

Recent Developments in Oil and Gas Law

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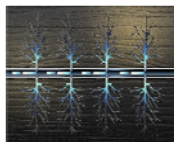
Institute for Energy Law
68th Annual Oil & Gas Law Conference
February 16, 2017



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TRC Rules: UFT Fields

- **Definition**
 - Field where horizontal drilling and hydraulic fracturing must be used to recover resources from the field
- **Designation**
 - **Administrative**
 - *In situ* permeability of a producible interval is 0.1 millidarcies or less
 - Certain number of producing wells have been drilled horizontally and completed using hydraulic fracture treatment
 - **After application and evidentiary hearing**
 - Reservoir characteristics are such that horizontal drilling and hydraulic fracturing must be used to recover resources

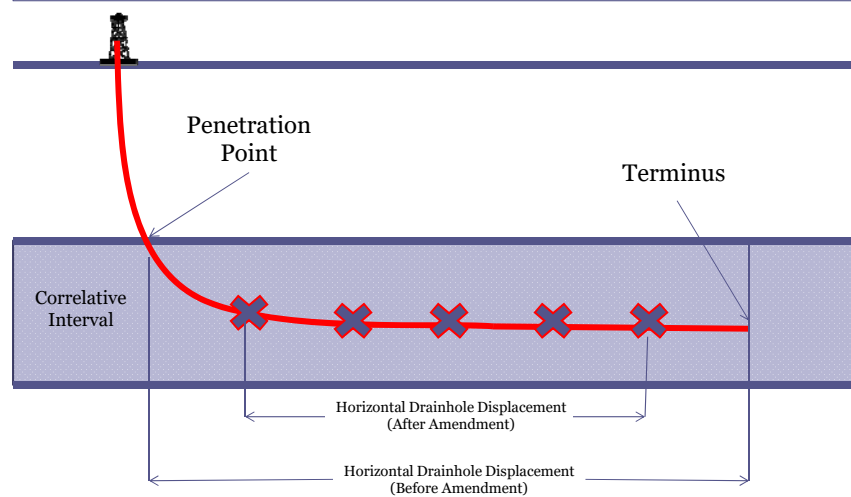


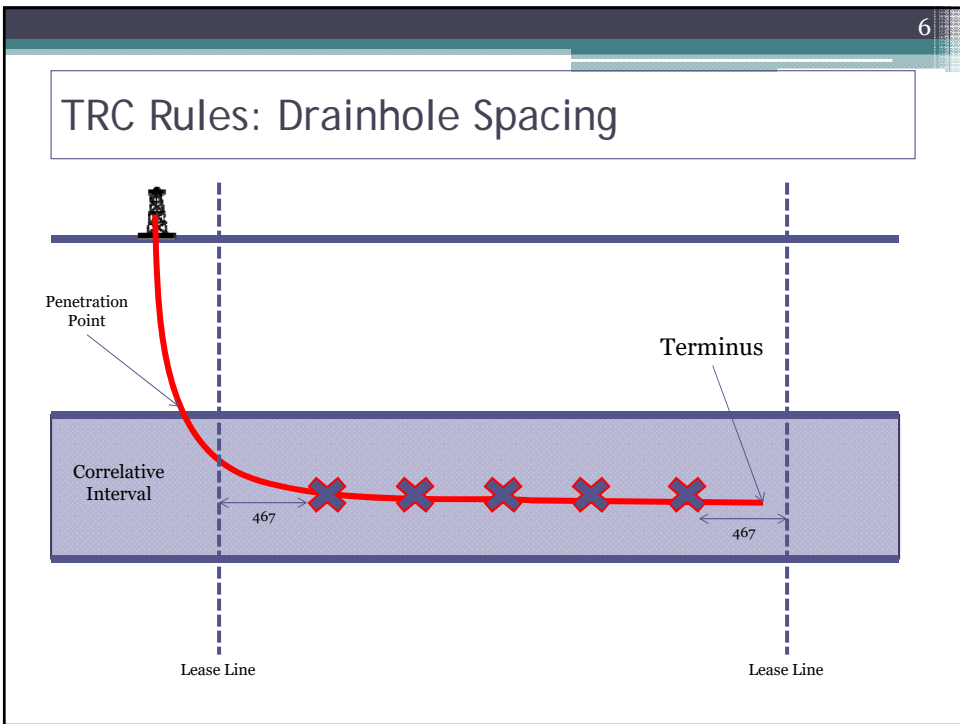
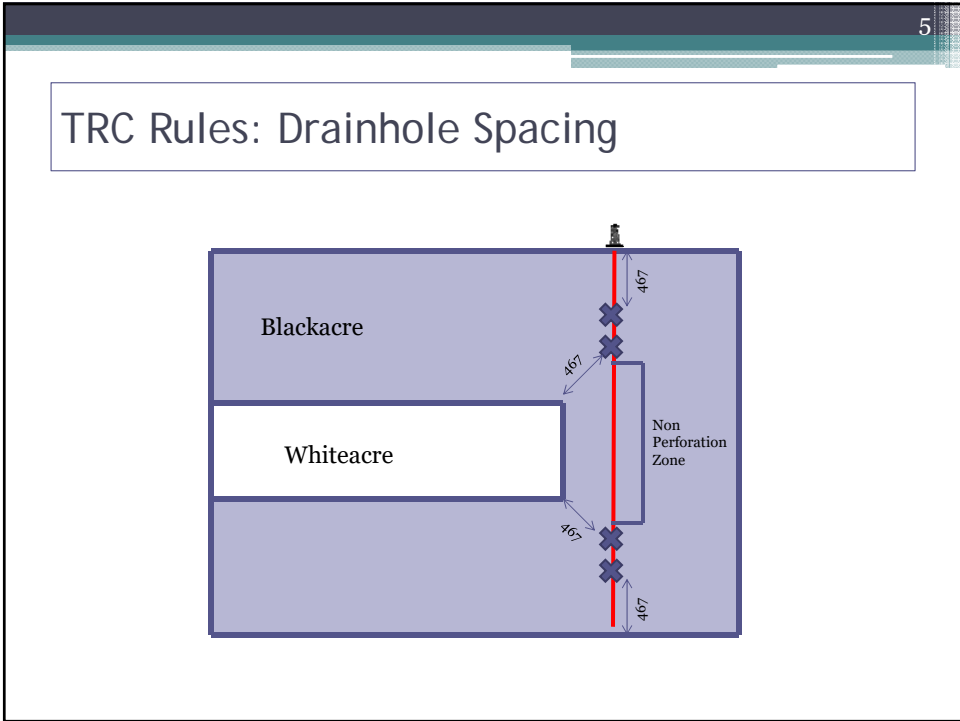
Benefits of UFT Designation

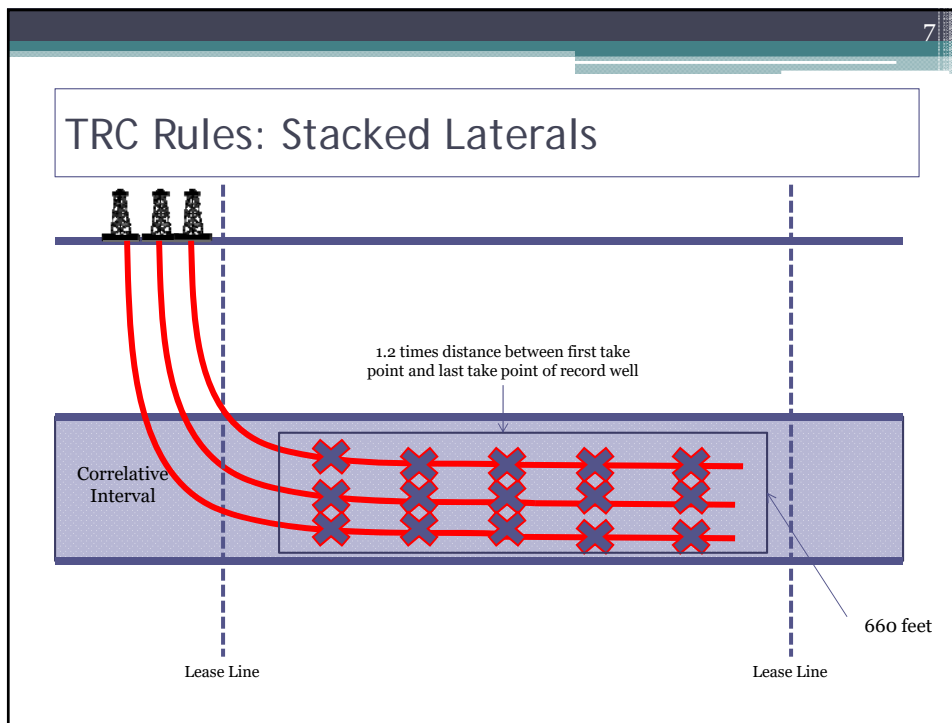
- Assigned acreage not counted against acreage assigned to vertical wells and vice versa
- Horizontal wells will usually be entitled to a larger allowable.
- Density exceptions are easier.



TRC Rules: Horizontal Drainhole Displacement








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TRC Rules: Inactive Wells

- Inactive wells may be considered active if:
 - at least 5 (reduced from 10) barrels of oil or 50 (reduced from 100) Mcf of gas is reported each month for 3 months; or
 - the well has reported production of at least 1 barrel of oil or 1 Mcf of gas each month for 12 months.



KEEP
CALM
AND
BE
ACTIVE

TRC Rules: Deliverability Tests for Gas Wells

- Initial deliverability test for gas well due 90 days after well completion.
- Operator may then elect not to perform additional tests
 - Deliverability is deemed to be lesser of
 - Most recent test on file
 - Maximum daily production from any of the 12 months before the due date of test
- Tests still required after recompletion into a different field, reclassification of the well, after the well has been inactive, or to reinstate an allowable.

Too. Many. Tests.



In re Sabine Oil & Gas Corp.

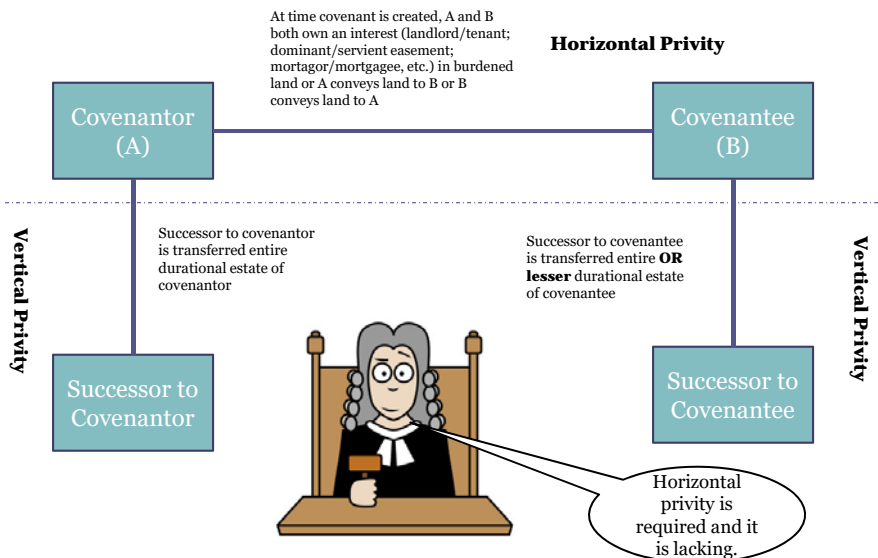
547 B.R. 66 (Bankr. S.D.N.Y. 2016); 550 B.R. 59 (Bankr. S.D.N.Y. 2016)

- **Gathering Agreements**
 - Sabine: “Dedicates” to the performance of the agreements gas and liquid hydrocarbons
 - HPIP and Nordheim: Constructs gathering and treatment facilities
- **2015: Sabine declares bankruptcy**
 - Can gathering agreements be rejected as executory contracts under Section 365(a) of the Bankruptcy Code?
 - HPIP and Nordheim: Please No! Dedications are covenants that run with the land.
 - Court: Yes.

Covenants Running with the Land

- Covenants Running at Law (Real Covenants)
 - Intent
 - “Touch and Concern” the Land
 - Horizontal Privity
 - Vertical Privity
- Covenants Running in Equity (Equitable Servitudes)
 - Intent
 - “Touch and Concern” the Land
 - Notice

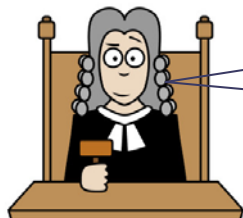
Horizontal Privity vs. Vertical Privity



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Touch and Concern the Land

- Was Sabine's property rendered less valuable by the covenant?
- Did the covenant affect Sabine's interest in the property or its use "independent of collateral circumstances"?



Dedication was of extracted products and incident to services. Extracted products are personal property under Texas law.

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Touch and Concern the Land

- The structure of the agreement matters
 - Compare *American Refining Co. v. Tidal Western Oil Corp.* (Tex. Civ. App. - Amarillo, 1924)
 - Gas conveyed in place
 - Covenantee was entitled to come upon the land to install its extensive plant and equipment
 - To retrieve the gas, the covenantee was required to draw the gas out of the ground using its equipment
 - In *Sabine*:
 - Sabine reserved the right to operate its oil and gas properties without interference from HPIP and Nordheim
 - HPIP and Nordheim connected at receipt points, not directly to Sabine's wells
 - Gathering fee was triggered by receipt of gas, not extraction

Coyote Lake Ranch, LLC v. City of Lubbock,
(Tex. 2016, reh'g denied)

- **The Accommodation Doctrine**
 - **Surface owner has burden to prove:**
 - Lessee's use completely precludes or substantially impairs an existing use; and
 - There is no reasonable alternative available to the surface owner by which the existing use can be continued; and
 - Given the circumstances, there are reasonable alternatives available to the lessee that will allow the recovery of minerals.

See Getty Oil Co. v. Jones (Tex. 1971); Merriman v. CTO Energy, Inc. (Tex. 2013).

Accommodation Doctrine: Applicable to Groundwater?

- ***Edward Aquifer Authority v. Day* (Tex. 2012)**
 - Groundwater is owned in place like oil and gas.
- **Should the accommodation doctrine apply to groundwater?**
 - **Yes – groundwater is just like oil and gas!**
 - Both exist in subterranean reservoirs and are fugacious
 - Both can be severed
 - Both include right to use surface
 - Both are protected from waste



It's like were twins!

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Accor

Deed

City may drill water wells and test wells at any time and location

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Hysaw v. Dawkins (Tex. 2016)

“Evelyn” is
 3 child
 all oil
 produ

Ethel was under a “misconception.”
 Look at the rest of the will

↓

But if I sell any royalty during life, then the three children shall each receive one-third of the remainder of the unsold royalty.”
 -- Signed Ethel

If the land is leased for a 1/5 royalty, does each child receive $1/3 \times 1/8 = 1/24$ or $1/3 \times 1/5 = 1/15$?

Apache Deepwater, LLC v. McDaniel Partners (Tex. 2016, reh'g denied)

- Ferguson assigned Tyson four oil and gas leases, reserving a production payment of 1/16 of 35/64 of 7/8 of the entire production from the lands under the respective leases until proceeds amounted to \$3.1 million and 1.42 million barrels. Where did the 35/64 come from?



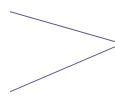
Reservation says “under the respective leases”

Reservation says nothing about allocating the burden to other leases

- Cowan Lease:
 - Survey 32:64
 - Survey 37: 32:64
- Peterman Lease:
 - 1/64 of Surveys 36 and 37
- Broudy Lease:
 - 2/64 of Surveys 36 and 37



Only 3/64 left



Crosstex North Texas Pipeline L.P. v. Gardiner, 2016 WL 3483165 (Tex. June 24, 2016, reh'g denied)



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What is a nuisance?

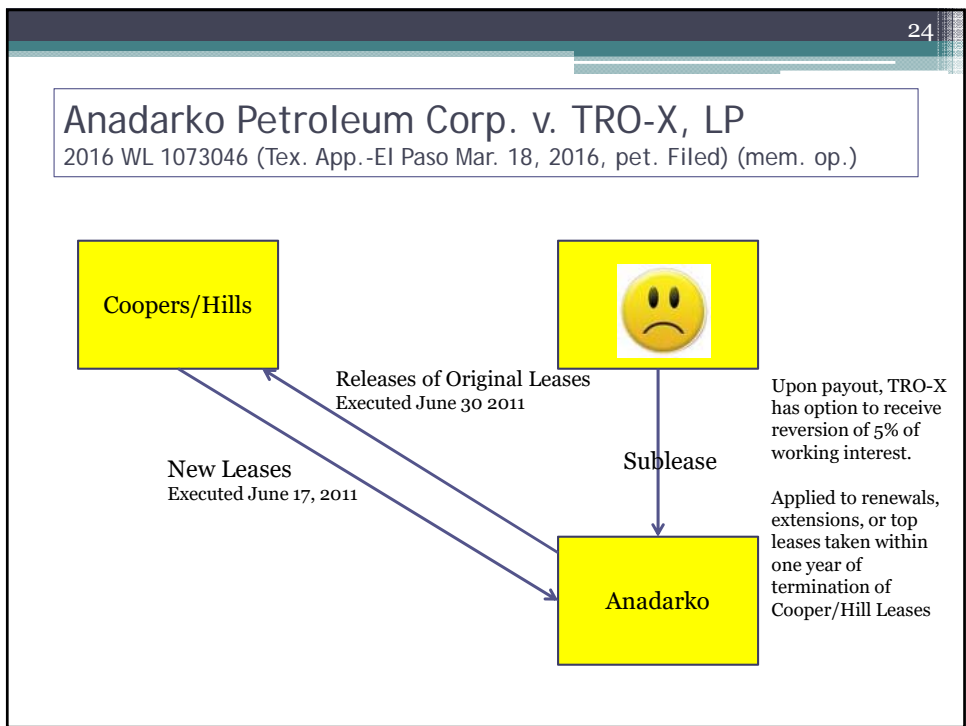
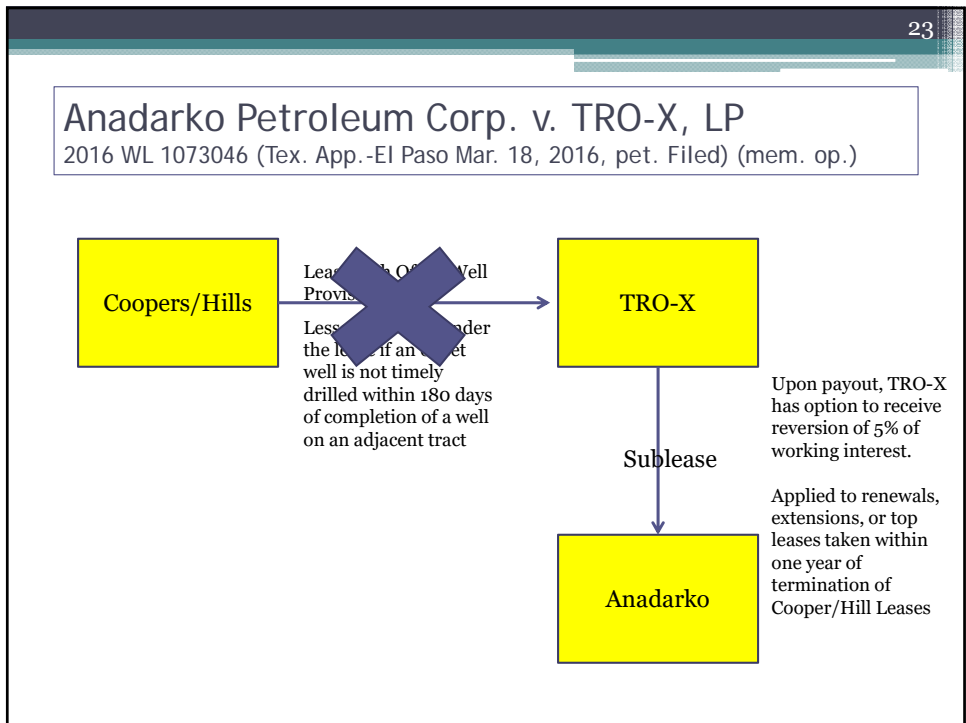
<p>What it isn't</p> <ul style="list-style-type: none"> • A cause of action • A standard of conduct • Damages that result from conduct 	<p>Its focus</p> <ul style="list-style-type: none"> • Substantial – not petty - interference • Effect on objectively reasonable person, not conduct of defendant • Balancing factors: gravity of the harm v. utility of the conduct
<p>What it is</p> <ul style="list-style-type: none"> • Legal injury/condition - • Substantial interference • With use and enjoyment of land • Causing unreasonable discomfort or annoyance • to persons of ordinary sensibilities 	<p>Types – Standard of Conduct</p> <ul style="list-style-type: none"> • Intentional nuisance <ul style="list-style-type: none"> • Intent to cause interference • or knowledge interference was substantially likely to occur • Negligent nuisance • Strict liability – abnormally dangerous activity

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North Shore Energy, LLC v. Harkins

501 S.W.3d 598 (Tex. 2016)

<p style="text-align: center;">Option Agreement</p> <p>Being 1,210 acres of land, more or less, out of the 1674 acres out of the Caleb Bennet Survey, A-5, Goliad County, Texas and being the same land described in the Export Lease</p> <p style="text-align: center;">_____</p> <p style="text-align: center;"><i>elc</i> <i>chm</i></p>	<p style="text-align: center;">Memorandum of Export Lease</p> <p>1274 acres in Goliad County and being all of the 1674 acre tract described on Exhibit "A" attached hereto, <u>SAVE AND EXCEPT the 400 acre tract described in the Hamman Lease</u></p> <p style="text-align: center;">_____</p> <p style="text-align: center;"><i>elc</i> <i>chm</i></p>
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Adams v. Murphy Exploration & Production Co.

497 S.W.3d 510 (Tex.App.—San Antonio 2016, pet. filed)

LEASE

Lessee must drill an offset well within 120 days of completion of a well on adjacent acreage within 467 feet of the leased premises.

[Signature] *[Signature]*

Williams and Myers

An offset well is “a well drilled on one trace of land to prevent the drainage of oil or gas to an adjoining tract of land”

Coastal Oil & Gas v. Garza Energy Trust (Tex. 2008)

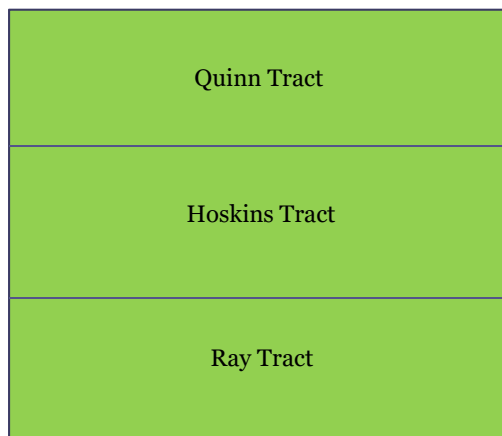
An offset well is one used “to offset drainage”

Aery v. Hoskins

493 S.W.3d 684 (Tex.App.-San Antonio 2016, pet. Filed)

Quinn Owns:

- Surface of Quinn Tract
- Mineral Interest in Quinn Tract, except royalty interest
- Pooled Royalty Interest in Quinn Tract, Hoskins Tract, and Ray Tract



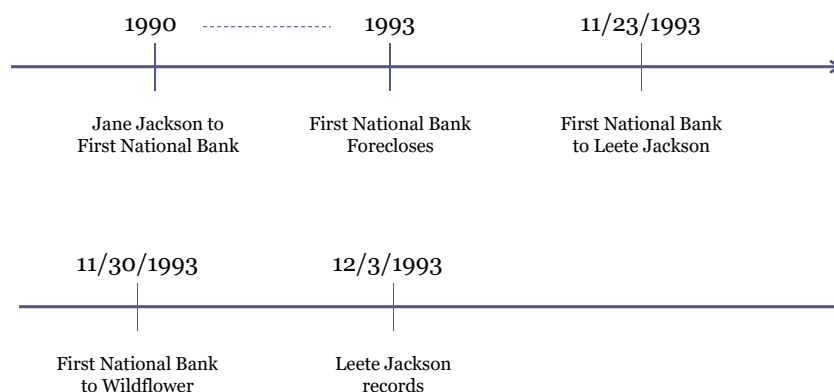
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The pooled royalty interests in the other tracts are not appurtenant

- They are not necessary for the use and enjoyment of the Quinn Tract.
- Compare:
 - *McCall v. McCall* (Tex.App.-Houston [1st Dist.] 2000, pet. denied)
 - Royalty interest that is appurtenant to property other than the one conveyed is not impliedly included in the conveyance
 - *Avery v. Moore* (W.Va. 1965)
 - Conveying a tract that has been partitioned conveys the mineral interest under the tract, but not royalty interests in the other tracts

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Jackson v. Wildflower Production Co., 2015 WL 6024387 (Tex.App.-Amarillo 2016, pet. Filed) (mem. op.)




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Was the Wildflower Deed a quitclaim deed?

**MINERAL DEED
WITHOUT WARRANTY**

[The Bank] . . . does hereby grant, bargain, sell convey, transfer, assign and deliver under [Wildflower] . . . a portion of the Grantor's right, title, interest, estate, and every claim and demand . . . in and to that part of the oil, gas and other minerals . . ."

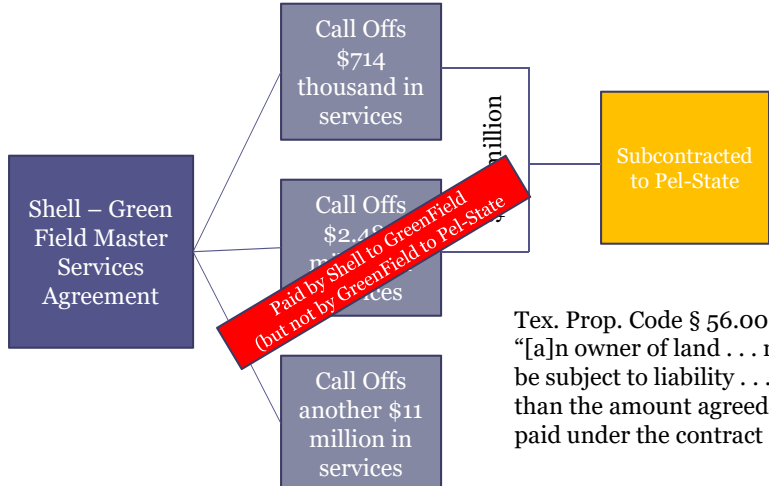
[Signature] *[Signature]*



"If anything can be said with certainty, it would be that the instrument was poorly drafted."

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Shell Western E&P, Inc. v. Pel-State Bulk Plant, LLC
2016 WL 6247007 (Tex.App.-San Antonio 2016)



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graph LR
    A[Shell - Green Field Master Services Agreement] --> B[Call Offs $714 thousand in services]
    A --> C[Call Offs $2.46 million in services]
    A --> D[Call Offs another $11 million in services]
    B --- E[million]
    C --- E
    D --- E
    E --- F[Subcontracted to Pel-State]
    
```

Paid by Shell to GreenField (but not by GreenField to Pel-State)

Tex. Prop. Code § 56.006:
"[a]n owner of land . . . may not be subject to liability . . . greater than the amount agreed to be paid under the contract . . ."

Regions Bank v. Questar Exploration & Production Corp.
 184 So.3d 160 (La.Ct.App. 2d Cir. 2016)

La. Civ. Code Art. 2679

The duration of a term may not exceed 99 years.

Code 31:115(A)

...the interest of a mineral lessee...
 ...but...
 ...in...
 ...no...
 ...pe...
 ...ye...
 ...m...
 ...pr...

In the event of a conflict between the Mineral Code and the Civil Code, the Mineral Code prevails.



St. Tammany Parish v. Welsh

199 So.3d 3 (La.Ct.App. 1st Cir. 2016), cert. or rev. denied, 194 So.3d 1109 (La. 2016)



“The issuance of a permit by the commissioner . . . shall be sufficient authorization to the holder of the permit to enter upon the property covered by the permit and to drill in search of minerals thereon. *No other agency or political subdivision of the state shall have the authority, and they are hereby expressly forbidden, to prohibit or in any way interfere with the drilling of a well or test well in search of minerals by the holder of such a permit.*”

LA. REV. STAT. 30:28(F)

St. Tammany Parish v. Welsh

199 So.3d 3 (La.Ct.App. 1st Cir. 2016), *cert. or rev. denied*, 194 So.3d 1109 (La. 2016)

Parish Argument

- La. Const., art. VI, § 17 bestows land use and zoning power on local governments
- La. Const., art. IX, §1 requires legislature to enact laws to protect the environment.
- The Commissioner is required to “consider” the Parish’s master plan

Court Response

- La. Const., art. VI, §9(B): notwithstanding other provisions of the article, the police power of the state shall never be abridged.
- La. Const., art. VI, §5, allows a home rule charter to exercise powers for management of local government affairs “not denied by general law.”
- The state did enact laws to protect the environment, and those laws included a preemption provision.
- Consider doesn’t mean give heed to. The plan was considered and rejected.

St. Tammany Parish v. Welsh

199 So.3d 3 (La.Ct.App. 1st Cir. 2016), *cert. or rev. denied*, 194 So.3d 1109 (La. 2016)

Supreme Court review denied, but

St. Tammany only sought to enforce its zoning ordinances, not regulate oil and gas.



Commissioner’s power to issue drilling permits may not be abridged, but neither may St. Tammany’s zoning power. And zoning is not the regulation of oil and gas.



Corban v. Chesapeake Exploration, L.L.C.,
2016 WL 4887428 (Sept. 15, 2016)

1989 Dormant Mineral Act

A mineral interest shall be “deemed abandoned and vested” unless one or more saving events occurred within the prior 20 years.

2006 Dormant Mineral Act

Mineral interest is only deemed abandoned if the mineral interest holder fails to timely respond to a notice from the surface owner and the surface owner takes certain procedural steps.

Corban v. Chesapeake Exploration, L.L.C.,
2016 WL 4887428 (Sept. 15, 2016)

1989 Dormant Mineral Act

A mineral interest shall be “deemed abandoned and vested” unless one or more saving events occurred within the prior 20 years.

What? This was a bluntly efficient means to vest title in the surface owner.

...

And why all the focus on the word “deemed”? What about the word vested?

The majority is violating constitutional protections against retroactive legislation and this is a taking.



Implications of *Corban*

- Immediate
 - *Walker v. Shondrick-Nau*
 - *Albanese v. Batman*
 - 10 other cases.
- Future
 - New life for mineral owners
 - Trouble for surface owners that leased



Lutz v. Chesapeake Appalachia, L.L.C., 2016-Ohio-6519011.

Marketable Product Rule or “At The Well” Rule

Majority

- It is just a contract.
- If leases are not ambiguous, interpret them.
- If they are ambiguous, we don't have the evidence to look at intent.

Pfeifer

- Follow the marketable product rule.
- Lessees control and can manipulate post-production costs.

O'Neill

- Follow the “at the well” rule.
- We strictly adhere to the terms of the lease.



Simmers v. City of North Royalton,

65 N.E.3d 247 (Ohio Ct. App. [10th Dist.] 2016)

Facts

- The Division of Oil & Gas Resources Management granted Cutter Oil's application to mandatorily pool the City of North Royalton.
- The Commission vacated the Division's pooling order based on the City's safety concerns.

Standards for Mandatory Pooling

- (1) Tracts under lease are of an insufficient size and shape to meet requirements for a unit.
- (2) Applicant used "all reasonable efforts" to obtain a voluntary agreement on a "just and equitable basis."



"Just and equitable" included non-monetary factors. Health and safety concerns should not be brushed aside.

Robinson Township v. Commonwealth,

147 A.3d 536 (Pa. 2016)

• 2013 Robinson Township Decision

▫ Preemption Provisions:

- **3302:** Local governments may not adopt requirements that regulate the same features of operations that are regulated by the State.
- **3303:** Local governments may not enact or enforce environmental legislation.
- **3304:** Local ordinances that regulate oil and gas must be uniform and certain drilling and ancillary activities must be allowed in every zoning district.



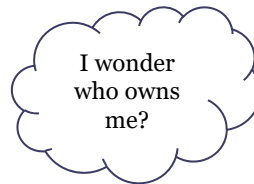
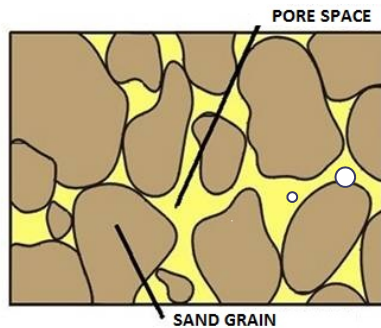
Robinson Township v. Commonwealth,
147 A.3d 536 (Pa. 2016)

• **2016 Robinson Township Decision**

- **3305 - 3309:** The PUC may determine whether ordinances violate the Municipal Planning Code
- **3222.1(b)(10), (11):** Limits access of health professionals to information about fracking chemicals to protect trade secrets.
- **3218.1:** DEP must disclose spills to public drinking water facilities, but not private well owners.
- **3241:** Eminent domain power granted for natural gas injection and storage.



City of Kenai v. Cook Inlet Nat. Gas Storage Alaska, LLC,
373 P.3d 476 (Alaska 2016)



CINGSA leased right to store non-native gas from State of Alaska and Cook Inlet Region (minerals owners). The City of Kenai (partial surface owner) alleged pore space ownership.

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City of Longmont v. Colorado Oil & Gas Assn.,

369 P.3d 573 (Colo. 2016)

Question: Is a ban on fracking and the disposal of fracking wastes enacted by a home-rule city preempted by state law?

First Legal Inquiry: Is the ban a question of statewide, local, or mixed state and local concern?

1. Need for statewide uniformity?	1. Yes. Boundaries of pools don't conform to jurisdictional boundaries. Fracing is applied to most wells.
2. Extraterritorial impact?	2. Yes. Bans may lead to more bans.
3. Have local or state governments traditionally regulated?	3. Push. State regulates operations. Local gov't regulates land use.
4. Does the Colorado Constitution say anything?	4. Push. Constitution says nothing.

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City of Longmont v. Colorado Oil & Gas Assn.,

369 P.3d 573 (Colo. 2016)

Question: Is a ban on fracking and the disposal of fracking wastes enacted by a home-rule city preempted by state law?

Second Inquiry: Is the ban preempted?

1. Express preemption	1. Nope
2. Implied preemption (occupation of field)?	2. Nope
3. Operational conflict? <ul style="list-style-type: none"> i. Does local law materially impede or destroy a state interest? ii. Yes, if a statute forbids what the state allows or vice versa. 	3. Yes. The State had enacted significant regulations governing the fracing process. The ban rendered these regulations superfluous.

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Fleck v. Missouri River Royalty Corp.,

872 N.W.2d 329 (N.D. 2015)

- *Clifton v. Koontz* (Tex. 1959) test adopted to determine production in paying quantities.
 - (1) Whether the well yielded a profit over operating costs over a reasonable period of time.
 - (2) Whether a reasonable and prudent operator would continue to operate the well in the manner in which the well was operated based on the facts and circumstances.

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Vogel v. Marathon Oil Co.,

879 N.W.2d 471 (N.D. 2016)

Vogel brought claims against Marathon for royalties on flared associated gas.

N.D. Century Code 3808-06.4

Producer must pay royalties on flared gas in violation of this Section. The Commissioner may enforce the section and determine royalties owed. The Commissioner's determination is final

No private right of action. Go to the Commission and exhaust administrative remedies.



Vogel v. Marathon Oil Co., 879 N.W.2d 471 (N.D. 2016)

Vogel brought claims against Marathon for royalties

**N.D. Century Code
3808-06-1**

Producer must pay royalties on flared gas in violation of this Section. The Commissioner may enforce the section and determine royalties owed. The Commissioner's determination is final

N.D. Environmental Law Enforcement Act

... the appropriate statute ... may bring an action in the appropriate district court ... to enforce such statute."

Remedies are cumulative, but still go to the Commissioner first.

And your common law remedies are displaced by statute.



Vogel v. Marathon Oil Co., 879 N.W.2d 471 (N.D. 2016)

Vogel brought claims against Marathon for royalties on flared associated gas.

I concur, but if there was a lease, the plaintiff shouldn't have to go through the Commissioner.

I dissent. The ELEA clearly provides a private remedy. And the majority doesn't understand the meaning of a cumulative remedy.



Amer. Nat. Res., LLC v. Eagle Rock Energy Partners, L.P.,
374 P.3d 766 (Okla. 2016)

Question: Does an AMI with an unlimited term in a letter agreement violate the Rule Against Perpetuities?

Producers Oil v. Gore (Okla. 1980)

- Preemptive in JOA.
- Termination of lease underlying terminates.
- Rule not applied.

Melcher v. Camp (Okla. 1967)

- Separate right of first refusal agreement.
- Applied to previously unleased property that might be leased in the future.
- Only one party held the right.
- Rule applied