VOL. 2 | ISSUE 2

MCGINNIS LOCHRIDGE

Producer's Edge

TEXAS OIL AND GAS LAW BULLETIN

FEATURED ARTICLES:

Twelve Lessor/Lessee Issues to Consider When Navigating the "New Normal"

— page 2

Surviving Oilfield Economic Turmoil in the Time of COVID-19

— page 6

IN THIS ISSUE

Recent Global Events and the Increased Importance of the Reasonably Prudent Operator Standard, *page 11*

De-Facto Mineral Lien Waiver Enforceable?, *page 14*

Court Holds Blanket Easement Allows Multiple Routes , *page 15*

Two recent SCOTX Cases Address Whether Emails Form Purchase Contract, *page 19*

SCOTX Interprets Clearinghouse Assignment, *page 16*

Federal Jurisdiction over Outer Continental Shelf, *page 13*

"Shall Not Affect" and "Other Benefits" Provisions Held to Reserve Entire Royalty Interest, *page 18*

"Strips and Gores" Doctrine Reaches Adjacent Severed Mineral Interest, *page 21*

McGinnis Welcomes Environmental Practice Group, *page 9*

About the *Producer's Edge*

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

We hope that you find this publication to be helpful and we welcome you to share copies with your friends and colleagues. If your friends or colleagues would like to receive the *Producer's Edge*, please invite them to sign up at *mineral.estate/subscribe*.

If you have any comments or wish to discuss any of these articles, please contact authors directly, or send an email to *oilandgas@mcginnislaw.com*.

McGINNIS LOCHRIDGE

DISCLAIMER: This newsletter contains information regarding case law recently published by Texas courts, and brief summaries of information contained in CLE articles. This information is not advice, should not be treated as advice, and should not be relied upon as an alternative to competent legal advice. You should not delay, disregard, commence, or discontinue any legal action on the basis of information contained within this newsletter.

Attorney Advertising.
© 2020 McGinnis Lochridge

MESSAGE FROM OUR PRACTICE GROUP CHAIR:

We hope this edition of *Producer's Edge* finds you and your loved ones healthy and safe during these difficult times. These are certainly challenging times for everybody but especially the oil and gas industry. The oil and gas industry has been uniquely impacted by a dramatic drop in oil prices largely caused by a global drop in demand due to COVID-19. Storage capacity is close to being maximized. Pipelines are refusing to accept additional production. And, what was previously unthinkable, after considerable debate the Railroad Commission considered, but rejected, imposing market demand prorationing.

The resulting financial, market, and operational issues have inevitably led to a wide array of novel legal issues and disputes. The industry is under siege. Now, more than ever, industry participants are striving to protect their most important assets. Operators will have to make difficult operational decisions, which will have legal implications. It now seems inevitable that many companies will face bankruptcy issues, either as creditor or debtor.

For nearly a century, McGinnis Lochridge has been at the forefront of the issues facing the oil and gas industry. Continuing this rich tradition, during these trying times, our lawyers have been helping clients proactively navigate these dangerous and to some extent unchartered waters. We have remained fully operational and committed to continuing to provide our clients with uninterrupted service. The collaboration and teamwork at the firm during these challenging times has made us proud.

This issue of *Producer's Edge* showcases some of the issues facing the industry. There are many more issues right around the corner.

If you are receiving this issue of *Producer's Edge*, you are either a valued client, colleague, or friend of the firm. Our firm's motto rings more true now than ever before: "we're in it together."

Please do not hesitate to contact us if we can be of assistance.

JONATHAN BAUGHMAN
CHAIR, OIL & GAS PRACTICE GROUP

FEATURED ARTICLE

COVID-19 UPDATE:

Twelve Lessor/Lessee Issues to Consider When Navigating the "New Normal"

By: Christopher L. Halgren and Austin W. Brister

Operators across the nation are scrutinizing their leases in a wide-spread effort to navigate historic low oil prices, takeaway curtailment, storage shortages, issues introduced by the COVID-19 pandemic, and a host of associated issues.

These circumstances present a variety of complex lease maintenance issues. Most leases obtained during the shale boom are in their secondary terms, held either by production in paying quantities, shut-in provisions, an operations clause, or continuous development provisions. Each of these introduce a unique analysis, and each is susceptible to significant strategic challenges in the face of low commodity prices along with transportation and storage issues.

Below, we briefly explore twelve issues that may be encountered by lessees in Texas while navigating these unique challenges.

Issue 1: Lease by Lease Analysis

While checklists and general rules may be helpful, when it comes to analyzing lease maintenance issues there is no-one-size-fits-all solution. Over the last several years, Texas courts have repeatedly held that leases are not interpreted merely by application of general rules, but rather by an individualized interpretation of specific lease language.

In addition, the recent Texas Supreme Court case, *Murphy v. Adams*[1] illustrates that fact-specific "surrounding circumstances" evidence can sometimes lead to deviations from the industry's customary understanding of a given word or phrase. In that case, due to admissible "surrounding circumstances" evidence, the phrase "offset well" did not refer to a well that would actually protect from drainage, but instead referred to a well drilled anywhere on the leased premises.

Many modern leases contain custom definitions for words or phrases like "operations," "drilling," or "reworking." Similarly, some modern leases contain provisions governing the evaluation of production in paying quantities and offset obligations. Those custom definitions and provisions generally control, further underscoring the need for a case-by-case analysis.

Issue 2: Continuous Development Obligations

Many leases granted over the last decade are currently held in their entirety by a continuous development provi-

[1] 560 S.W.3d 105 (Tex. 2018).

sion. These provisions vary widely in specifying when and how a lease may be held by continuous development, such as when a well is "completed" or "abandoned," when the next well is "commenced," and what type of drilling rigs or preparatory operations suffice. In addition, some provisions allow for "banking" of time saved between wells, and recent cases demonstrate the complexities those calculations can introduce.

Lessees seeking to slow down capital expenditures yet continue to maintain continuous development operations through this downturn should carefully examine their leases to ensure that such contractual deadlines are not missed.

Issue 3: Retained Acreage/ Separate Lease Clause

Many companies will inevitably suspend certain continuous development programs. When continuous development ceases, this generally triggers a retained acreage provision that provides for an automatic termination of some portion of leased acreage.

Retained acreage provisions widely vary and, as illustrated by recent Texas Supreme Court precedent, small changes in wording can lead to drastically different results in terms of the quantity of acreage retained and released. Additionally, some provisions call for a one-time termination, while others call for partial terminations on a "rolling" basis.

Retained acreage clauses are often paired with a "separate lease" clause, generally providing that, after the end of both the primary term and continuous development, each remaining production unit must be held by its own production and/or operations. Lessees considering shutting in some wells should evaluate whether production or operations on remaining wells will be sufficient to hold the shut-in production units.

Issue 4: Production in Paying Quantities

Most leases provide that, after the primary term, a lease continues as long as there is "production in paying quantities." To determine whether there is "production in paying quantities" Texas courts apply a two-pronged test. Under the first prong, the court will determine whether the well is making any profit, no matter how small.[2] Simple math reflects that reduced oil prices can negatively impact this test.

Under the second prong, a court determines "whether or not under all the relevant circumstances a reasonably prudent operator would, for the purpose of making a profit and not merely for speculation, continue to operate a well in the manner in which the well in question was operated."[3] If this downturn is prolonged, some lessors may argue certain leases are being held out of speculation.

The Texas Supreme Court recently emphasized that these tests must be analyzed over a reasonable period of time, to be determined by the jury. Therefore, if reduced commodity prices are only temporary, lessees will likely argue that arithmetic and prudent operator tests should both be analyzed over a longer period of time that factors in a period of higher prices – whether before or after the current downturn.

Issue 5: Minimum Royalties

Some leases require payment of "minimum royalties." With the drop in oil prices, coupled with the inability of some operators to market all of their production, lessees may need to evaluate whether royalty payments drop below a threshold that would require payment of minimum royalties. While failure to make minimum royalty payments may merely provide the lessor with a breach of lease claim, some clauses also provide the lessor with the option to terminate the lease.

Issue 6: Force Majeure

A flurry of recent social media posts have contemplated that COVID-19 and/or the market downturn may give rise to reliance on force majeure provisions. Force majeure provisions introduce a large variety of potential issues. The next few paragraphs merely introduce a few.

One significant issue is whether the event or condition at issue meets the definition of "force majeure" under the lease. Many force majeure provisions provide a specific list of events or conditions that qualify, as well as catch-all language. These lists and catch-all phrases vary widely and must be analyzed on a case-by-case basis. Some commentators have pondered whether COVID-19 could be considered an "Act of God" – a phrase sometimes listed in force majeure provisions.

Another critical issue is determining whether the lease requires the event or condition to be unforeseeable or preventable. In the recent case *TEC Olmos v. Conocophillips*,[4] the First Court of Appeals in Houston held that an economic downturn did not qualify as a force majeure event under the particular clause at issue in that case because (1) an economic downturn was not one of the specific events listed in the provision, and (2) an economic downturn did not fall under the "catch-all" because the catch-all required a showing that the event was unforeseeable. The court concluded that the lessee "did not and cannot" prove that an economic downturn is unforeseeable

[2] *See Garcia v. King*, 139 Tex. 578, 583, 164 S.W.2d 509, 511-12 (1942).
[3] *Clifton v. Koontz*, 160 Tex. 82, 89, 325 S.W.2d 684, 691 (1959).
[4] 555 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2018).

because "fluctuations in the oil and gas market are foreseeable as a matter of law." One may ask, is the current downturn, paired with a global pandemic, unique enough to call for a different conclusion?

An additional issue that may arise is whether the force majeure provision suspends both obligations and conditions in the lease. Generally, lessees are not under an obligation to maintain a lease. However, many force majeure provisions only mention the suspension of obligations. In those circumstances, a force majeure provision may not suspend conditions which are necessary to maintain the lease

Issue 7: Shut-in Royalties

With oil prices recently dipping into historic negative territory, some lessees may be evaluating whether it is prudent to shut-in some or all wells in certain leases or fields. Care should be taken in evaluating shut-in provisions. Being a matter of contract, shut-in provisions widely vary. Common variables include (i) the specific circumstances triggering the shut-in royalty clause, (ii) when and how the payments must be tendered, and (iii) the consequence of failing to make timely payments.

A failure to timely and properly pay a shut-in payment, or shutting in a well that does qualify under a specific shut-in provision, can result in lease termination.[5] The shutting in of oil wells in response to these unprecedented times raises numerous potential questions. For instance, while shut-in provisions traditionally only contemplate shut-in gas wells, many also cover oil wells. In addition, many provisions require a "lack of market," or similar condition. Whether depressed markets or curtailed takeaway capacity qualify under a specific shut-in provision should be carefully evaluated.

[5] *Fain Family First Ltd. P'ship v. EOG Res., Inc.*, 02-12-00081-CV, 2013 WL 1668281 (Tex. App.—Fort Worth Apr. 18, 2013, no pet.).

Issue 8: Regulatory Orders

With the decrease in prices and the threat of limited storage capacity, some are looking for the Texas Railroad Commission to intervene. In March of 2020, Pioneer Natural Resources filed a petition with the Commission, requesting the re-institution of market demand prorationing limits, with the aim of curtailing State and global supply. Based on the petition, the requested prorationing limits would apply to some operators, but not all, depending on their production levels. At the time this article was written, the Commission has declined to take that action.

In New Mexico, on the other hand, the New Mexico State Land Office announced emergency rulemaking to give relief to the oil and gas industry by allowing wells to be shut-in on certain leases covering state-owned minerals. Oklahoma seems to be headed in the same direction.

Regulatory action, while impactful, may or may not help lessees perpetuate their leases. While many force majeure clauses specifically make reference to regulatory orders, Texas courts have been hesitant to find that regulatory action triggers force majeure provisions when the effects of the regulatory order on the lease could have been avoided by the lessee. For instance, in Red River Resources, the court held that a Railroad Commission severance order "does not constitute a force majeure event when compliance with the regulation violated was within the reasonable control of the lessee."[6] "The RRC has the authority to order a well shut-in due to the lessee's failure to comply with its regulations. To accomplish this, the RRC issues severance orders." The court stated that a severance order "will only qualify as a force majeure event when compliance with the RRC regulation violated was outside the control of the lessee.

[6] See 443 B.R. 74, 80 (E.D. Tex. 2010).

Similarly, in *Schroeder v. Snoga*,[7] the San Antonio Court of Appeals held that, because the Railroad Commission's shut-in order was caused by the lessee's own violation of Commission rules or regulations, the lessee could not claim the shut-in order was a force majeure event. While the circumstances for each lease can be different, it is important to take into consideration these cases.

Issue 9: Cessation of Production/ Continuous Operations Clauses

Most modern oil and gas leases contain "cessation clauses," which provide that if production were to cease, the lease may be maintained by commencing production, drilling or reworking operations within a certain period of time — often 60 to 90 days. Whether such a clause could provide a basis to cease production during a time of low prices and/or storage constraints will depend on the express terms of the lease.

Most cessation clauses make no reference to the cause of cessation, or broadly refer to cessation "from any cause." However, it should be noted that in certain cases disputes may arise regarding whether a voluntary cessation of production is permitted under the express language of the provision at issue, particularly where the voluntary cessation is for reasons other than to work on the well or associated facilities.[8]

When there is no express cessation clause, the implied "temporary cessation of production" doctrine ("TCOP")

[7] 04-96-00489-CV, 1997 WL 428472 (Tex. App.—San Antonio July 31, 1997, no writ).

[8] *See, e.g.*, Williams & Meyers, Oil and Gas Law § 615 (2019) (discussing whether a voluntary cessation can trigger a cessation of production provision.).

may apply.[9] However, it is questionable whether a voluntary cessation of production based on reduced prices or reduced transportation or storage capacity would qualify under the TCOP doctrine. The TCOP doctrine has traditionally been applied where the cessation is due to a sudden stoppage of the well or some mechanical breakdown of the equipment, and requires the lessee to exercise diligence to resume production within a reasonable time.[10]

Issue 10: Offset Obligations

Lessees must remain prepared to respond to express or implied offset obligations. In Texas, in order to establish a breach of the implied covenant to protect against drainage a lessor must prove (1) substantial drainage from the leased premises, and (2) a reasonable prudent operator would have acted to prevent the drainage which ordinarily means there is a reasonable expectation of profit from drilling an offset well.[11] Of course, a drilling project is less likely to be profitable during depressed commodity prices than during high prices. In a market with negative commodity prices, perhaps no drilling project can reasonably be expected to produce a profit, though some lessors may see the current market conditions as a temporary condition.

However, it must be noted that many leases contain express offset provisions that do not condition the obligations on an expectation of profit, and some expressly waive the condition altogether. For instance, some express offset provisions provide that if a well is drilled within a certain number of feet from the leased premises, then drainage is "deemed" to exist, triggering an obligation to either drill an offset well, execute a partial release, or pay compensatory royalties.[12]

Issue 11: Volume Commitments and Pipeline Capacity Limitations

Many operators have entered into midstream contracts within minimum volume commitments. Under these agreements, if the operator fails to deliver the agreed-upon volume, the operator may be required to pay shortfall fees or deficiency fees. In the current market, though it may be prudent to temporarily curtail production, in some circumstances this can result in significant volume deficiency fees.

A similar, but opposite, potential issue is reduced takeaway capacity and storage limitations. With the significant reduction in demand caused by COVID-19, storage capacity has all but been reached in some parts of the country.

Issue 12: Potential Impacts on Royalty Calculations

Under many royalty provisions, a lessee is permitted to deduct or "net back" a share of certain post-production expenses when calculating royalties. In some rare cases, deductions can actually result in a negative number, sometimes referred to as a "negative royalty." While deductions are most commonly discussed in the context of gas royalties, recent Texas Supreme Court precedent has reflected that they can also occur in the context of oil royalties and "into the pipeline" language. While no Texas case has directly addressed the issue, commentators have split on whether Texas law would permit a lessee to charge a lessor with a negative royalty.

Negative royalty calculations can also occur where commodity prices fall to negative numbers. For instance, in West Texas, natural gas prices plunged to negative numbers in 2019. If the lessee is not permitted to flare or otherwise dispose of the negative-value commodity, the lessee may end up paying to have the gas taken away. Now that oil prices, too, reached a negative value in late April of 2020, questions are likely to arise as to how to calculate royalties on oil volumes that have a negative worth.

About the Authors

Austin Brister *is a partner in our Houston office and a member of the Oil and Gas Practice Group. Austin represents oil and gas exploration and production companies and landowners in complex litigation, including mineral and leasehold title disputes, surface trespass and damages, royalty calculation and payment disputes, operator/non-operator disputes, removal of operator, lease termination/perpetuation disputes, retained acreage and proration unit issues, and an array of other issues in the upstream oil and gas sector.*

Chris Halgren *is a partner in our Houston office and a member of the Oil and Gas Practice Group. With horizontal drilling transforming the energy landscape across Texas, Chris developed an emphasis on oil and gas related matters. He has represented operators, non-operators, and landowners in a variety of disputes ranging from seismic misappropriation, leasing issues, royalty disputes, title litigation, lease termination, midstream accounting and other related contractual disputes.*

For more information about the issues discussed in this article, contact Austin at 713-615-8523 or abrister@mcginnislaw.com or Chris at 713-615-8539 or chalgren@mcginnislaw.com.

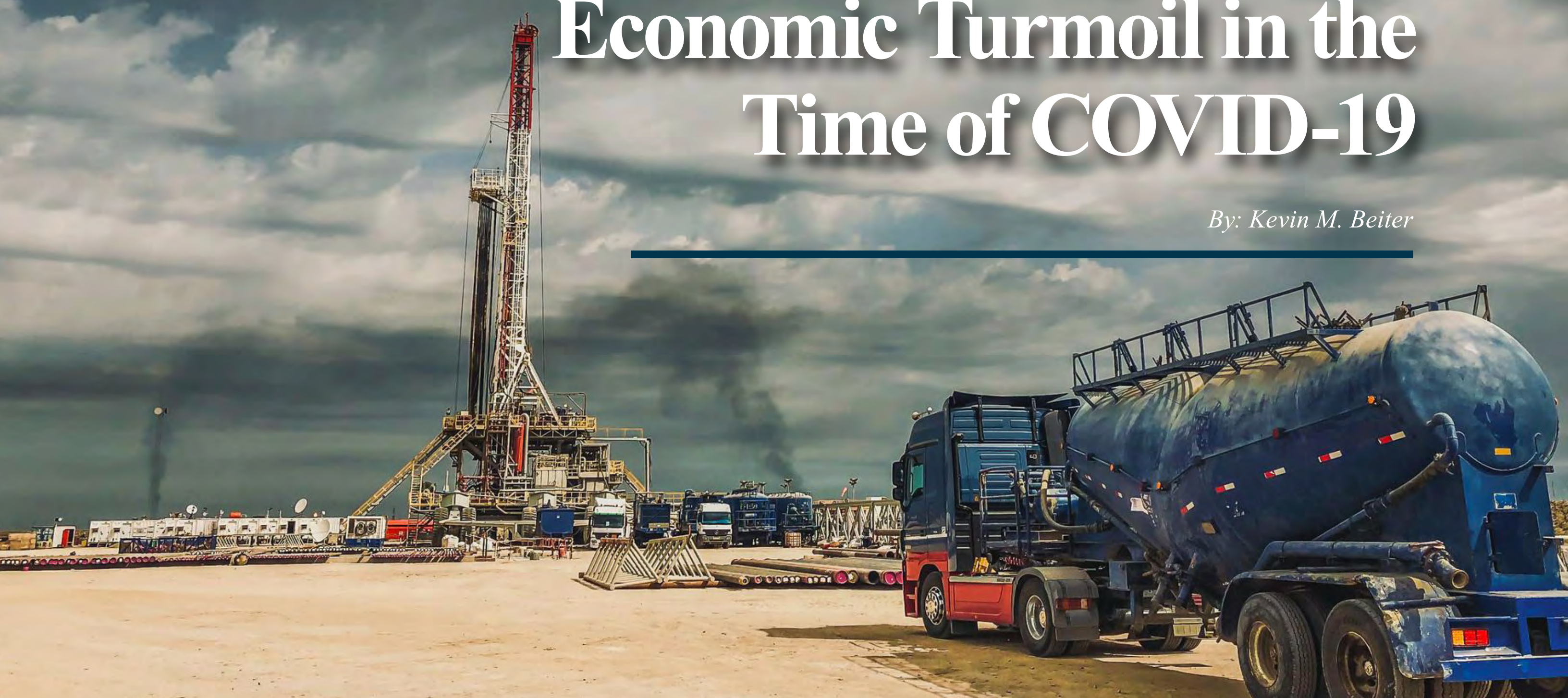
[9] *See Red River Res. Inc. v. Wickford, Inc.*, 443 B.R. 74, 81 (E.D. Tex. 2010).
[10] *Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 152 (Tex. 2004).
[11] *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 253 (Tex. 2004); *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 17 (Tex. 2008); *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563 (Tex. 1981).

[12] *See, e.g., Bell v. Chesapeake Energy*, No. 04-18-00129-CV, 2019 Tex. App. LEXIS 1978 (Tex. App. Mar. 13, 2019, pet. pending).

FEATURED ARTICLE

Surviving Oilfield Economic Turmoil in the Time of COVID-19

By: Kevin M. Beiter



Oil and gas price volatility has always been an inescapable element of the energy business. That said, the current confluence of events is unprecedented and would have been hard to predict. On March 6, 2020 when the COVID-19 crisis was slowly making its way into the domestic news cycle, a long simmering conflict between Saudi Arabia and Russia over production levels came to a head with Russia's refusal to continue abiding with OPEC guidance for agreed production level reductions. Saudi Arabia's subsequent decisions to dramatically increase production levels and discount oil pricing were met with tit-for-tat responses by Russia and other market participants over the next 2 days, sparking sharp increases in supply and reductions in market prices of as much as 30% on March 8. Then the true magnitude of the COVID-19 pandemic and its impact on the world economy and energy demand came to the fore. Subsequently, oil prices plummeted with WTI dipping into negative values in late April. As of this writing, prices have improved somewhat; however, IEA guidance sees global oil demand in a freefall due to the government actions to combat the COVID-19 contagion.

Demand and price disruptions could have long-term consequences that will likely suppress product prices for months or years. The impact to US domestic producers and service providers will likely be serious. This is particularly true since the conflict between Saudi Arabia and Russia has its genesis in a shared desire to hamper the competitiveness of US shale oil producers. Consequently, while we may see seasonal relief from the COVID-19 in the relatively near term, there is no assurance that the Saudi-Russian market disruption will abate before substantial damage is done to the U.S. oil industry due to distortion of demand and the resultant impacts on pricing.

Pricing impacts the finances of the entire energy industry at all levels. While the industry has improved efficiencies and reduced F&D costs substantially over the course of recent years, the improvements can't keep up with disruptions of the magnitude we are currently seeing. And the impacts will not end with producers. Service providers, suppliers and mid-market companies will all feel the sting. Insolvencies, business failures and bankruptcies are inevitable in this environment; and when they occur, there are ripple effects in all aspects of the industry. Though industry participants cannot change the price

of oil, they can protect their interests in other ways. In times like this, fortune favors the prepared.

MITIGATION AND PREPARATION

Proactivce/Preparatory Measures: Hoping for the Best but Planning for the Worst

There are relatively obvious, but often overlooked measures that can be taken to prepare for economic uncertainty and incipient insolvency.

Of critical importance are maintaining close controls on receivables and payables. Account management and practical issues aside, maintaining accounts in a relatively current status will make a difference in how they will be treated in litigation and bankruptcy. Payments made in the ordinary course of business are going to receive different treatment than payments made on account of a delinquent or "antecedent debt." That issue could come to have outsized ramifications in the event of bankruptcy as will be discussed further below.

Proactive contract review of substantial contracts is also very helpful in planning in uncertain economic times. Many contracts contain "safe harbor" provisions for early termination or reductions in performance obligations if notice is given timely. For example, it is not uncommon to see provisions for early termination of a contract at will provided notice is timely given in writing. Irrespective of whether such a provision works to your benefit or may be used against you, advance review and understanding of the implications of such a provision allows for advance planning for negotiation or resolutions of problems. Similarly, force majeure provisions are common in oil and gas agreements. Understanding which of your agreements have force majeure provisions and what constitutes a force majeure event and what kinds of activities may be affected by the event is critical to understanding what flexibility you may have in dealing with economic upset.

Early engagement in negotiations to address anticipated problems is key to effective management. Whether the counter-party is a vendor, bank, landowner or regulator, early affirmative engagement puts a company in some control of the process. Rather than being driven by events the negotiator has the opportunity to shape the narrative and the solution. Regulators are often willing to work with companies that are actively addressing issues, even if compliance takes time. Financiers will often enter into agreements for forbearance or suspension of performance if its perceived that the procedure may improve the potential for future performance. Those opportunities may be lost if negotiations only begin in the face of a liquidated demand, threat of enforcement action or litigation.

In particular, communication and negotiations with lenders and capital providers are of critical importance once the possibility of violations of loan covenants or default become likely. This can even be the case if restructuring (through bankruptcy or otherwise) is seen as a significant likelihood. Recent downturns have seen substantial increases in the number of pre-planned bankruptcy cases filed with post-petition financing and reorganization plans negotiated in advance of filing. Both in terms of controlling expense and maintaining predictable outcomes, understanding rights and planning for the most favorable outcomes, forethought and engagement provide significant advantages.

SURVIVING BANKRUPTCY

All of the analysis and preparation in the world will not eliminate the possibility of having to deal with bankruptcy in some form. In a recent interview, Daniel Yergin Pulitzer prize winning historian, when confronted with a prediction that as many as 70% of current shale producers may be bankrupted by the current downturn, noted "[c]ompanies go bankrupt, but rocks don't go bankrupt. When this all shakes out, there will be other people to develop shale." Certainly true, but cold comfort if you're one of those companies or are in business with one of those companies. Many analysts predict that like prior downturns, this one will end with a strong recovery with the industry including fewer but stronger companies that are more efficient and cost competitive. Recognizing that there will be a future, but that the present will almost certainly involve dealing with insolvency and bankruptcy, the issue becomes how to deal with the present to enjoy that future.

When bankruptcy laws are implicated, an entirely new structure is imposed. Bankruptcy effectively creates a new entity as of the time the petition is filed – the bankruptcy estate. The bankruptcy filing freezes the debtor's estate -- it sets the board for the rest of the game. Bankruptcy rules create priorities for the division of the limited resources of the bankruptcy estate. While the rules are complex, in general they strongly favor parties – debtors and creditors -- who take the necessary steps to protect and perfect their interests prior to the time bankruptcy is filed. Conversely, they severely penalize the complacent.

The following are a few basic rules unique to the bankruptcy game.

Automatic Stay

The filing of a bankruptcy petition automatically "stays" actions against the debtor, the property of the debtor, or the property of the estate. 11 U.S.C. § 362. The stay bars virtually all creditor activity against the debtor, includ-

ing obtaining, perfecting or enforcing liens. It generally applies until the bankruptcy case terminates. With limited exceptions, actions that violate the automatic stay are voidable and may subject the violator to actual and punitive damages.

Preferential and Fraudulent Transfer Avoidance

A trustee in bankruptcy has power to undo actions taken before the filing of the bankruptcy petition including preferential or fraudulent transfers. If you have received money or property under circumstances that constitute a preference or fraudulent transfer, you may be required to pay that money back to the bankruptcy estate. Preferential transfers include certain payments or transfers of property to creditors, while fraudulent transfers are those transfers made with the intent to hide assets or for less than fair market value.

Preferential Transfers

A transfer is preferential if it is (i) to or for the benefit of a creditor; (ii) on account of an antecedent debt; (iii) made while the debtor is insolvent; (iv) made on or within ninety days of the petition date or within one year if the creditor at the time of the transfer was an insider; and (v) allows the creditor to receive more than the creditor would receive in liquidation.

Fraudulent Transfers

Fraudulent transfers include those that are actually fraudulent -- made with "actual intent to hinder, delay or defraud" creditors and in some cases those that are constructively fraudulent—if the debtor received less than "reasonably equivalent value" in exchange and was either actually insolvent on the date that such transfer was made or became insolvent as a result of such transfer. The trustee may avoid fraudulent transfers occurring up to two years prior to the filing of bankruptcy. The trustee can also apply State law, such as the Uniform Fraudulent Transfers Act or the Uniform Fraudulent Conveyances Act, to avoid certain transfers occurring even earlier.

Executory Contracts

Executory contracts -- those requiring continuing performance such as JOA's and Joint Development Agreements -- can be assumed or rejected by a bankruptcy trustee. Effectively, the debtor is allowed to reject burdensome executory contracts and assume those that are to its benefit. Further, an executory contract is not enforceable against a debtor prior to its assumption, but is enforceable by the debtor. If a debtor elects to assume the benefits of an executory contract, however, it is required to perform all of its obligations -- including remedying any unfulfilled obligations.

WINNING GAME STRATEGY

Record & Perfect Liens Early

Properly perfecting security interests should be a top priority since a secured creditor collects payment before unsecured creditors. Proper perfection of a security interest depends on state law and the type of lien and property. In most jurisdictions this includes recording an executed and acknowledged memorandum of the interest in the public records of the county where the property is located and filing a properly completed financing statement with the appropriate U.C.C. filing office. Failure to strictly follow the applicable perfection requirements may result in loss of the creditor's secured status. Once a petition in bankruptcy is filed, the automatic stay applies to prevent perfection. A party should not wait until the eve of bankruptcy to perfect its security interest, however, since the date of a transfer for purposes of preferential avoidance will be the date of perfection.

Be Aware of Preference Periods

As simple as this sounds, stay current in accounts when dealing with a party in the zone of insolvency. As an account becomes non-current (antecedent), payments made within the preference period become subject to avoidance. Current accounts generally do not.

Setoff Early and Consider Recoupment

The right of setoff (also called "offset") allows entities that owe each other money to apply their mutual debts against each other -- avoiding "the absurdity of making A pay B when B owes A." For setoff to be available, the debts must be "mutual" (between the same parties, standing in the same capacity) and must have arisen prior to the commencement of the bankruptcy case. Setoff rights are not unlimited. If a party chooses to offset within ninety days before the date of the petition the offset may be subject to avoidance in part. And once a bankruptcy petition is filed, the automatic stay prevents a counter party from off-setting without court permission. While setoff may be unavailable post-petition, when the debts arise out of the same agreement, a counter party may be able to equitably recoup its debt. The right of recoupment is narrower than setoff rights and will depend on the facts of the case.

Withhold to Protect Against Lien Exposure

Laborers or vendors involved in the drilling, operation, or maintenance of a well generally have statutory or constitutional lien protection for the services and goods they furnish. The lien attaches to the property involved. Though a non-operator does not have a contractual relationship with a service provider or a vendor, Texas law may allow service providers, as subcontractors, to attach a mineral lien against the non-operator's leasehold

interest. However, a non-operator's liability to the laborer is limited to the amount that the non-operators owe the operator when the notice is received. Consequently, when a non-operator receives notice of vendor or subcontractor claims, the non-operator should consider withholding payment to the Operator "in the amount claimed until the debt on which the lien is based is settled or determined to be not owed."

Remove Operator/Take-over Operations

If an operator is approaching insolvency, the non-operators may desire to step in to continue to preserve production and avoid adverse consequences. Most JOAs provide for situations, such as an operator's inability to continue operations, under which parties to a JOA can elect a replacement. Since a JOA is an executory contract, effecting removal pre-petition will avoid significant complication in bankruptcy.

Forethought and preparation are key to successful outcomes in bankruptcy. The time to prepare for bankruptcy is before it becomes an inevitability.

About the Author

Kevin Beiter *is a partner in our Austin office and a member of the Oil and Gas Practice Group. With a background in petroleum geology, he has operated and participated in oil and gas exploration and development projects across North America. As a transactional lawyer, he has represented owners and operators with documentation, due diligence, and business counseling for acquisitions and divestitures and for exploration and operation. As a trial lawyer, he has represented plaintiffs and defendants, both majors and independents, in energy and environmental disputes.*

For more information about the issues discussed in this article, contact Kevin at 512-495-6084 or kbeiter@mcginnislaw.com.

NEW ATTORNEY ANNOUNCEMENT

McGinnis Lochridge Welcomes

Five Environmental Attorneys

We are pleased to welcome five new lawyers in our Austin office, including four environmental Partners and one environmental Associate. With them, they bring decades of experience involving a wide array of environmental issues including permitting, enforcement, site assessment, remediation, and compliance. The group also has significant administrative law, litigation, and regulatory experience. The new lawyers include: Partners, Al Axe, Keith Courtney, Lisa Dyar, and Derek Seal, along with associate, Lecelle Clarke.

"This year -- and the next decade -- is going to be one of thoughtful growth focused on the needs of our clients," said Managing Partner Doug Dodds. "We're excited about the addition of this impressive group of environmental attorneys. Not only do they have significant environmental expertise and a strong reputation in the marketplace, they are also wonderful people who will fit with the culture of our firm."

Al Axe brings more than 40 years of experience representing business and industrial clients in environmental and administrative litigation, regulatory, and legislative matters. Among other aspects of his environmental practice, he has guided clients through federal, state, and local government enforcement actions and citizen suits, private party environmental claims and investigations, and contested administrative permit proceedings. He has also advised clients on agency open records issues and procurement proceedings.

Keith Courtney has more than 32 years of experience representing clients on various environmental matters, with an emphasis on air quality. Those matters include permitting, enforcement, counseling, environmental auditing, air emissions events, and litigation. He has worked with clients in numerous industries, including chemical manufacturing, aggregate mining and processing, midstream and upstream oil and gas operations, and electricity generation.

Lisa Dyar has been practicing environmental law for more than

Left to right: Lisa Dyar, Al Axe, Doug Dodds (Managing Partner), Keith Courtney, Derek Seal, and Lecelle Clarke

20 years, representing clients in a wide range of industries with regard to permitting, compliance and enforcement, legislative and rulemaking objectives. Lisa served as a senior enforcement attorney in the Texas Commission on Environmental Quality's Litigation Division, where she was lead counsel on some of the agency's most complex and high profile enforcement cases.

Derek Seal brings almost three decades of regulatory and legislative experience to the firm. Before entering private practice, Derek served in numerous senior administrative and legislative positions, including as General Counsel of the Texas Commission on Environmental Quality and General Counsel in the Texas Legislature for the House Committee on Environmental Regulation. Derek has significant administrative law experience with water supply and on contested case hearings for air, waste, and water quality permits. He also focuses on permitting and enforcement.

Lecelle Clarke previously served as an Assistant Attorney General in the Environmental Protection Division of the Office of the Attorney General of Texas (AG). While at the AG's office, she represented the state and state agencies in litigation and enforcement proceedings pertaining to environmental, natural resources, and public utilities issues. Lecelle has also worked with the air quality, air monitoring, and air permitting teams at the Texas Commission on Environmental Quality.

CONTACT

Al Axe, *Partner*
600 Congress Ave., Ste. 2100
Austin, TX 78701
Direct: 512 495-6149
aaxe@mcginnislaw.com

Keith Courtney, *Partner*
600 Congress Ave., Ste. 2100
Austin, TX 78701
Direct: 512 495-6188
kcourtney@mcginnislaw.com

Lisa Dyar, *Partner*
600 Congress Ave., Ste. 2100
Austin, TX 78701
Direct: 512 495-6168
ldyar@mcginnislaw.com

Derek Seal, *Partner*
600 Congress Ave., Ste. 2100
Austin, TX 78701
Direct: 512 495-6175
dseal@mcginnislaw.com

Lecelle Clarke, *Associate*
600 Congress Ave., Ste. 2100
Austin, TX 78701
Direct: 512 495-6185
lclarke@mcginnislaw.com

Recent Global Events and the Increased Importance of the Reasonably Prudent Operator Standard

By: Jonathan Baughman

Given the recent historic developments of the global pandemic and the dramatic drop in oil prices, the oil and gas industry is facing new issues never before encountered at this magnitude. For instance, storage of oil and gas is expected to reach full capacity. Pipeline companies are refusing to accept production in their pipelines. Global demand has come to a dead halt. The Railroad Commission has been asked to consider implementing statewide proration. In many cases, producers are facing the dilemma of involuntarily shutting in wells at the risk of possibly losing valuable leases. How long these events will last is currently unknown but many in the industry expect the industry fallout will stretch out over the next 12-18 months, if not longer.

It is inevitable that the law governing oil and gas will once again take on new developments. Undoubtedly, over the ensuing months many in the industry will be faced with challenges which will, by necessity, invoke the reasonably prudent operator standard in the context of the lessor/lessee relationship. This article provides a reminder of those duties and the interplay of the standard in the relationship between the lessor/lessee.

The Reasonably Prudent Operator Standard in the Context of the Implied Obligations that Exist Between the Lessor and Lessee

At the outset, the most important thing a producer should do is look at the actual language of the lease. The reasonably prudent operator standard normally arises under implied obligations that are created as a creature of the law. However, it is important to keep in mind that where an express clause in an oil and gas lease addresses matters typically considered part of an implied covenant, the express provision will control.[1] Therefore, the language of the lease is paramount as the language of the lease can actually preempt any implied covenants and possibly expand or contract those obligations.

Implied covenants are implied obligations or duties that an oil and gas lessee owes a lessor to reasonably develop, produce, operate, and market the leased oil and gas interest for the benefit of both the lessor and the lessee. Although implied covenants are not expressed in the lease, they are the embodiment of the ongoing relationship between lessor and lessee established and memorialized by the oil and gas lease. Implied covenants function in two ways: (1) by providing what a reasonable lessee must do, the duty itself, and (2) by providing how a reasonable operator must carry out his duties, the standard of performance of the duty. The reasonably prudent operator standard primarily defines the standard of conduct required by the lessee to comply with the implied covenants and attempts to strike an appropriate balance between the conflict or imbalanced positions of the lessor and lessee.

The "Reasonably Prudent Operator Standard"

In evaluating whether a lessee complied with the reasonably prudent operator standard, each determination will be factually specific to the oil and gas lease in issue, in the particular locality at issue. However, based on existing case law, the subjective position

[1] See *Bowden v. Phillips Petroleum Co.*, 247 S.W.3d 690 (Tex. 2008); *Gulf Prod. Co. v. Kish*, 103 S.W.2d 965 (Tex. 1937).

of the lessee will normally not be considered: "[i]t is irrelevant that the lessee is in financial trouble and cannot afford to drill additional wells or that the lessee has more attractive investment opportunities in his portfolio of leases. If a reasonably prudent operator would have performed differently, the lessee has breached its obligations to the lessor."[2] In most cases, the key factor in determining whether a particular lessee complied with the reasonably prudent operator standard is whether the action taken or not taken by the lessee was reasonable under the circumstances.

Use of the Prudent Operator Standard in Evaluating Whether the Lessee has Complied with Particular Implied Covenants

Duty to Develop

The implied covenant to develop, likely the most commonly litigated implied covenant, provides that the lessee must act reasonably and prudently to develop the premises. Under the reasonably prudent operator standard, "the lessee is obligated to continue to make reasonable efforts to develop the leased premises for the common advantage of both the lessor and the lessee."[3] However, courts have recognized that a lessee's obligations to develop are not unlimited in the sense that the lessee is obligated to undertake development operations which are unprofitable. Instead, a lessee only has a duty to drill an additional well "if, considering the cost of the same and the probable profit therefrom, he would have been doing what an ordinarily prudent person would have done in the same or similar circumstances."[4] Courts have considered several factors when determining if a lessee has met his development duty, such as the geological data, the number and location of wells drilled on or near the leased property, productive capacity of existing wells, the cost of drilling compared with the profit reasonably expected, the time interval between completion of the last well and the demand for additional operation, and the acreage involved.

Duty to Protect Against Drainage

The implied covenant to protect against drainage implies a duty on the lessee to take action to prevent drainage, including both local radial damage as well as field wide drainage.[5] This may include the obligation to drill wells offsetting those on adjoining tracts or pool with adjoining tracts.[6] The prudent operator rule can require a lessee to drill a protection well on a lessor's acreage where a nearby tract is draining the lessor's tract, and a protection well would be profitable. However, Texas courts will not require protective action by a reasonably prudent operator until "substantial drainage" has occurred.[7]

Duty to Market

As part of a lessee's duty to manage and administer the lease, the lessee has a duty to reasonably market the oil and gas produced.[8] Once again, the standard to be applied is that of a reasonably prudent operator under the same or similar circumstances.[9] This duty ordinarily only applies under a "proceeds" royalty provision, and not under a "market value" royalty provision. The lessee's duty contains two elements: (1) to market production with due care, and (2) to obtain the best price reasonably possible.[10] "The focus in an action for breach of the duty to reasonably market is on the conduct of the lessee and not other sales."[11] Courts may look at factors such as "the availability of a market, means of transportation, the availability of pipe lines, the cost involved in transporting the product to the nearest available market."[12]

Duty to Conduct Operations with Reasonable Care and Due Diligence

The broadest, and most circular, of the commonly applied covenants is the duty to operate with reasonable care and due diligence. The duty, also called the duty of diligent and proper operations, "is a duty to perform operations such as testing, completing, operating, reconditioning, and plugging of wells. It is also a broad duty to perform those operations and all others in a diligent manner."[13] The provision acts as a "catchall obligation covering those acts or omissions not comprehended by the more specific implied covenants."[14] It may also be interpreted to include a duty to not prematurely abandon the lease or a producing well, a duty to use modern production techniques, a duty to seek favorable administrative action, and a duty to produce fair share from the leasehold.[15] This aspect of the reasonably prudent standard is likely to see creative use by lessors and lessees under current circumstances.

The Reasonably Prudent Operator Standard in the Context of "Production in Paying Quantities"

The reasonably prudent operator standard also comes up in the context of evaluating whether a lease while in its

[2] Gary B. Conine, The Prudent Operator Standard: Applications beyond the Oil and Gas Lease, 41 Nat. Resources J. 23, 33 (2001).
[3] 17 *Williston on Contracts* § 50.63 (4th ed. 1999).
[4] *Tex. Pac. Coal & Oil Co. v. Barker*, 6 S.W.2d 1031, 1036 (Tex. 1928).
[5] *Amoco Prod. v. Alexander*, 622 S.W.2d 563 (Tex. 1981).
[6] *See Southeast Pipe Line Co. v. Tichacek*, 997 S.W.2d 166, 170 (Tex. 1999).
[7] *Shell Oil Co. v. Stansbury*, 410 S.W.2d 187, 188 (Tex. 1966) (per curiam).
[8] *Yzaguirre v. KCS Res., Inc.*, 53 S.W.3d. 368, 373 (Tex. 2001).
[9] *Cabot Corp. v. Brown*, 754 S.W.2d 104, 106 (Tex. 1987).
[10] *Id.*.
[11] *Occidental Permian Ltd. v. Helen Jones Found.*, 333 S.W.3d 392, 401 (Tex. App.—El Paso 2011, pet. denied).
[12] *Eggleson v. McCasland*, 98 F. Supp. 693 (E.D. Tex. 1951).
[13] 5 *Kuntz Oil and Gas* § 59.1 (2011).
[14] 5 Patrick H. Martin & Bruce M. Kramer Williams & Meyers Oil & Gas Law § 861 (2011).
[15] *Id.* §§ 861.2-.5.

secondary term is "producing in paying quantities." Texas courts apply a two-prong test. The first prong involves determining whether the well is making any profit. The second prong of the test applies the reasonably prudent operator standard. Under the second prong test, even if a well is not generating a profit, it may nevertheless be deemed as producing in paying quantities if "a reasonably prudent operator would, for the purposes of making a profit and not merely for speculation, continue to operate a well in the manner in which the well in question was operated."[16] Given the dramatic drop in prices and the inability of producers being able to store oil and gas in the near future, the contours of these tests will surely arise.

While the industry is in uncertain times, it is important to keep in mind that the reasonably prudent standard will likely come into play in numerous contexts. This article briefly covered from a high level the standard in the context of implied lease covenants. The standard also comes up in the context of the operator/non-operator relationship and joint operating agreements which was not covered in this article. Regardless, the importance of the terms of the lease cannot be overstated when evaluating the duty and obligations of the producer in fulfilling its obligation under the lease.

16 *Clifton v. Koontz*, 325 S.W.2d 684, 691 (Tex. 1959).

About the Author

Jonathan Baughman *serves as Partner-in-Charge of the Firm's Houston office and chairs the Oil & Gas Practice Group. He was elected to a three-year term on the Council for the Oil, Gas and Energy Resources Law Section of the State Bar of Texas, and is one of 25 distinguished Advisory Board Members for the Louisiana Mineral Law Institute. Jonathan is an elected member of the Firm's Management Committee since 2009.*

For more information about the issues discussed in this article, contact Jonathan at 713-615-8540 or jbaughman@mcginnislaw.com.

Federal Court Examines Jurisdictional Reach Over Outer Continental Shelfs

Sam V. Laborde Marine, L.L.C., Civil Action No. H-19-4041, 2020 U.S. Dist. LEXIS 1585, (S.D. Tex. 2020)

By: Christopher Halgren

Following removal from State Court, the Plaintiff challenged the federal trial court's jurisdiction over the Plaintiff's personal injury claim. Ultimately, the district court concluded that it had jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), which grants federal courts jurisdiction over certain disputes arising out of conduct on the Outer Continental Shelf ("OCS"), codified at 43 U.S.C. 1331, et seq.

At the time of his injury, the Plaintiff was working as an inspector on a platform located on the OCS. However, the injury occurred while the Plaintiff was walking down the stairs of a nearby vessel where Plaintiff was being housed during his employment. The Plaintiff claimed that the OCSLA did not apply to his claim because it arose on the vessel, rather than the platform located on the OCS. The Plaintiff claimed that for the OCSLA to apply, his injury must have occurred while he was on a "proper situs." In other words, the injury had to have occurred on the platform and the fact that it occurred on the vessel precluded federal court jurisdiction.

The district court rejected the Plaintiff's argument, concluding that the Fifth Circuit has "explicitly rejected the argument that OCSLA jurisdiction includes a situs requirement." The court noted that there is a perceived conflict between the Fifth Circuit's 2013 opinion in *Barker v. Hercules*, which appears to refer to a situs requirement, and the Fifth Circuit's 2014 opinion in In re Deepwater Horizon, which appears to reject the inclusion of a situs requirement. Rather, In re Deepwater Horizon applied a "but for" test, looking only at whether the facts underlying the action would not have occurred but for an operation on the OCS. The district court harmonized the two Fifth Circuit opinions by concluding that Barker's "situs" element applied only when determining whether OCSLA's choice-of-law rules would apply. When the question is focused on jurisdiction, then Deepwater Horizon's broader "but for" test would apply.

The district court applied the "but for" test and concluded that the Plaintiff's injuries would not have occurred but for his employment as an inspector on a platform located on the OCS. Accordingly, the district court concluded that it was vested with jurisdiction.

About the Author

Chris Halgren *is a partner in our Houston office and a member of the Oil and Gas Practice Group.*

For more information about this case, contact Chris at 713-615-8539 or chalgren@mcginnislaw.com.

Appellate Court Holds that MSA Provision Acts as Enforceable De Facto Mineral Lien Waiver

Mesa Southern CWS Acquisitions, LP v. Deep Energy Exploration Partners, LLC, No. 14-18-00708-CV, 2019 Tex. App. LEXIS 10107 (Tex. App.—Houston [14th Dist.] November 21, 2019, no pet.).

By: Christopher Halgren

The Fourteenth Court of Appeals in Houston held that provisions within a master service agreement, stating that a subcontractor could only seek payment or damages exclusively from the contractor, were effective to preclude that subcontractor from enforcing a mineral lien against the mineral property owner. In effect, some have interpreted this case as allowing a de facto lien waiver for Chapter 56 mineral liens, despite the prohibition on lien waivers under §53.286 of the Property Code. While Chapter 56 (providing for mineral liens) does not expressly address lien waivers, §56.041 does expressly provide that "A claimant must enforce the lien within the same time and in the same manner" as a Chapter 53 lien. For this reason, the subcontractor argued that this provision in the master service agreement was a de-facto mineral lien waiver, unenforceable and void as against public policy pursuant to §53.286. The appellate court disagreed, dismissed its claims, and ordered it to release its liens.

Mesa Southern CWS acquisition, LP ("Mesa") entered into a Master Services Agreement ("MSA") with Deep Operating, LLC ("Deep Operating"), an oil and gas operator. The MSA called for Mesa to perform certain labor and material in connection with Deep Operating's wells in Milam County, Texas. Deep Operating failed to pay Mesa for its services and ultimately filed bankruptcy. After Deep Operating's bankruptcy filing, Mesa recorded a lien affidavit against each of the three wells for which it provided services.

While Deep Operating's bankruptcy case was proceeding, Mesa filed suit against Deep Operating's parent company, Deep Energy Exploration Partners, LLC ("Deep Energy"). In its lawsuit, Mesa sought to foreclose on three mineral liens and demanded payment from Deep Energy under Chapter 162 of the Texas Property Code. The trial court entered a take nothing judgment against Mesa based on certain waivers contained in the MSA. The appellate court affirmed.

The MSA between Mesa and Deep Operating contained several waivers and limitations on liability. For instance, the MSA expressly provided that Mesa "irrevocably waives any and all rights to lien, sequester, attach, seize or assert a privilege over the Work performed [by Mesa], the real property upon which the Work is located and any hydrocarbon produced associated with the Work." Furthermore, in the MSA, Mesa represented that it was "relying on the creditworthiness" of Deep Operating and would "look solely and exclusively to [Deep Operating] for payment" and would not "lien or otherwise encumber the real property of [Deep Operating] … or any hydrocarbon associated therewith." Based on this language, Deep Energy moved for summary judgment against Mesa, arguing that Mesa was contractually prohibited from asserting liens against the property and waived the right to seek payment from any party other than Deep Operating. Although Deep Energy asserted counterclaim for breach of contract and fraudulent lien, it nonsuited those claims after obtaining summary judgment on Mesa's claims. Mesa appealed.

The court of appeals held that the provisions in the MSA were unambiguous and enforceable. In reaching this decision, the appellate court relied on cases from other appellate jurisdictions and the Texas Supreme Court. The court ultimately concluded that "[i]n contractually limiting its recourse for payment solely to Deep Operating, Mesa cannot obtain satisfaction of the alleged debt from Deep Energy either by direct money judgment or through foreclosure and sale based on purported lien rights." Mesa's claims were dismissed and Mesa was ordered to release its liens.

About the Author

Chris Halgren *is a partner in our Houston office and a member of the Oil & Gas Practice Group.*

For more information about this case, contact Chris at 713-615-8539 or chalgren@mcginnislaw.com.

Appellate Court Holds that "Blanket Easement" for Multiple Pipelines Did Not Require Single Route Across Property

Atmos Energy Corp. v. Paul, No. 02-19-00042-CV, 2020 Tex. App. LEXIS 1926 (Tex.App.-Ft. Worth, Mar. 5, 2020, no pet.)

By: Austin Brister and Michael Szymanski

In this case the Fort Worth Court of Appeals held that a "blanket easement" for multiple pipelines did not require the grantee to lay the additional pipelines along the same route as the initial pipeline, but rather the grantee was permitted to lay the additional pipeline anywhere upon the entire tract so long as its location does not unreasonably interfere with grantor's property rights.

The basis for the suit stems from a right-of-way and easement granted in 1960 on a 137-acre tract for the purpose of "construct[ing], maintain[ing] and operat[ing] pipelines." Soon after the initial conveyance, grantee constructed Line W which runs parallel to the southern border of the tract. Decades later, in 2017, Atmos Energy Corp. ("Atmos") intended to construct a second pipeline along a markedly different route on the other side of the property. Paul (the successor-in-interest of the 1960 grantor) denied Atmos access to the property to begin construction of the pipeline. Atmos filed suit against Paul for breach of the right-of-way and easement agreement.

At trial, Paul moved for summary judgment on the basis that the Easement Agreement only permitted the creation of "one right-of-way and easement" that "allows for multiple pipelines, [but] not multiple easements." The trial court granted Paul's summary judgment motion and Atmos appealed.

On appeal, the Court began by stating the Easement Agreement was a "blanket easement" because the legal description only described a burdened tract but not a route for the easement. In addition, the Court noted that the deed's granting clause permitted grantee to construct multiple pipelines. On this basis, the court distinguished the prior Texas Supreme Court holding in *Houston Pipe Line Co. v. Dwyer*, 374 S.W.2d 662, 665-66 (Tex. 1964), as the deed in that case provided for the construction of a single pipeline and held that the location of the initial pipeline established the route for that one line, but that was not determinative of the location of subsequent pipelines such as in this case.

The Court also rejected Paul's argument that the deed must expressly permit "multiple routes" in order to allow multiple routes.

The court rejected that argument, indicating that there is no strict requirement to use that language, so long as there are other indicia of the drafter's intent permitting pipelines to be constructed in multiple routes along the blanket easement.

Nevertheless, the Court stated the grantee's ability to construct a pipeline on any part of the property is not without its limitations. The Court made note of the "reasonable necessity test" that applies to all such Texas cases. Under Texas law, the Court held, a grant or reservation of an easement in general terms implies a grant of unlimited "reasonable use," such as is "reasonably necessary and convenient and as little burdensome as possible to the servient owner."

About the Authors

Austin Brister *is a partner in our Houston office and a member of the Oil and Gas Practice Group. Austin represents oil and gas exploration and production companies and landowners in complex litigation.*

Michael Szymanski *is an associate in our Houston office and a member of the Oil and Gas Practice Group. Prior to joining the Firm, Michael worked as a geophysicist for over three years for a major seismic reprocessing company. Later, while attending law school, Michael worked full-time in the Land Department of an oil and gas company as a Lease Analyst, processing and monitoring more than $15 million of annual company drilling projects in the company's South Texas and Wyoming assets.*

For more information about this case, contact Austin at 713-615-8523 or abrister@mcginnislaw.com or Michael at 713-615-8535 or mszymanski@mcginnislaw.com.

Texas Supreme Court Holds that Assignment Conveyed Entire Lease Interest, Not Merely A Wellbore Interest

Piranha Partners v. Neuhoff, No. 18-0581, 63 Tex. Sup. Ct. J. 474, 2020 Tex. LEXIS 136 (Tex. Feb. 21, 2020)

By: Jordan Mullins and Michael Szymanski

Where parties assign an interest in a lease with a single existing well, disputes can sometimes arise when the leasehold is further developed. Was the parties' intent for the assignment to be limited to that single wellbore or did it also include production from later-drilled wells? The Texas Supreme Court reviewed a dispute as to whether an assignment of an overriding royalty interest conveyed an interest limited to an entire lease, a single well, or to the lands identified in the assignment.

In 1975, Neuhoff Oil & Gas ("Neuhoff") purchased a two-thirds interest in the Puryear Lease, an existing lease covering all the minerals under a tract of land. Neuhoff later sold its two-thirds interest in the Puryear Lease but reserved a 3.75% overriding royalty interest on all production under the Puryear Lease. For twenty-four years, only one well was completed on the lands covered by the lease, the Puryear B #1-28. Then, in 1999, Neuhoff sold its overriding royalty interest at auction to Piranha Partners ("Piranha"). Neuhoff then went out of business, assigning its remaining assets to individual family members (the "Neuhoff Heirs").

The operator under the Puryear Lease paid Piranha an overriding royalty on the Puryear B #1-28, but on additional wells it drilled on the

lease, it paid an overriding royalty to the Nuehoff Heirs, believing Piranha had only been conveyed the overriding royalty interest in the specific well and not on all production under the Puryear Lease. The Piranha Assignment's granting clause conveyed all of Neuhoff's interest in properties described in an attached "Exhibit A" which described Neuhoff's overriding royalty interest by reference to the Puryear #1-28, the land, and the Puryear Lease.

The Texas Supreme Court indicated Piranha erroneously relied upon numerous rules of construction that were not applicable. For instance, Piranha argued that the "greatest estate" canon applied since the assignment used the word "all." The Court dismissed the canon's applicability because the Assignment was unambiguous and the remainder of the sentence Piranha focused on included "all…right, title, and interest in and to the properties described in Exhibit 'A'," which, nevertheless, required analysis of Exhibit A.

Piranha also erroneously relied on construction rules regarding the clarity by which an instrument must describe a reservation or exception. The Court found those rules inapplicable because the issue was the scope of the grant to Piranha, not a reservation or exception. The Court also dismissed Piranha's "construe against the grantor" argument, because the assignment was unambiguous.

The Neuhoff Heirs, on the other hand, primarily relied upon so-called "surrounding circumstances evidence," including descriptions that appeared in the auction documentation and argued this information showed the interest offered was limited to the well. Arguing the flip side, Piranha contended those same documents did not describe the interest as "WBO," an acronym sometimes used in auction materials to show an offered interest pertained to "wellbore only." Piranha also pointed to the agreement Neuhoff signed with the auction house, indicating it was not selling a "fractionalized interest." The Neuhoff Heirs, however, argued that the agreement applied to Neuhoff selling 100% of its interest in the Puryear B #1-28. The Court concluded the auction documents failed to support either side as the documents disclaimed the reliance placed on them by the parties, requiring that the parties instead look to the actual Assignment to Piranha.

The Court ultimately held that Piranha Assignment included all overriding royalty in the Puryear Lease, not just in the land or the wellbore. Rather than apply rules of construction or surrounding circumstances, the Court used a "holistic and harmonizing approach" in construing the language within the Assignment and its Exhibit A. Specifically, the Court focused on several provisions in the Assignment referencing the interest in the lease (as opposed to in a well or lands), and language describing the interest being conveyed as "all oil and gas leases…which shall include any…overriding royalty interests…held by [Neuhoff], as of the Effective Date," to mean the Assignment to Piranha included all interest then owned by Neuhoff.

In addition, the Court noted the language "All presently existing contracts…to the extent they affect the Leases," indicated "Neuhoff Oil conveyed its entire interest under the Puryear Lease," further discrediting the assignment to Piranha was limited to the wellbore or land itself. Other provisions also referenced the lease, including a provision which indicated that the overriding royalty was payable out of oil produced under the lease and pursuant to the terms of the lease. The proportionate reduction clause also referenced the assignor's interest in the lease.

As a result, the Court concluded that the Assignment to Piranha conveyed the overriding royalty interest as to all production under the Puryear Lease, not just in the Puryear #1-28.

Taken as a whole, the conclusion in this case is largely consistent with the body of case law emphasizing a holistic and harmonizing approach to deed interpretation. This case underscores the importance of ensuring that not only the body of an assignment, but also the exhibits, both carefully describe the intended scope of the conveyance. It also underscores that boilerplate "all right, title, and interest" language is not always merely expansive quitclaim language, but sometimes can have material meaning. It is important to evaluate the rights of either party in the event circumstances change in the future (i.e. drilling and production of an additional well).

About the Authors

Jordan Mullins *is a partner in our Austin office and a member of the Oil and Gas Practice Group. Jordan represents individuals and businesses in commercial disputes with an emphasis on energy industry clients. He has represented energy industry clients in actions in Texas, Oklahoma, Kansas, Louisiana, and Wyoming.*

Michael Szymanski *is an associate in our Houston office and a member of the Oil and Gas Practice Group.*

For more information about this case, contact Jordan at 512-495-6006 or ***jmullins@mcginnislaw.com*** *or Michael at 713-615-8535 or* ***mszymanski@mcginnislaw.com****.*

Appellate Court Holds that "Shall Not Affect" and "Other Benefits" Language Reserved the Entirety of Royalty Interest

WTX Fund, LLC v. Brown, No. 08-17-00104-CV, 2020 Tex. App. LEXIS 94 (Tex. App.—El Paso Jan. 8, 2020, pet. filed)

By: Austin Brister and Michael Szymanski

In *WTX Fund v. Brown*, the El Paso Court of Appeals reviewed a dispute as to whether language in a 1951 mineral deed was sufficient to reserve a royalty interest in whole or in part. That issue turned largely on the meaning of the phrases "shall not affect" and "benefits." Ultimately, the El Paso Court of Appeals held that, under the holistic four-corners approach, the proper interpretation was that the deed reserved the entirety of the grantor's royalty interest.

The granting clause expressly conveyed "the leasing rights, bonuses and delay rentals …" The deed also contained an "intention clause," expressing the intention to convey executive rights, "the 7/8 leasing rights or working interest," and "all bonuses, delay rentals, oil payments ***and all other rights and benefits…***" (emphasis added). The court explained that, by describing the rights as "executive rights," as a "working interest," and as a 7/8 interest (lessee's historic share of production), revealed no intention to include a royalty interest.

However, the court explained that the sharpest points of contention turned on the meaning of the phrase "all other rights and benefits." The court held this did not equate with a conveyance of the royalty interest. Unlike "royalty" or "bonus" which have well-understood meanings, "benefit" is interchangeable and operates as a catch-all. By appearing in the deed alongside "bonus" and "delay rental," the word "benefit" in this deed represented the economic benefits of a mineral lessee, in contrast to the royalty interest "expressly reserved … by other language."

The court also indicated there was sharp contention regarding the meaning of the following provision:

> This conveyance ***shall not affect*** any interest … **in the future to the non-participating 1/8th royalty in and under said land**, and the grantors shall have no right to **any bonuses, delay rentals, oil payments or other *benefits* under any oil, gas and mineral leases which have been made or which may hereafter** be made by grantee… (emphasis by court).

The grantee's successors argued the "shall not affect" language was too unclear to effect a reservation. The court disagreed stating that this phrase described mandatory language, and that it indicated the granting language was not to act on those specified ownership rights. The court further stated that no "magic words" are required for a reservation. The court also refused to interpret the clause as a "subject to" clause, explaining that "rather than refer to the rights of another party, the deed's language specifies that the conveyance to grantee shall not affect grantors' own rights to the non-participating 1/8th royalty."

Ultimately, the Court concluded that the Deed conveyed the leasing right, bonuses delay rentals, and development rights in their entirety, but reserved the entire non-participating royalty interest as a floating royalty (rather than a fixed fraction or fixed royalty) in favor of the grantors.

About the Authors

Austin Brister *is a partner in our Houston office and a member of the Oil and Gas Practice Group.*

Michael Szymanski *is an associate in our Houston office and a member of the Oil and Gas Practice Group.*

For more information about this case, contact Austin at 713-615-8523 or abrister@mcginnislaw.com or Michael at 713-615-8535 or mszymanski@mcginnislaw.com.

Can Emails Form a Purchase Contract? Texas Supreme Court Tackles the Issue in Two Recent Cases

Chalker Energy Partners III, LLC v. Le Norman Operating LLC, No. 18-0352, 2020 Tex. LEXIS 161 (Tex. Feb. 28, 2020);

Copano Energy, LLC v. Bujnoch, No. 18-0044, 63 Tex. Sup. Ct. J. 348, 2020 Tex. LEXIS 49, (Jan. 31, 2020)

By: Austin Brister and William K. Grubb

In response to COVID-19, many companies and their employees have quickly shifted to a "work from home" model. Even though email has been a large part of business for decades, the new "remote" reality has only increased our reliance on electronic communications. In a pair of recent cases, the Texas Supreme Court was tasked with deciding what role email plays in contract formation. As companies continue to conduct an extensive amount of business electronically, it is important to keep in mind what effect courts will give to agreements formed through email conversations.

Chalker Energy Partners III, LLC v. Le Norman Operating LLC

In *Chalker*, The Texas Supreme Court had to decide whether an email exchange was sufficient to constitute a contract for the purchase and sale of $230 million in oil and gas assets. The sellers were 18 working interest owners in 70 oil and gas leases in the Texas panhandle. The sellers conducted a sale with bidding procedures that required the signing of a confidentiality agreement prior to gaining access to a virtual data room. The confidentiality agreement contained a "No Obligation" provision, indicating that, "unless and until a definitive agreement has been executed and delivered, no contract or agreement providing for a transaction between the Parties shall be deemed to exist."

Pursuant to the bidding procedures, Le Norman emailed a bid of $332 million for 100% of the Assets, indicating it was "subject to the execution of a mutually acceptable [PSA]," along with a proposed PSA. Jones Energy submitted a higher bid, and then Le Norman increased its bid to $345 million. The sellers refused to accept Le Norman's bid, and Le Norman declined further bidding.

The sellers then offered to sell 67% of the assets. Le Norman emailed a proposed set of deal terms, including a $230 million sales price and stating "PSA similar to what we returned." The email indicated Le Norman would not consider any counter proposals and gave a firm deadline of 5:00 pm the next day to accept. The sellers accepted the offer by email before the deadline, but "subject to a mutually agreeable PSA." Hours later the sellers provided a revised PSA and invited further discussion. The sellers sent Le Norman's private equity investor a congratulatory email, and Jones Energy emailed the sellers stating they "hear that we lost the deal again."

However, a few days later, Jones Energy presented the sellers with a new offer, which the sellers ultimately voted to accept. About a week after the sellers had already emailed Le Norman to accept its offer, the sellers executed a purchase and sale agreement with Jones Energy. That same day, unaware of what had happened, Le Norman's general counsel sent the sellers a redlined PSA.

Le Norman sued the sellers for breach of contract, contending that their email exchange constituted an enforceable agreement. The trial court held in favor of the sellers, and the Houston First Court of Appeals reversed and remanded, holding that there was a fact issue as to whether the parties intended to be bound by the terms in the emails.

The Texas Supreme Court reversed the court of appeals and rendered judgment in favor of the sellers. The court held that, by agreeing to the "No Obligation" provision in the Confidentiality Agreement, the parties had agreed upon an enforceable condition precedent to contract formation. As

the court acknowledged, most sophisticated transactions are now conducted by email, and parties often protect themselves by stipulated conditions precedent to contract formation. "A party seeking to recover under a contract bears the burden of proving that all conditions precedent have been satisfied."

The Court also rejected Le Norman's argument that the emails raise a fact issue as to whether a definitive agreement existed. The Court acknowledged that its previous decisions held that there can be a fact question regarding whether parties intend for a definitive document to be a condition precedent or merely a "memorial of an already-enforceable contract." However, those cases did not involve an express condition precedent like the No Obligation provision.

The Court also indicated that, although the emails in this case were in writing, they were not sufficient to form a definitive agreement, as the confidentiality agreement expressly indicated that a letter of intent or preliminary written agreement would not be sufficient. It is important to note that the Court faced a somewhat similar case involving ETP and Enterprise just a few months before the Court addressed this case. The court also rejected Le Norman's argument that the No Obligation clause did not apply since the disputed emails were after the formal bidding process. The Court disagreed, reasoning that the subject line "Counter Proposal" indicated that the negotiations were a continuation of the prior negotiations, and because the Confidentiality Agreement did not terminate until a year later.

Le Norman also argued there was a fact issue regarding whether the sellers waived the condition precedent established under the No Obligation clause, relying upon inconsistencies between the bidding procedures and how the parties actually made and responded to offers. The court rejected that argument, indicating that the deviation from bidding procedures was not evidence of an intentional relinquishment of the No Obligation provision. In addition, the parties' conduct was not inconsistent with the No Obligation provision, as the emails specifically contemplated working on and executing a PSA, and the email offer was made "subject to a mutually agreeable PSA."

Copano Energy, LLC v. Bujnoch

In another case involving emails, the Texas Supreme Court held that a series of emails relating to the purchase of an easement were not sufficient to meet the statute of frauds.

The plaintiffs were landowners in Lavaca and Dewitt Counties. In 2011, the landowners granted easements to Copano for the construction and operation of a 24-inch pipeline on their properties. In 2012, Copano approached the landowners about obtaining another easement to construct an additional pipeline.

A Copano landman contacted Marcus Schwartz, an attorney representing the landowners, to discuss the proposed second easement. The attorney's assistant exchanged several emails with the landman in advance of a meeting scheduled between the attorney and the landman. The emails included a discussion of the size of the proposed pipeline and what type of gas it would transport. Notably, the subject of the email was "Meeting with Schwartz."

Following the date of the proposed meeting, the landman emailed Schwartz directly for the first time. Schwartz said [p]ursuant to our conversation earlier, Copano agrees to pay your clients $70.00 per foot for the second 24-inch line it proposes to build. In addition to this amount Copano agrees to address and correct the damages to your client's property caused due to the construction of the first 24-inch line." Schwartz responded, "[i]n reliance on this representation we accept your offer and will tell our client you are authorized to proceed with the survey on their property. We would appreciate you letting them know a reasonable time before going on their property." Copano was in the midst of a sale to Kinder Morgan, and the second pipeline was never built.

The landowners sued Copano and Kinder Morgan for, among other things, breach of contract. The landowners claimed a contract to sell an easement to the landowners for $70 per foot existed and was enforceable. Copano and Kinder Morgan moved for summary judgment based on the statute of frauds.

The Supreme Court of Texas held that the statute of frauds was not met, even though the emails "surely contain[ed] an offer and an acceptance." The Court explained that essential terms, such as the easement's location and size, were not present in the emails in a form sufficient to demonstrate an intent to be bound. While certain terms were discussed via email, the Court found they were in anticipation of future, in-person meetings. According to the Court, these emails were nothing more than forward looking requests to negotiate. Thus, the landowners could not meet the statute of frauds.

About the Authors

Austin Brister *is a partner in our Houston office and a member of the Oil & Gas Practice Group. Austin represents oil and gas exploration and production companies and landowners in complex litigation.*

William K. Grubb *is an associate in our Houston office and a member of the Oil & Gas Practice Group. William assists clients with complex commercial litigation, with an emphasis on oil & gas.*

For more information about these contract law issues, contact Austin at 713-615-8523 or abrister@mcginnislaw.com and William at 713-615-8515 or wgrubb@mcginnislaw.com.

Strip and Gores Doctrine Extends Conveyance to Include Adjacent Severed Mineral Interest

Crawford v. XTO Energy, Inc., No. 02-18-00217-CV, 2019 Tex. App. LEXIS 11066 (Tex. App.—Fort Worth Dec. 19, 2019, pet. filed)

By:William K. Grubb and Austin Brister

The Fort Worth Court of Appeals held that the "strip and gore doctrine" applied to a 1984 conveyance of 76 acres, causing the conveyance to also include a severed mineral interest underlying an adjacent 8.25-acre strip of land.

Mary Ruth Crawford owned 145.99 acres of land in Tarrant County, Texas. In 1964, she conveyed to TESCO the surface of an 8.25 acre tract of land ("Disputed Tract"). That 1964 deed contained a mineral reservation and surface waiver, reading as follows:

> Grantors reserve unto themselves, [and] their heirs and assigns, the right to all oil and gas in and under the lands herein conveyed [the Disputed Tract] but expressly waive all rights of ingress and egress for the purpose of drilling for or producing oil and/or gas from the surface of the [Disputed Tract] provided that wells opened on other lands may be bottomed on [the Disputed Tract].

Subsequently, in 1984, Mary Ruth Crawford conveyed 76 acres of land to the north and south of the Disputed Tract, without any mention of the 8.25 acre tract or the mineral reservation.

In 2007, Crawford executed an oil and gas lease covering the Disputed Tract. XTO pooled the interest in a unit and drilled and completed four wells. The Court held that the strip-and-gore doctrine applied in this case, causing the 1984 deed to include the Disputed Tract in the conveyance.

The Court focused its analysis on the requirement that the narrow strip of land must have ceased to be of any benefit or importance to the grantor at the time of the deed. The Court reasoned that the Disputed Tract was of no practical benefit to Crawford in 1984 because the 1964 deed had already waived Crawford's surface rights to the Disputed Tract. As the Court explained, prior to the advent of horizontal drilling in around 2002, minerals were "wholly worthless" if the mineral owner could not obtain surface access. The Court also explained in a footnote that "there is no evidence that pooling with other mineral interest owners was a possibility in 1984."

Crawford argued that the surface waiver in the 1964 deed was conditional. The Court acknowledged that "provided that" clauses can sometimes be interpreted as a condition or the "functional equivalent of 'if.'" However, the Court rejected Crawford's argument, explaining that in context of the remainder of the deed made, the parties' intent was clear that the "provided that" clause was intended to reinforce the waiver, describing that the only means of physical intrusion would be by slant drilling that would not invade the surface estate.

This case was the subject of previous appeals through to the Texas Supreme Court on procedural grounds. See Crawford v. XTO Energy, Inc., 509 S.W.3d 906 (Tex. 2017). Additionally, a petition for review has been filed in the case, and the Court has requested a response.

About the Authors

William K. Grubb *is an associate in our Houston office and a member of the Oil & Gas Practice Group. William assists clients with complex commercial litigation, with an emphasis on oil & gas.*

Austin Brister *is a partner in our Houston office and a member of the Oil & Gas Practice Group. Austin represents oil and gas exploration and production companies and landowners in complex litigation.*

For more information about these regulatory issues contact William at 713 615-8515 or wgrubb@mcginnislaw.com and Austin at 713-615-8523 or abrister@mcginnislaw.com.

Miscellaneous Case Updates

Seeligson v. Devon Energy: Gas Processing Fee Class Certified

Seeligson v. Devon Energy Prod. Co., L.P., Civil Action No. 3:16-CV-00082-K, 2020 U.S. Dist. LEXIS 23166 (N.D. Tex. 2020).

In this royalty class action case, the class plaintiffs alleged that DEPCO improperly passed a 17.5% "gas processing fee" on to all class members by reducing their royalty payments by 17.5% thereby breaching the duty to market. In certifying the class, the court reasoned that because the gas is bought and sold under one contract and determining the rate a reasonably prudent operator would have received ("RPO Rate") did not require proof of other sales, determining the RPO rate was subject to generalized proof and applicable to the class as a whole. The court also noted that the entire class was comprised of proceeds leases, making it distinguishable from the Texas Supreme Court's decision in Union Pac. Res. Grp., Inc. v. Hankins, 111 S.W.3d 69 (Tex. 2003).

Energy Transfer v. Enterprise: Common Law Partnership

Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P., No 17-0862, Tex. Sup. Ct. J. 340, 2020 Tex. LEXIS (Tex. Jan. 31, 2020).

Energy Transfer Partners, L.P. ("ETP") claimed that it had entered into a common law partnership with Enterprise Products Partners, LP and Enterprise Products Operating, LLC (collectively, "Enterprise") to place into operation an oil pipeline. However, in three written agreements the parties had reiterated their intent that neither party would be bound to proceed until each company's board of directors had approved the execution of a formal contract. Thus, the Texas Supreme Court was tasked with determining whether Texas law permits parties to conclusively agree that, as between themselves, no partnership will exist unless certain conditions are satisfied. The Supreme Court affirmed the appellate court's decision, holding that it does and that ETP and Enterprise had made such an agreement and, as a result, had not entered into a partnership.

Geary v. Two Bow Ranch: Mineral Reservation

Geary v. Two Bow Ranch Ltd., P'ship, No. 04-18-00610-CV, 2020 Tex. App. LEXIS 552 (Tex. App.—San Antonio Jan. 22, 2020, pet. filed).

In this case, grantors under a warranty deed reserved an interest in the minerals but assigned the grantee a so-called "provisional authority" with respect the executive rights. Years later, the grantors file suit against the grantee's successors, claiming that they breached their alleged contractual or fiduciary duties as executive interest owners. The grantees' successors responded by disclaiming any ownership interest in the executive rights. The court interpreted the Provisional Authority clause as granting a conditional permission to exercise the grantor's executive rights. However, the court held that it did not actually convey an ownership interest in the executive rights. Further, the court held that those powers were exercisable by the original grantee alone and would not pass to grantee's successors or assigns. Therefore, the court concluded that the grantee's successor could not be liable for any alleged breach of contractual or fiduciary duties as an executive interest owner.

Samson v. Moak: Pooled Unit – Right to Accounting

Samson Expl., LLC v. T.W. Moak & Moak Mortg. & Inv. Co., No. 09-18-00463-CV, 2020 Tex. App. LEXIS 443 (Tex. App.—Beaumont Jan. 16, 2020, no pet.).

Held that foreclosure of deeds of trust covering a lessor's property, which were not made subordinate to the oil and gas leases, terminated the leases and the lessor's corresponding reversionary interest. As a result, a post-foreclosure purchaser of the mineral interest was not entitled to an accounting from a pooled unit that included the original lease. The court held that, even though the pooling declaration purported to pool "the land" as opposed to the leases themselves, the foreclosures had the effect of terminating the leases and the original lessee's pooling authority.

Verde Minerals v. Koerner: Royalty Deed

Verde Minerals, LLC v. Koerner, No. 2:16-CV-199, 2019 U.S. Dist. LEXIS 207737 (S.D. Tex. 2019).

The grantees under a royalty deed were permitted to maintain suit against their grantors for unpaid royalties, and were not limited to filing suit against the lessee. The royalty deed contained language obligating the grantors to "pay and deliver to [grantees]" all money received by grantors. The court held that, absent specific language to the contrary in a royalty deed, the owner of the executive interest does not effectively assign a prior contractual obligation to pay royalties by executing an oil and gas lease, nor will signing an oil and gas lease release the executive owner from obligations contained within the royalty deed.

About McGinnis Lochridge

McGinnis Lochridge is a highly experienced, multi-practice Texas law firm with more than 75 lawyers. Founded in 1927, McGinnis Lochridge has for more than 90 years maintained strong ties to its judicial and legislative traditions. The Firm has been fortunate to count among its lawyers distinguished leaders in judicial and governmental positions, including state and federal trial judges, a Texas Supreme Court justice, a Fifth Circuit justice, state and federal legislators, a past president of the Texas Bar, and even a governor of Texas. The Firm has continued to grow and adapt to meet clients' needs in a changing and increasingly complex business environment.

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

Throughout its history, the Firm has been a leader in the development of oil and gas law serving as trial and appellate counsel in several landmark cases setting important oil and gas law precedents. The Firm successfully represents oil and gas producers, marketers, and transporters in a wide range of matters including disputes over leasehold rights, joint interest billing, royalties, prudent operations, and constitutional limits on regulations that would unreasonably impair the oil and gas business.

At McGinnis Lochridge, each client and every legal matter receives partner-level attention. This client focus ensures maximum value, efficiency, and results. At the same time, the breadth of our practice areas enables clients to rely on McGinnis Lochridge as a comprehensive resource — a single-source, trusted advisor able to address the most challenging business and legal needs.

McGINNIS LOCHRIDGE
we're in it together®

Austin
600 Congress Ave., Ste. 2100
Austin, TX 78701
(512) 495-6000

Houston
609 Main St., Ste. 2800
Houston, TX 77002
(713) 615-8500

Dallas
2200 Ross Ave., Ste. 4900E
Dallas, TX 75201
(214) 307-6960

Decatur
203 W. Walnut St., Ste. 100
Decatur, TX 76234
(940) 627-1100

mcginnislaw.com