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Conveyances

Concho Res., Inc. v. Ellison, No. 19-0233, 2021 WL 1432222 (Tex. Apr. 16, 2021, mot. reh. filed).

A 1927 deed described one of the tracts conveyed as "…all of the lands located North and West of the public road which now runs across the corner

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of said survey, containing 147 acres…" A 1930 deed conveyed the remainder of the 640 acres and described same as being 493 acres. In actuality, that portion of the survey lying north and west of the referenced public road comprised 301 acres, with 339 acres lying south and east of same.

The northwest tract was leased for oil and gas in 1987 and described as 147 acres lying north and west of the public road, being the same land as conveyed by the 1927 deed. The lessee indicated in its Railroad Commission filings that the lease covered 320 acres. By 1996, the leases were owned by Ellison.

In 2006, the owners of the mineral estate in the southeast portion of the survey executed a lease to Samson Resources Company, describing same as 493 acres. A title opinion, obtained by Samson, noted inconsistencies in the descriptions of the two tracts. Samson also obtained a preliminary survey plat crediting 493 acres to the southeast tract, 154 of which lay to the north of the public road. Ellison and its lessors received notice from Samson in December 2006 that it intended to drill a well approximately 100 feet south of the public road and requesting an exception to the Railroad Commission's general prohibition against drilling within 467 feet of a lease line, arguably recognizing the public road as the boundary between the two tracts.

In 2008, Samson's landman prepared a Boundary Stipulation of Ownership of Mineral Interest, referencing the 1927 and 1930 deeds and describing the southeast tract as comprising 493 acres and the northwest as 147, and stating that a question had arisen as to the respective location of the two tracts. The stipulation was made effective as of the 1987 lease, was executed by the mineral owners of both tracts, and filed for record in the Irion County deed records. The landman then sent a letter to Ellison, enclosing the stipulation and requesting that he return a signed copy of the letter to signify acceptance of the description of the 147 acre tract. The landman also represented that, upon Ellison's acceptance, a more formal and recordable document would be provided. Ellison signed and returned the stipulation, but no further document was ever prepared. Samson later drilled one well on the 154 acre tract before assigning the leases, which ultimately came to be owned by Concho.

In 2013, Ellison filed suit, claiming that its lease covered all of the acreage north and west of the public road, and that neither the stipulation nor the signed letter were of any effect as to its leasehold. Concho moved for summary judgment, claiming that Ellison's signing the letter in 2008 ratified the boundary line established by the stipulation and that Ellison had given up any claim to the 154 acres, and the trial court agreed. On appeal, the court of appeals reversed, applying the general and established rule that the specificity of a metes and bounds description takes precedence to a conflicting general acreage call, and finding that the 1927 deed unambiguously conveyed all of the survey acreage northwest of the public road. Further, the appellate court held that the 1927 deed did not include an ambiguity or error needing correction, the stipulation was void because it did not effectively convey the disputed acreage and moreover that being void, the stipulation was incapable of ratification.

The Supreme Court reversed, finding that the mineral owners of the two tracts had agreed to resolve the apparent boundary issue as set forth in the stipulation, and recognizing the longstanding judicial deference shown agreed-upon settlements of boundary disputes, even those found afterwards to have been reached in error. The Court thus declined to upset the mineral owners' decision to resolve the issue in the manner they chose.

Next, Ellison argued that the stipulation could not retroactively be made effective against its leasehold, inasmuch as Ellison had no knowledge of it at the time it acquired the lease. The court agreed, but then found that Ellison's signing and returning of the 2008 letter evidenced an intent to be bound by the stipulation. The court noted that the failure to prepare and execute a 'more formal and recordable document,' after signing the letter, was of no consequence, as acceptance of the stipulation was not conditioned on the execution of a subsequent instrument.

Broadway Nat'l Bank v. Yates Energy Corp., No. 19-0334, 2021 Tex. LEXIS 396 (Tex. May 14, 2021, mot. reh. filed).

In 2005, Broadway Bank, as Trustee of the Mary Frances Evans Trust, conveyed a mineral interest in DeWitt and Gonzales counties to the Trust's beneficiaries; however, one beneficiary's share had been the subject of an amendment to the trust, calling for his interest to vest as a life estate, and upon his death, to his descendants. In 2006, the Bank executed a correction deed, which was not executed by the beneficiary. After execution of the 2005 deed but before the 2006 correction, the beneficiary executed an oil and gas lease in favor of Yates Energy. In 2012, the beneficiary conveyed his royalty interest to Yates, which assigned 70% of same to EOG Resources, Inc., and the balance to various third parties. In 2013, another purported correction deed was executed by all of the parties to the 2005 deed, but not any of the successors to their interests. The life tenant beneficiary died soon thereafter.

A dispute arose as to whether the royalty interest conveyed to Yates was vested in its successors, or the remaindermen to the beneficiary's life estate, and Broadway Bank sought suit seeking a declaratory judgment in the probate court, which was granted, holding that the correction deeds were valid under Texas Correction Statute, Tex. Prop. Code Section 5.029, that Yates and its successors had notice of the 2006 correction deed as a matter of law, and therefore were not innocent purchasers for value. The appellate court ruled that the correction deed was invalid and reversed; however, the Supreme Court found the 2013 correction deed to have been an effective correction of the 2005 mineral deed and in compliance with the Correction Deed Statute, and therefore reversed the appellate court.

Tex. Prop. Code Section 5.029 provides different rules for the correction of material and non-material mistakes. With respect to material mistakes, the correction instrument must be "… (1) executed by each party to the recorded original instrument of conveyance the correction instrument is executed to correct, or, if applicable, a party's heirs, successors, or assigns." The Supreme Court found that use of the words 'or' and 'if applicable' indicated the Legislature, in enacting the statute, had no preference whether the original parties or their successors executed a correction instrument, and that the correction was therefore effective.

A pointed dissent, by four of the nine justices, urged that the majority had negated the words 'if applicable' from the statute by allowing the original parties to a conveyance to change the interest conveyed without notice to the current owners, in contrast with the statute pertaining to non-material mistakes, which does require notice to the current owners. Additionally, the dissent argues that the phrase 'if applicable' makes the current owners necessary parties to a valid correction, and points out the common law axiom that once an assignment is made, the assignor loses all control over the interest assigned.

Van Dyke v. The Navigator Group, No. 11-18-00050-CV, 2020 WL 7863330 (Tex. App. – Eastland Dec. 31, 2020, pet. granted, Mem. Op.)

A 1924 deed reserved to the grantors "…one-half of one-eighth of all mineral rights in said land…" Appellants are successors to the grantors and claim a one-half mineral interest in the land subject to the reservation. Appellees claim that appellants are only entitled to an undivided one-sixteenth. In granting summary judgment, the trial court held that the deed was unambiguous and conveyed a fifteen-sixteenths interest.

Appellants first argued that summary judgment was improper because the trial court failed to consider that the deed was executed at a time when the prevailing view was that after executing an oil and gas lease, the lessor owned one-eighth of the minerals as royalty and that the reservation should therefore have been properly interpreted as reserving one-half of all minerals. Appellees countered that the deed unambiguously conveyed a fraction of a fraction, and moreover that no conflicting provision was found therein. After noting that the land was unleased at the time of the conveyance (and thus that the grantors owned more than just the royalty interest), the appellate court found that the reservation was clear and unambiguous and that the deed contained no inconsistencies needing harmonization or reconciliation, and therefore sided with the appellees on this issue.

Appellants next argued that summary judgment was improper because, based upon prior leases, ratifications, division orders, stipulations, and other documents, predecessors of both Appellants and Appellees had acted as equal owners of identical, undivided one-half mineral interests for decades. This argument was based on the 'presumed grant doctrine,' which operates as a common law form of adverse possession and can establish title by circumstantial evidence. In response, Appellees noted that to support such an argument, the court would have had to find a gap or missing link in title and that the appellants' argument was based on a mistaken interpretation of an unambiguous instrument. The court noted that to establish title under the doctrine, evidence must show (1) a long asserted and open claim, adverse to that of the apparent owner; (2) the absence of a claim by the apparent owner; and (3) acquiescence by the apparent owner in the adverse claim. Failing to find a title dispute to the land or claim of superior right to the minerals, the appellate court, in again ruling for Appellees, noted that the deed unambiguously reserved an undivided one-sixteenth mineral interest, and declined to find such an implied or presumed grant.

Hoffman v. Thomson, No. 04—00771-CV, 2021 WL 881286 (Tex. App. – San Antonio Mar. 10, 2021, no pet. h).

A 1956 deed conveyed 1,070 acres of land, reserving "...an undivided three thirty-seconds (3/32) interest (same being three-fourths (3/4's) of the usual one-eighth (1/8) royalty) in and to all of the oil, gas and other minerals, in to and under and that may be produced from the land herein conveyed." Later clauses in the deed specified that "…Hoffman…shall receive a full three thirty-seconds (3/32's) portion thereof as his own property…" and "… own and be entitled to receive three thirty-seconds (3/32's) of the gross production of all oil, gas and other minerals…"

Both parties argued that the deed was unambiguous; their dispute arose over whether it reserved a fixed 3/32 nonparticipating royalty or a floating 3/4 of royalty, and the trial court held that it reserved a fixed 3/32. In reviewing case law pertaining to deed construction, the San Antonio appellate court noted that the court's "duty is to ascertain the intent of the parties from all of the language within the four corners of the deed, and harmonizing all parts of an instrument, even if particular parts appear contradictory or inconsistent," citing *Wenske v. Ealy*, 521 S.W.3d 791, 795 (Tex. 2017).

In its analysis, the court noted that at the time of the conveyance, a one-eighth royalty was standard and customary. It also pointed out that, if not for the first clause, the second and third clauses read in isolation would indicate an into reserve a fixed interest. However, the court emphasized its duty to give effect to, and harmonize all of, the instrument's language, and the only reasonable way to do so was to conclude that the deed reserved a floating three-fourths of royalty. To hold otherwise would require the court to ignore the 'same being three-fourths (3/4's) of the usual one-eighth (1/8) royalty' in the first quoted provision.

Oil and Gas Leases

Endeavor Energy Res., L.P. v. Energen Res. Corp., 615 S.W.3d 144 (Tex. 2020).

Endeavor was assigned an oil and gas lease covering over 11,000 acres in Howard County, Texas. The lease was for a three-year primary term and "…as long thereafter as oil and gas, or either of them is produced in paying quantities." The lease also included a continuous development provision, providing that during the secondary term:

> "(c) This lease shall terminate as to all non-dedicated acreage any time a subsequent well is not commenced within 150 days from the completion of the preceding well…**Lessee shall have the right to accumulate unused days in any 150 day term during the continuous development program in order to extend the next allowed 150-day term between the completion of one well and the drilling of a subsequent well**." (emphasis in lease).

Endeavor drilled twelve wells without issue but did not commence operations on the 13th well within 150 days. Quinn leased the remaining undeveloped acreage to Energen 310 days after completion of the 12th well, and Energen filed suit seeking to have Endeavor's lease declared terminated as to the nonproducing acreage. Endeavor commenced operations for the drilling of the 13th well on the 320th day following completion of the 12th well.

At trial, Endeavor argued that the continuous development provision allowed it to accumulate unused days and carry them forward across multiple 150 day terms, and that because of its accelerated drilling schedule, it had thus accumulated 377 days. Energen claimed that the provision only allowed unused days to be applied to only the next ensuing 150 day term, and that Endeavor was only entitled to extend the 150 day period following completion of the 12th well by 36 days. Further, Energen argued that the continuous development provision operated as a special limitation which resulted in the automatic expiration of the lease as to all nonproducing acreage. The trial court sided with Energen, and the appellate court affirmed.

The Supreme Court, after reviewing the canons of lease construction, declared that its duty was to "…determine the parties' intent as objectively expressed in the words of their agreement," and to objectively determine what an ordinary person using those words would understand them to mean under same or similar circumstances. In addition, the Court would examine the entire lease and attempt to reconcile or harmonize any apparent contradictions. Only upon a finding that the contract's language was susceptible to two or more reasonable interpretations would it be declared ambiguous as a matter of law; similarly, the Court would not find a special limitation unless the language creating it was so "…clear, precise and unequivocal that we can reasonably give it no other meaning."

The Court considered the literal, grammatical and contextual arguments of both parties, and concluded that it could not reject either as unreasonable, based upon the lease's operative text. Having thus found its analysis inconclusive, the Court next looked to evidence of the surrounding circumstances, particularly the commercial purpose behind inclusion of continuous development clauses. Endeavor argued that the provision was included to result in the completion, on average, of one well every 150 days; Energen countered that its purpose was to require that drilling be more or less continuous, without significant breaks between wells. Again, the Court found both arguments reasonable.

Being unable to reject either party's argument as unreasonable, the Court held that the continuous development provision was ambiguous as a matter of law; since the ambiguous clause was also a special limitation, it could not be operative and therefore did not result in termination. Judgment was reversed and rendered for Endeavor, and the case remanded to the trial court.

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

Oil and gas leases, executed in 2003, consisted of a two-page printed form with an attached typewritten addendum. The printed form royalty provision obligated the lessee to pay royalties based on the 'market value at the well…of the gas so sold or used' whereas the addendum provided that'…all royalties…shall be without deduction…Lessee agrees to compute and pay royalties on the gross value received…', and further that in the event of conflict with the printed provisions that the addendum would prevail. Disputes arose whether royalties were to be based on gross value received or net of postproduction costs, and also whether royalties were payable on gas consumed in off-lease operations, if those operations benefit the lease.

In stating their respective positions, the lessors argued that the addendum and the printed form of the lease were inherently in conflict, and that the addendum must therefore prevail. Conversely, BlueStone argued that since the printed form provision is the only provision establishing a valuation point for production, nothing in the addendum could be considered contradictory, and it was up to the Court to reconcile, or harmonize, the two provisions. The lessors urged that 'gross value received' was equivalent to gross proceeds actually obtained at the point of sale and without deduction. Judgment at both the trial and appellate levels was in favor of the lessors.

In its analysis, the Court first identified the three components of a royalty provision, namely (i) the royalty fraction; (ii) the means of measuring, for instance, market value, proceeds or price; and (iii) the location for measuring, such as at the well or at the point of sale. The Court then reviewed modern case law regarding royalty provisions and allocation of post-production costs, and noted that whereas 'market value' and 'at the well' provisions typically subject the lessor to its proportionate share of post-production costs, those based on 'proceeds' or 'amount realized' typically depend on contractual language such as gross or net, or whether the valuation point is at the well or elsewhere, in order to determine whether such costs are shared. In affirming the appellate court, the Court found an inherent conflict between the printed form and addendum and recognized the primacy of the addendum.

As to whether BlueStone was entitled to royalty-free use of gas for off-lease operations benefiting the leased premises, the Court centered its analysis on the printed form provision limiting lessee's free use of gas to 'operations which Lessee may conduct hereunder'. The Court held that 'hereunder' was specific to the leased premises, and therefore gas used as fuel for compression, which was consumed on the leased premises, was free of royalty obligation, but royalty was owed on gas consumed off the leased premises as processing plant fuel.

Sundown Energy LPv. HJSA No. 3, Limited Partnership, No. 19-1054, 2021 Tex. LEXIS 272 (Tex. Apr. 9, 2021).

An oil and gas lease provided that following its primary term, the lessee was to release all nonproductive acreage, unless it was then engaged in a continuous drilling program on acreage outside of producing areas. Paragraph 7(b) of the lease required the first "…continuous development well shall be spudded-in on or before the sixth anniversary of the Effective Date, with no more than 120 days to elapse between completion or abandonment of operations on one well and commencement of drilling operations on the next ensuing well." 'Drilling operations' were defined in Paragraph 18 to mean "Whenever used in this lease… [1] actual operations for drilling, testing, completing and equipping a well…;[2] reworking operations, including fracturing and acidizing; and [3] reconditioning, deepening, plugging back, cleaning out, repairing or testing of a well."

HJSA filed suit in 2016, claiming the lease had terminated according to Paragraph 7(b) since more than 120 days had elapsed without the drilling of additional wells on multiple occasions. Sundown responded by pointing out that under Paragraph 18, 'drilling operations' were defined to include reworking and reconditioning operations, which it had conducted during the relevant time periods. Sundown was awarded partial summary judgment, holding that its reworking operations maintained the lease. On appeal, the El Paso Court of Appeals construed the lease as defining a continuous drilling program as commencing with the spudding in of the first such well and not more than 120 days elapsing between completion or abandonment of that well, and the commencement of the next ensuing well. The court disagreed with Sundown's contention that the separate definition of 'drilling operations' was applicable to continuous drilling, pointing out that specific provisions control over general ones, and that the definition of 'drilling operations' was general whereas the continuous development provision was specific.

In reversing the El Paso Court of Appeals, the Supreme Court noted its duty to construe contractual language in the context in which the words are used, but also that it cannot ignore clearly defined terms and must avoid constructions which render contract language meaningless. The Court found that the definition of 'drilling operations' in Paragraph 18 was made applicable whenever used in the lease, without exception. The Court also failed to find textual support for HJSA's argument that Paragraph 7(b) required a narrower meaning. Thus declining to rewrite the lease, the Court recognized its obligation to enforce the contract as the parties wrote it, and held that 'drilling operations' included activities in addition to spudding of a new well; therefore, the continuous development provision had been satisfied by reworking and reconditioning operations.

BPX Operating Co. v. Strickhausen, No. 19-0567 (Tex. June 11, 2021).

A 2009 oil and gas lease covering an undivided one-half mineral interest in LaSalle County, Texas included the following: "…pooling for oil or gas is expressly denied and shall not be allowed under any circumstances without the express written consent of the Lessor named herein…" Strickhausen, the lessor, declined to authorize pooling and BPX pooled the land with that covered by other leases. A horizontal well was drilled on the land covered by the Strickhausen lease which produced from it and other pooled tracts. After production was established, BPX requested that Strickhausen ratify the unit and consent to the pooling. Settlement discussions between BPX and Strickhausen's attorney continued for approximately 6 months, to no avail. Shortly before those discussions ended, however, Strickhausen received and deposited a royalty check representing her share of royalty for pooled production. Strickhausen continued to receive and deposit royalty payments up to her filing suit for breach of contract and other claims.

At trial, Strickhausen argued that since her lease required payment of royalties on all production from any well on her land, she was entitled to royalty based on total production, and not the ratio of the lateral perforation under her tract to that of the entire wellbore. In response, BPX argued that she had impliedly ratified the unit by accepting royalties based on a surface acreage basis and was therefore estopped to claim otherwise. The trial court granted BPX's motion for summary judgment, finding that Strickhausen had ratified BPX's breach of the lease by accepting royalties. On permissive appeal, the appellate court reversed, finding that Strickhausen's continuing challenge to the pooled units constituted a fact issue as to whether she had impliedly ratified the lease.

In affirming the court of appeals, the Supreme Court noted its duty to consider objective evidence of intent such as the conduct of the parties given the totality of the circumstances and noted the limitation that "implied ratification should be found only if that party's actions clearly evidence an intention to ratify." Considering implied ratification to be the mirror image of waiver by conduct, the Court concluded that in order to show Strickhausen had impliedly ratified the pooling of her leased acreage, BPX had to establish that her behavior clearly evidenced an intent to do so.

BPX urged that acceptance of royalties calculated on a pooled basis constitutes ratification of pooling as a matter of law. In distinguishing those cases cited by BPX in support of its position, the Court emphasized that, "…as with any objective inquiry, adjudicating a claim of implied ratification 'requires an examination of the totality of the circumstances,' not a narrow focus on one fact to the exclusion of all others." In its examination of the circumstances, the Court noted that the lease expressly prohibited pooling entirely without the lessor's express written consent, and that nothing in the subsequent course of conduct between the parties evidenced the granting of that consent but rather confirmed continued opposition to the pooling.

Martin v. Rosetta Res. Operating, LP, No. 13-19-00431-CV, 2020 WL 5887566 (Tex. App.—Corpus Christi Oct. 1, 2020, pet. filed).

Martin executed an oil and gas lease containing the following offset obligation:

> Notwithstanding anything contained herein to the contrary, it is further agreed that in the event a well is drilled on or in a unit containing part of this acreage or is drilled on acreage adjoining this Lease, the Lessor [sic], or its agent(s) shall protect the Lessee's [sic] undrilled acreage from drainage and in the opinions of reasonable and prudent operations, drainage is occurring on the un-drilled acreage, even though the draining well is located over three hundred thirty (330) feet from the un-drilled acreage, the Lessee shall spud an offset well on said un-drilled acreage or on a unit containing said acreage within twelve (12) months from the date the drainage began or release the acreage which is un-drilled or is not a part of a unit which is held by production.

Rosetta formed a pooled unit including some of the Martin acreage and drilled and completed a producing gas well (the "GU-1 Well"). Newfield Exploration later formed an unrelated pooled unit on non-adjacent acreage over a mile away (the "Simmons Unit"), and Martin filed suit claiming breach of the obligation to protect the leased premises from drainage.

Newfield was granted summary judgment because the Simmons Unit was not adjacent to the Martin lease, which was affirmed by the appellate court. Before Rosetta's motion for summary judgment on the same grounds could be heard, plaintiffs amended their petition, claiming that Rosetta's offset obligation was triggered as to the unpooled Martin acreage by production from the GU-1 Well.

The appellate court reversed, noting that the offset obligation required the lessee to protect the undrilled acreage from all drainage whenever a well is drilled on the leased or adjacent acreage, regardless of the entity causing the drainage.

PPC Acquisition Co. v. Delaware Basin Res., LLC, 619 S.W.3d 338 (Tex. App.— El Paso Feb. 19, 2021).

Three leases covering undivided interests in the same 640 acre section were executed in 2000, each providing for a three year primary term. Before the primary term expired, the owner of the leases drilled and completed a gas well in the D.A. (Devonian) Field and designated the 640 acres as a proration unit for the well. In December 2010, the well was recompleted as an oil well producing from the Wolfbone (Trend Area) Field, and 160 acres assigned to the reclassified well. That was the only well drilled on the 640 acres. After learning of the well reclassification, two of the lessors executed top leases covering the remaining 480 acres. In response, Delaware Basin Resources filed suit to quiet title in the three leases, claiming that the 2000 leases remained in effect as to the entire 640 acres. In response, appellants argued that the leases expired in 2010 except as to the 160 acres surrounding the oil well. The trial court granted appellees' motions for summary judgment, holding that all three leases remained in effect as to the 640 acres.

On appeal, the issues presented centered on whether the timing or substance of proration unit designations filed with the Railroad Commission of Texas resulted in full or partial lease termination in either 2003 or 2010, and whether the well reclassification in 2010 caused the leases to partially terminate under their continuous development and retained acreage provisions.

The Northern Trust lease contained a retained acreage clause which provided that

> …after the expiration of the primary term and after all continuous operations have ceased, Lessee…shall release all acreage not then dedicated to a proration unit designated by the appropriate regulatory body." The continuous development provision stated "If at the expiration of the primary term oil or gas is not being produced on said land but Lessee is then engaged in operations for drilling or reworking of any well, this Lease shall remain in force so long as drilling or reworking operations are prosecuted with no cessation of more than 90 consecutive days, and if they result in production, so long thereafter as oil or gas is produced…

Appellants argued that the retained acreage clause limited the lessee's ability to dedicate acreage to a proration unit by regulatory filing, which was not done until after expiration of the primary term. Additionally, appellants established that the lessee was not conducting continuous operations on expiration of the primary term, and that the lease therefore terminated.

The court disagreed, however, finding that the lease had not expired, since the retained acreage provision constituted a covenant and not a condition. In order to be found to be a condition which would result in an automatic termination, the court recognized the legal distinction between special limitations or conditions and covenants, and noted that a court will not find a special limitation unless the language is so clear, precise and unequivocal that it cannot be reasonably given any other meaning. In order to constitute a special limitation, the lease language should contain express language indicating that it shall terminate on the happening of a stipulated event, which was not the case. Finally, the court found instances of other clear and unequivocal language in the lease where the parties had contracted for automatic termination of the lease, indicating that they recognized how to create a special limitation, but in this instance had not chosen to do so.

Northern Trust also argued that its lease partially terminated as to 480 acres when the well was recompleted and reclassified in 2010. The court examined the distinction between 'snapshot' retained acreage provisions, which trigger lease termination only once, such as at the end of the primary term or continuous development, and 'rolling' provisions which may become effective at various specified times and noted that in order to be found to be 'rolling', the provision must contain clear and unequivocal language to that effect. Here, the court, having already found that the retained acreage clause did not constitute a special limitation and thus could not result in lease termination, noted that the language used specified only one date on which the clause would be triggered, specifically at the end of the primary term or after all continuous operations have ceased.

The second lease, the Lowe lease, provided that the lease would terminate on the cessation of continuous drilling operations, and thus constituted a special limitation. The inquiry thus turned to whether it provided for a rolling or snapshot termination. In this regard the court noted that whereas Paragraphs 7(a)(i) and (ii) provide for a snapshot termination at the end of continuous development, Paragraph 7(a)(iii) provides for further termination after production from or operations upon a particular proration unit have ended. Therefore, the lease was held to have terminated in 2010 as to all but the 160 acres dedicated to the reclassified oil well.

Finally, the retained acreage provision of the Colt lease did not provide for automatic termination. However, the continuous development provision did, although it excepted producing acreage in accordance with the retained acreage provision. In the instant case, since the well was classified as a 640 acre gas well when continuous operations ended, the lease remained effective as to all 640 acres. Colt next argued that the retained acreage provision should be held to operate on a rolling basis and thus to have expired as to 480 acres upon the 2010 well reclassification. Having already held that the retained acreage provision of the Colt lease was only triggered a the end of the primary term and upon the cessation of continuous development, and absent clear and express language indicating an intent that it should be applied at any other time, the court held that the lease remained effective as to all 640 acres.

Surface Rights and Accommodation Doctrine

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

Lyle owned an undivided mineral interest under 315 acres of land ("Section 14") in Pecos County, which interest originated in a 1948 deed which conveyed surface rights only, reserving the mineral estate and '…such use of the surface estate …as may be usual, necessary or convenient in the use and enjoyment of the oil, gas and mineral estate…' to the grantors. Lyle had never executed an oil and gas lease covering Section 14, nor planned to develop the minerals.

The surface estate of the South half of Section 14 was leased as part of a larger parcel of land to Midway Solar LLC in 2015 for construction of a solar energy facility. The leases granted Midway the right to install solar panels and transmission, electrical and cable lines for a term of up to 55 years. In addition, the leases recognized that they did not control or govern activities of the mineral owners; in further recognition of this fact, the leases were later amended to identify and set aside drill site tracts for the benefit of future mineral lessees, including 97 acres of Section 14. Midway eventually covered 215 acres of Section 14 with solar panels and transmission but left the 97 acre tracts undisturbed.

In 2016, Midway began obtaining surface waivers from mineral owners in adjoining property but not the mineral owners of Section 14. Some of those waivers purported to cover Section 14, although none of the parties owned minerals therein. Midway later executed and re-recorded correction waivers, deleting the reference to Section 14. None of the mineral owners who had executed surface waivers, however, executed the correction instruments.

Lyle sued Midway, claiming, in part, that construction of the solar facility constituted a trespass and unreasonably interfered with its right to develop the mineral estate. The trial court granted Midway's motion for summary judgment.

On appeal, the El Paso Court of Appeals provided a concise but thorough history of the development of, and refinements to, the dominant estate theory, which holds the surface estate servient to the mineral estate, and the accommodation doctrine, which requires the severed surface and mineral estates to exercise their respective rights with due regard for those of the other. In so doing, it is the surface owner's burden to show that the mineral owner's use of the surface completely precludes or substantially impairs the surface owner's existing use, and that there is no reasonable alternative manner available to the surface owner by which the use can be continued. Noting Texas' public policy interest in freedom of contract, the court inquired whether the 1948 deed prevented application of the accommodation doctrine. Failing to find agreement as to the meaning of the phrase 'usual, necessary or convenient', it ruled that the doctrine was not supplanted.

In its holding, the appellate court held that the accommodation doctrine does not require accommodation of an activity not yet undertaken or contemplated. In addition, it held that since both parties had rights to possess the surface, and until Lyle actually sought to exercise its surface rights, Midway's activities could not constitute a trespass.

Regulatory

Opiela v. R.R. Comm'n. of Texas, No. D-1-GN-000099, 53rd District Court of Travis County, Texas (May 12, 2021).

This appeal addressed whether the Railroad Commission of Texas has authority to issue permits for allocation and production sharing wells.

Enervest Operating, L.L.C. obtained a permit for the drilling of an allocation well on its lease in Karnes County, Texas. The permit was later amended, showing the well to be drilled as a production sharing well , and Magnolia Oil and Gas Operating LLC as the operator. Allocation and production sharing wells are horizontal wells in which the producing wellbore traverses more than one tract. For an allocation well, the operator holds leases covering each tract traversed by the wellbore; for a PSA well, at least 65% of the mineral and working interest owners from each tract must sign an agreement as to how proceeds will be divided.

Opiela objected to the issuance of the permit on the basis that its lease did not authorize pooling or joined in the execution of a production sharing agreement, and moreover that since Commission rules fail to mention or define production sharing or allocation wells, the Commission has no authority to issue permits for them.

In a Commission hearing, a petroleum engineer testified that the Commission customarily issues permits for allocation wells and PSA wells in cases where the operator has a lease covering each tract that the proposed well traverses, or that at least 65% of the mineral and working interest owners in each tract that the well will traverse have signed an agreement. Magnolia represented that 100% of the working and mineral interest owners in two of the three tracts had signed an agreement, and 100% of the working interest owners and 65.62% of the mineral interest owners in the third tract had. Testimony also addressed the number of production sharing and allocation wells permitted by the Commission in previous years.

The District Court found that because the Commission had not formally adopted rules, regulations and proceedings governing the issuance of permits for production sharing and allocation wells, the Commission had not satisfied the requirements of Sections 2001.001 et seq. of the Administrative Procedure Act. Additionally, the court found that the Commission erred in finding that Magnolia had a good faith claim to the right to drill the well without reviewing whether it had authority under a lease to do so. Therefore, the matter was reversed and remanded back to the Commission.

Taxation

San Augustine Cnty. Appraisal Dist. v. Chambers, No. 12-20-00128-CV, 2021 WL 219300 (Tex. App. – Tyler, Jan. 21, 2021).

Chambers owned land in Shelby County, Texas which was included in two pooled units which also contained land located in San Augustine County. In 2013, SCAD sent a notice of appraised value for that year, referencing their fractional royalty interests in the two units. Chambers filed a notice of protest with the Appraisal Review Board for San Augustine County asserting that the property should not be taxed in San Augustine County, because their land is located in Shelby County. The review board declined to change the appraisal records.

The trial court granted SCAD's motion for summary judgment, finding that Chambers had pooled their mineral interest with the other mineral owners in the two units, essentially effectuating a cross-conveyance, and therefore must pay taxes on their mineral interests within the units to the extent they lie within the boundaries of San Augustine County, in proportion to the percentage of the unit lying within each county.

The appellate court reviewed the Chambers leases and found that they specifically negated any intent to cross-convey the mineral interests covered thereby. SCAD had therefore failed to establish that Chambers owned an interest in San Augustine County on which it failed to pay taxes. As a result, summary judgment was improper, and the trial court's judgment was reversed.

Ridgefield Permian, LLC. v. Diamondback E&P LLC, No. 08-19-00156-CV (Tex. App. – El Paso, May. 5, 2021).

A mineral interest in 636.3 acres in Reeves County, Texas was subject to an oil and gas lease and held by production from a well drilled on the land. Property taxes assessed against the interest went unpaid, and in 1999 the Reeves County taxing authorities were granted a judgment foreclosing their lien for unpaid taxes and the interest ordered to be sold. In the following years the royalty owner whose interest had been foreclosed conveyed whatever remaining interest he owned in the land to a family trust, and the purchaser of the foreclosed royalty conveyed its interest to Magnolia. The well located on the 636.3 acres quit producing, and Magnolia executed a new lease which was assigned to Diamondback. Shortly thereafter, the family trust executed a lease in favor of Ridgefield. Ridgefield and Diamondback both then filed motions for summary judgment, seeking determination whether the mineral owner's possibility of reverter had been foreclosed and sold by the Reeves County Sheriff. The trial court granted summary judgment in favor of Magnolia and Diamondback, which was granted.

On appeal, the court noted that a possibility of reverter is a non-taxable interest, and thus there could not have been delinquent taxes on that interest. In response, appellees asserted that Article VIII, Section 1 of the Texas Constitution provides that absent exemption, all real and tangible personal property shall be taxed in proportion to its value, and that because a possibility of reverter is a future interest in the minerals in place, it falls under the definition of real property.

The court of appeals rejected this argument, noting that the Supreme Court of Texas explicitly held that a possibility of reverter is not taxable in *Texas Turnpike Co. v. Dallas County*, 271 S.W.2d 400 at 402 (Tex. 1954). In addition, the court found that the possibility of reverter remained attached to the surface estate, and that taxes were paid on the surface estate beyond foreclosure and sale of the royalty.

Additionally, the court looked to the plain language of the tax judgement and noted that same only related to and described the royalty interest in the lease that was in existence at the time of the judgment. Similarly, viewing the language in the Sheriff's Deed in its entirety, the court found that the deed limited its conveyance to the specific interests as foreclosed in the tax suit and as described on the Order of Sale. Since both the suit and order addressed the only the royalty and not the possibility of reverter, the deed could not have conveyed any greater interest.

For the above reasons, the judgment of the trial court was reversed, and judgment rendered in favor of appellants.