Oil and Gas Law: Recent Decisions

TADC Spring 2016 Edition

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May 5, 2016

I. SCOPE OF THE ARTICLE

This article surveys selected oil and gas cases decided by Texas state courts from October 9, 2015 through May 3, 2016. Below are one-paragraph abstracts of the selected cases. Full case summaries follow the abstracts.

II. ABSTRACTS

1. The Texas Supreme Court rejected bright-line rules in favor of a holistic, intent-based approach to construe a will employing double fractional royalties. A testamentary reference to a "1/8 royalty" was intended as a synonym for the landowner's royalty, and not a specific royalty percentage. Testatrix bequeathed differently-sized tracts of land to each of her three children in fee simple, but globally devised to each child a non-participating royalty interest of "an undivided one-third of an undivided one-eighth of all oil, gas, or other minerals in or under of that may be produced from any of said lands." Heirs of the original devisees disputed the proper construction of this will provision: whether each sibling received a fixed 1/24 royalty, or whether each sibling received 1/3 of all future royalties. The Texas Supreme Court held that the testamentary reference to a "1/8 royalty" was intended as a synonym for the landowner's royalty, and not a specific royalty percentage. Accordingly, each sibling received a 1/3 floating royalty, not a 1/24 fixed royalty. *Hysaw v. Dawkins*, No. 14-0984, 2016 WL 352229 (Tex. Jan. 29, 2016).

2. Production payments expire with the burdened lease. Lessee A assigned oil and gas leases to Lessee B, but reserved a 1/16 production payment from the leases. Forty years later, some of the leases terminated for lack of production, but others survived. After the leases terminated, Lessee B's successor acquired new leases and began paying Lessee A on a proportionately reduced basis. Lessee A sued, claiming that Lessee B could not adjust the production payments downward without express language in the assignment allowing for such a reduction. The Supreme Court analogized production payments to overriding royalty payments, and held that both production payments and ORRI payments expire when the lease terminates. Accordingly, Lessee B was permitted to proportionately reduce its payments based on the expired leases. *Apache Deepwater, LLC v. McDaniel Partners, Ltd.*, No. 14-0546, 2016 WL 766731 (Tex. Feb. 26, 2016).

3. The decision to pool leases together under standard pooling provisions do not extend terms specifically agreed to for an individual lessor to the entire pooled unit. Lessor's lease was pooled into a unit with a nearby well, and Lessor drilled two wells close to the boundary of the pooled unit, but not close to the boundary of Lessor's acreage. Lessor sued Lessee for breaching an offset obligation provision contained within his individual lease, arguing that once the lease is pooled, the protected zone is no longer based only on the originally leased tract, but rather is based on the boundary of the entire pooled unit. The court of appeals rejected this argument, noting that no court has construed this type of pooling provision to extend terms agreed to for the protection of an individual lessor to the entire pooled tract. *Samson Lone Star Limited Partnership v. Hooks*, No. 01-09-00328-CV, 2016 WL 1019217 (Tex. App.—Houston [1st Dist.] Mar. 15, 2016, no pet. h.).

4. Pooled royalty interests aren't necessarily appurtenant to property conveyed by a warranty deed. Three

siblings agreed to pool and share their royalty interests in each of their three separate tracts of land. One sibling conveyed his interests via general warranty deed, and the buyer claimed that the sibling's undivided royalty interest in the other tracts included in the pool became an appurtenance to his land and thereby passed with the general warranty deed. The trial court granted summary judgment to the sibling, stating that his royalty interest in the other tracts in the pool was not an appurtenance, and did not pass to the buyer. The court of appeals affirmed. *Aery v. Hoskins, Inc.*, No. 04-14-00807-CV, 2016 WL 1237985 (Tex. App.—San Antonio, Mar. 30, 2016, no pet. h.).

5. Summary judgment was improper in a suit to interpret deed language where the property descriptions in the deeds are ambiguous. Plaintiff sued defendant with each claiming title to the same mineral rights through separate conveyances from the same grantors. Defendant moved for summary judgment on the basis that his deeds were valid and obtained first, and left the grantors with no mineral interests to convey to plaintiff. The trial court granted summary judgment in defendant's favor, but the court of appeals reversed because the property descriptions in the original deeds are ambiguous, necessitating a trial to determine what interests were conveyed. *Mueller v. Davis*, No. 06-14-00100-CV, 2016 WL 433239 (Tex. App.—Texarkana Feb. 4, 2016, pet. filed).

6. The *Duhig* rule applied to a dispute over royalty interests, and grantors are estopped from claiming a royalty interest after they previously conveyed or reserved 100% of their interests in a property. Lessee A conveyed 480 acres to Lessee B (his son), reserving a ½ royalty. Later, Lessee A died intestate, passing his ½ royalty to Lessee B. Lessee B, in turn, conveyed the property to a purpose-formed entity, Lessee C, again reserving a ½ royalty. Lessee C conveyed the property to a bank to secure a note, again reserving a ½ royalty. After Lessee C defaulted on the note, the bank sold the property in a foreclosure sale to Lessee D. Eventually, Lessee B sued Lessee D, asserting that he owned a ½ royalty interest stemming from Lessee A's devise. The court of appeals applied the *Duhig* rule to estop Lessee B from claiming the ½ royalty interest because he executed two subsequent conveyances of a ½ royalty interest, leaving him with nothing reserved for himself. *Spartan Tex. Six Capital Partners, Ltd v. Perryman,* No. 14-14-00873-CV, 2016 WL 796073 (Tex. App.—Houston [14th Dist.] Mar. 1, 2016, no pet. h.).

7. Thirteen-day delay between recording new leases and recording release of the old leases did not result in the new leases being considered top leases. Sublessee and lessors executed new leases and filed a release of the old leases, unbeknownst to the lessee. The prime leases contained a back-in provision that applied to any renewal, extension, or top lease taken within one year of termination of the underlying interest. Lessors sued for their back-in rights to the new leases, but the court of appeals ruled there was not a scintilla of evidence to suggest the lessors intended to execute top leases which would trigger the back-in provision, rather than entirely new leases which would not. *Anadarko Petroleum Corp. v. TRO-X, L.P.*, No. 08-15-00158, 2016 WL 1073046 (Tex. App.—El Paso Mar. 18, 2016, no pet. h.).

III. CASE SUMMARIES

1. *Hysaw v. Dawkins,* No. 14-0984, 2016 WL 352229 (Tex. Jan. 29, 2016).

In *Hysaw v. Dawkins*, the heirs of one of three siblings sought a declaratory judgment to interpret the provisions of their grandmother's will.

When Ethel Nichols Hysaw executed her will in 1947, she had three children: Inez, Howard, and Dorothy, and 1,415 acres of land in Karnes County. Ethel's will divided the surface estates in fee-simple title unevenly to her three children, but utilized a different method of distribution for the related mineral estates.

The will stated that "each of my children shall have and hold an undivided one-third (1/3) of an undivided one-eighth (1/8) of all oil, gas, or other minerals in or under or that may be produced from any of said lands." At the time, Ethel was entitled to a 1/8 royalty on all oil and gas produced from her property.

Eventually, all of Ethel's children passed away, and their interests passed to descendants and other successors in interest. The dispute came into being when the successors of one of her children (Inez) executed a mineral lease in 2008 that provided for a 1/5 royalty on their 600 acres (the largest surface estate conveyed to any of the children). Inez's successors claimed that Ethel's will set the royalty devised to the other two sets of successors at a fixed 1/24 and allowed themselves, as fee owners of the surface estate, the exclusive benefit of any negotiated royalty exceeding 1/8—in this case the extra 7.5% afforded by their 1/5 royalty.

The other successors, of Howard and Dorothy, were understandably united in opposition to this construction, and argued that this disjunctive approach was inconsistent with what they argued was Ethel's clear intent that her children share royalties from all three surface estates equally. According to Howard's and Dorothy's successors, Ethel's will gave each child a "floating" 1/3 interest in any royalty obtained from all the surface estates, resulting in an equal sharing of royalties under all future leases. So, each set of successors would be entitled to a 1/15 royalty under the mineral lease obtained by Inez's successors.

The trial court granted summary judgment to Howard's and Dorothy's successors, rendering judgment that Ethel's will entitled each child to a floating 1/3 of any and all royalty interest on all the devised tracts of land. The court of appeals reversed, rendering judgment in favor of Inez's successors, holding that Ethel's will unambiguously devised all mineral interests to the surface estate owner, subject only to two 1/24 fractional royalty interests held by the non-fee owning siblings.

The Texas Supreme Court agreed with Howard's and Dorothy's successors, and reversed the court of appeals. After noting the "dilemma" posed by double-fraction conveyances and the shift away from the "near ubiquit[y]" of the 1/8 royalty, the Supreme Court held that "all the other language in the document must be considered to deduce intent" before any particular meaning can be ascribed to double-fraction language. In doing so, the Court "reject[ed] bright-line rules of interpretation that are arbitrary," "consider[ed] the testatrix's will in its entirety," and held that she intended to devise a floating 1/3 royalty that would

result in her three children equally sharing future royalties across all three tracts of land.

2. *Apache Deepwater, LLC v. McDaniel, Ltd.*, No. 14-0546, 2016 WL 766731 (Tex. Feb. 26, 2016).

This dispute originates with a 1953 assignment of four oil and gas leases by McDaniel's predecessor to Apache's predecessor. At the time of the assignment, the four leases covered a combined 35/64th of the mineral interests in Surveys 36 and 37 in Upton County. Two leases (the Cowden Leases) comprised 32/64 of the surveys, while the other two (the Peterman and Broudy Leases) amounted to 3/64.

The assignment reserved a production payment to McDaniel's predecessor, amounting to 1/16th of total production from the portion of the mineral estate covered by the leases after subtracting the lessor's 1/8 royalty interest, "being one-sixteenth of the entire interest in the production from said lands to which Assignor claims to be entitled under the terms of said respective oil and gas leases." The assignment also provided that the production payments would continue until a total payment of $3.55 million on 1.42 million barrels.

The Cowden Leases expired in 1994, fifteen years before Apache acquired the lease in its merger with Mariner Energy Resources in 2009. Apache subsequently acquired new leases on land in Surveys 36 and 37 that was not subject to the assignment, completed additional wells, and began production.

After beginning production, Apache sent a division order to McDaniel, stating that the production payment reserved in the 1953 assignment should now be 1/16 of 3/64 of 7/8, reflecting the expiration of the Cowden Leases which covered 32/64 of the Surveys. McDaniel objected to this reduction, and requested a new division order under the original equation. When Apache refused to pay for the 35/64 interest, McDaniel sued.

After a bench trial, the trial court rendered a take-nothing judgment against McDaniel, holding that the production payment was reserved from the four leases separately, and thus was subject to extinguishment upon expiration of each lease. Accordingly, Apache's division order was properly calculated.

The court of appeals reversed the trial court's judgment, reasoning that no adjustment could be made to the production payment's stated equation because the assignment did not expressly contemplate such an adjustment. It then remanded the case back to the trial court to calculate damages.

On appeal, the Supreme Court analyzed the production payment in two parts: the fractional share of production payment obligation, and the total amount to be paid before termination of the interest. The court reasoned that the assignment did not allow for an adjustment of the total amount, but that nothing stopped Apache from adjusting the fractional payment. Because the reservation is framed in terms of the "respective" oil and gas leases, the Court held that the production payment was tied to production from each respective lease, and rejected McDaniel's argument that it was payable out of production from the covered lands. Accordingly, the Court approved Apache's proportionate reduction of the payment based on the expired leases,

reversed the court of appeals, and reinstated the trial court's take-nothing verdict.

3. *Samson Lone Star Limited Partnership v. Hooks*, No. 01-09-00328-CV, 2016 WL 1019217 (Tex. App.—Houston [1st Dist.] March 15, 2016, no pet. h.).

This case has a long and tortured appellate history. In 1999, the Hooks entered into three oil and gas leases with Samson. All three leases contained offset obligations that stated that if a gas well was completed within a certain buffer zone from the leased premises, then lessor was required to release lessee's acreage, drill an offset well to protect against drainage, or pay compensatory royalties.

The bulk of the court of appeals' opinion, and indeed of this case's entire appellate history, deals with the Hooks' claim that they were fraudulently induced into agreeing to pool one of their leases. This allegedly fraudulent inducement centered around an allegation that Samson misrepresented whether the well with which their acreage was pooled was within the offset "buffer zone." A multi-million dollar jury verdict for the plaintiffs on this fraud claim was originally reversed by the court of appeals because limitations barred the action. On appeal, the Texas Supreme Court reversed that decision and remanded to consider the factual and legal sufficiency of the jury's verdict. On remand, the court of appeals reversed the trial court's judgment, recommended a remittur, and in the alternative remanded the case for a new trial.

With respect to oil and gas law specific issues, what is notable about this opinion is the plaintiff's single cross issue on appeal, challenging the trial court's denial of their motion for summary judgment on his claims that Samson breached offset obligations with respect to two leases located in Hardin County. These leases contained an offset provision that called for a 1,320 foot buffer zone. The Hardin County Leases also contained a pooling provision which stated that "the entire acreage constituting such unit or units shall be treated for all purposes, except the payment of royalties on production from the pooled unit, as if the same were included in this Lease." The Hardin County Leases were pooled with neighboring acreage, and Samson began producing from the pooled unit. Samson subsequently drilled another well, within 1,320 feet of the border of the pooled unit, but more than 1,320 feet from the border of the Hooks' acreage.

Before trial, the parties filed cross-motions for summary judgment on the issue of whether Samson breached the offset obligations in the Hardin County Leases. The Hooks argued that the plain language of the Leases established that Samson was liable for drilling an encroaching well, triggering offset obligations and requiring payment of compensatory royalties. The trial court disagreed, and granted Samson's motion without stating its reasoning. The court of appeals originally affirmed the trial court's summary judgment, holding that the Hooks' claims were barred by limitations. After the Supreme Court reversed the court of appeals' limitations holding, it remanded for consideration of the merits.

Now taking up the merits, the court of appeals noted that the Hardin County Leases' pooling provisions are "standard language" which has been consistently construed by Texas courts as providing that production and operations anywhere on the pooled unit are treated as if they have taken place on each tract within the unit. The court went on to note that "no court has construed

the decision to pool under this type of pooling provision as extending terms specifically agreed to for the protection of an individual lessor [] to an entire pooled unit," and declined to be the first court to do so. Because nothing in the pooling provision suggests an intent to broaden the offset obligation to cover leases not owned by the Hooks, but rather makes a distinction between the Hooks' leased premises and the larger pooled units, the court affirmed summary judgment to Samson.

4. *Aery v. Hoskins, Inc.,* No. 04-14-00807-CV, 2016 WL 1237985 (Tex. App.—San Antonio Mar. 30, 2016, no pet. h.).

In 1957 and 1963, Rose Quinn partitioned the surface of the 2,471 acre Rose Teal Quinn Ranch and conveyed specific tracts to her three children: Hazel, Sam, and Frances. Rose separately conveyed to her three children an undivided mineral interest in the Quinn Ranch. Also in 1963, the three siblings executed an agreement (the "Sibling Agreement") which acknowledged the individual tracts conveyed to each and the undivided mineral estate, and also partitioned the undivided mineral estate between themselves. The Sibling Agreement also contained a pooling provision, by which the siblings carved the royalty interest from each sibling's mineral estate on their separate tracts, and then pooled those royalty interests together. At that point, the three siblings each held the surface estate and the mineral estate respective to each of their individual tracts, and would additionally receive royalty payment from production occurring anywhere on the Quinn Ranch.

The issue in this appeal is whether this agreement created a pooled royalty interest appurtenant to the land of each owner, or whether it created a non-participating interest in royalty that would not pass through a general warranty deed.

In 1964, Frances conveyed all of her surface estate and mineral estate to Hazel, including all her royalty interest held in the other two siblings' tracts. In 1966, Sam executed a general warranty deed conveying his tract of 623.93 acres "together with all and singular rights and appurtenances thereto in anywise belonging" to James House. Three days later, Sam conveyed all of his right, title, and interest in and to the tracts belonging to Hazel and Frances to Hazel. Eventually, Sam's original tract was conveyed to the plaintiffs in this litigation—the Aerys.

Plaintiffs brought suit against numerous defendants, all of whom were successors to either Hazel or Frances, asserting numerous causes of action and seeking declaratory relief pertaining to their competing claims to royalty interest in production on the tracts originally devised to Hazel and Frances. The trial court eventually granted the defendants' motions for summary judgment, declaring that any royalty interest that Sam owned in Hazel's and Frances' tracts did not pass to House by the general warranty deed, but instead passed to Hazel in the second 1966 conveyance.

The court of appeals affirmed, reasoning that under the Sibling Agreement, each sibling obtained an undivided royalty interest in the entire pooled unit—an undivided interest which can be freely acquired and conveyed. Because the royalty interests could be freely transferred without any conveyance of the land in the pool, they were not appurtenant to the land. Each sibling's undivided royalty interest held in their own tract, however, was not separable

or independently capable of transfer, so they were appurtenant to the land.

Accordingly, the general warranty deed executed by Sam to House conveyed Sam's surface estate, the respective mineral estate (less the severed royalty interest), and Sam's undivided share of the royalty interest in Sam's tract. The general warranty deed did not convey Sam's undivided royalty interest in the remainder of the pool, i.e. Hazel's or Frances' tracts.

5. *Mueller v. Davis,* No. 06-14-00100-CV, 2016 WL 433239 (Tex. App.—Texarkana Feb. 4, 2016, pet. filed).

In 1991, Davis was the recipient of mineral and royalty deeds in Harrison County from Virginia Rose Mitchell (later Virginia Cope) and James Hammond Mills. Neither deed contained a metes and bounds description, but rather each stated that the grantor conveyed "[a]ll of those certain tracts or parcels of land out of the following surveys in Harrison County, Texas, described as follows," and went on to list certain parcels of land containing oil and gas production units.

Between 1994 and 2011, Mueller acquired various mineral and royalty interests from Cope and Mills. He then filed suit to quiet title to the mineral and royalty interests, claiming that Davis' deeds were void under the Statute of Frauds, and alleged claims for adverse possession, fraud, failure of consideration, and conversion. Mueller's fraud and failure of consideration claims alleged that Davis made false representations to, and paid "practically no consideration" to Mills, and so the deed was void and unenforceable.

Davis moved for summary judgment, arguing that his deeds satisfied the Statute of Frauds, that Mueller's adverse possession claim was barred by limitations, and that Mueller lacked standing to raise his remaining claims. The trial court, though it did not specify the grounds for its ruling, granted summary judgment in favor of Davis.

The court of appeals was first asked to construe the 1991 deeds and determine whether they are capable of a single, reasonable interpretation. While the deed language identifies certain tracts, a number of acres out of a specific survey, a grid or abstract number, and a specific production unit, the court held that the descriptions are insufficient to identify the property being conveyed because they fail to reference another writing or otherwise make it possible to determine the size, shape, and boundaries of the specific acreage to be conveyed.

Davis was not immediately thwarted, however, because the deeds also contain language purporting to convey all of the mineral, royalty, and overriding royalty interest owned by the Grantors in Harrison County to Davis, "whether or not the same is herein above correctly described." According to Davis, this sentence is not part of the Mother Hubbard clause, but rather is an independent, valid, county-wide general description of the property to be conveyed, and operated to convey all of the interests in Harrison County owned by the Grantors.

The court rejected this argument, instead ruling that the deeds, viewed in their entirety, are ambiguous because the meaning of this catch-all provision is not clear. Hence, summary judgment as to the superiority of Davis' ownership of the minerals was improper, and the court of appeals remanded the dispute for trial. Likewise, summary judgment on Mueller's

adverse possession and conversion claims was reversed, because both claims depend on who is the rightful owner of the mineral interests in dispute.

The court of appeals affirmed summary judgment, however, on Mueller's fraud and failure of consideration claims. Only the defrauded party has standing to bring a suit to set aside a deed obtained by fraud, and further a mere lack of consideration is generally not enough to void a deed. The allegedly defrauded party was not named as a party to the suit. Thus, Mueller lacked standing to bring either of these two claims.

6. *Spartan Tex. Six Capital Partners, Ltd v. Perryman,* No. 14-14-00873-CV, 2016 WL 796073 (Tex. App.—Houston [14th Dist.] Mar. 1, 2016, no pet. h.).

This case began as a breach-of-contract suit by the mineral owners (Appellants) against an exploration company which had drilled horizontal wells under Appellant's land. The exploration company joined third party defendants Gary Perryman, Nancy Perryman, and Leasha Perryman, who collectively filed a declaratory judgment to quiet title, asserting that they collectively owned 7/8 of the 1/4 royalty in the leased land. Appellants settled their claims with the exploration company, and this appeal solely involves the claims by the individual appellees to a portion of the royalties to be paid under Appellant's leases.

In 1977, Benjamin Perryman sold 480 acres in Montague County to his son Gary and Gary's wife Nancy ("Benjamin's Deed"). Benjamin's Deed conveyed three tracts, but only one is part of the property subject to this dispute—177 acres termed by the court as "Benjamin's Deed First Tract."

This conveyance reserved an undivided 1/2 of all royalties from the oil, gas, or other minerals produced from the land. In 1980, Benjamin died intestate, and his two sons Gary and Wade each inherited a 1/4 royalty interest. At this point, Gary and Nancy owned a 3/4 royalty interest in the Montague County land, and Wade owned 1/4.

In 1983, Gary and Nancy conveyed the entire 480 acres to an entity they formed, GNP, for the purpose—this conveyance contained a reservation of 1/2 of all royalties from the oil, gas, or other minerals produced from the land (the "Perrymans' Deed"). GNP then conveyed the same property, with the same reservation language, to Gainesville National Bank to secure a debt of roughly $700,000. GNP was unable to pay the note, and declared bankruptcy in 1984. Eventually, Gary and Nancy purchased some of the Montague County land back from the bank, but the bank purchased the bulk of it in the foreclosure sale. The trustee's deed conveying the land to the bank contained the same description of the land as Benjamin's Deed, and the same royalty reservation language in Gary's favor.

In 1987, the bank conveyed Benjamin's Deed First Tract to David Johnson and his wife, Dion Menser. Menser and Johnson subsequently divorced, and Menser conveyed her interest back to Johnson but reserved an undivided one-half interest in the mineral estate. In January 2003, Johnson conveyed 177 acres of Benjamin's Deed First Tract to Appellants.

Leasha Perryman filed a motion for summary judgment in January 2014, seeking a declaration that she owned a 1/4 interest in the royalty in Benjamin's Deed First Tract. Gary and Nancy filed motions for summary judgment seeking declarations that they

owned an interest in the royalty in Benjamin's Deed First Tract, and that the *Duhig* rule did not apply to this case. The trial court eventually granted the Perrymans' motions, and entered judgment that Leasha owned a 1/4 royalty interest , and Gary and Nancy owned a 9/16 royalty interest.

On appeal, Appellants argued that the trial court erred by disregarding the *Duhig* rule, which holds that a reservation in a deed is ineffective when, as a result of the grantor's shortage of title, the conveyance and the reservation cannot both be given effect. The court of appeals agreed, and ruled that the Perryman's Deed and the Bank's deed each conveyed the land subject to a 1/2 royalty interest, with no mention of Benjamin's previously reserved 1/2 royalty interest. Thus, under the *Duhig* rule, the Perrymans are estopped from claiming the original 1/2 royalty interest.

7. *Anadarko Petroleum Corp v. TRO-X, L.P.,* No. 08-15-00158, 2016 WL 1073046 (Tex. App.—El Paso Mar. 18, 2016, no pet. h.).

The Coopers, property owners in Ward County, executed five leases with TRO-X in February 2007. The leases all contained offset well obligations. In March 2007, TRO-X assigned the leases to Eagle Oil & Gas, but retained a reversionary interest giving it a "back-in" option to receive 5% of the original working interest back. This "back-in" option applied to renewals, extensions, or top leases taken within one year of termination of the underlying lease. Eagle Oil & Gas then assigned its interest to Anadarko, who began drilling operations.

In 2008, Anadarko completed a well on non-leasehold land that arguably triggered the offset provisions in the prime leases, and Anadarko (as sub-lessee) failed to drill an offset well. More than two years later, in May 2011, the Coopers sent a demand letter to Anadarko alleging that the Coopers had the right to terminate the prime leases for breach of the offset well provisions. Anadarko evaluated the Coopers' claims, realized that they had breached the offset well provision, and realized that the Coopers' written demand had automatically re-vested the leased mineral interests with the Coopers.

Anadarko then approached the Coopers to negotiate new leases. The parties came to an agreement—without TRO-X's knowledge or consent—and recorded new leases in June 2011. Thirteen days later, Anadarko recorded releases of any interests it held on the TRO-X leases.

TRO-X brought suit to try title and for breach of contract, alleging that it was entitled to five percent of Anadarko's interest in the 2011 leases under the terms of its agreement with Eagle Oil & Gas. The trial court entered judgment in favor of TRO-X, finding that the 2011 Leases were top leases, triggering the back-in provision.

The court of appeals reversed, rendering a take-nothing judgment against TRO-X, because the thirteen day delay between executing the 2011 leases and executing a written release of the old leases, standing alone, was not legally sufficient evidence that the Coopers intended for the 2011 leases to function as top leases until the release was recorded. Because a "lessor is deemed to have waived any formal surrender requirements if it signs a new lease with the intent to terminate the old one," the critical inquiry was the Coopers' intent at the time the 2011 leases were executed. Ultimately, TRO-X failed to carry its burden: "[n]othing in the interaction

between the parties or the trial testimony suggests the Coopers intended for the 2011 leases to be top leases that would come into effect only upon execution of a release."