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Texas: Survey of Selected 2021 Oil and Gas Cases and Statutes

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TEXAS: SURVEY OF SELECTED 2021 OIL AND GAS CASES AND STATUTES

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The Texas Supreme Court was quite active in 2021, issuing several oil and gas opinions; however, two were quite controversial, drawing numerous amicus curie from industry groups, oil and gas attorneys, and academia. In *Concho Resources, Inc. v Ellison*, the court held that a subsequently executed, inconsistent instrument, even without words of grant, may divest a record mineral title.[1] And, in *Broadway National Bank v. Yates Energy Corp.*, the court held that prior title holders may divest a current record title holder of their title by executing a correction deed without the joinder of, or notice to, the present record title holder.[2]

1. 627 S.W.3d 226, 237 (Tex. 2021).
2. 631 S.W.3d 16, 25–26 (Tex. 2021).

I. *CONCHO RESOURCES, INC. V. ELLISON*: BOUNDARY STIPULATIONS AND RATIFICATIONS IN CONTRADICTION OF DEED DESCRIPTIONS

In *Concho Resources, Inc. v. Ellison*, the Texas Supreme Court chose to uphold contractual agreements that stipulated the amount and location of acreage as differing from the deed descriptions.[3] The dispute in this case involved a 640-acre tract of land—Section 1—that was owned by one family in the early 1900s.[4]

The family conveyed part of the land (the "Northwest Tract") in 1927 and the rest (the "Southeast Tract") in 1930.[5] The 1927 deed described "[a]ll of [Section 1] lands located North and West of the public road which now runs across the corner of said Survey, containing 147 acres, more or less."[6] However, the actual acreage of the portion northwest of the road was 301 acres.[7] The 1930 deed described the land conveyed as "493 acres" from Section 1.[8] However, if the 1927 deed conveyed all of the land northwest of the road—301 acres—then there were only 339 acres left for the family to convey from Section 1.[9]

In 1987, the mineral owners of the Northwest Tract executed the "Pilon Leases" that described a "147 acre tract of land out of [Section 1], lying N and W of the public road . . . and being the same land conveyed [by the 1927 deed]."[10] By 1996, "the Pilon Leases were assigned to Jamie Ellison d/b/a Ellison Operating."[11]

By 2006, the Sugg and Farmar families owned the Southwest Tract mineral estate and granted an oil and gas lease to Samson Resources Company covering "'493 [acres]' in the 'South part of [Section 1].'"[12] However, in 2006, Samson obtained a drilling title opinion showing the discrepancies listed above relating to the Southeast Tract.[13] Samson procured a survey plat showing the Southeast Tract as being 493 acres and included 154 acres north of the road.[14] This would inferentially dictate that the Northwest Tract was 147 acres (as

3. *Concho Res., Inc*, 627 S.W.3d at 237.
4. *Id.* at 228.
5. *Id.* at 228–29.
6. *Id.*
7. *Id.* at 229.
8. *Id.*
9. *See id.* at 228–29.
10. *Id.* at 229.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 229–30.

described in its 1927 deed) but that it did *not* include all of the land north and west of the bridge (as described in the 1927 deed).[15]

In 2008, Samson initiated a contractual agreement—the Boundary Stipulation—to settle the question raised by the deed discrepancies.[16] The Stipulation purported to be effective as of the 1987 date of the execution of the Pilon Leases.[17] It agreed with the stated acreage on the 1927 and 1930 deeds but stipulated that 154 acres north and west of the public road were part of the Southwest Tract.[18] In other words, per the Boundary Stipulation, the Northwest Tract did *not* include "all of [Section 1] lands located North and West of the public road" as the 1927 deed had described.[19] Samson obtained the signatures of the then-current mineral owners of the Southeast Tract and the Northwest Tract and recorded the Boundary Stipulation in the property records.[20] Samson also sent a letter to Jamie Ellison, the leaseholder of the Northwest Tract, in which Samson enclosed the Boundary Stipulation and asked Ellison to "signify your acceptance of the description" by co-signing the letter, which Ellison did.[21]

However, in 2011, Jamie Ellison passed away, and his wife, Marsha Ellison, took over his lease on the Northwest Tract.[22] She promptly filed (among other claims) a trespass to try title suit against Samson and other defendants, claiming that the Pilon Leases included *all* of the land northwest of the road and that the 2008 Boundary Stipulation had no impact on the leases.[23]

The trial court held that the Boundary Stipulation was valid and that Ellison's signature on the letter ratified the Stipulation's boundary line.[24] The appeals court reversed, holding that the Boundary Stipulation was an attempted correction deed that was invalid because there was no ambiguity or error to correct.[25]

The Texas Supreme Court granted petition for review and generally agreed with the trial court, upholding the Boundary Stipulation and finding that Jamie Ellison ratified the Stipulation by co-signing

15. *See id.* at 228–30.
16. *Id.* at 230.
17. *Id.*
18. *Id.*
19. *See id.* at 228–30.
20. *Id.* at 230.
21. *Id.*
22. *Id.* at 231.
23. *Id.* at 231–32.
24. *Id.* at 232.
25. *Id.* at 232–34.

the letter from Samson.[26] When a question arises about a boundary location, parties have a choice: they can go to court for a judicial determination of the boundary,[27] or they can resolve the question informally by executing a stipulation.[28] Such a stipulation will be valid even if the parties later discover that the contractual resolution was erroneous.[29] The Court saw "no reason to second-guess the owners' decision to bind themselves in that manner without resorting to litigation."[30] Thus, the boundary stipulation was "enforceable between the parties according to its terms."[31]

The Court agreed that the Boundary Stipulation "could not by itself bind others who had an interest in the tracts and were not parties to the agreement."[32] However, here, Jamie Ellison was not legally required to sign the ratification letter.[33] There was no evidence that Samson coerced or fraudulently induced him to sign.[34] Rather, he voluntarily signed; this "confirm[ed] his acceptance of the boundary line agreed to in the stipulation as the leasehold boundary."[35] Even though the letter from Samson's landman stated that he would send a subsequent "more formal and recordable document" and never did so, Ellison's signing of the letter was sufficient because the letter asked Ellison to "signify your acceptance of the description . . . by countersigning *the letter*."[36] Thus, the Court held the lease assignee Ellison to the benefit of the bargain signed by her predecessor-in-interest.

In doing so, as many amici curiae pointed out, the decision is essentially allowing unrecorded instruments to not only operate as an estoppel to a direct party but also apparently alter the record title and the recorded deed descriptions.

II. *BROADWAY NATIONAL BANK*: RE-THINKING REQUIRED SIGNORS FOR CORRECTION DEEDS

In *Broadway National Bank*, the Texas Supreme Court held that Texas Property Code section 5.029 authorizes the original parties to a

26. *Id.* at 228, 234.
27. *See id.* at 235.
28. *See id.*
29. *Id.* at 234.
30. *Id.* at 235.
31. *Id.* at 234.
32. *Id.* at 236.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 237.

conveyance to correct a material error in a deed without requiring joinder of others who subsequently acquire interest in the property.[37] This case involves a trustee who executed a deed conveying the incorrect mineral interest to a beneficiary and then attempted to fix the mistake with correction deeds.[38]

After the settlor's death, the bank (as a trustee) executed a deed granting the settlor's son, John, a 25% mineral interest in fee simple.[39] The bank asserted that this was a mistake and filed a corrected deed in 2006, signed by only the bank, changing the fee simple grant to a life estate.[40] The bank sent copies of the correction deed to Yates, the lessee.[41]

Meanwhile, John granted his royalty interest to Yates, who acquired a title opinion expressing doubt as to the validity of the correction deed.[42] The bank responded by recording an Amended Correction Deed signed by all of the parties to the original mineral deed and stated that the corrected deed entitled John to only a life estate.[43] Shortly after, John died.[44]

A legal dispute ensued.[45] The bank believed that John conveyed to Yates only a life estate interest due to the amended deed.[46] Yates argued that John acquired full ownership under the original mineral deed and conveyed that full ownership to Yates and that the Amended Correction Deed did not affect Yates's title.[47]

The probate court agreed with the bank and declared that the Amended Correction Deed was valid, that it replaced the original mineral deed, and that Yates was not a bona fide purchaser because the initial correction deed provided notice.[48] But the court of appeals agreed with Yates, holding that "it is not the agreement of the original parties to the mistake that controls who must sign, but rather who controls the property at the time of the proposed correction."[49] Yates was

37. Broadway Nat'l Bank v. Yates Energy Corp., 631 S.W.3d 16, 29–30 (Tex. 2021).
38. *Id.* at 18–19.
39. *Id.* at 19.
40. *Id.*
41. *Id.*
42. *Id.* at 19–20.
43. *Id.* at 20.
44. *Id.*
45. *Id.* at 20–21.
46. *Id.* at 20.
47. *Id.*
48. *Id.* at 21.
49. *Id.* at 22–23.

an assignee but did not sign the correction deed; therefore, it was invalid.[50]

Texas Property Code section 5.029 provides for a recorded correction instrument to correct a material error in a recorded instrument of conveyance.[51] Such an 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; and
> (2) recorded in each county in which the original instrument of conveyance that is being corrected is recorded.[52]

This case's dispute centers on when a party's heirs, successors, or assigns are "applicable," "such that their signatures are necessary to validate a material correction under the statute."[53] The bank argued that the language "if applicable" allowed an heir, successor, or assign to sign in case the original party was unavailable.[54] The court of appeals disagreed, holding that "if applicable" was a conditional clause requiring any existing heir, successor, or assign to sign the correction instrument; or, if none exist, then the original parties must sign the document.[55]

The Texas Supreme Court stated that this is a matter of statutory construction, requiring the court to seek meaning from the statute as a whole, presume a purpose in each word, and use plain meaning unless it leads to absurd results.[56] Under these principles, the term "if applicable" in the statute "conditionally introduces the phrase 'heirs, successors, or assigns,' signaling that the phrase is meant to apply when relevant or appropriate."[57] The statutory scheme provides a protection for bona fide purchasers; this protection "would be pointless" if bona fide purchasers "were otherwise required to sign a correction instrument for it to take effect."[58]

Thus, the statute permits an original party's heirs, successors, or assigns to sign a correction instrument but does not require that they do so.[59] A correction deed is valid when executed by all of the original

50. *Id.* at 20, 22.
51. TEX PROP. CODE ANN. § 5.029(b); *Broadway*, 631 S.W.3d at 22.
52. PROP. § 5.029(b).
53. *Broadway*, 631 S.W.3d at 22.
54. *Id.*
55. *Id.* at 23, 25.
56. *Id.* at 23–24.
57. *Id.* at 24.
58. *Id.* at 27.
59. *Id.* at 29–30.

parties—regardless of whether they still own the relevant property interest.[60] The validly "executed correction instrument replaces and is a substitute for the original instrument, but the correction may not affect the property interest of a bona fide purchaser."[61]

However, four justices dissented and stated that the plain language of the statute combined with canons of statutory construction require that assignees, if any exist, must sign the correction deed.[62] The dissenting justices expressed concern that the majority opinion is "contrary to the Texas Title Examination Standards" and that it will "destabilize our record title system."[63] Numerous amicus pointed out the problems this holding created for various parties beyond the title holders, such as title insurance companies insuring title and lenders lending money based on liens being valid.[64] Further troubling is that by this ruling, not the least of which the apparent duty now for a record title holder to constantly review the public records to see if prior owners have filed a "correction" instrument that may have the effect of divesting title and triggering the commencement of limitations on challenging the instrument. It is the Author's opinion that a more reasoned approach is that the statute's reference to " . . . *if applicable*, a party's heirs, successors, or assigns"[65] means that if there is a subsequent purchaser, that party must join in the correction instrument.

III. *BPX OPERATING*: CLAUSES REQUIRING EXPRESS WRITTEN CONSENT FOR POOLING CAN STAVE OFF IMPLIED RATIFICATION ARGUMENTS

In *BPX Operating Co. v. Strickhausen*, the Texas Supreme Court held that implied ratification of pooling depends on objective manifestations of intent and is not, as a matter of law, accomplished through acceptance and deposit of checks.[66] This case also serves as yet another reminder of how strongly Texas jurisprudence upholds parties' freedom to contract.

Strickhausen, a mineral interest owner, executed a lease with BPX including a provision that "pooling for oil or gas is expressly denied and shall not be allowed under any circumstances without

60. *Id.* at 29.
61. *Id.* at 30.
62. *Id.*
63. *Id.*
64. *Id.* at 38.
65. TEX. PROP. CODE ANN. § 5.029(b).
66. 629 S.W.3d 189, 192 (Tex. 2021).

[lessor's] express written consent."[67] Disregarding this provision, BPX pooled the property and drilled a well that ran horizontally under Strickhausen's property.[68] Subsequently, BPX sent a letter to Strickhausen, asking her to sign a pooling consent agreement.[69] Strickhausen's attorney responded, asking for more information.[70]

The attorney and BPX exchanged emails on the issue, with BPX asking Strickhausen's attorney to "let us know what [the lessor] decides to do."[71] The attorney pointed out that the lessee had already violated the lease by pooling without Strickhausen's express, written consent and clearly stated that Strickhausen "would not ratify the pooling . . . until a favorable settlement could be reached."[72] BPX acknowledged this.[73]

Without reaching a conclusion, BPX filed a certificate of pooling with the Railroad Commission and sent Strickhausen a royalty check that notated the pooled unit.[74] Less than a month later, Strickhausen's attorney rejected BPX's "offer to settle the issue of the wrongful pooling" and made a counteroffer.[75] BPX did not respond but continued to send checks with the pooled unit notation, and Strickhausen deposited the checks.[76]

Strickhausen sued BPX for breach of contract.[77] The trial court held that Strickhausen "ratified [BPX's] breach by accepting, and negotiating, royalty checks from the pooled units," regardless of whether it was her intention to ratify.[78] However, the court of appeals reversed, holding that evidence did not conclusively establish intent to ratify because of Strickhausen's ongoing challenges to the pooling.[79]

The Texas Supreme Court accepted the appeal, and its ensuing opinion heavily discusses freedom to contract in the context of ratification and waiver. Courts must "look to objective evidence of intent, such as the party's conduct," as "a party's subjective state of mind is

67. *Id.* at 193.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 193–94.
73. *Id.* at 194.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 195.
79. *Id.*

immaterial to a claim of implied ratification."[80] This requires a court to examine the totality of the circumstances.[81]

The Court distinguished the present case from *Hooks*, where it held that the lessors' acceptance of royalties impliedly ratified pooling as a matter of law.[82] There, the Court said all the facts pointed to intent to ratify because the lessors accepted payments without challenging the pool.[83] But Strickhausen did object, presenting a set of facts that did not uniformly show intent to ratify.[84] Thus, Strickhausen's actions did not clearly establish intent to ratify as a matter of law.[85] The Court remanded for further proceedings.[86]

In analyzing Strickhausen's objective intent, the Court emphasized the terms of the lease, which did not "just prohibit pooling" but took "the additional step of dictating the *only* circumstance under which pooling can *ever* be authorized: with Strickhausen's 'express written consent.'"[87] The Court stated that "the clause exists precisely to stave off arguments like implied ratification."[88] Thus, lessors who want to maintain strict control over pooling consent should add similar clauses to leases or other mineral title instruments. Lessees should be wary of relying on an implied ratification argument when similar clauses exist in their leases.

IV. *SAN AUGUSTINE CITY APPRAISAL DISTRICT V. CHAMBERS*: NO TAXATION WITHOUT REPRESENTATION OF MINERAL INTERESTS WITHIN TAXING DISTRICT

In *San Augustine County Appraisal District v. Chambers*, the Tyler Court of Appeals held that lessors' signing of division orders did not affect or ratify any cross-conveyance giving rise to any taxable interests in San Augustine County.[89] The Chambers family entered into oil and gas leases on their 652 acres in Shelby County.[90] The leases unitized their mineral interests with other land in San Augustine

80. *Id.* at 197.
81. *Id.*
82. *Id.* at 198*; see also* Hooks v. Samson Lone Star, Ltd. P'ship, 457 S.W.3d 52, 66 (Tex. 2015).
83. *BPX Operating*, 629 S.W.3d at 199; *see also Hooks*, 457 S.W.3d at 66.
84. *BPX Operating*, 629 S.W.3d at 200.
85. *Id.* at 200, 204.
86. *Id.* at 204.
87. *Id.* at 203.
88. *Id.*
89. 618 S.W.3d 398, 400 (Tex. App.—Tyler 2021, pet. denied).
90. *Id.*

County.[91] San Augustine County attempted to collect ad valorem tax on the Chambers' mineral interests, even though those interests were located entirely within Shelby County.[92]

The Chambers protested, but the appraisal review board did not accept their arguments.[93] Next, the Chambers sought judicial review.[94] However, the trial court granted summary judgment for the San Augustine County Appraisal District ("SCAD"), presumably accepting the county's arguments that the Chambers had cross-conveyed their mineral interests with other mineral owners and were thus subject to taxation in San Augustine County.[95]

However, on review, the Tyler Court of Appeals held that, because the leases expressly prohibited cross-conveyance of interests, SCAD had failed to establish that the Chambers "own[ed] an interest in pooled minerals located in San Augustine County or had an obligation to pay taxes in that county."[96] The court reversed and remanded. On remand, the trial court granted summary judgment for the Chambers that, due to the leases' prohibition on cross-conveyance, SCAD lacked authority to assess ad valorem taxes on the Chambers' mineral interests.[97] SCAD appealed, and the case went back to the Tyler Court of Appeals.[98]

In this appeal, SCAD argued that,

> by signing division orders that acknowledge their interests and ownership within the units and accepting royalty payments pursuant to the division orders, Appellees waived their right to protest the cross-conveyance language in their leases, ratified the unit designations, and agreed to combine and share in the production from the units, effecting a cross-conveyance . . . .[99]

The court affirmed the trial court's judgment.[100] It appeared that SCAD relied heavily on the fact that cross-conveyance clauses are normal within pooling agreements and glossed over the fact that the Chambers' lease prohibited cross-conveyance of interests while still

91. *Id.*
92. *Id.* at 400–01.
93. *Id.* at 400.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 400–01.
98. *Id.*
99. *Id.* at 401.
100. *Id.* at 404.

providing for pooling.[101] As the court explained, the Texas statute does not authorize taxation of minerals outside the boundaries of the taxing unit merely because they are pooled with a certain production unit.[102] Neither does the Texas statute provide that pooling results in cross-conveyance.[103] Thus, "SCAD is required to apply the law."[104]

The court also clapped back at SCAD's argument that the Chambers had somehow ratified a cross-conveyance by signing division orders.[105] The court agreed that signing division orders and accepting payment can ratify a unitization.[106] But "unitization, in the absence of cross-conveyance, does not entitle SCAD to assess taxes on [the Chambers] interests in the pooled units."[107] Moreover, "whether there is a cross-conveyance depends on the lease language, not the presence of unitization."[108]

Ultimately, cross-conveyance did not occur because of the lease provisions prohibiting cross-conveyance,[109] nor did any factual circumstance accomplish a cross-conveyance.[110] Thus, San Augustine County failed to show valid authority to tax the Chambers' mineral interests.[111]

V. *HOFFMAN V. THOMSON*: THE FLOATING HORRORS OF DOUBLE FRACTIONS

In *Hoffman v. Thomson*, the San Antonio Court of Appeals held that a conveyance reserving an "undivided 3/32nd interest" had actually reserved a floating nonparticipating royalty interest ("NPRI").[112] The deed in question conveyed surface and mineral estates but then "expressly reserved and retained unto the grantor . . . an undivided three thirty-second's (3/32nd's) interest (same being three-fourths (3/4's) of the usual one-eighth (1/8th) royalty) in and to all of the oil, gas and other minerals . . . ."[113] The deed later referred twice to the 3/32 fraction, stating that in the event of production, the grantor "shall

101. *See id.* at 400–04.
102. *Id.* at 404.
103. *Id.*
104. *Id.*
105. *Id.* at 402–03.
106. *Id.* at 403.
107. *Id.*
108. *Id.*
109. *Id.*
110. *See id.* at 401–04.
111. *Id.* at 404.
112. 630 S.W.3d 427, 431 (Tex. App.—San Antonio 2021, pet. filed).
113. *Id.* at 431.

receive a full three thirty-second's (3/32nd's) portion thereof as his own property" and again that the grantor "shall own and be entitled to receive three thirty-second's (3/32nd's) of the gross production of all oil, gas and other minerals produced and saved . . . ."[114]

The parties disputed whether the deed reserved a fixed NPRI (a fixed fraction of total production) or a floating NPRI (a fraction of the total royalty interest that would vary depending on the royalty percentage the mineral estate owner negotiated).[115] The district court determined that the deed reserved a fixed 3/32nd NPRI.[116] But the court of appeals disagreed.[117]

On appeal, the court focused on the "four corners" rule and used a "holistic approach" to "harmonize all parts."[118] In multiple provisions, the deed named a term and then defined it; this structure was important to the court.[119] Additionally, the document was constructed at a time when 1/8th was the normal royalty in a lease.[120]

Based on these factors, the court found that construing the lease as conveying a fixed 3/32nd royalty would render the double fraction meaningless, and that the only way to harmonize all the clauses and give effect to each of them was to read the conveyance as reserving a floating (variable) royalty.[121] Based on this analysis, the Court construed "3/32nd" as a defined term, defined by the lease as "3/4 of the royalty interest," or 3/4th of whatever royalty interest happened to be reserved in a future lease.[122] Every subsequent mention of 3/32nd did not literally mean 3/32nd but instead meant the 3/4th of the royalty.[123] Thus, the deed reserved a floating NPRI.[124] A petition for review is pending in this case.

114. *Id.*
115. *Id.* at 430–31.
116. *Id.* at 429.
117. *Id.*
118. *Id.* at 430, 433.
119. *Id.* at 433.
120. *Id.* at 431–32.
121. *Id.* at 435–36.
122. *Id.* at 436.
123. *Id.*
124. *Id.*

VI. *MRC PERMIAN COMPANY V. POINT ENERGY PARTNERS PERMIAN LLC*: THE BENEFIT OF THE BARGAIN IN THE BROADEST OF FORCE MAJEURE CLAUSES

In *MRC Permian Company v. Point Energy Partners Permian LLC*, the San Antonio Court of Appeals held parties to the benefit of the bargain of their extremely broad force majeure clause and refused to imply conditions or narrow its scope.[125] MRC (the lessee) executed a lease with a force majeure clause providing that MRC could extend any continuous drilling deadline in the event of a "non-economic event beyond Lessee's control" that delayed its operations.[126] The primary term expired, and the lease required MRC to begin drilling another well before May 21, 2017 to avoid forfeiture.[127] MRC originally scheduled drilling to begin on May 11, but, due to an administrative error, MRC delayed the drilling until June.[128] However, in April, the rig that MRC needed to use to drill the well was damaged while drilling on another site, resulting in a 30-hour delay.[129]

MRC asserted that this was a force-majeure event capable of extending the continuous drilling deadline and gave the lessor timely notice of the event.[130] The lessor disputed that the force majeure clause applied.[131] MRC sought a declaratory judgment on the issue, which the trial court denied, and MRC subsequently appealed.[132] Although the parties raised other issues, this summary focuses on the force majeure clause analysis on appeal.

The lessee argued that this situation could not constitute a force-majeure event because it was an off-lease condition (the rig broke down on another drilling site) and because it was not a substantial factor in the lessee's failure to meet the deadline.[133] But the court found that the lease did not require an on-lease condition, and it did not require the triggering event to be a substantial factor or a direct link in the delay.[134] The lease merely required that MRC's drilling be "delayed by a non-economic event beyond its control."[135]

125. 624 S.W.3d 643, 660 (Tex. App.—El Paso 2021, pet. filed).
126. *Id.* at 652, 657.
127. *Id.* at 652.
128. *Id.* at 653.
129. *Id.*
130. *Id.*
131. *Id.* at 654.
132. *Id.* at 654–55.
133. *Id.* at 658.
134. *Id.* at 659–60.
135. *Id.* at 660.

The court applied ordinary principles of contract instruction and declined to "impose a more stringent obligation unless it is clear that the parties intended to do so."[136] Thus, an on-lease condition that was not a substantial factor could be a triggering event.[137] However, due to issues of fact including whether the rig breakdown had any causal connection to the delay, the court remanded.[138] A petition for review is pending in this case.

VII. REGENCY FIELD SERVICES, LLC V. SWIFT ENERGY OPERATING, LLC: TIMING MATTERS ON PLEADING INJURY

In *Regency*, the Texas Supreme Court considered whether lessee's claims of underground trespass, negligence, gross negligence, and nuisance accrued more than two years before the lessee discovered them, barring the claims by limitations.[139] Regency's disposal injection well leaked hydrogen sulfide underground onto an adjacent tract and contaminated some wells.[140] A nearby lessee, Swift, discovered in October 2012 that the hydrogen sulfite necessarily had to migrate through mineral estate covered under Swift's leases.[141] A study showed that the hydrogen sulfide may have leaked as early as April 2009.[142] In 2015, Swift intervened in a lawsuit and Regency moved for summary judgment based on limitations—a motion which the trial court granted and the appeals court partly reversed.[143]

The Supreme Court granted petition for review and determined that fact issues as to whether Swift had even suffered a legal injury precluded summary judgment.[144] Swift's pleadings alleged future damages and general injury but failed to allege that the injectate plume had already reached or damaged Swift's existing wells or specific planned drill sites.[145] The Court was unable to determine whether Regency's leakage had already interfered with Swift's use and enjoyment of property or invaded or interfered with his rights to explore and

136. *Id.* at 656.
137. *Id.* at 662–63.
138. *Id.*
139. Regency Field Servs., LLC v. Swift Energy Operating, LLC, 622 S.W.3d 807, 813–14 (Tex. 2021).
140. *Id.* at 812–13.
141. *Id.* at 813.
142. *Id.*
143. *Id.*
144. *Id.* at 824.
145. *Id.* at 822.

produce, much less to determine when that happened.[146] Thus, the Court reversed summary judgment and remanded the case.[147]

VIII. *YOWELL V. GRANITE OPERATING CO.:* REFORMATION TO AVOID VIOLATING THE RULE AGAINST PERPETUITIES

In the most recent iteration of *Yowell*, the Amarillo Court of Appeals considered on remand from the Supreme Court whether a top lease interest could be reformed to comply with the rule against perpetuities.[148] This dispute involved a lease provision that stated that if the lease terminated and the lessee obtained new leases covering or affecting all or part of the same mineral interest, "the overriding royalty interest reserved herein shall attach" to the new leases and that any subsequent new leases "shall contain a provision whereby such overriding royalty shall apply and attach to any subsequent extensions or renewal of Subject Leases."[149] This created a property interest under the subsequent new lease, but the interest did not vest at the time of creation and violated the rule against perpetuities.[150] The court agreed that the lease could be reformed under Tex. Prop. Code section 5.043(a) to "limit the period in which it might vest to no longer than twenty-one years after the death of any natural person whose life was in being at the time the overriding royalty interest was created."[151] A petition for review is pending in this case.

IX. *POSSE ENERGY, LTD. V. PARSLEY ENERGY, LP*: "ALL" DOES NOT MEAN "ALL" WHEN THE PARTIES SAY IT DOES NOT

In *Posse Energy, Ltd. v. Parsley Energy, LP*, the El Paso Court of Appeals considered whether a set of documents conveyed mineral rights to all depths or only to shallow depths.[152] The acquisition agreement and assignment indicated they were to be harmonized with other expressly named agreements and deeds.[153] The court refused to use the corresponding documents to alter the plain meaning of the

146. *Id.* at 821.
147. *Id.* at 824.
148. Yowell v. Granite Operating Co., 630 S.W.3d 566, 569 (Tex. App.—Amarillo 2021, pet. filed).
149. *Id.* at 570.
150. *Id.*
151. *Id.* at 571.
152. Posse Energy, Ltd. v. Parsley Energy, LP, 632 S.W.3d 677, 685–86 (Tex. App.—El Paso 2021, pet. filed).
153. *Id.* at 691.

agreement.[154] The acquisition agreement and assignment expressly set the conveyance as "all" property described in the exhibits.[155] The exhibits describing the disputed areas limit the broad grant by stating "insofar and only insofar as the lease covers the proration units" for named wells.[156] Proration units did not reach below 8,900 feet. So, harmonizing the documents, the court found that the parties' intent was to convey only rights down to 8,900 feet, not below.[157] A petition for review is pending in this case.

X. *FOOTE V. TEXCEL EXPLORATION, INC.*: CATTLE ARE NOT LICENSEES—THE CASE OF THE INCORRECT CAUSE OF ACTION

In *Foote v. Texcel Exploration, Inc.*, Texcel operated a well on land where the surface was subleased to a cattle rancher who used it to pasture over 650 head of cattle.[158] The cattle had a habit of getting into the well operations area, and one day the cattle broke a pipe, caused a spill, and ingested oil.[159] Many cattle became ill, and 132 head died.[160] The cattle owner and manager sued Texcel on theories of premises liability and negligent undertaking, alleging that the lessee negligently failed to build a fence and that the cattle were licensees.[161] The jury found that the cattle were not "licensees" on the property.[162]

On appeal, the cattle rancher argued that the trial court erred by not finding as a matter of law that the cattle were invitees.[163] But the Eastland Court of Appeals affirmed the trial court's judgment, adding that premises liability was the incorrect cause of action.[164] The court stated that the cattle rancher had ignored the two potentially viable causes of action.[165]

154. *Id.* at 691–92.
155. *Id.* at 692–93, 696.
156. *Id.* at 695.
157. *Id.*
158. Foote v. Texcel Expl., Inc., No. 11-20-00028-CV, 2022 WL 175824, at *1–2 (Tex. App.—Eastland Jan. 20, 2022, no pet. h.).
159. *Id.*
160. *Id.*
161. *Id.* at *1, *3.
162. *Id.* at *3.
163. *Id.* at *4.
164. *Id.* at *3, *10.
165. *Id.* at *3 (quoting Satanta Oil Co. v. Henderson, 855 S.W.2d 888, 889–90 (Tex. App.—El Paso 1993, no writ) ("[T]he owner/lessee of the surface estate in order to recover against the mineral lessee or operator for injury to his cattle must plead, prove and obtain a jury finding on one of the following: [1] That the lessee/operator intentionally, willfully or wantonly injured the cattle; or [2] That the lessee/operator used more land than was reasonably necessary for carrying out the

XI. BLUESTONE AND POSTPRODUCTION COSTS: CALCULATING ROYALTIES "AT THE MOUTH" AND "IN THE PIPELINE"

In *BlueStone Natural Resources II, LLC v. Randle*,[166] the Texas Supreme Court affirmed the Fort Worth Court of Appeals holding that the lessee could not deduct post-production costs from the lessor's royalty when the contract contained conflicting provisions.[167] The royalty clause in the printed lease instructed the parties to base the royalty on "the market value at the well" with the amount "computed at the mouth of the well."[168] This language indicates that the lessee may deduct post-production costs.[169] However, an addendum to the lease stated, to the contrary, that the "[l]essee agrees to compute and pay royalties on the gross value received," negating the lessee's ability to deduct post-production costs.[170]

At first glance, the court's holding here may appear to contradict *Burlington Resources Oil & Gas Co. LP v. Texas Crude Energy, LLC*, in which the Texas Supreme Court found that the "mouth of the well" language controlled in a similar conflict of terms regarding postproduction costs.[171] However, here—unlike in *Burlington*—the parties had anticipated potential conflict and addressed it by providing that the addendum would supersede any contradictory provisions in the printed lease.[172] Thus, the court held that BlueStone had wrongfully deducted postproduction costs.[173] This holding confirms that *Burlington* does not override parties' contractual freedom to agree on a different result than the court would otherwise reach. It also serves to remind contracting parties to anticipate potential issues and address them clearly at the time of contracting to avoid uncertain results in the courts.

Less than a year later, the Texas Supreme Court released another opinion in a dispute involving BlueStone's ability to deduct

purposes of his lease and that as a result of some negligent act or omission on his part, he proximately caused an injury to the surface owner/lessee's cattle.")).

166. 620 S.W.3d 380 (2021).

167. *See* William D. Farrar, *Survey of Selected 2019 Texas Oil and Gas Cases and Statutes*, 6 TEX. A&M J. PROP. L. 343, 345–47 (2020) (discussing the court of appeals holding in BlueStone Nat. Res. II, LLC v. Randle, 601 S.W.3d 848 (Tex. App.—Fort Worth 2019), *aff'd in part*, *rev'd in part*, 620 S.W.3d 380 (Tex. 2021)).

168. *BlueStone*, 620 S.W.3d at 384.

169. *Id.*

170. *Id.*

171. Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy, LLC, 573 S.W.3d 198, 211 (Tex. 2019).

172. *BlueStone*, 620 S.W.3d at 387.

173. *Id.* at 393.

postproduction costs from a royalty payment.[174] This time, the dispute centered on the meaning of "the pipeline."[175] The relevant deed conveyed a royalty "to be delivered . . . free of cost in the pipe line, if any, otherwise free of cost at the mouth of the well or mine."[176] The court of appeals had referenced the *Burlington* holding, construing *Burlington* as establishing a rule that delivery "into the pipeline" always indicates a valuation point at the well.[177] The Texas Supreme Court agreed with this conclusion but clarified that the *Burlington* holding is narrower than the court of appeals had assumed.[178]

The correct interpretation of "into the pipeline" or similar phrases depends on the parties' intent, as ascertained "from the language they used to express their agreement."[179] Here, the parties disputed whether "the pipeline" meant the onsite gathering system or the distribution pipeline at the point of sale (offsite).[180] The lessor argued in favor of the distribution pipeline interpretation in order to avoid paying transportation costs up to that point.[181] However, the Court found that the term "pipeline" is commonly used in the industry for onsite gathering systems.[182] Also, the provision of an alternate location that is at or near the wellhead in the absence of a "pipeline" confirms that the parties intended a valuation point at or near the wellhead.[183] Based on this analysis, the Court construed the term "pipeline" as the onsite gathering system, allowing BlueStone to deduct postproduction costs.[184]

The court reiterated that "the decisive factor in each [contract-construction] case is the language chosen by the parties to express their agreement," adding, "[j]ust as in *Burlington Resources*, our analysis here turns not on an immutable construct but on the parties' chosen language."[185]

174. Nettye Engler Energy, LP v. BlueStone Nat. Res. II, LLC, 639 S.W.3d 682, 684 (Tex. 2022).
175. *See id.*
176. *Id.* at 685–86.
177. *See id.* at 685, 688.
178. *Id.* at 689.
179. *Id.* at 685.
180. *Id.* at 686.
181. *Id.*
182. *Id.* at 691.
183. *Id.*
184. *Id.* at 696.
185. *Id.*

XII. 2021 LEGISLATIVE CHANGES

A. *HB 4218: Vetoed for Contractual Freedom*

HB 4218 would have created a statutory cause of action for bad faith washout of an overriding royalty interest.[186] The Texas Legislature passed this bill unanimously with a 148-0 vote in the House and a 31-0 vote in the Senate.[187] However, Governor Abbott vetoed the bill on the grounds that it would contravene core principles of freedom to contract and Texans' right to have their bargains enforced.[188] "Instead of enriching lawyers through costly litigation on the back end," the governor stated, "Texas law should encourage the parties to negotiate wash out protections in advance."[189]

B. *SB 1259: A Win for Production Companies, a Loss for Royalty Owners*

SB 1259 added a provision to protect production companies that withhold royalty payments due to competing claims of ownership by barring royalty owners from bringing common law causes of action for breach of contract.[190] The Texas Natural Resources Code (the "Code") allows companies to withhold royalty payments due to title disputes affecting distribution of payments and other circumstances that call into question the contractual payee's right to receive the royalties.[191] However, in 2018, the Texas Supreme Court held that the statute did not protect companies who suspended royalties in compliance with the Code from a breach of contract cause of action.[192] In response, the Texas Legislature passed SB 1259, which adds to the statute: "A payee does not have a common law cause of action for breach of contract against a payor for withholding payments under Subsection (b) unless, for a dispute concerning the title, the contract requiring payment specifies otherwise."[193]

186. Tex. H.B. 4218, 87th Leg., R.S. (2021).
187. H.J. of Tex., 87th Leg., R.S. 1345 (2021); S.J. of Tex., 87th Leg., R.S. 2287 (2021).
188. Veto Message of Gov. Abbott, Tex. H.B. 4218, 87th Leg., R.S. (2021).
189. *Id.*
190. TEX. NAT. RES. CODE ANN. § 91.402(b).
191. *Id.*
192. Sen. Comm. on Nat. Res. & Econ. Dev., Bill Analysis, Tex. S.B. 1259, 87th Leg., R.S. (2021); ConocoPhillips Co. v. Koopmann, 547 S.W.3d 858 (Tex. 2018).
193. TEX. NAT. RES. CODE ANN. § 91.402(b-1).

C. *SB 1258: Rolling Back State Land Lessee Duties*

SB 1258 revised the statutory requirement for state land lessees to either drill an offset well or pay a compensatory royalty when oil or gas is being produced in commercial quantities from a nearby well.[194] State land lessees no longer have a duty to drill an offset well based on a nearby horizontal drainhole well located in an unconventional fracture treated field unless the well is within 330 feet of the state land or is closer than the minimum distance established by the Railroad Commission's lease-line spacing requirement.[195] However, this amendment does not alter lessees' duty to drill an offset well for conventional oil and gas development.[196] This amendment to the statute applies only to leases entered into on or after September 1, 2021.[197] However, parties to prior leases may contractually agree to avoid a duty to drill an offset well that this legislation eliminated.[198]

D. *HB 3794: First-Priority Oil & Gas Liens to Protect Texans' Security Interests*

HB 3794 replaces the Texas Uniform Commercial Code ("UCC") first purchaser statute for oil and gas security interests with a first-priority oil and gas lien on the basis of real property interests. The newly-created Chapter 67 of the Texas Property Code now governs oil and gas liens.[199] Each interest owner has an oil and gas lien to the extent of the interest owner's interest in oil and gas rights.[200] The oil and gas lien is perfected automatically; the interest owner does not need to file a financing statement or any other type of documentation.[201] An oil and gas lien takes priority over any other lien except for a permitted lien.[202] The Texas Legislature passed this bill in response to a recent Fifth Circuit Court of Appeals decision in which the court refused to give a Texas, gas interest owner priority in a bankruptcy dispute because of Texas' nonstandard UCC provisions.[203]

194. TEX. NAT. RES. CODE ANN. § 52.034(a-1).
195. *Id.* at (a-1)–(a-2).
196. *See id.*
197. Sen. Comm. on Nat. Res. & Econ. Dev., Bill Analysis, Tex. S.B. 1258, 87th Leg., R.S. (2021).
198. *Id.*
199. TEX. PROP. CODE ANN. § 67.
200. § 67.002.
201. § 67.004.
202. § 67.007.
203. Sen. Comm. on Nat. Res. & Econ. Dev., Bill Analysis, Tex. H.B. 3794, 87th Leg., R.S. (2021); *In re* First River Energy, LLC, 986 F.3d 914 (5th Cir. 2021).