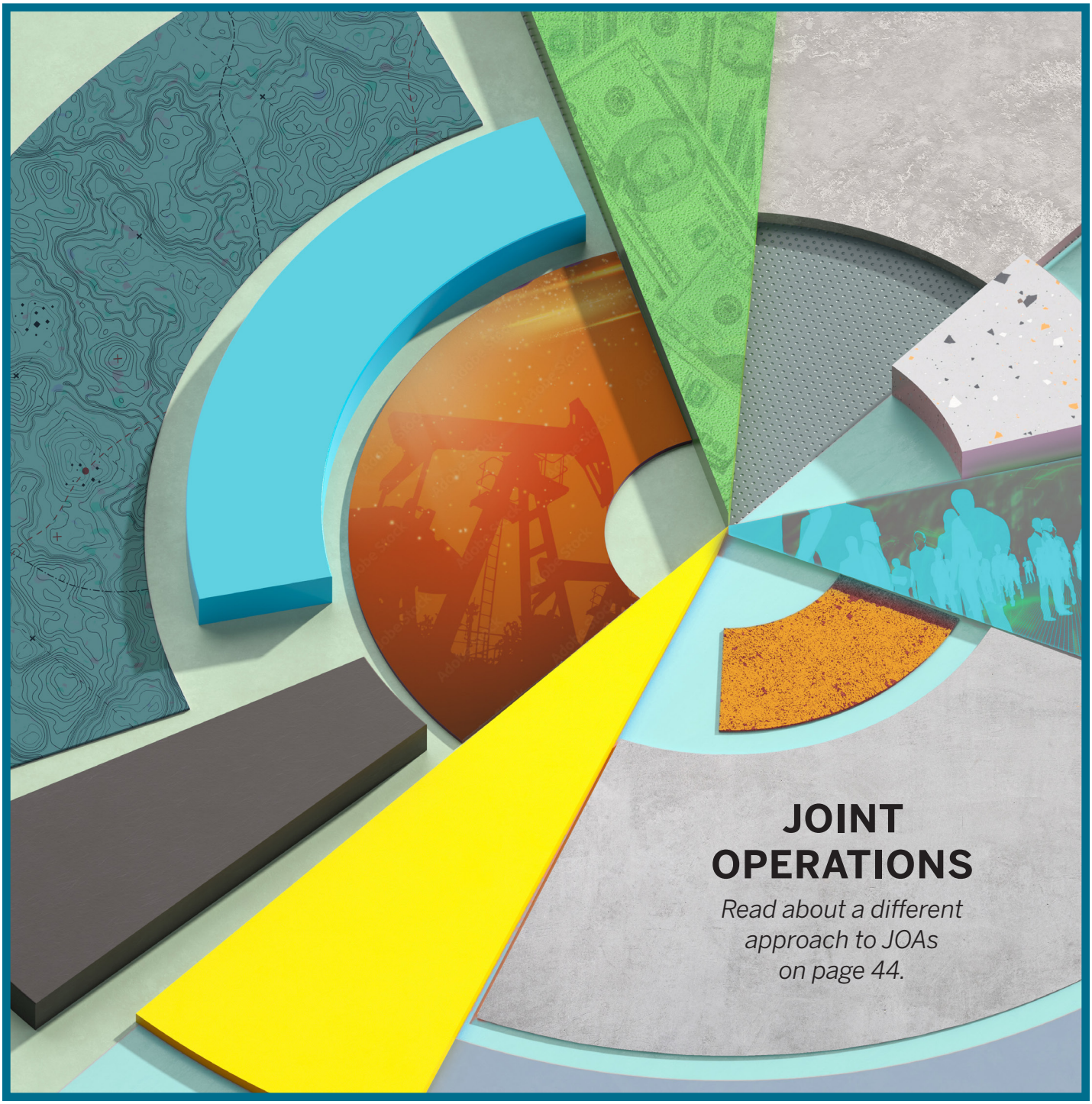
LANDMAN magazine



JOINT OPERATIONS

Read about a different approach to JOAs on page 44.

Top 10 Texas Oil and Gas Cases of 2021

by/ ETHAN WOOD

This article discusses significant oil and gas decisions, in chronological order, from state and federal courts in Texas during 2021. It is not intended to be a strict legal analysis but rather a useful guide for landmen in their daily work. Therefore, complete discussions of all legal analyses contained in the decisions are not included.

Lyle v. Midway Solar LLC 618 S.W.3d 857 (Tex. App. — El Paso 2020, pet. denied)

Decided Dec. 30, 2020[1]

In this case, the El Paso Court of Appeals held that the accommodation doctrine could apply to a dispute between the owners of oil and gas interests and surface owners who had leased a tract for a large-scale solar facility, but, ultimately, the causes of action asserted by the mineral owners were premature.

The Lyles were successors-in-interest to the grantor of a 1948 deed covering a tract of land in Pecos County. In the 1948 deed, the grantors conveyed the surface and reserved oil and gas interests, along with "the right to ... use of the surface estate in the lands above described as may be usual, necessary or convenient in the use and enjoyment of the oil, gas and general mineral estate hereinabove reserved."

In 2015, the owner of the surface estate leased the tract to Midway to place solar panels, transmission lines, electrical lines and cable lines. Midway ultimately constructed a solar facility covering 70% of the surface of the tract in which the Lyles owned a mineral interest, leaving certain portions of the tract unused as "designated drillsite tracts."

The Lyles filed suit claiming breach of contract and trespass, seeking damages and an injunction to remove the solar panels because the construction of the facility had "destroyed or greatly diminished the value of their mineral estate." Although the Lyles obtained affidavits from expert witnesses that horizontal drilling from the designated drillsite tracts was not economically feasible due to costs and geography, it was undisputed that the Lyles had never leased their interests, had no plans to lease their interests and had never commissioned geological surveys or otherwise taken any steps to develop the mineral estate. Midway filed for and obtained partial summary judgments that the accommodation doctrine applied to the dispute and that Midway's use of the surface was reasonable because the Lyles had taken no steps to develop the minerals. The El Paso Court of Appeals ultimately affirmed the trial court's ruling on these issues.

In Texas, the mineral estate is the dominate estate, but the mineral owner's rights to use the surface are not absolute. They can be limited by contract or the "accommodation doctrine," which seeks to balance the rights of the surface and mineral owner. Under this doctrine,

1 Although technically decided at the end of 2020, this decision came too late to make it into last year's Top 10 cases article.

the surface owner must show that the mineral owner's use of the surface completely precludes or substantially impairs the surface owner's existing use and that there is no reasonable alternative method available to the surface owner to continue said use. Additionally, the surface owner must further prove that under the circumstances, there are alternative reasonable, customary and industry-accepted methods available to the mineral owner that would allow for recovery of the minerals and also allow the surface owner to continue the existing use. If proved, the accommodation doctrine requires the mineral owner to use the alternative method. But if evidence shows that there is only one means of surface use to develop the minerals, the mineral owner is entitled to pursue such use regardless of surface damage.

The Court of Appeals first turned to whether the language of the 1948 deed precluded the application of the accommodation doctrine. Although the Lyles contended that the "usual, necessary or convenient" way to access the mineral estate at the time of the conveyance was vertical drilling, the court looked to prior Texas case law and concluded that this language was used in a general sense and that the contemplated use might change over time with advancements in technology.

Because the deed did not preclude application of the accommodation doctrine, the court then turned to the question of whether the Lyles had to attempt to develop their minerals to bring a claim. The Lyles argued that they had already suffered damage because the solar facility covered 70% of their tract. Midway argued that its use might only *potentially* interfere with the Lyles' mineral use at some point in the future. The court agreed with Midway, stating: "There is simply no logic in allowing trespass damages today for a mineral estate that might never be developed."

As Texas continues to lead the way as an energy producer — both in oil and gas and in wind, solar and geothermal — disputes will continue to arise among various interest owners. Going forward, solar and wind developers should seek surface use waivers from mineral interest owners and their lessees whenever possible, especially in areas with notable oil and gas development.

***BlueStone Nat. Res. II LLC v. Randle*, 620 S.W.3d 380 (Tex. 2021)**

Decided March 12, 2021

In this decision, the Texas Supreme Court weighed in on another postproduction cost dispute, holding that deduction of postproduction costs was improper where a lease explicitly resolved a conflict

between "gross value received" and "computed at the mouth of the well" language and that a lease's "free use" clause did not authorize the lessee to consume gas in off-lease operations without compensation.

BlueStone's predecessor-in-interest entered into several oil and gas leases with lessors. Each lease consisted of a two-page pre-printed form with an attached addendum providing that its language "supersedes any provisions to the contrary in the printed lease." Paragraph 3 of the pre-printed form required payment on "market value at the well." Paragraph 26 of the addendum provided for payment on "gross value received" and included typical "no deductions" language.

For more than a decade, the lessee paid royalties on gross value received. When BlueStone took over in 2016, it began deducting postproduction costs. Noticing the decline in royalties paid, several groups of lessors sued BlueStone over these deductions. While litigation was ongoing, the lessors also discovered that BlueStone was not paying royalties on commingled gas used as plant fuel by a third-party processor or on commingled gas the processor returned to BlueStone to fuel compressors on and off the leased premises. The trial court determined BlueStone had breached the lease by deducting postproduction costs and not paying royalty on plant and compressor fuels. The Court of Appeals affirmed. BlueStone appealed.

The basic structure of a royalty clause has three components: the royalty fraction (e.g., 1/8th, 25%, 1/5th), the yardstick (e.g., market value, proceeds, price) and the location for measuring (e.g., at the well, at the point of sale). BlueStone argued that because the addendum lacked the third element — a valuation point — the pre-printed form controls and that the "at the well" measurement necessitated deduction of postproduction costs. The lessors argued that "gross value received" is equivalent to gross proceeds and that the language supplied both the second and third elements of the royalty component.

After a brief examination of the distinction between market value and amount realized clauses, the court noted that generally a royalty clause based on "amount realized" creates an interest free of postproduction costs. But this general rule can be modified depending on the language used, as was the case in the court's 2019 decision in *Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy LLC*. Here, however, the lease addendum's use of "gross proceeds" could not be harmonized with an "at the well" measurement point — unlike in *Burlington,* which combined "amount realized" language with "into the pipelines" language. Thus, the court concluded that the lease addendum expressly resolved the conflict and that BlueStone improperly deducted royalties.

Turning to the plant and compressor fuel issue, the court rejected BlueStone's argument that the free use clause excused nonpayment for such gas. The free gas provision provided that the lessee "shall have free from royalty ... the use of ... gas ... produced from said land in all operations which Lessee may conduct hereunder." Although BlueStone argued that using gas for plant and compressor fuels benefited and furthered lease operations, the court found that the lease's language could not be reasonably construed as extending to off-lease uses. The court affirmed the appellate decision but remanded the case for further consideration of damages for off-lease compressor fuel use.

This case has already been cited in multiple postproduction and off-lease use cases. Lawyers and landmen should strive to ensure that every royalty provision has a royalty fraction, a "yardstick" and a measuring point consistent with the "yardstick" to avoid confusion and costly litigation.

***Headington Royalty Inc. v. Finley Res. Inc.*, 623 S.W.3d 480 (Tex. App. — Dallas 2021, pet. filed)**

Decided March 18, 2021

In this case, the Dallas Court of Appeals considered the scope of the term "predecessors" in the context of a release of claims provision in an acreage swap between leasehold owners.

Finley Resources owned leasehold rights and operated the shallow depths of a tract in Loving County. Headington owned portions of the leasehold in the shallow depths as well as most of the deep rights. In 2017, Petro Canyon Energy obtained a top lease on the tract covering all depths and notified Finley that the bottom lease may have expired for lack of production in paying quantities. Finley quitclaimed its interest to Petro Canyon and transferred operatorship of its wells to Petro Canyon's affiliate.

Petro Canyon and Headington then executed an acreage swap in which Petro Canyon assigned the top lease to Headington and Headington assigned interests in other tracts to Petro Canyon. The acreage swap included a release provision stating that Headington "waives, releases, acquits and discharges *Petro Canyon and its* affiliates and their respective officers, directors, shareholders, employees, agents, *predecessors* and representatives for any liabilities ... related in any way to the Loving County Tract." No part of the acreage swap specifically identified or mentioned Finley, and Finley did not sign the agreement.

Before quitclaiming its interest, Finley notified Headington that Finley intended to plug and abandon its wells. Headington claimed that the notice was late and breached the assignment through which Finley obtained its rights. Headington sued Finley, seeking to recover damages for an alleged premature and unnecessary termination of the bottom lease. Petro Canyon intervened and argued that the acreage swap's release barred the claim because Finley was Petro

Canyon's "predecessor." The trial court granted summary judgment in favor of Finley/Petro Canyon, and Headington appealed.

On appeal, the Dallas Court of Appeals noted that a release in an agreement will only apply to a party that is specifically identified in the release or described with sufficient particularity. The court then looked to the commonly understood meaning of the word "predecessor" and concluded that the term referred to Petro Canyon's corporate predecessors — i.e., prior forms of the business entities and individuals who previously served as officers, directors, shareholders, employees, agents or representatives of those entities — not to its predecessors-in-title. Although the dissent argued that the release should have been construed more broadly in light of the surrounding circumstances and that Texas case law uses "predecessors-in-title" and "predecessors" interchangeably, the majority dismissed these arguments as "impermissibly rewriting the ... agreement."

Petition for review has been filed, so don't be surprised if this case makes it to a future installment of Top 10 Oil and Gas Cases.

Lockhart as Tr. of Lockhart Family Bypass Tr. v. Chisos Minerals LLC, 621 S.W.3d 89 (Tex. App. — El Paso 2021, pet. denied)

Decided March 24, 2021

In this case, the El Paso Court of Appeals held that a trespass-to-try title claim failed because the record conclusively negated the plaintiff's claim to superior title. The court rejected several alternative theories for why a conveyance was void — not voidable — but this decision is especially notable for its analysis of quitclaim and special warranty language in conveyances.

William Lockhart owned mineral interests in a tract of land in Howard County and died in 2001. His will bequeathed these interests to a bypass trust and named his wife, Jean, as independent executor, granting her "all of the powers enumerated in this will and all powers now or hereafter conferred by the Texas Trust Code." By a distribution deed — that was subsequently corrected twice — Jean Lockhart "as Executor of the Warren L. Lockhart Estate" conveyed the mineral interests to three individuals, who ultimately conveyed the interests to Chisos, et al.

Jean Lockhart — in her capacity as trustee of the bypass trust — filed suit against Chisos, asserting claims for trespass to try title, rescission and cancellation of one of the correction deeds and a suit to quiet title. The trial court denied

her motion for summary judgment, granted Chisos' motion for summary judgment, quieted title to the interests and ordered that Lockhart take nothing. Lockhart appealed.

The primary issue on appeal concerned whether Lockhart conclusively established one of the elements of a trespass-to-try title claim. The Court of Appeals first noted the differences between a trespass-to-try title claim and a quiet title action: A claimant in a trespass-to-try title action must prove superior title to the interests. To the extent Lockhart could establish the distribution deeds were *void* and not simply *voidable*, her trespass claim could proceed. Otherwise, her waiver of the quiet title and rescission claims on appeal would preclude relief.

Lockhart argued that she did not sign the distribution deeds as trustee, she lacked authority to sign as executor, the distribution deeds were mere quitclaims (and the estate owned no interest to convey) and the correction deeds were not valid and, therefore, the original deed did not properly convey mineral interests. Although the court agreed that she did not execute the distribution deeds as trustee, it concluded she did have authority to sign them as executor, the distribution deeds were *not* quitclaim deeds and the original distribution deed was properly corrected. Accordingly, the distribution deeds were not void and the record conclusively negated a crucial element of her trespass-to-try title claim.

The Court of Appeals' analysis of the quitclaim issue is particularly of interest. For years, Texas oil and gas commentators have warned that conveyances of "all right, title and interest" coupled with general or special warranty language without including a specific quantum of interest may actually be quitclaim conveyances. Whether an instrument is a quitclaim or not affects several legal rights of the grantees. Consequently, many lawyers and landmen insist upon including a warranty of a specific quantum of interest where a deed grants "all right, title and interest" to protect grantees, based in part on the 2009 Eastland Court of Appeals decision in *Enerlex Inc. v. Amerada Hess Inc.*

Here, the distribution deed conveyed "all of the Estate's interest, if any" and further recited that grantor would "warrant and forever defend the said property ... against every person lawfully claiming or to claim the same or any part thereof, by, through, or under grantor but not otherwise." The *Lockhart* court looked to the recent Texas Supreme Court case, *Chicago Title Ins. Co. v. Cochran Investments Inc.,* to conclude that the correction deeds were not quitclaims because they contained a special warranty provision. Lockhart had argued that *Enerlex* controlled because "the inclusion of a special warranty does not preclude [a] deed from being a quitclaim." But the court concluded that the precedent established in *Chicago Title* "leads us to conclude that a deed containing a special warranty is not a quitclaim deed because it gives the grantee recourse against the grantor for any claim of title defect arising by, through or under such grantor."

It should be noted, however, that *Lockhart* is factually distinguishable from *Chicago Title* on this point: The deed in *Chicago Title* conveyed "all that certain tract of land ..." and not "all right, title and interest" of the grantor. Whether a deed was a quitclaim or not was not at issue in *Chicago Title*; rather, the issue was whether a party could recover for breach of the implied covenant of seisin. Petition for review in *Lockhart* was denied, but lawyers and landman should still exercise caution when it comes to conveyances of "all right, title and interest" until the Texas Supreme Court takes another look at what *Chicago Title* has to say about the nature of quitclaim deeds.

***Sundown Energy LP v. HJSA No. 3, Ltd. P'ship*, 622 S.W.3d 884 (Tex. 2021)**

Decided April 9, 2021

In this case, the Texas Supreme Court held that a lease's special definition of "drilling activities" that included activities other than spudding in a well were sufficient to satisfy a lease's continuous operations clause.

Lessor HJSA and lessee Sundown Energy were successors-in-interest to an oil and gas lease

covering a 30,450-acre tract of land in Ward County. The lease became effective Aug. 4, 2000, and had a primary term of six years. At the end of the primary term, Sundown was required to "reassign to Lessor … all of Lessee's operating rights in [each individual tract] of the lease not then held by production" unless Sundown was engaged in a continuous drilling program.

The continuous drilling clause (Paragraph 7b) provided that the "first such continuous development well shall be *spudded-in* on or before the [end of the primary term], with no more than 120 days to elapse between completion or abandonment of operations on one well and commencement of *drilling operations* on the next ensuing well."

"Drilling operations" was defined in Paragraph 18 of the lease as "actual operations for drilling, testing, completing and equipping a well (spud in with equipment capable of drilling to Lessee's object depth); reworking operations, including fracturing and acidizing; and reconditioning, deepening, plugging back, cleaning out, repairing or testing of a well."

Before the end of the primary term, Sundown spudded in three development wells and continued to engage in "drilling operations" thereafter. Despite the continued development, HJSA filed suit in 2016 seeking a declaration that the lease had terminated in 2007 as to nonproducing tracts because Sundown had failed to comply with the continuous drilling program. HJSA argued that Sundown had to "spud-in" a new well every 120 days to maintain the lease, whereas Sundown argued that after the first well, "drilling operations" as defined in Paragraph 18 of the lease — e.g., drilling, reworking, fracturing and other operations — were sufficient.

The trial court agreed with Sundown and granted partial summary judgment. But on appeal, a divided El Paso Court of Appeals reached the opposite conclusion. The Texas Supreme Court ultimately reversed the Court of Appeals decision, holding that Sundown was not obligated to reassign the contested tracts to HJSA.

HJSA argued that the term "drilling operations" in the continuous drilling provision must be inferred to be something more specific than the expressly defined term in Paragraph 18 of the lease. The court noted that although words must be construed in the context in which they are used, courts "cannot interpret a contract to ignore clearly defined terms." Here, the continuous drilling provision distinguished between "spudded-in" and "drilling operations," evidencing the intent of the parties to apply the broader "drilling operations" definition after the first continuous development well. The court reasoned that had the lessor and lessee intended well-spudding activities to be required to maintain the lease, "they could easily have done so."

HJSA additionally argued that "from a utilitarian standpoint," permitting the broader definition to control would hinder the objective of the lessor to encourage full exploration and development of the entire lease block. Sundown countered that fracturing, reworking and other "drilling operations" are production-maximizing activities that can ultimately be more cost-effective than drilling new wells. The court noted that freedom of contract requires the recognition that "sophisticated parties have broad latitude to define the terms of their business relationship" and that the express language of the lease must control — including the express provision that nothing in the lease relieves the lessee of its implied duty to reasonably develop the leased premises.

This case once again demonstrates the importance of using defined terms correctly and consistently in oil and gas contracts. Parties should say what they mean and mean what they say in every contract; Texas courts are loathe to deviate from clearly defined terms.

Concho Resources Inc. v. Ellison, 627 S.W.3d 226 (Tex. 2021)

Decided April 16, 2021

This case picks up where one of 2019's Top 10 cases left off. In reversing the Court of Appeals decision in *Ellison v. Three Rivers Acquisition LLC*, the Texas Supreme Court held that a boundary stipulation regarding disputed acreage was valid and properly ratified.

J.D. Sugg died in 1925 owning land in Irion County. Some of his heirs decided to swap land with nearby landowners, and in 1927 the Suggs executed a deed conveying to the Noelkes "All of [the Section] located North and West of the public road which now runs across the corner of said Survey, containing 147 acres, more or less." However, the actual acreage located north and west of the road was 301 acres, not 147.

In 2008, Samson Resources' landman prepared a "Boundary Stipulation of Ownership of Mineral Interest" agreement to be executed by the successors to the mineral interests 1927 deed that established a new boundary line *(see Figure 1).*

The agreement was signed and filed of record. Samson's landman then sent a letter to Ellison — lessee of the 301-acre tract — enclosing the stipulation and requesting that Ellison "signify your acceptance of the description of the ... 147 acre tract as set out in the Stipulation (your leasehold)." Ellison countersigned the letter, and although Ellison and Samson agreed to execute a "more formal and recordable document," no such formal agreement was ever signed.

After Samson drilled numerous wells in and around the "disputed" tract, its interests were ultimately assigned to Concho. Ellison sued, seeking a declaratory judgment that Ellison's leases covered the entire 301 acres north and west of the public road and that the 2008 boundary agreement and letter signed by Ellison had no impact on the Ellison leases. Concho and related parties counterclaimed and ultimately prevailed at the trial court. The Court of Appeals reversed, holding that the 1927 deed contained no "ambiguity or error" to correct and therefore the boundary agreement was void. Thus, Ellison could not have ratified it and consequently was not bound by it.

In rejecting the Court of Appeals' analysis, the Texas Supreme Court agreed with Concho that requiring boundary stipulations to correct an objective "ambiguity or error" would "scuttle boundary agreements as a mechanism to avoid litigation." Citing to precedent, the court noted that boundary agreements are generally binding once executed and delivered and ought not to be disturbed "regardless of whether it was afterwards shown that they had been erroneously settled." Because the agreement itself was valid, the court further held that Ellison's signature of the letter ratified the boundary stipulation.

This case was closely watched by industry stakeholders and many — including the Texas Land Title Association and the Texas Oil and Gas Association — filed amicus briefs. Whether one agrees or disagrees with the result, this case serves as a reminder of the importance of accurate legal descriptions and ratifications in oil and gas agreements.

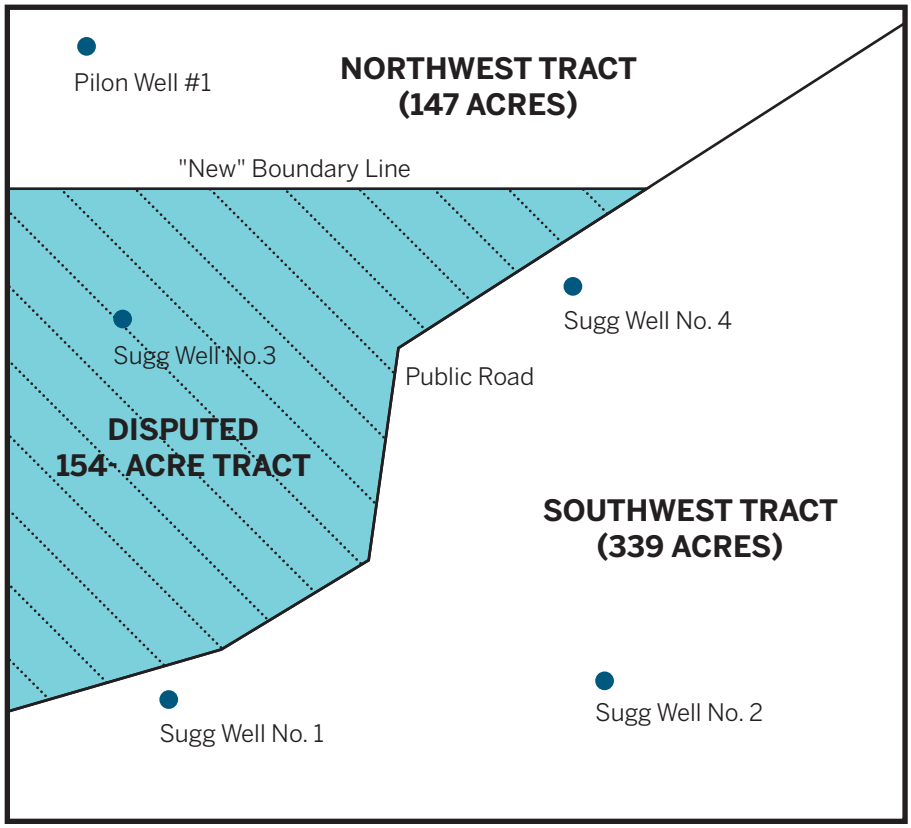
Opiela v. Railroad Comm'n of Texas, No. D-1-GN-20-000099 (53rd Dist. Ct., Travis County, Tex., May 12, 2021)

Decided May 12, 2021

In this case, an Austin District Court determined that the Texas Railroad Commission's final order granting a permit for a PSA well in Karnes County did not comply with the Administrative Procedure Act.

Opiela was the owner of the executive rights under a 637-acre tract of land in Karnes County and one-fourth of the royalty interest. Enervest Operating applied to drill an allocation well across the 637-acre tract as well as two additional tracts — a 175.69-acre tract and a 2.42-acre state highway tract. Thereafter, the permit was amended and the proposed well was identified as a production sharing agreement well. The Opiela lease does not permit pooling, nor did Opiela sign a PSA, a consent to pool or a ratification

Figure 1



of any unit. But 65.625% of the royalty interest owners in the 637-acre tract — together with 68.993% of the owners of the 175.69-acre tract and 100% of the state highway tract — consented to pool either by ratification, signing a PSA or leasing with a pooling clause.

Opiela filed a complaint with the Railroad Commission against Magnolia — the successor to Enervest — claiming that because the Railroad Commission has no formal rules that mention PSA or allocation wells, there is no statutory or administrative authority to issue permits for such wells. Opiela also asserted that allocation wells violate Statewide Rule 26 requiring that all liquid hydrocarbons be measured before leaving a lease and Statewide Rule 40 requiring that pooled units must be established if operators want to combine acreage from separate leases to form a drilling unit. The Railroad Commission's administrative law judge and technical examiner recommended that the RRC find that it had authority to grant drilling permits and the RRC agreed. Opiela sued for judicial review in the Travis County District Court.

The District Court concluded that the RRC erred by adopting rules for allocation and PSA well permits without complying with the Administrative Procedure Act; applying those rules and issuing well permits for the well; determining it had no authority to review whether an applicant seeking a well permit has authority under a lease or other relevant title documents to drill a well; failing to consider the pooling clause of the lease in deciding whether an operator had a good-faith claim to operate a well; and finding that the operator showed a good faith claim of right to drill the well.

The case was remanded to the Railroad Commission for further proceedings. While far from over, this case is notable in that it is the first challenge to allocation wells that has led to a District Court decision. Whether — and to what extent — the Railroad Commission will revise its practices with respect to issuing PSA and allocation well permits remains to be seen.

Broadway Nat'l Bank, Tr. of Mary Frances Evers Tr. v. Yates Energy Corp., 631 S.W.3d 16 (Tex. 2021)

Decided May 14, 2021

In this case with far-reaching implications for the industry, the Texas Supreme Court reversed a lower court ruling interpreting the requirements of Texas' Correction Deeds Statute.

In 2005, Broadway Bank, trustee of the Mary Frances Evers Trust, executed a mineral deed that conveyed mineral interests in DeWitt and Gonzales counties to John Evers in fee simple. In 2006, Broadway executed a correction deed that attempted to change the interest conveyed to a life estate, but Evers did not sign the correction instrument. In 2012, Evers conveyed his interest to Yates.

In 2013, Broadway, Evers and all of the original grantees of the 2005 deed executed a second correction deed, which again attempted to change the fee interest conveyed to Evers to a life estate interest. But the 2013 correction deed was not executed by Yates.

After Evers died, Broadway sued Yates for declaratory judgment in the probate court. The probate court granted summary judgment for Broadway. Yates appealed. The appellate court looked to the requirements of Texas' Material Correction Statute (Texas Property

Code Section 5.029) and concluded that the 2013 correction deed did not replace the 2005 deed because the successor to the original deed — Yates — did not join in the correction. Broadway appealed.

Because the correction to the 2005 involved changing the amount of interest conveyed — a "material" correction — the correction instrument must comply with Section 5.029, which provides that a correction instrument "must be ... executed by each party to the recorded original instrument of conveyance ... *or, if applicable*, a party's heirs, successors, or assigns." Thus, the dispute centered on when a party's heirs, successors or assigns are "applicable" such that they must sign a correction deed. Broadway argued that successors are only required when one of the original parties is unable to sign. Yates argued that the parties that control the property at the time of the proposed correction are the proper parties.

Turning to the rules governing statutory construction, the Texas Supreme Court reasoned that "or if applicable" offered parties a choice between two equally viable alternatives, stating that "a party's heirs, successors, or assigns may be relevant when the original party is unavailable and, in that case, may serve as a substitute." The court also concluded that Yates was not without any protections — the Correction Deeds Statute specifically provides that correction deeds are subject to the protections afforded to bona fide purchasers under the recording statute. Because the appellate court failed to consider whether Yates was protected under the recording statutes, the Texas Supreme Court remanded the case for further consideration.

This case is also notable for its strong dissent by four justices. According to the dissenters, the majority effectively read the words "if applicable" out of the statute, and the court's holding would allow property owners to be stripped of their land without notice or consent. Until the Texas Legislature further amends the Correction Deed Statute, lawyers and landman should look to the original parties to deeds for material corrections but should also seek the ratification of the correction by all successors-in-interest.

BPX Operating Co. v. Strickhausen, 629 S.W.3d 189 (Tex. 2021)

Decided June 11, 2021

In this case, the Texas Supreme Court considered whether acceptance of royalty payments alone was enough to evidence an intent to ratify improper pooling.

Margaret Strickhausen leased her interests in a tract of land in La Salle County to BPX's predecessor-in-interest. Her lease expressly prohibited pooling without consent, but despite this prohibition, BPX pooled her tract with others. BPX sent Strickhausen a letter asking her to ratify the unit, and Strickhausen's lawyer contacted BPX to resolve the issue. Multiple offers and counteroffers were made, but no resolution was reached. During this period, BPX began sending Strickhausen royalty checks, which she deposited.

Strickhausen sued BPX for breach of contract, among other claims. In its summary judgment motion, BPX argued that Strickhausen had impliedly ratified the pooling by accepting royalty checks and was therefore estopped from challenging the pooling of her tract. The trial court ruled in favor of BPX, the appellate court reversed and BPX appealed to the Texas Supreme Court.

Ratification is the adoption or confirmation of a prior act that was not legally binding by a person with knowledge of all material facts. Full knowledge of those facts combined with intent to adopt the unauthorized act is a crucial element. Ratifications can be express or implied. But a party asserting an implied ratification must show actions that "clearly evidence an intention to ratify."

BPX argued that a lessor's acceptance of royalty alone always amounts to a ratification as a matter of law, citing recent Texas Supreme Court decisions with similar facts — *Hooks v. Samson Lone Star LP* and *Samson Expl. LLC v. T.S. Reed Props. Inc.* The court disagreed, rejecting such a bright line rule in favor of a look at the "totality of the circumstances" to ascertain intent.

In this instance, Strickhausen did deposit royalty checks while her attorney attempted to negotiate a settlement. Because there was production from her tract — i.e., she was not only owed money because of the pooling — Strickhausen knew BPX owed her significant royalties regardless of whether she agreed to pooling. The court reasoned that she could have viewed the royalty checks as payment toward what was owed to her. Noting that ratification is not a game of

"gotcha," the court concluded that acceptance of royalties combined with the surrounding circumstances did not objectively evidence an intent to ratify.

However, similarly situated parties should note that four justices dissented in this case. Looking to the fact that Strickhausen knew the royalty checks were calculated based on pooling and not on allocation principles, the dissent would have concluded that her conduct "conveyed nothing less than her intention to accept the benefits of the pooling and thereby ratify the pooling agreement."

Going forward, lessees should be mindful that acceptance of royalty payments may evidence an intent to ratify, but such actions alone are no guarantee. Also, lessors should be careful in accepting any benefits under a lease where there is a dispute about pooling provisions.

Stingray Pressure Pumping LLC In re Gulfport Energy Corp., BR 20-35562, 2021 WL 4026291 (S.D. Tex. Sept. 3, 2021)

Decided Sept. 3, 2021

In this decision from the U.S. District Court in the Southern District of Texas, parties to a master services agreement argued over whether a subsidiary who did not sign an amendment extending the term of the MSA was still a party after the original expiration date.

Stingray and Gulfport Energy signed an MSA for oilfield services in October 2014. The MSA was amended twice in 2016, adding Gulfport Buckeye LLC — predecessor to Gulfport Appalachia LLC — as a party. The MSA was amended for a final time in 2018 to extend the term until the end of 2021, but the last amendment was only signed by Stingray and Gulfport Energy.

In December 2019, Gulfport Energy sued Stingray in Delaware state court for breach of contract and Stingray countersued. In November 2020, Gulfport Energy and its subsidiaries — including Gulfport Appalachia — filed for bankruptcy in the Southern District of Texas. In the bankruptcy proceedings, Stingray filed proofs of claim against both Gulfport Energy and Gulfport Appalachia. Gulfport objected to the proof of claim against Gulfport Appalachia, claiming that it no longer remained a party to the MSA after it was extended in 2018. After reviewing the MSA and its amendments, the bankruptcy court held that Gulfport Appalachia was not liable after Sept. 30, 2018 — the day the MSA would have ended without the 2018 amendment. Stingray appealed.

Gulfport Energy argued that Gulfport Appalachia was not liable after Sept. 30, 2018, because it was not a party to the 2018 amendment. The court disagreed, finding that after the 2016 amendment, both Gulfport Energy and Gulfport Appalachia represented "Company" and that either party was effectively a "partner" that could bind the other in future amendments. The court also reasoned that without an explicit provision removing Gulfport Appalachia as a party to the MSA, it remained in the agreement and was bound by the 2018 amendment. The District Court reversed the bankruptcy court and held that Stingray could pursue its claims against both Gulfport Energy and Gulfport Appalachia that arose after Sept. 30, 2018.

An appeal is currently pending before the U.S. 5th Circuit, but oil and gas practitioners should remember this cautionary tale: Don't forget the original terms of agreements when amending them.

CONCLUSION

I hope this article will help you address the legal issues presented by modern oil and gas activities. As always, if you believe one of these decisions might have a bearing on an action you are about to take or a decision you might make, consult a lawyer.

ABOUT THE AUTHOR

Ethan Wood, *an associate at Gray Reed, advises upstream and midstream energy clients on the entire range of transactions and issues that arise during oil and gas operations in Texas and many states across the country.*

He also conducts title examinations and renders opinions for producers with drilling operations throughout Texas and coordinates identical activities with local counsel in multiple jurisdictions, including New Mexico, Ohio, Pennsylvania and Oklahoma. A former independent petroleum landman, Wood is Board Certified in Oil, Gas and Mineral Law by the Texas Board of Legal Specialization.