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2012 SURVEY ON OIL & GAS: TEXAS

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I. Introduction

With the renaissance of onshore oil and gas activity in the United States ranging from the Bakken Field in North Dakota and Montana; to the Marcellus Field underlying portions of Maryland, New York, Ohio, Pennsylvania, and West Virginia; to the Barnett and Eagle Ford Fields of north and south Texas respectively, it is not surprising that there is renewed oil-and gas-related litigation. The 2010-2011 term of the Texas Supreme Court was particularly active in deciding oil and gas cases or cases that have a direct impact on oil and gas operations. One has to look back to 1923, when the Texas Supreme Court issued several significant oil and gas decisions on the same day, to find a year in which more oil and gas decisions were handed down. n1 This Article will explore those decisions, along with a single Fifth Circuit opinion, in an attempt to explain their impact on oil and gas jurisprudence. n2

II. Conservation Regulation

A. Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC

In Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, the Court overturned a long-standing practice of the Railroad Commission regarding its certification of pipelines as common carriers that would give such common carriers the power of eminent domain. n3 The case involved a clash of two very significant public policy issues; the "property rights" movement, which seeks to restrict the ability of governmental entities and governmental-licensed entities to exercise the power of eminent domain; and the "drill-baby-drill" movement, whereby domestic energy and oil and gas production is to be encouraged. n4 Denbury Green applied to the Railroad Commission for a permit to operate a carbon dioxide pipeline that would carry carbon [*629] dioxide from a field in Mississippi, which Denbury Green operated, to various oil fields in Brazoria and Galveston County for the purpose of engaging in tertiary recovery projects that would lead to greater production of oil. n5 Denbury Green filed a Form T-4 that the Railroad Commission had used for many years in its role as the permitting agency for intrastate pipelines. Denbury Green checked the box stating it would be operated as a "common carrier" rather than as a "private line" and further indicated that it would transport carbon dioxide "owned by others, but transported for a fee." n6 Denbury Green also sent a letter to the Commission noting it would accept the provisions of Chapter 111 of the Natural Resources Code, which define the requirements to achieve common carrier status and also impose requirements on the operations of a common carrier pipeline. n7 Eight days after the application and letter were filed, the Commission issued the permit for the transportation of carbon dioxide through a common carrier pipeline. n8

One of the benefits of achieving common carrier status is the statutory grant of the power of eminent domain to such entities. n9 Texas Rice owned the surface estate under which Denbury Green intended to place the pipeline. When Denbury Green employees attempted to enter Texas Rice's land to survey it for the purpose of either purchasing or condemning a portion of the surface estate for pipeline right-of-way purposes, Texas Rice denied entry. Denbury Green then sought an injunction to prevent the interference. The trial court found that Denbury Green was a "common carrier" pipeline and thus had the power of eminent domain, which gave it the ancillary right

to enter upon the surface estate in order to further that power. n10 It thus permanently enjoined Texas Rice from interfering with Denbury Green's right to enter and survey the lands in question.

The court of appeals had no problem in affirming the district court's judgment based on two reasonably simple and non-controversial principles: (1) the determination of whether a pipeline company is a common carrier is a question of law; n11 and (2) substantial deference is to be given to Railroad Commission decisions in areas of its expertise. n12 As this Author has stated elsewhere, the Form T-4 and the letter committing [*630] the permit applicant to operate as a common carrier had, prior to the Texas Supreme Court's opinion, been given preclusive effect on judicial review of the Commission's permit decision. n13 In a dissenting opinion, however, Justice Gaultney rejected the notion that checking the boxes and filing the letter precluded effective judicial review of what he considered to be factual issues relating to Denbury Green's compliance with the requirements of being classified as a common carrier. n14 He found within Denbury Green's application evidence that the pipeline would be solely used by Denbury Green to transport Denbury Green's carbon dioxide. This raised factual questions as to whether the common carrier decision was consistent with the constitutional requirement that prohibits the taking of private property for private, and not public, use. n15

It was the dissenting justice's theme that the majority opinion adopted. The Court was, in essence, challenging the principle that once the Railroad Commission makes a determination that a pipeline company is entitled to common carrier status, judicial review is essentially precluded. As Justice Willett stated for a unanimous court, "Unadorned assertions of public use are constitutionally insufficient." n16 Instead of the Commission's decision being given preclusive effect, or even deferential effect, the Court determined that where the Legislature has delegated to private entities the right of eminent domain, such "authority is subject to special scrutiny by the courts." n17 That strict scrutiny entails two related principles: (1) strict compliance with the statutory requirements is required; and (2) any doubt as to the scope of the grant of the power is to be strictly construed in favor of the landowner and against the private entity exercising the power of eminent domain. n18

The Court debunked the notion that the filings with the Railroad Commission are to be given preclusive or conclusive effect. While not disagreeing with the principle that the question of whether a use is a public use is a question of law for the court, the Court did not find that the Legislature intended to give the Railroad Commission the [*631] final determination of whether or not a permit applicant was entitled to common carrier status. n19 The seemingly ministerial process by which the Commission operated did not reflect the requirement that in order for the eminent domain authority to be legitimately delegated by the Commission to a private entity, the Commission needed to insure that the proposed exercise of that power was for a public, not a private, use. n20

In order to comply with the constitutional mandate of being for a public use, the common carrier must show that its operations will serve a public purpose, which, as a matter of law, does not include the transportation of company-owned substances over a company-owned pipeline for use in a company-owned tertiary recovery project. n21 The Court rejected Denbury Green's claim that by agreeing to be a common carrier and accepting products in the pipeline owned by third parties, it has complied with the statutory and constitutional requirements. The Court gave a somewhat convoluted reading of the statute to conclude that merely making the pipeline available for third-party use does not meet the requirement that the pipeline be operated "to or for the public for hire." n22 With a proposed new pipeline, it is unclear how a permit applicant can meet the Court's requirement other than by showing contracts in place for future deliveries of product through the as-yet unbuilt pipeline. Apparently, statements that the pipeline will be made available to third parties when constructed and after a tariff has been filed and accepted are insufficient, as a matter of law, to show that the proposed pipeline is for a public use.

The Court also intruded itself into the legislative process by presuming that the Legislature would not have intended to create a system that could be "gamed" by pipeline permit applicants seeking common carrier status merely by the checking of the appropriate box and the filing of the letter, committing the pipeline to be subject to the common carrier statutory and regulatory requirements. n23 This appears to be a polar opposite view of how the Railroad Commission is supposed to do its job when it comes to hydraulic fracturing regulation. In Coastal Oil, one of the rationales for not finding that a cross-boundary frac job constituted a common law trespass claim was that the Commission was the proper body to deal with that issue because it had been delegated authority by the Legislature over oil and gas production [*632] activities. n24 Even though the Commission had not adopted any rules or regulations relating to hydraulic fracing, the Court in Coastal Oil deferred to their delegated powers to regulate. Here, the Commission adopted a form and process by which to make common carrier determinations, a decision delegated to it by the Legislature. Nonetheless, the Court in this case finds that it is ultimately the role of the court to

determine whether or not a prospective common carrier pipeline is really a common carrier pipeline deserving of the legislative delegation of the power of eminent domain.

B. Railroad Commission of Texas v. Texas Citizens for a Safe Future

Railroad Commission of Texas v. Texas Citizens for a Safe Future also involved the issue of the proper role for the court in reviewing an agency interpretation of its statutory enabling act. n25 Pioneer Exploration filed a permit application with the Railroad Commission in order to convert an existing production well into an injection well. n26 Two hearings were conducted on the matter because there was opposition to the issuance of the permit. n27 The Railroad Commission was given authority to issue injection well permits related to the disposal of oil and gas wastes. n28 The statute sets out the following four findings that must be made before a permit may be issued: (1) that the use or installation of the injection well is in the public interest; (2) that the use or installation of the injection well will not endanger or injure any oil, gas, or other mineral formation; (3) that, with proper safeguards, both ground and surface fresh water can be adequately protected from pollution; and (4) that the applicant has made a satisfactory showing of financial responsibility if required by section 27.073 of this code. n29

The parties contesting the permit claimed at the hearing that the Railroad Commission ignored evidence relating to traffic safety matters that would follow from the permitting of the well. n30 Pioneer did not rebut the traffic safety evidence, and the hearing examiner did not directly address that issue, confining his public interest determination to matters relating to encouraging oil and gas production and preventing [*633] waste. n31 The Commission affirmed the decision of the examiner to issue the permit.

The only issue before the Texas Supreme Court was the court of appeals' conclusion that the decision needed to be remanded to the Commission in order to broaden the Commission's restricted interpretation of the statutory use of the term "public interest" to define one of its mandatory findings. n32

The parties disagreed on the nature of the issue that the Court had to decide. The Commission believed the issue was a simple one of giving substantial deference to its interpretation of an ambiguous statute. Plaintiffs, on the other hand, asserted that the principal issue was whether the term "public interest" as used in the statute could encompass matters outside the field of oil and gas production. n33 The Texas Supreme Court agreed with the Commission that the principal issue involved a matter of statutory construction and the degree to which the reviewing court is to give deference to the agency interpretation.

The normal scope of judicial review of a Commission adjudicatory order is under the substantial evidence test. n34 The substantial evidence standard, however, relates to the nexus between the evidence presented at the hearing and the agency's ultimate determination. It is not the appropriate standard of review for issues of statutory interpretation, which are pure questions of law. n35

Unlike the Chevron deference test at the federal level, Texas courts have described the deference due agency interpretations of statutes in varying terms that are not always consistent. For example, the Texas Supreme Court has said that an agency's interpretations of its enabling statute are entitled to "serious consideration" so long as the interpretation is reasonable and not in conflict with the statute's language. n36 But there are occasional Texas Supreme Court decisions that appear to give less deference n37 and others that only give deference if some predicate finding is made, such as if the statutory language is ambiguous. n38

The Texas Supreme Court chose not to adopt the formal Chevron two-part deference test, which requires the reviewing court to first determine [*634] whether Congress "has directly spoken to the precise question at issue," and if Congress has not, or it has spoken ambiguously, the court does not impose its own construction but must defer to any reasonable interpretation proffered by the agency. n39 Chevron deference applies to a formal agency construction of a statute such as that which follows from a formal adjudication or a formal rulemaking proceeding. Likewise, the Court chose not to adopt the federal Skidmore deference test, which is less deferential and applies to informal interpretations of statutes by agencies. n40

While rejecting a formal adoption of the Chevron and Skidmore tests, the Court said that its approach, which it defined as the "serious consideration" approach, was similar in application to Chevron and Skidmore. n41 The "serious consideration" approach only applies when: (1) there are formal opinions adopted after formal proceedings; (2) the statutory language is ambiguous, and (3) the agency's construction is reasonable. n42 Since the agency's interpretation was part of a formal adjudicatory order, the "serious consideration" standard of review was applicable.

Notwithstanding its pronouncement of giving deference to the Commission's interpretation, the Court embarked on an extensive review of the relevant statutory sections, legislative history, and a comparison of the grant of powers to the Railroad Commission over injection wells for oil and gas wastes to an analogous, but not identical, grant of powers to the Texas Commission on Environmental Quality ("TCEQ") over injection wells for hazardous wastes. n43 Thus, what should have been reasonably simple questions of whether the grant of authority to the Railroad Commission was unambiguous when interpreting the term "public interest" and if not, whether the Commission's limiting interpretation was reasonable, mutated into a de novo review of the interpretational issue. The Texas Supreme Court's review of the "statutory framework" seems to be unnecessary under either Chevron deference or "serious consideration" deference. The Court had no trouble finding that the Commission's interpretation is reasonable given the much more specific instructions given TCEQ in its injection well permit review process than was given the Commission in its injection well permit review process. n44 While conceding [*635] that the plaintiffs' interpretation was reasonable, in a battle between reasonable interpretations, the Commission's interpretation will prevail. Finally, the Court rejected the plaintiffs' claim that determinations of the "public interest" are outside the technical expertise of the Railroad Commission, which is one reason courts do not give deference to agency decisions. n45 There is some tension between the holding in this case and Berkley v. Railroad Commission of Texas. n46 In Berkley, the court did note that public safety concerns were an appropriate consideration in making a public interest determination. The Texas Supreme Court distinguishes Berkley on the grounds that traffic safety was not necessarily involved in that case and that the Commission apparently followed its longstanding practice of only looking at oil-and gas-related matters in reaching its public interest conclusion. The Court's analysis of Berkley is unpersuasive. It appears to suggest that public safety concerns, even if they are not oil-and gas-related, should be considered in any type of public interest rationale. It would have been better for the Court to merely state that to the extent Berkley would require the Commission to consider non-oil-and gas-related matters in its public interest finding, that point would be overruled.

There appears to be a reasonably sharp contrast in approaches taken to statutory interpretation issues between Texas Citizens and Denbury Green. A possible way to distinguish the two opinions is to say that Denbury Green involved not statutory or regulatory interpretation issues, but constitutional interpretation issues. But if that was the case, the Court should have invalidated the statutory grant of eminent domain powers to private common carriers without sufficient safeguards to comply with the constitutional requirement that such grants must contain a requirement that the state agency make a specific finding that the individual permit applicant complies with the public use requirement. Texas Citizens announced a deferential approach to interpretational issues consistent with the federal "soft glance" approach in Chevron and Skidmore but then went ahead and engaged in a "hard look" approach to the agency interpretation. The area of the appropriate scope of judicial review of agency actions is one rife with conflicting signals and standards. n47 The Texas Supreme Court should be applauded for trying to "set the record straight" and get all courts applying the same standard. Unfortunately the Court's sub silentio "hard look" scope of judicial review in Texas Citizens and its very "hard look" scope of judicial review in Denbury Green suggest that future courts will have a difficult time articulating and applying a [*636] uniform scope of judicial review for agencies that are interpreting and applying statutory mandates.

C. FPL Farming Ltd. v. Environmental Processing Systems, L.C.

In FPL Farming Ltd. v. Environmental Processing Systems, L.C., the Court was faced with resolving the sometimes inconsistent relationship between common law causes of action and Railroad Commission orders. n48 This question was addressed in Railroad Commission v. Manziel, which involved an adjacent owner asserting that a Commission order allowing a Rule 37 exception well to be converted into an injection well for the purpose of engaging in a secondary recovery operation. n49 In dissolving the trial court's injunction against the Commission order approving the secondary recovery project and the injection permit, the Court said:

The orthodox rules and principles applied by the courts as regards surface invasions of land may not be appropriately applied to subsurface invasions as arise out of the secondary recovery of natural resources ... .

We conclude that if, in the valid exercise of its authority to prevent waste, protect correlative rights, or in the exercise of other powers within its jurisdiction, the Commission authorizes secondary recovery projects, a trespass does not occur when the injected, secondary recovery forces move across lease lines, and the operations are not subject to an injunction on that basis. The technical rules of trespass have no place in the consideration of the validity of the orders of the Commission. n50

Since Manziel involved a challenge to the Commission order and thus did not directly involve a common law trespass action, the impact of Commission orders on common law causes of action was somewhat unclear. In Coastal Oil, the Court relied in part on Manziel but never directly resolved the issue of how Commission orders impact common law causes of action since, in that case, the challenged hydraulic fracturing operations were not approved by the Commission. It is this issue that the Texas Supreme Court resolves in FPL Farming.

In 1996, the Texas Natural Resource Conservation Commission ("TNRCC") issued two permits to EPS that authorized the permit holder to inject commercial non-hazardous waste into a specific formation. n51 FPL owned both the surface and the subsurface estate on an adjacent tract, and received notice of the permit because EPS's application showed that the injected water would likely migrate into [*637] the subsurface estate owned by FPL. n52 After requesting a contested case hearing, a settlement was reached between the parties and FPL withdrew its hearing request. n53 In 1999, EPS sought to amend one of its permits to increase the allowed injection rate, and once again FPL requested a contested case hearing. n54 The administrative law judge recommended that the permit be granted. That recommendation was followed by TCEQ. FPL then appealed the permit amendment decision, and the court of appeals concluded that the permit was appropriately issued but eschewed making any findings as to whether FPL had any existing rights in the subsurface estate that would be damaged by EPS's injection. n55 In dicta, the Austin Court of Appeals noted that "should the waste plume migrate to the subsurface of FPL Farming's property and cause harm, FPL Farming may seek damages from EPS." n56 Three years later, FPL filed this action seeking damages and/or injunctive relief based on various common law theories including trespass, negligence, and unjust enrichment.

The jury found that there was no trespass, and after the trial court dismissed its motion for a new trial, FPL appealed. The court of appeals, focusing on language in Manziel and Coastal Oil that seemingly insulates permit applicants from liability for trespass, affirmed the trial court's take-nothing judgment. n57 The opinion quoted from Coastal Oil's analysis of Manziel, which stated that Manziel '"relied heavily on the fact that the [Railroad] Commission had approved the operation.'" n58 As noted earlier, Coastal Oil is a common law trespass and breach of implied covenant case without the added complexity of fitting those claims into a direct appeal of a Railroad Commission order. The Manziel decision alternates between being a simple case of judicial review of a Commission order with the more complex issue of what impact that order may have on private, common law rights. n59 [*638] Coastal Oil complicates the matter by extensively relying on the Commission's expertise and power to prevent waste, conserve natural resources, and protect correlative rights to justify its finding that the rule of capture precludes a finding of common law trespass in the cross-boundary hydraulic fracturing scenario. n60 Relying on the dicta of Manziel that one cannot have a cross-boundary subsurface trespass that is authorized by the state conservation agency that takes into consideration the public and private interests involved, the court of appeals concluded: "that under the common law, when a state agency has authorized deep subsurface injections, no trespass occurs when fluids that were injected at deep levels are then alleged to have migrated at those levels into the deep subsurface of nearby tracts." n61

This case was attractive to the Texas Supreme Court not only because it raised significant jurisprudential and practical issues, but also because another Texas court of appeals had reached the opposite result. n62 The Court's resolution of the conflict between the two courts of appeal was rather straightforward:

As a general rule, a permit granted by an agency does not act to immunize the permit holder from civil tort liability from private parties for actions arising out of the use of the permit. This is because a permit is a "negative pronouncement" that "grants no affirmative rights to the permittee." n63

The Court reached the common sense conclusion that the TCEQ, or any other administrative agency, does not have the delegated authority to resolve common law claims unless the Legislature provides for statutory remedies that are exclusive. n64 The relevant provisions of the Water Code delegating to the TCEQ the power to issue permits for the underground injection of everything but oil field wastes do not contain language showing a legislative intent to preempt or co-opt [*639] civil actions. n65 In fact, a TCEQ regulation specifically provides: "The issuance of a permit does not authorize any injury to persons or property or an invasion of other property rights, or any

infringement of state or local law or regulations." n66 The Court's holding is consistent with the policy that state agencies do not have the power to adjudicate private claims. Where the Texas Supreme Court's reasoning loses some of its traction is in its attempt to resolve the inconsistencies between Manziel, Coastal Oil, and FPL Farming.

The appellate court's reading of Manziel is certainly justified from the language used even though that language should have been treated as dicta since the Manziel result depended on the legality of the order and not the common law trespass issue. The Texas Supreme Court focused on the language in Manziel that said that the impact of the Railroad Commission order on the trespass claim was not being decided. n67 Thus, Manziel could be treated as having no impact on the issue before the Court in FPL Farming.

The Court has greater difficulty in dealing with Coastal Oil. While Coastal Oil was a common law trespass action and thus was similar to FPL Farming, the Court noted that both "the rule of capture and administrative deference to agency interpretations" were important building blocks in finding that no trespass occurred when there was a cross-boundary migration of injected frac fluids. n68 Since FPL Farming did not involve oil and gas operations, a reading of the Court's language might suggest that governmentally-permitted injections that cross property lines in the non-oil and gas scenario are subject to common law trespass liability, while governmentally-permitted injections that cross property lines in the oil and gas scenario are not subject to such liability because of the importance of the industry as reflected in both statutory and judicial policy pronouncements. n69 It is certainly true, as the Court stated, that adjacent owners can protect themselves against neighboring fracing operations through a number of different strategies, but the owner in Manziel did not have those same options. In the end the Court concluded:

Manziel and Garza did not decide the issues in this case, and because of the oil and gas interests at issue in Manziel and Garza, [*640] their reasoning does not dictate our analysis in this wastewater injection trespass case. n70

Because the court of appeals did not deal with the common law claims and affirmative defenses as decided by the trial court, the Texas Supreme Court opted to remand the case to the court of appeals to resolve those issues which were now to be determinative since the TCEQ permit would no longer preclude those common law claims.

III. Taxation

A. TGS-NOPEC Geophysical Co. v. Combs

In TGS-NOPEC Geophysical Co. v. Combs, a case decided after Texas Citizens but before Denbury Green, the Texas Supreme Court again dealt with the issue of the proper level of deference afforded to an administrative agency in interpreting either its statutory enabling act or its own regulations. n71 Unfortunately for Texas administrative law practitioners, this opinion followed neither case and applied a "hard look" to an agency's interpretation of the relevant statute and regulations utilizing some traditional administrative law principles.

TGS was in the business of gathering and marketing seismic data in Texas and throughout the nation. It typically required potential customers to sign a master license agreement, followed by a specific license agreement relating to a particular data set. n72 The specific license agreement gave the licensee access to the data for its use subject to restrictions on the licensee's ability to allow third parties to access the data. The data was delivered through some type of tangible media such as magnetic tapes, printed materials, or film. n73 For many years, the Texas Comptroller's Office treated TGS's licensing process as the sale of an intangible, which meant that, for franchise tax purposes, the revenue was allocated to the customer's legal domicile. n74 In 2004, as part of its audit, the Comptroller characterized this licensing revenue as constituting receipts from the use of a license that resulted in the revenue being allocated to Texas if the license was used in Texas. n75 The audit showed a substantial deficiency in the amount of franchise tax owed because many of the licenses were being used in Texas. TGS then paid the additional taxes, penalties, and interest under protest in order to challenge the validity of the Comptroller's [*641] decision. n76 Both the trial court and the court of appeals upheld the Comptroller's decision. n77 The court of appeals did not expressly deal with the deference issue; instead it applied various statutory canons of construction, including the plain meaning canon, and found that the relevant statutory provisions supported the Comptroller. n78 The case also involved the Comptroller's interpretation of its own regulations designed to deal with the issue raised by the taxpayer.

The franchise tax is a tax imposed on the privilege of doing business in Texas. n79 Over its long history, it has been changed by the Legislature both as to its overall purpose and how it functions. The basis for determining the amount of franchise tax owed is the concept of an entity's "taxable margin," n80 which requires the multiplication of an entity's capital by a fraction, "the numerator of which consists of receipts from business done in Texas (Texas-sourced receipts), and the denominator of which consists of all receipts from business anywhere, including Texas." n81 In sourcing receipts in Texas, the statute sets forth six categories, of which two are critical to TGS's tax liability. One source of receipts is "the use of a patent, copyright, trademark, franchise, or license in this state," while the other is "other business done in this state." n82 If TGS's income from the licensing of its seismic data is classified under the former category, the Comptroller's decision is correct, but if it is categorized under the latter, the taxpayer wins.

The Court applied the "serious consideration" deference model with the two recognized exceptions that the agency's interpretation cannot be "plainly erroneous" or "inconsistent with the language of the statute, regulation, or rule." n83 But the Court added: "Deference to the agency's interpretation, however, is not conclusive or unlimited." n84 This opened the door for the Court to get a very "hard look" [*642] at the statutory and regulatory language while professing to apply a deferential standard. As with canons of construction, one can normally find canons that oppose each other. That type of judicial decision-making leads to substantial uncertainty since the courts can choose among competing canons, or in this case, choose to ignore the deferential or "soft glance" view of judicial review and apply a non-deferential "hard look," in essence making the review de novo. This de novo approach was clearly reflected by the Court's listing of the standard canons of statutory construction as guidance for its "hard look" approach. n85 The Court then embarked on its "hard look" analyzing the history of how the Comptroller and the Legislature have dealt with the issue of sourcing receipts from intangible assets. The Court rejected the Comptroller's interpretation of the statute and the Comptroller's regulations and instead found inconsistencies between the interpretation and the language of the regulations. There was no indication that the Comptroller's interpretation was given "serious consideration" as the Court said is required under a deferential approach. The Court's "hard look" was reflected in its comparison of how other states' statutes deal with the issue in a manner more explicit than Texas. n86 Under a deference model, the issue should not be whether other states have more clear statutes but whether or not the interpretation proffered by the Comptroller is reasonable. Instead, the court embarks on a de novo "hard look" as if no agency interpretation was involved.

IV. Joint Operating Agreements

A. Tawes v. Barnes

In Tawes v. Barnes, n87 the Texas Supreme Court responded to certified questions submitted by the Fifth Circuit in a bankruptcy case. n88 [*643] Moose Oil & Gas purchased several oil and gas leases. One of these leases, denoted as the Baker Lease, was assigned to a group of investors, one of whom was Tawes. The Barnes' leased their minerals in a tract adjacent to the Baker Lease to a third party. In order to jointly develop the Baker and Barnes leases, the owners who were assigned the Barnes lease, which included Moose, Tawes, and Dominion entered into a working interest unit agreement ("WIUA") and a joint operating agreement ("JOA"). The two agreements provided for the initial drilling of a test well. The JOA also gave the working interest parties the option to consent or go non-consent as to future well drilling operations. n89 As is typically included in the non-consent election, there was a contractual risk penalty provided for that would be recovered out of the non-consenting working interest owner's share of production. During the period of time prior to payout of the non-consenting owner's share of expenses plus risk penalty, the non-consenting owner is deemed to have relinquished its working interest share to the consenting parties. n90 The WIUA further provided that each party is responsible for their own lease burdens, including any royalties or overriding royalties. n91

After the drilling of the initial well, Moose Oil proposed two additional wells. Dominion, which was the operator, chose to go non-consent and thus ceded its operator status to Moose Oil. Tawes elected to participate in the two proposed wells. It is undisputed that Barnes owns a 9.675% royalty in each of the wells drilled on the pooled unit. In 2000, Barnes filed suit in state court against Moose Oil and Dominion seeking an additional 8.241% royalty on the two wells where Dominion went non-consent. In 2002, at Dominion's request, the matter was removed to the Bankruptcy Court since Moose Oil filed a voluntary Chapter 7 bankruptcy petition. n92 At the foreclosure sale, Tawes purchased Moose Oil's interests in the three wells in the pooled unit. The bankruptcy court found that Dominion was liable to Barnes for Barnes's undisputed 9.675% royalty interest. Barnes continued litigating her claim for the additional royalty amounts that led to a settlement with Dominion. Tawes, however, refused to participate in the settlement agreement and Barnes continued her claim for unpaid royalties. n93 The bankruptcy

court determined that as a signatory party to the JOA, Tawes became obligated to pay Barnes her royalty interest [*644] pursuant to the Barnes/Dominion lease. n94 Upon appeal, the Fifth Circuit certified three questions to the Texas Supreme Court. n95 The Texas Supreme Court only answered the first of the three questions since their answer co-opts the need to answer the second and third questions. The first question was:

> Does Barnes have any right [to] enforce the [Dominion-Moose Agreements] - the WIUA and the JOA - between Dominion, Moose ... and the Moose Assignees, including Tawes, to recover unpaid royalties, between the date of first production and February 2002, of Baker-Barnes Nos. 1 & 2 wells under what we have called the "Royalty Provision" of the JOA, either as a third-party beneficiary of the WIUA and JOA or by virtue of having privity of estate with Tawes? n96

The Texas Supreme Court answered no to this question holding that Barnes was neither a third-party beneficiary to the JOA or WIUA, or in privity of estate with Tawes. n97

A third party may only enforce a contract it did not sign when the "parties to the contract entered the agreement with the clear and express intention of directly benefiting the third party." n98 In addition to this difficult standard, Texas courts presume that parties contract solely for themselves and not for the benefit of third parties. Barnes's principal claim was that the JOA directed Tawes, who consented to participate in the two wells, to pay all royalties, including the Barnes' royalty. Tawes asserted that the principal purpose of a JOA is to govern the relationship between the operators and non-operators and only indirectly deal with royalty interest owners. The bulk of any JOA discusses how the working interest owners are to allocate the various operational costs that are to be incurred by the operator in conducting the joint operations. Given that primary purpose, the Court found that neither Dominion, Moose Oil, nor Tawes intended to confer a direct benefit on any of its royalty owners who are not parties to the JOA. Construing the JOA and WIUA in pari materia, the Court also noted that the WIUA imposed upon each individual working interest owner the duty to make all payments to its lessors in order to maintain the lease. Given Texas jurisprudence on the third- [*645] party beneficiary doctrine that makes it difficult to achieve that status, the Texas Supreme Court believed that the language of the JOA regarding individual working owner responsibility to pay royalty interest owners was insufficient to overcome the presumption of no direct benefits to non-signatory parties.

The privity of estate claim made by Barnes was based on the notion that when Tawes consented to the two new wells and Dominion went non-consent, Barnes stepped into the shoes of Dominion and thus established privity of estate between Barnes and Tawes, just as there was between Barnes and Dominion. It is clear that where an assignee succeeds to the entire leasehold interest of the original lessee, privity of estate exists between the original lessor and the assignee. n99 Barnes argued that the leasehold covenant to pay royalty, which normally is a covenant that runs with the land, burdens Tawes as the assignee of the Dominion working interest during the period after non-consent and prior to payout. The Court found language in the JOA denying that the JOA involved an assignment or cross-assignment of interests along with the reversionary interest held by Dominion once payout plus risk penalty is achieved to deny that Barnes and Tawes are in privity of estate. n100 The Court further found that Tawes' election to participate and pick up Dominion's share of the working interest was not an express assumption of the Dominion/Barnes lease and royalty covenants. Before a party will be deemed to have assumed the burden of covenants, which would otherwise not be binding on it, specific language must be found in the agreement; the JOA did not contain such specific language.

V. Oil and Gas Leases

A. BP America Production Co. v. Marshall

In BP America Production Co. v. Marshall, the Court was faced with numerous problems arising from the alleged termination of a lease for failing to comply with the terms of various savings clauses contained therein. n101 This case involved the 17,712-acre Slator Ranch whose mineral estate was divided between Tenneco Oil, which owned 50%, and several other individuals and entities including the Vaquillas Ranch entities and the Marshalls. BP's predecessors in interest negotiated oil and gas leases with Tenneco, the Vaquillas Ranch entities, [*646] and the Marshalls. n102 The leases contained various savings provisions including one that provided that the lease would not terminate at the end of the primary term in the absence of production in paying quantities if BP was engaged in

good faith drilling or reworking operations. n103 The primary terms of the Vaquillas and Marshall lease were set to expire on July 11, 1980. Two weeks prior to that date, BP drilled a well that was eventually deemed to be non-productive. n104 Noting that there had been no production by July 11th, a member of the Marshall family inquired of BP as to why the lease had not terminated. He was informed by letter that BP was engaging in a series of actions designed to comply with the continuous operations clause of the lease. n105 In March 1981, BP contacted Sanchez-O'Brien Oil & Gas Corp. for the purpose of giving it a farmout on a portion of the Slator Ranch. On the same day that Sanchez-O'Brien and BP entered into a series of agreements designed to transfer the leasehold development rights to Sanchez-O'Brien, BP permanently plugged and abandoned the only well it drilled on the premises. n106 The farmout well, which was drilled within a month of the plugging and abandonment of the BP-drilled well, was a success and production in paying quantities has continued from 1981 to the present time. Through a series of assignments from Sanchez-O'Brien, Wagner Oil became an owner of a portion of the Marshall and Vaquillas leases. n107

In 1997, Vaquillas sued Wagner for breaches of several of the implied covenants. During discovery it was given information suggesting that BP had not complied with the requirements of the leasehold savings provision, which, according to Vaquillas, would have terminated its lease in 1981. n108 In 2001, the Marshalls intervened in this action similarly alleging that their lease automatically terminated in 1981. They added a fraud claim and asserted that the statute of limitations was tolled due to fraudulent concealment by BP. n109

[*647] The jury found in favor of the Marshalls in their action against BP but dismissed all of the claims against Wagner on the basis that Wagner's continued production from the leasehold premises constituted adverse possession of the mineral estate. n110 The court of appeals upheld the jury verdict against BP on both the fraud claim and the fraudulent concealment claim relating to the statute of limitations. n111 The court of appeals reversed the findings in favor of Wagner Oil relating to its affirmative defense of adverse possession. n112

Whether or not a statute of limitations will be tolled or not begin to run under the separate doctrines of the discovery rule and fraudulent concealment has been the subject of much litigation both within and outside the oil and gas patch. n113 The discovery rule delays the date when the cause of action first accrues until such time as the injury could have been reasonably discovered. n114 A party must meet two requirements to have the discovery rule applied "categorically": (1) the nature of the injury must be inherently undiscoverable; and (2) the evidence of injury must be objectively verifiable. n115 Because the discovery rule is to be narrowly or strictly applied as an exception to the policies underlying the statute of limitations, the party asserting it must show that the type of injury alleged could not have been discovered through the exercise of reasonable diligence. n116 Where the information is available to the public, such as through the records of the Railroad Commission, the discovery rule is not applicable. In this case, Marshall's own expert said that he discovered BP's alleged failure to comply with the good faith continuous operations clause by examining BP's filings with the Commission. The gravamen of their claim, namely that BP's operations were not conducted in a good-faith attempt to secure production in paying quantities, was readily discoverable by a search of BP's well logs and plugging report. n117

Unlike the discovery rule, which is categorically applied, the fraudulent concealment doctrine is fact-specific based on actions or inactions taken by a party after the cause of action has accrued. n118 In order to [*648] prove fraudulent concealment, a party must show that "the defendant actually knew that the plaintiff was in fact wronged and concealed that fact to deceive the plaintiff." n119 Further, the party asserting the doctrine must show that it was reasonably diligent in protecting its interests. Even though BP sent a letter to the Marshalls that contained allegedly fraudulent statements designed to deceive them about the nature of the operations on the lease, the Marshalls were obligated to perform "additional investigation," such as checking the Railroad Commission records. n120 Furthermore, the Marshalls needed to have shown that they reasonably relied to their detriment on the fraudulent statements. Again, since the records were available from the Railroad Commission by October 1982, one cannot reasonably rely on the BP letter when independent, publically available information can be obtained that would belie the fraudulent statements.

Since Natural Gas Pipeline Co. v. Pool, the law of adverse possession will give limitations title to the fee simple determinable estate to a holdover lessee who continues to produce hydrocarbons and pay royalties after the lease has automatically terminated. n121 This case adds an element that was not present in Pool where the holdover/producing lessee was the only working interest owner on the leasehold estate. The Pool Court found that the act of producing and paying royalties, instead of 100% of production to the lessor who had become the owner of the mineral estate upon the automatic termination doctrine, met the statutory requirements of being an "actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim

of another person." n122 In this case, Vaquillas argued that because Wagner did not own 100% of the leasehold estate, they became co-tenants of the mineral estate upon the termination of its lease. n123 In cases involving co-tenants, an additional requirement must be shown to successfully assert an adverse possession claim. That requirement is ouster. n124 The holdover lessee's continued payment of royalty is treated as sufficient to meet the ouster requirement because the lessee is asserting that a lessor-lessee relationship is in existence rather than a co-tenancy relationship whereby the unleased co-tenant would be entitled to its pro rata share of revenue less its pro rata share of expenses. n125 [*649] The continued payment of royalties also meets the hostility and "notice" elements of adverse possession, along with other indicia that the holdover lessee is continuing the lessor/lessee relationship including the execution of division orders and payment of taxes on the lessor's royalty interest. The fact that the holdover lessee has no subjective intent to adversely possess is insufficient to defeat its claim. n126

The effect of the Court's analysis on the Marshall/BP fraud litigation is to require its dismissal on statute of limitations grounds. The Vaquillas/Wagner trespass litigation was resolved by reinstating the trial court's order that awarded title to the Vaquillas's leasehold estate to Wagner based on its acquisition of limitations title.

VI. Contract Interpretation

A. Houston Exploration Co. v. Wellington Underwriting Agencies, Ltd.

In Houston Exploration Co. v. Wellington Underwriting Agencies, Ltd., the Court attempted to resolve the tension between the parol evidence rule and the surrounding circumstances doctrine. n127 Under the parol evidence rule, testimony or extrinsic evidence attempting to determine the intent of the parties to a written agreement is inadmissible, while under the surrounding circumstances doctrine, such testimony or extrinsic evidence is admissible to the extent that such testimony or evidence relates to the formation of the contract. n128 In 2002, Offshore Specialty Fabricators agreed to construct an offshore drilling platform for The Houston Exploration Co. The contract required Offshore to obtain builder's risk insurance naming Houston as an additional insured. Offshore's Texas insurance broker used the Lloyd's of London market for the policy. n129 Working through a London-based broker, negotiations commenced between Offshore and Wellington. The negotiators used a printed form policy as provided by Wellington as the basis for the final insurance contract. There were interdelineations from the form policy before the final contract was agreed to. The final contract was an original document incorporating the changes made to the printed form. After the insurance contract was executed, the drilling platform became unstable requiring immediate repairs that were delayed by weather in the Gulf of [*650] Mexico. Offshore submitted a claim for $ 3.25 million of which about $ 1 million was for weather stand-by charges. Wellington refused to pay the stand-by charges based on the fact that such charges had been deleted from the form contract and were therefore not covered by other provisions of the contract. n130 The trial court refused to admit the evidence relating to the deletion of whether stand-by problems were a covered expense, asserting that it was parol evidence that varied the terms of the final contract. n131 The court of appeals concluded that the deletion of a specific provision that would have treated stand-by charges as covered claims was admissible to ascertain the intent of the parties. n132

The Court only applied one canon of construction, albeit with a number of subparts:

A written contract must be construed to give effect to the parties' intent expressed in the text as understood in light of the facts and circumstances surrounding the contract's execution, subject to the parol evidence rule. n133

The parol evidence rule does not preclude the consideration of surrounding circumstances that "inform," rather than "vary from or contradict" the contract text. n134 The Court presented no guidelines as to what informs and what varies or contradicts, giving trial judges substantial discretion as to when to allow such type of evidence where an unambiguous document is involved. Relying on Professor Williston's landmark contracts treatise, the Court believed that objectively determinable factors give context to the transaction and thus allowed the Court to ascertain the parties' intent. n135 When parties delete specific provisions of an insurance contract that deal with what types of claims are covered, the Court found that to ignore such actions or treat them as irrelevant "blinks reality." n136

[*651] Not only is such evidence admissible and relevant, according to the Court, "deletions in a printed form agreement must be considered in construing the other provisions." n137 Whether the deletions or interdelineations

inexorably lead to one interpretation is not determinative as to whether or not such evidence is admissible and relevant. In this case, the Court took the view that the parties should not be allowed to replace a specific covered claim that had been deleted through the construction of other provisions of the contract that might somehow be read to include that claim.

Justice Johnson, in a concurring opinion, also agreed that the deletion of language from a form contract in the negotiation phase is relevant but would emphasize that the final contract language does not cover the weather stand-by claim made by the insured. n138 Chief Justice Jefferson, speaking for Justices Willett and Lehrmann, decried the Court's entrance into "a morass of indeterminacy" that might wreak havoc with written contracts since parties would be encouraged to seek the admission of extrinsic or parol evidence to not only inform the Court as to the parties' intent but to attempt to vary or to contradict the written instrument. n139

This tension or duality is not new to contract or property-based construction issues. n140 In the property-based arena, courts have generally been less receptive to finding instruments ambiguous than they do in the contracts-based arena. Likewise, courts applying property-based principles are less receptive to considering surrounding circumstances evidence in the absence of such ambiguity, than are courts in the contract-based arena. While the *Restatement of Property § 242* adopted in 1940 took the position that surrounding circumstances evidence was relevant, such evidence has only occasionally been admitted and only occasionally been mentioned. n141 The Williston approach for contracts, however, is much more widely accepted, and, notwithstanding the dissenting opinion's protestations to the contrary, the mention and use of surrounding circumstances evidence in contract-based canons of construction is much more widespread.

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VII. Split Estates - Rights of the Severed Mineral Owner

A. Dunn-McCampbell Royalty Interest, Inc. v. National Park Service

In Dunn-McCampbell Royalty Interest, Inc. v. National Park Service, the Fifth Circuit dealt with the somewhat arcane issue of interpreting a unique "Consent Statute" whereby the Texas Legislature authorized the federal government to acquire public and private lands that eventually became part of the Padre Island National Seashore. n142 Although the case largely devolves into a matter of statutory interpretation, the Fifth Circuit made some statements that seemingly do some violence to long-held oil and gas jurisprudential principles.

Congress authorized the creation of the National Seashore in 1962 with the passage of the Enabling Act. n143 The Enabling Act authorized the National Park Service ("Service") to purchase or condemn private property within the boundaries of the Seashore but required the Service to obtain state lands only with the state's "concurrence." n144 Texas enacted a "Consent Statute" that allowed these condemnations but reserved to the state the mineral estate with an express easement of surface use in order to develop the minerals. n145 The "Consent Statute" also provided that the Service's purchase of the surface estate should "not deprive the grantor or successor in title [to the mineral estate] the right of ingress and egress for the purpose of exploring for, developing ... and transporting minerals from beneath said lands and waters ... ." n146

In 2001, the Service developed the Oil and Gas Management Plan ("the Plan") that divided the National Parks and National Seashores into various areas, some of which essentially precluded surface use for mineral extraction purposes. n147 As the Plan applied to Padre Island, the Service admitted that some 7.6% of the surface estate would be effectively closed, and some 52.7% would have substantial restrictions imposed on the mineral owners even though it noted that all oil and gas rights would have been accessible, albeit at a higher cost than would otherwise have been applicable. n148 The plaintiffs brought this action asserting that the Plan essentially interfered with their right of [*653] ingress and egress for the purposes of developing the oil and gas resources located beneath the Seashore. n149 The trial court held in favor of the plaintiffs in part, finding that the "Consent Statute" applied to protect the ingress and egress rights of the plaintiffs. n150

While the National Park Service has broad powers granted to it under its Organic Act, which is consistent with Congress's plenary powers under the Property Clause, n151 the plaintiffs argued that the "Consent Statute," by which Texas authorized the Service to purchase surface interests, restricted the Service's ability to impact their mineral estates and their express and/or implied easement of surface use. In interpreting various provisions of the "Consent Statute," the court found that the protections contained therein for mineral owners only apply to private mineral owners, or their successors in interest, who conveyed the surface estate to the Service. n152 Applying the plain meaning canon of statutory construction, the court found the express reference to a grantor or its successor in

interest required a grant or conveyance before the surface easement protections were triggered. n153 It was undisputed that the plaintiffs, like most mineral owners, only owned the severed mineral estate at the time that title to the surface of the Seashore was purchased or condemned by the Service. n154 The court rejected the plaintiffs' claim that another canon of statutory construction applied, namely that the plain meaning should not be given effect where it would lead to an absurd result, because having a checkerboard pattern for those mineral interests which were protected by the "Consent Statute" and those which were not was not an absurd result. n155

In dealing with the plaintiffs' next claim that their severed mineral estates were outside of the boundaries of the Seashore and thus had their easements of surface use protected by virtue of the Enabling Act, the court wreaked havoc with some traditional principles of Texas oil and gas jurisprudence. According to the plaintiffs, when the Service purchased the surface estate, it did not impact the separate ownership of the plaintiffs in the mineral estates, and thus the mineral estates were outside of the Seashore's boundaries. The Fifth Circuit said:

[*654]

Although it is true that [the plaintiffs] own mineral estates beneath the Seashore's surface, the conveyance of mineral rights ownership does not convey the entirety of the sub-surface. As the Texas Supreme Court has stated, "the minerals owner is entitled, not to the molecules actually residing below the surface, but to a fair chance to recover the oil and gas ... ." *Coastal Oil and Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 15 (Tex. 2008).* In other words, if there are no minerals beneath the surface of the Seashore, Dunn-McCampbell owns the legal fiction of an estate that is nothing. n156

The notion that the owner of the mineral estate does not own a corporeal or possessory interest in the oil and gas beneath the surface has not existed in Texas since at least 1915. n157 The quotation from Coastal Oil is especially troublesome because it opens up the theoretical conundrum of reconciling the rule of capture and the absolute ownership theory that had been put to rest nearly a century ago. The Fifth Circuit stated that when the minerals were severed, the surface owners retained everything else so that when the Service purchased the surface estates, it purchased everything but the mineral estate, which is seemingly nothing more than the power to search for and produce the minerals, if any, that underlay the surface. n158 That conclusion would have significant ramifications for other current issues including who owns the underground strata for purposes of natural gas storage or carbon sequestration. n159 The court seemingly confuses a mineral owner's express or implied easement of surface use, which is appurtenant to the corporeal mineral estate, with the corporeal mineral estate itself. n160

[*655] Because it concluded that none of the relevant statutory provisions limited the National Park Service's power to regulate surface use for mineral extraction purposes, the court reversed the trial court's judgment in favor of the plaintiffs and remanded for entry of judgment in favor of the Service. n161

VIII. The Executive Power

A. Lesley v. Veterans Land Board

In Lesley v. Veterans Land Board, n162 the Texas Supreme Court was asked to make some sense out of its somewhat confusing jurisprudence regarding the relationship between the owner of the executive power and the owner of a non-executive interest. n163 In 1952 the Hedricks owned the unified fee simple absolute estate in some 4,100 acres in Erath County. n164 They conveyed all of the surface, <fr12> of the mineral estate, and 100% of the executive power to the Fosters. n165 The plaintiffs succeeded to the Fosters' interest and in 1998 conveyed their interest to Bluff Dale Development Corp. for about $ 2 million, reserving an undivided <fr14> mineral interest in the "minerals to which Grantors are now entitled ... ." n166 Bluegreen Southwest One L.P. is a successor in interest to Bluff Dale, receiving 100% of the surface estate, a portion of the mineral estate, and 100% of the executive power. Bluegreen began a residential subdivision development on the premises and included within its deeds to lot purchasers a declaration of covenants, conditions, and restrictions, one of which prohibited the [*656] use of the surface for commercial oil drilling, oil development, oil refining, or mining operations of any kind. n167 Most of the deeds to the lot owners excepted the <fr34> mineral interest owned by the plaintiffs but did not specifically reserve the remaining mineral interest and were silent on who owned the executive power. n168 In 2008, the plaintiffs who owned the non-executive mineral interests underlying the 4,100 acres sued Bluegreen and the individual lot owners, which includes the Veterans Land Board, asserting that the restrictive covenants limited the development of their mineral interests.

The key issues relating to the executive power include: who owned the executive power at the time the litigation commenced, and whether the duty owed by the executive to the non-executive encompasses actions taken other than the actual execution of a lease. n169 On the issue of whether the Veterans Land Board was entitled to immunity, the Court had no problem finding that the plaintiffs' action involved a suit to determine the ownership of the Board's property interest, from which it was clearly immune. n170

The plaintiffs had brought a claim for reformation based on the Lesley/Bluff Dale deed, which had reserved "one-fourth (<fr14>) of the oil ... and other minerals to which Grantors are now entitled ... ." n171 The deed then reserved to the Grantor <fr14> of all bonuses and delay rentals. n172 The Lesley plaintiffs argued that the parties intended that the grantors reserve a <fr14> mineral interest and not a <fr14> of <fr12>, or <fr18>, mineral interest as evidenced by the reservation of a full <fr14> of the bonus and delay rentals. They alleged mutual mistake as the basis for the reformation. The trial court granted the Lesley plaintiffs' motion for summary judgment on the reformation claim, but the court of appeals reversed. n173 The issue was whether the four-year statute of limitations had run on the reformation cause of action. Where the disputed language is not plain on its face and raises arguable questions of fact, such as with this deed - which had inconsistent signals between the principal reservation clause and the reference to the bonus and delay rentals reserved - it cannot be said, as a matter of law, that the Lesley plaintiffs should have known at the time of the conveyance the alleged mutual mistake. Therefore, the reformation claim must be remanded [*657] to the trial court to ascertain whether the statute of limitations should have applied given the somewhat ambiguous language of the deed. n174

Texas has been firmly committed to the doctrine that the mineral estate is composed of five "essential attributes," to wit, the development right, the executive right, the right to receive bonus, the right to receive delay rentals, and the right to receive royalty. n175 While this approach has been widely used, albeit not with consistent results in attempting to resolve the oft-times difficult question of whether the parties granted or reserved a mineral or royalty interest, it is clear that the five "attributes" are not essential since one can possess something less than all five and still be labeled a mineral interest owner. n176 In theory, at least, one should be able to convey or reserve any of the five attributes independent of each other. In practice, however, since most individuals do not consciously attempt to separate the development right and the executive power, the Texas Supreme Court has come up with a default rule that treats the executive power as a correlative to the development right, which has the effect of lowering the number of "essential attributes" from five to four. n177 The default rule applied in this case where the deed to the individual lot owners conveyed the mineral interests not previously reserved. Since the deeds did not specifically mention the executive power, or the other attributes, the executive power was conveyed to the individual lot owners subject to the restrictive covenant prohibiting mineral development. n178

Part of the confusion arising from attempts to define the scope of the duty owed to the non-executives by the executive has been the intrusion of "fiduciary duty" language into the lexicon. It was Manges v. Guerra that transformed what had been the prior standard of "utmost good faith and fair dealing" into a fiduciary standard. n179 But as courts and commentators have noted, it is clear that the standard described in Manges is not the classic, self-sacrificing fiduciary duty that applies to trustee/beneficiary and attorney/client relationships. n180 Unfortunately, the Texas Supreme Court reinforced its prior holdings that the executive owes a fiduciary duty to the non-executive while at the same time noting that in the context of the executive/non-executive situation, the self-sacrificing standard of conduct is probably not [*658] required of the executive. n181 The Court repeated its narrow definition of the executive's alleged "fiduciary" standard: that the executive not obtain benefits for itself that are not shared with the non-executive. n182 Thus we are left with the same conundrum we faced before Lesley, namely that there are two fiduciary duties alive and well in Texas: the traditional one relating to principal/agent, trustee/beneficiary and attorney/client relationships; and the more limited one relating to the executive/non-executive relationship.

The other issue facing the Court was whether or not the duty owed by the executive includes a duty to actually execute a lease or refrain from actions that might otherwise injure the non-executive interest. The Texas Supreme Court's decision in In re Bass, n183 in the minds of many, including two courts of appeal n184 and the court of appeals in this case, n185 read Bass as precluding the existence of any duty except when the executive actually executes a lease. The Court, without distinguishing Bass except to say that in Bass there was no expectation of any leasing, concluded:

We do not agree with Bluegreen and the land owners that Bass can be read to shield the executive from liability for all inaction. It may be that an executive cannot be liable to the non-executive for failing to lease minerals when

never requested to do so, but an executive's refusal to lease must be examined more carefully. If the refusal is arbitrary or motivated by self-interest to the non-executive's detriment, the executive may have breached his duty. n186

The Court found that its newfound duty was not implicated in this case because, by imposing restrictive covenants upon the sale of the subdivided lots, the executive did the same thing that the executive was doing in Manges when it executed a deed of trust secured by both the executive and non-executive's mineral estates. Just as the Court cancelled the deed of trust as to the non-executive mineral interest in [*659] Manges, the Texas Supreme Court cancelled the restrictive covenant in this case. n187

While the Court's decision in Lesley reaches an appropriate result, in my opinion, the Texas Supreme Court lost an opportunity to clear up some of the loose ends that have plagued Texas courts in dealing with the duty owed by the executive to the non-executive. The Court could have repudiated the continued use of the term "fiduciary duty" and still retained the basic standard of conduct that was reflected in the earlier cases and in the Manges jury instruction. Instead, Texas will retain two fiduciary duties. Likewise the Court could have partially overruled Bass to the extent that it holds that there is never a duty to lease, as it did with the two court of appeals decisions it disapproved of. Instead, it did a poor job of distinguishing Bass, so it still may be cited as good law for the proposition that if the parties are not contemplating leasing, whether or not an offer to lease has been made, there may be no breach of the duty owed to the non-executive.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawTransportation & PipelinesPipelinesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawRail TransportationRailroad Commissions

FOOTNOTES:

n1. See, e.g., *Humphreys-Mexia Co. v. Gammon, 254 S.W. 296 (Tex. 1923); Stephens Cnty. v. Mid-Kansas Oil & Gas Co., 254 S.W. 290 (Tex. 1923).*

n2. The Author specifically omits from this Article two Texas Supreme Court opinions because the firm of which he is counsel has, and continues to represent Exxon Corp. in these matters. These cases are *Exxon Corp. v. Emerald Oil & Gas Co., 331 S.W.3d 419 (Tex. 2010)* and *Exxon Corp. v. Emerald Oil & Gas Co., 348 S.W.3d 194 (Tex. 2011).*

n3. *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 54 Tex. Sup. Ct. J. 1732, 2011 WL 3796574, at 3* (Tex. Aug. 26, 2011).

n4. A good example of the judicial embracing of the "drill baby drill" movement is Justice Willett's concurring opinion in *Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 26-42 (Tex. 2008)* (Willett, J., concurring).

n5. *Denbury, 2011 WL 3796574, at 1.*

n6. Id.

n7. Id.; see also *Tex. Nat. Res. Code Ann.§§111.002(6)*; 111.011-.025 (West 2011 & Supp. 2011).

n8. *Denbury, 2011 WL 3796574, at 2.*

n9. See *Tex. Nat. Res. Code Ann. § 111.019(a)* (West 2011).

n10. *Denbury, 2011 WL 3796574, at 2* (citing *Tex. Nat. Res. Code Ann. § 111.002(6)* (West 2011) for the statutory definition of a "common carrier").

n11. See *Vardeman v. Mustang Pipeline Co., 51 S.W.3d 308, 310, 312* (Tex. App. - Tyler 2001, pet. denied).

n12. *State v. Pub. Utils. Comm'n of Tex., 883 S.W.2d 190, 196 (Tex. 1994); Vardeman, 51 S.W.3d at 312;* see also Bruce M. Kramer & Patrick H. Martin, The Law of Pooling and Unitization § 24.06 (3d ed. 2011) (discussing the extent to which courts give deference to agency adjudicatory decisions along with agency interpretations of statutes and their own rules).

n13. Kramer & Martin, supra note 12, § 25.06 at 25-134 to 25-135.

n14. *Tex. Rice Land Partners, Ltd., v. Denbury Green Pipeline-Texas LLC, 296 S.W.3d 877, 881-83* (Tex. App. - Beaumont 2009) (Gaultney, J., dissenting), rev'd, *54 Tex. Sup. Ct. J. 1732, 2011 WL 3796574* (Tex. Aug. 26, 2011).

n15. *Id. at 883* (citing *Maher v. Lasater, 354 S.W.2d 923, 924 (Tex. 1962));* see also Tex. Const. art. I, § 17(a).

n16. *Denbury, 2011 WL 3796574, at 1*.

n17. Id. at 3.

n18. Id. (citing *State v. Bristol Hotel Asset Co., 65 S.W.3d 638, 640 (Tex. 2001), Coastal States Gas Producing Co. v. Pate, 309 S.W.2d 828, 831 (Tex. 1958)).* There is language in Justice Scalia's opinion in *Lucas v. South Carolina Coastal Council, 505 U.S. 105 (1992)* that supports treating governmental regulation impacting private property rights with a heightened level of scrutiny.

n19. Id.

n20. Id. at 6 (emphasizing that there is no adjudication by the Commission of the public use issue in these common carrier application cases because the Commission is really running a registration procedure whereby it accepts without question whatever comes in the door and issues its common carrier designation in a pro forma or ministerial manner).

n21. Id. (noting that the public use determination would require the court to ignore the separate corporate status of a parent corporation and its subsidiary).

n22. Id. at 5 (interpreting *Tex. Nat. Res. Code Ann. § 111.002(6)* (West 2011)).

n23. Id.

n24. *Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 14-15 (Tex. 2008)* ("The Railroad Commission is vested with the power and charged with the duty of regulating the production of oil and gas

for the prevention of waste as well as for the protection of correlative rights. The Commission's role should not be supplanted by the law of trespass.").

n25. *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water, 336 S.W.3d 619 (Tex. 2011),* rev'g, *254 S.W.3d 492* (Tex. App. - Austin 2007).

n26. *Id. at 622.*

n27. *R.R. Comm'n of Tex., 254 S.W.3d at 495-96* (indicating that the second hearing was precipitated by a mistaken identification of nearby wells, as shown on Pioneer's plat).

n28. *Tex. Water Code Ann.§§27.031* (West 2008), 27.051 (West Supp. 2011).

n29. Id. § 27.051(b).

n30. *R.R. Comm'n of Tex., 336 S.W.3d at 622.*

n31. Id.

n32. See *R.R. Comm'n of Tex., 254 S.W.3d at 497-98* (holding that the plaintiffs were given a full and fair opportunity to be heard at the two hearings so that there was no procedural due process violation).

n33. *R.R. Comm'n of Tex., 336 S.W.3d at 623.*

n34. *Tex. Util. Code Ann. § 105.001(a)* (West 2011); see also Kramer & Martin, supra note 12,§§25.05-.06 (reviewing the general application of the substantial evidence standard to state conservation agency decisions in depth).

n35. *R.R. Comm'n of Tex., 336 S.W.3d at 624.*

n36. *First Am. Title Ins. Co. v. Combs, 258 S.W.3d 627, 631-32 (Tex. 2008);* accord *Mid-Century Ins. Co. v. Admaj, 243 S.W.3d 618, 623 (Tex. 2007).*

n37. See e.g., *Fiess v. State Farm Lloyds, 202 S.W.3d 744, 747-48 (Tex. 2006); TXU Elec. Co. v. Pub. Util. Comm'n of Tex., 51 S.W.3d 275, 286 (Tex. 2001)* (per curiam).

n38. See *Stanford v. Butler, 181 S.W.2d 269, 273 (Tex. 1944).*

n39. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).*

n40. *Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944).*

n41. *R.R. Comm'n of Tex., 336 S.W.3d at 625* (relying solely on cases applying "serious consideration" deference).

n42. Id. (citing *Fiess v. State Farm Lloyds, 202 S.W.3d 744, 747-48 (Tex. 2006)).* The court really adds a fourth consideration, namely that the agency's opinion cannot change the plain language of the statute, which gives a reviewing court considerably more leeway in deciding whether to give deference to the agency interpretation.

n43. *R.R. Comm'n of Tex., 336 S.W.3d at 626-27.*

n44. *Id. at 628.*

n45. See Kramer & Martin, supra note 12,§§24.05, 24.06 (discussing how courts limit the deference they give to agency decisions).

n46. *Berkley v. R.R. Comm'n of Tex., 282 S.W.3d 240* (Tex. App. - Amarillo 2009, no pet.).

n47. Kramer & Martin, supra note 12,§§24.05, 24.06.

n48. *FPL Farming Ltd. v. Envtl. Processing Sys., L.C. (FPL Farming III), 54 Tex. Sup. Ct. J. 1744, 2011 WL 3796612* (Tex. Aug. 26, 2011).

n49. *R.R. Comm'n of Tex. v. Manziel, 361 S.W.2d 560 (Tex. 1962).*

n50. *Id. at 568-69.*

n51. See *FPL Farming III, 2011 WL 3796612, at 1.* The TNRCC was replaced by the Texas Commission on Environmental Quality in 2004. Id. at 7 n.2.

n52. *FPL Farming Ltd. v. Envtl. Processing Sys., L.C. (FPL Farming II), 305 S.W.3d 739, 741* (Tex. App. - Beaumont 2009), rev'd, *FPL Farming III, 54 Tex. Sup. Ct. J. 1744, 2011 WL 3796612* (Tex. Aug. 26, 2011).

n53. *FPL Farming II, 305 S.W.3d at 741* (noting that EPS paid $ 185,000 to FPL).

n54. Id.

n55. *Id. at 741-42.* The earlier Court of Appeal decision was not officially published. See FPL Farming, Ltd. v. Tex. Natural Res. Comm'n (FPL Farming I), No. 03-02-00477-*CV, 2003 WL 247183* (Tex. App. - Austin Feb. 6, 2003, no pet.) (mem. op.).

n56. *FPL Farming III, 2011 WL 3796612, at 3* (quoting *FPL Farming I, 2003 WL 247183, at 5).*

n57. *FPL Farming II, 305 S.W.3d at 742-44.*

n58. *Id. at 744* (quoting *Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 12 (Tex. 2008)).*

n59. See generally Kramer & Martin, supra note 12, chs. 21-22 (pointing out that the Manziel decision ignores the longstanding principle that oil and gas conservation agencies are agencies of limited power which normally do not include the power to resolve common law disputes between parties); see also *SWEPI, L.P. v.*

Camden Res., Inc., 139 S.W.3d 332 (Tex. App. - San Antonio 2004, pet denied); *In re SWEPI, L.P., 103 S.W.3d 578* (Tex. App. - San Antonio 2003, no pet.); Kramer & Martin, supra note 12, § 24.02.

n60. *Coastal Oil, 268 S.W.3d at 14-15.* The Coastal Oil case is discussed in greater depth at Owen L. Anderson, Subsurface Trespass After Coastal v. Garza, 60 Inst. on Oil & Gas L. & Tax'n 11-1 (2009); Bruce M. Kramer, Coastal Oil & Gas Corp. v. Garza Energy Trust: Some New Paradigms for the Rule of Capture and Implied Covenant Jurisprudence, E. Min. L. Found. 329 (2009).

n61. *FPL Farming II, 305 S.W.3d at 744-45.*

n62. See *Berkley v. R.R. Comm'n of Tex., 282 S.W.3d 240* (Tex. App. - Amarillo 2009, no pet.) This case, like Manziel, was a direct appeal of a Commission order and not a common law action between two private parties. See Kramer & Martin, supra note 12, § 22.05 (discussing Berkley and the Court of Appeals decision in FPL Farming II).

n63. *FPL Farming III, 54 Tex. Sup. Ct. J. 1744, 1747, 2011 WL 3796612, at 3* (Tex. Aug. 26, 2011) (citing *Magnolia Petroleum Co. v. R.R. Comm'n, 170 S.W.2d 189, 191 (Tex. 1943)).*

n64. See id. at 3-4 (relying on Magnolia Petroleum to support the conclusion that while private law issues may be considered by the Railroad Commission, such as when issuing a permit to drill, that permit cannot resolve any common law trespass or ownership claims brought by another private party relating to the lands covered by the permit to drill).

n65. See id. at 4-5.

n66. *30 Tex. Admin. Code § 305.122(c)* (2011).

n67. *FPL Farming III, 2011 WL 3796612, at 6.*

n68. Id. at 6. The quoted language makes more sense if "administrative" is replaced by "judicial" because giving "administrative deference" to an agency's interpretation makes little sense. The court does not deal with Coastal Oil's language that technical issues should be best left to administrative agencies and language that courts are ill-equipped to handle such technical issues. One could make the same arguments in FPL Farming III.

n69. See id. at 6.

n70. Id. at 6.

n71. *TGS-NOPEC Geophysical Co. v. Combs, 340 S.W.3d 432, 437 (Tex. 2011).*

n72. *Id. at 435.*

n73. Id.

n74. *Id. at 436* (referencing *Tex. Tax Code Ann. § 171.103(a)(6)* (West 2008) (providing that the gross receipts of taxable entities are the sum of its receipts from other business done in the state).

n75. Id. (citing *Tex. Tax Code Ann. § 171.103(a)(4)*; *34 Tex. Admin. Code Ann. § 3.549(e)(30)(A)(iii)* (2011)).

n76. Id. (citing *Tex. Tax Code Ann. § 112.052(a)* (West Supp. 2011) (requiring taxpayers to make such payments as a condition precedent to filing suit challenging the alleged deficiency)).

n77. *Id. at 436-37.*

n78. *TGS-NOPEC Geophysical Co. v. Combs, 268 S.W.3d 637, 645-46* (Tex. App. - Austin 2008), rev'd, *340 S.W.3d 432 (Tex. 2011).* Statutory canons of construction, like deed or contract canons of construction, reflect a veritable rainbow of truisms and assumptions that may or may not assist the decision-maker in divining the intent of the legislature or the grantor. See Bruce M. Kramer, The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction, *24 Tex. Tech L. Rev. 1 (1993).*

n79. *TGS-NOPEC, 340 S.W.3d at 437* (citing *Bullock v. Nat'l Bancshares Corp., 584 S.W.2d 268, 270 (Tex. 1979)).*

n80. *Tex. Tax Code Ann. § 171.002* (West Supp. 2011), *Tex. Tax Code Ann. § 171.101* (West 2008).

n81. *TGS-NOPEC, 340 S.W.3d at 437* (citing *Tex. Tax Code Ann. § 171.006* (West Supp. 2011)).

n82. *Tex. Tax Code Ann. § 171.103(a)(4),* (6) (West 2008).

n83. *TGS-NOPEC, 340 S.W.3d at 438* (relying on *Tarrant Appraisal Dist. v. Moore, 845 S.W.2d 802, 823 (Tex. 1993); Pub. Utils. Comm'n v. Gulf States Utils. Co., 809 S.W.2d 201, 207 (Tex. 1991); Stanford v. Butler, 181 S.W.2d 269, 273 (Tex. 1944)).*

n84. Id. (citing *Rodriguez v. Serv. Lloyds Ins. Co., 997 S.W.2d 248, 254 (Tex. 1999)).*

n85. *TGS-NOPEC, 340 S.W.3d at 439.* Here is a paraphrased listing of the canons cited by the court: (1) primary objective is to ascertain and give effect to Legislature's intent; (2) intent is discerned from the words used; (3) terms with a particular meaning or terms assigned a particular meaning are given the particular meaning; (4) undefined terms are given their "ordinary meaning;" (5) undefined terms are not given their "ordinary meaning" if a different or more precise definition is apparent from the term's use in the context of the statute; (6) if the statutory language is unambiguous, the language is given its plain meaning unless it would lead to an absurd result; (7) four corners canon; and (8) presumption that the Legislature chose its language with care. Id. The Author always questions the use of canons of construction when they are listed seriatim in the opinion as opposed to being used to support individual interpretational results as announced by the court. This is a prime example of where canons replace "rational decision-making" and the notion of deference to an administrative interpretation of a statute or its own rule.

n86. *Id. at 442 n.11.*

n87. *Tawes v. Barnes, 340 S.W.3d 419 (Tex. 2011).*

n88. *In re Moose Oil & Gas Co., 613 F.3d 521, 523 (5th Cir. 2010)* (per curiam). The Bankruptcy Court decision is *Barnes v. Dominion Okla. Tex. Exploration & Prod., Inc. (In re Moose Oil & Gas Co.), 347 B.R.*

868 (Bankr. S.D. Tex. 2006), aff'd in part, rev'd in part, *Tawes v. Barnes, 2008 WL 905209* (S.D. Tex. Mar. 31, 2008).

n89. *Tawes, 340 S.W.3d at 421;* see also Kramer & Martin, supra note 12, § 17.02[12] (discussing some of the issues involved in the consent/non-consent election for JOA's). The typical unit operating agreement does not provide for the consent/non-consent election procedure while the typical joint operating agreement does so provide. Id.

n90. *Tawes, 340 S.W.3d at 422-23.*

n91. *Id. at 422* (holding that each working interest owner was also obligated to make all payments necessary to keep their leases alive).

n92. *Id. at 423-24.*

n93. *Id. at 424.*

n94. Id.

n95. *Id. at 424-25.*

n96. Id. (quoting *In re Moose Oil & Gas Co., 613 F.3d 521, 531 (5th Cir. 2010)* (per curiam)).

n97. Id. at 428-30. The court does not answer the more challenging question as to the status of a non-consenting working interest owner during the pre-payout period. In *Boldrick v. BTA Oil Producers, 222 S.W.3d 672, 675, 677* (Tex. App. - Eastland 2007, no pet.), the court concluded that an overriding royalty interest carved out of a working interest prior to a non-consent election is not entitled to recover any royalty until its working interest owner begins to receive production proceeds after payout of the expenses plus risk penalty.

n98. *Tawes, 340 S.W.3d at 425* (citing *MCI Telecomms. Corp. v. Tex. Utils. Electric Co., 995 S.W.2d 647, 651 (Tex. 1999)).*

n99. See generally *Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903 (Tex. 1982); Davis v. Vidal, 151 S.W. 290 (Tex. 1912).*

n100. *Tawes, 340 S.W.3d at 429-30.* The non-consenting working interest owner's reversionary interest upon payout is similar to a lessee/assignor's retention of a one day reversion which would make the transfer a sub-lease and not an assignment. See, e.g., *Amco Trust, Inc. v. Naylor, 317 S.W.2d 47, 50 (Tex. 1958).*

n101. *BP Am. Prod. Co. v. Marshall (Marshall II), 342 S.W.3d 59 (Tex. 2011).*

n102. *BP Am. Prod. Co. v. Marshall (Marshall I), 288 S.W.3d 430, 438* (Tex. App. - San Antonio 2008), rev'd, *Marshall II, 342 S.W.3d 59 (Tex. 2011).*

n103. *Marshall II, 342 S.W.3d at 63.*

n104. Id. See also *Marshall I, 288 S.W.3d at 438-39* (explaining in detail the various operations and activities relating to this particular well).

n105. *Marshall II, 342 S.W.3d at 63.*

n106. *Id. at 64.*

n107. Id.

n108. Id. The theory was that BP had not complied with the requirement that its drilling and/or reworking operations on the now plugged and abandoned well be conducted in good faith with the objective of achieving production in paying quantities. Id. Because more than sixty days would have elapsed between the "fraudulent" BP operations and Sanchez-O'Brien's spudding of its well, the lease would have terminated automatically. Id.

n109. Id. Whether the "fraud" claim made by the Marshalls was nothing more than a part of its fraudulent concealment assertion designed to toll the running of the statute of limitations is not clear. A fraud claim would require the party asserting it to show detrimental reliance while a fraudulent concealment claim does not have such a requirement.

n110. *Id. at 64-65.*

n111. *Marshall I, 288 S.W.3d 430, 452* (Tex. App. - San Antonio 2008), rev'd, *342 S.W.3d 59 (Tex. 2011).*

n112. *Id. at 462.*

n113. For oil and gas-related cases dealing with one or both of these doctrines see *Kerlin v. Sauceda, 263 S.W.3d 920 (Tex. 2008); Wagner & Brown, Ltd. v. Horwood, 58 S.W.3d 732 (Tex. 2001); HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998); Arabian Shield Dev. Co. v. Hunt, 808 S.W.2d 577* (Tex. App. - Dallas 1991, writ denied).

n114. *Computer Assocs. Int'l, Inc. v. Altai, 918 S.W.2d 453, 455 (Tex. 1996).*

n115. *Marshall II, 342 S.W.3d at 65-66.*

n116. *Id. at 66* (citing *Horwood, 58 S.W.3d at 734-35).*

n117. Id. at 66-67.

n118. For a particularly harsh denial of a fraudulent concealment case, see *Kerlin v. Sauceda, 263 S.W.3d 920 (Tex. 2008)* (involving an attorney and his clients in a matter dealing with an oil and gas conveyance).

n119. *Marshall II, 342 S.W.3d at 67* (citing *Earle v. Ratliff, 998 S.W.2d 882, 888 (Tex. 1999); Weaver v. Witt, 561 S.W.2d 792, 793 (Tex. 1977)* (per curiam)).

n120. Id. at 67-68.

n121. *Natural Gas Pipeline Co. of Am. v. Pool, 124 S.W.3d 188 (Tex. 2003).*

n122. *Tex. Civ. Prac. & Rem. Code Ann. § 16.021(1)* (West 2002).

n123. *Marshall II, 342 S.W.3d at 69.*

n124. *Id. at 70.* See also *Rhodes v. Cahill, 802 S.W.2d 643, 645-46 (Tex. 1990)* (pronouncing the general rule relating to how a co-tenant may adversely possess its co-tenant's interest); *Rick v. Grubbs, 214 S.W.2d 925, 926-27 (Tex. 1948)* (same); *Satterwhite v. Rosser, 61 Tex. 166, 171-72 (1884)* (same).

n125. *Marshall II, 342 S.W.3d at 71-72.* See generally *Wagner & Brown, Ltd. v. Sheppard, 282 S.W.3d 419 (Tex. 2008)* (discussing of the rights of unleased cotenants).

n126. *Marshall II, 342 S.W.3d at 72.*

n127. *Hous. Exploration Co. v. Wellington Underwriting Agencies, Ltd., 352 S.W.3d 462 (Tex. 2011).* It should be noted that contract canons of construction and property-based canons of construction are not the same although there is some substantial overlap between the two. For an exhaustive study of property-based canons of construction, see Kramer, supra note 78.

n128. *Hous. Exploration Co., 352 S.W.3d at 469.*

n129. *Id. at 464-65* (providing a short history of the development of the Lloyd's insurance market and how it operates).

n130. *Id. at 467.*

n131. *Id. at 468.*

n132. *Hous. Exploration Co. v. Wellington Underwriting Agencies, Ltd., 267 S.W.3d 277, 288-89* (Tex. App. - Houston [14th Dist.] 2008), aff'd, *352 S.W.3d 462 (Tex. 2011).*

n133. *Hous. Exploration Co., 352 S.W.3d at 469* (relying on *Sun Oil Co. v. Madeley, 626 S.W.2d 726, 731 (Tex. 1981)* and *City of Pinehurst v. Spooner Addition Water Co., 432 S.W.2d 515 (Tex. 1968)* for its particular distillation of the primary canon of construction). Sun Oil lists several related, if not duplicative canons of construction, but clearly does incorporate the notion that even as to an unambiguous contract, evidence relating to the surrounding circumstances at the time of the negotiation and drafting of the instrument is relevant and admissible. *Sun Oil, 626 S.W.2d at 732.* With property-based canons of construction, the courts have tended to minimize the admission of parol evidence, including surrounding circumstances evidence, notwithstanding language in the Restatement of Property to the contrary. See Kramer, supra note 78, at 6-19.

n134. *Hous. Exploration Co., 352 S.W.3d at 469.*

n135. Id. (quoting 11 Richard A. Lord, Williston on Contracts § 32:7 (4th ed. 1999)).

n136. *Id. at 470.*

n137. *Id. at 471* (relying on an oil and gas lease case, *Gibson v. Turner, 294 S.W.2d 781, 785 (Tex. 1956),* and a natural gas pipeline easement case, *Hous. Pipe Line Co. v. Dwyer, 374 S.W.2d 662 (Tex. 1964)).* Gibson involved an interdelineation of the proportionate reduction clause of a form lease. While stating that an unambiguous lease could be construed through the use of surrounding circumstances evidence, in that case the interdelineation occurred on the final lease instrument executed by the parties. *Gibson, 294 S.W.2d at 783, 785.*

n138. *Hous. Exploration Co., 352 S.W.3d at 473-74* (Johnson, J., concurring).

n139. *Id. at 474-75* (Jefferson, C.J., dissenting).

n140. See *Anderson & Kerr Drilling Co. v. Bruhlmeyer, 136 S.W.2d 800, 805 (Tex. 1940);* Kramer, supra note 78, at 10-11 (discussing Anderson).

n141. See Kramer, supra note 78, at 14; *Gibson v. Turner, 294 S.W.2d 781, 785 (Tex. 1956)* (specifically mentioning and accepting the admissibility of surrounding circumstances evidence in a property-based dispute).

n142. *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Svc., 630 F.3d 431, 433-34 (5th Cir. 2011).*

n143. *16 U.S.C.§§459d* to 459d-7 (2006).

n144. *Dunn-McCampbell, 630 F.3d at 433.*

n145. *Id. at 433.*

n146. *Id. at 434.* The State instructed the School Land Board to execute a deed incorporating the provisions of the Consent Statute regarding the reserved express easement of surface use. Id.

n147. Id.

n148. Id. The use of no surface occupancy provisions in leases is not uncommon for federal lands in the western portion of the United States. See 1 Rocky Mountain Mineral Law Found., Law of Federal Oil and Gas Leases, § 15.04 (LexisNexis Matthew Bender 2011).

n149. *Dunn-McCampbell, 630 F.3d at 434-45.* Plaintiffs had filed an earlier action seeking to overturn pre-Plan regulations impacting the surface use of Service lands for mineral exploitation purposes. That action was barred by the applicable statute of limitations. *Dunn McCampbell Royalty Interests, Inc. v. Nat'l Park Serv., 964 F.Supp. 1125, 1132 (S.D. Tex. 1995),* aff'd, *112 F.3d 1283 (5th Cir. 1997).*

n150. *Dunn-McCampbell, 630 F.3d at 435.*

n151. See generally *Kleppe v. New Mexico, 426 U.S. 529 (1976).*

n152. *Dunn-McCampbell, 630 F.3d at 439.*

n153. *Id. at 438.*

n154. *Id. at 438-39.*

n155. Id.

n156. *Id. at 441.*

n157. See generally *Tex. Co. v. Daugherty, 176 S.W. 717 (Tex. 1915)* (recognizing the ownership-in-place theory for oil and gas in Texas); *Stephens Cnty. v. Mid-Kansas Oil & Gas Co., 254 S.W. 290 (Tex. 1923); Humphreys-Mexia Co. v. Gammon, 254 S.W. 296 (Tex. 1923);* A.W. Walker, Jr., The Nature of Property Interests Created by an Oil and Gas Lease in Texas, *7 Tex. L. Rev. 1, 1 (1928)* (noting that Texas followed the ownership in place doctrine regarding a landowner's title to oil and gas).

n158. *Dunn-McCampbell, 630 F.3d at 442.*

n159. See generally Owen L. Anderson, Geologic CO<2> Sequestration: Who Owns the Pore Space?, *9 Wyo. L. Rev. 97 (2009);* Victor B. Flatt, Paving the Legal Path for Carbon Sequestration From Coal, *19 Duke Envtl. L. & Pol'y F. 211 (2008);* Alexandra B. Klass & Elizabeth J. Wilson, Climate Change, Carbon Sequestration, & Property Rights, *2010 U. Ill. L. Rev. 363 (2010); Arnold W. Reitze, Jr. & Marie Bradshaw Durrant, State and Regional Control of Geological Carbon Sequestration (Part I), 41 Envtl. L. Rep. 10348 (2011).*

n160. See *Dunn-McCampbell, 630 F.3d at 442.* A mineral owner in Texas has either an implied or express easement of surface use that is appurtenant to the mineral estate. A mineral owner may go onto the surface estate and explore for minerals whether or not there are any minerals located thereon. Even where an area has been determined to be bereft of oil and gas molecules, the mineral owner still owns a separate and independent mineral estate that does not magically re-unite with the surface estate. While the mineral estate may have no economic value, it is still a separate property interest.

n161. *Id. at 442-43.* In a roughly analogous situation involving national forests in the Eastern United States which were only annexed to the Forest Service in the early part of the 20th Century and which typically did not involve purchase or condemnation of the severed mineral estate, the Third Circuit has found that surface use regulations impacting the mineral estate or imposing NEPA-type requirements on mineral owners seeking to use the surface estate was ultra vires. See *Minard Run Oil Co. v. U.S. Forest Serv., Nos. 10-1265, 10-2332, 2011 WL 4389220* (3rd Cir. Sept. 20, 2011).

n162. *Lesley v. Veterans Land Bd. (Lesley II), 54 Tex. Sup. Ct. J. 1705, 2011 WL 3796568* (Tex. Aug. 26, 2011). The Author wrote an amicus brief in favor of the Texas Supreme Court's granting of the petition for review in this case and participated in some conversations with the attorneys representing Lesley prior to oral argument. The Author was not compensated for his work on this matter.

n163. The Author uses the term executive "power" rather than the term executive "right" since the ability to lease another's interest is much more akin to a classic Hohfeldian and Restatement of Property "power" than it is to a "right." The Author acknowledges that he is swimming upstream on this issue since the courts and the commentators almost universally refer to the executive right. In fact the Williams and Meyers treatise which the author has co-authored since 1996 uses the term "Executive Right" to describe the analysis of the executive power. Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law,§§338-340.1* (LexisNexis Matthew Bender 2011).

n164. See *Veteran's Land Bd. v. Lesley (Lesley I), 281 S.W.3d 602, 608* (Tex. App. - Eastland 2009), aff'd in part, rev'd in part, *Lesley II, 54 Tex. Sup. Ct. J. 1705, 2011 WL 3796568* (Tex. Aug. 26, 2011).

n165. *Lesley I, 281 S.W.3d at 608.*

n166. *Id. at 609.*

n167. *Id. at 608-09.*

n168. See *id. at 609.*

n169. See generally *In re Bass, 113 S.W.3d 735 (Tex. 2003)* (suggesting that the duty owed by the executive to the non-executive only arises through the leasing of the premises so that actions other than leasing are not subject to the duty); *Aurora Petroleum, Inc. v. Newton, 287 S.W.3d 373* (Tex. App. - Amarillo 2009, no pet.) (same); *Hlavinka v. Hancock, 116 S.W.3d 412* (Tex. App. - Corpus Christi 2003, no pet.) (same).

n170. *Lesley II, 54 Tex. Sup. Ct. J. 1705, 2011 WL 3796568, at 2-3* (Tex. Aug. 26, 2011).

n171. Id. at 4.

n172. Id.

n173. *Lesley I, 281 S.W.3d at 623-25.*

n174. *Lesley II, 2011 WL 3796568, at 4* (relying on the principal reformation case *Brown v. Havard, 593 S.W.2d 939 (Tex. 1980)).*

n175. *Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986).*

n176. See *French v. Chevron U.S.A. Inc., 896 S.W.2d 795, 797-98 (Tex. 1995).*

n177. *Day & Co., Inc. v. Texland Petroleum, Inc., 786 S.W.2d 667, 669 (Tex. 1990).*

n178. *Lesley II, 2011 WL 3796568, at 5.*

n179. *Manges v. Guerra, 673 S.W.2d 180, 183 (Tex. 1984).*

n180. See *Marrs & Smith P'ship v. D.K. Boyd Oil & Gas Co., 223 S.W.3d 1* (Tex. App. - El Paso 2005, pet. denied); Martin & Kramer, supra note 163, § 339.2; Ernest E. Smith, Implications of Fiduciary Standard of Conduct for the Holder of the Executive Right, *64 Tex. L. Rev. 371 (1985).*

n181. *Lesley II, 2011 WL 3796568, at 9.* The fiduciary duty language has become endemic in Texas court of appeals decisions. See Martin & Kramer, supra note 163, § 339.2. The fiduciary duty standard for the executive has also been referred to in *HECI Exploration Co. v. Neel, 982 S.W.2d 881, 888 (Tex. 1998)* and *Andretta v. West, 415 S.W.2d 638, 639 (Tex. 1967).*

n182. *Lesley II, 2011 WL 3796568, at 9.*

n183. *In re Bass, 113 S.W.3d 735 (Tex. 2003).*

n184. *Aurora Petroleum, Inc. v. Newton, 287 S.W.3d 373, 376-77* (Tex. App. - Amarillo 2009, no pet.); *Hlavinka v. Hancock, 116 S.W.3d 412, 419-20* (Tex. App. - Corpus Christi 2003, no pet.).

n185. *Lesley I, 281 S.W.3d 602* (Tex. App. - Eastland 2009) aff'd in part, rev'd in part, *54 Tex. Sup. Ct. J. 1705, 2011 WL 3796568* (Tex. Aug. 16, 2011).

n186. *Lesley II, 2011 WL 3796568 at 9.* To the extent the Aurora Petroleum and Hlavinka deny the existence of a potential duty to execute a lease, those decisions are disapproved.

n187. Id. Clearly the residential lot owners have lost an important property interest by having the no drilling covenant canceled. The Court gives solace to them by saying that under the reasonable accommodation doctrine, the mineral owner's implied easement of surface use will have to consider the impact on the surface owner before engaging in surface disturbing activities. The Court appears to be replacing a whole loaf of bread with a slice.