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## **Documenting Oil and Gas Leasehold Transactions to Survive the Statute of Frauds**

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**DOCUMENTING OIL AND GAS LEASEHOLD TRANSACTIONS  
TO SURVIVE THE STATUTE OF FRAUDS**

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For virtually every oil and gas leasehold transaction, Texas law requires signed documentation containing “a written memorandum which is complete within itself in every material detail and which contains all of the essential elements of the agreement so that the contract can be ascertained from the writing without resorting to oral testimony.”<sup>1</sup> This requirement is codified in the Statute of Frauds<sup>2</sup> and the Statute of Conveyances<sup>3</sup> as “the Legislature’s directive that courts enforce promises covered by the statute only if such promises are in writing.”<sup>4</sup>

**I. STATUTE OF FRAUDS**

As adopted by the Legislature, the broad scope of the Statute of Frauds applies to almost all oil and gas leasehold agreements because such agreements typically constitute a conveyance of an interest in land. The relevant text of the Statute of Frauds provides:

*Promise or Agreement Must Be In  
Writing*

- (a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is
  - (1) in writing; and
  - (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.
- (b) Subsection (a) of this section applies to:
  - \* \* \*
  - (4) a contract for the sale of real estate;
  - (5) a lease of real estate for a term longer than one year;
  - (6) an agreement which is not to be performed within one year from the date of making the agreement;

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<sup>1</sup> *Frost Nat’l Bank v. Burge*, 29 S.W.3d 580, 594 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *see also Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983).

<sup>2</sup> TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 2005).

<sup>3</sup> TEX. PROP. CODE § 5.021 (Vernon 1984).

<sup>4</sup> *Nagle v. Nagle*, 633 S.W.2d 796, 799 (Tex. 1982) (quoting *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114 (1921)).

- (7) a promise or agreement to pay a commission for the sale or purchase of:
- (A) an oil or gas mining lease;
  - (B) an oil or gas royalty;
  - (C) minerals; or
  - (D) a mineral interest.<sup>5</sup>

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## II. STATUTE OF CONVEYANCES

The Statute of Conveyances applies to all oil and gas leasehold conveyances. The relevant text of the Statute of Conveyances provides:

*Instrument of Conveyance.* A conveyance of an estate of inheritance, a freehold, or an estate for more than one year, in land and tenements, must be in writing and must be subscribed and delivered by the conveyor or by the conveyor's agent authorized in writing.<sup>6</sup>

<sup>5</sup> TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 2005).

<sup>6</sup> TEX. PROP. CODE § 5.021 (Vernon 1984).

<sup>7</sup> *Chambers v. Pruitt*, 241 S.W.3d 679, 687 (Tex. App.—Dallas 2007, no pet.); *Lewis v. Adams*, 979 S.W.2d 831, 834 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

<sup>8</sup> *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 165 254 S.W. 290, 291 (1923).

<sup>9</sup> See, e.g., *Minchen v. Fields*, 345 S.W.2d 282, 288 (Tex. 1961).

<sup>10</sup> *Sheffield v. Hogg*, 124 Tex. 290, 77 S.W.2d 1021, 1024 (1934); *Stoval v. Poole*, 382 S.W.2d 783, 784 (Tex. Civ. App.—Waco 1964, writ ref'd n.r.e.).

<sup>11</sup> *Johnson v. Texas Gulf Coast Corp.*, 359 S.W.2d 91, 92 (Tex. Civ. App.—San Antonio 1962, no writ).

## III. TEXAS COURT DECISIONS

Texas court decisions confirm that, to be enforceable, a contract for the conveyance of real property or an interest in land must comply with the Statute of Frauds.<sup>7</sup> Court decisions also confirm that these requirements apply to the documentation for virtually every type of oil and gas leasehold transaction—oil and gas leases,<sup>8</sup> an interest in oil and gas leases,<sup>9</sup> royalties,<sup>10</sup> overriding royalties,<sup>11</sup> severed mineral estates,<sup>12</sup> oil payments out of fractional shares in the minerals,<sup>13</sup> and in some cases, joint operating agreements.<sup>14</sup>

Compliance with the Statute of Frauds is critically important. If the signed written documentation is insufficient under the Statute of Frauds, the agreement is voidable by a party to the agreement.<sup>15</sup>

The validity of the agreement (for an alleged failure to comply with the Statute of Frauds) can only be attacked by one of the parties. A stranger to the agreement lacks standing to challenge a contract on the basis

<sup>12</sup> *Grissom v. Anderson*, 125 Tex. 26, 31, 79 S.W.2d 619, 621 (1935); *Humphreys-Mexia Co. v. Gammien*, 113 Tex. 247, 263, 254 S.W.2d 296, 303 (1923); *Stephens County*, 113 Tex. at 165, 254 S.W. at 291.

<sup>13</sup> *Minchen*, 345 S.W.2d at 288.

<sup>14</sup> *Hill v. Heritage Resources, Inc.*, 964 S.W.2d 89, 135 (Tex. App.—El Paso 1997, pet. denied); *Eland Energy, Inc. v. Rowden Oil & Gas, Inc.*, 914 S.W.2d 179, 186 (Tex. App.—San Antonio 1995, writ denied); *Crowder v. Tri-C Resources, Inc.*, 821 S.W.2d 393, 396 (Tex. App.—Houston [1st Dist.] 1991, no writ).

<sup>15</sup> *Eland Energy*, 914 S.W.2d at 186 (“A contract that fails to meet the requirements of the statute of frauds is not void but is merely voidable.”).

that it fails to comply with the Statute of Frauds.<sup>16</sup>

## A. DESCRIPTIONS OF THE PROPERTY

To satisfy the Statute of Frauds, the description of the tract of land must “furnish within itself, or by reference to some other existing writing, the means or data by which the particular land to be conveyed may be identified with reasonable certainty.”<sup>17</sup>

Although neither a metes-and-bounds description<sup>18</sup> nor a recorded plat<sup>19</sup> are required, there must be sufficient information within either the contract or an incorporated document to identify the land in question.<sup>20</sup> The property description must be enough “that a party familiar with the locality can identify the premises with reasonable certainty.”<sup>21</sup> If the documentation contains the “nucleus of description,”<sup>22</sup> the court will admit parol evidence to explain the words used in the documentation and to identify the land, but this requires that the contract must, at least, furnish the property description within itself or by reference to other identified writings then in existence, the means or data by which the particular land to

be conveyed may be identified with specific certainty.<sup>23</sup>

## 1. METES AND BOUNDS

A property description in metes and bounds is a detailed description that includes a precise starting point and then boundary lines described by course and distance from that point to another definite point, until each border of the property has been defined.<sup>24</sup> The boundary lines can reference natural or artificial boundaries, such as survey lines, highways, or rivers, or be located by distance and angle. The intermediate lines between the points are known as “calls.”<sup>25</sup> Specific descriptions by metes and bounds typically prevail over more general descriptions.<sup>26</sup> While the metes and bounds of a property are not required by the Statute of Frauds, a description in metes and bounds is nearly always sufficient to satisfy the statute.<sup>27</sup>

## 2. MAPS AND PLATS

To provide the reasonably certain property description required by the Statute of Frauds, a map or plat should identify the survey in which the property is situated, describe the boundary lines of the property

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<sup>16</sup> *Madera Prod. Co. v. Atl. Richfield Co.*, 107 S.W.3d 652, 662 (Tex. App.—Texarkana 2003, pet. denied) (citing “*Moore*” *Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 938 (Tex. 1972)).

<sup>17</sup> *Wilson v. Fisher*, 144 Tex. 53, 188 S.W.2d 150, 152 (1943); see also *Jones v. Kelley*, 614 S.W.2d 95, 99–100 (Tex. 1981).

<sup>18</sup> See *Tex. Builders v. Keller*, 928 S.W.2d 479, 481 (Tex. 1996).

<sup>19</sup> See *Nguyen v. Yovan*, 317 S.W.3d 261, 269 (Tex. App.—Houston [1st. Dist.] 2009, pet. denied).

<sup>20</sup> *Gates v. Asher*, 154 Tex. 538, 280 S.W.2d 247, 248–49 (1955).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 248.

<sup>23</sup> *Pick*, 659 S.W.2d at 637; *Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.* 48 S.W.3d 865 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

<sup>24</sup> See, e.g., *Montgomery v. Carlton*, 56 Tex. 431, 433 (1882).

<sup>25</sup> *Id.*

<sup>26</sup> *Smith-Gilbard v. Perry*, 332 S.W.3d 709, 714 (Tex. App.—Dallas 2011, no pet.).

<sup>27</sup> See, e.g., *Reeder v. Curry*, 426 S.W.3d 352, 359 (Tex. App.—Dallas 2014, no pet.).

with reference to the survey, and state the size of the property. The omission of any of these elements can render the description insufficient.

In *U.S. Enterprises, Inc. v. Dauley*, the Texas Supreme Court analyzed a map to determine whether it supplied sufficient information to identify the property.<sup>28</sup> The map contained a shaded green triangle outlining the land to be conveyed, but the map did not have any descriptive means to identify which tracts were within the triangle.<sup>29</sup> The map had no “identifying name or number on it which correspond[ed] with one or more of the ten tracts listed in the written contract.”<sup>30</sup> The map did not even identify the survey which contained the land. Ultimately, the court held that the description was insufficient. The court’s decision appeared driven by the fact that the attached map did not identify the name or location of the survey where the “triangle” of land was located. Beyond providing no identifying information to tie the tracts within the triangle of land to the tracts identified in the contract, the map did not give the size of the tracts, or show course or distance calls for the boundary lines of the tracts. Without this information, the court concluded that the map did not satisfy the Statute of Frauds because the map failed to include sufficient detailed information to describe the property with reasonable certainty.<sup>31</sup>

In *Guenther v. Amer-Tex. Const. Co.*, the Court of Appeals applied the reasonable certainty requirement to invalidate a conveyance that relied on a map for the description of the property.<sup>32</sup> An exhibit attached to the contract included a map labeled “The Land.”<sup>33</sup> The map listed the survey and depicted a utility line, two nearby roads, and a park.<sup>34</sup> While the appellee argued that a “reasonable man could take the map and locate the land on the ground,” the court disagreed, noting that the map did not show the size of the property or the length of the borders.<sup>35</sup> The court concluded that while “the parties to the contract to convey knew and understood what land was intended to be conveyed . . . the knowledge and intent of the parties will not give validity to the contract.”<sup>36</sup>

In some cases, a map or plat can supplement other property description information contained in the documentation. In *Dickson v. Amoco Production Co.*, the Court of Appeals upheld a pooled unit designation that relied on both a list of the pooled leases and a Tobin Map that depicted the leases.<sup>37</sup> The map provided survey names, abstract numbers, survey lines for each tract, the size of each tract, the lessors of the leases covering each tract, and the names of owners in the chain of title. The combination of the detailed map, along with the list of leases identified by volume and page number in the official records, was a

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<sup>28</sup> 535 S.W.2d 623, 628 (Tex. 1976).

<sup>29</sup> See *id.* at 628–29.

<sup>30</sup> See *id.* at 628.

<sup>31</sup> *Id.* at 631.

<sup>32</sup> 534 S.W.2d 396, 398 (Tex. App.—Austin 1976, no writ).

<sup>33</sup> *Id.* at 396.

<sup>34</sup> *Id.* at 397.

<sup>35</sup> *Id.* at 398 (internal quotations omitted).

<sup>36</sup> *Id.*

<sup>37</sup> 150 S.W.3d 191, 193 (Tex. App.—Tyler 2004, pet. denied)

sufficient description of the property to satisfy the Statute of Frauds.<sup>38</sup>

In *Ardmore, Inc. v. Rex Group, Inc.*, the Court enforced an agreement that included a map depicting the property covered by the sublease option.<sup>39</sup> The court concluded that the map, in combination with other information in the lease document that identified three of the mapped area's boundaries by metes-and-bounds, provided a sufficient description for the Statute of Frauds.<sup>40</sup>

### 3. REFERENCES TO MULTIPLE DOCUMENTS

Property descriptions can be contained in exhibits or other related multiple documents that, separately, might not qualify as a signed writing containing all the terms of the agreement.<sup>41</sup> To incorporate an attached exhibit or related documents into a signed agreement, the exhibit or other document must be specifically referenced in the signed documentation.<sup>42</sup> Stapling an exhibit to the agreement will likely not be sufficient. Only an express reference in the signed document to the attachment or an associated document will likely satisfy the Statute of Frauds.

The court decisions applying the Statute of Frauds allow an exhibit or other associated document to be incorporated into

the signed written documentation if it is sufficiently related.<sup>43</sup> This occurs when the signed documentation “plainly refers to another writing”—the unsigned exhibit or associated document.<sup>44</sup> It is insufficient for the unsigned document to merely be attached to the signed document; there must be a reference to the unsigned document in the text of the signed document.<sup>45</sup> It is also not enough that several writings appear to relate to the same transaction.<sup>46</sup> If an agreement is comprised of several documents, each document must expressly reference the other documents.<sup>47</sup>

For example, in *Crowder v. Tri-C Resources, Inc.*, one party tried to enforce an AMI agreement based on an unsigned plat with an outline labeled “area of mutual interest boundary” and a signed letter describing an acquisition of “an additional 320 acres within our area of mutual interest.”<sup>48</sup> Neither the signed contract document nor the signed letter between the parties contained any reference to an area of mutual interest.<sup>49</sup> The court concluded that the unsigned plat might have supplied a sufficient description of the land for the purposes of the Statute of Frauds if it had been sufficiently tied to a signed document, but the plat did not refer to the signed letter and the signed letter did not refer to the plat.<sup>50</sup>

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<sup>38</sup> *Id.* at 195–96.

<sup>39</sup> 377 S.W.3d 45, 59 (Tex. App.—Houston [1st Dist. 2012, pet. denied).

<sup>40</sup> *Id.* at 57–58.

<sup>41</sup> *Adams v. Abbott*, 151 Tex. 601, 604–05, 254 S.W.2d 78, 80 (1952).

<sup>42</sup> *Morrow v. Shotwell*, 477 S.W.2d 538, 539 (Tex. 1972); *Owen v. Hendricks*, 433 S.W.2d 164, 166–167 (Tex. 1968); *Tabor v. Pettus Oil & Refining Co.*, 139 Tex. 395, 162 S.W.2d 959, 961 (1942).

<sup>43</sup> See *M Trust Corp. NA v. AJLH Corp.*, 837 S.W.2d 250 (Tex. App.—Fort Worth 1992, writ denied).

<sup>44</sup> *Owen*, 433 S.W.2d at 166.

<sup>45</sup> See, e.g., *Joplin v. Nystel*, 212 S.W.2d 869, 871–72 (Tex. Civ. App.—Amarillo 1948, no writ).

<sup>46</sup> *Owen*, 433 S.W.2d at 167.

<sup>47</sup> See, e.g., *Morrow*, 477 S.W.2d at 539.

<sup>48</sup> 821 S.W.2d at 395.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 396.

Accordingly, because of this failure to reference or incorporate the plat into the documents that were signed by the parties, the court held that the purported AMI agreement did not satisfy the Statute of Frauds.<sup>51</sup>

In *Westland Oil Dev. Corp. v. Gulf Oil Corp.*,<sup>52</sup> the Texas Supreme Court considered the documentation for an AMI that referred to a property description in a separate farmout agreement.<sup>53</sup> That separate farmout agreement described the county, survey section, and location of the property. The Court held that this reference to this description in the farmout agreement was sufficient to identify the property for the AMI.<sup>54</sup> In contrast, the Court held that a second description in the AMI documentation did not satisfy the Statute of Frauds because the reference was only to “lands in the area of the farmout acreage,” which did not adequately describe any specific area.<sup>55</sup> The Court concluded that the covenant to convey in the AMI was divisible and that the first description was enforceable but the second description was not.<sup>56</sup>

Reliance on multiple related documents, however, does not diminish the need for a reasonably certain description of the property in the documentation. In *Long Trusts v. Griffin*, the Texas Supreme Court considered two farmout agreements, one

signed in 1978 and the other in 1982.<sup>57</sup> The 1978 agreement purported to convey interests in “50+ leases” in the northeast portion of the county.<sup>58</sup>

Although the documentation of the 1978 farmout attached an exhibit that included “the lessor name, the survey name, the term, and the net acreage for each lease at issue,” the Court held that was insufficient to describe the interests conveyed with reasonable certainty.<sup>59</sup> The court reached its holding based on the exhibit’s failure to provide sufficient information to identify the exact location of the various leases. The information provided merely described the leases and a general location of where the leased lands were located. Presumably, however, the description may have been sufficient if the various leases (each of which should have contained a description of the leased property) had been recorded and if the parties included the recording information in the exhibit.<sup>60</sup> Here, no such information was provided.

The 1982 agreement was also held to be unenforceable for multiple reasons.<sup>61</sup> First, the agreement referred to an attached “Exhibit A,” but no exhibit was attached. Second, the agreement provided that the interests being conveyed were described in a separate gas contract, but the court concluded that the gas contract “contained no more than

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<sup>51</sup> *Id.* at 396–97.

<sup>52</sup> 637 S.W.2d 903 (Tex. 1982).

<sup>53</sup> *Id.* at 905.

<sup>54</sup> *Id.* at 909.

<sup>55</sup> *Id.* at 910.

<sup>56</sup> *Id.*

<sup>57</sup> 222 S.W.3d 412, 416 (Tex. 2006).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See e.g. *Preston Expl. Co., L.P. v. GSF, L.L.C.*, 669 F.3d 518, 524 (5th Cir. 2012) (applying Texas law and holding that description was sufficient as to leases where recording information was referenced, but was unenforceable as to leases where recording information was omitted).

<sup>61</sup> See *id.* at 416–17.

headings for items like lease name, description and acreage” and a plat that did not describe the specific leasehold tracts.<sup>62</sup> Because the referenced documents provided a general description of the various properties, rather than an exact description, the court concluded that neither farmout agreement satisfied the Statute of Frauds.<sup>63</sup> However, because the Long Trusts (who were seeking to avoid the agreements) had accepted past benefits from the agreements, the court affirmed the appellate court’s holding that the agreement would be enforceable as to any past obligations.<sup>64</sup> However, the court permitted the Long Trusts to rely on the Statute of Frauds defense to void the agreements as to any future wells.<sup>65</sup>

In *Preston Exploration Co. v. GSF, L.L.C.*, the Fifth Circuit reversed the trial court’s judgment which provided that a purchase and sale agreement failed to contain sufficient property descriptions of various leases to satisfy the Statute of Frauds.<sup>66</sup> The dispute concerned a purchase and sale agreement which was executed by the parties, but which GSF and Chesapeake refused to close. Preston Exploration sued GSF and Chesapeake and sought specific performance, requiring them to close on the transaction. The defendants argued that the agreement was void because the leases to be conveyed were not adequately described because the exhibits identifying the leases were never finalized.

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<sup>62</sup> *Id.* at 416–17.

<sup>63</sup> *Id.* at 417.

<sup>64</sup> *Id.*

<sup>65</sup> *See id.*

<sup>66</sup> 669 F.3d 518, 524 (5th Cir. 2012).

The Fifth Circuit first found that the lower court erred by concluding that there was no “meeting of the minds” (i.e., no enforceable contract) because the parties never finalized the exhibits which were intended to identify the leases being conveyed.<sup>67</sup> Noting that the parties’ agreement contemplated that future title work would affect which leases would ultimately be included in the agreement, the Fifth Circuit held that the absence of finalized exhibits did not preclude the court from considering them.<sup>68</sup> The court concluded that the exhibits could not have been finalized when the agreements were initially executed, but instead would be finalized once the title work was completed.

Once the Fifth Circuit determined it could consider the drafts of the exhibits, it then had to determine whether the exhibits provided sufficient property descriptions. The court noted that the exhibits made reference to the recording information for some, but not all, of the leases. The court held that the agreements were enforceable as to the leases where the recording information was included, but not enforceable as to the leases where the recording information was omitted.<sup>69</sup>

## **B. DESCRIPTION OF THE OBLIGATIONS**

The Statute of Frauds requires that the written documentation contain a sufficient description of the agreed-upon terms of the transaction. If essential terms are missing, a

<sup>67</sup> *See id.* at 522–23.

<sup>68</sup> *See id.*

<sup>69</sup> *See id.* at 524.



purported contract can be rendered unenforceable.

## 1. PARTIES TO THE TRANSACTION

One seemingly obvious detail, necessary for enforcing the agreement, is that the parties to the agreement must be identified with certainty. The Statute of Frauds requires that the written documentation supply the identity of the party to be bound by the agreement and that the written documentation be signed by the party.<sup>70</sup>

If the documentation is signed by an agent, the Statute of Frauds requires that agent to be “someone lawfully authorized to sign,”<sup>71</sup> and the Statute of Conveyances requires that the “conveyor’s agent [be] authorized in writing.”<sup>72</sup> For a business entity, a representation of authority can be included in the documentation, but “the only certain way to ensure that the agent signing the agreement has authority is to require a properly executed power of attorney or a certified copy of evidence of authority.”<sup>73</sup>

## 2. DESCRIPTION OF ESSENTIAL TERMS

The Statute of Frauds also requires a sufficiently certain description of the terms of the deal. In the early case of *Cantrell v. Garrard*, the written documentation failed to describe the terms for an oil and gas lease with sufficient detail, saying only that it would be a “commercial lease” with a 1/8

royalty.<sup>74</sup> This description of the terms of the transaction was deemed insufficient to satisfy the Statute of Frauds:

The rule is that a written agreement for the sale of land must contain the essential terms of a contract, expressed with such certainty that it may be understood without recourse to parol evidence to show the intention of the parties; and no part of such contract is more essential than that which identifies the subject matter of the agreement.<sup>75</sup>

Since the subject matter of the contract was not described in a legally sufficient manner, the contract could not be enforced. The written documentation failed to describe the lease term, the time for drilling to begin, the time and amount of payments in lieu of drilling, and the amount to be paid, all of which the court deemed to be essential elements of the description required by the Statute of Frauds.<sup>76</sup>

In *Taber v. Pettus Oil & Refining Co.*, the documentation for purchase and assignment of oil and gas leases did not supply the essential elements of the transaction.<sup>77</sup> Quoting from the Texas

<sup>70</sup> *Cohen v McCutchin*, 565 S.W.2d 230, 232 (Tex. 1978).

<sup>71</sup> TEX. BUS. & COM. CODE ANN. § 26.01(a) (Vernon 2005).

<sup>72</sup> TEX. PROP. CODE § 5.021 (Vernon 1984).

<sup>73</sup> John S. Lowe, *Analyzing Oil and Gas Farmout Agreements*, 41 Sw. L.J. 759, 785–86 (1987).

<sup>74</sup> 240 S.W. 533, 533 (Tex. 1922)

<sup>75</sup> *Id.* at 534.

<sup>76</sup> *Id.* at 535.

<sup>77</sup> 139 Tex. 395, 399 162 S.W.2d 959, 961 (Tex. 1942).

Supreme Court decision in *Smith v. Sorelle*,<sup>78</sup> the court in *Taber* stated:

“[I]f the subject matter sought to be conveyed is not described sufficiently to identify same, the requirements of the statute have not been met”

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“[T]he subject granted must be identified by the description given of it in the instrument itself” or by other writing referred to.<sup>79</sup>

The court noted that neither the terms of the lease nor the terms of the assignment could be ascertained at the time the memorandum was executed.<sup>80</sup> Therefore, the contract was not enforceable under the Statute of Frauds.

More recently, in 2002, the court in *Oakrock Exploration Co. v. Killam* reached a similar result in a case involving the acceptance of an offer to enter into an oil and gas lease.<sup>81</sup> Although the offer letter did describe the bonus amount and the royalty, the court found that the letter did not contain the essential terms describing the lease required by the decisions in *Cantrell* and *Taber*. The essential elements, as identified by the *Oakrock Exploration* court, are “the term of the lease, the drilling commencement date, time and amount of payments in lieu of drilling operations, and amounts to be paid

for produced gas are essential elements in describing an oil and gas lease.”<sup>82</sup> The court stated that the “character, extent, and duration of the rights to the oil and gas in place are also essential terms.”<sup>83</sup>

### **3. OBLIGATIONS ARISING FROM FUTURE EVENTS**

Other common leasehold agreements like AMIs, farmouts, or retained acreage provisions can also be subject to Statute of Frauds concerns about the certainty of the description of the obligations where the obligations are triggered and/or defined by future events. In general, the courts have recognized that if agreements like these sufficiently describe the conditions for a future event or selection, the agreements are enforceable under the Statute of Frauds.

Typically, the obligations under these types of agreements will be consequences of future actions or choices by the parties. AMI agreements usually involve an ongoing option, extending out into the future, for the parties to acquire interests in properties if future activities occur. Farmout agreements usually give a party the right to earn acreage to be determined in the future by drilling in future.<sup>84</sup> Retained acreage clauses in oil and gas leases operate in tandem with the habendum clause at the end of the primary term to either perpetuate or terminate portions of the oil and gas leasehold that can only be identified after the lessee drills future

<sup>78</sup>126 Tex. 353, 357, 87 S.W.2d 703, 705 (1935).

<sup>79</sup>*Id.* at 961.

<sup>80</sup>*Id.* at 962.

<sup>81</sup> 87 S.W.3d 685, 691 (Tex. App. — San Antonio 2002, pet. denied).

<sup>82</sup> *Id.* at 690–91.

<sup>83</sup> *Id.* at 691.

<sup>84</sup> Lowe, *supra* note 73, at 793.

wells that might be subject to governmental regulatory requirements that have not yet been adopted at the time of the oil and gas lease.<sup>85</sup>

For example, in *Long v. RIM Operating, Inc.*, the court considered the sufficiency of an earned acreage provision in a joint operating agreement for enforcement under the Statute of Frauds.<sup>86</sup> Under the agreement, the failure of an owner to participate in the repair of the producing well resulted in loss and reassignment of that owner's share in the well. The owner argued that the agreement was too uncertain under the Statute of Frauds because it was entirely conditioned on future events and because the future well and parties that might be subject to the provision were insufficiently defined.<sup>87</sup>

The court, however, found that the agreement did not violate the Statute of Frauds and was enforceable.<sup>88</sup> The court found that the agreement as a whole was "limited to the parties to that agreement. From this group, assignors will be those who do not participate in a required well or operation. The assignees will be those who do."<sup>89</sup> The court concluded that although the "original parties did not know if [the assignment clause] would be invoked, and, if so, exactly what interest would be assigned or who would be required to assign," they did know the relevant parties to the contract, and had sufficient knowledge of the contract area

based on the agreement's other provisions.<sup>90</sup> Therefore, the court enforced the JOA under the Statute of Frauds because, even though essential terms of the agreement were conditional, the meaning of those terms could be determined from within the written documentation.

In *Eland Energy, Inc. v. Rowden Oil & Gas*, the court considered a 40-acre retained acreage provision with an assignment requirement under a farmout agreement.<sup>91</sup> Eland asserted that the assignment requirement was unenforceable under the Statute of Frauds because it was impossible to determine at the time of the agreement what acreage and wells might be subject to the assignment requirement.<sup>92</sup> The court rejected that argument, concluding that the terms of the farmout granted the unrestricted right and authority to locate the wells anywhere on the lease, along with an equitable right to perfect title in tracts by selecting the boundaries of the 40-acre tracts to be earned for each well.<sup>93</sup> The court held that the right to select the designation, coupled with the interest in doing so, satisfied the requirements of the Statute of Frauds.<sup>94</sup>

In *Stekoll Petroleum Co. v. Hamilton*, the Texas Supreme Court considered a contract that gave the buyer an option to select "1,000 acres equitably checkerboarded in a fashion similar to the checkerboarding in the first block."<sup>95</sup> The court determined that

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<sup>85</sup> *Mathews v. Sun Oil Co.*, 425 S.W.2d 330, 333 (Tex. 1968).

<sup>86</sup> 345 S.W.3d 79, 87–89 (Tex. App.—Eastland 2011, pet. denied).

<sup>87</sup> *Id.* at 87–88.

<sup>88</sup> *Id.* at 89.

<sup>89</sup> *Id.* at 88.

<sup>90</sup> *Id.* at 89.

<sup>91</sup> 914 S.W.2d at 186.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 187.

<sup>94</sup> *Id.*

<sup>95</sup> *Stekoll Petroleum Co. v. Hamilton*, 152 Tex. 182, 255 S.W.2d 187, 189 (1953).

this provision “makes uncertain and indefinite the land on which petitioner is to acquire the lease and that on which the lease is to be left to respondents.”<sup>96</sup> The court also determined that the meaning of “equitably checkerboarded” could not be determined from the referenced “first block” because “[t]he contract and the other instruments do not disclose a clearly defined pattern for the first block.”<sup>97</sup>

The court explained that selection contracts can be enforceable under the Statute of Frauds because the “the grantee does not acquire a present title, but acquires an equitable right to make the selection and thereby to become the owner of the tract selected.”<sup>98</sup> The specific future checkerboard selection contract at issue in *Stekoll*, however, was not enforceable under the Statute of Frauds because it lacked sufficient certainty in the description of the terms of the agreement. As with the decision in *Eland*, the courts have relied on *Stekoll* to uphold selection contracts that give a party the power to make a selection or determination as sufficient under the Statute of Frauds.<sup>99</sup>

#### IV. EVIDENTIARY ISSUES

Parties facing a Statute of Frauds issue may attempt to bring in evidence of their intentions or of other documents or data

that can identify the term. However, this approach is frequently barred by the parol evidence rule, which excludes extrinsic evidence to interpret a contract, and the four corners rule, which requires a court to limit its interpretation to the four corners of a contract.<sup>100</sup>

##### A. FOUR CORNERS RULE

When a contract is not ambiguous, a court will “ascertain the true intentions of the parties as expressed in the instrument.”<sup>101</sup> The court looks to the instrument as a whole, and not the parties’ present interpretation or any requested additions.<sup>102</sup> Instead, the court will apply the rules of construction to the plain meaning of the contract language and enforce the contract as written.<sup>103</sup> The “Four Corners Rule” is one of several reasons that it is key to include everything required by the Statute of Frauds in the contract, instead of relying on other evidence.

As discussed above, the court may look to attached exhibits, documents referenced in the agreement, or other documents by “necessary inference” and then properly rely on these documents as part of the main agreement.<sup>104</sup> Such instruments are not considered to be outside the four corners of the agreement. However, there are numerous cases which illustrate the difficulty

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<sup>96</sup> *Id.* at 191.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> See *Skeeters v. Granger*, 314 S.W.2d 364, 367 (Tex. Civ. App.—Texarkana 1958, writ ref’d n.r.e.); see also *Best Bldg. Co. v. Sikes*, 394 S.W.2d 57, 62 (Tex. Civ. App.—Fort Worth 1965, writ ref’d n.r.e.).

<sup>100</sup> See *Fisher*, 144 Tex. 53, 188 S.W.2d at 152.

<sup>101</sup> *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983).

<sup>102</sup> *Calpine Producer Servs., L.P. v. Wiser Oil Co.*, 169 S.W.3d 783, 787 (Tex. App.—Dallas 2005, no pet.)

<sup>103</sup> *Id.*

<sup>104</sup> See e.g. *Preston Expl.*, 669 F.3d at 523–24 (stating that the “Texas Supreme Court has repeatedly held that multiple writings pertaining to the same transaction will be construed as one contract” and noting that documents incorporated by reference or connected by “express or by necessary inference” may be construed with the agreement).

which can arise when the parties dispute whether another writing should be considered within the four corners of the agreement.

## B. PAROL EVIDENCE

The parol evidence rule naturally follows from the Four Corners Rule, and generally prevents the introduction of extrinsic evidence such as prior or contemporaneous agreements to determine the meaning of an unambiguous contract.<sup>105</sup>

However, parol evidence may be admissible to aid the certainty of contract so that it satisfies the Statute of Frauds. In *Morrow v. Shotwell*, the Texas Supreme Court explained the function of the rule as follows:

The certainty of the contract may be aided by parol only with certain limitations. The essential elements may never be supplied by parol. The details which merely explain or clarify the essential terms appearing in the instrument may ordinarily be shown by parol. But the parol must not constitute the framework or skeleton of the agreement. That must be contained in the writing. Thus, resort to extrinsic evidence, where proper at all, is not for the purpose of supplying the location or description of the land, but only for the purpose

of identifying it with reasonable certainty from the data in the memorandum.<sup>106</sup>

Courts have found only a limited exception that allows the use of parol evidence to further explain the terms of the contract “not for the purpose of supplying the location or description of the land, but only for the purpose of identifying it with reasonable certainty from the data in the memorandum.”<sup>107</sup> As a result, parol evidence is only allowed when the contract contains a sufficient “nucleus” of the property’s description.<sup>108</sup>

A typical case showing the operation of the parol evidence rule in conjunction with the Statute of Frauds is *Carpenter v. Phelps*.<sup>109</sup> In *Carpenter*, a lessor sought capital from several investors to develop roughly 48 wells.<sup>110</sup> Rather than crafting a formal contract, the parties “exchanged numerous emails.”<sup>111</sup> When some of the investors sued for breach of contract, the lessor argued that the contract did not satisfy the Statute of Frauds because it failed to sufficiently describe the property.<sup>112</sup>

The plaintiffs argued that the description of the property could be inferred from references in the initial “pitch package,” a document filed with the Texas Railroad Commission containing a “lease number,” an

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<sup>105</sup> *Hubacek v. Ennis State Bank*, 159 Tex. 166, 170, 317 S.W.2d 30, 31 (1958).

<sup>106</sup> *Morrow*, 477 S.W.2d at 541 (quoting *O’Herin v. Neal*, 56 S.W.2d 1105 (Tex. Civ. App. 1932, writ ref’d.)).

<sup>107</sup> *Id.*

<sup>108</sup> *Gates v. Asher*, 154 Tex. 538, 541, 280 S.W.2d 247, 248 (1955) (allowing parol evidence to correct error in description’s wording).

<sup>109</sup> 391 S.W.3d 143 (Tex. App.—Houston [1st Dist.] 2011, no pet.)

<sup>110</sup> *Id.* at 146.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 147.

assignment and bill of sale for the lease, and two drawings entitled “East Texas Well Location Map Lease Area 1 and 2.”<sup>113</sup> The plaintiffs also offered testimony at trial from a petroleum landman who stated that “based on the documents previously discussed, he could obtain a list of the wells and physically locate them based on an internet search using the ‘lease number.’”<sup>114</sup>

The *Carpenter* court concluded that the alleged contract did not contain a sufficient “nucleus” of a property description.<sup>115</sup> According to the court, the “pitch package” merely described land being “somewhere” in Gregg County.<sup>116</sup> Further, the court noted that the parties had not cited any authority supporting the argument that a lease identification number can serve as the basis of a legal description.<sup>117</sup> However, the court stopped short of holding that the lease identification number could not, as a matter of law, provide a sufficient “nucleus” of a property description. Rather, the court explained that, assuming *arguendo* that the lease identification number could provide a sufficient nucleus, Phelps failed to show that the lease identification number actually lead to a proper description of the property or was sufficient to enable its expert to locate the property.<sup>118</sup> Because the court concluded that the agreement lacked any sufficient nucleus of information with which the expert landman could identify the property, the court held that the landman’s testimony was

improper parol evidence and could not form the basis of an exception to the Statute of Frauds.<sup>119</sup>

In contrast, in *Anderson Energy Corporation v. Dominion Oklahoma Texas Exploration & Production, Inc.*, extrinsic evidence was ruled admissible to determine whether an AMI provision identified the subject property sufficiently.<sup>120</sup> The operating agreement at issue in the case defined the contract area through reference to a series of documents depicting plats on standard Midland Maps, albeit reduced in size so they could be attached to the document.<sup>121</sup> Each of the plats depicted “an irregularly-shaped area outlined in hash marks and smaller areas of stippling shown on some of the tracks” as well as “natural landmarks such as rivers.”<sup>122</sup> The agreement’s language provided the total acreage and also made reference to “the outlined areas on the attached plats.”<sup>123</sup>

Three surveyors provided affidavits, two in favor of being able to locate the contract area from the maps, and one against.<sup>124</sup> The defendants attacked the affidavits as being improper extrinsic evidence, and claimed that the trial court erred in failing to grant summary judgment in their favor.<sup>125</sup> The court disagreed, stating that while “the sufficiency of a property description under the Statute of Frauds is a question of law, the court may properly

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<sup>113</sup> *Id.* at 148.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 149.

<sup>116</sup> *See id.*

<sup>117</sup> *See id.*

<sup>118</sup> *See id.*

<sup>119</sup> *Id.*

<sup>120</sup> 469 S.W.3d 280, 299 (Tex. App.—San Antonio 2015, no pet.).

<sup>121</sup> *Id.* at 296.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 296–97.

<sup>125</sup> *Id.* at 294, 297.

consider extrinsic evidence in determining whether a person familiar with the area could locate the property with reasonable certainty.”<sup>126</sup> The court concluded that the operating agreement and plats provided “a sufficient nucleus of a property description to enable a person familiar with the area to locate the land and boundaries of the Contract Area with reasonable certainty.”<sup>127</sup>

The use of parol evidence, even if improper, is not necessarily guaranteed to cause reversal on appeal. In *May v. Buck*, the parol evidence was considered cumulative of the contractual evidence showing that the property was insufficiently defined, and therefore harmless error.<sup>128</sup> *May* concerned a farmout agreement and assignment of mineral rights drafted in a letter instrument.<sup>129</sup> The agreement purported to convey “a 100 acre spacing centered around the David Morris Gas Unit # 1” and stated that the acreage it conveyed was “better described in the Exhibit A attached to this agreement and made a part of this agreement.”<sup>130</sup> The parties disputed whether the “David Morris Gas Unit” referred to the wellbore in the property or to the entire tract of land recorded in the county records.<sup>131</sup>

In support of their motion for summary judgment on the basis of Statute of Frauds, defendants read in the deposition

testimony of the plaintiff, who stated that the hundred acres circumference around the wellbore could be square or circular.<sup>132</sup> The defendants contended that this testimony showed that the contract area was not identified with reasonable certainty, because even the shape of the area was unclear.<sup>133</sup> Without ruling on whether this was improper parol evidence,<sup>134</sup> the court held that it could not cause the rendition of an improper judgment because the contract was ambiguous as to whether it referred to the tract as a whole or the wellbore.<sup>135</sup> Regardless of the issue disputed by the testimony, the agreement violated the Statute of Frauds; therefore the parol testimony was harmless.

### C. SURROUNDING CIRCUMSTANCES

One of the more recent developments in the parol evidence rule realm is the use of evidence of “surrounding circumstances.” As described by the Supreme Court of Texas, the parol evidence rule “does not prohibit consideration of surrounding circumstances that inform, rather than vary from or contradict, the contract text.”<sup>136</sup> These circumstances can include the commercial setting in which the contract was negotiated, the intent of the parties as embodied in the contract, and “other objectively determinable

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<sup>126</sup> *Id.* at 299.

<sup>127</sup> *Id.*

<sup>128</sup> 375 S.W.3d 568, 578 (Tex. App.—Dallas 2012, no pet.).

<sup>129</sup> *Id.* at 572, 574.

<sup>130</sup> *Id.* at 575.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 577.

<sup>133</sup> *Id.* at 578.

<sup>134</sup> Instead, the court noted that rather than bolstering the identification of the land, the testimony was used for the opposite purpose: supporting “their conclusion that the letter agreement did *not* identify the land with reasonable certainty.” *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Houston Exploration Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469 (Tex. 2011).

factors that give a context to the transaction between the parties.”<sup>137</sup>

This “surrounding circumstances” exception has been applied twice by the San Antonio Court of Appeals to oil and gas cases. In *PNP Petroleum I, LP v. Taylor*, a petroleum company attempted to offer prior drafts of an agreement that included a shut-in royalty savings clause.<sup>138</sup> They particularly sought to include a draft version of a clause which read:

If, at the expiration of the primary term—or at any time thereafter, there is located on the leased premises a well or wells ~~not capable of producing oil/gas in paying quantities or being used as a salt-water injection well(s), and such gas is not otherwise produced and sold in paying quantities for lack of suitable market and this lease is not otherwise being maintained in force and effect,~~ Lessee may pay [to extend the lease term.]<sup>139</sup>

The defendants objected on the basis of the parol evidence rule, and the trial court overruled the objection.<sup>140</sup> The appellate court ruled that the evidence of the prior draft was admissible as “surrounding circumstances” evidence and that the deletions could be introduced as part of the course of the parties’ negotiations.<sup>141</sup>

Similarly, in *BP Am. Prod. Co. v. Zaffirini*, BP argued that lease negotiations could be introduced to show the unambiguous meaning of the final agreement.<sup>142</sup> The parties disagreed about whether the bonus could be allocated between a bonus payment and separate consent-to-assignment fee that would not be treated as a bonus, or an all-inclusive bonus.<sup>143</sup> BP introduced repeated exchanges where the parties sent terms back and forth debating this point, with lessors offering “lease drafts that included the split allocation, and BP consistently reject[ing] those drafts.”<sup>144</sup> The court found that these facts were relevant to show that the lease terms ultimately specified an unallocated bonus that did not carve out a separate consent-to-assignment fee.<sup>145</sup>

It remains to be seen if the “surrounding circumstances” exception will also apply to save contracts from the Statute of Frauds. One could imagine a scenario where, for example, prior drafts of an agreement contained a sufficient property description, but the final negotiated agreement’s language was insufficient. If the “surrounding circumstances” exception would apply in that scenario, it would open a major loophole in Statute of Frauds jurisprudence. The “nucleus” of the description allowing parol evidence could effectively come from evidence that was formerly considered parol itself: the parties’

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<sup>137</sup> *Id.* at 469–70.

<sup>138</sup> 438 S.W.3d 723, 727 (Tex. App.—San Antonio 2014, pet. denied).

<sup>139</sup> *Id.* at 732.

<sup>140</sup> *Id.* at 732–33.

<sup>141</sup> *Id.* at 734–35.

<sup>142</sup> 419 S.W.3d 485, 499–500 (Tex. App.—San Antonio 2013, pet. denied).

<sup>143</sup> *Id.* at 500–01.

<sup>144</sup> *Id.* at 501.

<sup>145</sup> *Id.*



past discussions prior to their final integrated agreement.

While ideally a party will never need to use parol evidence to avoid the Statute of Frauds, it is helpful to understand when such evidence will and will not be allowed. A few basic principles are important to keep in mind:

- The “nucleus” of the description must be included in the written memorandum—typically either a legal description or a sufficient exhibit or reference
- Extrinsic evidence is properly used to determine the factual issue of whether a person familiar with the area could locate the property with reasonable certainty
- Extrinsic evidence may also be proper to disprove that a person familiar with the area could locate the property.
- The “surrounding circumstances” exception may allow evidence of prior drafts where a party alleges a term is ambiguous but the course of drafting indicates it is not.

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<sup>146</sup> See, e.g., *Carmack v. Beltway Dev. Co.*, 701 S.W.2d 37, 40 (Tex. App.—Dallas 1985, no writ) (finding part-performance exception applicable to real estate contract that did not satisfy statute of frauds but broker was not fully compensated for services it provided).

<sup>147</sup> *Exxon Corp. v. Breezevale, Ltd.*, 82 S.W.3d 429, 440–41 (Tex. App.—Dallas 2002, pet. denied).

## V. EXCEPTIONS TO THE STATUTE

### A. PART PERFORMANCE

Partial performance may constitute an exception to the Statute of Frauds, even when terms within a contract are uncertain.<sup>146</sup>

The partial-performance doctrine operates similarly to quasi-estoppel or other equitable remedies, and allows a remedy for contracts that were invalid under the Statute of Frauds if denial of enforcement would amount to a virtual fraud.<sup>147</sup> Invoking the doctrine requires a showing that the claimant relied specifically on the particular covenant it seeks to enforce.<sup>148</sup> The very particular, fact-driven nature of this defense to the Statute of Frauds naturally limits its application.

While partial performance may constitute an exception, there are examples of cases where past performance of the contract did not save the contract from being voided going forward. For instance, in *Long Trusts v. Griffin*, partial performance of a farmout agreement as to certain leases did not stop the court from declaring the agreement unenforceable as to future leases.<sup>149</sup>

<sup>148</sup> See *COC Services, Ltd. v. CompUSA, Inc.*, 150 S.W.3d 654, 668–69 & n.8 (Tex. App.—Dallas 2004, pet. denied) (the “alleged performance must be unequivocally referable to the agreement and corroborative of the fact that a contract actually was made” and “done with no other design than to fulfill the agreement sought to be enforced”) (internal quotations omitted).

<sup>149</sup> 222 S.W.3d at 417.

## B. PROMISSORY ESTOPPEL

Promissory estoppel can render an otherwise unenforceable agreement—such as one that does not fulfill the Statute of Frauds—enforceable.<sup>150</sup> To assert promissory estoppel, the promise must show that: (1) the promisor made a promise that he “should have expected would lead the promisee to some definite and substantial injury; (2) such an injury occurred; and (3) the court must enforce the promise to avoid the injury.”<sup>151</sup> If the promise at issue is an oral promise to sign an agreement, and that agreement complies with the Statute of Frauds, then promissory estoppel can operate to render the underlying agreement enforceable.<sup>152</sup> However, the written agreement must already be in existence for this scenario to occur.<sup>153</sup>

As is apparent from the number of factual requirements to assert a promissory estoppel exception to the Statute of Frauds, it is unlikely that it would apply to save many oil and gas agreements.

## VI. CONCLUSION

When preparing the written documentation for oil and gas transactions, the parties should be careful to comply with the Statute of Frauds. Because failure to comply with the Statute of Frauds merely renders an agreement voidable, rather than void, cases tend to arise where one party is looking to avoid the consequences of an agreement it made. For instance, a party

could enter into a contract but, as a result of changing market conditions, seek a way to undo the deal. Attacking the sufficiency of the property description is a common target. Therefore, it is important that the written documentation of the transaction be as complete as possible in order to avoid a legal challenge under the Statute of Frauds.


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<sup>150</sup> *Bank of Texas, N.A. v. Gaubert*, 286 S.W.3d 546, 553–54 (Tex. App.—Dallas 2009, pet. dism’d w.o.j.).

<sup>151</sup> *Id.* at 553.


<sup>152</sup> *See Breezevale*, 82 S.W.3d at 438.


<sup>153</sup> *Id.* at 439.

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**DOCUMENTING OIL AND GAS  
LEASEHOLD TRANSACTIONS  
TO SURVIVE THE STATUTE OF FRAUDS**


April 14, 2017

 MCGINNIS LOCHRIDGE TIM GEORGE

 **What is the Statute of Frauds?**


- Statute
  - Actually 2 statutes
- Requires signed written documentation for enforcement of some agreements
  - But not all agreements
- Applies to most oil and gas transactions

 2




## What is the Statute of Frauds?

- Originally to prevent “*fraud*”
  - Some agreements are too important for oral contracts
  - To avoid the risk of fraudulent oral contracts, signed written documentation was required
- In oil and gas transactions, the focus is typically on the requirement for a clear written description of the deal
  - What property is involved?
  - What are the terms of the agreement?




3




## What is the Statute of Frauds?

- Court decisions use words like:
  - “Reasonable certainty”
  - “Specific certainty”
  - “Essential terms of a contract”
  - “Subject matter of the contract”




4




## What is the Statute of Frauds?

- Actually two statutes:
  - Statute of Frauds
  - Statute of Conveyances
- Discussed together as the Statute of Frauds




5




## Statute of Frauds

- **§26.01 - Texas BUSINESS & COMMERCE CODE**
- Requires signed written documentation for specified agreements
- Applies to most common oil and gas agreements



6




## Statute of Frauds


- **Subsection (a) of §26.01:**

A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

  - (1) In writing; and
  - (2) Signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.



7




## Statute of Frauds

**Subsection (b) of § 26.01:**


Subsection (a) of this section applies to:

\* \* \*

- (4) A contract for the sale of real estate;
- (5) A lease of real estate for a term longer than one year;
- (6) An agreement which is not to be performed within one year from the date of making the agreement;




8




## Statute of Frauds

(7) a promise or agreement to pay a commission for the sale or purchase of:

- (A) An oil or gas mining lease;
- (B) An oil or gas royalty;
- (C) Minerals; or
- (D) A mineral interest.




9




## Statute of Conveyances

- §5.021 – Texas Property Code
- Land conveyances must be
  - In writing
  - Signed
    - By conveyor, or
    - By agent




10




## Statute of Conveyances

- §5.021 – Texas Property Code:  
***Instrument of Conveyance.*** A conveyance of an estate of inheritance, a freehold, or an estate for more than one year, in land and tenements, must be in writing and must be subscribed and delivered by the conveyor or by the conveyor's agent authorized in writing.




11




## Why does the Statute of Frauds Matter?

- Applies to virtually every type of oil and gas leasehold transaction
  - Oil and gas lease
  - Royalties and overriding royalties
  - Severed minerals
  - Oil payments out of mineral interests
  - AMIs
  - JOAs




12






## Why does the Statute of Frauds Matter?

- A promise or agreement that fails to meet SOF requirements . . . ***is not enforceable***
  - no court remedies
    - no damages
    - no specific performance




13




## Why does the Statute of Frauds Matter?

- If the signed written documentation is insufficient under the Statute of Frauds, the agreement is voidable by a party to the agreement.
  - *Voidable*
    - But ***not void***
  - By a *party*
    - A stranger to the agreement lacks standing to challenge a contract under the Statute of Frauds.




14




## Property Description

- SOF requires reasonably certain property description
- Many choices:
  - Metes and Bounds
  - Survey Blocks/Tracts/Sections
  - Township & Range
  - Map or Plat
  - Multiple documents incorporated by reference




15




## Metes and Bounds

- Metes and Bounds
  - Written descriptive text
  - Precise starting point
    - “Beginning at the NW corner of Section 10”
  - Boundary lines descriptions or “calls”
    - Course and distance to another definite point
      - “East, 300 feet”
    - Artificial boundary
      - Survey line
    - Physical boundary
      - Highway or road
      - River




16




## Metes and Bounds

- Metes and Bounds
  - Not required
  - But . . . almost always sufficient
- Metes and Bounds will prevail over more general descriptions




17




## Survey Reference

- Texas Land Survey System
  - Incorporates Spanish Land Grants
  - Named Surveys
    - Blocks/Tracts/Sections
    - League/Labor




18




## Survey Reference

- Township and Range
  - **Not** generally used in Texas
    - Only a portion of the Panhandle
  - PLSS
    - Public Land Survey System
  - Divides lands into rectangular grid
  - Used in other states
  - Used in all states surrounding Texas (La, Ark, Ok., NM)




19




## Map or Plat

- Map or Plat
  - Surveyor's plat
  - Hand-drawn map
- Minimum requirements for reasonable certainty
  - Survey identification
    - The Survey inside which property is located
  - Boundary Line descriptions
  - Link between Boundary Lines and Survey
  - Property Size

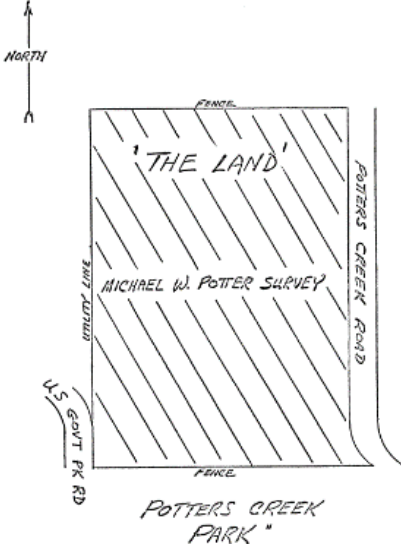


20




## Map or Plat

***Guenther v. Amer-Tex. Const. Co.***




21



## Map or Plat

- ***Guenther v. Amer-Tex. Const. Co***
  - Could a “reasonable man could take the map and locate the land on the ground?”
  - Court said “No”
    - Missing
      - Size of property
      - Length of borders
      - Linkage between borders and survey

22



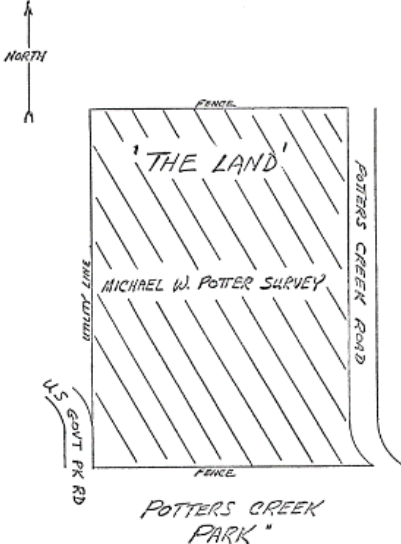
## Map or Plat

***Guenther v. Amer-Tex. Const. Co.***


***Property Size?***

***Border lengths?***

***Survey ties?***




23



## Map or Plat


- ***Guenther v. Amer-Tex. Const. Co***
  - “The parties to the contract to convey knew and understood what land was intended to be conveyed”
  - But . . .
    - “The knowledge and intent of the parties will not give validity to the contract.”

24




## Map or Plat

- ***U.S. Enterprises, Inc. v. Dauley***
  - Map with shaded green triangle outlining the land
  - Did not identify
    - Tracts within triangle
    - Name or location of the survey
    - Size of tracts
    - Course or distance calls for boundary lines
  - **Court:** Map failed to include sufficient information to describe the property with reasonable certainty




25




## Map or Plat

- **Summary - Map/Plat Requirements**
  - locate the tract by reference to survey
  - tie the tract to the survey
  - describe the size of the tract
  - describe the boundaries of the tract
    - course and distance
    - map scale and north arrow




26




## Incorporated References

- Reference to Other Incorporated Documents
  - Multiple documents must be specifically referenced in *signed* documentation
  - Not sufficient:
    - Documents that are just attached
    - Documents that just related to same transaction




27



## Incorporated References


- *Crowder v. Tri-C Resources, Inc.*
  - AMI
    - Unsigned plat with an outline labeled “area of mutual interest boundary”
    - Signed letter describing “an additional 320 acres within our area of mutual interest”
    - Plat did not refer to signed letter
    - Signed letter did not refer to plat

Court: AMI documentation failed to reference or incorporate plat into documents signed by parties – did not satisfy SOF




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# Multiple Documents

- *Ardmore, Inc. v. Rex Group, Inc.*
  - Maps were incorporated into signed documentation

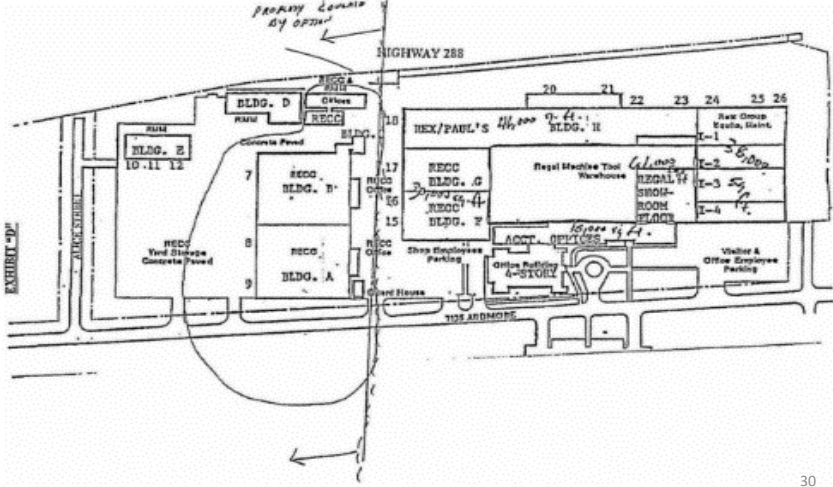


29




# Multiple Documents

*Ardmore, Inc. v. Rex Group, Inc.*



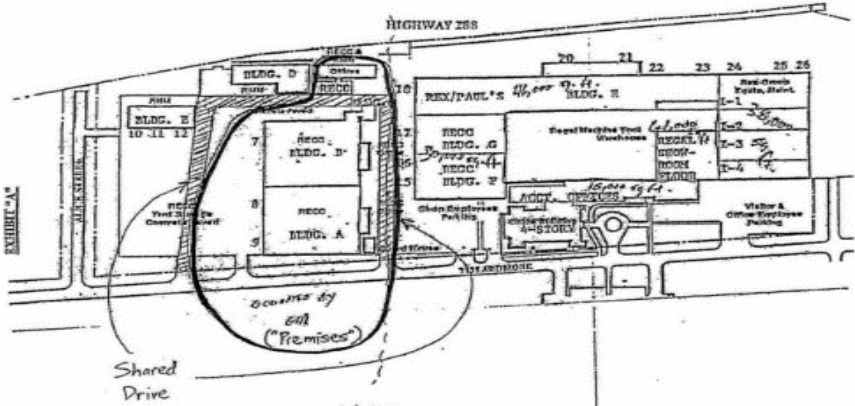
30





## Multiple Documents

*Ardmore, Inc. v. Rex Group, Inc.*

G.H. Sablinski 11-1-17






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## Multiple Documents


- *Ardmore, Inc. v. Rex Group, Inc.*
  - Incorporated written text provided 3 out of 4 boundaries by metes-and-bounds description
  - **Court:** Map in combination with other documents was sufficient under SOF


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## Multiple Documents

- **Long Trusts v. Griffin**
  - Two Farmout Documents
    - “50+ leases” in northeast part of County
    - Exhibit listed lessor, survey, term, and net acreage
    - No information to identify location of leases
    - No recording information for leases
  - **Court:**
    - Even taken together, neither document satisfied SOF




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## Multiple Documents

- **Westland Oil Dev. Corp. v. Gulf Oil Corp.**
  - AMI document referenced property description in a separate farmout agreement
    - **1<sup>st</sup> Issue:** Lands described by farmout agreement?
      - Description included County, Survey Section, and Property Location
    - **Court:** Reference was sufficient for SOF
    - **2<sup>nd</sup> Issue:** Lands *in area of* the farmout agreement?
      - **Court:**
        - Does not adequately describe any specific area
        - Not enforceable under SOF




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## Property Description

- **Recap:**
  - Survey reference and tie to tract
  - Precise tract boundaries (course and distance)
  - Size of tract
  - Clear reference to map or plat (drawn to scale and labeled) depicting tract
  - Clear references to other incorporated documents in the **signed** document




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## Signed by the Parties

- Written documentation
  - Must supply the identity of the party
  - Must be signed by the party or agent
    - SOF – someone lawfully authorized to sign
    - SOC – conveyer's agent authorized in writing
  - Certainty about authority requires documentation
    - Power of attorney
    - Certified copy of evidence of authority



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## Signed by the Parties

- Digital signatures?
- Email?
- Uniform Electronic Transactions Act
  - Tex. Bus. & Com. Code § 322.001 – 322.021




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## Essential Terms

- Statute of Frauds requires sufficiently certain description of the terms of the deal:
  - “Promise or agreement, or a memorandum of it . . . is in writing”




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## Essential Terms

- ***Cantrell v. Garrard***
  - Documentation failed to describe the terms for an oil and gas lease with sufficient detail:
    - “Commercial lease”
    - 1/8 royalty
  - Did **not** describe
    - Lease term
    - Time for drilling to begin
    - Time and amount of payments in lieu of drilling
    - Amount to be paid
  - **Court deemed these to be essential elements**




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## Essential Terms

- ***Taber v. Pettus Oil & Refining Co.***
  - Agreement for purchase and assignment of oil and gas leases
    - Did **not** describe:
      - Terms of the lease
      - Terms of the assignment

**Court:** “[I]f the subject matter sought to be conveyed is not described sufficiently to identify same, the requirements of the statute have not been met.”




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## Essential Terms

- *Oakrock Exploration Co. v. Killam*
  - Offer for oil and gas lease
  - Described bonus and royalty
  - Did **not** describe
    - Term
    - Drilling commencement date
    - Payments in lieu of drilling
    - Amounts to be paid for produced gas

Court: *“character, extent, and duration of the rights to the oil and gas in place are also essential terms”*



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## Obligations That Arise From Future Events

- Obligations or rights triggered by a future event
- Typical oil and gas leasehold agreements that involve events or selections in the future:
  - AMI
  - Farmout
  - Retained Acreage Clause
- Generally, these can satisfy SOF if the future event is sufficiently described




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## Obligations That Arise From Future Events

- AMI
  - Option to acquire interest in properties if future activities occur
- Farmout
  - Right to earn acreage to be determined in the future by drilling in the future
- Retained Acreage Clause
  - Perpetuates or terminates leasehold acreage to be identified after lessee drills future wells
  - Often subject to RRC rules (that perhaps have not yet been adopted)



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## Obligations That Arise From Future Events

- ***Long v. RIM Operating, Inc.***
  - JOA
    - Earned acreage provision
    - Triggered by participation/non-participation in well repair
  - Challenge under SOF:
    - too uncertain
    - entirely conditioned on future events
    - future well and parties insufficiently defined



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## Obligations That Arise From Future Events

- ***Long v. RIM Operating, Inc.***
  - Court: JOA satisfied SOF
    - Essential terms were conditional
    - Meaning of essential terms were determinable from the written agreement
      - Parties
      - Contract area
      - Participation terms




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## Obligations That Arise From Future Events

- ***Eland Energy, Inc. v. Rowden Oil & Gas***
  - Farmout
    - 40-acre retained acreage provision with an assignment requirement
  - Challenge under SOF:
    - At time of agreement, not possible to determine the acreage or wells that might be subject to assignment requirement




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## Obligations That Arise From Future Events

- ***Eland Energy, Inc. v. Rowden Oil & Gas***
  - **Court:** Farmout agreement satisfied SOF
    - granted unrestricted right to locate wells anywhere on lease
    - created equitable right to perfect title by selecting the boundaries of the 40-acre tracts to be earned for each well
  - The right to select the designation, coupled with the interest in making the selection, satisfied the SOF




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## Obligations That Arise From Future Events

- ***Stekoll Petroleum Co. v. Hamilton***
  - Lease option to select “1,000 acres equitably checkerboarded in a fashion similar to the checkerboarding in the first block.”
  - **Court:** Option does not satisfy SOF
    - provision “makes uncertain and indefinite the land on which petitioner is to acquire the lease and that on which the lease is to be left to respondents.”
    - “[t]he contract and the other instruments do not disclose a clearly defined pattern for the first block.”




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## Obligations That Arise From Future Events

- *Stekoll Petroleum Co. v. Hamilton*
  - Selection contracts can be enforceable under SOF because the “the grantee does not acquire a present title, but acquires an equitable right to make the selection and thereby to become the owner of the tract selected.”
  - This future checkerboard selection contract was not enforceable under SOF because it lacked sufficient certainty in the description of the terms of the agreement.




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## Parol Evidence and the SOF

- **Parol Evidence Rule**
  - Substantive rule of law
  - Extrinsic evidence not permitted to determine the meaning of an unambiguous contract
- Applied to property descriptions under the SOF
  - parol evidence allowed only if the contract contains a sufficient “nucleus” of the property’s description




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## Parol Evidence and the SOF

- *Morrow v. Shotwell*
  - Use of parol evidence is limited
    - “not for the purpose of supplying the location or description of the land”
    - “only for the purpose of identifying it with reasonable certainty from the data in the memorandum”




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## Parol Evidence and the SOF

- *Morrow v. Shotwell*
  - Parol evidence :
    - cannot supply essential elements
    - cannot constitute the framework or skeleton of the agreement
    - can only supply details that explain or clarify the essential terms appearing in the instrument




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## Parol Evidence and the SOF

- ***Anderson Energy Corporation v. Dominion Oklahoma Texas Exploration & Production, Inc.***
  - AMI
  - Property description included:
    - Contract Area: “the outlined areas on the attached maps”
    - Midland Maps with “an irregularly-shaped area outlined in hash marks and smaller areas of stippling shown on some of the tracks” as well as “natural landmarks such as rivers.”
    - Total acreage




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## Parol Evidence and the SOF

- ***Anderson Energy Corporation v. Dominion Oklahoma Texas Exploration & Production, Inc.***
  - Parol Evidence offered:
    - Surveyor’s affidavits about ability to locate the contract area from the maps




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## Parol Evidence and the SOF

- ***Anderson Energy Corporation v. Dominion Oklahoma Texas Exploration & Production, Inc.***
  - Court:
    - “the sufficiency of a property description under the Statute of Frauds is a question of law”
    - “ the court may properly consider extrinsic evidence in determining whether a person familiar with the area could locate the property with reasonable certainty.”
    - maps provided “a sufficient nucleus of a property description to enable a person familiar with the area to locate the land and boundaries of the Contract Area with reasonable certainty.”




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## Parol Evidence and the SOF

- ***Carpenter v. Phelps***
  - Agreement for capital investment in 48 wells
    - Parties exchanged emails to reach agreement
  - Property description included:
    - “Pitch Package”
    - Assignment and bill of sale for the lease
    - Drawings entitled “East Texas Well Location Map Lease Area 1 and 2”
    - RRC lease identification number




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## Parol Evidence and the SOF

- *Carpenter v. Phelps*
  - Parol Evidence offered:
    - testimony of a petroleum landman
    - “based on the documents previously discussed, he could obtain a list of the wells and physically locate them based on an internet search using the ‘lease number.’ “




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## Parol Evidence and the SOF

- *Carpenter v. Phelps*
  - Court:
    - “Pitch package” described land “somewhere” in the county
    - No indication that RRC lease number supplied a property description
    - Agreement lacked a sufficient nucleus of a property description required by SOF
    - Parol evidence to locate property not permissible




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## Proof Issues

- **Parol Evidence – Surrounding Circumstances**
  - "Surrounding circumstances" exception
    - Prior drafts and negotiations might be admissible to show how contract is unambiguous




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## Proof Issues

- **Parol Evidence – Surrounding Circumstances**
  - *PNP Petroleum I, LP v. Taylor*
    - Shut-in royalty clause
    - Prior drafts admissible to show intent that a saving clause include wells "capable of production" along with wells actually producing




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## Proof Issues

- **Parol Evidence – Surrounding Circumstances**
  - *BP Am. Prod. Co. v. Zaffirini*
    - Consent-to-assignment clause payment issue
    - Repeated exchanges of drafts refusing allocated bonus in negotiations were admissible to show that all-inclusive bonus was intent of final agreement




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## Exceptions to Statute of Frauds

- **Part Performance**
  - Equitable defense
  - Contract that is unenforceable due to statute of frauds might be enforceable *if* denial of enforcement would itself be virtual fraud
  - Equivalent to reliance: claimant relied on unenforceable contract and performed




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## Exceptions to Statute of Frauds

- **Promissory Estoppel**
  - Claimant must prove:
    - Promisor made promise that he expected would lead to definite and substantial injury
    - Injury occurred
    - Court must enforce promise to avoid injury
  - In SOF context, promisor made an oral promise to sign a written agreement
  - If so, underlying agreement must satisfy SOF




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## Conclusions

- To document oil and gas leasehold transactions to survive the SOF:
  - Use specific property descriptions
  - Make references clear and consistent
  - State parties' obligations as fully as possible




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## Other SOF Research Sources

<b>Snell &amp; Marsland</b>	<b>Sartain &amp; Kelsheimer</b>
<ul style="list-style-type: none"><li>• George A. Snell, III and Ana Maria Marsland-Griffith, <i>Legal Descriptions – A Little Background and a Few New Issues</i>, State Bar of Texas Oil Gas and Energy Resource Law Section Report (March 2011)</li></ul>	<ul style="list-style-type: none"><li>• Charles W. Sartain and Michael C. Kelsheimer, <i>The Statute of Frauds in Oil and Gas Transactions: What does it Really Mean?</i>, AAPL Southwest Land Institute (April 12, 2007)</li></ul>

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## Other SOF Research Sources

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