirement to cause a forfeiture of his interest."

In so doing, the Court reenforced its commitment to the rule that special limitations must be clear, precise and unequivocal, and that provisions providing for automatic termination may not be implied. This rule is undoubtedly one of the most important tenets of oil and gas lease interpretation. Its consistent application is important to the stability of mineral title in the State of Texas, something which the Court also acknowledged in the concluding paragraph of the opinion:

> We remain faithful to the text of oil-and-gas leases because doing so provides "legal certainty and predictability," values which "are nowhere more vital than in matters of property ownership, an area of law that requires bright lines and sharp corners.

What Bright Lines and Sharp Corners Mean for Practitioners

As a practitioner that regularly represents industry participants in lease termination cases and title disputes, the consistent placement of "bright lines and sharp corners" is greatly appreciated.



About the Author

Derrick Price handles a wide variety of civil matters in the oil and gas industry, representing both oil and gas operators and landowners. His litigation expertise includes disputes over surface use, joint operating agreements, royalty underpayment, gas measurement, oil and gas lease covenants, lease termination, bad faith pooling, lease development, retained acreage and mineral ownership throughout Texas. Derrick regularly represents landowners, mineral owners and royalty owners in negotiating oil, gas and other mineral leases, surface agreements, seismic permits and pipeline easements.

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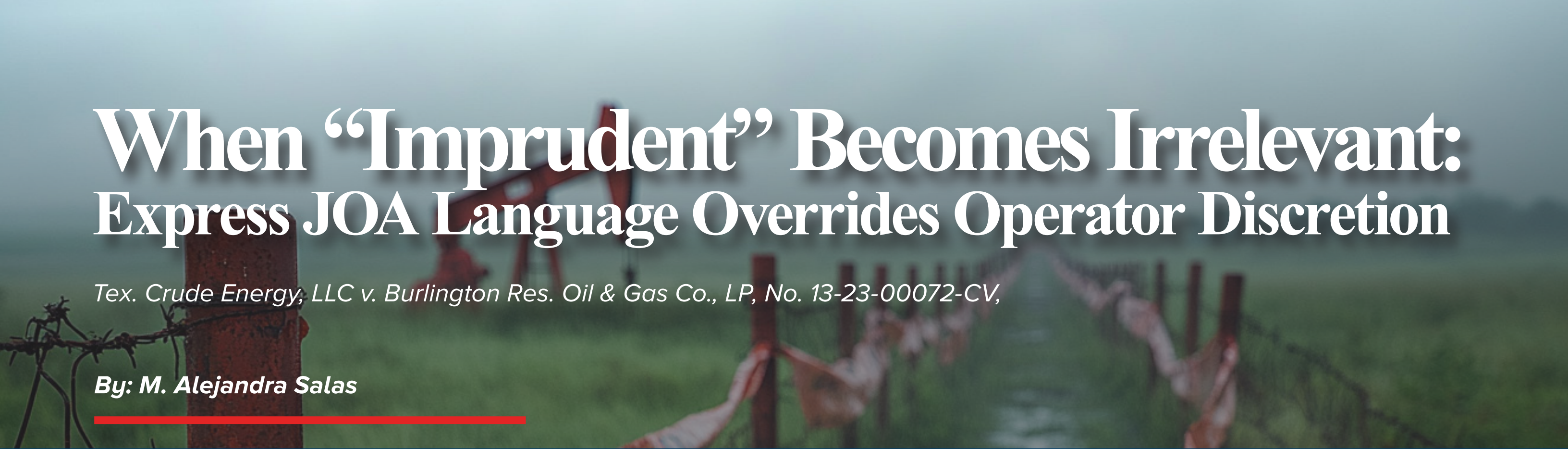

When "Imprudent" Becomes Irrelevant:
Express JOA Language Overrides Operator Discretion

Tex. Crude Energy, LLC v. Burlington Res. Oil & Gas Co., LP, No. 13-23-00072-CV,

By: M. Alejandra Salas

In this case, after Burlington refused to drill several proposed wells on the basis that "it would be imprudent to do so." By way of background, in 2005, Texas Crude and Burlington executed a Joint Operating Agreement (JOA), which was modeled after the AAPL's 1982 form agreement, to develop the Sugarloaf Prospect Area in Live Oak, Bee, and Karnes Counties. Texas Crude and Burlington agreed that Burlington would be the operator. Subsequently, Warwick acquired a 10% working interest from Texas Crude, reducing Texas Crude's interest to 2.5%. In 2018 and 2021, Warwick proposed a total of 44 wells. Texas Crude and Burlington elected to participate in each of the proposed wells, but each time Burlington, in its capacity as operator, notified Texas Crude and Warwick that it would not be drilling the wells on the basis that "it would be imprudent to do so." Each time, the notice came shortly before the expiration of Burlington's ninety-day deadline to commence operations.

Burlington argued that it was not required to drill wells it deemed imprudent under Article V.A. of the JOA, which required the operator to "conduct all such operations in a good and workmanlike manner . . . ." It also argued that any party still wanting to drill the proposed wells after Burlington (as the operator) failed to commence drilling operations, was required to resubmit the proposal under Article VI.B.1. of the JOA, which required "written notice proposing same" to be "resubmitted to the other parties in accordance with the provisions hereof as if no prior proposal had been made."

Texas Crude and Warwick argued that Article VI.B.1. of the JOA required Burlington to timely commence operations on the proposed wells in which all parties had elected to participate and that the resubmittal process did not excuse Burlington's failure to do so. Further, they claimed that the exculpatory language in Article V.A. did not apply to Burlington's obligation under Article VI.B.1. to commence drilling operations.

The trial court ruled in favor of Burlington, finding that the JOA did not require Burlington to conduct operations in any manner other than in a "good workmanlike manner" and that "resubmittal" was the only remedy for a party wanting to proceed with the proposed drilling operation that had not been timely commenced. After the trial court's ruling, Burlington acquired Warwick and non-suited Warwick's claims.

On appeal, the appellate court first held that Article VI.B.1, which provided that the "Operator *shall*, within ninety (90) days after expiration of the notice period of thirty (30) days . . . *actually commence* the proposed operation and complete it", required Burlington to timely commence drilling for a proposal to which all parties consented under the JOA. It noted that JOA's use of the word "shall" imposed a mandatory, not a discretionary, duty.

Next, the appellate court turned to the exculpatory language in Article V.A. and found that because Burlington's duty to perform as a reasonable prudent operator was limited to "such operations" in the contract area, the clause did not apply to Texas Crude's breach of contract claim against Burlington. In doing so, the court differentiated the reference to "such operations" on the contract area in the JOA to exculpatory clauses that protect operators from "its activities," noting that "'the use of the term "its activities" include actions under the JOA that are not limited to operation and implicate a broader scope of conduct.'"

Finally, the court considered the resubmittal process in Article VI.B.1 and rejected Burlington's argument that the sole consequence of failing to timely commence drilling operations was the process requiring resubmittal of a proposal to drill a well. Rather, the court found that the provision informs a party still wishing to drill a proposed well on how to proceed, regardless of the reason for the delay. According to the court, providing a resubmittal process did not foreclose a breach of contract claim (and monetary damages) if any party did not wish to proceed with the proposed operations after a delay. And, even if it could be considered a contractual remedy, the court found that it was not an exclusive remedy because there was no such limiting language in the JOA. Ultimately, the appellate court reversed the trial court and rendered judgment granting Texas Crude's summary judgment motion.

About the Author

Alejandra Salas *is a litigation associate with a focus on the oil and gas industry. She has represented oil and gas exploration and production companies, royalty owners, and mineral owners in state and federal court, advocating for their interests in a variety of litigation matters. Her experience includes a diverse range of cases, including lease disputes, royalty disputes, title issues, trespass claims, negligence, and contractual disputes.*

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Can Lease Ratification Transform an NPRI?

***ConocoPhillips Co. v. Hahn*, No. 23-0024, 2024 WL 5249570 (Tex. Dec. 31, 2024).**

By: Austin W. Brister

In this recent case, the Texas Supreme Court resolved whether ratification of a lease or signing of a stipulation agreement could transform a fixed non-participating royalty interest (NPRI) into a floating NPRI. In short, the court held that mere ratification of a lease does not alter a fixed NPRI. However, the court also held that a subsequent stipulation between the parties effectively modified the NPRI, rejecting arguments that an unambiguous deed could not be modified by a later stipulation.

In 2002, Kenneth Hahn conveyed land to William and Lucille Gips, reserving "an undivided one-half (1/2) non-participating interest in and to all of the royalty [Hahn] now owns ConocoPhillips Co. v. Hahn, No. 23-0024, 2024 WL 5249570 (Tex. Dec. 31, 2024), (same being an undivided one-half (1/2) of [Hahn's] one-fourth (1/4) or an undivided one-eighth (1/8) royalty) in and to all of the oil royalty, gas royalty and royalty in other minerals." The Gipses later leased the minerals to ConocoPhillips for a 1/4 royalty. At ConocoPhillips's request, Hahn signed both a lease ratification and a separate stipulation with the Gipses stating that the parties intended the reserved interest to be a 1/8 "of royalty."

After years of litigation about whether Hahn's NPRI was fixed or floating, the Texas Supreme Court addressed two key issues: (1) whether Hahn's ratification of the lease subjected his NPRI to the lease's 1/4 royalty provision (i.e., converting it to a floating NPRI), and (2) whether the stipulation effectively modified his interest from fixed to floating?

The court first held that ratification of a lease does not subject an NPRI to lease provisions that are otherwise inapplicable to non-possessory interests in production. The court emphasized the fundamental difference between mineral fee ownership — which includes rights to possess, extract, and lease minerals — and an NPRI, which is merely "a fractional non-possessory interest in oil and gas produced from the tract."

Because an NPRI is non-possessory, certain lease provisions naturally apply to it (like pooling), while others do not (like delay rentals or shut-in royalties). The court explained that a standard lease provision obligating payment of royalties to mineral fee owners does not apply to a pre-existing fixed NPRI, as such interests "remain[ ] constant regardless of the amount of royalty contained in a subsequently negotiated oil and gas lease." That provided the primary basis for the court's holding that Hahn's ratification of "all terms and provisions" of the lease did not convert his fixed NPRI into a floating NPRI.

Regarding the stipulation, the court addressed Hahn's argument that the holding in *Concho Resources, Inc. v. Ellison*, 627 S.W.3d 226 (Tex. 2021), should be limited to boundary dispute stipulations to remain effective without proof of uncertainty or ambiguity. The court rejected this narrow reading, explaining that its reasoning in *Concho Resources* about facilitating private resolution of ownership disputes applied equally here — requiring proof of title uncertainty "would scuttle agreements between property owners as a mechanism to avoid litigation because parties will never know whether their informal settlement … is effective until it is declared so by a court." The court emphasized that this principle extends beyond just boundary disputes to other title matters that parties wish to resolve by agreement.

Hahn also challenged the stipulation under the statute of frauds, arguing it failed as a conveyance for lack of adequate property descriptions. The court disagreed, finding the instrument sufficiently identified the relevant property interests through references to prior recorded documents. The court explained that while the statute requires property descriptions to be ascertainable from the instrument itself or reference to existing writings, the stipulation met this standard by incorporating the prior deed. In the court's view, the inclusion of quitclaim language further supported its effectiveness, reasoning that quitclaims are commonly used to convey "interests of an unknown extent or claims having a dubious basis."

This decision is notable for a couple of reasons. First, it confirms that lease ratification by NPRI owners only binds them to provisions that can logically apply to non-possessory interests — an NPRI owner's broad lease ratification will not inadvertently convert a fixed NPRI into a floating one. Second, it establishes that the principles favoring private resolution of boundary disputes in *Concho Resources* extend to agreements clarifying other title matters, such that a stipulation may be effective regardless of any showing of ambiguity.

Business Court Weighs Jurisdiction Over Out-of-State Property

Targa N. Del., LLC v. Franklin Mt. Energy 2, LLC et al, No. 24-BC01B-0001, 2025 WL 952987 (Tex. Bus. Ct. Mar. 28, 2025)

By: Ashley N. Vega

Since its inception, the Texas Business Court (the "Court") has faced recurring and complex questions of jurisdiction—issues that have quickly become central to its early jurisprudence. One area of contention is the extent of the Court's authority when a case touches on out-of-state real property interests. When a lawsuit is filed against you in a state you believe has no authority to hear the case, a plea to the jurisdiction is one way to challenge the court's jurisdiction. While it is well settled that Texas courts do not have subject matter jurisdiction over claims seeking to determine title to real property located in another state, a recent Texas Business Court decision highlights an important caveat. In *Targa N. Del., LLC v. Franklin Mt. Energy 2, LLC*, the Court ruled that if a claim involving out-of-state real property merely has an "incidental" consequence on that property, and title itself is not the central issue, a Texas court may still have jurisdiction.

In this case, Targa Northern Delaware, LLC ("Targa") sued Franklin Mountain Energy 2, LLC and Franklin Mountain Energy, LLC (together "FME"), alleging that FME materially breached a gas gathering, processing and purchase agreement (the "Agreement") by failing to deliver Committed Gas to Targa.

Under the Agreement, FME agreed to sell and deliver produced gas, referred to as Committed Gas, and Targa agreed to purchase the gas. FME produced the Committed Gas (personal property) from its Committed Gas Interests (real property) located in New Mexico. Also under the Agreement, FME was entitled to receive from Targa a release of the Committed Gas and the reasonably associated Committed Gas Interests if Targa was unable to accept the deliveries.

After Targa filed suit in the Texas Business Court, FME filed a separate suit for declaratory relief in New Mexico to declare that Targa was no longer entitled to any interest in the gas and instead FME was now the rightful owner of the gas interests. FME then filed a plea to the jurisdiction in the Texas lawsuit, arguing the Texas court lacked subject matter jurisdiction because the lawsuit was ultimately about who owned the natural, unproduced gas still in the ground in New Mexico, i.e. real property. FME asserted that Targa was unable to accept FME's delivery and had previously asked for a release of Targa's interest in the affected gas. FME argued the Texas lawsuit involved real property interests and concerned a core dispute of whether Targa retained any interest in the gas, specifically the unproduced Committed Gas Interests.

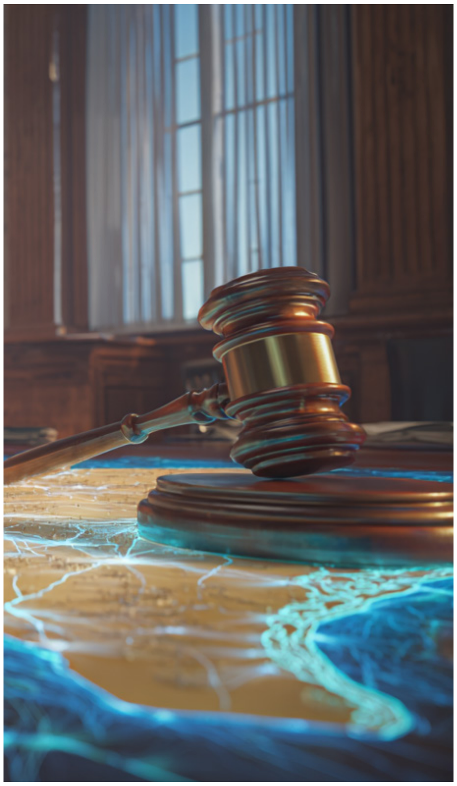
Targa countered that the Texas Business Court did have jurisdiction because its claims focused on personal property by seeking damages for FME's alleged failure to deliver severed or produced Committed Gas and that any effects on New Mexico real property interests were merely collateral to the actual dispute; therefore, the interest owner of the gas is immaterial.

Relying on Texas law, the Court recognized that native unproduced gas is real property that becomes personal property once it is severed or produced and that, the Court has no subject matter jurisdiction over claims to determine title to real property located outside of Texas. However, if the question of title is not the basis of a lawsuit or the measure of recovery in a lawsuit, the question of title is merely incidental, and the Court may assert jurisdiction.

The Texas Business Court found that because Targa's sole cause of action sought to recover damages for FME's alleged failure to deliver severed or produced Committed Gas under the Agreement, the seminal issue concerned personal property, not real property. Specifically, the issue was who materially breached the contract as to the severed Committed Gas.

Agreeing with Targa, the Court denied FME's plea to the jurisdiction, holding that the Court has subject matter jurisdiction because "any effect that a favorable finding for Targa might have regarding New Mexico real property interests would be collateral and incidental to this Court's judgement."

What might this mean for future interstate energy dispute? This opinion is one of several examples of how the Texas Business Court is already shaping legal precedent in the oil and gas sector as these cases form a large part of the Court's docket. As more oil and gas disputes land in the Texas Business Court, these early rulings will continue to define the court's reach and the limits of jurisdictional challenges.



About the Author

Ashley Vega *is an associate attorney in our Houston office. Ashley represents individuals and companies in state and federal court across a variety of industries. Her practice primarily focuses on litigation with an emphasis on onshore / off-shore energy disputes and construction defect matters.*

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When Force Majeure Isn't Enough: The $100M Causation Trap

Freeport LNG Mktg., LLC v. Kinder Morgan Tex. Pipeline LLC, No. 14-22-00864-CV, 2025 WL 1109028 (Tex. App.—Houston [14th Dist.] Apr. 15, 2025, no pet. h.)

By: McLean Bell

In case you somehow forgot, the 2021 Valentines Day storm coined "Snovid," "Snowmageddon," or officially labeled Winter Storm Uri, blanketed Texas in snow and ice, even bringing snowfall to Galveston Beach. As temperatures dropped, oil field equipment froze, wells were shut in, and the natural gas needed to generate electricity crashed as the demand for power sky rocketed. According to the Texas Supreme Court, "Texas was fewer than five minutes away from a total grid collapse that would have plunged the state into darkness for weeks, maybe months." PUC of Tex. v. Luminant Energy, 691 S.W.3d 448, 455 (Tex. 2024).

At first pass, this may seem like it would constitute a force majeure event, and few natural gas purchasers and suppliers have argued otherwise. But the question in *Freeport*, was whether a force majeure event actually caused Kinder Morgan's failure to purchase gas. The Fourteenth Court of Appeals reversed and remanded the trial court's award of summary judgment to Kinder Morgan, holding it failed to meet its burden that its failure to purchase was caused by force majeure.

The $100 Million Question: What Really Happened During Uri?

Kinder Morgan is a natural gas pipeline that purchases, sells, and transports gas. In 2018, Kinder Morgan and Freeport entered into the industry standard "NAESB" Base Contract which contains the stock provisions for the purchase and sale of natural gas. NAESB is short for North American Energy Standards Board, an industry forum who promulgated the form contract to expedite negotiations and to provide industry participants a clear understanding of the obligations of both parties. These base contracts include "check-the-box" general terms that parties agree to such as cover standards, payment methods, and force majeure provisions. Separate Transaction Confirmations are then entered into between the buyers and sellers that set the price, delivery location, and quantity of gas to be sold.

Of course, like any contract, the parties are free to modify the base terms. This is normally completed through an addendum or "special provision." In the *Freeport LNG Marketing* case, the parties, through special provisions, modified portions of the standardized force majeure language, clarifying that events qualifying as force majeure in the contract only excuse the party from performance, "if and to the extent that such cause, event or circumstance directly prevents or restricts delivery by Seller or receipt by Buyer of Gas at the applicable Delivery Point."

When Standard Contracts Meet Extraordinary Circumstances

The Transaction Confirmation at issue here was unique in that Kinder Morgan was required to sell gas to Freeport, which Freeport could, at its option, then sell back to Kinder Morgan.

When Winter Storm Uri hit, Freeport informed Kinder Morgan of its election to sell back its daily quantity of gas for February 10 through February 22. Kinder Morgan accepted the sellback on some days but rejected it on others because it was curtailing sales itself. Kinder Morgan ultimately disputed eighty percent of the invoiced amount (roughly $100 million), claiming force majeure. For reference, gas prices during the storm rose well over 100 times daily prices immediately before and after the winter storm.

Kinder Morgan argued at the trial court that the force majeure event fully excused its repurchase of gas from Freeport. Kinder Morgan further contended that the sellback provision was subject to the force majeure clause in the contract; thus, if Kinder Morgan no longer had an obligation to sell gas to Freeport due to force majeure, then Freeport no longer had a right to exercise the sellback provision.

The relevant clauses in the NAESB, as amended by the special provisions read:

> 11.1 … [N]either party shall be liable to the other for failure to perform a Firm obligation, to the extent such failure was caused by force majeure.
>
> 11.2 Force Majeure shall include, but not be limited to the following … (ii) weather related events affecting an entire region, such as low temperatures which cause freezing or failure of wells or lines of pipe; (iii) interruption and/or curtailment of Firm transportation … (v) governmental actions such as necessity for compliance with any court order, law, statute, ordinance, regulation, or policy having the effect of the law promulgated by a governmental authority having jurisdiction … provided, however, that any of the previously described causes, events or circumstances shall only constitute Force Majeure if and to the extent that such cause, event or circumstance directly prevents or restricts delivery by Seller or receipt by Buyer of Gas at the applicable Delivery Point. …
>
> 11.3 Without limiting the foregoing Section 11.2, it is recognized that Seller may be subject to governmentally sanctioned or mandated orders or plans for Gas allocation and/or curtailment in the event of a Gas Shortage. It is stipulated that any reduction or suspension of Gas deliveries by the Seller in compliance with such an order or plan shall be deemed to be fully excused … and shall not cause the incurrence of any liability of any kind or type by Seller to Buyer.

Undoubtedly, this was a weather-related event affecting an entire region. Most of the country experienced sub-freezing temperatures for more than 7 days.

These cold temperatures significantly impacted wells and pipelines. FEMA reported that the U.S. experienced the largest monthly gas decline on record, falling from 90.8 billion cubic feet of production on February 4, 2021 ("Bcf") to 65.4 BCF on February 17, 2021. In Texas, the month-over-month gas production was down 70.1%. Altogether, this created an energy crisis that the government attempted to mitigate through a series of emergency declarations and orders. The Railroad Commission issued an order on February 12 that required deliveries of natural gas to be prioritized for electrical generation facilities.

Based on these conditions, the trial court ultimately held that Kinder Morgan satisfied its burden, as a matter of law, that its refusal to purchase gas was excused by force majeure. Freeport, however, argued there were many fact issues, all of which can be boiled down to: was the existence of the government order, statewide drop in supply, and freezing temperatures the actual reason that Kinder Morgan failed to satisfy its obligations? In other words, Freeport attacked the "causation" element of the force majeure defense, arguing that Kinder Morgan failed to address causation in its motion.

The Causation Challenge

On appeal Kinder Morgan homed in on its compliance with Railroad Commission orders that required gas to be directed to certain tiered recipients, to the extent possible and necessary. Freeport argued, and the court of appeals agreed, that Kinder Morgan failed to provide any evidence that its reduction of supply of gas to Freeport was necessary to comply with the order. Moreover, the Court held that Kinder Morgan failed to demonstrate that any curtailment was necessary in the first instance. Kinder Morgan simply asserted – which the Court found conclusory – that it needed to curtail its deliveries to Freeport to satisfy gas deliveries to higher tiered customers. Kinder Morgan failed to provide any data to support this argument.

Finally, Kinder Morgan argued that the mere existence of the order justifies any reduction in supply to Freeport, pursuant to Section 11.3 of the parties' agreement. But the court rejected this argument. The court reasoned that, while there may have been an event or condition that qualified as a force majeure under the NAESB contract, Kinder Morgan failed to conclusively prove that the event or condition was the actual cause of its failure purchase and sell gas. Therefore, the court reversed and remanded, holding summary judgment was improper.

This case stands for the proposition that parties must prove a casual nexus between the force majeure event and the failure to perform. Freeport creatively attacked causation, questioning whether the order required 100% curtailment to Freeport, whether Kinder Morgan's actual gas supply necessitated curtailment, and if so, what percentage of curtailment was necessary. These issues are difficult to prove as a matter of law at the summary judgment stage, but the trial court's ruling would have had a stronger chance at being upheld had Kinder Morgan provided the court with its Electronic Bulletin Board data and volume accounting data.

The Evidence Dilemma

This information would have provided the court with a better picture of the volume of gas at Kinder Morgan's disposal, who it allocated that gas to, and the Railroad Commission category that the counterparty fell within. But producing this data has its drawbacks. This data opens the door to other potential issues savvy lawyers will identify e.g., did Kinder Morgan redirect gas supply to higher priced markets, did Kinder Morgan prioritize parties with gas daily pricing or first of month pricing, did Kinder Morgan prioritize its baseload customers versus spot deals, and how much gas did Kinder Morgan sell under no-notice contracts?

A recent jury verdict underscores just how fact-intensive and case-specific force majeure defenses can be. While Kinder Morgan's defense failed at the summary judgment stage due to a lack of evidence on actual cause, Marathon Oil Company prevailed on the same issue at trial by persuading a jury that Winter Storm Uri "prevented Marathon from delivering [gas] or made Marathon's delivery impracticable." *See Verdict, Marathon Oil Company v. Koch Energy Services, LLC*, No. 4:21-CV-01262 (S.D. Tex. May 5, 2025), ECF No. 301.

Beyond Uri: What This Means for Your Next Force Majeure Strategy

The difference between these outcomes illustrates that parties must tailor their evidence to meet the evidentiary burdens imposed by any NAESB special provisions. Questions remain whether a party must prove full and complete causation – and how damages should be calculated when a party's non-performance was only partially caused by a force majeure event. For example, what if a party reasonably, but mistakenly, prioritized a counterparty that it thought was serving human needs customers? Nitpicking causation, and effectively how a party complies with a government order during a historic gas supply shortage, seems inconsistent with the certainty the NAESB forum envisioned, but adding special provisions that change the stock language has this impact. The lesson is clear: parties need to consider the evidentiary burden their special provisions will create at trial. Proving absolute causation may not be easy.

About the Author

McLean Bell *is an associate attorney in our Austin office. McLean is a versatile trial lawyer who oversees high-stakes litigation for both individuals and the world's largest energy companies. He takes an upfront and candid approach to complex cases without sacrificing attorney's fees on antiquated approaches and inefficient practices. His methodology relies on early case evaluation, strategy, and goal setting, allowing him to accommodate the client's business goals and budget.*

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Who Owns the Empty Space? Analysis of Landmark Ruling

Myers-Woodward, LLC v. Underground Services Markham, LLC, No. 22-0878, 2025 WL 4356581 (Tex. May 16, 2025)

By: Austin W. Brister

In this case, Texas Supreme Court resolved two significant issues affecting mineral owners and surface owners: (1) who owns the empty caverns created by salt mining operations, and (2) how to calculate royalty payments on produced salt.

This dispute involved 160 acres in Matagorda County, Texas. In 1947, Myers-Woodward's predecessors retained the surface estate but conveyed the mineral estate to Underground Services Markham's (USM) predecessor through a mineral deed that included "all of the said oil, gas and other minerals in, on and under said land."

In 2008, USM acquired from Texas Brine Company "all of [Texas Brine Company's] right, title and interest, in and to all of the salt and salt formations only" on the property. USM began producing salt from the property, extracting an impressive 2,674,058.90 tons of salt, which created large underground caverns. Despite this substantial production, USM did not pay Myers any royalty.

The dispute arose on two fronts. First, USM claimed ownership of the resulting salt caverns and sought to use them to store oil and gas produced off-site. Second, the parties disagreed over how to calculate Myers's royalty.

Ownership After Salt Mining?

The essential question was whether empty spaces within salt formations were included within the mineral conveyance. The Court relied on numerous prior decisions as establishing a general rule that subsurface spaces generally belong to the owner of the surface estate, absent deed language stating otherwise:

- In *Humble Oil v. West*, 508 S.W.2d 812 (Tex. 1974), the Court drew a distinction between the "mineral estate" and "the matrix of the underlying earth, i.e., the reservoir storage space," which "would remain with the surface-estate holder after severance of the mineral estate."
- *Lightning v. Anadarko*, 520 S.W.3d 39 (Tex. 2017), said the mineral estate generally includes the right to "possess the minerals" but "do[es] not include the right to possess the specific place or space where the minerals are located."
- More recently in *Regency Field Servs., LLC v. Swift Energy Operating, LLC*, 622 S.W.3d 807, 820 (Tex. 2021), the Court reiterated that "the surface owner, and not the mineral lessee, owns the possessory rights to the space under the property's surface."
- The Fifth Circuit similarly held for the surface owner in *Dunn-McCampbell Royalty Int., Inc. v. Nat'l Park Serv.*, 630 F.3d 431, 442 (5th Cir. 2011), stating "Texas law establishes that the holder of a mineral estate has the right to exploit minerals, but does not own the subsurface mass."
- a U.S. Court of Claims held subsurface geological structures suitable for underground storage remained property of the surface owners in *Emeny v. United States*, 412 F.2d 1319, 1323 (Ct. Cl. 1969).

From this line of cases, the Court concluded that "we consider Texas law reasonably clear that underground storage space generally belongs to the surface owner absent a contrary agreement."

USM sought to distinguish this precedent as applying only to oil and gas which is subject to the rule of capture under which oil and gas ownership does not reach any specific molecules, but instead only provides a "fair chance to recover the oil and gas." According to USM, a different rule should apply to hard minerals. USM cited to precedents from coal-mining states supporting its position. USM also relied heavily on Mapco, Inc. v. Carter, 808 S.W.2d 262, 274 (Tex. App.—Beaumont), rev'd in part on other grounds, 817 S.W.2d 686 (Tex. 1991), where a Texas court of appeals held that "the continued ownership interest [of] the mineral estate in an underground storage facility is acknowledged and harmonious with the decisional law of our state."

The Court acknowledged that USM's position was "not without intuitive appeal" and that such a rule would not be "altogether unjust or unreasonable." Nevertheless, the Court rejected this distinction for two main reasons. First, the Court found Mapco unpersuasive, citing little Texas authority in support, and seldom being cited over the years. As a result, the Court explicitly overruled Mapco on this ruling. Second, the Court stated a preference for "simple bright-line rules" that would "apply...consistently across a variety of fact patterns," rather than to introduce "greater complexity and uncertainty" by drawing "ever finer distinctions" to account for "factual vagaries that so often test the edges of bright-line rules."

Why this Surface Owner Still Won - Despite Intuitive Appeals

Applying that holding in this case, Court rejected USM's ownership claim for two primary reasons. First, USM did not own the salt formations—only the salt itself. The Court explained that, although USM's deed purported to convey to USM the and the "salt formation," USM's predecessor in title had only obtained ordinary ownership of the mineral estate. Given the "axiomatic" rule that a grantor can only convey what he owns, the Court concluded that USM never obtained title to the salt formations themselves.

Second, the Court bluntly stated its view that "[e]mpty space is not a mineral, no matter how economically valuable it becomes," and later stated "despite its apparent complexity, much of this case boils down to the elementary observation that empty space is not salt." The Court concluded that "[n]o matter who created the underground empty space or where it is located, the space itself is not salt, which means the mineral estate generally does not entail physical ownership of it (absent some indication to the contrary in the conveyance, which we do not see here)."

Regardless of Ownership Could the Caverns Be Used for Storage?

Although the Court established that Myers owned the caverns, that did not yet resolve USM's claimed right to use them in connection with its implied easement as an owner of a of the mineral estate. The Court said that, while USM's mineral estate gives it a qualified right to use Myers's surface estate (including subsurface space like the disputed salt caverns), that right is limited to uses "reasonably necessary to recover [USM's] minerals."

The Court ultimately rejected USM's claimed right to use the caverns for storing off-site hydrocarbons, holding that it was not a reasonably necessary use that fell within its implied easement. The Court offered two primary rationales:

1. USM had not demonstrated that storage of hydrocarbons was reasonably necessary to recover its salt. In fact, in the court's view, such storage would likely hinder, rather than facilitate, further production of salt.

2. Storage of hydrocarbons produced elsewhere introduced an additional problem for USM, because ownership of the mineral estate does not entitle "the mineral owner to increase the burden on the surface estate for the benefit of additional lands."

Because USM's proposed use of the caverns had "no connection to the production of salt on the property," the Court affirmed that USM had no right to use the caverns for storing off-site hydrocarbons.

Royalty on Salt - Market Value or Net Proceeds?

As for royalties on the salt, the key issue was whether the deed reserved an in-kind royalty (payable on net proceeds) or a market-value royalty. This distinction was remarkably impactful in this case, given that USM contended the salt's market value warranted a royalty of only about $260,000, while Myers calculated its entitlement to net proceeds at more than $2,000,000—over seven times greater.

There were two reservation deeds at issue: an original deed and a correction deed entered a few months later. Myers and USM agreed that the original 1947 deed, which reserved a royalty only in oil, provided an in-kind royalty. Specifically, USM conceded that in-kind royalties were due on oil given the deed's statement that oil royalties were "to be delivered at the wells or to the credit of Grantors... into pipe line to which the wells may be connected."

But the correction deed, which later corrected the reservation to include "gas and other minerals," did not repeat the delivery language. USM contended that meant royalties on other minerals (such as salt) would not be due in-kind.

The Court rejected that argument. In the Court's view, royalties on gas and other minerals were also due on an in-kind basis. The Court focused on language in the correction deed indicating the parties intended to correct an "inadvertent" failure to include gas and other minerals in the original reservation. In addition, the correction deed used materially similar language to describe the reservation, and then closed by summing up the parties' intent "that [the royalty holders] shall receive a total royalty interest of 1/8 of all the oil, gas, or other minerals (except sulphur) produced from said land."

Given these features, the Court concluded that "the parties intended to create identical royalties for all three categories—oil, gas, and other minerals." The Court found "nothing in these documents supporting the notion that the royalty on 'other minerals' should not be treated just like the in-kind oil royalty to which the parties unquestionably agreed."

The Court therefore held that Myers was entitled to an in-kind royalty—which meant Myers was entitled to either physical possession of a 1/8th share of the salt produced or payment of 1/8th of the net proceeds from the sale of that salt. Because the trial had "proceeded from the mistaken premise that market value was the only appropriate measure of Myers's royalty," the Court reversed and remanded for further proceedings on this issue.

Strategic Takeaways and Doctrinal Signals

What This Means for Operators, Drafters, and Storage Developers

This decision is notable for a few reasons. Perhaps most directly, it provides additional clarity for both surface and mineral owners regarding their respective rights in the increasingly valuable underground storage space created by mining operations. Those in favor of the decision will argue that the Court's self-titled "bright-line rule"—that surface owners own subsurface spaces absent agreement otherwise—will promote certainty and consistency in property rights.

The ruling is also potentially notable for its guidance on interpreting calculation of fee royalties derived from mineral conveyances or reservations. Although the Court attributed much of its discussion of the in-kind interpretation of the oil royalties to the parties' mutual concession, the case arguably lends support to the notion that language requiring physical delivery of the royalty strongly suggests that the royalty is payable in-kind. The case also affirms that in-kind royalties are payable both through actual physical possession, or through a cash payment on the basis of net proceeds.

Of interest are two policy rationales the Court relied upon which arguably pull in opposite directions. On one hand, the Court cautioned that "[n]ot all mineral estates are created equal," and that courts should "begin with the text of the conveyance-not with generalizations about the default nature of a 'surface estate' or a 'mineral estate.'"

Court Prefers Simplicity - Until It Doesn't

The Court's opinion reveals a fascinating tension between competing jurisprudential approaches to property rights. On one hand, the Court emphasizes textual specificity and the uniqueness of individual conveyances; on the other, it champions bright-line property rules that intentionally avoid complex nuances to take into account distinctions presented by edge cases. This tension merits careful examination, as it illuminates the Court's approach complex property disputes.

Early in its analysis, the Court cautions that "not all mineral estates are created equal" and that resolving disputes over the scope of mineral conveyances "should therefore begin with the text of the conveyance—not with generalizations about the default nature of a 'surface estate' or a 'mineral estate.'" This admonition places primacy on the specific unique language chosen by parties to a particular conveyance, suggesting a contract-centric approach treating each deed as potentially unique.

Yet immediately after this observation, the Court acknowledges that "doctrinal labels such as these—and the caselaw from which they derive—are of course very useful, indeed essential, when courts are confronted with questions not fully answered by the text of the conveyance." This qualification suggests that despite the primacy of text, general rules remain necessary for resolving ambiguities or addressing matters the parties failed to contemplate explicitly.

The most revealing tension emerges later when the Court confronts USM's argument that solid minerals like salt deserve different treatment than migratory minerals like oil and gas. Despite acknowledging that USM's position has "intuitive appeal" and that a rule favoring mineral owners' rights to caverns they created "would strike few observers as altogether unjust or unreasonable," the Court rejects this distinction in favor of a bright-line rule that surface owners generally own subsurface spaces.

The Court's justification for this approach is particularly notable:

> [W]e should always prefer, where possible, to stick with simple, bright-line rules and to apply them consistently across a variety of fact patterns. And we should always avoid, where possible, inviting greater complexity and uncertainty into the law by drawing ever finer distinctions in an effort to account for the factual vagaries that so often test the edges of bright-line rules.

This statement of philosophy reveals the Court's preference for simplicity, consistency, and predictability in the context of general rules applicable to property law concepts, which stands in notable contrast with the Court's contract-centric approach emphasized earlier where each unique deed is to be read as a whole to understand the objective intent.

The Court's reasoning implicitly recognizes a hierarchical relationship between these competing approaches. On one hand, the Court begins by suggesting that deed language remains primary and can override general property rules ("absent some indication to the contrary in the conveyance"). Yet, on the other hand, the Court states that general rules are "very useful, indeed essential" when deed language does not "fully answer" the question before the court. In this case, the absence of express language governing ownership of subsurface caverns gave way for the Court to ultimately embrace a generalized default rule. Moreover, when it comes to that general rule, the Court favored a simple "bright-line" rule, declining to create specialized property rules for different categories of minerals in the absence of specific textual direction.

Putting this together, perhaps it could be said that a deed's unique language will uniquely govern, but when a deed is silent on a particular issue, the Court favors broad, generally applicable property rules over nuanced, context-specific ones.

This jurisprudential approach could have significant implications for practitioners. First, it underscores the paramount importance of precise drafting in mineral conveyances. If parties wish to allocate ownership of subsurface caverns created by mineral extraction, they should do so through express language, as the default rule will likely assign them to the surface owner. Second, it signals when it comes to general rules, attempts to argue for exceptional treatment for edge cases or nuanced facts may face an uphill battle absent textual support.

The Court's preference for bright-line rules in property law while maintaining textual specificity in contract interpretation arguably represents a pragmatic balance between competing values. While contract terms should be interpreted according to the parties' specific intent, the Court apparently believes that property law benefits from clear, consistently applied rules that promote certainty and consistency in land titles.

The author anticipates that these aspects of the Court's reasoning in Myers-Woodward will likely prove influential in future oil and gas cases, well beyond those involving subsurface ownership. The Court's emphatic endorsement of bright-line rules and its explicit rejection of fact-specific distinctions in property law principles will undoubtedly be cited whenever litigants seek specialized treatment for particular categories of minerals or novel subsurface uses. Meanwhile, its recognition that "not all mineral estates are created equal" will continue to remind courts that textual analysis must precede application of general rules when interpreting mineral conveyances.

Court Interprets Royalties "Free of Cost Forever"

Fasken Oil & Ranch, Ltd. v. Puig, No. 04-23-00106-CV, 2024 WL 4608591 [Tex. App.—San Antonio Oct. 30, 2024, no pet. h.]

By: Austin W. Brister

In this case, the San Antonio Court of Appeals held that a deed reserving a non-participating royalty interest "free of cost forever" exempted the royalty owner from bearing both production and postproduction costs, rejecting the producer's argument that "free of cost" language only relieves royalty owners from bearing production costs.

The dispute arose from a 1960 deed where B.A. Puig, Jr. and Emilia Gutierrez Puig sold their ranch to Palafox Exploration Company while reserving a 1/16th non-participating royalty interest (NPRI) to be paid "free of cost forever." Fasken Oil, as successor to the original grantee, had historically deducted postproduction costs from royalty payments made to Puig's successors. The royalty owners sued in 2021, seeking a declaration that their "free of cost forever" NPRI could not be burdened with postproduction costs.

On competing motions for summary judgment, the trial court ruled in favor of the royalty owners. The court of appeals accepted a permissive appeal to address whether the "free of cost forever" language precluded deduction of postproduction costs.

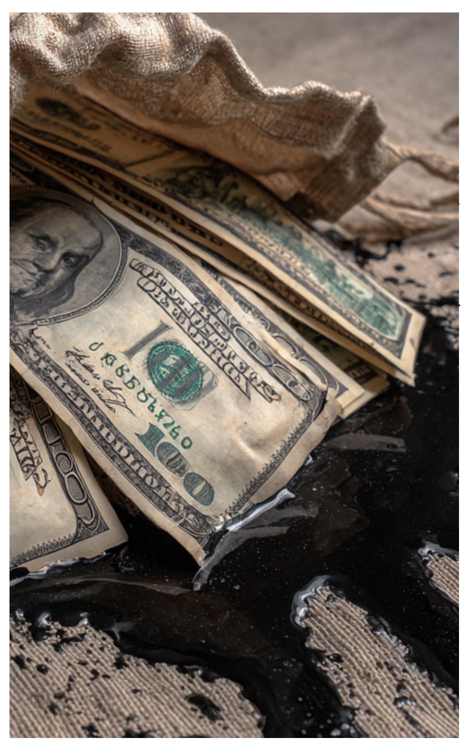
The court began by reiterating established principles that while royalties are normally "free of the expenses incurred to bring minerals to the surface (production costs)," they usually bear their proportionate share of "expenses incurred thereafter to make production marketable (postproduction costs)." However, parties may modify this default rule by agreement.

The court found this case controlled by the Texas Supreme Court's decision in *Chesapeake Exploration, L.L.C. v. Hyder*, which also addressed a royalty provision with "cost-free" language. In Hyder, the royalty clause provided for a "perpetual, cost-free (except only its portion of production taxes) overriding royalty." Fasken argued *Hyder* was distinguishable because that holding turned on the parenthetical also excepting production taxes (a postproduction cost), while the Puig deed contained no such exception. The court rejected this argument, explaining that *Hyder's* central holding was that "cost-free" language, without more, "does not distinguish between production and postproduction costs and thus literally refers to all costs."

Critically, like in *Hyder*, the Puig deed contained no language establishing a valuation point for the royalty. While Fasken argued the deed's use of the word "produced" established a wellhead valuation point that would make the "free of cost" language mere surplusage as to production costs, the court found "no language in the royalty provision providing for a valuation point at the well." The court characterized Fasken's argument as "a strained extension of current law," noting the word "produced" would likely appear in any royalty provision regardless of valuation point, since minerals must be produced for any royalty to be payable.

Because the deed lacked a specified valuation point and Fasken could not demonstrate that "free of cost forever" referred only to production costs, the court held the phrase's plain meaning encompassed both production and postproduction costs.

This case is potentially notable for its discussion of *Hyder*, and holding that "free of cost" language, at least in this specific context, was able to free the royalty of post-production costs. It is also notable for clarifying that the word "produced" would not, in this context, establish any valuation location.



Statute of Limitations:
A New Frontline in Injection Cases

Aris Water Sols., Inc. v. Stateline Operating, LLC, 2025 Tex. App. LEXIS 2828 (Tex. App. — El Paso, April 25, 2025)

By: Logan B. Jones

Aris is interesting and important not so much because of the legal analysis set out by the El Paso Court of Appeals regarding any substantive laws, but because it comes on the heels of Basic Energy Services, L.P. v. PPC Energy LLP. 2024 Tex. App. LEXIS 9015 (Tex. App. — El Paso Dec. 27, 2024, pet. filed). In Basic, the El Paso Court of Appeals held that injecting oil and gas waste water into an underground stratum constitutes "production, transportation and storage of oil and gas" such that a commercial disposal well operator could be held strictly liable for watering out for committing "waste" according to Section 85.045 of the Texas Natural Resources Code when its injection of oil and gas waste water lead to a nearby operator's well to be watered out.

The primary issue in the permissive interlocutory appeal in Aris is when an oil and gas operator's claim arises for purposes of the applicable statute of limitations when its wells are watered out by a wastewater injection company's injection activities.

In 2018, Stateline's (Plaintiff) predecessors acquired mineral interest in Eddy County, New Mexico located near Aris's wastewater disposal wells. In 2019 Stateline's predecessors investigated potential effects of wastewater on the mineral interest at issue while preparing a drilling program. In 2021 Stateline drilled four wells that did not experience any interference from injected wastewater. Also in 2021, Aris substantially increased its injection activities in Loving County. In early 2022 Stateline began drilling a second set of wells and encountered significant pressurized water during the drilling process. In October of 2022, several of Stateline's wells were experiencing abnormal water production, which Stateline claimed diminished the value of its interest by $180 million.

At the trial court, Aris moved for summary judgment arguing that the statute of limitations began to run on Stateline's claims when it knew of a "concrete risk of harm" which Aris argued was more than two years before it filed suit so Stateline's claim were barred by the applicable two (2) year statute of limitations. The trial court denied Aris's motion for summary judgment but permitted Aris's interlocutory appeal as to whether Stateline's claims had accrued based on a "concrete risk of harm." According to Aris, Stateline was aware of a "concrete risk of harm" to its oil and gas wells from Aris's injected water no later than January of 2021 when Stateline's predecessor learned from a third party that Aris's injected water affected its drilling operations.

The court of appeals noted and the parties agreed that the "concrete risk of harm" standard had never been applied in the context of injury to land. The court analyzed the "concrete risk of harm" standard in the context of federal standing law and Texas professional malpractice law where such a standard is typically applied. With regard to the federal standing "concrete and particularized standard" the court reasoned that Aris did not develop the issue of whether any pertinent risk of harm to Stateline's property entailed a degree of risk sufficient to be "concrete." In the context of Texas professional malpractice law, the court reasoned that Aris did not identify a particular event or explain why a particular event would be "concrete and specific" enough to trigger the accrual of Stateline's claims under the discovery rule. The court ultimately held that the date that the statute of limitations accrued was a fact issue and denied Aris's petition for interlocutory appeal

When Legal Precedent Meets Operational Reality

This case marks another dispute between water injectors and gas producers. Produced water is a natural byproduct of oil and gas production. As of March of 2024 over 11 million of barrels of produced water were produced in the Permian Basin every day. Most of that water is injected right back into underground stratum.

Dispute between oil and gas producers and produced water injectors will likely to continue to intensify in the coming years as the law continues to develop and the amount of produced water encountered in exploration activities continues to increase. In Basic the El Paso Court of Appeals cleared a path for produced water injectors to be sued for "waste" under Section 85.045 of the Texas Natural Resources Code. The damage in that case totaled roughly $13 million.

In Aris, Stateline's claimed damages are much more substantial ($180 million). One can imagine scenarios where, through creative damages calculations, $180 million could be a modest amount depending on the oil and gas interest affected by water injection

The Collision Course No One Wants to Navigate

One thing is certain, produced water is an industry wide issue that requires an industry wide solution. Obviously, we should avoid wasting the valuable natural resources underlying the surface of the state, but we also have to do something with the produced water. Potential solutions for the "produced water problem" might come in the form of finding ways to transport the water to areas of the state where there will not be an effect oil and gas production and injecting it there or finding a way to commercialize the cleaning and reuse of produced water for agricultural or other commercial uses.

The state and federal government has always taken an interest in subsidizing the research and development for natural resources. It seems to me that a substantial investment to find practical long-term solutions and uses for produced water is necessary especially given the major water challenges in West Texas and the Western United States more broadly. Until a solution is reached, we will continue to see unavoidable fights between oil and gas producers and produced water injectors.

About the Author

Logan Jones *is an associate in our Houston office and has represented large energy companies and individual and family mineral owners across the State of Texas in complex oil and gas litigation. He has successfully handled disputes concerning mineral and leasehold title, operator/non-operator disputes, and breach of joint operating agreements among other things.*

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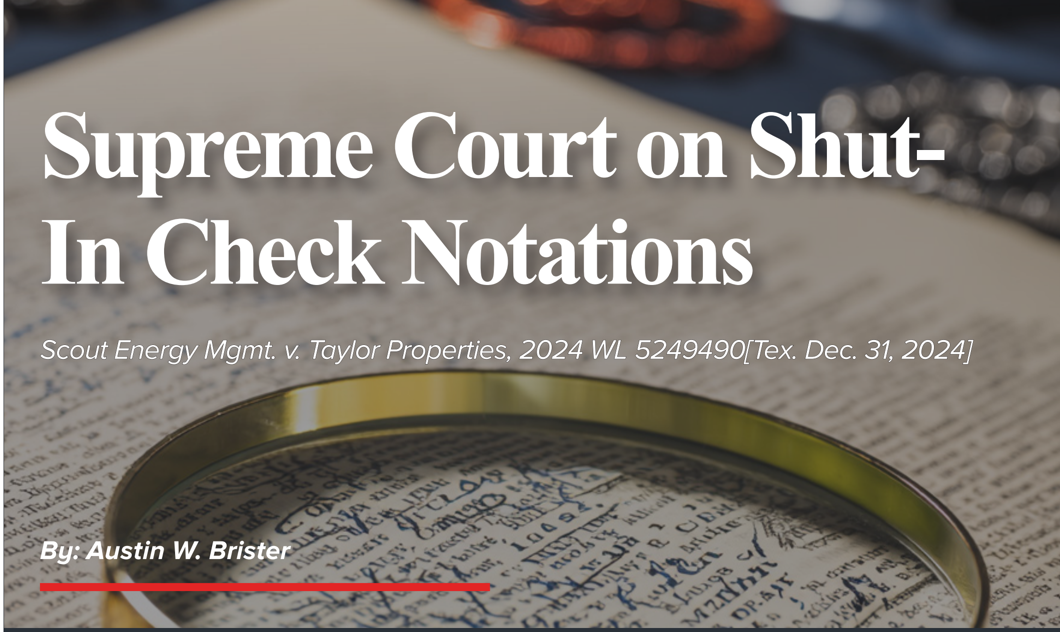


Supreme Court on Shut-In Check Notations

Scout Energy Mgmt. v. Taylor Properties, 2024 WL 5249490[Tex. Dec. 31, 2024]

By: Austin W. Brister

In this case, the Texas Supreme Court held that vague notations on shut-in royalty check receipts cannot modify an unambiguous lease provision regarding the timing and effect of shut-in payments.

The dispute arose from two leases containing identical shut-in royalty provisions. These provisions allowed the lessee to maintain the lease during periods of non-production by paying "$50.00 per well per year," stating that "upon such payment it will be considered that gas is being produced" within the meaning of the habendum clause.

After production ceased in September 2017, ConocoPhillips (Scout's predecessor) made shut-in payments for both leases, with receipts showing "Mth Begin: 9-06-17". One month later, in October 2017, ConocoPhillips made two additional shut-in payments in the same amounts, but they included a notation reading "Mth Begin: 10-09-2017". Scout interpreted the payments as securing two consecutive 12-month periods, and made another shut-in payment in December 2018.

Taylor Properties sued Scout, arguing the leases had terminated before Scout's December 2018 payment because more than one year had passed since the October 9, 2017 date noted on ConocoPhillips's October 2017 shut-in check. The trial court found the shut-in clause ambiguous but ruled for Scout, holding that each payment secured a full year of constructive production without resetting the clock. The court of appeals agreed with Scout that the clause unambiguously would have allowed each payment to secure a full one-year period of constructive production, but ultimately reversed and held the leases had terminated because, in its view, the "Mth Begin" notations on the check receipts controlled the beginning date for the applicable one-year shut-in period. Under that view, the shut-in period expired in October of 2018, making Scout's December 2018 payment untimely.

The supreme court held the shut-in clause was unambiguous and that each $50 payment secured a full year of constructive production, regardless of when subsequent payments were made. The court explained this interpretation properly gave effect to the parties' express agreement that $50 would cover an entire year of constructive production.

The court rejected Taylor's argument that the phrase "upon such payment" meant the one-year period began anew at the time of each payment. The court explained this interpretation would improperly rewrite the clause to add language about resetting the time period, while also potentially requiring lessees to pay twice for the same months of constructive production—undercutting the parties' express agreement that $50 would cover an entire year.

The court then addressed whether the "Mth Begin" notations modified the lease terms regarding when the shut-in period would run. While acknowledging parties can modify lease terms through subsequent agreement, the court held these particular notations were "too vague to be given effect as a contract or a lease modification."

In the court's view, this was distinguishable from two cases the appellate court had relied upon which involved more specific check notations. Without expressly approving those prior decisions, the supreme court explained they involved situations where check notations explicitly stated the specific time period intended to be covered by the payment. Distinguishing those cases from the ConocoPhillips payments, the court said that the mere notation "Mth Begin" with a date was insufficient to constitute a clear agreement modifying unambiguous lease terms.

This case is notable insofar as providing guidance for practitioners regarding both interpretation of shut-in clauses and whether notations on shut-in payments can effectuate a modification of lease terms. The court's analysis suggests shut-in provisions should generally be construed to avoid interpretations requiring double payment for overlapping time periods. The court's treatment of the *Amend* and *Mayers* decisions also provides some guidance for practitioners analyzing when payment notations might effectively modify lease terms.

NEW ATTORNEY ANNOUNCEMENT

McGinnis Lochridge Welcomes Marla D. Broaddus

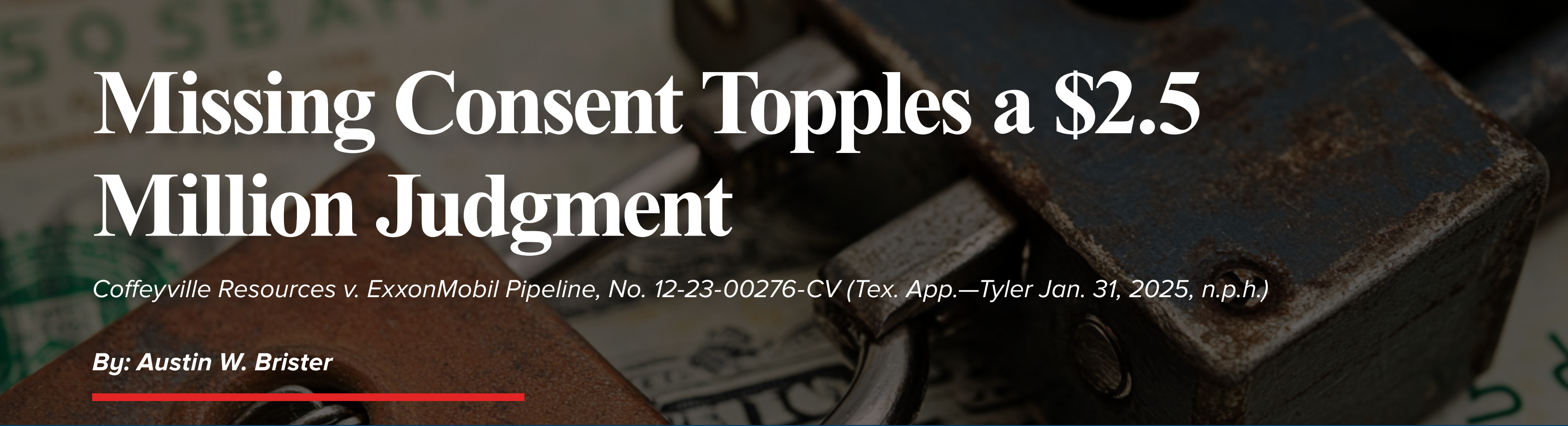
We are pleased to give a warm welcome to Marla D. Broaddus, who joins McGinnis Lochridge as Partner in our Austin office. Marla brings decades of specialized oil and gas litigation and appellate experience, representing energy companies, operators, mineral rights holders, and service providers in complex disputes across state and federal courts.

"Marla's addition significantly enhances our oil and gas litigation capabilities" said Doug Dodds, Managing Partner, *"Her oil and gas experience will provide tremendous value to clients navigating complex litigation challenges."*

Marla's practice specializes in complex oil and gas litigation, including class-action matters across the country, upstream exploration disputes, and royalty litigation. She handles trial work with a deep understanding of the industry, while preparing for appellate challenges. Known for her strategic thinking and client-first approach, she tailors litigation strategies to meet the unique operational needs of energy clients.

For assistance with oil and gas litigation matters, contact Marla at (512) 495-6032 or via email at mbroaddus@mcginnislaw.com.


Marla D. Broaddus



Missing Consent Topples a $2.5 Million Judgment

Coffeyville Resources v. ExxonMobil Pipeline, No. 12-23-00276-CV (Tex. App.—Tyler Jan. 31, 2025, n.p.h.)

By: Austin W. Brister

The Tyler Court of Appeals reversed a $2.5 million judgment against pipeline successors, holding that an assignment made without required a contractually-required written consent was void ab initio and broke the chain of title for all subsequent transfers.

In 1944, P.K. Birdwell granted Humble Pipe Line Company (ExxonMobil's predecessor) a pipeline easement across 126.7 acres for transporting oil, gas, and water. Humble built the Sand Flat Pipeline and later added a tank battery and flowline. ExxonMobil sold the tank battery and flowline to Scurlock Oil Company in 1974, and these facilities were demolished by 1978.

In October 2000, ExxonMobil entered into a Purchase and Sale Agreement (PSA) with Salter Creek Resources LLC to sell certain pipeline assets, including the Sand Flat Pipeline. Critically, Paragraph 23 of the PSA provided:

> *This Agreement may not be assigned, in whole or in part, without the prior written consent of the other Party hereto, and any such assignment that is made without such consent shall be void and of no force and effect.*

Two months later, Salter Creek assigned its PSA interests to Seminole Creek, Ltd. (later Coffeyville) through a General Assignment document—without obtaining ExxonMobil's written consent. The pipeline and easement then passed through subsequent transfers: Coffeyville to Rose Rock (2007) and Rose Rock to SemGreen (2011).

In 2017, crude oil was discovered seeping into a stream on the property. The RRC investigated and found "sufficient evidence to indicate that the crude oil release originated in the flow line while it was being operated by predecessor entities to ExxonMobil." The RRC ordered ExxonMobil to remediate. ExxonMobil then sued all downstream owners, claiming they had assumed liability for the spill under the PSA.

At the trial court, ExxonMobil advanced several arguments to avoid the provision's plain language. First, it claimed to have impliedly consented because the PSA was part of a larger transaction binder. The court rejected this, noting that the provision explicitly required "written" consent, precluding implied consent.

ExxonMobil also argued that the consent provision applied only to assignments of the PSA itself, not to the underlying assets, and that Coffeyville had "assumed" obligations rather than receiving them by "assignment." The court found this distinction untenable, observing that "[i]t is axiomatic that the parties would not have assumed the liabilities associated with the PSA's assets without the assignment of those assets as well."

Most significantly, ExxonMobil contended it could waive the consent requirement, citing *Twelve Oaks Tower v. Premier Allergy*, 938 S.W.2d 102 (Tex. App.—Houston [14th Dist.] 1996, no pet.). The court distinguished *Twelve Oaks*, which involved a landlord-tenant subletting provision that made unauthorized assignments merely "voidable." In contrast, the PSA stated that non-compliant assignments "shall be void and of no force and effect."

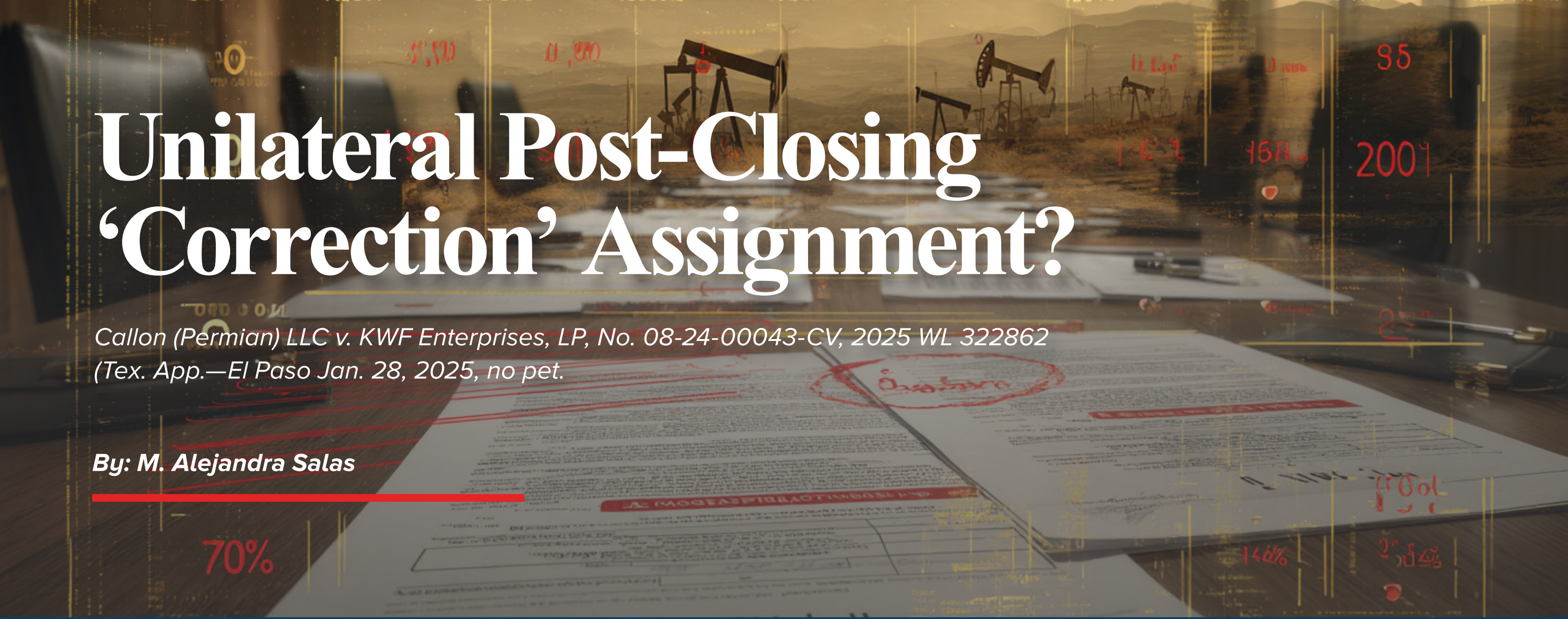
The court emphasized a critical distinction: the PSA's provision protected both parties equally and benefited both sides of the transaction, unlike typical landlord consent provisions that exist solely for the landlord's protection. Therefore, the court said the parties' chosen language (making unauthorized assignments "void" rather than "voidable") must be enforced.

Having found that Salter Creek's assignment to Coffeyville was "void and of no effect," the court reached the inevitable conclusion: "Coffeyville had no interest in the Birdwell Easement to assign or convey to Rose Rock and SemGreen." All subsequent transfers failed because Coffeyville never acquired valid title.

This decision provides guidance for practitioners on a few fronts. First, it reflects that Texas courts are willing to enforce consent provisions that "void" breaching transactions in certain circumstances. Ideally, parties should not merely rely on implied consent, participation in closing, or subsequent conduct.

Second, the case highlights importance of precise drafting—if parties want flexibility to ignore consent requirements in certain transactions or situations, they should ensure that is compatible with the express language used.

Finally, the decision illustrates the cascading consequences of a void assignment. Once the initial transfer failed, every downstream purchaser's title failed as well, regardless of their good faith or lack of knowledge about the consent violation. When circumstances allow in transactional due diligence, buyers should review not just their immediate seller's title, but the entire chain of title for compliance with any consent provisions. This case serves as a sobering reminder that in commercial transactions, a chain of title is only as strong as its weakest link.



Unilateral Post-Closing 'Correction' Assignment?

Callon (Permian) LLC v. KWF Enterprises, LP, No. 08-24-00043-CV, 2025 WL 322862 (Tex. App.—El Paso Jan. 28, 2025, no pet.

By: M. Alejandra Salas

In this case, the El Paso Court of Appeals reversed a trial court's summary judgment and held that post-closing unilateral "correction" assignments were invalid and unenforceable.

This dispute arose from complex oil and gas transactions involving hundreds of leases across thousands of acres. KEW Drilling (KEW) sold its interests in these leases to three buyers—ExL Petroleum Management, LLC (Callon's predecessor), Silverback Exploration, LLC, and Arris Delaware Basin, LLC—through contracts executed in 2015 with closings between June 2015 and February 2016.

The distinguishing feature of the 24 leases at issue was that KEW owned up to an 80% working interest in them (compared to 75% in all other leases). The sales contracts addressed this extra up-to-5% interest through Section 8.1(iii), which provided that KEW "may assign overriding royalty interests in the Leases to certain key personnel of [KEW] (or their Affiliates), provided that after giving effect to such assignments, the Designated NRI is satisfied." The contracts defined "Designated NRI" as 75%.

Before closing, KEW executed assignments conveying only 65% of its extra up-to-5% interest to its affiliate KWF Enterprises, LP. This meant KWF received an up-to-3.25% overriding royalty interest (65% of the extra 5%), while the buyers received the 75% Designated NRI plus an additional up-to-1.75% interest.

Callon acquired and recorded its ownership interest in August 2017. Three months later, KEW and KWF executed "corrected" assignments that purported to fix a "scrivener's error" by changing the assigned percentage from 65% to 100%. If valid, these corrected assignments would reduce Callon's ownership interest by granting KWF the full up-to-5% overriding royalty.

The court framed the central question as "whether an assignment under Section 8.1(iii) involves a permissive or mandatory act." KWF argued that the contracts required KEW to convey exactly 75% NRI to the buyers, necessitating assignment of 100% of any extra interest as overriding royalties. Callon countered that Section 8.1(iii) merely permitted such assignments.

The court sided with Callon, emphasizing that Section 8.1(iii) used "may" rather than "shall" or "must." Citing established Texas precedent, including G.T. Leach Builders, LLC v. Sapphire V.P., LP, 458 S.W.3d 502, 525 (Tex. 2015), the court noted that "may" is generally construed as permissive.

KWF attempted to distinguish these cases by arguing that the juxtaposition of "may" with "shall not" in Section 8.1 suggested both terms were mandatory. The court rejected this argument, finding "no reason why construing 'may' and 'shall not' in accordance with their plain meanings—i.e., as permissive and mandatory, respectively—would lead to an absurd or improbable result here."

The court found additional support in the contract's overall structure. Section 3.2B provided for downward price adjustments if title defects reduced a lease's value below 75% NRI, but only if the buyer timely notified the seller. The court observed a "symmetry" between this provision and Section 8.1(iii): both required timely action to ensure conveyance of exactly 75% NRI, but neither allowed post-closing corrections.

KWF also argued that Exhibit B to the contracts, containing a fill-in-the-blank form ending with "TOTAL 100%," mandated assignment of the full extra interest. The court disagreed, analogizing to Texas Pattern Jury Charge 4.3, which similarly ends with

"Total 100%" but explicitly instructs that "The percentages you find must total 100 percent." The court reasoned that if the contract drafters intended to require 100% assignment, they would have included express language to that effect.

The El Paso Court of Appeals' decision in Callon provides important guidance on contract interpretation in oil and gas transactions. The case reinforces that courts will give contract terms their plain meaning absent compelling reasons to do otherwise. For practitioners, the decision highlights the importance of precise drafting when allocating interests in complex multi-party transactions.

Most significantly, the case stands for the proposition that post-closing "corrections" to assignments cannot be used to unilaterally alter the parties' original bargain, particularly when the underlying contract grants only permissive authority. Parties seeking to preserve flexibility in allocating overriding royalty interests should ensure their contracts clearly specify whether such allocations are mandatory or optional, and whether any right to correct errors survives closing. The court's emphasis on contractual symmetry and the need for express language when imposing obligations provides a useful framework for analyzing similar provisions in future transactions.

Plain Language Meets Common Sense:

Traps in Contract Interpretation

*Sewak v. Sutherland Energy Co., LLC, No. 07-24-00273-CV, 2025 Tex. App. LEXIS 2207, at *1 (Tex. App.—Amarillo Apr. 2, 2025, no pet. h.)*

By: Marcus V. Eason

In early April 2025, the Amarillo Court of Appeals reversed in part and affirmed in part a trial court's summary judgment regarding the agreed-upon compensation for a geophysicist in a "Letter of Agreement," highlighting how courts weigh both literal terms and what the courts believe "makes sense" in reading contract language. This opinion cautions that seemingly ordinary phrases can carry unexpected consequences when read together with other contract provisions.

In this case, geophysicist Thomas Sewak was hired by Sutherland Energy Co., LLC ("SEC") to perform geophysical and prospecting services. The "Agreement" entitled Sewak to a day rate of $600.00 per day on work performed "concerning the subject seismic survey." The agreement also gave Sewak an opportunity to invest "on a ground floor basis," in "drilling opportunities within the subject survey" – capped at 20% of SEC's working interest.

Under the Agreement, Sewak was paid his day rate for work done in 2013 to 2015. In late-2014 to early-2015, the survey was completed enough to begin identifying drilling prospects. Sewak continued providing services through early 2017 and was offered the opportunity to participate in four wells drilled by SEC from 2015 to 2017; Sewak elected to participate in two.

Between September 2017 and February 2018, Sewak submitted three unpaid invoices. Additionally, in 2017 and 2018, SEC did not give Sewak an opportunity to participate in two units/wells: (1) the Hamrick #3 Unit, which had already been designated; and (2) the Hamrick #5, drilled as an offset well on the Hamrick #3 Unit.

In June 2020, Sewak sued SEC, claiming breach of the Agreement by (1) failing to pay the three final invoices; and (2) failing to provide Sewak the option to invest in SEC's drilling opportunities. The trial court granted SEC's motion on summary judgment.

The Battle Over Competing Contract Interpretations

On appeal, Sewak argued the Agreement required SEC to pay the final three day-rate invoices, regardless of when the work was performed. SEC argued that under the Agreement, the day rate was only payable for work on the "subject seismic survey" and that Sewak's compensation for work performed after the survey was completed was limited to the investment opportunity. The investment opportunity was denoted as payable: "[i]n addition to the [day rate] fees above and after fulfillment of those duties..." SEC argued that the phrase "after fulfillment of those duties" created two compensation "schemes" based on when the work was performed.

The Court of Appeals rejected SEC's argument and determined that Sewak's final three invoices should have been paid. The Court construed the plain language of the Agreement, ruling that the phrase "in addition to" did not limit Sewak's compensation as that phrase commonly means "combined or associated with," and not "instead of."

Looking Beyond the Four Corners of the Agreement

But the Court ruled that SEC was not required to give Sewak an opportunity to invest in the Hamrick #3 and Hamrick #5. The Court determined that the language providing Sewak an investment option in "drilling opportunities" did not extend to the Hamrick #3 as that unit had already been designated.

With respect to the Hamrick #5, the Court similarly determined that SEC did not breach the Agreement, even though the Hamrick #5 was a new well drilled by SEC. The Court's holding was based on the fact that the investment provision was limited to opportunities on "a ground floor basis," and because the Hamrick #5 had been drilled on the already-designated Hamrick #3 Unit, it would make no sense to permit Sewak to invest in an existing production unit.

The "Ground Floor" Dilemma: When Defined Terms Don't Define Outcomes

This case is notable because while the Court's holding regarding the invoices was based strictly on a plain reading of the contract, the Court expanded this reading to consider what "makes sense" when determining the investment dispute. Under Texas law, Courts must construe contracts to give effect to all contract language. But what makes sense to one party may not make sense to another. For example, the Agreement defined "ground floor basis" as: "you will not be charged a prospect fee or incur any land or seismic expenses that SEC can apply to payout of the Hamrick #3 well." Despite this "definition," the Court determined that the phrase "ground floor basis...[does] not make sense when applied to existing unit operations."

Whether in the oil patch or elsewhere, careful attention should be given to contract language. A party should always err on the side of over-inclusivity, especially when including abnormal or uncommon phrases in a contract. In that context, more can sometimes be better.

About the Author

Marcus Eason *is a partner in our Houston office and specializes in complex commercial, business, and partnership disputes. He practices in a wide variety of industries and Marcus' matters entail fiduciary duty disputes; partnership termination and wind-up disputes; business fraud and theft; various contract actions and disputes; lien disputes; disputes over purchase and sale agreements, non-competes, and various other corporate agreements.*

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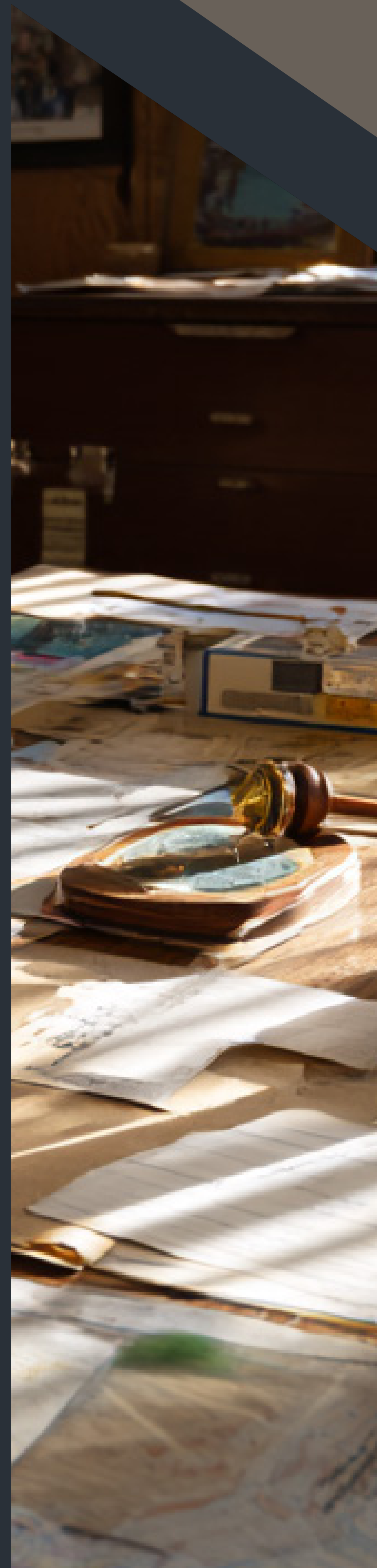

A Horse of a Different Color:
Texas Supreme Court Finally Weighs In on the Ownership of Produced Water

Cactus Water Servs., LLC v. COG Operating, LLC, No. 23-0676, (June 27, 2025)

By: Austin W. Brister and Marcus V. Eason

After years of appellate maneuvering, the Texas Supreme Court has ruled in *Cactus Water Services v. COG Operating* and answered the long-asked question of who owns produced water. On June 27, 2025, the Texas Supreme Court determined that a "deed or lease using typical language to convey oil-and-gas rights, though not expressly addressing produced water, includes that substance as part of the conveyance whether the parties knew of its prospective value or not."

The Cactus Water Services case has been closely followed through the appellate rounds given technological advances that "have given new purpose to produced water as a potentially lucrative commodity." Historically, produced water was treated as a waste byproduct with companies having to spend millions in disposal costs – generally through reinjection. But now, as the oil and gas industry ever evolves, reusing or recycling produced water has created new opportunities for the once-disposed of matter.

Naturally, this leads to the question of ownership – who owns the produced water when a conveyance document is silent on the topic? Is it water, which typically remains part of the surface estate? Or is it a "valuable substance" that was intended to be conveyed to the mineral owner?

In determining that produced water is part of the mineral estate, Justice Devine in delivering the Texas jurisprudential quote of the year writes that "produced water is not water" and despite its characteristics the matter is "a horse of an entirely different color."

To read further about this opinion, and the far-reaching implications the ruling has on oil and gas operations, scan the QR code below:

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