# 2023 UPDATE OF FEDERAL, OHIO, OKLAHOMA AND TEXAS OIL AND GAS CASE LAW

Prepared by

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January 2024

Mazurek, Belden & Burke, P.C. is a San Antonio, Texas-based law firm that handles oil and gas matters, particularly in the fields of title examination, merger and acquisition due diligence, and regulatory advising. MBB represents clients in Texas, Ohio, Oklahoma, New Mexico, Utah, Colorado, and Massachusetts. To find out more about us, please visit: www.mbb-legal.com.

If you have any questions, or if you would like to discuss any of the cases set forth herein in greater detail, please do not hesitate to contact us.

Sincerely,

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**Acknowledgment**

A sincere thank you to all those who helped publish the 2023 Case Law Update.

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## A. FEDERAL CASE LAW UPDATE

### SUPREME COURT OF THE UNITED STATES CASES

**Sackett v. Environmental Protection Agency** [1]
*Supreme Court of the United States*

**In this case, the Court held that the Clean Water Act ("CWA") extends to "only those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right, so that they are indistinguishable from those waters."** [2] In 2004, the Sacketts purchased land to build a home near Priest Lake, Idaho. They backfilled the property with rocks and dirt to prepare for building the home. The Environmental Protection Agency ("EPA") notified the landowners that backfilling their residential lot with dirt and rocks near a lake violated the CWA because the lot contained protected wetlands. Ultimately, the EPA sent the Sacketts a compliance order requiring site restoration. The EPA asserted the wetlands on the lot were "waters of the United States" because they fed into a ditch that fed into the interstate Priest Lake.

The Court began by reviewing the intent and reach of the CWA. In 1972, Congress enacted the CWA to prohibit "the discharge of any pollutant" into "navigable waters."[3] Pollutants were broadly defined under the CWA to include contaminants, but also materials like rock, sand, and cellar dirt. The EPA interpreted the waters of the United States to include all waters that *could affect* interstate commerce, as well as wetlands adjacent to those waters. Agency guidance asserted jurisdiction over wetlands, or even dry lands, adjacent to non-navigable tributaries when those wetlands had a *significant nexus* to those waters. When wetlands, either alone or in combination with similarly situated land in the region, significantly affected the integrity of a traditional waterbody, a significant nexus existed. Under this interpretation, the EPA asserted jurisdiction over storm drains, roadside ditches, and lands that were covered by floodwaters on rare occasions (i.e., once every 100 years).

The Court reasoned that to assert jurisdiction over an adjacent wetland under the CWA, a party must first establish that the adjacent body of water constitutes a water of the United States—which is a relatively permanent body of water (lakes, rivers, oceans). Second, the wetland must have a continuous surface connection with that water. For the reasons set out by the Court, the Sackett's wetlands were not considered waters subject to the CWA because they (1) lacked a continuous surface connection with traditional navigable water, (2) because the tributary across the street from the Sackett's property could not reasonably be made a highway of interstate commerce, and (3) the EPA was unable to establish that Priest Lake was a navigable waterway. As such, the Court held that the CWA extends only to those wetlands with a continuous surface connection to bodies that are protected waters in their own right.

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[1] *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023).
[2] *Id.* at 677.
[3] *Id*. at 660.

## FEDERAL CIRCUIT COURTS OF APPEALS CASES

### 1. *Fifth Circuit Court of Appeals*

**DOH Oil Co. v. Kahle**[4]

*Fifth Circuit Court of Appeals*

**In this case, the court looked at a common practice in the Texas oil and gas industry to decide if it established a pattern of racketeering activity under RICO.** DOH Oil Company ("DOH") asserted that Aaron Kahle and Ridgefield Permian Minerals, LLC, among others ("Ridgefield"), clouded their title to minerals "through a fraudulent and extortionate RICO scheme by (1) a mail and wire fraud scheme involving the purchase of mineral interests from the successors of the defendants in tax foreclosure suits and (2) an extortion scheme whereby Defendants brought suits against Plaintiffs to adjudicate title to the minerals in state court."[5] DOH alleged Kahle intended to "acquire and record the minerals deeds, 'not to give Ridgefield record title but to fabricate the appearance of a colorable title claim, thereby clouding [Plaintiffs] valid title and tying up their property, [and] stopping their revenue payments.'"[6]

In a scheme known as the "Tax Foreclosure Project," Kahle and Ridgefield worked together to obtain mineral deeds from interest owners whose minerals were acquired by DOH through tax foreclosure sales. Ridgefield specifically targeted interests which were subject to title defects or where the tax foreclosure proceedings contained potential errors. Ridgefield then filed four lawsuits seeking to clear title to the interests claimed by DOH. Royalty payments associated with the interests were then suspended due to the lawsuit.

DOH filed suit against Ridgefield for civil RICO claims, alleging "Defendants executed and recorded 31 bogus mineral deeds…to cover Plaintiff's property interests, which Defendants purportedly knew to be invalid thereby clouding Plaintiffs' rightful title." The court held that DOH never established direct injury to themselves and could not use the alleged fraud between Ridgefield and third parties to establish the RICO or extortion claims.

The court pointed out that DOH was complaining about a common oil and gas industry practice, in which a landman will acquire mineral interests based on title defects and initiate title litigation to resolve the ownership dispute. Ultimately, the court dismissed the case refusing to "determine the propriety of how to resolve title questions under state law."[7] Additionally, the court found that Ridgefield's activity did not equate to racketeering and was not part of an ongoing scheme to extort or defraud DOH.

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[4] *DOH Oil Co v. Kahle*, No. MO:22-CV-58-DC, 2023 WL 102150 (W.D. Tex. Jan. 4, 2023), *aff'd*, No. 23-50098, 2023 WL 8930174 (5th Cir. Dec. 27, 2023).

[5] *Id.* at *3.

[6] *Id*.

[7] *Id.* at *9.

**Johnson v. Chesapeake Louisiana, L.P.**[8]
*Fifth Circuit Court of Appeals*

**In this case, the Fifth Circuit Court of Appeals certified a question to the Louisiana Supreme Court: May post production costs be  in a forced drilling unit?** The Johnsons, on behalf of a class of unleased mineral owners in a forced drilling unit, alleged that Chesapeake Louisiana, L.P. and Chesapeake Operating, L.L.C. ("Chesapeake"), the operator, improperly deducted post-production costs from their pro rata share of the royalties. The Johnsons asserted that Chesapeake could not deduct post-production costs incurred in the sale of production. The Johnsons brought the action in state court, and Chesapeake removed the action to federal court based on diversity jurisdiction. The federal district court analyzed the relevant Louisiana pooling law, which addresses payment of production proceeds:

> If there is included in any unit created by the commissioner of conservation one or more unleased interests for which the party or parties entitled to market production therefrom have not made arrangement to separately dispose of the share of such production attributable to such tract, and the unit operator proceeds with the sale of unit production, then the unit operator shall pay to such party or parties such tract's pro rata share of the proceeds of the sale of production within one hundred eighty days of such sale.[9]

The Johnsons argued that sale proceeds defined in the law meant *gross* proceeds. Chesapeake argued that there is a legal mechanism, the quasi-contractual regime of *negotiorium gestio*, to support the post-production cost deduction. Under this doctrine, a proposed gestor must act (1) voluntarily and without authority, (2) to protect the interests of another, and (3) in the reasonable belief that the owner would approve of the action if made aware of the circumstances.[10] If the doctrine applies, "[t]he owner whose affair has been managed [must] … reimburse the manager for all necessary and useful expenses." [11] In prior case law, the Louisiana Supreme Court recognized that a relationship between an unleased mineral interest owner and an operator could be quasi-contractual, but the *gestores* relationship between the parties was not examined. Thus, there is no controlling Louisiana case law that resolves the parties' issue as to whether Chesapeake may rely on the doctrine to deduct post-production costs. Unwilling to answer a question of state law, the Fifth Circuit certified the issue to the Louisiana Supreme Court to determine whether the *negotiorium gestio* doctrine applies to unit operators selling production in accordance with LA. STAT. ANN. § 30:10(A)(3).[12]

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[8] *Johnson v. Chesapeake Louisiana, L.P.*, 87 F.4th 305 (5th Cir. 2023).
[9] LA. STAT. ANN. § 30:10 (A)(3).
[10] LA. CIV. CODE ANN. art. 2292 (2023).
[11] LA. CIV. CODE ANN. art. 2297 (2023).
[12] *See Johnson*, 87 F.4th at 310-11 (5th Cir.2023); *See also Self v. BPX Operating Company*, 80 F.4th 632 (5th Cir.2023), certified question accepted, 2023-01242 La. 12/5/23.

**Munoz v. Intercontinental Terminals Co., LLC**[13]
*Fifth Circuit Court of Appeals*

**In this case, the court looked at the definition of "oil" under both the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") and the Oil Pollution Act of 1990 ("OPA"). The Court held the OPA's definition of "oil" excludes a commingled mixture of oil and CERCLA-related "hazardous substances."** CERCLA defines "hazardous substance" as a list of substances pulled from other federal statutes. However, CERCLA's definition of "hazardous substance" expressly excludes "petroleum, including crude oil or any fraction thereof…[.]"[14] OPA's definition of oil is as follows:

> Oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act. [15]

Munoz filed a complaint against Intercontinental Terminals Company, LLC ("ITC") about an accidental discharge of unwelcome products into the Houston Ship Channel. ITC released fifty chemicals; seventeen were "hazardous substances" under CERCLA and five were deemed "oils" under OPA. Munoz asserted two claims exclusively under OPA. ITC argued that OPA did not apply because the chemicals they released were a mixture of CERCLA substances and oil. ITC asserted that CERCLA, not OPA, applied to mixtures of hazardous substances and oil.

In its analysis, the court assumed that when Congress enacted OPA, it knew that courts interpreted CERCLA's definition of "hazardous substance" to include mixtures of oil and hazardous substances. For example, in the case of *Wilshire*, the court interpreted the petroleum exclusion to exclude oil products when they were mixed with even limited amounts of "hazardous substances" as defined by CERCLA.[16] Additionally, in *Amoco Oil Co.*, the court held that when an oil-bearing mixture includes hazardous substances, the mixture is deemed hazardous under CERCLA.[17] Additionally, the EPA interpreted the petroleum exclusion to not apply to petroleum when mixed with other hazardous materials. Based off these interpretations, the court held that when oil contains a hazardous substance not related to oil refining, "the commingled mixture *is itself a hazardous substance* covered by CERCLA."[18] The substance in this case was a mixture of oil and other hazardous material, accordingly, the plaintiff must assert its claims under CERCLA rather than OPA.

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[13] *Munoz v. Intercontinental Terminals Co., LLC*, 85 F.4th 343 (5th Cir. 2023).
[14] 42 U.S.C. § 9601 (14) (2018) (referencing the defined term "hazardous substance.")
[15] *Munoz*, 85 F.4th at 2.
[16] *Wilshire Westwood Associates v. Atlantic Richfield Corp*., 881 F.2d 801, 810 (9th Cir. 1989).
[17] *Amoco Oil Co. v. Borden, Inc.,* 889 F.2d 664 (5th Cir. 1989).
[18] *Munoz*, 85 F.4th at 5.

## B. NEW MEXICO CASE LAW UPDATE

### SUPREME COURT OF NEW MEXICO CASES

### McFarland Land and Cattle Inc. v. Caprock Solar 1, LLC [19]

*Supreme Court of New Mexico*

**In this case, the Court revisited the requirements for proving a public prescriptive easement in Quay County and held that a public prescriptive easement existed over a low water crossing due to substantial evidence of public use.** Quay Road originally ran south along the tracts of two families, the McFarlands and the Abercrombies. In 1954, a flood washed out the wooden bridge that crossed a channel near the corner of McFarland's property. Due to the flood, the road was rerouted one hundred feet onto the McFarland's property as a low water crossing. This low water crossing is the underlying subject of dispute. In 2015, Caprock entered into a lease with the Abercrombies to construct and operate a solar energy farm. The only access to the Abercrombies' property was by using the low water crossing. The McFarlands demanded payment from Caprock to use the low water crossing even though unfettered public access was previously allowed. The suit was then initiated to determine if a public prescriptive easement was established over the low water crossing.

The Court began by reviewing the principles established in the *Trigg* case: the road's character is the critical aspect in determining a public prescriptive easement, not the number of users.[20] "Once a road is found to be open to the public and free and common to all citizens, [it] should be open for all uses reasonably foreseeable."[21] In addition to the road's "character," the Court must determine whether the road has a "reputation" for being public.

Evidence showing that the public use of Quay Road was sufficient to establish a prescriptive easement. The road appeared on the county highway map, and the county was responsible for service and maintenance. The title insurance policy for the solar farm identified Quay Road as a public road. Neighbors and their invitees believed it was a public road, and other members of the public used it. No party previously sought permission from McFarland, nor did McFarland prevent anyone from using the low water crossing until 2015. Further, McFarland did not interrupt neighbors or the county from using the crossing during the construction of the solar farm. Due to the substantial evidence in support of the road's public use and character, the Court held that a public prescriptive easement existed at the low water crossing.

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[19] *McFarland Land & Cattle Inc. v. Caprock Solar 1, LLC*, 2023-NMSC-018, 533 P.3d 1078.
[20] *Trigg v. Allemand*, 1980-NMCA-151, 95 N.M. 128, 619 P.2d 573.
[21] *Trigg*, 1980-NMCA-151, ¶ 9, (paraphrasing *Westlake v. Duncan, Dieckman & Duncan Mining Co.*, 228 Ark. 336, 307 S.W.2d 220 (1957)).

## Premier Oil & Gas Inc. v Welch [22]

*Supreme Court of New Mexico*

**In this case, the court looked at whether a buyer could be considered a bona fide purchaser if they purchased property subject to a facially regular judgment that was later voided. The court held that a buyer could rely on a judgment that appeared valid based on the court records, regardless of whether outside evidence would show a jurisdictional issue. [23]**

This case affects title to minerals in Eddy County, New Mexico owned by Herbert and Marie Welch. In 1974, the Welch's executed a joint will identifying each other, as well as other family members, as devisees. In 1975 Herbert died, and Marie became the sole owner. Marie then executed a new will in 1980 and gave it to her cousin, Samuel Alderman ("Alderman"), for safe keeping. Ralph Griffin ("Griffin"), Marie Welch's nephew, knew of the existence of multiple wills but did not have possession of any of them. Marie Welch then died in 1988, but Mr. Alderman did not produce a will for probate and was unable to be located. For twenty years, Marie's will was not probated until Griffin filed a petition to determine heirship for Marie's estate. The district court issued a judgment finding that Marie died intestate, and that Griffin was the sole heir to the minerals in Eddy County. Thereafter, Griffin Minerals, LLC (successor to Griffin) leased the Eddy County minerals to Sam L. Shackelford in January of 2010. Premier Oil & Gas, Inc. ("Premier") was interested in purchasing the Shackleford's leasehold interest and obtained a title opinion. The title opinion credited ownership based upon the heirship judgment, and Premier closed the purchase.

In 2012, Alderman petitioned for a formal probate of the 1980 will. The court admitted the will and appointed Alderman as personal representative of Marie Welch's estate. Premier intervened to quiet title, claiming its ownership of the minerals was protected due to its status as a bona fide purchaser. Alderman sought to assert his title and set aside the 2007 judgment.

The court found that because Premier relied on a valid judgment by the court, they were a bona fide purchaser and their right to title would not be affected. The court reasoned that a party buying property that was previously sold under a judgment would qualify as a bona fide purchaser so long as the judgment was facially regular, even if the judgment was later voided.[24] The court focused on the difference between a facially regular judgment and a facially void one. A facially regular judgment is a judgment that has no apparent issues on the face of the record, whereas a facially void judgment would be a judgment that contained an error that would show the reader there was an underlying issue.[25] The court explained that a judgment voided based on new evidence brought in from outside the court's records would not defeat the rights of a buyer who relied on the prior judgment. Therefore, Premier was entitled to assume the 2007 judgment was valid as to the mineral title and not bound to look beyond it. Subsequent evidence would not remove Premier's status as a protected bona fide purchaser.

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[22] *Premier Oil & Gas Inc. v Welch*, 2023-NMSC-017, 533 P.3d 1086.
[23] *Premier Oil & Gas Inc.* at ¶ 10-14.
[24] *Id.* at ¶ 13.
[25] *Id.* at ¶ 14.

## C. OHIO CASE LAW UPDATE

### OHIO DISTRICT COURTS OF APPEALS CASES

#### *1. Third District Court of Appeals*

**Columbia Gas v. Bailey** [26]

*3rd District Court of Appeals of Ohio, Union County*

**In this case, the court was asked to determine whether the appropriation of a private pipeline easement was unauthorized because of an existing public agricultural easement.** Columbia Gas of Ohio, Inc. ("Columbia Gas"), a public utility company, applied for approval to construct a new natural gas pipeline. The Ohio Power Siting Board ("OPSB") conditionally issued a certificate of approval for the pipeline. Columbia Gas sought to appropriate the necessary easements from owners of land encumbered by an agricultural easement (the "protected property") granted in favor of the Ohio Department of Agriculture ("ODA"). Ultimately, negotiations between the landowners and Columbia Gas failed.

The landowners argued that the agricultural easement prohibited installation of the new pipeline due to the irreparable harm it would cause to prime farmlands. They asserted that the agricultural easement restricted Columbia Gas's pipeline construction by means of the prior public use doctrine. The landowners argued that the preservation of farmland and agricultural soils under the agricultural easement in favor of the ODA constituted a public use. The Ohio prior public use doctrine provides:

> [T]hat when a condemner, to which the power of eminent domain is given by law, seeks to exercise its power with respect to property already devoted to public use, its action may be enjoined if the proposed use will either destroy the existing use or interfere with it to such an extent as is tantamount to destruction, unless the law has authorized the acquisition either expressly or by necessary implication.[27]

The court found that the landowners presented credible evidence that the proposed pipeline location was subject to prior public use. The court referenced the Supreme Court of Ohio's decision in *Northwood*, where the Court held that "[such] taking may be enjoined if it will result in the destruction of an existing public use." [28] Here, the court explained that the Ohio Supreme Court has yet to refine the prior public use doctrine to allow courts to determine which public use best serves the population. As such, the court required Columbia Gas to present evidence to contradict the notion that its pipeline would destroy the existing public use of the land with the agricultural easement. The court remanded this case to the trial court to find whether Columbia Gas's proposed easement would destroy the existing public use of the property.

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[26] *Columbia Gas v. Bailey*, 2023-Ohio-1245, 213 N.E.3d 138, (3d Dist.).
[27] *Id*. at ¶98.
[28] *Northwood v. Wood Cty. Regional Water & Sewer Dist*., 86 Ohio St.3d 92, 95, 711 N.E.2d 1003 (1999).

2. *Fourth District Court of Appeals*

**Estate of Coppick**[29]

*4th District Court of Appeals of Ohio, Meigs County*

**The court examined whether property should be excluded from a decedent's estate after an ex-spouse retained a survivorship interest in the property through a divorce decree.** Ben Coppick, Sr. and Sherri Bonsu ("Bonsu") received a warranty deed to their home, which granted them a "joint life estate with remainder over in fee simple to the survivor of them."[30] The couple divorced in 2006, and Ben Coppick, Sr. died in 2020. The parties' daughter, April Coppick ("Coppick"), was appointed administrator of the estate. Coppick filed a complaint to sell the property and Bonsu answered, claiming she held a survivorship tenancy in the property. Coppick argued that R.C. 5302.20(C)(5) terminated Bonsu's survivorship interest at the time of the divorce and converted it to a tenancy in common. The agreed divorce decree stated:

> The Plaintiff and Defendant are joint owners of the marital home, situated in Bedford Township, Meigs County, Ohio consisting of 2 acres, more or less. The parties <u>shall remain as joint owners</u> of said real estate. [31]

R.C. 5302.20(C)(5) governs survivorship tenancies and provides that if two married survivorship tenants divorce, the title ceases to be a survivorship tenancy and becomes a tenancy in common.[32] However, R.C. 5302.20(C)(5) does not apply if the divorce judgment expressly states that the survivorship tenancy will continue. The court found that the term "expressly," as used in R.C. 5302.20(C)(5), should mean a direct and unmistakable statement made in an express manner. The trial court found that the divorce decree has "some specific written mention" that the survivorship was to continue after the divorce. However, here, the court found that while the trial court did not properly define the term "expressly" in its application of R.C. 5302.20(C)(5), the error did not change the outcome of the proceeding. The court explained that construing the divorce decree would affect the parties' intent. The divorce decree explicitly and unambiguously stated that the parties' pre-divorce interests in the property would remain the same upon divorce. The court explained that the word "remain" was instructive as to the parties' intent. As such, at the time of the divorce the parties were joint owners, thus, the divorce decree ordered the parties *remain* "joint" owners, and the joint tenancy continued post-divorce.[33]

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[29] *Estate of Coppick*, 4th Dist. Meigs No. 22CA6, 2023-Ohio-2279.
[30] *Id.* at ¶ 3.
[31] *Id.*
[32] *Id.* at ¶ 16.
[33] *Id* at ¶ 26.

*3. Fifth District Court of Appeals*

**Dougherty v. Abarta Oil & Gas Co., Inc. [34]**

*5th District Court of Appeals of Ohio, Guernsey County*

**In this case, the court determined whether an interest was specifically identified in the muniments of title in relation to a Marketable Title Act ("MTA") claim.** Dougherty, et al., appealed the trial court's summary judgment in favor of Abarta Oil & Gas Co., et al., regarding the ownership of a mineral interest in Guernsey County. A 1954 deed recorded in Bk. 227, Page 497, Guernsey County Deed Records, included the following reservation:

> Excepting and reserving to the Grantors, their heirs and assigns all oil and gas lying under and within the premises hereby conveyed with the right to enter on said premises, to drill for, develop, produce, store and remove the same with necessary machinery and equipment necessary for such purpose and the right to use so much of the surface as may be necessary therefore.[35]

Thereafter, deeds within the muniments of title, including the claimed root of title, contained derivations of the following provision:

> EXCEPTING AND RESERVING, as previously excepted and reserved, all oil and gas lying under in within the premises hereby conveyed with the right to enter on said premises, to draw for, develop, produce, store in remove the same with necessary machinery and equipment necessary for such purpose and the right to use so much of the surface as may be necessary therefore.
>
> Deed References: …Bk. 227, Page 497, Guernsey County Deed Records.[36]

The court was asked whether the above-quoted language preserved the severed mineral interest from extinguishment under the MTA. The court analyzed the language under the three-part test from *Blackstone v. Moore*.[37] First, was there an interest described within the chain of title? If so, was the reference to that interest a general reference? Finally, if the answer to the first two parts is "yes," did the general reference contain a specific identification of a recorded title transaction?[38]

The court concluded that the language in the root of title clearly satisfied the first two parts of the *Blackstone* test. As to the third part, the court determined the reference to the recording information of the 1954 deed would lead a title examiner to discover the identity of the parties who previously excepted the minerals, despite the fact that the language did not identify them by name. The court reiterated that directly identifying the holders of the severed interest is <u>not</u> a requirement to preserve a severed interest under the Marketable Title Act.[39]

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[34] *Dougherty v. Abarta Oil & Gas Co., Inc.*, 5th Dist. Guernsey No. 22CA000019, 2023-Ohio-1279.
[35] *Id.*at ¶3.
[36] *Id*. at ¶5.
[37] *See Id*. at ¶23 (citing *Blackstone v. Moore*, 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E.3d 132).
[38] *Id*. at ¶24.
[39] *See Id.* at ¶42 (citing *Erikson v. Morrison*, 165 Ohio St.3d 76, 2021-Ohio-746, 176 N.E.3d 1).

## Toma v. Devaul [40]

*5th District Court of Appeals of Ohio, Stark County*

**In this case, the court analyzed whether Toma exercised reasonable diligence in his attempt to identify and locate owners of a mineral interest before resorting to notice by publication under the Dormant Mineral Act ("DMA").**

Devaul's ancestors transferred their interest in a portion of Toma's property in 1912, reserving one-half of the minerals underlying the property. The parties recorded the deed in Guernsey County, but the deed was executed in adjoining Belmont County. Upon acquiring title to the property, Toma hired an attorney to search for any conveyances or heirs of the Devaul reservation. The attorney found evidence that the Devaul heirs lived in Belmont County but saw no reason to search the Belmont County Public Records. Because the Toma's sought to reintegrate the mineral interest through the DMA, the court applied the reasonable diligence standard when deciding if Toma should have investigated the location of the heirs further before resorting to notice by publication. The court applied the following reasonable-diligence standard:

> There may, however, be circumstances in which the surface owner's independent knowledge or information revealed by the surface owner's review of the property and court record would require the surface owner, in the exercise of reasonable diligence, to continue looking elsewhere to identify or locate a holder.[41]

Toma hired an attorney to search for the current owners of the severed minerals. An online search using ancestry.com showed evidence that the Devaul heirs lived in Belmont County. However, the attorney failed to investigate further. The court explained that while the Guernsey County Records search was unsuccessful, the attorney found additional information that indicated there were probable heirs in the neighboring county in Belmont County. Additionally, the court reasoned that their counsel had possession of a report that indicated there were people with similar or exact names in Belmont County in 1910 and 1920. Because Toma possessed information about the Devaul heirs, but failed to investigate it further, the court found that the search was not reasonably diligent. Consequently, the court noted that if Toma researched further in Belmont County, he would have found at least one of the Devaul heirs. Because Toma did not conduct a reasonably diligent search, the court held that notice by publication did not satisfy the requirements of the DMA in this case.[42]

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[40] *Toma v. Devaul*, 2023-Ohio-2163, 219 N.E.3d 1014, (5th Dist.).
[41] *Id* at ¶11; citing *Gerrity v. Chervenak*, 2020-Ohio-6705, at ¶36.
[42] *Id* at ¶30.

*4. Seventh District Court of Appeals*

**Chartier v. Rice Drilling D LLC**[43]

*7th District Court of Appeals of Ohio, Belmont County*

**The court applied the three-part *Blackstone* Test to repeated exception language in a chain of title to determine whether oil and gas interests were preserved from extinguishment by the Marketable Title Act ("MTA").**

In 1940, Anna Carpenter executed a deed conveying one-half of all oil, gas and royalties under the contested property to Charles R. Grimm. On the same day, Anna Carpenter also executed a warranty deed conveying fee title to the same property to her daughter, Bessie Cook ("Cook Deed"), with the following exception:

> ALSO EXCEPTING AND RESERVING to the GRANTOR, herein, her heirs and assigns, one-half of all oil, gas and royalties under the premises described herein.[44]

In 1948, Bessie Cook executed a warranty deed conveying the property to Dale Doak and William Doak ("Doak Deed"). The Doak Deed purported to convey full fee title in the land with no exceptions or reservations. In 1950, Bessie Cook (and her husband) unilaterally executed a deed ("Doak II Deed") purporting to correct the Doak Deed by adding the following exception language:

> Excepting and reserving all the Pittsburgh #8 vein of coal and 1/2 of all oil and gas royalties under said land together with mining rights and reservations made in the deed conveying said lands from Annie E. Carpenter to Bessie Cook.[45]

Thereafter, the remaining deeds in the chain of title repeated the exception language from the Doak II Deed. In 2012, the successors of Dale and William Doak ("Chartier") initiated a suit to quiet title to 100% of the oil and gas estate in property pursuant to the MTA. The trial court granted summary judgment in favor of Chartier, and the successors of Charles R. Grimm and Anna Carpenter (the "Carpenters") appealed. The court's opinion focuses on two issues. First, which deed in the chain of title qualifies as the root of title. Second, were the repetitions of the exception language in the Doak II Deed sufficient to preserve the severed oil and gas interest from extinguishment?

On appeal, the Carpenters argued that a deed filed of record in 1976 ("Whaley Deed") which repeats the exception language from the Doak II Deed was the root of title. Conversely, Chartier argued the Doak Deed was the root of title. The determining factor was whether or not the Doak II Deed validly corrected the Doak Deed. Because the Doak II Deed was not executed by the grantees of the Doak Deed, the court held that that Doak II Deed was not a valid correction. Thus, the court determined the Doak Deed was the root of title because it "purported to create the interest claimed"[46] by Chartier. The practical application of the court's holding is that the date of

[43] *Chartier v. Rice Drilling D LLC*, 2023-Ohio-272, 206 N.E.3d 755, (7th Dist.).
[44] *Id*. at ¶3.
[45] *Id*. at ¶7.
[46] *Id.* at ¶46-48, quoting R.C. 5301.47(E).

marketability under the MTA is 40-years after the root of title, not the date superior title is sought to be enforced.

Because the Doak Deed is the root of title, next the court analyzed the instruments filed of record during the 40-year period after the Doak Deed through the lens of the Ohio Supreme Court's three-part test in *Blackstone v. Moore*.[47] The *Blackstone* Test is used to determine whether a reference to a severed interest in a deed is sufficiently specific to preserve the severed interest from extinguishment by the MTA. The court determined the repeated exception and reservation language in the chain of title was general because it "does not except and/or reserve the oil and gas interests, but rather excepts and/or reserves royalties from the oil and gas interests."[48] Because the reference was deemed to be general rather than specific, the court upheld the trial court's judgment that the MTA extinguished the oil and gas interests claimed by the Carpenters. The court's analysis of the date of marketability clarifies that the root of title is not necessarily the most recent deed which is more than 40 years old.

[47] *Blackstone v. Moore*, 155 Ohio St. 3d 448, 2018-Ohio-4959, 122 N.E.3d 132.
[48] *Chartier* at ¶49.

## Crozier v. Pipe Creek Conservancy, LLC[49]

*7th District Court of Appeals of Ohio, Belmont County*

**In this case, the court was asked to determine which deed in the chain of title was the root of title under the Marketable Title Act ("MTA"). Using the three-step *Blackstone* inquiry, the court determined that a 1947 deed was the root of title.[50]** In 1935, the predecessors-in-interest, conveyed the subject property with the following reservation:

> EXCEPTED AND RESERVED, all the oil & gas rights and privileges on and underlying the above-described tract of land.[51]

Subsequently, a 1947 warranty deed contained the following language:

> Excepting and reserving all the oil and gas rights and privileges on and underlying the above-described tract of land.[52]

The court was asked to determine whether the 1947 deed could qualify as the root of title under the MTA, resulting in the extinguishment of the oil and gas rights severed in 1935. The court applied the three-step *Blackstone* test to determine whether the language in the 1947 deed was a specific or general reference: "(1) Is there an interest described within the chain of title? (2) If so, is the reference to that interest a 'general reference'? (3) If the answers to the first two questions are yes, does the general reference contain a specific identification of a recorded title transaction?"[53]

In applying the three-step *Blackstone* analysis, the court first found an interest described within the root of title. Second, the court concluded that the reference in the root of title was a general reference because the only difference in the change of tense was from "excepted and reserved" to "excepting and reserving." As such, the court concluded that the modification did not affect the repetition but found that the repetition was vague and subject to two interpretations. The court held that because the repetition was subject to two interpretations, the repetition constituted a general reference. Lastly, the court concluded that the general reference did not contain a specific identification of a recorded title transaction. For these reasons, the court ruled that the 1947 deed was the root of title and that the repetition of the severance language, which appeared in no other deed in the chain of title during the forty years after the 1947 deed, was a general reference.

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[49] *Crozier v. Pipe Creek Conservancy, LLC*, 7th Dist. Belmont No. 22 BE 0052, 2023-Ohio-4297.
[50] *Blackstone v. Moore,* 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E.3d 132.
[51] *Crozier* at ¶7.
[52] *Id*. at ¶37.
[53] *Id.* at ¶12, citing *Blackstone*.

## Crum v. Mooney[54]

*7th District Court of Appeals of Ohio, Monroe County*

**In this case, the court looked at whether a royalty assignment conveyed a fixed or floating royalty interest. The court found the royalty assignment conveyed a fixed, fractional 1/16 royalty interest.** In 1898, an assignment of royalty conveyed the following described interest:

> T.D. Seal and M.E. Seal, his wife, the grantors, have granted and conveyed and do hereby grant and convey unto C.L. Norris and F.L. Mooney, the one-half (1/2) part of his royalty. Being 1/16 part of all the oil and gas in and under the following described premises, to wit. *** This grant and the provisions hereof shall apply and extend to the said grantor and grantees their heirs, executors, administrators and assigns.[55]

The court began by analyzing the "1/16" reference, indicating that it appears in a separate sentence, "or at least it appears so based on the capitalization of the 'Being,' despite the absence of a period at the apparent end of the prior sentence."[56] While the royalty interest passed to the grantee's heirs and assigns, the court noted, the conveyance did not mention a current oil or gas lease, nor a reference to a future lease on the property. As such the parties "could not have intended to tie the reservation to something that simply did not exist."[57]

The court further noted that "[b]eing 1/16 part of all the oil and gas in and under the following described premises" is not a subordinate clause.[58] Instead, it is a separate sentence in the granting clause that should be weighted equally as the previous sentence. Lastly, the court reasoned that the two fractions could be harmonized "without stripping the 1/2 fraction of any meaning."[59] Because the parties to the assignment used closed terms, did not mention a current or future oil or gas lease on the property, did not include a subordinate clause preceding the "1/2" reference, and because the two fractions can be used simultaneously, the court concluded that the assignment of royalty conveyed a fixed, fractional 1/16 royalty in oil and gas.

[54] *Crum v. Mooney*, 7th Dist. Monroe No. 23 MO 0011, 2023-Ohio-4451.
[55] *Id*. at ¶8.
[56] *Id.* at ¶37.
[57] *Id.* at ¶32.
[58] *Id.* at ¶39.
[59] *Id*.

**Faith Ranch and Farms Fund, Inc. v. PNC Bank, National Association**[60]
*7th District Court of Appeals of Ohio, Harrison County*

**In this case, the court determined whether oil and gas rights were excepted and reserved by the grantor in a 1953 Deed reserving "other minerals."** The 1953 Deed contained the following reservation:

> EXCEPTING AND RESERVING to the Grantor from the lands herein conveyed all the coal below the horizon of the No. 8 coal, if any under vein exists thereunder, and all other minerals, with the right to mine and remove such coal or other minerals of any vein, using any convenient underground mining methods, and to transport coal and minerals from other premises through and under the surface of said lands; and particularly reserving the seam of coal, if any, now being mined at the Nelm's mine of the Y.&O. Coal Company, near Unionvale, Ohio, with all mining rights necessary or convenient for the mining and removal thereof, and the right to transport other coal of the same vein under said lands.[61]

The court began its analysis with the presumption that the phrase "other minerals" within a deed includes oil and gas interests unless language within the deed indicates the parties intended to limit the term.[62] However, if the court found the deed was ambiguous, the parties could introduce evidence outside the deed to demonstrate the parties' intent.

Ultimately, the court concluded that "other minerals" as referenced in the reservation language did not include oil and gas. By analyzing the specific language of the deed, the court explained that the deed referred to the "right to mine" and "mining methods" but did not include anything related to oil and gas, such as the word "drilling." Because the deed language concerned coal and its removal, it was possible the parties did not contemplate the removal of oil and gas. As such, the court concluded that the parties' intent was ambiguous.

Because the deed was ambiguous, the court allowed evidence to determine the parties' intent. Other deeds were presented wherein the same grantor specifically conveyed "oil and gas" utilizing language related to the drilling and removal of oil and gas. The court reasoned that because the original grantor previously included "oil and gas" and other relevant terms in past deeds but declined to do so here, the grantor's intent was not to reserve the oil and gas under the subject lands. Therefore, the court found that the successors to the grantee owned the underlying oil and gas.

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[60] *Faith Ranch & Farms Fund, Inc. v. PNC Bank, Natl. Assn.*, 7th Dist. Harrison Nos. 23 HA 0001, 23 HA 0002, 2023-Ohio-3608.
[61] *Id*. at ¶ 3.
[62] *Id*. at ¶ 26.

## French v. Ascent Resources-Utica, LLC [63]

*7th District Court of Appeals of Ohio, Jefferson County*

**In this case, the court looked at a paragraph contained in three leases to determine if the commencement of operations began before the expiration of the primary term.** In three different leases executed in June and July 2007, various lessors leased the oil and gas rights under Sutherland Farm to Mason Dixon Energy, Inc. ("Lessee"). The leases were for a primary term of five years, after which, the leases would expire unless the lessee paid an additional sum for an extension or commenced drilling operations. Paragraph 33 of the Addenda to the Leases provides:

> 33. Commencement of Operations: Commencement of operations shall be defined as Lessee having secured a drilling permit from the State and further entering upon the herein described premises with equipment necessary to build any access road(s) for drilling of a well subsequently followed by a drilling rig for the spudding of the well to be drilled, and the commencement and completion of the drilling of a well.[64]

The court found three requirements set forth in Paragraph 33. First, the lessee needed to secure a *drilling permit* from the State of Ohio.[65] Second, the lessee needed to enter Sutherland Farm, or lands pooled therewith, with the necessary equipment to build access roads.[66] Lastly, the lessee needed to begin and complete the drilling of the well.[67] If the three requirements were not satisfied before the expiration of the primary term, the lease was to expire.

As to the requirement to obtain a drilling permit, the Ohio Department of Natural Resources issued three stratigraphic test well permits to the lessee. The court determined that a vertical stratigraphic test well is separate and distinct from an oil and gas well because stratigraphic test wells are utilized for stratigraphic information, whereas oil and gas wells are designed to produce oil and/or gas from a targeted formation. Because stratigraphic wells are not permitted for production of oil and gas, these permits did not satisfy the first requirement for commencement of operations.

The lessee asserted that the leases were unitized with adjacent lands where operations had already started, satisfying the second requirement. The court found the lessee's attempt to form a pooled unit did not satisfy the second requirement because the proposed unit included acreage owned by other parties who refused to join in the unit. The acreage was not properly unitized before the end of the primary term. Accordingly, the lessee's operations on the proposed unit did not count toward satisfying the second requirement. Because the lessee also failed to drill and complete a producing well on Sutherland Farm prior to the expiration of the primary term, the court held that the lessee failed to satisfy any part of the savings clause, and the leases had terminated.

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[63] *French v. Ascent Resources-Utica, LLC*, 7th Dist. No. 22 JE 0024, 2023-Ohio-3228.
[64] *Id*. at ¶29.
[65] *Id*. at ¶30.
[66] *Id*.
[67] *Id*.

## McCoy v. C.G.O., Inc. [68]

*7th District Court of Appeals of Ohio, Monroe County*

**In this case, the court determined that the trial court correctly shifted the burden of proof to the lessee for a production in paying quantities analysis.** Charlotte McCoy and McCoy Resources, LLC ("McCoy") own 183.519 acres in Monroe County divided into three tracts, each of which are encumbered by separate oil and gas leases. C.G.O., Inc. ("CGO") owns the oil and gas wells that held the three separate oil and gas leases. Each lease's habendum clause requires the following to be maintained after the primary term:

> [S]o much longer thereafter as oil, gas, or their constituents are produced in paying quantities thereon[.][69]

In 2017, in response to a lack of royalty payments and failure by CGO to report production to the Ohio Department of Natural Resources, McCoy requested CGO release the three leases or begin additional drilling operations. CGO refused, and McCoy sought a judicial declaration that the leases expired pursuant to the habendum clause.

Under Ohio law, the party asserting a claim that a well is not producing in paying quantities usually carries the burden of proof, however, under certain circumstances, the burden of proof may be shifted to the other party. The trial court found that CGO continuously destroyed business records relevant to the subject of this lawsuit, even though CGO had knowledge of this relevant legal matter and potential for litigation. Thus, the court concluded that the trial court did not abuse its discretion in shifting the burden of proof to CGO to prove that the wells were producing in paying quantities.

On appeal, the court determined that the trial court properly placed the burden of proof on CGO in this case, so it was imperative for CGO to provide mathematical evidence to substantiate its operating expenses for each of the wells. The court noted that: "in a paying quantities analysis, the reviewing court looks to the direct operating cost and excludes any indirect operating costs that do not contribute to the production of oil or gas."[70] Without this evidence, which CGO failed to provide, the court could not hold that the wells were producing in paying quantities, resulting in termination of the leases.

[68] *McCoy v. C.G.O., Inc.*, 7th Dist. Monroe No. 22 MO 0015, 2023-Ohio-2945, 223 N.E.3d 850.
[69] *Id.* at ¶3-5.
[70] *Hogue v. Whitacre*, 7th Dist. Monroe, 2017-Ohio-9377, 103 N.E.3d 314, ¶27.

### Mineral Development Inc. v. SWN Production (Ohio), LLC[71]

*7th District Court of Appeals of Ohio, Monroe County*

**In this case, the court reviewed royalty reservation language to determine if the interests were fixed or floating. The court rejected the estate misconception theory.** The first royalty is in the "West Tract" and is described as follows:

> The grantors, their heirs and assigns reserve and except from this deed one half of the royalty of all oil produced and saved therefrom, that it to say: 1/16 of all the oil produced and saved from said premises, and one half of all monies received for rentals for gas wells that may be drilled on [the West Tract.][72]

The second royalty is in the West Tract and is described as follows:

> The grantors, their heirs and assigns, hereby reserve and except from this deed the 1/2 of the 1/16, being the 1/32 of the royalty of all oil and gas underlying the [West Tract].[73]

The third royalty is in the "East Tract" and is described as follows:

> The grantors, their heirs and assigns, hereby reserve and except from this deed the 1/2 of the 1/8, being the 1/16 of the royalty of all the oil and gas underlying the [East Tract].[74]

To determine the size of the royalty interest in the East Tract, the court broke the deed language into sub-clauses for analysis: "the 1/2 of the 1/8" and "being the 1/16 of the royalty of all the oil [and] gas." [75] The court analyzed the two clauses and noted that they were separated by a comma and appeared to refer to something specific because of the definitive article, *the*, in front of each fraction at issue.[76] The court presumed the royalty interest held by the grantor in the East Tract was a 1/8 interest. To determine the first sub-clause of the third reservation, the court concluded the grantor reserved one-half of what they owned at the time of conveyance, which was a 1/8 royalty. It was common in older deeds for grantors to reserve half of what they owned, the court noted, "expressed as both 1/2 of 1/8, or as 1/16." [77]

Looking at the West Tract, the court explained that the two-sub clauses for review in the reservation were "1/2 of the 1/16" and "being the 1/32 of the royalty of all oil and gas."[78] The court looked at the reservation of the first royalty where the grantors reserved half of the royalties in the land, to discern why the "1/8" reservation in the third reservation was changed to "1/16" in the

[71] *Mineral Development Inc. v. SWN Production (Ohio), LLC, et al.*, 7th Dist. Monroe Nos. 23 MO 0004, 23 MO 0005, 2023-Ohio-4749.
[72] *Id*. at ¶6.
[73] *Id*. at ¶8.
[74] *Id*. at ¶9.
[75] *Id*. at ¶31.
[76] *Id*.
[77] *Id*. at ¶34, citing *Moore Family Tr. V. Jeffers*, 7th Dist. Monroe No. 22 MO 0013, 2023-Ohio-3653, ¶39.
[78] Mineral Development Inc., 2023-Ohio-4749 at ¶35.

second reservation. The court noted that the Cleggs only owned half of the royalties in the West Tract at the time of conveyance, so it was clear that the grantor in the second reservation intended to reserve a 1/32 royalty in the West Tract. The court found nothing in the deed that led them to believe the grantor intended anything other than reserving 1/2 of the royalty interest they owned in each section.

Additionally, as to whether the reserved interests were fixed or floating, the court explained that if it were the intent of the grantor to reserve a floating 1/2 royalty, they would have done so, as it was common practice during that time in Ohio. Ultimately, the court found that the only plausible interpretation of the reservations was that the grantor "reserved specific fractional amounts of 1/16 and 1/32 royalty in the two parcels."[79] The court explained that the assumption that all landowners used "1/8" to mean "any future lease royalty" is not supported by the language in the deed, Ohio law, or the record.

[79] *Id*. at ¶39.

**Moore Family Trust v. Jeffers** [80]

*7$^{th}$ District Court of Appeals of Ohio, Monroe County*

**In this case, the court was asked to determine whether a royalty deed created a perpetual NPRI and whether the interest granted was fixed or floating.** The relevant deed provides:

> [Assignors] do hereby grant, bargain, sell and convey to [Assignees] their heirs and assigns forever full equal one sixteenth (1/16) of all petroleum oil and gas in and under the premises hereinafter described, that may hereafter be produced from said premises, under and by virtue of a certain oil and gas lease entered into the 30 day of November 1894 to one S.D. Griffth or to any other party or partys [sic] to whom said premises may hereafter be leased, for oil and gas purposes.[81]

First, the Moore Family Trust (the "Trust") argued that the NPRI granted in the royalty deed was a license that expired when the 1894 lease terminated. The court rejected this argument, stating that the royalty deed clearly referred to both the existing lease and to future leases, thereby creating a perpetual NPRI.

Next, the Trust asserted that the deed only conveyed a fixed one-sixteenth (1/16) royalty interest. While references to the legacy cases which evolved to create the estate misconception theory were referenced, ultimately the court applied the dual grant theory.[82] The court held that the assigned royalty interest was describing two interests: the interest in the existing 1894 lease and the interest in any future leases.[83]

The court noted that the first clause signified an undiluted 1/16 royalty interest, but language appearing later in the royalty deed described the interest as "*said 1/16 interest being the one-half part of the royalty*."[84] The court again, rejected the Trust's arguments, stating that to interpret the deed to grant a fixed 1/16 interest would be to ignore the "*one-half part of the royalty*" reference.

Ultimately, the court applied the dual grant theory and concluded that by harmonizing both clauses of the deed, the deed assigned a fixed 1/16 royalty in production from the 1984 lease and a floating one-half of royalty in future leases.

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[80] *Moore Family Trust v. Jeffers*, 7th Dist. Monroe No. 22 MO 0013, 2023-Ohio-3653.
[81] *Id*. at ¶6.
[82] *Id*. at ¶39 – 41 (Citing *Hysaw v. Dawkins*, 483 S.W.3d 1 (Tex. 2016) and *U.S. Shale Energy II, LLC, v Laborde Properties, L.P.*, 551 S.W. 3d (Tex. 2018).
[83] *Id.* at ¶40.
[84] *See Id.* at ¶36.

## SJBK, LLC v. Northwood Energy Corporation, et al. [85]

*7th District Court of Appeals of Ohio, Monroe County*

**In this case, the court interpreted oil and gas lease language to determine if the failure to pool the entire leased premises resulted in the lease being forfeited as to the lands that were pooled.** The lease at dispute covered 79.774 acres and contains the following clause:

> Lessee agrees that the entirety of the leased premises shall be include[d] in any pooled unit formed, unless Lessee receives the prior written consent of the Lessor… Any drilling or reworking on or production from a well located on a pooled unit shall continue this Lease in full force and effect as to that part of the premises contained within a pooled unit. If the entirety of the leased premises is not included in a single unit, [the] leasehold on any portion of the leased premises not contained in a pooled unit can only be maintained for a period of two years after the expiration of the primary term unless it is included in one or more pooled unit(s) or otherwise maintained under the terms of this lease.[86]

The lessee pooled 65.832 acres of the leased premises with other lands and drilled a producing well within the primary term but failed to pool the remaining 13.942 acres. In 2020, the lessor filed suit seeking forfeiture of the *entire* lease.

In its review of the lease, the court explained that the written consent provision in the quoted clause was not a condition precedent but rather a covenant. Moreover, the written consent paragraph did not change the effect of other clauses in the lease which authorized the lessee to surrender all or part of the leased premises at any time. The court further stated that the quoted clause "contemplate[d] pooling less than all acreage and specially provide[d] the consequence of release of unpooled acreage."[87] In addition, the keyword "any" was used in the provision describing the drilling and production from the pooled unit.[88] In conclusion, because written consent was a covenant and not a condition, the court held that the lease provided for a *partial* termination of the lands outside the pooled unit only.

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[85] *SJBK, L.L.C. v. Northwood Energy Corp.*, *et al,* 7th Dist. Monroe No. 23 MO 0010, 2023-Ohio-4729.
[86] *Id*. at ¶ 12.
[87] *Id*. at ¶ 33.
[88] *Id*. at ¶34.

### Tatum v. Dawson [89]

*7th District Court of Appeals of Ohio, Harrison County*

**In this case, the court analyzed whether a surface owner's search for severed mineral owners satisfied the reasonably diligent standard required to satisfy the Dormant Mineral Act's ("DMA") notice requirement.** In 1973, Oscar E. Hines transferred property in Harrison County, reserving a 1/2 mineral interest. The minerals were then leased to Floyd E. Kimble in 1983 for a term of ten years. The deed recited an address in Tuscarawas County. Tatum later acquired the surface and remaining 1/2 mineral interest in the property.

Prior to serving notice of abandonment under the DMA, Tatum conducted a search of the public records in Harrison County which produced the oil and gas lease with the Tuscarawas County address. Despite having access to the prior address, Tatum did not extend the search to the public records of Tuscarawas County. Tatum ultimately filed notice by publication and then recorded an affidavit of abandonment in Harrison County in 2011. A year later, Dawson (successor to Oscar E. Hines) filed a motion to reopen Oscar's estate and applied for a certificate of transfer for the 1/2 mineral interest, resulting in this dispute.

The court began its analysis by explaining that the reasonableness of an owner's search is dependent on the particular facts and circumstances of each case. The court reasoned that the search conducted by Tatum in the present case was not reasonably diligent, as he did not extend the search beyond the county where the property is located, even though there was evidence in the Harrison County public records indicating the current mineral interest owner may reside in a different county. To satisfy the reasonably diligent standard, the searching party must expand its search when publicly available information indicates the parties may be located in another county.

[89] *Tatum v. Dawson*, 7th Dist. Harrison No. 22HA-0005, 2023-Ohio-1746.

**Tera, LLC v. Rice Drilling D, LLC [90]**
*7th District Court of Appeals of Ohio, Belmont County*

**In this case, the court analyzed whether an oil and gas lease reserved the Point Pleasant formation to the lessors, Tera, LLC ("Tera"), or whether the Point Pleasant formation was included in the depths covered by the lease owned by Rice Drilling D, LLC ("Rice").** Article One of the leases reads:

> Lessor, in consideration of the payments described herein and the covenants and agreements hereafter contained, hereby leases and lets exclusively to the Lessee all the oil, gas, minerals and their constituents (not including coal) **in the formations commonly known as the Marcellus Shale and the Utica Shale**, underlying the land described below for the sole purpose of exploring for, drilling, operating, producing and gathering the oil, gas, casinghead gasoline and all other gases and their respective vapors, liquid or gaseous hydrocarbons produced in association therewith **other than as reserved unto Lessor below.**[91]

The reservations section within each lease reads:

> The Lessor reserves all rights not specifically granted to Lessee in this Lease. Lessor specifically reserves the right to all products contained in any formation: (1) from the surface of the Leased Premises to the top of the formation commonly known as Marcellus Shale, (2) in any and all formations below the base of Marcellus Shale to the top of the formation commonly known as Utica Shale, and **(3) in all formations below the base of the Utica Shale.** [92]

The court focused on the reservation made in the lease to quantify the depths within the Utica Shale, and thus to determine what depths were reserved by Tera. The court relied on the technical definition of the Utica Shale as opposed to a specialist definition of a geological or stratigraphic formation. Rice argued that the phrase "commonly known as," found in Article One of the lease, allowed for a general definition of the Utica Shale and results in ambiguity.[93] Rice further argued that the Point Pleasant formation was included within the term "Utica Shale" as it was used within the oil and gas industry at the time the lease was executed. However, the court held that Point Pleasant was undisputedly a formation below the Utica Shale, thus Point Pleasant was reserved by Tera in the lease when they reserved "all rights not specifically granted to [Rice] in this lease. [Tera] specifically reserves the right to all products contained in all formations below the base of the Utica Shale."[94] The court affirmed the entry of summary judgment in favor of Tera against Rice on the claim of bad faith trespass and conversion.[95]

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[90] *Tera, LLC v. Rice Drilling D, LLC*, 2023-Ohio-273, 205 N.E.3d 1168 (7th Dist.).
[91] *Id*. at 1176, ¶9.
[92] *Id*. at ¶10.
[93] *Id*. at 1184, ¶50. We note that if the clause was ambiguous, Rice would have been allowed to bring in extrinsic evidence, such as lease negotiation communication, to determine the intent of the parties.
[94] *Id*. at ¶51.
[95] *Id*. at ¶52.

### The Roger L. White and Ruth E. White Revocable Trust v. Kemp[96]

*7th District Court of Appeals of Ohio, Belmont County*

**In this case, the court applied the Marketable Title Act ("MTA") to determine whether a reference in the root of title was specific or general and whether the transfer of an oil and gas lease qualified as a preserving event.** In 1930, Shultz conveyed the surface of the disputed lands to Gatten, excepting and reserving the oil and gas rights. After a series of conveyances, Stanley Moore owned the property and executed a 1967 oil and gas lease. Three years later, in 1970, Moore conveyed the property to Seaway Coal Company. The 1970 deed is the root of title and includes the following language:

> Said premises is also subject to oil and gas lease previously given and also subject to easements for rights of way as previously given and conveyed.[97]

A lease cancellation was then filed of record in 1978. The trial court held the lease cancellation was a title transaction that preserved the Shultz interest under the MTA. On appeal, the court explained that the root deed did not include the names of prior interest holders, reference to a recorded instrument, or contain information specifically identifying any particular prior lease.[98] Further, the deed's specific language said "subject to oil and gas lease previously given," which the court distinguished from "subject to *an* oil and gas lease."[99] The court clarified that this reference was not specific because there was no way to know how many leases involved the property without requiring parties to search the entire title record. As such, the quoted language in the root deed was a general reference and did not preserve the prior severance under the MTA.[100]

Secondly, the court found that the recording of the 1978 lease cancellation was not a title transaction involving the Shultz interest under the MTA. Section D of R.C. 5301.49 provides that to be a valid "title transaction" under the MTA, the lease:

> (1) must involve a legal interest rather than a fictitious or nonexistent one, and (2) must refer to the party who is attempting to establish its interests under the MTA.[101]

The court explained that Moore did not own the oil and gas rights when he executed the lease, so the title transaction could not preserve interests prior to the root deed. There was nothing in the Moore lease to suggest that anyone other than Moore owned the rights. For example, the cancellation only referred to Stanley Moore as the lessor, not anyone else. Thus, the court found that the 1978 lease cancellation could not preserve the Schultz interest from extinguishment.

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[96] *The Roger L. White and Ruth E. White Revocable Trust v. Kemp*, 7th Dist. Belmont No. 22 BE 0072, 2023-Ohio-4513.
[97] *Id.* at ¶14.
[98] *Id.* at ¶34.
[99] *Id.*
[100] *Id.* at ¶56.
[101] R.C. 5301.49 (D).

## D. OKLAHOMA CASE LAW UPDATE

### SUPREME COURT OF OKLAHOMA CASES

### Tres C, LLC v. Raker Resources, LLC [102]

*Supreme Court of Oklahoma*

**In this case, the Court analyzed how to determine whether production had ceased on a gas lease maintained into its secondary term.** George and Carol Cowen executed an oil and gas lease in 1995 (the "Cowan Lease") in favor of J.J. Wright, as lessee. The habendum clause of the Cowan Lease provided for a 10-year primary term and would continue "—so long as a producing well was drilled—for a secondary term lasting as long thereafter as oil, gas, casinghead gas, casinghead gasoline, or any of the products covered by this lease is or can be produced."[103] The Cowan Lease also contained the following cessation-of-production clause:

> If, after the expiration of the primary term of this lease, production on the leased premises shall cease from any cause, this lease shall not terminate provided lessee resumes operations for drilling a well within sixty (60) days from such cessation, and this lease shall remain in force during the prosecution of such operations and, if production results therefrom, then as long as production continues.[104]

The Court focused on whether a three-month window was adequate to assess whether the well had ceased producing in paying quantities. The Court noted that the cessation-of-production clause would only be applicable after a cessation had occurred, not during the assessment to determine if the well is profitable.[105] Neither the cessation-of-production clause nor the common law temporary cessation doctrine established a strict time period to determine profitability. The cessation-of-production clause is categorized as a savings clause, which includes a grace period to preserve the lease by reestablishing production. Additionally, the Court noted that the cessation-of-production clause was not designed to eliminate the temporary cessation doctrine, since oil and gas production is not always a continuous flow. Here, the successor lessee made multiple attempts to resolve the production issue after the first month the well did not return a profit in 2015. After several attempts to increase production, plans were put in place to drill a new well. Based off this information, the court held that three months did not qualify as an appropriate time period under the present facts and circumstances. Given the lessee's efforts to remedy production of the Cowan Well, and the finding that a three-month assessment period was not an appropriate time period for fluctuating production, the Court held that the Cowan Lease had not yet terminated due to a lack of production.

[102] *Tres C, LLC v. Raker Resources, LLC*, 2023 OK 13,532 P.3d 1.
[103] *Id*. at *2.
[104] *Id*. at *3.
[105] *Id*. at *18.

## OKLAHOMA LEGISLATION

### 60 O.S. § 121.[106]

*Oklahoma Act Affecting Title and/or Ownership of Property*

The Oklahoma Legislature enacted Senate Bill 212 during the First Regular Session of the Fifty-Ninth Legislature. Senate Bill 212, hereinafter referred to as Title 60 O.S. §121, went into effect on Nov. 1, 2023. **Title 60 O.S. §121 requires a non-alien affidavit for title or ownership of land to be attached as an exhibit to every deed recorded in the state. The statute provides as follows:**

> A. **No alien or person who is not a citizen of the United States shall acquire title to or own land in this state either directly or indirectly through a business entity or trust**, except as hereinafter provided, but he or she shall have and enjoy in this state such rights as to personal property as are, or shall be accorded a citizen of the United States under the laws of the nation to which such alien belongs, or by the treaties of such nation with the United States, except as the same may be affected by the provisions of Section 121 et seq. of this title or the Constitution of this state. Provided, however, the requirements of this subsection shall not apply to a business entity that is engaged in regulated interstate commerce in accordance with federal law.
>
> B. **On or after the effective date of this act, any deed recorded with a county clerk shall include as an exhibit to the deed an affidavit executed by the person or entity coming into title attesting that the person, business entity, or trust is obtaining the land in compliance with the requirements of this section and that no funding source is being used in the sale or transfer in violation of this section or any other state or federal law**. A county clerk shall not accept and record any deed without an affidavit as required by this section. The Attorney General shall promulgate a separate affidavit form for individuals and for business entities or trusts to comply with the requirements of this section, with the exception of those deeds which the Attorney General deems necessary when promulgating the affidavit form.

Any real estate transaction where a deed is recorded with a county clerk will need to include an affidavit attesting that the person, business, or trust abides by 60 O.S. §121. The affidavit requires the signatory/buyer, which would be the individual/entity/trust acquiring title, to attest that they are a U.S. citizen or an alien who is or who shall become a bona fide resident of Oklahoma. A bona fide resident is a person/entity that intends to make Oklahoma their residence or domicile, and makes an honest, good-faith effort to do so.

60 O.S. §121 adds a procedural requirement to existing Oklahoma law that bans an alien from directly or indirectly acquiring title to or own land in the state. Any deed, including corrective deeds, must be recorded with the affidavit as an exhibit. Sample affidavits have been included in this case law update for your convenience.

[106] Okla. Stat. Ann. tit. 60, §121 (West).

**Exhibit to Deed**

**AFFIDAVIT OF LAND OR MINERAL OWNERSHIP: EXEMPT BUSINESS OR TRUST**

STATE OF OKLAHOMA )<br>
) ss.<br>
COUNTY OF ____________ )

TO: THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA

Before me, the undersigned ______________________________________________(list legal name and any aliases) (the "Affiant"), who, having been first duly sworn, deposes and states as of the date of this Affidavit:

1. I am eighteen (18) years of age or older and have personal knowledge of the statements made herein.

2. I am a/an __________________________(role, such as titled officer or trustee) of ____________________________________________________________ (legal name, along with any trade or fictitious names, of business, trust, or other legal entity) (referred to herein as the "Entity"). I am duly authorized to record this Affidavit on behalf of the Entity, which took title to the real property identified in the Deed to which this Affidavit is attached (the "Property"), and to bind the Entity for the consequences of any false statements in this Affidavit.

3. This Affidavit is executed in accordance with and pursuant to 60 O.S. § 121, which provides in part as follows:

> No alien or any person who is not a citizen of the United States shall acquire title to or own land in this state either directly or indirectly through a business entity or trust, except as hereinafter provided, but he or she shall have and enjoy in this state such rights as to personal property as are, or shall be accorded a citizen of the United States under the laws of the nation to which such alien belongs, or by the treaties of such nation with the United States, except as the same may be affected by the provisions of Section 121 et seq. of this title or the Constitution of this state. Provided, however, the requirements of this subsection shall not apply to a business entity that is engaged in regulated interstate commerce in accordance with federal law.

4. For purposes of this Affidavit, I acknowledge and understand that to be "engaged in regulated interstate commerce in accordance with federal law," means all the Entity's business activities in Oklahoma must be either: (a) expressly permitted by federal regulation or federal law, or (b) not prohibited by federal regulation or federal law. I further acknowledge and understand that an entity engaged in or supporting the cultivation of marijuana in Oklahoma is not "engaged in regulated interstate commerce in accordance with federal law." I have read the provisions of 60 O.S. § 121 and this Affidavit and certify that the Entity is engaged in regulated interstate commerce in accordance with federal law."

OAG 2023-1 - INDIVIDUAL

5. No funding source is being used in the sale or transfer of the Property in violation of section 121 or any other state or federal law.

6. I acknowledge and understand that making or causing to be made a false statement in this affidavit may subject me to criminal prosecution for perjury and/or subject me and/or the Entity to being liable for actual damages suffered or incurred by any person or other entity as a result or consequence of the making of or reliance upon such false statement.

FURTHER AFFIANT SAYETH NOT.

______________________________ ________________________
AFFIANT, individually, and as authorized agent of the Entity Date

The foregoing instrument was acknowledged before me this ___day of _______________, 20___, by __________________.

______________________________
NOTARY PUBLIC

My Commission Expires: ______________________

My Commission Number: ______________________

OAG 2023-1 - INDIVIDUAL

**Exhibit to Deed**

**AFFIDAVIT OF LAND OR MINERAL OWNERSHIP: INDIVIDUAL**

STATE OF OKLAHOMA )
) ss.
COUNTY OF ___________ )

TO: THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA

Before me, the undersigned ______________________________________________ (list legal name and any aliases) (the "Affiant"), who, having been first duly sworn, deposes and states as of the date of this Affidavit:

1. I have personal knowledge of the statements made herein.

2. I am:

☐ a citizen of the United States; or

☐ not a citizen of the United States, but an alien who is or who shall become a bona fide resident of the State of Oklahoma.

3. I acquired title to the real property identified in the Deed to which this Affidavit is attached (the "Property").

4. This Affidavit is executed in accordance with and pursuant to 60 O.S. § 121, which provides in part as follows:

> No alien or any person who is not a citizen of the United States shall acquire title to or own land in this state either directly or indirectly through a business entity or trust, except as hereinafter provided, but he or she shall have and enjoy in this state such rights as to personal property as are, or shall be accorded a citizen of the United States under the laws of the nation to which such alien belongs, or by the treaties of such nation with the United States, except as the same may be affected by the provisions of Section 121 et seq. of this title or the Constitution of this state. Provided, however, the requirements of this subsection shall not apply to a business entity that is engaged in regulated interstate commerce in accordance with federal law.

5. I acknowledge and understand that section 121 generally prohibits an alien or person who is not a citizen of the United States from acquiring title to or owning land in the State of Oklahoma. I further acknowledge and understand that section 121 does not prohibit an alien who is or who shall become a bona fide resident of the State of Oklahoma from acquiring title to or owning land in the State of Oklahoma.

6. I acquired title to the Property in compliance with the requirements of 60 O.S. § 121 and no funding source was used in the sale or transfer of the Property in violation of section 121 or any other state or federal law.

7. I acknowledge and understand that making or causing to be made a false statement in this affidavit may subject me to criminal prosecution for perjury and/or being liable for actual damages suffered or incurred by any person or other entity as a result or consequence of the making of or reliance upon such false statement.

FURTHER AFFIANT SAYETH NOT.

______________________________ ________________________

AFFIANT Date

The foregoing instrument was acknowledged before me this __ day of _______________, 20___, by __________________.

______________________________

NOTARY PUBLIC

My Commission Expires: _____________________

My Commission Number: _____________________

**Exhibit to Deed**

**AFFIDAVIT OF LAND OR MINERAL OWNERSHIP: NON-EXEMPT BUSINESS OR TRUST**

STATE OF OKLAHOMA )
) ss.
COUNTY OF ____________ )

TO: THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA

Before me, the undersigned ______________________________________________________ (list legal name and any aliases) (the "Affiant"), who, having been first duly sworn, deposes and states:

1. I am eighteen (18) years of age or older and have personal knowledge of the statements made herein.

2. I am a/an ___________________________(role, such as titled officer or trustee) of _______________________________________________________________________ (legal name, along with any trade or fictitious names, of business, trust, or other legal entity) (referred to herein as the "Entity"). I am duly authorized to record this Affidavit on behalf of the Entity, which is taking title to the real property identified in the Deed to which this Affidavit is attached (the "Property"), and to bind the Entity for the consequences of any false statements in this Affidavit.

3. This Affidavit is executed in accordance with and pursuant to 60 O.S. § 121, which provides in part as follows:

> No alien or any person who is not a citizen of the United States shall acquire title to or own land in this state either directly or indirectly through a business entity or trust, except as hereinafter provided, but he or she shall have and enjoy in this state such rights as to personal property as are, or shall be accorded a citizen of the United States under the laws of the nation to which such alien belongs, or by the treaties of such nation with the United States, except as the same may be affected by the provisions of Section 121 et seq. of this title or the Constitution of this state. Provided, however, the requirements of this subsection shall not apply to a business entity that is engaged in regulated interstate commerce in accordance with federal law.

4. The Entity acquired title to the Property in compliance with the requirements of 60 O.S. § 121 and no funding source was used in the sale or transfer of the Property in violation of section 121 or any other state or federal law.

5. If the Entity is a trust, its grantor(s), trustees and all direct and contingent beneficiaries are United States citizens or bona fide residents of the State of Oklahoma. If the Entity is a business, its direct and indirect owner(s) is/are United States citizens(s) or bona fide residents of the State of Oklahoma.

6. I acknowledge and understand that making or causing to be made a false statement in this affidavit may subject me to criminal prosecution for perjury and/or subject me and/or the Entity to being liable for actual damages suffered or incurred by any person or other entity as a result or consequence of the making of or reliance upon such false statement.

FURTHER AFFIANT SAYETH NOT.

______________________________ ________________________
AFFIANT, individually and as authorized agent of the Entity Date

The foregoing instrument was acknowledged before me this ___day of _______________, 20 ____________________, by ____________________________.

______________________________
NOTARY PUBLIC

My Commission Expires: ______________________

My Commission Number: ______________________

## E. TEXAS CASE LAW UPDATE

### SUPREME COURT OF TEXAS CASES

**Apache Corporation v. Apollo Exploration, LLC[107]**
*Supreme Court of Texas*

**In this case, the Court addressed three issues: (1) on what precise day did a lease expire; (2) whether a sellback provision in a Purchase and Sale Agreement (the "PSA") included only the interest acquired from a particular seller or all of the interest held by the buyer in a particular asset; and (3) at what point is "Project Payout" reached under the agreement?** In 2011, Apache Corporation acquired a 75% working interest in 109 leases from three different parties, including the Bivens Ranch Lease, which covered 116,019.07 acres for a 3-year primary term. A dispute arose between the Sellers of the working interest and Apache as to the lease expiration and whether the terms of their PSAs were breached. The Court addressed the primary issue first: on what specific day did the primary term of the lease expire? The lease stated:

> THIS AGREEMENT, effective the 1st day of January 2007 (the "Effective Date"), from which date the anniversary dates of this Lease shall be computed…[108]

However, the recorded memorandum of the lease stated the primary term's expiration date as December 31, 2009. The memorandum also stated that that the lease, not the memorandum, controlled the terms between the parties. Perpetuating the lease during the secondary term was dependent upon compliance with a continuous development program. The Sellers argued that the lease expired on December 31, 2015, whereas Apache argued the lease expired on January 1, 2016. If the expiration date was December 31, 2015, then Apache was required to have offered its interests to the Sellers by November 1, 2014. If the lease expired on January 1, 2016, then Apache was required to make the offer on November 1, 2015.

The Court looked to the language in the PSAs and applied a common-law rule which provides that the "measuring date–the date 'from' or 'after' a period is to be measured–***is excluded*** in calculating time periods."[109] In other words, the measuring date is computed as day zero. The Court explained that this default common law rule can be displaced by the parties by adopting some other rule (i.e., a different date) in their contract. Since the parties in this case did not express an intent to disperse of the common law rule, the Court held that the primary term of the lease expired on January 1, 2010, and thus that the secondary term expired on January 1, 2016, upon failure to comply with the continuous development program.

Next, the Court interpreted the sellback provision of the PSA:

> Purchaser hereby covenants to make a good faith effort to follow the Commitment in order to perpetuate the Leases, but if any Commitment contemplates or will result in the loss or release of one or more of the Leases (or parts thereof), then Purchaser

[107] *Apache Corp. v. Apollo Expl., LLC*, 670 S.W.3d 319 (Tex. 2023), reh'g denied (July 21, 2023).
[108] *Id*. at 330.
[109] *Id*. at 327.

> shall concurrently offer **all of Purchaser's interest** in the affected leases (or parts thereof) to Seller at no cost to Seller and upon Seller's acceptance of such Leases, Purchaser shall transfer and assign the affected Leases (or parts thereof) to Seller.[110]

The Sellers argued the clause required Apache to offer all of Apache's interest in the block, not just the interest acquired from that particular seller. The Court pointed out, however, that the above clause expressly used the word "Seller" rather than "Sellers" and that each of the Sellers all had their own PSAs with Apache. The Court reasoned that under the Sellers' logic, if "Apache was required under one PSA to offer back to *each individual Seller* the interests it purchases from *all others*, it would owe the *same* interests to each other individual Seller."[111] While multiple parties can own part of the same interest, they cannot each own 100% of the same interest. Following this logic, the Court ruled that Apache was not obligated to offer each Seller all of its interest, rather only the interests it acquired from each individual Seller.

Finally, the Court examined the back-in clause in the PSA to determine when "Project Payout" occurred. "Project Payout" is defined in the PSA as follows:

> "Project Payout" means the first day of the next calendar month following that point in time when the sum of the cumulative Production Income and/or Other Revenues, equals the sum of the Preliminary Purchase Price … the Drilling Credit, the actual costs borne by Purchaser to explore, drill and complete all the wells (whether productive or dry hole) on the Leases (to the extent such costs are attributable to interests which Purchaser acquired in and to the Leases hereunder, but excluding any and all costs associated with other interests which Purchaser may acquire in the Leases), and the actual Operating Costs borne by Purchaser for operation of the Leases and all wells located thereon.[112]

Apache argued that it refers to the point when the "specified revenues *double* specified expenses." Though unclear, the Sellers seemed to argue that it referred to when "specified revenues *equal* specified expenses." The Court ultimately agreed with Apache, holding that while Apache's interpretation would be literally read as "200% of the first day of the next calendar month following that point in time when specified revenues equal specified expenses" only Apache's reading explains the 200% language. As a result, the Court held that the clause required a "2:1 ratio for specified revenues versus specified expenses."[113]

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[110] *Id*. at 336.
[111] *Id*. at 337.
[112] *Id*. at 339.
[113] *Id*.

**Devon Energy Production Company, LP v. Sheppard** [114]
*Supreme Court of Texas*

**In this case, the court looked at whether a lease provision made the landowners' royalty free of post-sale postproduction costs which added value but were not part of the gross sales proceeds. The court held the language of the lease suggests the landowners' royalty was payable on gross proceeds and on post-sale postproduction costs.** This royalty dispute occurred as a result of the landowners discovering the producers were selling oil under contracts that set the sales price by using the published index prices and then subtracting $18 per barrel for the buyer's costs but failed to include an $18 adjustment in the royalty base. The landowners read the leases as "requiring royalty to be paid on additional sums that are not gross proceeds and that do not inure to the producers' benefit [,]" whereas the producers read it as "requiring them to 'add back' only pre-sale postproduction costs that may have diminished the sales price."[115] The lease language was as follows:

> (c) If any disposition, contract or sale of gas shall include **any reduction or charge for the expenses or costs** of production, treatment, transportation, manufacturing, process[ing] or marketing of the oil or gas, **then such deduction, expense or cost shall be added to… gross proceeds** so that Lessor's royalty shall **never be chargeable directly or indirectly with any costs or expenses** other than its pro rata share of severance on production taxes.
>
> Payments of royalty under the terms of this lease **shall never bear or be charged with, either directly or indirectly, any part of the costs or expenses** of production…Anything to the contrary herein notwithstanding, it is expressly provided that the terms of this paragraph shall be controlling over the provisions of Paragraph 3 of this lease to the contrary and this paragraph shall not be treated as surplusage despite the holding in the cases styled.[116]

The court found that Paragraph 3(c) was clear in that "it require[d] any reduction or charge for postproduction costs that [had] been included in the producer's disposition of production to be 'added to' gross proceeds so that the landowners' royalty 'never' [bore] those costs[.]"[117] The lease used the term "indirectly," which the court reasoned "could only refer to the buyer's post-sale expenditures because all other pre-sale expenditures–whether incurred directly or indirectly by the producers–[would] already be included in gross proceeds."[118] The language of the provision made it clear that the landowners' leases were "proceeds plus leases that employ[ed] a two-prong calculation of the royalty base."[119] The language the parties used demonstrated an intent that costs could be added to the producers' gross proceeds when calculating royalties. As such, the court held the lease unburdened the landowners' royalty from pre-sale postproduction costs as well as post-sale postproduction costs.

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[114] *Devon Energy Prod. Co., L.P. v. Sheppard*, 668 S.W.3d 332, (Tex. 2023), reh'g denied (June 16, 2023).
[115] *Id*. at 339.
[116] *Id*. at 337-38.
[117] *Id*. at 345.
[118] *Id*.
[119] *Id*. at 348.

## Freeport-McMoRan Oil & Gas LLC v. 1776 Energy Partners, LLC [120]

*Supreme Court of Texas*

**In this case, the court looked at whether the statutory safe-harbor provision allowed Ovintiv to withhold funds without interest. The court found that because there was a dispute concerning title and a reasonable doubt regarding clear title, Ovintiv acted lawfully.**

Ovintiv and 1776 Energy entered a series of joint-operating agreements for leases they owned in Karnes County, with Ovintiv being designated as the operator. Ovintiv withheld payments without interest from 1776 Energy after learning of a title dispute between 1776 Energy and Longview Energy Company, alleging a breach of fiduciary duties by 1776 Energy.

Under the Texas Natural Resources Code, the payor is permitted to withhold payments "without interest beyond the time limits" under certain circumstances. [121] First, the court required Ovintiv to establish that a dispute concerning title existed when it withheld payments and that the outcome "would [have] affect[ed] distribution of payments."[122] The court interpreted "would" to mean "a possibility" and the term "affect" to mean "cause a response."[123] As such, the court held that the statute did not require a "current effect," just that the dispute had the present ability to affect the distribution of production payments.[124] The court found that the lawsuit between 1776 Energy and Longview did, in fact, have the ability to affect the payments. Accordingly, the first safe-harbor provision requirements were met, allowing Ovintiv to withhold the payments without interest.

In order to apply the second safe-harbor provision, Ovintiv must have had a "'reasonable doubt' that 1776 Energy had 'clear title to the interest in the proceeds of production.'"[125] The court held that Ovintiv did have the requisite reasonable doubt, due to Longview's claims of title over the interest and the pending lawsuit which "clouded 1776 Energy's title to the production proceeds."[126]

As a result, the Supreme Court of Texas found that because there was a dispute concerning title and a reasonable doubt regarding clear title, Ovintiv lawfully withheld production payments without interest under the statutory safe-harbor provisions.

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[120] *Freeport-McMoRan Oil & Gas LLC v. 1776 Energy Partners, LLC*, 672 S.W.3d 391 (Tex. 2023).
[121] Tex. Nat. Res. Code §91.402(b).
[122] *Freeport-McMoRan Oil & Gas LLC*, 2023 WL 3556695 at 396 (citing Tex. Nat. Res. Code. § 91.402(b)(1)(A)).
[123] *Id.* at 398.
[124] *Id.*
[125] *Id.* at 399 (citing Tex. Nat. Res. Code. § 91.402(b)(1)(B)(ii)).
[126] *Id.* at 399-400.

**Point Energy Partners Permian, LLC, et al. v. MRC Permian Company [127]**
*Supreme Court of Texas*

**In this case, the Court reviewed whether a lessee could extend the drilling deadline by invoking a force majeure clause while a scheduling error existed.** [128] **The Court held that since operations were scheduled to occur after the drilling deadline, a delay by a force majeure event would not prevent the Lessee from meeting the drilling deadline.**

The force majeure provision of the lease provided:

> When Lessee's operations are delayed by an event of force majeure, being a non-economic event beyond Lessee's control, if Lessee shall furnish Lessor a reasonable written description of the problem encountered within 60 days after its commencement, and Lessee shall thereafter use its best efforts to overcome the problem, this lease shall remain in force during the continuance of such delay, and Lessee shall have 90 days after the reasonable removal of such majeure within which to resume operations; provided, however, this paragraph shall not extend this lease or relieve Lessee for liability for any breach thereof for a period in excess of 180 days, and Lessee's obligation to pay sums due hereunder shall not be affected by an event of force majeure.[129]

The Court sought to determine if the force majeure event caused the delay in drilling operations. The Continuous Drilling Requirements in the lease required the Lessee to drill by May 21; however, the spud date for the well was mistakenly scheduled for June 2. Thereafter, the Lessee invoked the force majeure clause based on a delay that lasted 30 hours and occurred 60 miles away from the drilling operation in question.[130] The Court held that the delay in drilling was not caused by the force majeure event. To invoke the force majeure clause, the Lessee's operations had to be delayed by the actual event. [131] Here, however, the Lessee would have missed the deadline anyways and the lease would have terminated prior to the spud date. The Court reasoned that the assertion of the force majeure clause was moot; the operations would have ceased to exist, and there would have been no operations for the force majeure event to delay since it was scheduled to occur after the lease terminated. As a result, the Court determined that the force majeure clause did not provide the Lessee with an excuse for delay and explained that the delay was caused by the Lessee's own scheduling mistake rather than an event beyond its control.

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[127] *Point Energy Partners Permian, LLC v. MRC Permian Co.*, 669 S.W.3d 796 (Tex. 2023).
[128] The Court also rendered a decision on retained acreage and tortious interference which will not be discussed here.
[129] *Id*. at 801.
[130] *Id*. at 802.
[131] *Id*. at 807.

### Van Dyke v. Navigator Group[132]

*Supreme Court of Texas*

**In this case, the court was asked to determine the meaning of "one-half of one-eighth" in a 1924 deed and whether it effectively reserved a 1/16 or 1/2 mineral interest.** The 1924 deed provided:

> It is understood and agreed that *one-half of one eighth* of all minerals and mineral rights in said land are reserved in grantors, Geo. H. Mulkey and Frances E. Mulkey, and are not conveyed herein. [Emphasis added.][133]

The court interpreted the meaning of the double fraction reservation by applying the ordinary usage, estate misconception theory and the presumed grant doctrine. The court first applied the lens of "what the text reasonably meant to an ordinary speaker of the language who would have understood the original text in its context."[134] Relying on the case precedent of *Hysaw*, the court stated that "words must be given the meaning they had when the text was adopted," which in this case meant that "'1/8' was widely used as a term of art to refer to the total mineral estate."[135]

The court then examined the text through the estate misconception theory. The estate misconception theory reflected the belief that by entering an oil and gas lease, "a lessor retained only a 1/8 interest in the minerals rather than the entire mineral estate in fee simple determinable with the possibility of reverter of the entire estate."[136] Consequently, for many years lessors would use the term "1/8" to reflect their entire interest in the mineral estate. As a result of the use of the estate misconception theory during this time, it has become the court's practice to presume the use of a "double fraction was purposeful and that 1/8 reflects the entire mineral estate, not just 1/8 of it."[137]

Finally, the court applied the presumed grant doctrine. The three elements of the presumed grant doctrine consist of: "(1) a long-asserted and open claim adverse to that of the apparent owner; (2) nonclaim by the apparent owner; and (3) acquiescence by the apparent owner in the adverse claim."[138] The court found the Mulkeys satisfied these elements through evidence that, over the past 90 years, the parties and their successors in interest continued to engage in transactions and make representations that each party owned a 1/2 interest in the minerals.

As a result, the Supreme Court of Texas concluded that the accurate interpretation of the 1924 text is that "one-half of one-eighth" equals 1/2 of the mineral estate. If a deed uses a double fraction, there is now a rebuttable presumption that 1/8 means "the mineral estate," and there must be other language present in the text which rebuts this presumption.

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[132] *Van Dyke v. Navigator Grp.*, 668 S.W.3d 353 (Tex. Feb. 17, 2023).
[133] *Id.* at 357.
[134] *Id.* at 360.
[135] *Id.* at 362 (referring to *Hysaw v. Dawkins*, 483 S.W.3d 1, 10 (Tex. 2016)).
[136] *Id.* at 363 (reinstating *Hysaw v. Dawkins* at 4.
[137] *Id.* at 364 (referencing *Hysaw v. Dawkins* at 12).
[138] *Magee v. Paul*, 110 Tex. 470, 221 S.W. 254, 257 (1920).

## TEXAS DISTRICT COURTS OF APPEALS CASES

### 1. *Second District Court of Appeals—Fort Worth*

**Nortex Minerals, L.P. v. Blackbeard Operating, LLC**[139]
*Fort Worth Court of Appeals*

**In this case, the court examined whether a corporate merger triggered a consent-to-assign clause.** Nortex Minerals, L.P. and Petrus Investment, L.P. ("lessors") sought to have the court accept their interpretation of an assignment provision in the oil and gas leases at issue ("Alliance Leases"). The Alliance Leases contained a Limited Assignment Provision that reads:

> Except as provided herein, Lessee may not assign or otherwise transfer an interest in this Lease without prior written consent of Lessor, which consent may be granted or denied in the sole and absolute discretion [,] and without such consent, any instrument purporting to assign or otherwise transfer of this lease shall be void. Lessee shall have the right to transfer this Lease in its entirety without obtaining consent from lessor if such transfer of the Lease is (i) part of a merger, sale of membership interests or combination of Lessee and another entity[,] or a sale of all or substantially all of Lessee's assets [.][140]

BlueStone, a wholly owned subsidiary of Blackbeard, owned an approximate 54% interest in the Alliance Leases. In May 2021, Blackbeard entered into a Purchase and Sale Agreement ("PSA") with Diversified Production, LLC ("DGO") whereby DGO would acquire all membership interests in BlueStone's equity. Nortex argued the sale of BlueStone's equity constituted a transfer of interest in the Alliance Leases, triggering its consent rights.[141] To determine if the lessors' consent rights were triggered, the court relied primarily on the Business Organizations Code:

> When a merger takes effect [,] … all rights, title, and interests to all real estate and other property owned by each organization that is a party to the merger is allocated to and vested, … in one or more of the surviving or new organizations as provided in the plan of merger without … any transfer or assignment having occurred.[142]

Ultimately, the court determined the consent provision was not triggered because Blackbeard's sale of BlueStone's equity occurred through a merger, not a transfer of interest in the Alliance Leases.

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[139] *Nortex Minerals, L.P. v. Blackbeard Operating, LLC*, No. 02-23-00027-CV, 2023 WL 7401052 (Tex. App. — Fort Worth Nov. 9, 2023, no pet. h.) (mem. op.).
[140] *Id.* at 1.
[141] *Id.* at 3.
[142] Tex. Bus. Orgs. Code Ann. § 10.008(a)(2)(C).

### 2. *Third District Court of Appeals—Austin*

**Parsley Minerals, LLC v. Flat Creek Res., LLC**[143]
*Austin Court of Appeals*

**In this case, the court found that a paragraph contained within the lease contract was not contrary to an Obligation Well Provision and released Flat Creek from its obligation to drill or pay by a specified date.** Parsley Minerals, lessor, and Flat Creek, lessee, entered into an oil and gas lease in 2018 with the following obligation well provision:

> Notwithstanding anything to the contrary … Lessee must commence drilling operations for one horizontal well on or before April 1, 2020, [later amended by the parties to October 1, 2020] or Lessee shall be obligated to pay Parsley $500,000 within twenty (20) business days of its failure to begin drilling.[144]

The lease also contained a release provision which Flat Creek subsequently exercised, releasing the lease in its entirety on September 23, 2020, before the obligation to drill deadline. Parsley proceeded to sue Flat Creek for breach of contract seeking $500,000 in damages. The court stated that the clause at issue was paragraph 7 of the lease, which read in part:

> Lessee shall have the right at any time … to release the lands covered hereby … and thereby be relieved of all obligations thereafter accruing as to the acreage so released[.][145]

The court held that based on the plain language of the lease, Parsley had no legally enforceable claim against Flat Creek until October 1, 2020. Accordingly, when Flat Creek released the lease before the drilling deadline, it relieved itself of all obligations which would have accrued on October 1, 2020, including the obligation to drill or pay. Parsley argued that the qualifying "notwithstanding anything to the contrary" provision of the Obligation Well Provision takes precedence over the Release provision. The court reasoned that the use of the "notwithstanding" language is used when the parties contemplate the possibility that parts of their contract *may* conflict. The court concluded the release provision did not conflict with the Obligation Well Provision because the Release provision unambiguously gave Flat Creek the right *at any time* to release the lease. The court held that the trial court did not err in granting Flat Creek's motion to dismiss and affirmed the lower court's ruling.

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[143] *Parsley Minerals, LLC v. Flat Creek Res., LLC*, No. 03-21-00337-CV, 2023 WL 2052315 (Tex. App.—Austin, Feb. 17, 2023, no pet.) (mem. op.).
[144] *Id*. at * 1.
[145] *Id*. at * 4.

## Railroad Commission of Texas v. Opiela [146]

*Austin Court of Appeals*

**In this case, the court considered whether an anti-pooling clause in a lease was sufficient grounds to challenge a permit for a PSA well and whether the RRC properly granted such permit.** This case arose on appeal by the Railroad Commission of Texas ("RRC") and Magnolia Oil & Gas Operating, LLC ("Magnolia") after the 53rd District Court in Travis County ("trial court") determined the RRC inappropriately granted a drilling permit for a production sharing agreement ("PSA") well. The Opielas, whose lease specifically prohibited pooling, successfully challenged the permit at the trial court. The appellate court reversed in part, affirmed in part, and remanded the case back to the Commission for further proceedings. The court primarily focused on the RRC's decision-making processes and application of regulations when issuing the permit. The court looked at the following factors to determine whether the RRC complied with regulations when granting the permit for the PSA well:

1. ***The RRC's power to issue permits for multi-tract horizontal wells without pooling.*** The court examined the nature of pooling versus PSAs to determine if the assertion of the right to drill under a PSA impedes an anti-pooling lease clause. The court explained that Texas does not expressly require pooling of tracts in order to drill a wellbore that crosses property lines. An expert witness testified that "if it were a pooled unit, it would be neither a PSA nor an allocation, but that a lessee who had pooling authority… could choose whether to pool or use a PSA."[147] Accordingly, the court found that the RRC did not fail to consider the lease's pooling clause, it simply found that the clause did not prevent Magnolia from showing a good faith claim to drill the well. Further, "a lack of pooling authority alone does not prohibit drilling under a PSA."[148]

2. ***The RRC's authority to adjudicate the validity of leases.*** The court began its analysis by reminding the parties that "when [the RRC] grants a permit to drill a well it does not undertake to adjudicate questions of title or rights of possession. These questions must be settled in the courts."[149] Thus, Opielas' assertion that the RRC failed to consider the anti-pooling clause when issuing the PSA permit was inconsequential. The RRC's lack of consideration of a clause or the lease altogether does not prejudice the Opielas' rights under the lease. Accordingly, the court found that the trial court erred by asserting the RRC had the power to adjudicate a contractual dispute under the lease.

3. ***The RRC's adoption of rules.*** The trial court found that the RRC erred when it adopted rules for allocation and PSA wells that did not comply with the requirements of the Administrative Procedure Act. However, the court explained that the resolution of this issue would not alter their overall decision on the case and declined to make a final decision on the matter.

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[146] *R.R. Comm'n of Tex. v. Opiela*, No. 03-21-00258-CV, 2023 WL 4284984 (Tex. App.—Austin June 30, 2023, pet. filed).
[147] *Id.* at *7.
[148] *Id.* at *8.
[149] *Id.* at *9.

4. ***The finding that Magnolia made a reasonably satisfactory showing of good faith claim to operate the Well.***
   The RRC found that 65.625% of the mineral interest owners in spacing unit either signed a PSA or a consent to pool. Because the RRC previously adopted the 65% standard, they issued the permit. However, the evidence presented in court showed that only 15.625% of the interest owners signed a PSA while 49.437% of the interest owners had signed a consent to pool. The court found that the percentage attributed to owners who signed a consent to pool was irrelevant because production under a PSA is not treated the same way as pooling. Accordingly, the court found that Magnolia did not show a good faith claim to for a PSA well drilling permit, as it did not obtain 65% of the owners' consent for a PSA well.

5. ***Allocation well alternative.***
   Lastly, Magnolia urged the court to render judgment granting the permit as an allocation well. The court, however, explained that the remedy of granting a permit was not proper, as the Order did not permit the court to do so. The court remanded this case back to the RRC to consider whether the well could be permitted as an allocation well.

This opinion is important for three reasons. First, the appellate court reiterated that horizontal wells may cross tract boundaries without pooling. Second, the RRC is still not an arbiter of title or contract rights amongst applicants and challengers. Third, the 65% threshold to qualify for a PSA well permit must be backed by substantial evidence. The primary complaint of the Opielas' protest against the drilling permit issued by the RRC was that allocation and PSA wells are "pooling by another name" and, as such, were prohibited based on the language of the Opielas' lease. The question of whether allocation and PSA well development is akin to pooling was not directly challenged in this appeal, as it was not clearly ruled on by the trial court. Nonetheless, this court provided a very clear answer, at least for the moment.

*3. Fourth District Court of Appeals—San Antonio*

**Repsol Oil & Gas USA, LLC v. Matrix Petroleum, LLC** [150]
*San Antonio Court of Appeals*

**In this case, the court considered whether a contract operator may recover drilling and completion costs from non-operating working interest owners pursuant to a contract operating agreement ("COA").** In 1954, the working interest owners in the Cooke Ranch, being the predecessors to the Appellees and Appellants in this case, signed a joint operating agreement ("JOA"). Talisman Energy USA Inc. ("Talisman") was appointed operator under the JOA and bore the sole responsibility of drilling and operating the wells pursuant to the JOA. In 2016, Talisman and Statoil Texas Onshore Properties LLC ("Statoil") entered into a Contract Operating Agreement ("COA") wherein Talisman appointed Statoil as its contract operator to "perform the services and carry out all the duties to be performed by Talisman as operator under the 1954 JOA."[151] The non-operators under the JOA did not join in the COA. Pursuant to the COA, Statoil drilled and completed three wells in October 2016 on behalf of Talisman. This dispute arose when Statoil attempted to recover costs associated with the drilling program from the non-operators under the JOA.

The dispute involved numerous parties and legal issues. This brief is focused on the rights of the operator under an operating agreement and whether those rights may be delegated through a COA that is not joined by all the parties to the original agreement. The trial court held that Statoil had no standing to recover costs from the non-operators because the non-operators did not join in the COA.

The non-operators analogized the operator/contract operator relationship to that of a general contractor and subcontractor and argued that the subcontractor has no authority to go after owners for damages and must look to the general contractor for payment. Accordingly, the non-operators argued Statoil only had standing to pursue damages against Talisman as the operator.

This court disagreed with the non-operators' arguments under the principle: "as a general rule, all contractual duties are delegable."[152] Accordingly, an assignee of claims has standing to sue upon the assigned claims. The court elaborated and stated that nothing in the COA curtailed these general contract principles. On the contrary, the COA expressly provided that Statoil had the authority to perform and carry out all duties to be performed by Talisman as operator and that Talisman "will, at Statoil's election and to the extend legally possible, assign the claim to Statoil for collection."[153] As a result of the express language of the COA and the general rule allowing for the delegation of contractual duties, the court found that a contract operator may charge non-operating working interest owners for approved JOA costs, even when the non-operators did not expressly join in the contract operating agreement.

[150] *Repsol Oil & Gas USA, LLC v. Matrix Petroleum, LLC*, No. 04-18-00411-CV, 2023 WL 8897012 (Tex.—San Antonio Dec. 27, 2023, no pet. h.).
[151] *Id.* at *14.
[152] *Id.* at *15.
[153] *Id.*

### 4. *Seventh District Court of Appeals—Amarillo*

**PBEX II, LLC v. Dorchester Minerals, L.P.**[154]
*Amarillo Court of Appeals*

**In this case, the court looked at whether a non-operating working interest may be adversely possessed. The court found all working interests are possessory and are thus subject to adverse possession under Texas law.** In May of 1982, Felmont Oil Corporation, Torch's predecessor-in-interest, executed the Willis Lease in which Felmont owned 25% of the working interest in Section 4. In 1989, Torch acquired Felmont's interest. Just a year later, Torch conveyed its interest to Dorchester's predecessors-in-interest, Baytech and SASI. In June 1990, Torch, as seller, and SASI and Baytech, as buyers, entered into an unrecorded Purchase and Sale Agreement.[155] Torch's interest in Section 4 was reduced to 0% by a division order signed by Torch.

In September of 2016, Torch notified Dorchester by letter that they had "mistakenly notified the operator [under the JOA] that Torch had assigned its leasehold working interest in the Moreland Wells to [Dorchester's predecessors] in 1990, thereby allowing Dorchester's predecessors to take possession of Torch's interest. The letter also stated Torch rescind[ed] and cancel[ed] any and all authority previously granted to [Dorchester and its predecessors] to possess the working interest."[156] Dorchester refused to negotiate a correction to confirm Torch owned the working interest and Torch filed suit.

PBEX and Torch argued that the non-operating working interest is nonpossessory in nature, so it cannot be adversely possessed as a matter of law.[157] However, a working interest owner in Texas has the right to possess "all of the oil, gas, and other minerals underlying the leased estate, subject to the payment of royalties to the lesser."[158] The court stated that "there is no distinction between 'operating' and 'non-operating' working interest under Texas law."[159] Thus, working interests in leases are "possessory interests in real property and subject to adverse possession as a matter of law."[160] Because the working interest was subject to adverse possession, the court required Dorchester to demonstrate the requirements of adverse possession.

Torch argued that Dorchester failed to meet the "actual, visible appropriation" requirement for adverse possession and that "only the operator could adversely possess the interest."[161] The court reasoned that one cannot physically "set foot" on the minerals which distinguished adverse possession of a mineral estate from that of the surface estate. "Ownership of the mineral estate is the right to produce and possess the minerals 'in place,' and adverse possession of the minerals requires an act hostile to those rights. Removal of the minerals is necessarily an act hostile to the mineral owner's right to exclusively produce and possess the minerals."[162] The court explained

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[154] *PBEX II, LLC v. Dorchester Minerals, L.P.*, 670 S.W.3d 374 (Tex. App.—Amarillo 2023, pet. filed).
[155] *Id.* at 378-79.
[156] *Id.* at 379.
[157] *Id.* at 381.
[158] *Nat. Gas Pipeline Co. of Am. V. Pool*, 124 S.W.3d 188, 192 (Tex. 2003).
[159] *Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 80-81 (Tex. 1989).
[160] *Id.*
[161] TEX. CIV. PRAC. & REM. CODE ANN. §§16.027.
[162] *Pool*, 124 S.W.3d at 195-196.

that a working interest is the right to possess and produce minerals under the Willis Lease, and because minerals were "continually removed and sold for over twenty-six years, substantially depleting the mineral estate," Dorchester and its predecessors "acted as the owners of the working interest for over twenty-six years [which] is an act that is hostile sufficient to establish adverse possession."[163] The court found that by not acting on its claim to the working interest for over two decades, "Torch acquiesced title to Dorchester, and Dorchester and its predecessors adversely possessed the working interest by acting as the exclusive owners of the working interest."[164]

[163] *Dorchester*, 2023 WL 3151830 at *6.
[164] *Id*.

*5. Eighth District Court of Appeals—El Paso*

**Cactus Water Services, LLC v. COG Operating, LLC** [165]
*El Paso Court of Appeals*

**In this case, the court determined whether a mineral lease conveyed produced water to COG Operating ("COG"). In doing so, the court had to decide if "produced water" is water or waste. The court determined "produced water" is waste resulting as a byproduct of production. As such, COG had the right to all of the oil and gas product stream, including produced water.**

COG entered into multiple oil, gas and mineral leases on lands owned by two surface owners. Thereafter, these owners conveyed all of the surface estates' water rights to Cactus Water Services. Thus began the lawsuit to determine who owned the right to produced water. Throughout trial, the parties disagreed on whether produced water was part of the mineral lease. Cactus argued that the mineral lease was limited to oil, gas and hydrocarbons, and since water is not a hydrocarbon, produced water was not conveyed as part of the mineral lease. COG argued they owned the produced water as a waste byproduct since it is part of the single combined product stream that arises from its wells, in line with industry standards.

In determining whether "produced water" is water or waste, the court turned to statutory and regulatory definitions. Oil and gas waste is defined as waste that is the result of drilling or production of oil, gas and minerals, which includes produced water. In contrast, ground water is defined as water percolating below the surface of the earth. Based off the legal definitions, produced water from oil and gas waste should be considered a water byproduct of oil and gas production.[166]

The court found an important distinction between produced water and ground water. Because oil and gas waste inherently includes produced water, making that water waste itself, then it could not also be considered as water for the purposes of the water leases.[167] The court also explained that the RRC heavily regulates the disposal of produced water and places the burden of proper disposal solely on the operator. Thus, the leases confirmed COG owned the exclusive right to the oil and gas product stream, which included the produced water.[168] Accordingly, Cactus' subsequent leases, which purported to convey produced water rights, were ineffective.[169]

A dissenting opinion was filed which opined that the issue the court should have considered was "whether the entire product stream…is conveyed by a granting clause that merely conveys 'oil and gas.'"[170] The dissent's analysis concluded that produced water was not covered by the leases and therefore, the surface estates' water rights were conveyed to Cactus instead.

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[165] *Cactus Water Services, LLC v. COG Operating, LLC*, 676 S.W. 3d 733 (Tex. App.—El Paso 2023, pet. filed).
[166] *Id.* at 739.
[167] *Id.*
[168] *Id.* at 740.
[169] *Id.*
[170] *Id.* at 741

## Cromwell v. Anadarko E & P Onshore, LLC[171]
*El Paso Court of Appeals*

**This case arose out of a dispute over whether Cromwell's oil and gas leases were being held by production.** To decide this, the court compared this case with *Cimarex Energy Co. v. Anadarko Petroleum Corp.* to determine if Cromwell and Anadarko had a joint operating relationship that would attribute production to Cromwell and perpetuate the leases.[172]

By comparing the facts in this case with the facts in *Cimarex*, the court acknowledged similarities between both cases. Both Cromwell and Cimarex were cotenants with Anadarko, they held leases in the same property as Anadarko, they paid costs invoiced to them by Anadarko, and they were paid their share of the production from wells Anadarko drilled. When Anadarko believed Cromwell's and Cimarex's leases had expired, Anadarko stopped paying them.[173] Both Cromwell and Cimarex contended that their leases were still valid because they were entitled to rely on Anadarko's production to hold their leases, even though neither executed a joint operating agreement with Anadarko. Essentially, via Anadarko's production, both Cromwell and Cimarex believed they satisfied their requirement to actively participate in production. The key issue in both cases was what actions qualified as active participation in production for the purposes of perpetuating the leases.

In *Cimarex*, the court concluded that Cimarex did not participate in production. The court reasoned that Anadarko shared information covering costs and expenses, which Cimarex chose to pay, but there was no agreement that allocated costs and risks. Instead, Anadarko bore all the risk for any losses while Cimarex reaped the profits from Anadarko's production.[174] Cromwell argued that, unlike Cimarex, he did share the risks, costs, and liabilities of production by paying Anadarko for the costs of producing the well and a new compressor. Cromwell also paid for "damages" related to the well; reimbursed Anadarko for spill containment, cleanup, and remediation costs; and paid interest.[175]

The court applied *Cimarex* to this case and found Cromwell's costs were the same type of costs that Cimarex paid: their proportionate share of expenses. The court added that the payment of the expenses did not indicate the parties' intended for Cromwell to assume any risk or liability of operating the well. It was only a reflection of ordinary proportionate shares owed by a nonparticipating cotenant.[176] Because Cromwell's actions were not enough to qualify as active participation and did not satisfy the production requirement, the court ruled that his leases expired at the end of their primary term.[177]

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[171] *Cromwell v. Anadarko E&P Onshore, LLC*, 676 S.W.3d 860 (Tex. App.—El Paso 2023, pet. filed).
[172] *Cimarex Energy Co. v. Anadarko Petroleum Corp.*, 574 S.W.3d 73 (Tex. App.—El Paso 2019, pet. filed).
[173] *Cromwell*, 676 S.W.3d at 867, 873.
[174] *Id*. at 869-870.
[175] *Id*. at 870.
[176] *Id*. at 873.
[177] *Id*. at 874.

**Devon Energy Production Company, LP v. Enplat II, LLC [178]**
*El Paso Court of Appeals*

**In this case, the court determined whether the grantors reserved a 1/16th fixed royalty interest or a 1/16th non-executive mineral interest ("NEMI") from a conveyance of property. The court held the language in the deed resembled a reservation of a mineral interest rather than a royalty interest.** The 1940 deed provided:

> However, this conveyance is made with express understanding that there is reserved to the Grantors, their heirs and assigns an undivided one-sixteenth (1/16) of any and all oil, gas or other mineral produced on or from under the land above described. John Lopoo [Grantee], or his heirs and assigns shall have the right to lease said land for mineral development without the joinder of Grantors or their heirs and assigns, and to keep all bonus money, as well as all delay rentals, but when, if and as Oil, Gas or other mineral is produced from said land, one-sixteenth (1/16) of same, or the value thereof, shall be the property of Grantors, their heirs and assigns.[179]

To determine whether the 1/16 interest was a NEMI or a fixed royalty interest, the court analyzed the language in the reservation provision. The first phrase provides that the Grantors reserved an undivided one-sixteenth (1/16) interest of minerals produced "on or from under the land[.]"[180] Texas courts have previously associated conveyances or reservations of a mineral interest with the following language: "in and under" and that "may be produced" from the described lands. Furthermore, language such as "produced and saved" are usually used to create a royalty interest. Here, the 1940 deed used language similar to "in and under" by using the terms "on or from under." Since the language in the reservation was more closely related to the terms associated with a mineral interest, the court held that the Grantors reserved a 1/16 NEMI in the property.[181]

To determine the size of the royalty associated with the reserved NEMI, the court finished its analysis by determining that the reserved minerals were "stripped" of bonus and delay rentals.[182] The attribute-stripping left the grantors with a floating 1/16 share of the royalty rather than a fixed share of production.

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[178] *Devon Energy Prod. Co., LP v. Enplat II, LLC*, 677 S.W.3d 1(Tex. App.—El Paso 2023), opinion withdrawn and superseded on denial of reh'g, No. 08-21-00217-CV, 2023 WL 4424629 (Tex. App.—El Paso July 10, 2023, pet. filed).
[179] *Id*. at *3.
[180] *Id*.
[181] *Id.* at *7-8.
[182] *Id*. at *9.

## Gardner Energy Corp. v. McNeil [183]
*El Paso Court of Appeals*

**In this case, the court interpreted a mineral deed to determine whether the grantee's interest was burdened by an existing NPRI.** In 1951, the State of Texas patented the subject property to Earl Ellis, reserving a 1/16 free royalty. In 1976, L.D. McNeil and wife, successors to Earl Ellis, executed a Mineral Deed (the "1976 Deed") in favor of Jimmy Don McNeil, Floyd McNeil, and William C. McNeil (the "McNeil Grantees"), reserving a 1/2 mineral interest. In 2018, a title opinion issued for lessees of oil and gas leases covering the subject property, stated the entirety of the NPRI burden should be allocated to the Gardner Group, successors to L.D. McNeil, with none of the NPRI to be allocated to the McNeil Group, successors to the McNeil Grantees. In 2021, the Gardner Group filed suit against the McNeil Group seeking a declaratory judgment that the burden of the State's NPRI should be allocated proportionately between the parties. The trial court determined that the entire burden of the NPRI should be allocated to the Gardner Group. The issue on appeal was whether the grantors of the 1976 Deed intended to convey the lands subject to the proportionate share of the NPRI burden.

On appeal, the court confirmed the unambiguous nature of the 1976 Deed and employed the four corners approach of limiting their interpretation of the deed to the four corners and harmonizing the provisions therein to ascertain the intent of the parties. In holding that the 1976 Deed conveyed a 1/2 mineral interest, subject to a proportionate share of the NPRI burden, the court relied on *Wenske v. Ealy*. In *Wenske,* the Texas Supreme Court found that although the deed's granting clause did not specifically address the outstanding NPRI, the deed contained a subject-to clause providing that the grant was subject to the reservations from conveyance and exceptions to conveyance and warranty.[184] The reservation clause referenced the mineral interest reservation, and the exception clause identified the deed reserving the NPRI. According to *Wenske,* the subject-to clause put the grantees on notice that the entirety of the minerals was subject to the outstanding NPRI. The court recognized that in general, a "conveyance of an interest in the minerals in place carries with it by operation of law the right to a corresponding interest in the royalty."[185] As such, a severed fraction of a royalty generally burdens the entire mineral estate because it necessarily limits the royalty interests attached to the underlying mineral interests. The *Wenske* court held that if parties intend their agreement to operate differently from the general rule, then the instrument should plainly and formally express that intention.

Like the deed in the *Wenske* case, the 1976 Deed contained no expression that the parties sought to deviate from the general principle that a severed royalty interest is to be allocated proportionately to all mineral interest owners. Instead, the court noted, the 1976 Deed's subject to clause evidenced an intent that the grantors intended to convey the proportionate share of the NPRI burden to the Grantees. Accordingly, the McNeil Group and the Gardner Group should each bear their proportionate share of the outstanding NPRI.

[183] *Gardner Energy Corp. v. McNeil*, No. 08-23-00140-CV, 2023 WL 8937162 (Tex. App.—El Paso Dec. 27. 2023, no pet. h.) (mem. op.).
[184] *Wenske v. Ealy,* 512 S.W.3d 791, 794 (Tex. 2017).
[185] *Id.*

### Johnson v. Clifton[186]

*El Paso Court of Appeals*

**In this case, the court interpreted a 1951 Deed to decide whether it conveyed a mineral interest and/or a royalty interest and the amount of any such interest.** The deed provided:

> [Grantors] Grant, Sell and Convey, unto [Grantees], an undivided one-one hundred and twenty-eighth (1/128) interest in and to all of the oil, gas and other minerals in and under the following described tracts of land .... It is understood and herein stipulated that said land is under oil and gas leases providing for a royalty of 1/8 of the oil and certain royalties or rentals for gas and other minerals and that Grantees herein shall receive one-sixteenth (1/16) of the royalties provided for in said lease insofar as the same cover the above described land, but Grantees shall have no interest in or be entitled to nor be entitled to receive any part of any rentals paid under said leases, nor shall the Grantees have any interest in any bonus money received by Grantors, their heirs or assigns, in any future lease or leases given on said land or any part thereof, and it shall not be necessary for the Grantees to join in any such subsequent lease or leases so made; that Grantees shall only receive under such subsequent lease or leases a 1/128 (1/16 of the usual 1/8 royalty) part of all of the oil, gas, and other minerals taken and saved under such lease or leases and Grantees shall receive same out of the royalty provided for in such lease or leases.[187]

The court explained that when a deed conveys an interest in the minerals "in and under" the land, that language shows an intent to convey a mineral interest.[188] Even though the mineral estate grant was stripped of all its attributes but the right to receive royalties, that did not transform the grant into a royalty interest.[189] Accordingly, the court held the grantors intended to convey a mineral estate stripped of its attributes except the royalty interest.

Next, the court determined the amount of the mineral interest by first applying the "estate misconception" doctrine. The court explained that the "estate misconception" doctrine is applicable when a deed uses a fraction that is a multiple of 1/8.[190] Because the deed conveyed a 1/128 interest, described as 1/16 of 1/8, that raised the presumption that the grantors believed they retained a 1/8 mineral interest and intended to convey 1/16 of what they owned, being a 1/16 mineral interest with a corresponding 1/16 floating royalty interest. Ultimately, the court held the deed conveyed a non-participating 1/16 mineral interest with a corresponding 1/16 floating royalty interest.[191]

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[186] *Johnson v. Clifton*, No. 08-22-00132-CV, 2023 WL 4443016 (Tex. App.—El Paso July 10, 2023, pet. filed) (mem. op.).
[187] *Id*. at *1.
[188] *Id*. at *6.
[189] *Id*. at *5.
[190] *Id*. at *9.
[191] *Id*. at *10.

**Permico Royalties, LLC v. Barron Properties Ltd.** [192]
*El Paso Court of Appeals*

**In this case, the court was asked to determine whether a 1937 Deed reserved a 1/16th fixed royalty interest or a 1/2 floating royalty interest.** The conveyance was subject to the following reservation:

> This conveyance is made subject to the reservation and exception, and the Grantors herein hereby specifically reserve unto themselves, their heirs and assigns, a one-sixteenth (1/16) free royalty interest, (being 1/2 of the usual 1/8th free royalty) in and to all of the oil and gas in and under, and that may be produced from, the above described land; but the Grantee herein, his heirs and assigns, shall have and he and they are hereby granted, the exclusive right, insofar as the Grantors herein are concerned, to execute and deliver any and all oil and gas leases on said land, and the Grantors, their heirs or assigns shall not join in such leases, but shall be entitled to receive 1/16th of the oil and/or gas produced, saved and sold from said land, being 1/2 of the usual 1/8th royalty therein.[193]

Deeds of this era used "1/8th" to describe the grantor's entire royalty interest, as people at the time believed the royalty in a mineral lease would always be 1/8th. The court, therefore, concluded that the "use of a double fraction involving 1/8th create[ed] a rebuttable presumption that the parties intended to use the 1/8th as a placeholder for the royalty provided for in a lease (the legacy doctrine) or as a placeholder for the grantor's entire mineral estate (the estate-misconception doctrine)."[194] Applying the *Van Dyke* presumption, the court held that because the deed used a double fraction with 1/8th, the legacy doctrine applied. Furthermore, the court reasoned that if the grantors wanted to reserve a 1/16th royalty interest, they would not have used the double fractions in multiple clauses when describing the interest. As such, the court explained that the only way to harmonize the deed provisions was to assert that the 1/8th fraction was used as a placeholder for the royalty in the lease. Additionally, the deed used the term "the usual" 1/8th royalty multiple times, further indicating an intent to use the fraction as a placeholder for the royalty. "The Deed consistently demonstrate[d] an intent to convey a 1/2 floating royalty interest given its repeated use of the 'usual 1/8th royalty' in the double fraction describing that interest."[195] Accordingly, the El Paso Court of Appeals rendered the judgment in favor of Permico, finding that the deed did, in fact, reserve a 1/2 floating royalty interest instead of a 1/16th fixed royalty interest.

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[192] *Permico Royalties, LLC v. Barron Properties, Ltd.*, No. 08-22-00168-CV, 2023 WL 4442007 (Tex. App.—El Paso July 10, 2023, no pet. h.) (mem. op.).
[193] *Id*. at *1.
[194] *Id*. at *4.
[195] *Id*. at *8.

### Powder River Mineral Partners, LLC v. Cimarex Energy Co.[196]

*El Paso Court of Appeals*

**In this case, the court looked at whether a deed conveyed a fixed 3/128th royalty interest or a floating 3/16th royalty interest.** The 1947 Deed provided:

> an undivided three sixteenths (3/16ths) interest in and to all the oil, gas and other minerals in and under that may be produced from the … described land [first clause]… [i]t is the intention of this instrument to convey to Grantee a royalty interest covering an undivided 120 acres, being an undivided 3/16ths of all the oil, gas and/or other minerals in and above described land [second clause]… [I]n the event the above land should be loaned for the mining of oil and gas or other minerals, then Grantees shall be entitled to receive under this conveyance free of cost in the pipeline to which any wells or wells on said land may be connected, 3/16ths of one-eighth of all the oil and/or gas or other minerals produced therefrom under such lease. [third clause] [197]

In conducting its analysis of the deed, the court turned to *Van Dyke*, where that court established that the term one-eighth was typically used to refer to the entire mineral estate or a standard royalty.[198] The Supreme Court of Texas in *Van Dyke* indicated that a mineral reservation with a double fraction involving 1/8th created a rebuttable presumption that the use of the 1/8th refers to the entire mineral estate.[199]

Here, the court began its analysis with the rebuttable presumption that the parties to the 1947 Deed intended to convey a floating 3/16th royalty interest. Based off its analysis, the court determined that the entire instrument confirmed the presumption that a floating 3/16th royalty interest was conveyed in the deed. First, the court noted that the first clause "does not use a double fraction at all; instead, it conveyed a 3/16th 'interest in and to all the oil, gas and other minerals in and under and that may be produced from' from the subject land."[200] The court reasoned that the grant could not be harmonized with the double fraction used in the third clause if the intent was only to convey a 3/128th fixed royalty. Additionally, the second clause could not be harmonized with the third clause since it did not use a double fraction. Since the rest of the language in the 1947 Deed did not make sense if it was interpreted as conveying a 3/128th royalty, the language in the deed could not rebut the presumption that the parties intended to convey a floating 3/16th royalty interest. Therefore, the court ruled that the 1947 Deed conveyed a floating 3/16 royalty interest in the subject property.

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[196] *Powder River Mineral Partners, LLC v. Cimarex Energy Co.*, No. 08-23-00058-CV, 2023 WL 8703418 (Tex. App.—El Paso Dec. 15, 2023, no pet. h.) (mem. op.).
[197] *Id*. at *2.
[198] *Van Dyke v. Navigator Grp.*, 668 S.W. 3d 353, 357 (Tex. 2023) at ¶362.
[199] *Id.* at ¶364.
[200] *Powder River Mineral Partners*, 2023 WL 8703418, at *5.

### Royalty Asset Holdings II, LP v. Bayswater Fund III-A LLC[201]

*El Paso Court of Appeals*

**In this case, the court interpreted a deed to determine if the grantor's intent was to reserve a floating or fixed NPRI.** The deed provided:

> EXCEPT that Grantors, for themselves and their heirs and assigns, retain, reserve and except from this conveyance and [sic] undivided 1/4th of the land owner's usual 1/8th royalty interest (being a full 1/32nd royalty interest) payable or accruing under the terms of any existing or future oil, gas or mineral lease pertaining to or covering the oil, gas and other minerals on, in or under the above described [sic] land.[202]

First, the court found the use of multiple fractions with 1/8 created the rebuttable presumption that the grantor intended to refer to the whole mineral interest. As such, the court read the deed as reserving an "undivided 1/4 of the entire mineral interest–a floating not fixed interest."[203] The court also looked at the deed under the scope of the "usual 1/8th royalty language." In doing so, the court explained that the use of a fraction followed by "the usual one-eighth (1/8th) royalty" typically indicates an intent to reserve a floating interest." [204]

The court also reviewed the language in the parenthetical following the multiple fractions. The court reasoned that, if read in isolation, the parenthetical referred to a fixed 1/32 royalty interest.[205] However, the court analyzed the grammatical structure of the parenthetical in the context of the entire deed.[206] Basic grammar rules suggest that a single-parenthetical is a non-essential explanation of a provision.[207] Accordingly, the court found the single-parenthetical did not rebut the presumption of a floating 1/4 interest. Lastly, the court looked at the deed's reference to future production. Courts have held that "the reference to existing and future leases implies that the authors of the deed contemplated the royalty taking place at a future time."[208] Based on the deed's use of multiple fractions, the usual 1/8 language, the single-fraction parenthetical and the reference to future leases, the court held the grantor intended to reserve a floating 1/4 NPRI.

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[201] *Royalty Asset Holdings II, LP v. Bayswater Fund III-A LLC*, No. 08-22-00108-CV, 2023 WL 2533169 (Tex. App.—El Paso Mar. 15, 2023, pet. denied).
[202] *Id*. at *1.
[203] *Id*. at *5.
[204] *Hoffman v. Thomson*, 630 S.W.3d 427, 432 (Tex. App.—San Antonio 2021, pet. filed).
[205] *Id*.
[206] *Id*. at *6.
[207] *Bridges v. Uhl*, No. 08-21-00130-CV, 2022 WL 17985705 (Tex. App.—El Paso Feb. 14, 2023).
[208] Royalty Asset Holdings II, LP, 2023 WL 2533169, at *6.

### Stillwell v. Stevenson [209]

*El Paso Court of Appeals*

**In this case, the court examined whether a mineral interest acquired by someone residing in a common law state was presumptively community property.** During John and Courtney Borden's marriage, John acquired a one-eighth mineral interest in Reeves County, Texas while residing in Illinois, a common law jurisdiction. The heirs of Courtney Borden argued that they were legally entitled to half of the mineral rights.

To settle the dispute, the court determined whether the mineral interest was characterized as community or separate property at the time John acquired it. Under Texas law, property obtained by a spouse during marriage is presumptively community property.[210] However, at times, Texas courts have declined to apply the community property presumption, deeming it "unreasonable" when "the spouse who acquired the property at issue never resided in Texas or another community property state, or there is no evidence the spouse drew income while domiciled in Texas or any other community property state."[211] Out-of-state earnings from a common law jurisdiction are not community property and thus, the court reasoned that because census records indicated that John resided in Illinois during his marriage and because evidence does not establish that he bought the mineral property with joint funds, the mineral interest acquired was his separate property.[212] He bought the mineral estate while he was married to Courtney in a state that does not recognize community property, and Courtney was not named as a grantee in the deed. Accordingly, the community property presumption did not apply when John acquired the mineral interest and Courtney did not own an undivided 1/2 community share of the mineral interest.[213]

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[209] *Stillwell v. Stevenson*, , 668 S.W.3d 844 (Tex. App.—El Paso 2023, pet. denied).
[210] *Viera v. Viera,* 331 S.W.3d 195, 206 (Tex. App.—El Paso 2011, no pet.).
[211] *Bauer v. White*, No. 13-16-00054-CV, 2016 WL 3136608, at *3 (Tex. App.—Corpus Christi June 2, 2016, pet. denied) (mem. op.).
[212] *Id; Orr v. Pope,* 400 S.W.2d 614, 616-17 (Tex. App.—Amarillo 1966, no writ).
[213] *Stillwell,* 2023 WL 2447470, at 855.

### 6. *Ninth District Court of Appeals—Beaumont*

**Fogal v. Fogal** [214]
*Beaumont Court of Appeals*

**In this case, the court sought to determine if a conveyance by one joint tenant terminated the survivorship rights of the other joint tenants.** As of 2014, Marjorie Ann Fogal and Todd Fogal owned the disputed property as joint tenants with the right of survivorship. In 2018, Marjorie conveyed her undivided interest in the property to her son, Neil. Under the 2018 deed, Marjorie reserved a life estate in the lands, but provided that her half interest shall vest fully in Neil upon her death. After Majorie died in 2021, Neil sued Todd seeking to partition the property.

Todd argued that when Marjorie conveyed her portion of the property to Neil, it did not sever his survivorship right. Instead, he argued that his survivorship right matured when Marjorie died, and her interest fully vested in him. However, Neil contended that he and Todd became tenants in common when Marjorie conveyed her interest, and the survivorship right was extinguished.

The court began by reviewing the deed which created the joint tenancy, finding that it contained no restrictions on either party's right to convey their interest in the property. Because the deed did not resolve the issue, the court explained that when "it is not inconsistent with the constitution or laws" of Texas, the court will look to the English common law.[215] In English common law, "when a party disposed of their interest in property held in a joint tenancy, disposal by one of the joint tenants destroyed the unity of title, which destroyed the joint tenancy."[216] Here, Marjorie decided to deed her undivided joint interest to Neil, which "cut off the expectancy interest" that Todd would have inherited had Marjorie retained her interest in the property until her death. Ultimately, the court found that because the deed creating the joint tenancy did not restrict Marjorie's ability to sell her interest, the deed to Neil terminated the joint tenancy and the right of survivorship.

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[214] *Fogal v. Fogal*, 671 S.W.3d 753 (Tex. App.—Beaumont 2023, no pet.).
[215] Tex. Civ. Prac. & Rem. Code Ann. §5.001.
[216] *Fogal*, 671 S.W.3d 753 at 758.

*7. Eleventh District Court of Appeals—Eastland*

**Brooke-Willbanks v. Flatland Mineral Fund, LP**[217]
*Eastland Court of Appeals*

**In this case, the court looked at whose royalty interest would bear the burden for two previously reserved NPRIs.** The court held the deed conveyed to Grantee 72 net mineral acres, which included a proportional interest in royalties that was burdened by two previous NPRIs. The relevant portions of the deed provided:

> This conveyance is made subject to the terms of any valid and subsisting oil, gas and other mineral lease or leases on said land; and Grantor's [sic] have granted, transferred, assigned and conveyed, and by these presents do grant, transfer, assign and convey unto the Grantee, their heirs, successors and assigns, the above stated interest of Grantor's interest in and to the rights, rentals, royalties and other benefits accruing or to accrue under said lease or leases from the above described land.
>
> Notwithstanding, it is the specific intent of this instrument to convey to Grantee the right to receive all bonuses, rents, royalties, production payments, or monies of any nature, including those in suspense, accrued in the past or in the future, associated with the undivided interest herein conveyed.[218]

When determining whom the parties intended to burden with the NPRIs, the court first verified the actual interest conveyed by the deed. The court concluded "net mineral acres" had "one reasonable and plain meaning—an undivided fee simple mineral interest in 72 acres."[219] The "subject to" clause further limited the estate and rights granted and it clarified both the type of interest and the amount of royalty interest conveyed. First, the deed was made *subject to* the terms of any valid subsisting oil, gas, and other mineral lease and the parties agreed an active oil and gas lease was in place at the time of the conveyance. Thus, the court concluded Grantee would take an interest in the land subject to the existing oil and gas lease and receive the same interests owned by Grantor at the time of conveyance—a future reversionary interest and a royalty interest in the 72 acres conveyed.[220] Second, the "subject to" clause limited Grantee's interest in the royalties to the same interest Grantor had at the time of the conveyance. The court reasoned that the grant being subject to the Grantor's interest in and to the royalties accruing or to accrue under the lease clearly showed the parties' intent that Grantee's acquired interest was to be burdened by the previously reserved NPRIs. The court added the specific intent clause further supported this conclusion. Because the entire mineral estate was burdened by the previously reserved NPRIs at the time of the conveyance, the court concluded the Grantee's interest was also burdened by the NPRIs.[221]

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[217] *Brooke-Willbanks v. Flatland Mineral Fund, LP*, 660 S.W.3d 559 (Tex. App.—Eastland 2023, no pet. h.).
[218] *Id*. at 561-62.
[219] *Id*. at 564.
[220] *Id*. at 565.
[221] *Id*. at 565-66.

## Darkhorse Water, LP v. Birch Operations, Inc.[222]

*Eastland Court of Appeals*

**In this case, the court interpreted a saltwater disposal lease to determine if the lessee received a fee simple determinable interest or the right to "use and occupy" the property for a term.** The court held that the lessee possessed a fee simple determinable interest in the reservoir pore space.

In August 2019, Billie McKaskle and Darkhorse Water, LP ("Darkhorse") entered into a Saltwater Disposal Agreement (the "Darkhorse Agreement"). The Darkhorse Agreement was subsequently recorded a few weeks following its execution. Approximately three weeks prior to the Darkhorse Agreement, McKaskle entered into a Surface Lease Agreement (the "Birch Agreement") with Birch Operations, Inc. ("Birch") for the same property, which was not filed of record until March 2021. In July of 2021, Darkhorse brought suit to quiet title, asserting both it and Birch claimed leaseholds in the same surface estate. On appeal, the court was tasked with determining whether the terms of the Darkhorse Agreement conveyed an ownership interest sufficient enough to permit Darkhorse to bring action to quiet title.

Birch asserted that the Darkhorse Agreement was only a "traditional occupancy lease" and did not convey an ownership interest.[223] In Texas, an oil and gas lease typically conveys the mineral estate as a determinable fee in the minerals in place. For this reason, the court had to determine if the Darkhorse Agreement was similar to an oil and gas lease that conveyed an ownership interest, or a "regular" lease of real property that merely conveyed possessor rights.[224] Here, the court applied the reasoning of *Stephens County* to interpret the contractual language of the Darkhorse Agreement.[225] The court first analyzed the habendum clause, which provided for a primary term of five years but would continue as long as actual operations were being conducted on the property, similar to clauses seen in oil and gas leases. As such, the Dark Horse Agreement could "endure forever" the court explained.[226] The court then analyzed the Darkhorse Agreement's subject matter to determine if it could convey a determinable fee interest, finding the subject matter of the agreement to be reservoir pore space. The court noted that reservoir pore space is as an attribute of the surface estate that is "capable of being consumed and depleted by the disposal of saltwater just like oil, gas…[which] may be extracted from the property."[227] The court reasoned the Darkhorse Agreement granted much more than just the right to use and occupy the property and, instead, conveyed to Darkhorse a fee simple determinable interest in the reservoir pore space sufficient enough to bring an action to quiet title. This is the first Texas case to address the nature of the interest conveyed in a saltwater disposal agreement and could have far reaching effects on the validity of other agreements ancillary to a saltwater disposal agreement.

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[222] *Darkhorse Water, LP v. Birch Operations, Inc*., No. 11-22-00124-CV, 2023 WL 8814329 (Tex. App.—Eastland Dec. 21, 2023, no pet. h).
[223] *Id.* at *2.
[224] *Id.* at *3.
[225] *Stephens Cnty. v. Mid-Kansas Oil & Gas Co*., 254 S.W. 290 (1923).
[226] *Darkhorse Water, LP* at *5.
[227] *Id.* at *6.

## Echols Minerals, LLC v. Green, Tr. Of Donald & Betty Lou Irrevocable Trust [228]

*Eastland Court of Appeals*

**In this case, the court analyzed whether a retained interest of 33.25/278.5 NPRI was valid under the *Duhig*[229] rule post-*Dragon*.[230]** In 1952, Floyd Haynes and his relatives conveyed to Lois Madison an undivided 5/6 interest in the property, reserving an undivided 33.25/278.5 NPRI from the 278.5-acre tract to themselves ("1952 NPRI Deed"). At the time of this conveyance, 1/2 of the mineral had previously been conveyed to Regan but the 1952 NPRI Deed did not reference the prior conveyance. Further, as Roselyn Haynes's Guardian, Floyd Haynes conveyed an undivided 1/6 interest subject to outstanding royalty and mineral conveyances. Echols Minerals asserted that it owned 1/2 of the 33.25/278.5 NPRI retained by the Haynes grantors as a successor-in-interest. The Green Trust argued that it was a successor-in-interest to Madison and claimed the 1952 NPRI Deed was ineffective under *Duhig* because the Haynes grantors did not except the previously conveyed interest.

In deciding if the 1952 NPRI Deed was ineffective, the court turned to the Texas Supreme Court's analysis of *Duhig* in the case of *Trial v. Dragon*. The *Dragon* court limited the equitable remedy laid out in *Duhig* and explained that the *Duhig* rule is specific to the facts in that case. As such, the court applied a two-part test to determine if *Duhig* applied to the conveyance in this case. The court sought to determine if the "grantor convey[ed] an interest greater than what he or she possessed, such that there is an over-conveyance and therefore, a failure of title, while at the same time reserving an interest" (the *Duhig* problem). If there was a Duhig problem, then the court needed to determine whether the "grantor own[ed] the very interest required to remedy the breach of warranty at the time of the conveyance to nullify or reduce the grantor's reservation." [231]

Here, the Haynes grantors owned a 5/6 surface interest and a 1/3 mineral interest when they executed the 1952 NPRI Deed. Initially, they owned 5/6 of the mineral estate, which was reduced to 1/3 when they conveyed 1/2 to Regan. The 1952 NPRI Deed did not refer to the prior 1/2 conveyance of the mineral estate to Regan. The court explained that because of this, the 1952 NPRI Deed had a *Duhig* problem "because the Haynes grantors conveyed more interest in the mineral estate than they owned, while at the same time reserving an interest." [232] The court then explained that for *Duhig's* remedy post-*Dragon* to apply, the "over-conveying grantor must own 'the exact interest to remedy the breach *at the time of the execution*.'" [233] In this case, the interest needed to remedy the Haynes grantors' title failure would be a 1/2 mineral interest. However, the Hayne grantors did not reserve or own a 1/2 mineral interest because they already conveyed that to Regan, which was the interest needed to remedy their failure of title under *Dragon*. Therefore, the court determined that *Duhig* did not require Echols Minerals to be estopped from asserting title to the reserved 33.25/278.5 NPRI.

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[228] *Echols Minerals, LLC v. Green, Tr. Of Donald & Betty Lou Irrevocable Trust*, 675 S.W.3d 344 (Tex. App.—Eastland 2023, no pet.).
[229] *Duhig v. Peavy-Moore Lumber Co.,* 135 Tex. 503, 144 S.W.2d 878 (1940).
[230] *Trial v. Dragon*, 593 S.W.3d 313 (Tex. 2019).
[231] *Echols Minerals*, 675 S.W.3d 344at 354.
[232] *Id.*
[233] *Id.* at 353 (quoting *Trial v. Dragon*, 593 S.W.3d 313, 319 (Tex. 2019)).

**Gaskins, Tr. of Van Martin Gaskins Family Tr. v. Navigator Oil & Minerals, Inc.** [234]
*Eastland Court of Appeals*

**In this case, the court considered the validity of a correction deed that was not signed by all the parties to the original deed.** In 1960, J.S. Clay conveyed a fractional royalty interest to Joe Mac and LaVerne Gaskins. Thereafter, J.S. Clay and Joe Mac "on behalf of the Grantees" executed a correction deed to clarify the scope of the interests conveyed in the original deed. LaVerne Gaskins did not sign the correction deed. The Appellees, being Navigator Oil & Minerals, Inc., the successor-in-interest to J.S. Clay, argued the correction deed was valid while the Appellants, the Gaskins trustees, successors-in-interest to Joe Mac and LaVerne Gaskins, argued the correction deed was invalid, in part, because LaVerne Gaskins, an original grantee, did not sign the correction deed.

Since 2011, the Correction Instrument Statutes have codified the procedures required for the execution of valid correction instruments. Under Section 5.029, in order to effectuate material corrections to an original deed, the deed must be: "(1) executed by the original parties to the record instrument of conveyance, and (2) recorded in each county in which the original instrument of conveyance that which is being corrected is recorded," to be valid.[235] The Correction Instrument Statutes also contain a retroactive component: a correction deed executed before 2011 need only substantially comply with the requirements of Section 5.029.[236] The court noted that while there is no statutory definition of substantial compliance, one has substantially complied when the essential requirements of a statute have been performed, and deviations that do not seriously hinder the legislature's purpose in imposing such requirements are excused.[237] The court emphasized that nothing in the Correction Instrument Statutes require that all parties to the original instrument *sign* a correction instrument. Here, the court stated that each party to the original recorded instrument must *execute* the correction deed. The court explained that "execute" is not limited to only mean "sign," instead it could also mean, to perform, complete or to change.[238]

The court held that Joe Mac's signature, on behalf of himself and as representative for LaVerne Gaskins, substantially complied with the retroactive component of Section 5.029. Even if Joe Mac lacked the authority to sign on behalf of LaVerne Gaskins, the court stated that the deed would not be void, but voidable. Because Navigator presented no evidence to challenge Joe Mac's authority to sign on behalf of LaVerne Gaskins, his authority is presumed to be true. Accordingly, the court held the Correction Deed was valid and enforceable, as it substantially complied with requirements of Section 5.029, namely, the deed was executed (not necessarily signed) by all of the original parties and it was filed of record in the county of the original instrument.

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[234] *Gaskins, Tr. of Van Martin Gaskins Family Tr. v. Navigator Oil & Minerals, Inc*., 670 S.W.3d 391 (Tex. App—Eastland 2023, pet. filed).
[235] TEX. PROP. CODE ANN. § 5.027-5.031.
[236] *Gaskins*, 670 S.W.3d, at 404.
[237] Id. (quoting *Endeavor Energy Res., LP v. Trudy Jane Anderson Testamentary Tr. by & Through Anderson*, 644 S.W.3d 212, 219 (Tex. App.—Eastland 2022, pet. denied).
[238] *Id*. at 405.

**Pacer Energy, Ltd. v. Endeavor Energy Resources, LP[239]**
*Eastland Court of Appeals*

**In this case, the court interpreted a deed to determine whether it conveyed a fixed or a floating royalty interest. The court held that the deed conveyed a fixed royalty interest.** The dispute centered around language in a 1923 Deed and a 1960 Declaration of Interest executed by the parties' predecessors-in-interest. Pacer argued that the grantors conveyed a floating royalty interest, while Endeavor claimed the grantees received a fixed royalty interest. The court focused on the following language from the 1923 Deed:

> It is expressly agreed and stipulated that Seven Eights of all Oil and Mineral rights on said [property] is retained by the grantors herein, A.F. Becker, and wife Rose M. Becker, and the other One-Eighth of the Oil and Mineral rights therein is hereby conveyed as a royalty to the said J. L. Henderson, his heirs and assigns.[240]

The court focused on the words "Oil and Mineral rights" in its analysis of the 1923 Deed. The court explained that the Texas Supreme Court interpreted the term "mineral rights" as referring to the mineral estate rather than a royalty interest. In the 1923 Deed, the parties reserved a full interest in the minerals, but it was "subject only to an outstanding 1/8 of all the oil, gas, and mineral rights" that were previously conveyed. As such, the court explained that the parties "did not tether" the interest to a specific lease royalty in the 1923 Deed or the 1960 Declarations of Interest, which exhibited that the interest conveyed was a 1/8 fixed royalty, as it was a 1/8 fraction of gross production.[241] The court explained that when an interest is conveyed as a fraction of the entire estate, it is a fixed royalty. When an interest is conveyed as a fraction of the royalty, it is a floating royalty. Although Pacer asserted that "minerals" and "mineral rights" reflect an intention by the parties to mean two different things, the court explained that both terms are synonymous and refer to the mineral estate. Therefore, the interest conveyed in the 1923 Deed was carved out of the mineral estate rather than out of the royalty interest alone. Because the interest conveyed was carved out of the mineral estate, the court determined that the 1923 Deed conveyed a fixed 1/8 royalty interest.

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[239] *Pacer Energy, Ltd. v. Endeavor Energy Res., LP,* 675 S.W.3d 390(Tex. App.—Eastland 2023, pet. filed).
[240] *Id*. at 393.
[241] *Id*. at 398.

## Perdido Properties LLC v. Devon Energy Production Company, L.P.[242]

*Eastland Court of Appeals*

**In this case, the court looked at whether the *Gavenda* holding precluded the plaintiffs from bringing a lawsuit against Devon for unpaid royalties.**[243] Pauline Bray was the original owner of the interests in controversy. She died intestate survived by her husband, Leon Smitherman, Sr., her sister Claire Bremer, and her brother William Watson. In 2008, Devon Energy Production Company ("Devon") became the operators on the lease covering the Bray Interest and obtained a title opinion linking Pauline Bray to the Bray Interest. Devon held the royalties attributable to that interest in suspense after being unable to identify Pauline Bray's heirs. On September 29, 2010, Enerlex, Inc. ("Enerlex") emailed Devon informing them it had acquired 1/4 of the interest of Pauline W. Bray from her heir, William Watson. However, Devon continued to hold the proceeds in suspense, since there was an alleged issue with the validity of William Watson's deed to Enerlex. The deed was set aside in a judgment, and the new Watson division order reflected that 100% of the Bray Interest was payable to William Watson. Devon then began paying the proceeds held in suspense pursuant to the division order.

On November 11, 2016, Devon received a demand letter from Smitherman, Jr. which asserted that his father was married to Pauline Bray when she died and that "because of intestacy laws, his father was entitled to half of her interest."[244] Smitherman, Jr. claimed he was entitled to the interest now that his father and his widow had passed. A month later, Devon received a demand letter from Bremer, Jr. claiming ownership to 25% of the disputed interest through his mother, Claire Bremer. Devon refused to pay Smitherman, Jr. and Bremer, Jr., so they filed a suit against Devon.

Devon contended that Smitherman and Bremer could not "pursue a claim for nonpayment of royalties against Devon under *Gavenda* because Devon made payments according to division orders," and thus was not liable to them as unpaid payees since Devon was not unjustly enriched.[245] The Texas Supreme Court in *Gavenda* noted that when an operator prepares erroneous division orders such division orders are not binding if the operator retained the benefits for himself.[246] Here, the court looked to *Acoma*, which held that a party who was not a signor to a division order may seek unpaid royalties from the oil company even though the company was not unjustly enriched.[247] The court in this case found the opinion persuasive, and for the same reasons as stated in *Acoma*, held *Gavenda* did not preclude Smitherman and Bremer from bringing a suit against Devon for unpaid royalties even though Devon was not unjustly enriched.[248]

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[242] *Perdido Properties LLC on Behalf of Bremer v. Devon Energy Prod. Co., L.P.,* 669 S.W.3d 535(Tex. App.—Eastland 2023, pet. filed).
[243] *Gavenda v. Strata Energy, Inc.*, 705 S.W.2d 690 (Tex. 1986).
[244] *Perdido Properties,* 2023 WL 3511234 at 543.
[245] *Id*. at 547.
[246] *Gavenda,* 705 S.W.2d at 692.
[247] *Acoma Oil Corp v. Wilson,* 471 N.W.2d 476 (N.D. 1991).
[248] *Perdido Properties,* 2023 WL 3511234 at 551.

*8. Fourteenth District Court of Appeals—Houston*

**Armour Pipe Line Co. v. Sandel Energy, Inc.** [249]
*Houston Court of Appeals*

**The court determined whether a reservation in a deed by a lienholder was valid pursuant to the estoppel-by-deed doctrine.** In 1992, Armour Pipe Line Company ("Armour") bought non-recourse mortgage notes becoming a lienholder in certain oil and gas leases. Armour never foreclosed its lien nor held title to the leases. In 1999, Armour joined in an assignment with other interest holders, releasing all of its right, title and interest in the leases to Sandel Energy, Inc. ("Sandel"), subject to a reservation of an overriding royalty interest to Armour (the "Assignment").

In 2011, Sandel farmed out the oil and gas leases to CML Exploration, LLC ("CML"). In 2013, CML obtained a title opinion which questioned the validity of Armour's reservation, reasoning Armour was a stranger to title and, therefore, could not have reserved the overriding royalty interest. Sandel agreed with the title opinion and asserted that the purported reservation was void under Texas law. CML placed the royalty in suspense and litigation followed. The trial court determined that the royalty reservation was void, and Armour appealed.

On appeal, this court concluded that the trial court erred by not applying the estoppel-by-deed-doctrine. Under the estoppel-by-deed doctrine, "a *grantee* who accepts a deed is a party to the deed, and as between the grantor and the grantee and those in privity with them, the reservations in the deed are binding and effective, even if the grantor did not have good title to the property in question when the deed was executed."[250] Heavily relying on *Greene,* the court concluded that the reservation of the royalty was contractual and binding upon Armour, Sandel, and its successors—even though Armour held no title in the subject leases when Armour executed the Assignment. In other words, because Sandel was a party to the Assignment, as grantee, they were bound by the terms of the assignment and estopped from claiming an interest they did not receive. As a result, the court held that Armour owned the royalty it reserved in the Assignment.[251]

The court analyzed the stranger to title rule and the stranger to deed rule.[252] The court stated that the stranger to deed rule does not conflict with estoppel-by-deed because estoppel-by-deed binds the parties to the deed but does not bind strangers to the deed. Under *Greene*'s precedent, the court concluded that the reservation of the overriding royalty interest was binding and effective under the estoppel-by-deed doctrine. Here, even though Armour, as assignor, held no title in the leases, Sandel was estopped from claiming the interest reserved by Armour.[253]

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[249] *Armour Pipe Line Co. v. Sandel Energy, Inc*., 672 S.W.3d 505 (Tex. App.—Houston [14th Dist.] 2023, pet. denied).
[250] *Id*. at 517; *Accord Greene v. White*, 137 Tex. 361, 153 S.W.2d 575, 584-85 (1941) (acknowledging that estoppel-by-deed can operate against a grantee who accepts a deed).
[251] *Armour Pipe Line Co.*, 672 S.W.3d at 519-523.
[252] *Id*. at 520-521. (Under the stranger to title rule, if a grantor in a deed owns no title to the property conveyed in the deed, then any exception or reservation in the grantor's favor is ineffective and inoperative. In comparison, under the stranger to deed rule, if a grantor makes a reservation or exception of real property in favor of a person not a party to the deed, then this exception or reservation in favor of the stranger to deed is ineffective and inoperative.)
[253] *Id*. at 510-511.

## Lil C Ranch, LLC v. Ridgefield Eagle Ford Minerals, LLC[254]

*Houston Court of Appeals*

**In this case, the court sought to determine if the pooling provision in a lease that included a 36.2-acre tract of land perpetuated a mineral reservation, even though the production under the lease was not generated from the 36.2-acre tract.** In 1996, the Henry Gardiner Symonds Trust and Thumbs Up Land Company, Ltd. executed a deed ("the Hopper Deed") that conveyed 46.209 acres to the Hoppers. In the Hopper Deed, the Grantors conveyed:

> 100 percent of the surface estate but reserved 100 percent of the oil, gas and other liquefiable hydrocarbons and seventy-five percent of the royalties from the mineral estate for a period of ten years and so long thereafter as production of any minerals continued uninterrupted in commercially paying quantities.[255]

In 2014, Lil C became the owner of a 36.2-acre tract out of the 46.209-acre land conveyed in the Hopper Deed and claimed it owned all of the surface estate, mineral estate, and royalty interest therefrom because there had been no production associated with the mineral interest subject to the mineral reservation within the ten year period.[256] However, Ridgefield argued the mineral reservation had not expired because the 36.2-acre tract was included in a pooled unit which had been producing, even though the production under the lease was not generated from the 36.2 acres of land owned by Lil C.[257]

The court stated that the "primary legal consequence" of pooling is that "production anywhere on a pooled unit is treated as production on every tract in the unit."[258] While the 36.2-acre tract had not produced anything, production from the pooled unit that included the 36.2-acre tract was also considered production from the 36.2-acre tract. Due to the pooled unit continuously producing in in commercially paying quantities, the reservation was still in effect. As a result, the court ruled that Lil C Ranch did not own the mineral estate.[259]

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[254] *Lil C Ranch, LLC v. Ridgefield Eagle Ford Minerals, LLC,* No. 14-21-00285-CV, 2023 WL 2386940 (Tex. App.—Houston [14th Dist.] Mar. 7, 2023, no pet.).
[255] *Id.*
[256] *Id.* at *2.
[257] *Id.*
[258] *Id.* at *9.
[259] *Id.*