TEXAS OIL & GAS
CASE LAW UPDATE
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I. SCOPE OF THE ARTICLE

This article surveys selected oil and gas cases decided by the Supreme Court of Texas, Texas Courts of Appeals, and federal courts from April 7, 2011 through October 1, 2011.

II. SUMMARIES

1. An oil and gas lessor cannot enforce an agreement among lessees as a third-party beneficiary, unless the agreement unequivocally expresses an intent to benefit the lessor. The Texas Supreme Court held that an oil and gas lessor could not enforce a Joint Operating Agreement or a Working Interest Unit Agreement, either as a third-party beneficiary or by virtue of privity of estate, despite the inclusion of a royalty provision benefitting the lessor. *Tawes v. Barnes*, 340 S.W.3d 419 (Tex. 2011).

2. The statute of limitations will not be tolled when a party fraudulently conceals information, if that same information is available in the public record. The Texas Supreme Court held that an oil and gas lessee's fraudulent activity would not toll the statute of limitations because the relevant information could be found in the public record. The court also found that a cotenant demonstrated his intent to oust the other tenant by paying the tenant a royalty share instead of a higher cotenant share. Consequently, the court held that the cotenant satisfied the elevated requirements for adverse possession by a cotenant**.** *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59 (Tex. 2011).

3. Placing restrictive covenants limiting oil and gas production in deeds to subdivision lot owners can constitute a breach of the executive's fiduciary duty to non-executives. The Texas Supreme Court held that the owner of the executive right can breach its fiduciary duty even if the executive treats its mineral interest the same as the mineral interests of the non-executives; the question is whether the action of the executive was motivated by self interest. *Lesley v. Veterans Land Board*, No. 09-0306, 2011 WL 3796568 (Tex. 2011) (Aug. 26, 2011).

4. A common-carrier permit issued by the Texas Railroad Commission does not conclusively establish eminent-domain power. The Texas Supreme Court held that a pipeline company's common-carrier permit does not prevent landowners from challenging its eminent domain power in court. If challenged, the pipeline company must establish its common-carrier bona fides as prescribed by the court. *Texas Rice Land Partners, Ltd. v. Denbury Green Pipline-Texas, LLC*, No. 09-0901, 2011 WL 3796574 (Tex. 2011) (Aug. 26, 2011).

5. A suit to determine whether oil and gas leases are still in existence should ordinarily be brought as a trespass to try title action. The appeals court held that a suit seeking a declaratory judgment that oil and gas leases had not yet terminated, in addition to other declarations, should properly have been filed as a trespass to try title action. *Teon Management, LLC v. Turquoise Bay Corp.*, No. 11-10-00050-CV, 2011 WL 1326325 (Tex. App.—Eastland April 7 2011, no pet.).

6. A warranty deed may be reformed when it differs from a corresponding sales contract, if the author of the deed fails to compare the deed to the contract. The court of appeals held that a warranty deed could be reformed on the basis of mutual mistake, due to the lawyer's failure to

include in the deed a mineral reservation provided in the sales contract. *Gail v. Berry*, 343 S.W.3d 520 (Tex. App.—Eastland 2011, pet. struck).

7. A court tasked to determine ownership in mineral interests should consider all four corners of a mineral deed, not simply the granting clause. The court of appeals held a mineral deed conveyed one half the grantor's interest in the mineral estate by harmonizing the granting clause with other clauses in the deed. *Hernandez v. El Paso Prod. Co.*, No. 13-09-184-CV, 2011 WL 1442991 (Tex. App.—Corpus Christi April 14, 2011, no pet. h.).

8. A governmental entity can effect a regulatory taking even if the conduct at issue was performed by an agent without authorization. The court of appeals held that a city's stop work order forbidding an oil company to drill constituted a regulatory taking, despite the fact that the order was not issued by the city council. The court declined to decide whether intent is a necessary requirement for a regulatory taking, but held that the city official's intent to enforce the ordinance satisfied any such requirement. *City of Houston v. Maguire Oil Co.*, 342 S.W.3d 726 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

9. The convenience of the surface owner is not the sole issue when determining whether the mineral estate owner has exercised reasonable use of the surface. The court of appeals held that an oil and gas lessee did not violate the accommodation doctrine by constructing a well on the surface estate, despite the fact that the surface owner had to find an alternative way to work his cattle. *Merriman v. XTO Energy, Inc.*, No. 10-09-00276, 2011 WL 1911987 (Tex. App.—Waco May 11, 2011, no pet. h.).

10. A mandatory injunction requiring changes to surface use by an oil and gas lessee requires a showing of irreparable harm or extreme hardship. The court of appeals held that an order requiring an oil and gas lessee to remove equipment stored on the leased land was a mandatory injunction, requiring a showing of irreparable harm or extreme hardship. Such a showing cannot be made if damages are calculable and no extreme hardship will exist while a merits trial proceeds. *Pharaoh Oil & Gas, Inc. v. Ranchero Esperanza, Ltd.*, 343 S.W.3d 875 (Tex. App.—El Paso 2011, no pet. h.).

11. A royalty owner can recover damages for harm to an oil well if the royalty owner would not recover all of its interest in the formation underlying the land involved. The court of appeals held that a well-repair company was liable not only to the working interest owners, but also to the royalty owner of the lease. Liability was found because the damaged well was unique and the likelihood of drilling another successful well in the area was low. *Basic Energy Service, Inc. v. D-S-B Properties, Inc.*, No. 12-10-00005-CV, 2011 WL 2659989 (Tex. App.—Tyler June 30, 2011, no pet.).

12. Suits brought by common carriers seeking injunctive relief to enforce their rights are not subject to the provision of the Texas Government Code granting exclusive jurisdiction over eminent domain proceedings to civil courts at law. The court of appeals held that § 25.1032 of the Government Code only applies to inverse condemnation proceedings and statutory eminent domain proceedings as detailed in Chapter 21 of the Property Code.

The court also held that the district court's grant of a temporary injunction was not in error, because the requirements for a temporary injunction were satisfied and there was evidence that the party was a common carrier. *Occidental Chemical Corp. v. ETC NGL Transport, LLC*, No. 01-11-00536-CV, 2011 WL 2930133 (Tex. App.—Houston [1st Dist.] July 20, 2011, pet. filed).

13. An event of force majeure occurred where the City of Denton failed to issue drilling permits. The Court of appeals held that the City of Denton's failure to issue drilling permits fell within the definition of "force majeure" in a Surface Use Agreement. The court reached this conclusion despite the oil and gas lessee's imprudence in submitting application materials. *Allegiance Hillview, L.P. v. Range Texas Prod., LLC*, No. 02-10-00062-CV, 2011 WL 3211222 (Tex. App.—Fort Worth July 28, 2011, no pet. h.).

14. To ascertain the true intention of parties to a deed, the court must examine all of the deed's language. The appeals court held that a reservation in a deed gave the grantor a royalty interest in the entire property, not merely in the fractional mineral interest actually conveyed. This interpretation was gleaned by viewing the reservation clause in light of the entire deed. *Philipello v. Nelson Family Farming Trust*, No. 14-10-00026-CV, 2011 WL 3570169 (Tex. App.—Houston [14th Dist.] Aug. 16, 2011, pet. filed).

15. Gathering-system compression of natural gas does not comport with the meaning of "processing" as used in a gas-purchase agreement. The court of appeals held that a company was not entitled to compensation under a gas-purchase agreement for the Natural Gas Liquids created by the purchaser's compression of the gas. According to the court, gathering-system compression did not fall within the ambit of "processing" as used in the agreement's definition of Natural Gas Liquids. *Forest Oil Corp. v. Eagle Rock Field Services, LP*, No. 14-10-00558-CV, 2011 WL 3570176 (Tex. App.—Houston [14th Dist.] Aug. 16, 2011, no pet. h.).

16. By accepting royalty payments for production from a well not included in a pooling unit, an oil and gas lessor can be estopped from obtaining royalties from a well that is included in the unit. The court of appeals held that an oil and gas lessor was estopped from recovering royalties from a well included in a pooling unit, Well A, because the lessor accepted royalty payments from a well the lessee led it to believe was Well A. The court also applied the Texas Supreme Court's recent decision in *Marshall*, and found that a fraud claim was barred by limitations. *Samson Lone Star, LP v. Hooks*, No. 01-09-00328, 2011 WL 3918093 (Tex. App.—Houston [1st Dist.] Aug. 25, 2011, no pet. h.).

17. A mineral reservation found in an invalid deed is effective so long as it is referenced in another, valid deed. The court of appeals held that a land owner was estopped from claiming title to the mineral estate because of a mineral reservation originally made in an invalid deed. The court came to this conclusion after identifying an additional deed referencing the mineral reservation. *XTO Energy Inc. v. Nikolai*, No.02-09-00299, 2011 WL 4345201 (Tex. App.—Fort Worth Aug. 30, 2011, no pet. h.).

18. Section 111.104(f) of the Texas Tax Code does not create a private cause of action. The court of appeals held that a group of royalty interest and non-operating interest owners did not have standing to

bring its suit under section 111.104(f) of the Texas Tax Code, because the section does not create a private cause of action. The non-operating owners claimed that the operator of oil and gas properties had not complied with the requirements for properly obtaining refunds on state severance taxes. *Coll v. Abaco Oper. Co.*, No. 2:08-CV-345-TJW, 2011 WL 1831748 (E.D. Tex. 2011) (May 12, 2011).

III. CASES

1. *Tawes v. Barnes*, 340 S.W.3d 419 (Tex. 2011).

In *Tawes*, the Texas Supreme Court held that an oil and gas lessor could not enforce a Joint Operating Agreement or a Working Interest Unit Agreement, either as a third-party beneficiary or by way of privity of estate

Leon and Doris Barnes executed an oil and gas lease. Through a series of assignments, Dominion Oklahoma Texas Exploration & Production, Inc. ("Dominion") eventually succeeded as the lessee. The land adjoining the Barnes Lease was subject to a series of oil, gas and mineral leases, collectively known as the Baker Lease. Moose Oil & Gas Company held a working interest in the Baker Lease, along with a group of investors including O. Lee Tawes, III.

In preparation for a joint drilling venture on the lands covered by the Baker and Barnes leases, Dominion entered into a Joint Operating Agreement (JOA) and Working Interest Unit Agreement (WIUA) with the working-interest owners of the Baker Lease. The JOA permitted the parties to drill an initial well and to propose additional drilling operations. Also, the JOA allowed any party to protect itself from the risks associated with additional operations by withholding consent. By electing to go non-consent, a party would temporarily relinquish its interest in the well. However, following a specified period of time, each non-consenting party's interest in the well would revert back.

In 1998, after the initial well was successfully drilled, Moose proposed the drilling of two additional wells. Dominion elected to withhold consent from the additional wells, which were subsequently drilled. Significantly, the JOA included a royalty provision that required the consenting parties to pay the royalties owed by non-consenting parties to their respective lessors. As a result, the consenting parties were responsible for paying royalties to Leon and Doris Barnes.

Two years later, Doris Barnes brought suit against Dominion and Moose seeking to recover royalties on the non-consent wells. Dominion joined Tawes and the other investors in the suit; and it removed the action to bankruptcy court after Moose filed for bankruptcy. The bankruptcy court granted partial summary judgment in favor of Barnes, holding Dominion liable for the unpaid amount of the *undisputed* royalty on the non-consent wells. However, Barnes continued to pursue a claim for *additional* royalties on the wells. Before her claims proceeded to trial, Barnes reached a settlement with all parties except for Tawes—who had acquired Moose's undivided working interest in the wells at a foreclosure sale.

Upon consideration of Barnes' claims against Tawes, the bankruptcy court determined that as a JOA signatory, Tawes was obligated to perform Dominion's duty of paying Barnes the lessor's royalty. Tawes

appealed to the United States District Court for the Southern District of Texas. The district court affirmed the bankruptcy's court's decision, concluding that Barnes qualified as a third-party beneficiary of the JOA and WIUA. Tawes appealed again to the Fifth Circuit, which certified three questions for the Texas Supreme Court. The Supreme Court was only required to address the first one, however, which asked whether Barnes had any right to enforce the JOA and WIUA as a third-party beneficiary or by virtue of having privity of estate with Tawes.

The Supreme Court began by reiterating the following principle: in the absence of a clear and unequivocal expression of the contracting parties intent to directly benefit a third party, courts will not confer third-party beneficiary status by implication. The court then examined the joint-venture agreements—the JOA and WIUA—and concluded that neither agreement included a clear intent to directly benefit Barnes. Specifically, the court concluded that despite the inclusion of the royalty provision, the purpose of the JOA was to allocate responsibilities and govern operations, not to benefit lessors. But the fatal flaw was the absence of any unequivocal language demonstrating an intent to directly benefit Barnes.

The court's conclusion with respect to third-party beneficiary status paved the way for its ruling on privity of estate. Barnes claimed that she and Tawes shared privity of estate due to Tawes' assumption—as a consenting party—of Dominion's obligation to pay royalties. However, the court concluded that no privity of estate existed for two key reasons. First, the court stated that an assignment creating privity of estate only occurs when a lessee conveys his *entire* estate. According to the court, Dominion only temporarily relinquished its interest in the non-consent wells, and thus it did not convey its entire estate. Second, the court pointed to a provision in the JOA, which declared that nothing in the contract shall be deemed an assignment. As a result of these findings, the court held that Barnes could not enforce either the JOA or the WIUA as a third-party beneficiary or through privity of estate.

2. *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59 (Tex. 2011).

In *Marshall*, the Texas Supreme Court held that a cotenant could demonstrate his intent to oust—a requirement of adverse possession by a cotenant—by paying the tenant a royalty share instead of a higher cotenant share.

BP America Production Co. ("BP") obtained oil and gas leases on the Slator Ranch from a number of individuals and entities, including the Marshall family and three companies operating under the name Vaquillas (collectively "Vaquillas"). The leases had a standard savings clause providing that the lease would continue past the expiration date so long as BP was engaged in good-faith drilling or reworking operations with no cessation for more than sixty days. BP drilled a well in June of 1980, two weeks before the expiration of the primary term. Seeing no production from the well after the lease expiration date, a member of the Marshall family contacted BP. A few days later, a BP landman sent the Marshalls and Vaquillas a letter purporting to document BP's continuous operations on the well. The letter satisfied the lessors, and neither investigated further.

BP entered into a series of agreements with Sanchez–O'Brien Oil and Gas Corporation on March 25, 1981,

through which Sanchez–O'Brien became the operator of a portion of the Slator Ranch. On that same day, BP permanently plugged and abandoned the well. Since that time, continuous operations have been performed on the lease, first by Sanchez–O'Brien, and later by Wagner Oil Co. and associated entities ("Wagner"), who ultimately obtained the Slator Ranch lease.

Vaquillas sued Wagner, BP and other entities in 1997, contending, among other things, that title to the leasehold reverted back to Vaquillas in 1981, because BP had abandoned any real efforts to rework the well more than 60 days before Sanchez–O'Brien began drilling operations. The Marshalls intervened in the suit, similarly alleging that their lease had terminated in 1981 and also claiming that BP had defrauded them by concealing facts related to termination of the lease. Following a series of settlements, only two disputes proceeded to trial: the Marshalls' fraud claim against BP, and Vaquillas' claim that it retained title to the leasehold over Wagner. At trial, the jury found in favor of the Marshalls against BP; but it found against Vaquillas, concluding that Wagner had adversely possessed the leasehold. Both verdicts were appealed.

The San Antonio Court of Appeals held there was sufficient evidence to support the jury's finding that BP committed fraud. The appeals court also addressed an issue raised by BP concerning the limitations period, ruling that the discovery rule defeated BP's limitations defense. With respect to Vaquillas, the court reversed the judgment awarding title to the leases to Wagner by adverse possession. BP and Wagner appealed to the Texas Supreme Court.

The Supreme Court first addressed whether the Marshalls' fraud claim was barred by the limitations period, an analysis that required consideration of the discovery rule and whether the limitations were tolled by BP's fraudulent concealment of the true status of its operations. Under the discovery rule, a cause of action does not accrue until the injury could reasonably have been discovered. Thus, the discovery rule is only triggered when the nature of the injury incurred is "inherently undiscoverable." According to the court, the injury suffered by the Marshall family was discoverable through public records—namely, the well log and the plugging report filed with the Texas Railroad Commission within the limitations period. As a result, the court ruled that information disclosing a lessee's failure to continue good faith efforts to develop an oil and gas lease is not an instance where the discovery rule applies, so long as that information is held in public records.

Turning to the second portion of the limitations issue, the court explained that a defendant's fraudulent concealment of wrongdoing may toll the limitations after the cause of action accrues. However, fraudulent concealment only tolls the limitations until the fraud is discovered or could have been discovered with reasonable diligence. The Marshalls argued that relying on the letter sent by the BP landman satisfied their duty of diligence. But the court rejected that argument, declaring that reasonable diligence requires owners of property interests to make themselves aware of information available in the public record. Thus, even if the landman's letter misrepresented the continuing nature of the operations, the limitations period would not be tolled because that information was available through other means. As a result,

the court held that the Marshall's claim was barred by the statute of limitations.

Next, the court addressed the dispute between Wagner and Vaquillas regarding whether Wagner adversely possessed the Vaquillas lease. The court of appeals had found that Vaquillas and BP, Wagner's predecessor-in-interest, became cotenants in 1981, after the lease terminated due to cessation of good faith operations. Accordingly, the Supreme Court was tasked with determining whether Wagner had satisfied the requirements for adverse possession by *cotenants*. In addition to the traditional requirements of adverse possession, a cotenant must show "unmistakable and hostile acts that would put other cotenants on notice of its intent to oust them from the leasehold."

In Texas, unleased cotenants are generally entitled to the value of minerals taken less reasonable costs, as opposed to a fractional royalty from production. Yet Wagner had paid Vaquillas a royalty interest of approximately four percent instead of a cotenant share of twenty-five percent. According to the court, the royalty payment put Vaquillas on notice that Wagner claimed to own the leasehold. Further evidence that Vaquillas was on notice included division orders certifying that Vaquillas owned a royalty interest and not a cotenant's share, as well as correspondence from Vaquillas' counsel recognizing a royalty interest. That Vaquillas did not know the lease had terminated was irrelevant, the court stated, because Vaquillas was on notice that Wagner claimed title to the leasehold.

Vaquillas also argued that since the jury determined that it did not have sufficient knowledge of BP's fraudulent concealment until 2000, Wagner's adverse possession cause of action did not accrue until that time. The court disagreed, declaring that the cause of action accrued when Wagner's adverse activity began a number of years earlier. Consequently, the court held that Wagner had adversely possessed the Vaquillas lease.

3. *Lesley v. Veterans Land Board*, No. 09-0306, 2011 WL 3796568 (Tex. 2011) (Aug. 26, 2011).

In *Lesley*, the Texas Supreme Court held that the owner of the executive right can breach its duty to the non-executive interest holders even if the executive treats its mineral interest the same as the mineral interests of the non-executives; the question is whether the action of the executive was motivated by self interest.

In 1998, Bluegreen Southwest One, L.P. ("Bluegreen") acquired approximately 4,100 acres of land near Fort Worth, which included the executive right in the entire mineral estate. The Lesley group, which had conveyed the land to Bluegreen's predecessor, reserved part of an undivided one-half interest in the minerals. The other half was owned by the Hedrick group.

Bluegreen subsequently developed the property into a residential subdivision. Each of the more than 1,200 lots contained a restrictive covenant forbidding oil development operations. In 2005, the Lesley and Hedrick groups sued Bluegreen and the subdivision lot owners, one of whom is the Texas Veterans Land Board (TVLB), alleging various theories of unlawful limitation of mineral development. Several issues made it up to the Supreme Court on appeal.

The Supreme Court first addressed the question of whether the TVLB was immune from the suit. Because the

legislature has not yet allowed a "suit for land" to be brought against state agencies, the court quickly concluded that the TVLB was immune from the action brought by the Lesley and Hedrick groups.

The court then turned to questions surrounding the conveyances. The Lesley group argued that its deeds should be reformed to reserve a one-fourth mineral interest in the entire tract, rather than one-fourth of the group's one-half interest (or a one-eighth interest). The group's argument rested on incompatible language in the deeds, as well as the fact that Bluegreen also believed that the Lesley group reserved a one-fourth interest, evidenced by language in the conveyances to subdivision lot owners. The court explained that a suit for reformation is governed by a four year statute of limitations, which runs from the date the mistake either was discovered or should have been discovered. Because both parties shared a similar understanding, the court declared that it could not be said as a matter of law that the Lesley group knew or should have known of the mistake in the deed. As a result, the court reversed the summary judgment of the appeals court and remanded the limitations issue.

The next issue was whether Bluegreen held the executive right in the mineral estate, or whether Bluegreen had conveyed the right to the lot owners. Each deed to a lot conveyed the land and Bluegreen's mineral interest, excepting the interests held by the Lesley and Hedrick groups, but did not mention the executive right. The court explained that—unless the executive right was reserved or excepted—the deed to each lot conveyed the executive right covering both the mineral interests of the lot owners and the mineral interests of the Lesley and Hedrick groups. The groups argued that the restrictive covenant limiting development of the mineral effectively reserved the executive right to Bluegreen. However, the court rejected that argument and held that the executive right was not reserved by the restrictive covenant. Significantly, in coming to this conclusion, the court focused on a provision in the restrictive covenant allowing modification by a two-thirds vote of the owners.

Finally, the court addressed the principal issue in the case: whether Bluegreen, as original owner of the executive right, breached its duty to the Lesley and Hedrick groups. The owner of the executive right owes a duty of utmost fair dealing to those holding non-executive interests. According to the court, this duty created a fiduciary relationship between Bluegreen and the Lesley and Hedrick groups.

The Lesley and Hedrick groups argued that by placing the restrictive covenants in the deeds to the subdivision lot owners, Bluegreen breached its fiduciary duty. Bluegreen responded that the restrictive covenants only benefitted its surface estate; its mineral estate was treated the same as the groups'. Following precedent, the court declared that an executive can breach its fiduciary duty even when its mineral interest is treated the same as non-executives. The question, the court said, is whether the action of the executive is motivated by self interest.

The court viewed the restrictive covenants as self-interested action by Bluegreen, and therefore held that Bluegreen breached its duty. The court recognized that as a land developer, Bluegreen acquired the executive right for the purpose of protecting the subdivision from disruptive activities; however, the court noted that common law provides such protection to the surface

owner through the accommodation doctrine. Consequently, the court ordered the cancellation of the restrictive covenants.

4. *Texas Rice Land Partners, Ltd. v. Denbury Green Pipline-Texas, LLC*, No. 09-0901, 2011 WL 3796574 (Tex. 2011) (Aug. 26, 2011).

In *Texas Rice Land Partners*, the Texas Supreme Court held that a pipeline company's common-carrier permit does not prevent landowners from challenging its eminent domain power in court. If challenged, the pipeline company must establish its common-carrier bona fides as prescribed by the court.

Denbury Green Pipeline-Texas, LLC ("Denbury"), along with its parent companies, engaged in tertiary recovery operations involving the injection of CO2 into existing oil wells to increase production. Denbury desired to build a pipeline from a CO2 reserve it owned in Mississippi to the Hastings Field in south Texas. With this goal in mind, Denbury applied with the Texas Railroad Commission to operate a CO2 pipeline in Texas. By selecting a few boxes on the T-4 permit application, Denbury indicated that it would operate as a "common carrier." Denbury also submitted a letter stating that it agreed to comply with the duties and obligations provided in Chapter 111 of the Natural Resources Code. The Commission granted the permit.

Later, Denbury set out to survey land along the pipeline in preparation for condemning a pipeline easement. The owner of two tracts along the pipeline, Texas Rice Land Partners, Ltd., refused entry to Denbury. Denbury sued for an injunction allowing access to the tracts. On motions for summary judgment, the trial court held that Denbury was a common carrier and, therefore, had the power of eminent domain. The appeals court affirmed, ruling that Denbury established its common-carrier status as a matter of law. Texas Rice Land Partners appealed to the Supreme Court, which reversed and remanded.

The Supreme Court set out to decide two issues: First, does a common-carrier permit granted by the Railroad Commission conclusively establishes eminent-domain power? And second, does Denbury qualify as a common carrier as a matter of law? With respect to the first issue, the court began by recognizing that nothing in the statutory scheme indicates that a Commission permit carries conclusive effect. Also, the permit process does not effectively protect the constitutional prohibition against the taking of property for private use. As the court explained, a common-carrier permit (T-4 permit) can be obtained by simply checking a few boxes on a one-page government form. And the Commission does not perform an ad hoc investigation to determine whether a pipeline will in fact serve the public interest. Consequently, the court held that the granting of a common-carrier permit does not prohibit a landowner from challenging in court the eminent-domain power of a permit holder.

Turning to the second issue, the court made explicit that to qualify as a common carrier with the power of eminent domain, the pipeline must serve the public. Denbury argued that making the pipeline available for public use was sufficient to confer common-carrier status. The court disagreed. Section 111.002 of the Natural Resources Code provides that a common carrier owns or operates a pipeline "to or for the public for hire . . . ." According to the court, this language imposes a necessary

requirement, in addition to other obligations under Chapter 111, for a pipeline company to qualify as a common carrier. Specifically, pursuant to the statutory language, a reasonable probability must exist that the pipeline will serve the public by transporting gas for customers who will either retain ownership of their gas or sell it to parties other than the carrier. The court determined that Denbury could not satisfy the common-carrier test as a matter of law, and as result, the court remanded the issue to the trial court.

5. *Teon Management, LLC v. Turquoise Bay Corp.*, No. 11-10-00050-CV, 2011 WL 1326325 (Tex. App.—Eastland April 7 2011, no pet.).

In *Teon Management*, the appeals court held that a suit seeking a declaratory judgment that oil and gas leases had not yet terminated should have properly been filed as a trespass to try title action.

Turquoise Bay Corporation filed suit against Teon Management LLC and others, seeking a declaratory judgment that seven oil and gas leases had not terminated and, consequently, that it was the operator of four wells located on those leases. In a counterclaim, Teon Management asked the court to find that the leases had terminated, and also that Turquoise Bay was a bad faith trespasser. The trial court found in favor of Turquoise Bay, entering a declaratory judgment that the leases were still in effect; that Turquoise Bay was the proper operator of three wells; and that Turquoise Bay was not a trespasser. Teon Management appealed.

The appeals court considered several issues, two of which were central to the court's ultimate holding—(1) whether the suit should have been prosecuted as a trespass to try title suit rather than a declaratory judgment; and (2) whether Turquoise Bay properly proved its title.

Turning to the first issue, the court explained that when title is in dispute, the proper cause of action in most cases is a trespass to try title action. Turquoise Bay argued that the general rule did not apply because the relief it sought was different from the relief available in a trespass to try title action. Specifically, Turquoise Bay pointed out that it sought a declaratory judgment on issues concerning operator status, trespassing, and production payments. These issues, Turquoise Bay contended, reach far beyond the simple determination of title. However, the court of appeals rejected this argument, reasoning that each decision made by the trial court hinged on its threshold determination that the leases were still in existence. Accordingly, the court declared that each decision was a title determination.

The court then addressed Turquoise Bay's argument that it was not required to file a trespass to try title action because the suit was more akin to a quiet title action. The court disagreed, explaining that the purpose of such a suit is to remove a cloud on title. According to the court, Turquoise Bay's action did not seek to remove a cloud on title, such as by challenging the validity of the leases; instead, the action sought a determination of whether the leases provided Turquoise Bay with a present right to possession. Moreover, the court declared that the competing claims made it necessary for Turquoise Bay to satisfy the burden of proof required in trespass to try title suits irrespective of whether the suit was characterized as a quiet title action.

Upon the foregoing conclusions, the court held as follows: Because every

substantive issue was resolved when the trial court determined who owned the mineral estate, the action was a title determination. Therefore, Turquoise Bay was required to proceed with a trespass to try title suit. The court then turned to decide whether Turquoise Bay could prove its title, as required under a trespass to try title action. Turquoise Bay relied on the presumption of title created by prior possession to satisfy its burden. However, the court ruled that Turquoise Bay could not rely on that presumption because it admitted that Teon Management had at least an assignment of the mineral owner's reversionary interest—which was sufficient to establish an ownership interest.

Turquoise Bay did not claim adverse possession or otherwise prove title. As a result, the court applied the rule it described as "harsh": if the plaintiff cannot establish title in a trespass to try title action, the court must enter a take-nothing judgment against it. The court thus ruled that Teon Management held title, not Turquoise Bay. However, the court also ruled that questions of fact remained with respect to whether Turquoise Bay was a good faith trespasser entitled to recover its drilling and operation costs. Therefore, the court reversed on the issue of the expiration of the leases and remanded on the issue of trespassing.

6. *Gail v. Berry*, 343 S.W.3d 520 (Tex. App.—Eastland 2011, pet. struck).

In *Gail*, the court of appeals held that a warranty deed could be reformed on the basis of mutual mistake, due to the lawyer's failure to include in the deed a mineral reservation provided in the sales contract.

In 2004, Hazel Berry, Bernadine Wilson, and Evelyn Mebane (collectively, "Berry") entered into a contract to sell 176 acres to Cynthia Gail. The contract reserved to Berry all minerals, royalties, and timber interests in the land. At a later date, Berry's attorney executed a warranty deed to Gail; however, the deed did not contain a mineral reservation.

During the probate of Evelyn Mebane's estate, the executrix discovered the flaw in the warranty deed to Gail. When Gail refused to revise the title, Berry sued for reformation of the deed on the basis of mutual mistake. At summary judgment, the trial court ruled in Berry's favor. Gail appealed.

The court of appeals began by ruling that the trial court had abused its discretion by failing to strike certain statements in Gail's summary judgment affidavit. Specifically, the court found that several statements in Gail's affidavit would not be admissible into evidence, a requirement of supporting and opposing affidavits to a summary judgment motion.

The court then turned to Gail's sole issue on appeal—whether the trial court erred in granting summary judgment. The court explained that a party is entitled to reformation of a deed when it proves it reached an agreement with the other party that, due to mutual mistake, is not accurately reflected in the deed. The court noted that a scrivener's failure to accurately embody the agreement is a ground for reformation on the basis of mutual mistake.

The attorney who prepared both the sales contract and warranty deed testified that he made a mistake by failing to include the reservation in the deed. He explained that he used the title insurance commitment's legal description of the property, which did not contain a mineral reservation, to prepare the deed. Also, he

never compared the deed to the sales contract. Gail responded to this evidence by contending that the merger doctrine prevented using the sales contract to interpret the unambiguous warranty deed. The court dismissed this argument, however, declaring that the merger doctrine only applies in the absence of fraud, accident, or *mistake*.

Gail also claimed that the reservation in the deed should be construed against Berry, whose attorney drafted the deed. Once again, the court summarily rejected the argument, explaining that canons of construction—such as the one raised by Gail—only apply when the deed is ambiguous, which it was not. Consequently, the court held that there was no genuine issue of material fact concerning whether Berry was entitled to reformation due to mutual mistake.

7. *Hernandez v. El Paso Prod. Co.*, No. 13-09-184-CV, 2011 WL 1442991 (Tex. App.—Corpus Christi April 14, 2011, no pet. h.).

In *Hernandez*, the court of appeals found that a mineral deed conveyed one half of the grantor's interest in the mineral estate by harmonizing the granting clause with other clauses in the deed.

Yolanda Hernandez and others (collectively "Hernandez") filed suit to quiet title with respect to a mineral deed recorded in 1932. Hernandez, the heir of the deed's grantor, argued that the deed conveyed a 1/16 mineral interest. Consequently, Hernandez claimed ownership to an undivided 7/16 of the mineral interest in and under the property. In response, El Paso, an assignee of mineral interests in the property, contended that the grantors conveyed their entire mineral interest in the property during their lifetime and, therefore, Hernandez did not own any interest in the mineral estate. The trial court granted summary judgment in favor of El Paso, ruling that Hernandez owned no mineral interest in the property.

On appeal, the court sought to determine ownership in the mineral interests of the subject property, a question complicated by the many deeds in the chain of title. The question was also complicated due to confusion surrounding three clauses in the deed—the "granting" clause, the "subject to" clause, and the "future lease" clause. Significantly, the court rejected Hernandez's argument that the only clause the court should consider was the granting clause. Instead, the court ruled that it must consider all "four corners" of the document.

In addressing the historical use of the three clauses, the court explained that the granting clause is similar to other real property conveyances; the subject-to clause concerns an existing lease to which the conveyance is subject; and the future-lease clause addresses ownership rights following expiration of the existing lease. In regard to the deed at issue in the case, the granting clause granted a 1/16 interest in the minerals and the subject-to clause covered 1/2 of all the oil and gas royalty. According to the court, the subject-to clause suggested that the grantors understood that they owned a 1/8 royalty and that they were giving 1/2 of it to the grantees. The future-lease provision, the court explained, also expressed the parties' intent to jointly own the minerals, 1/2 each.

The court analyzed the three clauses against descriptions of such clauses provided in Texas case law and scholarly articles. In construing the deed pursuant to the rules provided therein, the court concluded that the deed's grantor did convey

1/2 of its interest in the mineral estate, rather than a 1/16 interest as Hernandez argued. Also, because Hernandez's ancestors conveyed the other half two years later, the court determined that Hernandez did not inherit any mineral interest. Accordingly, the appeals court affirmed the trial court in that regard. The court of appeals reversed and remanded, however, with respect to an additional issue of whether El Paso had demonstrated as a matter of law that it had not negligently damaged the surface.

8. *City of Houston v. Maguire Oil Co.*, 342 S.W.3d 726 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

In *Maguire*, the court of appeals held that a city's stop work order forbidding an oil company to drill constituted a regulatory taking, despite the fact that the order was not issued by the city council.

Maguire Oil Company acquired oil and gas leases covering land near Lake Houston. In 1991, Maguire applied for a drilling permit to drill a vertical well approximately 300 feet from the lake's shore. The city approved the permit, and Maguire spent at least $250,000 in preparation for drilling. During this time, a Lake Houston patrol office noticed the drilling site and contacted Houston's Water Quality Control Department. An inspector from the Department inspected the site and, after a series of departmental communications, issued a stop work order. The order was based on a Houston city ordinance later determined to be inapplicable to Maguire.

After several attempts to regain permission to drill, Maguire sued the City of Houston, contending that the City's conduct amounted to a taking without adequate compensation and discrimination against a mineral property owner. Following twenty years of litigation and a jury award of $2 million in favor of Maguire, the case wound up in the Fourteenth District Court of Appeals. The appeals court considered two issues: (1) whether a taking had occurred, and (2) whether an intent to take property must be shown.

Maguire argued that the City's enforcement of an inapplicable ordinance to prevent drilling unreasonably interfered with Maguire's right to use and enjoy its mineral estate. Accordingly, Maguire contended that compensation was warranted for the regulatory taking, or "inverse condemnation." In response, the City of Houston maintained that no taking had occurred because the City employees who shut down drilling operations acted without authorization. This argument proved unavailing with the court, which explained that the ultra vires activity of employees has been deemed relevant in the sovereign immunity context, not in the takings clause context.

The city also argued that the factors used by the trial court for finding a regulatory taking—those listed in the United States Supreme Court case *Penn Central Transportation Company v. New York*—were not applicable in the case. The court concluded that the *Penn Central* factors were indeed applicable, as the allegedly unauthorized acts of the City's employees did not change the analysis. Because the City did not argue that the trial court's application of the factors was flawed, the court upheld the finding of inverse condemnation.

Turning to the second issue, the court examined Texas precedent to determine whether intent is a necessary requisite to recover on a claim for inverse

condemnation. The court explained that the law is clear with respect to a physical taking—intent to exercise eminent domain power is required. For a regulatory taking, however, the law is less clear. Ultimately, the court declined to give an affirmative answer, holding as follows: Assuming some level of government intent must be established, such a requirement is satisfied by the unequivocal intent of the City's final decision-maker to enforce the ordinance against Maguire.

The court also rejected the City's argument that the intent of the employees should not be attributed to the city, because the city only acts through the City Council. According to the court, the director of the Water Quality Control Department was the relevant decision maker, and therefore his intent was the city's intent.

9. *Merriman v. XTO Energy, Inc.*, No. 10-09-00276, 2011 WL 1911987 (Tex. App.—Waco May 11, 2011, no pet. h.).

In *Merriman*, the court of appeals held that an oil and gas lessee did not violate the accommodation doctrine by constructing a well on the surface estate, despite the fact that the surface owner had to find an alternative way to work his cattle.

Homer Merriman purchased the surface estate of a 40-acre tract in 1996. In addition to living on the tract, Merriman occasionally used the property for his cattle operation. Specifically, Merriman would bring his cattle to the tract once a year; he would sort them into three areas using stock panels and electric fences; and then he would remove the separating equipment and allow the cattle to graze.

In 2007, XTO Energy, Inc., the holder of an oil and gas lease on the severed mineral estate, contacted Merriman about constructing a gas well on the property. Merriman objected, claiming that the site would interfere with his cattle operation. XTO offered to pay Merriman $10,000 for surface damages, but Merriman declined. Nevertheless, XTO began construction on the well site. Merriman then filed suit requesting a permanent injunction. The trial court granted XTO's No-Evidence Motion for Summary Judgment, finding that Merriman failed to provide evidence that XTO had performed a wrongful act—one of the requirements to obtain a permanent injunction.

Merriman argued on appeal that XTO's wrongful act was violating the accommodation doctrine. The appeals court began its analysis by explaining that, under the accommodation doctrine, the dominant mineral estate has the right to reasonable use of the surface estate to produce minerals, but it must exercise that right with "due regard" for the rights of the surface owner. Merriman contended that XTO failed to exercise due regard because the well site interfered with the sorting pens and working corral he used to sort his cattle.

With this in mind, the court set out to decide whether Merriman had alternative, reasonable means of performing his cattle operation now that the well had been constructed. According to the court, Merriman would have to show that any alternative method for sorting cattle would be impracticable and unreasonable under all the circumstances.

The court took little time to conduct this inquiry, concluding that Merriman did have reasonable and practicable means of conducting his operation. Specifically, the court noted that Merriman acknowledged he could potentially sort the cows with a

portable squeeze chute on the lot across the street, which he also owned. Also, Merriman admitted that he could build pens on the individual locations where the cows were regularly kept. But that option, Merriman declared, was not his first choice.

In response, the court declared that although Merriman's current method of working his cattle was convenient for him, "the convenience of the surface owner is not the sole issue." Accordingly, the court ruled that there was no violation of the accommodation doctrine, affirming the trial court's grant of summary judgment.

10. *Pharaoh Oil & Gas, Inc. v. Ranchero Esperanza, Ltd.*, 343 S.W.3d 875 (Tex. App.—El Paso 2011, no pet.).

In *Pharaoh*, the court of appeals held that an order requiring an oil and gas lessee to remove equipment stored on the leased land was a mandatory injunction, requiring a showing of irreparable harm or extreme hardship. Such a showing cannot be made if damages are calculable and no extreme hardship will exist while a merits trial proceeds.

In late 2004, Ranchero acquired the surface estate and one-half of the mineral estate in a large ranch, which was used, in part, for recreational hunting and as a survey environment for Texas A & M Students. Following Ranchero's acquisition, Pharaoh began operating oil and gas wells on the Ranch; those wells had previously been owned and operated by another individual since 1982. Due to Pharaoh's use of two sections of the ranch, the "Top Yard" and "Bottom Yard," Ranchero filed suit for trespass, violation of the Texas Railroad Commission Rules, unreasonable use of the surface, and negligence. Specifically, Ranchero alleged that Pharaoh's storage of equipment and materials on those sections of the ranch was causing a loss of vegetation and soil erosion, and creating a dangerous environment. Ranchero also sought a temporary injunction, which the trial court granted after finding that the storage of equipment constituted an unreasonable burden on the leased land.

On an accelerated appeal, the El Paso Court of Appeals reversed the injunction order and remanded for a trial on the merits. In coming to this conclusion, the appeals court first addressed Pharaoh's argument that the trial court's order amounted to a mandatory injunction because it required Pharaoh to remove all unused equipment on the ranch. Ranchero responded that the order merely restored the status quo to the Top and Bottom yards prior to the trespass by Pharaoh. However, the court recognized that the Top and Bottom Yards had been used to store equipment and supplies since 1992—long before Ranchero even purchased the ranch. Thus, the court ruled that the temporary injunction was mandatory because it altered the status quo by requiring Pharaoh to remove the unused equipment.

Having decided that the trial court had issued a mandatory injunction, the court turned to address whether there was the necessary showing of irreparable harm or extreme hardship. The court principally focused on whether Pharaoh's conduct created an irreparable injury, which exists when a party cannot be adequately compensated or damages cannot be measured. The testimony from an environmental engineer confirmed that the land at issue had been harmed by leakage from vehicles and machinery. However, the engineer testified that the Yards could be cleaned up at a cost of $100,000,

conclusively establishing that damages can be measured.

The court also addressed Ranchero's argument that the harm was irreparable because Pharaoh might not be able to pay the judgment. Although the court stated that an injury can be irreparable if the defendant is insolvent, it ruled that Ranchero failed to meet its burden to prove insolvency. In addition, the court found that maintaining the equipment on the land while a trial on the merits proceeded would not cause extreme hardship to Ranchero. Upon these findings, the court reversed and remanded, striking down the injunction.

11. B*asic Energy Service, Inc. v. D-S-B Properties, Inc.*, No. 12-10-00005-CV, 2011 WL 2659989 (Tex. App.—Tyler June 30, 2011, no pet.).

In *Basic Energy Service*, the court of appeals held that a well-repair company was liable not only to the working interest owners, but also to the royalty owner of the lease.

D-S-B Properties, Inc. ("DSB") operated an oil well located in the area overlying the Paluxy Formation in Smith County, Texas. In 2007, DSB hired Basic Energy Services, Inc. ("Basic") to repair a problem with the well's tubing. In the process of testing the tubing, Basic's crew caused several joints of tubing to break free and fall down the wellbore. The efforts to retrieve the remaining tubing proved fruitless, and the parties determined that the well was irreparably damaged. DSB, acting as the representative of the working interest owners, filed a negligence suit against Basic. The trial court found Basic liable to DSB for nearly $2 million, and to the royalty owner for $71,000. Basic appealed, contending, among other things, that DBS did not have standing and that no damages should have been awarded to the royalty owner.

With respect to standing, Basic argued that DSB did not have standing to bring suit because it had no justiciable interest in the controversy. Basic relied on case law holding that an agent cannot sue as a representative of the principal, if the suit is only on the agent's behalf. However, the court recognized that DSB asserted claims both on its own behalf and on behalf of the working interest owners. The court therefore overruled Basic's challenge to standing. But before doing so, the court explained that the scope of DSB's authority to represent the working interest owners was a question of capacity, not standing. The court refused to address that question, though, finding that Basic waived the issue by abandoning the only pleading that contained the capacity argument.

Basic also challenged the trial court's award of damages to the royalty owner for lost royalties. Specifically, Basic argued that a royalty owner only suffers an injury if the formation containing the oil is damaged. Thus, without a showing that the formation was damaged, the royalty owner was not entitled to damages. The court quibbled with Basic's assertion, concluding instead that the record must show that the royalty owner successfully proved that it would not recover all of its interest in the formation.

The court characterized the well as unique. The well had produced oil continuously for over sixty years, despite the fact that it is located in a "channel sand formation." A formation of that type, the court explained, meanders far below the earth's surface, such that the course of the oil within the formation is continually changing. This cripples any guarantee that a

future well would be similarly successful. In fact, the court noted that two wells drilled within one-quarter mile of the damaged well resulted in dry holes. Additionally, the court stated that because of the fickle formation, the likelihood that another operator would undertake drilling a well was significantly decreased. As a result, the court determined that the royalty owner would not likely recover all of its interest in the formation.

The court also considered whether the damages were calculated with sufficient certainty. The damages calculation was based on the average price of oil per barrel, the average number of barrels produced per month, the predicted life span of the well, and the likelihood of a future well being a dry hole. The court held the calculation sufficient, and stressed that "damages must be established with reasonable certainty[;] mathematical precision is not required."

12. *Occidental Chemical Corp. v. ETC NGL Transport, LLC*, No. 01-11-00536-CV, 2011 WL 2930133 (Tex. App.—Houston [1st Dist.] July 20, 2011, pet. filed).

In *Occidental*, the court of appeals held that § 25.1032 of the Government Code only applies to inverse condemnation proceedings and statutory eminent domain proceedings as detailed in Chapter 21 of the Property Code. The court also held that the district court's grant of a temporary injunction was not in error, because the requirements for a temporary injunction were satisfied and there was evidence that the party was a common carrier.

ETC NGL Transport, LLC ("ETC") intended to build a pipeline to transport liquid natural gas. ETC requested that Occidental Chemical Corporation allow it to enter onto Occidental's pipeline corridor to conduct a preliminary survey of the corridor for construction of the pipeline. Occidental denied ETC's request due to its own strategic plans for the corridor. In May of 2011, ETC obtained a T-4 permit from the Texas Railroad Commission to operate as a common carrier.

Occidental still denied entry to ETC, so ETC filed suit in Harris County district court, seeking declaratory relief and a temporary injunction. The district court granted ETC's application for a temporary injunction, enjoining Occidental from interfering with ETC's entrance onto Occidental's corridor. Occidental filed an interlocutory appeal, contending that the district court did not have jurisdiction, and that the court erred in granting the injunction.

Occidental argued that Texas Government Code § 25.1032 grants civil courts of law exclusive jurisdiction over eminent domain proceedings in Harris County. That section states that county civil courts at law have "exclusive jurisdiction in Harris County of eminent domain proceedings, both statutory and inverse, regardless of the amount in controversy." The appeals court began by noting that there is a constitutional presumption that district courts are authorized to resolve disputes. Against this backdrop the court analyzed the language of section 25.1032 and concluded that it only applies to statutory eminent domain proceedings as detailed in Chapter 21 of the Property Code, as well as inverse condemnation proceedings. According to the court, the authority to enter upon the land to make a survey is "ancillary" to the power of eminent domain. Thus, the court held that suits brought by common carriers seeking injunctive relief to enforce their right to enter and assess land are not subject to the

clause at issue. The district court therefore had jurisdiction over the suit.

Occidental also contended that, for several reasons, the district court erred in granting the temporary injunction. First, Occidental argued that ETC would not suffer imminent harm and the injunction would alter the status quo. The court quickly concluded that ETC would be imminently harmed by the "business disruptions" caused by delays in the surveying process; and that the injunction would not alter the status quo, because ETC held rights to access and survey Occidental's corridor. Second, Occidental argued that there were procedural errors in the district court's order granting a temporary injunction. Once again, the court took little time to overrule Occidental's argument, holding that the order properly set forth the reasons for its issuance and was sufficiently descriptive.

Finally, Occidental argued that ETC was not a common carrier. The court stated that when determining whether an entity is a common carrier, a court is to "give great weight to the [Railroad Commission's] determination of that issue." Going further, the court explained that when the evidence before a court demonstrates that a pipeline carrying petroleum has subjected itself to the authority of the Railroad Commission, then it is a common carrier. The court noted that ETC presented evidence that it had obtained a T-4 permit as a common carrier, and that it had already executed multiple contracts with shippers. With this in mind, the court held that the district court was presented with sufficient evidence to find ETC qualified as a common carrier, and consequently it upheld the district court's judgment. Significantly, this decision was handed down prior to the Supreme Court's decision in *Texas Rice Land Partners v. Denbury Green Pipline-Texas, LLC*, addressed above. A petition for review was filed in the case on September 23, 2011.

13. *Allegiance Hillview, L.P. v. Range Texas Prod., LLC*, No. 02-10-00062-CV, 2011 WL 3211222 (Tex. App.—Fort Worth July 28, 2011, no pet. h.).

In *Allegiance Hillview*, the court of appeals held that the City of Denton's failure to issue drilling permits fell within the definition of "force majeure" in a Surface Use Agreement. The court reached this conclusion despite the oil and gas lessee's imprudence in submitting application materials.

Allegiance Hillview, L.P was the surface owner of property in Denton. Rayzor Investments, Ltd. owned the property's mineral estate. And Range Production Company and Range Texas Production, LLC (collectively "Range") operated together as the oil and gas lessee. Allegiance and Rayzor entered into a Surface Use Agreement (SUA) in 2006, which, after amendment, provided that Rayzor's right to access the drill sites terminated if drilling had not commenced as of July 11, 2009. The SUA also included a force majeure clause that allowed the Development Deadline to be extended. "Force Majeure" was defined in the agreement to include the City of Denton's failure to issue permits, provided that the permit seeker timely submitted permit applications.

As of the day before the Development Deadline, drilling had not commenced, and Range filed a suit seeking a declaration that an event of force majeure had occurred. The force majeure, Range claimed, was the City of Denton's failure to issue necessary permits. Allegiance responded that the failure to issue the permits was not due to fault of the City, but

rather to Range's untimely submission of application materials. The case proceeded to a bench trial, and the trial court entered an order declaring that an event of force majeure had occurred and that the Development Deadline would be extended. Allegiance appealed.

On appeal, the court considered three issues: whether Range provided proper notice, whether an event of force majeure had occurred, and whether Range timely submitted its permit applications. With respect to the first issue, the court examined the SUA and concluded that Range gave proper notice to Allegiance of the event of force majeure. The key to the second issue, the court explained, was the definition of force majeure in the SUA. The court focused on the portion of that definition addressing the City of Denton's failure to issue permits. There was no doubt, according to the court, that the city failed to issue permits. The question was whether its failure to do so was beyond the reasonable control of Range.

In answering this question, the court provided a detailed chronology of the events leading up to the Development Deadline. The court noted several issues demonstrating that Range did not act with utmost prudence. Nevertheless, the court concluded that the City's notification error was the key component of the untimely permit. Specifically, the court explained that if the City had properly posted notice of the date on which the SUP application would be considered at the commission hearing, the application could have been reviewed a full two weeks—a crucial two weeks—earlier. This fact outweighed others, including Range's subjective belief on May 20 that it would not meet the July 11 Development Deadline.

Having concluded that an event of force majeure had occurred, the court turned to consider whether Range satisfied the additional requirement that it "timely" submitted permit applications. The court first upheld the trial court's interpretation of timely as "within a reasonable time considering all the circumstances." The court's conclusion in this regard quashed Allegiance's argument that the word timely should be construed in the context of a hard-and-fast drilling deadline. Therefore, the court asked whether Range's submission of permit materials was reasonable considering the circumstances.

Those circumstances, the court explained, included several hurdles—a reduction in the number of drill sites, the requirement of a lease from the State of Texas to cross a highway, and the requirement of set-back waivers from local homeowners. Considering these circumstances, and others, the court opined that it was a "close call": there was evidence that Range may have waited too long to submit materials but there was also evidence that Range acted reasonably under the circumstances. In the end, the court held that there was legally sufficient evidence to support the trial court's findings. Consequently, the court upheld the declaratory judgment in favor of Range.

14. *Philipello v. Nelson Family Farming Trust*, No. 14-10-00026-CV, 2011 WL 3570169 (Tex. App.—Houston [14th Dist.] Aug. 16, 2011, pet. filed).

In *Philipello*, the appeals court held that a reservation in a deed gave the grantor a royalty interest in the entire property, not merely in the fractional mineral interest actually conveyed.

The Nelson Family Farming Trust (the "Nelson Trust") conveyed to Nathan and Shari Philipello approximately 100 acres of land in Robertson County, Texas. The Deed included the following reservation for the Nelson Trust: "For a period of ten (10) years from the date of this conveyance, one-eighth (1/8) of the royalty in oil, gas and other minerals in and under that may be produced with the oil and gas." The Deed also stated that the Nelson Trust is conveying the property subject to all prior reservations of mineral or royalty interests. Significantly, only one-fourth or one-half of the mineral interest was conveyed to the Philipellos; the parties were litigating this issue in a separate suit.

The dispute in this suit concerned the Deed's reservation. The Nelson Trust contended that the Deed reserved to it one-eighth of the royalty of the entire property; and the Philipellos argued that the Deed merely reserved one-eighth of the royalty of the one quarter or one half of the minerals that the Nelson Trust owned prior to conveyance. The trial court granted the Nelson Trust's motion for summary judgment in the declaratory-judgment action. Specifically, the court held that, as a matter of law, the Deed reserved a royalty in the entire property. The Philipellos appealed.

To the knowledge of the appeals court, no court had construed a reservation with language similar to that at issue. Thus, the court endeavored the interpret the Deed as a matter of first impression. The court first examined the specific language of the reservation, finding that it did not make explicit to which property the reservation applied. As a result, the court decided to considered the reservation in light of the entire Deed.

When viewing the Deed in its entirety, the court noted that shortly before the reservation paragraph, the Deed contained a section with a detailed description of the full property. In addition, the court recognized that the Deed did not contain a description of the fractional mineral interest conveyed by the Nelson Trust. With these factors in mind, the court deemed the reservation to unambiguously apply to the whole property. Thus, the court upheld the trial court's granting of summary judgment, ruling that the Nelson Trust owned a one-eighth royalty in the entire property—rather than a one-eighth royalty of a fractional interest.

This conclusion was reached notwithstanding the Philipellos' argument that doubts regarding construction of a deed should be resolved *against* the grantor. According to the court, that canon of construction is inapplicable when the Deed is unambiguous.

15. *Forest Oil Corp. v. Eagle Rock Field Services, LP*, No. 14-10-00558-CV, 2011 WL 3570176 (Tex. App.—Houston [14th Dist.] Aug. 16, 2011, no pet. h.).

The court of appeals held that a company was not entitled to compensation under a gas-purchase agreement for the Natural Gas Liquids created by the purchaser's compression of the gas. According to the court, gathering-system compression did not fall within the ambit of "processing" as used in the agreement's definition of Natural Gas Liquids.

Forest Oil Corporation and Eagle Rock Field Services, LP, succeeded to a gas-purchase agreement originally executed in 2003. Under the agreement, Forest Oil agreed to sell gas produced from certain Texas wells to Eagle Rock. Also, the agreement entitled Forest Oil to receive

compensation for eighty-five percent of the natural-gas liquids ("NGLs") and residue gas up to a certain quantity. Because of a dispute over the compensation provision, Forest Oil sued eagle Rock in 2007 for breach of contract, breach of duty, waste, and confusion of goods. Specifically, Forest Oil claimed that Eagle Rock failed to pay the value associated with liquids that condensed within Eagle's Rocks compression facilities and processing plant. According to Forest Oil, Eagle Rock's compression of gas resulted in the recovery of NGLs for which Forest should be compensated; also, Eagle Rock allowed a significant amount of NGLs to evaporate from its compression facilities.

Following a non-jury trial, the trial court concluded that the agreement was unambiguous with respect to the compensation provision, and entered a take-nothing judgment in favor of Eagle Rock. Forest Oil appealed, contending that the hydrocarbon liquids extracted from mechanically induced compression fall under the agreement's definition of NGLs: "those liquid hydrocarbons extracted from the Gas from *processing*." According to Forest Oil, the liquids extracted due to Eagle Rock's compression are the result of "processing" within the meaning of the agreement, as well as within the context of oil and gas industry custom. The appeals court affirmed the trial court, holding that the term "processing"—undefined in the agreement—does not include compression.

In its analysis, the court of appeals began by addressing the compression process conducted by Eagle Rock. In short: Forest Oil delivered gas from numerous wells to two central delivery points. When the gas entered Eagle Rock's gathering system, it was compressed to lower the pressure at the system's inlet, thus allowing greater volumes of gas to enter the system. Before the gas could be compressed, however, hydrocarbon liquids were removed to avoid damaging the compression equipment. Once removed, the liquids were transferred to storage tanks, and the gas proceeded through stages of compression. Any additional liquids that formed as a consequence of compression were also removed and transferred to storage tanks.

Pursuant to the agreement, Forest Oil was entitled to be compensated for NGLs saved and sold at the plants. The issue was whether Eagle Rock's removal of liquids through field compression and subsequent separation of liquids within its plant created NGLs for which Forest Oil should receive compensation. Through an examination of the agreement's definitions, the appeals court agreed with the trial court that "gathering-system compression is not 'processing' as that term is used in" the agreement's definition of NGLs. According to the court, Forest had the right to compress the gas itself and elected not to do so. The court also noted that its conclusion was supported by the Texas Supreme Court's recent decision in *Dynegy Midstream Services, L.P v. Apache Corporation*, in which the court held that compressor stations are not "plants," as they are necessary to move gas to a plant.

In addition, the appeals court highlighted the fact that the Texas Pipeline Association, as amicus curiae, agreed with its position. The Pipeline Association explained that the industry definition of "processing" is the act of extracting liquids at a gas processing plant, not the condensation of liquids at a compression facility. Ultimately, the court affirmed the trial court's judgment that Forest Oil was not entitled to compensation for compression-produced NGLs. As a result,

the court also held that Eagle Rock did not commit waste, because Forest Oil had no right to the liquids.

16. *Samson Lone Star, LP v. Hooks,* No. 01-09-00328, 2011 WL 3918093 (Tex. App.—Houston [1st Dist.] Aug. 25, 2011, no pet. h.).

In addition to other rulings, the court of appeals held that an oil and gas lessor was estopped from recovering royalties from a well included in a pooling unit, Well A, because the lessor accepted royalty payments from a well the lessee led it to believe was Well A.

In 1999, Charles Hooks, III and family (collectively "the Hooks") entered into an oil and gas lease with Samson Lone Star, LP ("Samson") in Jefferson County, Texas. The Jefferson County Lease included a section designed to protect the leased premises from drainage. This section, entitled "Offset Obligations," provided Samson with three alternatives if a gas well were completed within a specified area: drill an offset well, pay compensatory royalties, or release the offset acreage.

Many events took place over the course of the next few years; the following is a summary: Samson began drilling a directional well on a tract adjacent to the Hooks' property in 2000. When the well bottomed within the buffer zone, Samson had a contractual obligation to perform one of the three alternatives. Samson failed to do so. Instead, Samson sought to avoid those obligations by seeking to pool the Hooks' interest with those of other mineral owners even though the Jefferson County Lease did not provide pooling authority.

Samson filed a P-12 "Pooling Authority" form with the Texas Railroad Commission. Samson then sent the Hooks a letter offering to pool 50 acres covered by the Jefferson County Lease, which would require the Lease to be amended. Samson also misrepresented the location of the well, informing the Hooks that it was outside the buffer zone. The Hooks eventually consented to pool 50 acres from its lease into a unit called BSM 1. The Hooks conditioned their consent on an amendment to the Lease; but the parties never actually executed the amendment.

Samson began sending royalty checks to the Hooks for their interest in the BSM 1 unit, which the Hooks cashed. However, the royalty checks did not include the compensatory royalties as calculated under the terms of the Offset Obligations section. Later, Samson drilled a second well within the buffer zone of the Jefferson County Lease—the DuJay 1 Well—from which the Hooks also received royalty payments.

In addition to the Jefferson County Lease, the Hooks also owned two leases in Hardin County. The Hardin County Leases did provide pooling authority. As a result, Samson pooled the Hooks' interest in a well named BSM A-1. Later, however, Samson informed the hooks that the BSM A-1 unit had been amended, changing the unit's name to DuJay 1. Samson began paying the Hooks royalties from the DuJay 1 well—a separate well from BSM A-1, which Samson did not include in any unit.

Through a series of events, the Hooks joined a suit against Samson in 2006 for, among other things, underpayment of royalties and fraud. The trial court severed the Hooks' action in 2007, and a jury found Samson liable for fraud and underpayment of royalties on all three of the Hooks' leases. Samson appealed eight issues, and the

Hooks cross-appealed with one. Ultimately, the appeals court reversed the trial court's final judgment awarding the Hooks damages on their fraud and underpayment claims, ruling that the hooks should take nothing. The court also vacated the permanent injunction entered against Sampson.

There were three principal issues in the case—(1) whether the Hooks' fraud claims were barred by the statute of limitations, (2) whether the Hooks were estopped from denying the validity of the pooling agreements, and (3) whether the Hooks' royalties were underpaid by Samson's failure to properly apply the Formation Production Clause. In addressing the limitations issue, the court focused on the Texas Supreme Court's recent decision in *BP America Production Company v. Marshall*, which is addressed above. With *Marshall* in mind, the court ruled that the Hooks' fraud claims were not subject to the discovery rule, because the nature of the Hooks' injury was not inherently undiscoverable. Specifically, the court concluded that despite Samson's blatant fraud, the limitations period had run because the Hooks' failed to consult the public records that contained information related to the directional well's location in the buffer zone. Justice Sharp's dissenting and concurring opinion argues that while the appeals court correctly applied Supreme Court precedent, *Marshall* is not wise law.

With respect to the second issue, the court analyzed whether the trial court correctly granted summary judgment to the Hooks for royalties from the BSM A-1 well due to Samson's improper "unpooling" of that unit. Although the court explained that a lessee must obtain consent to terminate the pooling arrangement unless the lease expressly authorizes such termination, the court overruled the summary judgment order. Specifically, the court held that by accepting royalty payments for the DuJay units, the Hooks ratified their pooling agreement. Consequently, the court declared that the Hooks were estopped from recovering royalties from the BSM A-1 well. Sharp's dissent criticizes this holding, arguing that by accepting royalties to the DuJay units, the Hooks' pooling agreement extended to those units as well—it did not cut off the BSM A-1 unit.

The court then turned to the third issue regarding the Formation Production Clause. That clause provided that royalties on gas and liquid should be twenty-five percent of the market value or twenty-five percent of the price received, whichever is greater. The clause also states that calculations of royalties should be based on "formation production." With focus on this provision, the trial court held that liquid condensate produced from the well operates to give the Hooks a twenty-five percent royalty for both gas and liquid, amounting to a fifty-percent royalty. The court struck down the trial court's interpretation, however, and ruled that the Formation Production Clause simply provides a calculation of the total amount of natural gas taken from the reservoir.

In addition to these issues, the court also ruled that the Most Favored Nations clause did not require royalties payable to the Hooks to equal those payable under the settlement agreement between Samson and the State. Finally, the court held that the Hooks failed to provide a sufficient showing of imminent harm or irreparable injury to sustain the temporary injunction; and that the Hooks' cross-appeal was barred by the statute of limitations.

17. *XTO Energy Inc. v. Nikolai*, No.02-09-00299, 2011 WL 4345201 (Tex. App.—Fort Worth Aug. 30, 2011, no pet. h.).

In *Nikolai*, court of appeals held that that a land owner was estopped from claiming title to the mineral estate because of a mineral reservation originally made in an invalid deed. According to the court, a mineral reservation in an invalid deed is effective so long as it is referenced in another, valid deed.

In 1981, Leonard Nikolai purchased approximately thirty six acres of land in Denton County, Texas. XTO Energy Inc. contacted Nikolai in 2004 to express an interest in entering a lease concerning the minerals under his land. However, in 2005, XTO told Nikolai that he did not own the minerals due to a mineral reservation in the Madewell Deed—a 1904 deed purporting to convey the land now owned by Nikolai. And in 2007, a representative of Joint Resources Company ("JRC") informed Nikolai that several individuals other than Nikolai owned mineral interests in the property, and that JRC held leases on the minerals.

Later, XTO acquired the leases from JRC. Nikolai then sued XTO to quiet title. In a motion for summary judgment, Nikolai argued that the Madewell Deed—and its mineral reservation—was void under the statute of frauds. The trial court granted Nikolai's motion and XTO appealed.

On appeal, XTO argued that Nikola was estopped from claiming title in the mineral interest because of the mineral reservation in the Madewell Deed. Nikolai responded that the Madewell deed was void for lack of a sufficient description of the land it conveys. Although the court did not refute the void status of the Madewell Deed, it declared that in the construction of written instruments, all instruments in a chain of title must be considered.

Significantly, a separate deed conveying Nikolai's property, the Speer Deed, also addressed the mineral reservation. The Speer Deed read: "It is thoroughly understood that the Mineral Rights upon this tract of land are not transferred by this instrument, same having been retained by W.R. Madewell in deed to J.L. Goff." Also, the court noted, two other deeds in the chain of title relied on the Speer Deed in their description. Thus, the court concluded that the mineral reservation originally made in the Madewell Deed survived, notwithstanding the Deed's failure in form.

With this conclusion, the appeals court ruled that estoppel by deed applied to the case, barring Nikolai from denying the mineral reservation. Consequently, the court overruled the trial court's grant of summary judgment. The court also overruled Nikolai's argument that he had obtained the mineral estate by adverse possession. According to the court, estoppel by deed also foreclosed Nikolai's adverse possession argument. Irrespective, the court explained, Nikolai failed to meet the requirements of adverse possession.

18. *Coll v. Abaco Oper. Co.*, No. 2:08-CV-345-TJW, 2011 WL 1831748 (E.D. Tex. 2011) (May 12, 2011).

In *Coll,* the court held that a group of royalty interest and non-operating interest owners did not have standing to bring its suit under section 111.104(f) of the Texas Tax Code because the section does not create a private cause of action.

The State of Texas imposes a severance tax on the production of oil and gas though chapters 201 and 202 of the

Texas Tax Code. The severance tax applies to almost any type of interest in minerals, including operating interests, non-operating interests, and royalty interests. The Texas Legislature has established a withholding scheme whereby the entire severance tax is paid by the first purchaser or, in some instances, the producer or operator of the wells; the portion of the tax allocable to the non-operating and royalty interest owners is then deducted from the payments otherwise due to those parties. If a refund is due from the state, the Tax Code only permits the person or entity who directly paid the severance tax to seek a refund, unless there has been an assignment.

A collection of royalty interest owners and non-operating working interest owners brought a diversity action in federal district court claiming, among other things, that the operators of their oil and gas properties failed to properly seek a tax refund under section 111.104(f) of the Tax Code. That section declares that "[n]o taxes . . . may be refunded to a person who has collected the taxes from another person unless the person has refunded all the taxes and interest to the person from whom the taxes were collected." Simply put, the Plaintiffs claimed that the defendants had an obligation to give them refunds before the defendants could obtain the underlying severance tax refunds from the state of Texas.

On cross-motions for summary judgment, the district court set out to determine whether the section 111.104(f) applies to severance taxes in the way alleged by the Plaintiffs. Before doing so, however, the court first had to determine whether that section even creates a private cause of action. The court explained that it was bound by the Texas Supreme Court's decision in *Brown v. De la Cruz*, in which the court held that the rule for determining whether a statute gives rise to a private cause of action is a "strict rule of construction"—a statute implies a private cause of action only when the Legislature's intent to create such a cause of action is clearly expressed from the language of the statute as written.

With the strict rule of construction in mind, the court considered whether the statute clearly expressed the Texas Legislature's intent to create a private cause of action in section 111.104(f). The court began by noting that nothing in the plain language of the statute creates an express cause of action. Then the court addressed the Plaintiffs' arguments. According to the Plaintiffs, the statute was designed to avoid unjust enrichment at the expense of the indirect taxpayers—the owners of royalty and non-operating interests. The Plaintiffs also argued that evidence of the Legislature's intent to create a private cause of action is found in the fact that section 111 prohibits indirect taxpayers from directly seeking refunds. These arguments proved unavailing with the court.

Specifically, the court concluded that whatever implication might be gleaned from considering the purpose and overall design of the statute was not enough to imply a private cause of action. According to the court, there must be evidence of such an intent in the *language* of the statute. Furthermore, the court pointed out, had the Legislature desired to create a private cause of action, it already knew how to do so; sections 201.252 and 202.252 create a private cause of action in favor of a producer against a first purchaser who withholds severance taxes but fails to pay those taxes to the state.

Consequently, the court ruled that section 111.104(f) of the Tax Code does not create a private cause of action. The court therefore dismissed the Plaintiff's claim based on that section of the Tax Code for lack of standing. The court also dismissed the Plaintiffs' argument that the oil and gas leases included an implied covenant to comply with applicable tax laws. According to the court, the Plaintiff's failed to demonstrate that such a covenant was within the contemplation of the parties.

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