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I. Introduction

The following is an update on Texas's case law and legislative activity relating to oil, gas and mineral law from August 1, 2016 to July 1, 2017.

II. Case Law

A. Production in Paying Quantities and Lease Maintenance

1. BP America Production Company v. Laddex, Ltd.[1]

BP acquired a 1971 oil and gas lease that contained a 5-year primary term, and continued "as long thereafter as oil or gas is produced from said land hereunder."[2] The Lessee drilled one producing well that steadily produced until its production sharply decreased in August 2005.[3] Production resumed in November 2006.[4] Lessors' attorney sent BP a letter in April 2006 claiming that the lease had terminated for failure to produce in paying quantities; BP did not respond.[5] The Lessors granted a top lease to Laddex in March 2007.[6] In April 2007, the lessee of the top lease sued, seeking lease termination based on failure to produce in paying quantities.[7]

The top lease language provided:

> [T]he primary term of this lease shall commence [(a)] upon the date written releases are filed . . . or (b) upon the date a judgment of a court of competent jurisdiction terminating the base lease . . . becomes final and nonappealable . . . . This Lease is intended to and does include and vest in Lessee any and all remainder and reversionary interest and after-acquired title of

1. 513 S.W.3d 476 (Tex. 2017).
2. *Id*. at 477-78.
3. *Id*. at 478.
4. *Id*.
5. *Id*.
6. *Id*.
7. *Id*.

> Lessor in the Leased Premises upon expiration of any prior oil, gas or mineral lease . . . .[8]

In Texas, production that does not permit a lessee to pay operating expenses will not keep a lease in existence, even though the lease does not specifically require paying quantities but merely provides that the lease will continue for so long as "oil or gas is produced."[9] *Clifton v. Koontz*[10] refined that rule of law, for which there is now a two prong test: (1) Does income from a well's production exceed operating and marketing costs?[11] If yes, the inquiry ends, and production in paying quantities is established. If no, (2) under all relevant circumstances, would a reasonably prudent operator continue to operate in the same manner in hope of making a profit, and not for mere speculation?[12]

BP moved to dismiss the case for lack of subject matter jurisdiction, arguing that the top lease violated the Rule Against Perpetuities.[13] The court denied this motion.[14] The trial court asked the jury if (1) the well failed to produce in paying quantities from August 1, 2005 to October 31, 2006, and (2) if, under all the relevant circumstances, a reasonably prudent operator would not continue, for the sole purpose of making a profit and not merely for speculation, operating the well as it was between those dates.[15] The jury not only determined that there was a lack of production in paying quantities between August 2005 and October 2006, but that a reasonably prudent operator would not have continued to operate the well for profit.[16] As a result, the 1971 lease terminated.[17] BP appealed, claiming that (1) the top lease violated the Rule Against Perpetuities; (2) no evidence of lack of production in paying quantities or that a reasonably prudent operator wouldn't continue to operate the well; and (3) the jury charge allowed consideration of incompetent expert testimony.[18]

On appeal, the trial court's ruling was reversed and remanded, as the lease was found not to violate the Rule Against Perpetuities, since Texas

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8. *Id*.
9. *Id*. at 482 (citing Garcia v. King, 164 S.W.2d 509, 511 (Tex. 1942)).
10. 325 S.W.2d 684 (Tex. 1959).
11. *Id*. at 691.
12. *Id*.
13. *Laddex,* 513 S.W.3d at 478-89.
14. *Id*. at 479.
15. *Id*.
16. *Id*. at 483-87.
17. *Id*.
18. *Id*.

leases create a fee simple determinable with the lessor retaining a possibility of reverter, which is a vested future interest.[19] However, the trial judge erred in limiting the jury's consideration of profitability to a specific fifteen month period, preventing consideration of the fact of profitability before and after.[20]

On review by the supreme court, the issues were (1) whether a top lease can be saved from the Rule Against Perpetuities (the "Rule") by purporting to convey a "possibility of reverter" which may never revert to lessor, and (2) whether a jury can consider profitable production post-lease expiration?[21]

As to the first point of inquiry, the court noted that the Rule does not apply to present or future interests that vest at their creation, regardless of when it becomes vested in possession, and pointed out that a typical oil and gas lease actually conveys the mineral estate as a determinable fee subject to the lessor's possibility of reverter if the condition terminating the determinable fee occurs.[22] The court pointed out that the possibility of reverter vests at the time the lease is executed, although same is not possessory at the time of execution.[23]

BP argued that to the extent Laddex acquired the Lessors' possibility of reverter, the lease's language precluded vesting of that interest until the occurrence of a future event, namely the filing of written releases, or upon a court judgment terminating the lease becoming final and unappealable.[24] The court held that the Laddex lease resulted in a present "partial alienation" of the Lessors' possibility of reverter, and that Laddex had acquired an estate capable of ripening into a fee simple determinable interest upon expiration of the underlying lease, and, as such, did not violate the Rule.[25]

As to the second point of inquiry, the court pointed out that under *Skelly Oil Co. v. Archer*, a determination whether a well is producing in paying quantities is a question of fact for the jury, with the lessor having the

19. *Id*.

20. *Id*.

21. *Id*. 479, 482.

22. *Id*. at 480 (citation omitted).

23. *Id*. (citing Jupiter Oil Co. v. Snow, 819 S.W.2d 466, 468 (Tex. 1991)); *see also* Kelly v. Womack, 268 S.W.2d 903 (Tex. 1954); Luckel v. White, 819 S.W.2d 459 (Tex. 1991).

24. *Laddex*, 513 S.W.3d at 480.

25. *Id*. at 482.

burden of proving a lack of such production in order to terminate a lease.[26] Further, the court emphasized *Clifton* principles in its holding, such as "there can be no limit as to time, whether it be days, weeks or months, to be taken into consideration in determining whether paying production from a lease has ceased."[27] BP urged that although reversal based on the trial court's jury charge limiting the jury's consideration to only the 15 month period of decreased production was warranted, it was instead entitled to rendition of a judgment in its favor, rather than remand, because the evidence conclusively established the lease's profitability over a reasonable period of time.[28] The court, in affirming the court of appeals, held that the jury charge did not allow the jury to fulfill its duties and that a reasonable jury could have differed as to whether the well ceased to produce in paying quantities, and therefore remand for a new trial was proper.[29]

2. BP America Production Company v. Red Deer Resources, LLC[30]

A 1962 lease covered 2113 acres, and provided for a five year primary term.[31] By April, 2009, only production from the Vera Murray Well No. 11 was maintaining the lease.[32] In 1994, that well was averaging 200 Mcf per day, but when BP acquired the lease in 2000 production was less than 100 Mcf per day, and by 2009 had declined to less than 10 Mcf per day.[33] Between March and June 2011, Red Deer acquired top leases, which gave Red Deer the right to sue to terminate BP's lease.[34] In May 2012, the well ceased to produce for seven days and then resumed producing, but only every other day, and ceased to produce altogether for eight days beginning June 4.[35] BP shut in the well on June 12 and tendered shut-in payments June 13, designating June 13, 2012 as the beginning of the shut-in period.[36]

The Shut In Provision of the lease at issue provides:

26. *Id*. at 482-83 (citing Skelly Oil Co. v. Archer, 356 S.W.2d 774 (Tex. 1961)).
27. *Id.* at 482-83 (citation and internal quotations omitted).
28. *Id*. at 484.
29. *Id*. at 486-87.
30. No. 15-0569, 2017 WL 1553112 (Tex. Apr. 28, 2017, reh'g overruled Sept. 22, 2017).
31. *Id*. at *1.
32. *Id*.
33. *Id*.
34. *Id*.
35. *Id*.
36. *Id*.

> Where gas from any well capable of producing gas . . . is not sold or used after the primary term and this lease is not otherwise maintained, lessee may pay or tender as shut-in royalty . . . , payable annually on or before the end of each twelve-month period during which such gas is not sold or used . . . and it shall be considered that gas is produced in paying quantities, and this lease shall remain in force for each twelve-month period for which shut-in royalty is so paid or tendered . . . .[37]

The Cessation of Production provision reads: "[i]f production from said land . . . should cease . . . this lease shall not terminate if lessee commences mining, drilling or reworking operations on or before the expiration of sixty days from . . . cessation of production."[38]

Red Deer sued in August 2012, alleging termination because the well had not produced in paying quantities for the time period ended June 12, 2012.[39] Red Deer also asserted that there was an unexcused total cessation of production, incapable of rescue by payment of shut-in royalty, since the well was incapable of producing in paying quantities on June 13, 2012.[40] The jury found that the lease did not fail to produce in paying quantities for the period ended June 12, 2012, but had terminated because of a total cessation of production on June 13, 2012.[41] The appellate court affirmed.[42]

In its analysis, the supreme court noted that Red Deer bore the burden of proving that the well in question experienced a total cessation of production for a period of at least 60 days, and that no savings provision, such as the shut-in royalty clause, would maintain the lease during that time.[43] The lease at issue provides that it shall survive on payment of shut-in payment being made within one year after gas is last "sold or used" from a well capable of producing gas.[44] Facts indicated that the last date any gas was sold or used was June 4, and BP tendered shut-in payments June 13, 2012.[45] The Court stated that a retroactive shut-in clause, such as the one at issue, allows the operator to shut-in a well up to twelve months after production ceases, with constructive production relating back to the date gas was last

37. *Id*. at *2.
38. *Id*.
39. *Id*.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Id*. at *5.
44. *Id*.
45. *Id*. at *1.

sold or used, and that to negate BP's invocation of its shut-in rights, Red Deer must prove that the well was incapable of production in paying quantities over a reasonable time period as of June 4, 2012.[46] Looking at the trial record, the court noted that Red Deer had not obtained such a finding.[47] Moreover, the court found that the jury charge was improper, insofar as same instructed the jury to determine whether June 13, 2012 was the relevant date to consider in deciding whether the well was incapable of producing in paying quantities, since that was not the date gas was last sold or used.[48] Accordingly, the court reversed the appellate court's decision and rendered a take-nothing judgment in favor of BP.[49]

B. Operations

1. ExxonMobil Corp. v. Lazy R Ranch, et al.[50]

ExxonMobil conducted operations on the Lazy R Ranch for nearly 60 years until it sold its operations in 2008.[51] The Ranch hired an environmental manager to determine the extent of any contamination caused by ExxonMobil's operations, if any.[52] That report, dated March 31, 2009, identified 4 areas totaling 1.20 acre where hydrocarbon contamination levels exceeded state limits, and warned of a threat posed by same to groundwater.[53] In October of that year, the Ranch sued; its amended petition sought injunctive relief requiring remediation, regardless of the cost.[54] ExxonMobil moved for summary judgment, alleging the claims were barred by the statute of limitations; that plaintiffs were not, as a matter of law, entitled to the requested relief; and that there was no evidence of diminution of the value of the property.[55] The trial court granted ExxonMobil's summary judgment motion, which decision was overturned by the appellate court.[56]

In its review, the supreme court noted that as to two of the four sites, operations had ceased prior to 2005, and any contamination at those sites

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46. *Id*. at *5.
47. *Id*. at *8.
48. *Id*. at *9.
49. *Id*. at *10.
50. 511 S.W.3d 538 (Tex. 2017).
51. *Id*. at 539.
52. *Id*.
53. *Id*. at 539-40.
54. *Id*. at 540-41.
55. *Id*. at 541.
56. *Id*. at 542.

must necessarily have occurred before then, and therefore ExxonMobil's claim was barred.[57] As to the other two tracts, the court noted conflicting evidence regarding when contamination might have occurred, and reversed the granting of summary judgment.[58]

The Ranch argued that the statute of limitations should be tolled by the discovery rule, which applies when an injury is found to be objectively verifiable and inherently undiscoverable during the limitations period, and would result in its claims accruing until they were or should reasonably have been discovered.[59] The court noted that application of the discovery rule in nuisance cases is rare, as the condition giving cause to the claim is generally obvious and apparent.[60] Further, trial testimony established that the ranch owner often observed and was routinely informed of spills and cleanup operations; as a result, the court stated that there was nothing inherent in the possibility of contamination that kept the Ranch from hiring its environmental consultant sooner than it did.[61]

Finally, the Court affirmed Texas's adherence to the "economic feasibility exception" in establishing damages for land contamination, but limiting repair costs to the loss in the land's value due to the objectionable harm.[62]

2. Lightning Oil Co. v. Anadarko E&P Onshore, LLC[63]

Anadarko entered an oil and gas lease with the State of Texas on a wildlife area, which lease contained restrictions on Anadarko's ability to use the surface for exploration and production operations.[64] In response, Anadarko entered into a surface use and subsurface easement agreement with Briscoe Ranch, the owner of an adjacent tract, which would allow it to use the surface of that tract to drill from and through in order to access its leasehold on the adjacent to the state-owned tract.[65] The mineral estate underlying the Briscoe Ranch tract was under lease to Lightning.[66] Lightning sued, alleging trespass and tortious interference with contract,

57. *See id*. at 543-44.
58. *Id*.
59. *Id*. at 544.
60. *Id*. & n.20 (citing Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264 (Tex. 2004)).
61. *ExxonMobil*, 511 S.W.3d at 544.
62. *Id*. at 545.
63. 520 S.W.3d 39 (Tex. 2017).
64. *Id*. at 43.
65. *Id*.
66. *Id*.

and seeking injunctive relief.[67] The district court dismissed Lightning's claim, which ruling was affirmed by the appellate court.[68]

In its review, the supreme court noted that Lightning's claim centered on whether a mineral lessee's rights include the ability to preclude the surface owner's activities not intended to capture the lessee's minerals, but intended only to traverse through them.[69] In addressing the trespass claim, the court noted its earlier holding in *Humble Oil & Refining Co. v. West*, that the surface overlying a leased mineral estate is the surface owner's property, and those rights include the geological structures beneath the surface, and a Fifth Circuit case applying Texas law, concluding that the surface owner owns all non-mineral molecules of the land, i.e., the mass that undergirds the surface estate.[70]

Following a review of the dominant estate theory set forth in *Getty Oil Co. v. Jones*,[71] which establishes the right of the mineral owner to use so much of the surface as is reasonably necessary to produce and remove the minerals therefrom, the court noted limitations on that dominance, and pointed out that "the rights conveyed by a mineral lease generally encompass the rights to explore, obtain, produce and possess the minerals subject to the lease; they do not include the right to possess the specific place or space where the minerals are located."[72] Thus, an unauthorized interference with the *place* where the minerals are located constitutes a trespass as to the mineral estate only if the interference infringes on the lessee's ability to exercise its rights.[73] The court noted that Lightning speculated that Anadarko's proposed locations and operations might interfere with Lightning's planned use of the property, but that mere speculation was not enough to justify the granting of injunctive relief, which requires proof of imminent, irreparable harm.[74]

Lightning also argued that Anadarko's operations would result in a loss of minerals to which Lightning would otherwise be entitled.[75] In response,

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67. *Id*. 45-46.

68. *Id*. at 43.

69. *Id*. at 45-46

70. *Id*. at 46-47 (citing Humble Oil & Refining Co. v. West, 508 S.W.2d 812 (Tex. 1974)); *see also* Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv., 630 F.3d 431 (5th Cir. 2011).

71. 470 S.W.2d 618, 621 (Tex. 1971).

72. *Lighting Oil Co*., 520 S.W.3d at 48-49 (applying principles of *Getty Oil Co*. and progeny to support dominance and limitations of the mineral estate in Texas).

73. *Id*. at 49.

74. *Id*. (citing Batnaru v. Ford Motor Co., 84 S.W.3d 198 (Tex. 2002)).

75. *See id.* at 50-51.

the Court held that "the loss of minerals Lightning will suffer . . . is not a sufficient injury to support a claim for trespass."[76] In reaching its conclusion, the court indicated that it was weighing "the interests of society and the oil and gas industry against the interest of the individual operator," and finding that Anadarko's proposed operations would allow for recovering the most minerals while drilling the fewest wells, resulting in reduced waste.[77] Finally, the court pointed out that Lightning's tortious interference claim must necessarily fail, since Anadarko had the legal right to do what it planned to do.[78]

3. Ring Energy v. Trey Res., Inc.[79]

Trey Resources, Inc. applied for and obtained nine permits from the Railroad Commission (the "RRC") to inject fluids into designated wells in Andrews County.[80] Ring Energy, Inc. contends that Trey did not substantially comply with the requirement to provide a copy of the application to any surface owner or operator within a half mile of an injection well.[81] Ring did not protest the permits with the RRC; the RRC granted the applications.[82] Before Trey began any injection operations, Ring sued in Andrews County seeking injunctive relief, claiming that it would suffer irreparable waste damage.[83] Trey moved to dismiss on the basis that Ring did not exhaust its administrative remedies before the RRC and any such appeal must be filed in Travis County.[84] The trial court granted Trey's motion.[85]

The court focused on two provisions of the Texas Natural Resources Code; in particular, Section 85.321 and Section 85.322.[86] Those provisions, respectively, reads as follows:

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76. *Id*.
77. *Id*. at 50 (internal quotations and citation omitted).
78. *Id*. at 53.
79. No. 08-15-00080-CV, 2017 WL 192911 (Tex. App.—El Paso Jan. 18, 2017, no pet.).
80. *Id*. at *1.
81. *Id*.
82. *Id*.
83. *Id*. at *2.
84. *Id*.
85. *Id*.
86. *See id*. at *5.

> [A] party . . . that may be damaged by another party['s] . . . waste . . . may sue for and recover damages and have any other relief to which he may be entitled at law or in equity.[87]

> [N]o suit by or against the commission . . . shall impair or abridge or delay a cause of action for damages or other relief that an owner of land or a producer . . . [might have for violation of a rule or order of the commission].[88]

Trey argued that if Ring suffers damages such a claim would be cognizable under § 85.321, but only as to an action filed in Travis County.[89] Ring responded that § 85.321 grants the state courts jurisdiction to hear claims for injunctive relief.[90] The court determined, after analyzing the the statutes using several grammatical and stylistic approaches, that § 85.322 allows litigants to obtain injunctive relief at courts outside of Travis County.[91]

Trey also contended that the RRC has exclusive jurisdiction over injection wells until all administrative remedies have been exhausted.[92] The court noted that, in addition to § 85.321 and § 85.322, another Texas appellate court recently determined that the RRC did not have exclusive jurisdiction over injection wells in *In re Discovery Operating, Inc.*.[93]

Because the court determined that both the RRC and the court have authority to review and adjudicate initial disputes, it again relied on *In re Discovery* and the lack of "a clear remedy before the RRC" to find that the RRC did not have primary jurisdiction.[94]

The court ultimately held that "the Legislature intended to allow preinjury injunctive relief in the county where the injury is threatened," and reversed the trial court to allow Ring the opportunity to demonstrate its need for injunctive relief.[95]

87. TEX. NAT. RES. CODE ANN. § 85.321 (West 2011).
88. *Id*. § 85.322.
89. *Ring Energy*, 2017 WL 192911, at *5.
90. *Id*.
91. *See id*. at *8.
92. *See id*.
93. *Id*. at *9 (citing 216 S.W.3d 898 (Tex. App.—Eastland 2007, orig. proceeding)).
94. *Id.* at *10 (citation omitted).
95. *Id*. at *12.

4. *Crystal River Oil & Gas, LLC v. Patton*[96]

A 1948 lease (the "Scoggins Lease") covering property in Stonewall County contained the following provisions:

> 2. Subject to the other provisions herein contained, this lease shall be for a term of ten years from this date (called "primary term") and as long thereafter as oil, gas or other mineral is produced from said land hereunder.
>
> 5. If prior to discovery of oil or gas on said land Lessee should drill a dry hole or holes thereon, or if after discovery of oil, or gas the production thereof should cease from any cause, this lease shall not terminate if Lessee commences additional drilling or re-working operations within sixty (60) days thereafter . . . .[97]

After 20 years of production of oil and saltwater, the saltwater disposal well on the property became inoperable and the producing wells were shut down.[98] Robert Patton reviewed the RRC production records, decided to lease the property covered by the Scoggins Lease based on his observation that there had been no production for several months and sent a letter to Crystal River Oil & Gas, LLC and RMS Monte Christo, LLC contending that the Scoggins Lease had terminated.[99]

At trial, the jury was asked whether "the Defendants fail[ed] to commence drilling or reworking activities *on the producing wells in question* within 60 days after the wells ceased to produce oil and gas?[100] At issue in this case is whether the jury question erroneously included the phrase "on the producing wells in question" and whether its inclusion prevented the jury from considering reworking activities performed on the saltwater disposal well.[101]

While the jury question presented largely conformed to the Texas Pattern Jury Charges for such question, the pattern jury charges do not restrict reworking to only work performed on producing wells.[102] The court identified "re-working operations" as a key undefined phrase in this

96. 510 S.W.3d 226 (Tex. App.—Eastland 2016, no pet.).
97. *Id*. at 228.
98. *Id*.
99. *Id*.
100. *Id*.
101. *Id*. at 228-29.
102. *Id*. at 229.

lease.[103] Relying on the guidance of *Cox v. Stowers,*[104] which defined "reworking operations" without restricting operations to work performed on the producing wells, the court focused on "what an ordinarily competent operator would do under the same or similar circumstances to restore production."[105] The court noted that *William & Meyers Oil and Gas Law* § 618.1 cites approvingly to precedent offered by Crystal River in *Pro-Chem, Inc. v. Lassetter Petroleum, Inc.*, in which a Kansas court held that "work done to secure the use of a saltwater disposal well can constitute reworking operations under a cessation-of-production clause."[106]

The court held that "in the absence of a restriction in the lease that only work performed on the producing wells constitutes reworking operations, we conclude that the trial court abused its discretion by limiting the jury question to only work performed on the producing wells."[107] Because the error in the jury charge related to the critically contested issue, the court found that the trial court's error caused harm and remanded the case for a new trial.[108]

C. Pooling

1. Samson Exploration, LLC v. T.S. Reed Properties, Inc.[109]

Samson Exploration formed two pooled units, the Joyce DuJay No. 1 Gas Unit and the Joyce DuJay "A" No. 1 Gas Unit.[110] The units overlapped one another as to depths and acreage for the most part, but the "A" No. 1 Unit included one additional lease not included in the No. 1 Unit.[111] One well was located upon land included in both units, and produced from the interval pooled in both.[112] Samson paid royalties on this well under the first unit (which did not include the additional lease), contending that the second unit was invalid, and the unpaid lessors sued.[113]

In seeking to excuse its error, Samson argued that pooling necessarily effects a cross-conveyance of title and that a pooled unit is not valid unless

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103. *Id*.
104. 786 S.W.2d 102, 105 (Tex. App.—Amarillo 1990, no writ).
105. *Crystal River*, 510 S.W.3d at 229-30.
106. *Id*. at 230 (citation omitted).
107. *Id*.
108. *Id*. at 231.
109. 521 S.W.3d 766 (Tex. 2017).
110. *Id*. at 771.
111. *Id*. at 772.
112. *Id*.
113. *Id*. at 773.

title is cross-conveyed, and that since title cannot be conveyed twice, and the production interval for the disputed unit was previously committed to another pooled unit, the subsequently pooled unit was invalid.[114] The trial and appellate courts rejected this approach, and the supreme court affirmed, holding:

> Under the law in Texas, pooling implicates both contract and property law—authority to pool emanates from contract but pooing agreements give rise to interests in realty.The cross-conveyance theory of title can be critical . . . but Samson's argument in this case is a theoretical construct that holds no water. Considering the pertinent authority, we discern no impediment to enforcing Samson's obligations in this case under a contract theory even if the pooling designation failed to effect a new conveyance of title.[115]

Moreover, the court pointed out that although its holding would have an adverse economic impact on Samson, the holding was brought about by Samson's own making.[116]

D. Conveyance and Deed Construction

1. James H. Davis, Individually and D/B/A JD Minerals, and JDMI, LLC v. Mark Muelle[117]

A 1991 mineral deed to JD Minerals imprecisely described ten tracts of land in the following manner: "1) 704.00 acres out of the G.W. PETTY, ET AL, A-582, ET AL, known as the 'AMOCO PRODUCING COMPANY – JOHN HARRISON JR. 'B'."[118] Following the putative descriptions was the statement that "Grantor agrees to execute any supplemental instrument requested by Grantee for a more complete or accurate description of said land."[119] Beneath that was the following paragraph:

> The "Lands" subject to this deed also include all strips, gores, roadways, water bottoms and other lands adjacent to or contiguous with the lands specifically described above and

114. *Id*. at 770.
115. *Id*. at 777-78.
116. *Id*. at 780-81.
117. No. 16-0155, 2017 WL 2299316 (Tex. May 26, 2017, reh'g overruled Sept. 22, 2017).
118. *Id*. at *1 n.8.
119. *Id*. at *1.

> owned or claimed by Grantors. If the description above proves incorrect in any respect or does not include these adjacent or contiguous lands, Grantor shall, without additional consideration, execute, acknowledge and deliver to Grant[ee], its successors and assigns, such instruments as are useful or necessary to correct the description and evidence such correction in the appropriate public records. Grantor hereby conveys to Grantee all of the mineral, royalty, and overriding royalty interest owned by Grantor in Harrison County, whether or not same is herein above correctly described.[120]

In 2011, the Grantor in the 1991 deed conveyed the same specific properties to Mark J. Mueller, but employing more precise descriptions.[121] Mueller then sued Davis to quiet title to the mineral interests, arguing that the descriptions in the 1991 deed were insufficient to satisfy the Statute of Frauds, requiring that property to be conveyed be identified with reasonable certainty.[122] At trial, Davis's motion for summary judgment was granted, and a take-nothing judgment issued against Mueller.[123]

On appeal, Mueller argued that the general granting clause, that purporting to convey all of Grantor's interest in Harrison County, is ambiguous, because it was located in the same paragraph as the Mother Hubbard clause, a catch-all for small, overlooked interests.[124] The appellate court agreed and reversed, concluding that the intent of the parties was a fact issue to be decided by a jury.[125]

The supreme court, in its review, acknowledged that the specific property descriptions in the 1991 deed failed to satisfy the statute of frauds, but also noted the long-standing recognition of general granting clauses as valid and effective.[126] The court rejected Mueller's argument that the location of the general grant in proximity to the Mother Hubbard clause rendered it ambiguous and noted that if the general grant were held to apply only to the small strips contemplated by the Mother Hubbard clause, it would accomplish nothing other than that accomplished by the Mother

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120. *Id*.
121. *Id*. at *2.
122. *Id*.
123. *Id*.
124. *Id*.
125. *Id*.
126. *Id*. & n.21 (citing Holloway's Unknown Heirs v. Whatley, 131 S.W.2d 89 (Tex. 1939); Smith v. Westall, 13 S.W. 540 (Tex. 1890); Witt v. Harlan, 2 S.W. 41 (Tex. 1886)).

Hubbard clause itself.[127] The court concluded by stating that the "general grant's conveyance of 'all of the mineral, royalty, and overriding royalty interest owned by Grantor in Harrison County, whether or not same is herein above correctly described' could not be clearer. *All means all*."[128]

2. Benedict G. Wenske & Elizabeth Wenske v. Steve Ealy and Deborah Ealy[129]

A 1998 mineral deed reserved a one-fourth (1/4th) nonparticipating royalty for a term of 25 years.[130] The Grantees under that deed later sold the property, in 2003, reserving an undivided three-eighths (3/8th) mineral interest.[131] The later deed provided that if the mineral estate was subject to an existing lease or production, the lease or production, and the benefits from it, would be allocated in proportion to ownership in the mineral estate.[132] The mineral interest was made subject to the one-fourth (1/4) royalty previously reserved.[133]

In 2011, the Grantors and Grantees under the 2003 deed entered into an oil and gas lease, and a dispute subsequently arose as to who would bear the nonparticipating royalty burden, the Grantors urging that their mineral interest was unencumbered by same and that the Grantees would bear all of it.[134] Both the trial and appellate courts ruled that the burden was to be borne proportionately.[135]

In affirming the lower courts, the supreme court acknowledged the historical application of strict rules for deed construction, and the modern approach based on determining the parties' intent from the four corners of the instrument.[136] In its rejection of mechanical, hard-and-fast rules of interpretation, the Court adopted a more holistic approach focused on the intent of the parties as expressed within the four corners of the deed, giving words their plain meaning, and harmonizing all parts of an instrument, even if particular parts appear contradictory or inconsistent.[137]

127. *Id*. at *3.
128. *Id*. (emphasis added).
129. 521 S.W.3d 791 (Tex. 2017).
130. *Id*. at 793.
131. *Id*.
132. *Id*.
133. *Id*.
134. *Id*. at 793-94.
135. *Id*. at 794.
136. *See id*. (citations omitted).
137. *See id*. at 797-99.

The court recognized the general rule that a previously reserved interest burdens the entire mineral estate, but held that such a rule is not necessarily determinative of the parties' intent, since they are free to contract otherwise.[138]

3. Greer v. Shook[139]

A 1927 mineral deed was subject to an existing oil and gas lease.[140] The deed conveyed

> an undivided one-sixteenth (1/16) interest in and to all of the oil, gas and other minerals in, under and that may be produced . . . [G]rantee is purchasing one-half of the royalty and one-half (1/2) of the minerals . . . subject to [an existing oil and gas lease], but covers one-half (1/2) of all [royalty payable under said lease, and when the lease terminates an] undivided one-sixteenth (1/16) of the lease interest and all future rentals . . . shall be owned by . . . Grantee, he owning one sixteenth of all oil, gas and other minerals . . . .[141]

The deed also stated that Grantee would never be required to join in the execution of future oil, gas and mineral leases.[142] Long after the lease expired, a new lease was taken, providing for a one-fourth (1/4) royalty, and the lessee filed an interpleader action seeking a ruling as to the interest owned by the successors of the grantee in the 1927 deed.[143] The trial court ruled that the Grantee's successors were entitled to one-half (1/2) of the royalty provided for under the new lease, or one-eighth (1/8).[144] The appellate court affirmed, finding ambiguity in the deed, but ruling that due to the near-universal use of one-eighth (1/8) royalties at the time of the deed in question and the fact that landowners commonly believed they only owned a one-eighth (1/8) interest rather than the entire mineral estate in the possibility of reverter (the "estate misconception" theory), meaning that the 1927 deed conveyed an undivided one-half (1/2) nonexecutive mineral interest.[145]

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138. *Id*.
139. 503 S.W.3d 571 (Tex. App.—El Paso 2016, no pet.).
140. *Id*. at 575-76.
141. *Id*. at 576.
142. *Id*.
143. *See id*. at 577.
144. *Id*. at 575.
145. *See id*. at 590-92.

4. Laborde Properties, L.P. v. U.S. Shale Energy II, LLC[146]

A 1951 deed contained the following reservation:

> There is reserved and excepted . . . an undivided one-half interest in and to the . . . royalty . . . in and under and that may be produced . . . , same being equal to an undivided one-sixteenth. This reservation is what is generally termed a nonparticipating Royalty Reservation[.][147]

A dispute subsequently arose regarding whether the reservation entitled the grantors' successors to one-half (1/2) of the one-fifth (1/5) royalty for provided for under a current lease, or a fixed one-sixteenth (1/16).[148] The trial court ruled that they were entitled to one-half (1/2) of one-fifth (1/5).[149] On appeal, the appellate court reversed, holding that to rule otherwise would be to require it to ignore the plain language in the deed calling for "same being equal to an undivided one-sixteenth."[150]

5. BNSF Ry. Co. v. Chevron Midcontinent, L.P.[151]

In dispute in this case is the interest conveyed by a 1903 deed from W.H.C. Goode to Panhandle & Gulf Railway Company which states that "the said party of the first . . . does GRANT, BARGAIN, SELL, RELINQUISH and CONVEY unto the said party of the second part, and unto its successors and assigns, . . . , for a right of way, that certain strip of land hereinafter described."[152] The deed includes a description of a surveyed line and describes "the said railway right of way being 100 feet wide on each side of the center line."[153] The deed includes a habendum clause which purports to define the interest being conveyed as being "in fee simple, unto the said party of the second party . . . its successors and assigns forever."[154]

146. 04-16-00168-CV, 2016 WL 5922404 (Tex. App.—San Antonio Oct. 12, 2016), *reconsideration en banc denied* 04-16-00168-CV, 2016 WL 7445084 (Tex. App.—San Antonio Dec. 28, 2016, no pet.)
147. *Id*. at *1.
148. *Id*. at *2.
149. *Id*.
150. *Id*. at *10.
151. No. 08-16-00119-CV, 2017 WL 1076540 (Tex. App.—El Paso Mar. 22, 2017, no pet.).
152. *Id*. at *1.
153. *Id*. at *2.
154. *Id*.

After determining that the use of the phrase “right of way” does automatically convey only an easement, the court next applied to its review the “Neale rule” which says:

> [A] deed which by the terms of the granting clause grants, sells and conveys to the grantee a “right of way” in or over a tract of land conveys only an easement . . . [but] a deed which in the granting clause grants, sells and conveys a tract or strip of land conveys the title in fee, even though in a subsequent clause or paragraph of the deed the land conveyed is referred to as a right of way.[155]

Because the deed at issue has blended language, the court found that application of the Neale rule was not dispositive as to what was conveyed.[156] Nevertheless, the court held that this deed is a surface easement, reasoning that use of the word “over” in the opening clause shows that Goode did not intend to convey the entirety of the land described and the phrase “for a right of way” in front of the phrase “strip of land” could be understood as limiting the nature of the conveyance.[157]

Finally, the court considered the use of the phrase “fee simple” in the habendum clause.[158] Acknowledging that “fee simple” can often be used both to describe the size of the estate and rights associated therewith, as well as the term of any durational or conditional qualifiers.[159] Understood as the latter, there would be no conflict between the granting language and the habendum clause; the granting clause would define the type of property rights, while the habendum would identify the term.[160] While the court recognized that this approach is “rational, intuitive and sensible” it declined to adopt this approach due to the lack of Texas authority.[161]

155. *Id*. at *4 (quoting *Tex. Elec. Ry. Co. v. Neale*, 151 Tex. 526, 252 S.W.2d 451, 453 (1952)).
156. *Chevron Midcontinent*, 2017 WL 1076540, at *5.
157. *See id*. at *6-7.
158. *Id*. at *8.
159. *Id*.
160. *Id*.
161. *Id*.

E. Pipelines

1. Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.[162]

In 2007, Denbury began to plan and construct a carbon dioxide pipeline over land owned by Texas Rice Land Partners, which was contested by the landowner.[163] In response, Denbury filed the required form with the RRC, claiming common carrier status, which would allow it to exercise eminent domain authority, and also filed suit seeking injunctive relief against Texas Rice Land.[164] While proceedings were underway, Denbury completed its survey and commenced construction of the pipeline.[165] At the time, Texas pipeline companies were able to claim common carrier status simply by so indicating on RCC form T-4.[166]

When this controversy first reached the Texas Supreme Court, the court held that in order to authorize eminent domain, the Texas Constitution requires objective evidence that the pipeline will serve the public, rather than the builder's exclusive use.[167] Further, the court enunciated a new test, one requiring that once challenged, the party claiming common carrier status must prove "a reasonable probability that the pipeline will *at some point after construction* serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier."[168] Looking at the facts in issue, the court held that Denbury's claimed intent to negotiate with unaffiliated parties for the transport of their gas raised only the possibility, and not a reasonable probability, that the pipeline once completed would serve the public, and remanded the matter to the District Court of Jefferson County (the "district court").[169] The district court heard evidence of transportation agreements with unaffiliated parties which were entered into post-construction, and granted Denbury's motion for summary judgment, finding Denbury to be a common carrier, and thus entitled to eminent domain authority.[170]

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162. 510 S.W.3d 909 (Tex. 2017)

163. *Id*. at 911.

164. *Id*.

165. *Id*. at 912.

166. *Id*.

167. *Id*. at 913 (citing Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W. 3d 192, 200 (Tex. 2012)).

168. *See Texas Rice*, 510 S.W.3d at 913 (internal quotations omitted and emphasis added).

169. *Id*.

170. *Id*. at 911-12.

The Beaumont Court of Appeals overturned the district court ruling, holding in essence that the pipeline company was required to prove it had the intent to serve as a common carrier at the time the pipeline was proposed.[171] That decision was overturned by the supreme court, which reinstated the district court's decision.[172]

In its opinion, the court noted that its "reasonable probability test" is an objective one, not requiring the pipeline company to prove the necessary intent prior to construction, and instead allowed that evidence of post-construction contracts with unaffiliated parties were relevant and admissible.[173] The court pointed out that such contracts could be used to establish a reasonable probability that at some point after construction the pipeline would serve the public, and also to establish specific potential customers near the pipeline's route.[174] The court also identified the regulatory atmosphere, the proximity of the pipeline to potential customers, and the actual use by unaffiliated parties as potentially relevant evidence.[175]

III. Texas Legislative Update

A. House Bill 1818[176]

Effective September 1, 2017, Section 81.01001(a) of the Natural Resources Code is amended to provide for the continuance of the RRC until September 1, 2029. Sections 81.065 and 81.066 are added to the Natural Resources Code, requiring, in the instance of Section 81.065, that the RRC to develop and implement a policy to encourage the use of appropriate alternative dispute resolution procedures for addressing disputes under the commission's jurisdiction, and requiring in the instance of Section 81.066, that the oil and gas division of the RRC develop an annual plan to use oil and gas monitoring and enforcement resources to ensure public safety and protect the environment. With respect to Section 81.066, the Commission must seek input from stakeholders, maintain information about monitoring and enforcement efforts, and collect data regarding violations of statutes or Commission rules related to oil and gas. The plan will be published annually on the Commission's website no later than July 1 of the year

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171. *See id*. at 911.
172. *Id*.
173. *See id*. at 915-18.
174. *Id*.
175. *Id*.
176. Act of May 10, 2017, 85th Leg., R.S., Tex. H.B. 1818 (amending TEX. NAT. RES. CODE § 81 *et seq*.).

preceding the year in which the plan will be implemented. Section 81.071 is also added to the Natural Resources Code, providing that the commission may establish pipeline safety and regulatory fees to be assessed for permits or registrations for pipelines, specifically including the establishment of fees to be assessed annually against permit or registration holders. Such fees should be sufficient to support pipeline sage and regulatory program costs and may be based on any number of factors, including the length of the pipeline, the number of new permits or registrations, or the number of pipeline systems.

B. House Bill 129[177]

Effective September 1, 2017, Sections 91.501 and 91.506 of the Natural Resources Code are amended to provide that the information required by Section 91.502 to be delivered to the royalty interest owner must be included on the check stub, an attachment to the payment form, or another remittance advice that accompanies the payment unless the payor has the consent of the royalty interest owner to provide the information in another manner.

177. Act of May 23, 2017, 85th Leg., R.S., Tex. H.B. 129 (amending TEX. NAT. RES. CODE § 91 *et seq.*).