The Register

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President's Message

Dear Members,

Has Spring Sprung? We have enjoyed some beautiful weather over the last couple of weeks. Personally, and I am sure many of you would agree, a welcome change. I am thankful for the sunshine! It is my hope that everyone is still staying busy with fruitful projects and ventures. Despite current natural gas prices of $1.62, just this past week I heard of two different companies staffing a few new projects in the Ark-La-Tex.

Thank you to all who attended the 2024 ALTAPL Educational Seminar at the Petroleum Club. We were just shy of 100 participants. Thank you very much to each excellent speaker: John Kalmbach, Drew Burnham, Robert Reynolds, Pat Ottinger, Jimmy Sledge, Patrick Schenkel, Michael Brassett, Taunton Melville, and David Hankins. We are truly thankful and grateful for your generous contributions and dedication to our association and seminar. We were educated about recent developments in the Ark-La-Tex, lithium, clauses in the oil and gas lease, carbon capture, estate planning, the Haynesville Shale completion process, and Ethics.

Please join me again in expressing gratitude and appreciation for Educational Seminar Chairman, Cody Channell and his committee, Mike Hernandez, and Chad Sepulvado. Special thanks to Rebecca Pittman for technology coordination, and to Marie Vanderlick for photography. Thank you to everyone who contributed to make this seminar yet another success.

Thank you to all seminar sponsors: Bradley Murchison, Cook Yancey, James R. Sledge, CPL, LLC, Kean Miller, Roca Land & ROW, CMN Title & Acquisitions, LLC, Blanchard Walker, Poljak Group Wealth Management, Maven Royalty Partners, Louise F. Pearce-Attorney at Law, LLC, EnSight IV Energy Partners, LLC, Cypress Energy Partners, LLC, Law Office of Paul L. Wood, LLC and W.A.L.T Services, LLC, Marlin Exploration, LLC and Donner Properties. I hope you were able to join us for the cocktail reception hosted by Seabaugh & Sepulvado.

Registration is now open on our website for the Past President's Dinner on Monday, March 4th at the Petroleum Club, where former Louisiana State Senator, and ALTAPL President (1982-1983), Mr. Robert Mills will speak.

Past President's you are cordially invited to join us for a complimentary dinner honoring you.

Mark your calendars for Monday, April 8, for our Monthly Membership Lunch featuring a presentation from AAPL President, Brooks Yates, CPL.

Also, don't forget the Crawfish Boil, Friday, May 3rd at Pierremont Oaks Tennis Club. Musical entertainment provided by "SUITE HARMONY" compliments of the SGS!

Thank you all for your continued support of the ALTAPL!

Sincerely,

Adam R. Choate

Adam R. Choate, RPL
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ALTAPL Events

View the interactive ALTAPL calendar online and register for events at https://altapl.org/events.

March 4

ALTAPL Social and Dinner Meeting
Honoring Our Past Presidents

April 8

Monthly Membership Lunch Meeting

AAPL Events

See more at https://learning.landman.org/calendar.

Date	Event	Location
3/6/2024	Structuring a Deal: Negotiation Strategy and Technique	Webinar
3/12/2024	Royalty Deductions	Webinar
3/13/2024	Consent to Assign and Preferential Rights	Webinar
3/26-28/2024	AAPL RPL/CPL Certification Exam Review	Ft. Worth, TX
3/27/2024	Evolving Electricity	Webinar

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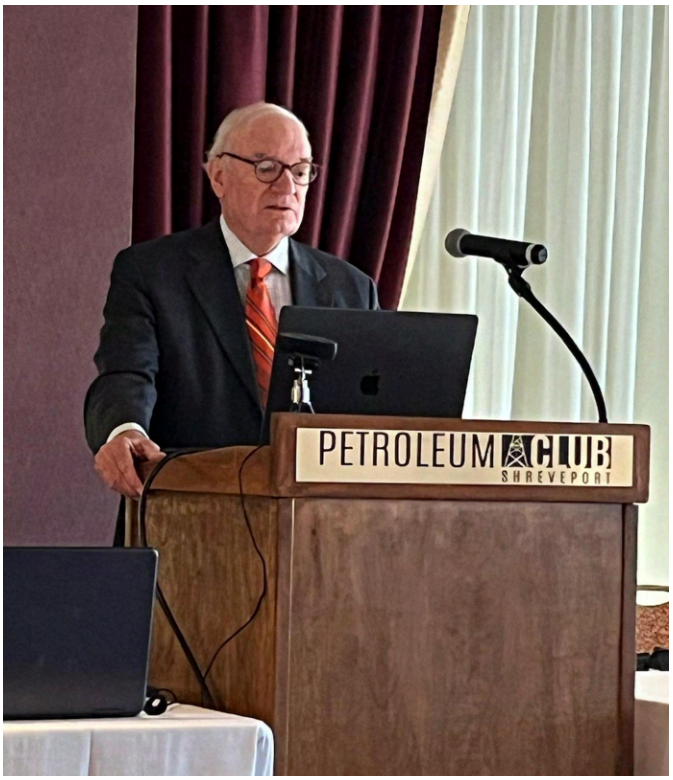
Pictures from the 2024 Educational Seminar

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The Ark-La-Tex Association of Professional Landmen is a non-profit organization operated by its membership for mutual benefit to further the knowledge and interests of Professional Landmen, and to better acquaint the public with the scope of the Landman's work.

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Contributions from our readers are welcome.

All suggestions and manuscripts should be mailed or emailed to the editor. We reserve the right to edit all material according to standard practices.

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Letter From the Editor


Drew Burnham

Happy Spring, Readers!

At least it feels like Spring already. I hope you've been enjoying the lovely weather we have been having and are having a great start to March. May your allergies be mild this pollen season.

I will count the Educational Seminar held on February 23 as a great success! Thanks to Cody Channell and his team for their hard work to make that event happen. While at the Seminar, I learned that my partner here at Cook Yancey, Bill Fleming, had passed away during the night. As did many of you, I of course knew Bill as a pillar of the oil and gas community here, but also as a kind and gracious man. Throughout my career I have often made the short trip up to his office to ask him questions relating to oil and gas title, SONRIS, or the DNR, and he always was generous with his time and wisdom, and usually had a story to tell as well. He will be greatly missed at our firm, and in our oil and gas community. Please join me in praying for peace and comfort for his family and friends.

This month we have the final part of a two-part series on 2023's most important oil and gas cases from Texas, courtesy of the attorneys at Gray Reed. Additionally, Ken Womack has, again, generously written a great article on local and international oil and gas news. Xingwen Chen at ABCD GIS Mapping, LLC has sent data on local development activities, located at the end of the Register.

As always, if you would like to write an article for an upcoming Register, or have an idea for an article that you would like me to investigate and write, I would love to hear from you. Please don't hesitate to reach out to me at drew.burnham@cookyancey.com or 318-227-7754. I greatly appreciate all who have contributed this year to the Register.

Thanks,
Drew Burnham
Editor

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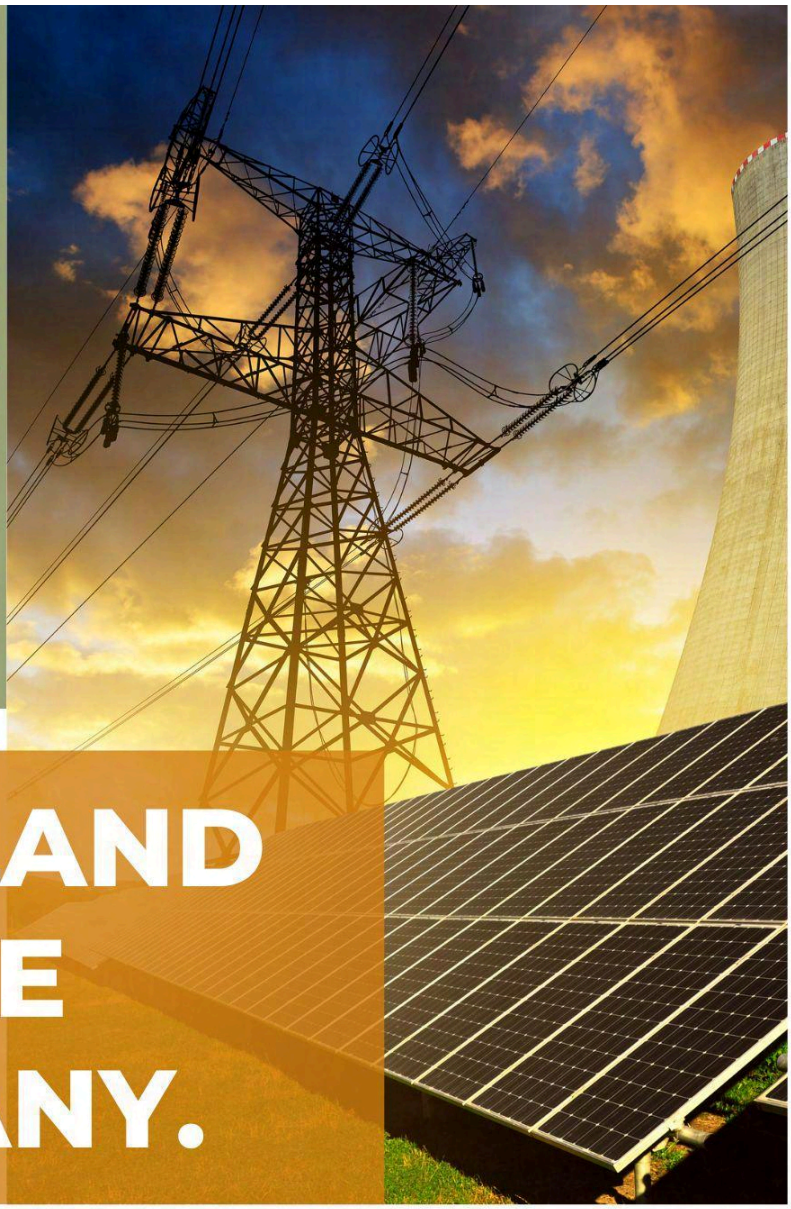

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Ken's Corner

Ramblings, Rig Counts, Prices, And Items of Local Interest

When I get to the bottom I go back to the top of the slide

Where I stop and I turn, and I go for a ride

Till I get to the bottom, and I see you again…

© John Lennon, Sir Paul McCartney, CH, MBE. 1968

ALTAPL members,

Here we are again, (hopefully) at the bottom of the rollercoaster. On February 15, 2024, natural gas spot prices closed at $1.58, after almost reaching $10 just 18 months ago. The lowest close in this writer's memory was $1.05, in December of 1998. After a brief run past $10 in December of 2000, we saw another collapse in January of 2002 down to $2.02. It was about this time that we saw gas prices rise steadily as demand outpaced supply until the advent of widespread horizontal drilling and hydraulic fracturing. With these technological advances came the wild ride that is the state of the natural gas business today. April 2012 saw gas plummet to $1.82 and in March of 2016 we found the floor again at $1.49. Finally, on September 21, 2020, spot prices hit $1.33, the third lowest daily close in 26 years.

Record production levels, more unseasonably warm weather, and our old friend associated gas are mostly to blame for the recent downturn in prices. Associated gas is gas that is incidental to the production of oil. Since 2022 we've seen associated gas production rise from 6% of overall natural gas production to 15% in the most recently available reports. Many years ago, when these downturns happened we took our call compasses and Allen scales westward on that pilgrimage to Pecos we all hope never to repeat. Passing through Midland, flares were to be seen everywhere, even in the median of I-20. Gas that was then a nuisance has now been monetized with pipelines flowing from Reeves County into Mexico and to the Gulf Coast.

Ken's Corner *(continued)*

Colorado State Senator Sonya Jaquez Lewis of Boulder County plans to introduce legislation that would ban new oil and gas exploration in the Centennial State by 2030. Details are sketchy as yet but the former pharmacist's website bio states: *"I met my wife Allison in Boulder. She has also found a way to help those in need in her job as hospice nurse. Together we live on a small farm off unincorporated Longmont that reminds me of my summers in San Luis. Unfortunately, our dream home is under threat by something many families in our community are facing. Last year we received a letter from the oil and gas company Crestone Peak Resources stating their intent to put a massive, multi-well production pad 500 feet from our home. We were forced to sell our minerals due to an antiquated Colorado law called Forced Pooling. We were told there was nothing we could do. Instead of moving or just accepting our fate, we organized…"*

CenterPoint Energy recently announced the sale of its Louisiana and Mississippi assets in a deal reportedly worth 1.2 billion dollars. The buyer, Bernhard Capital Partners, a private equity management firm established in 2013, receives a pipeline network of about 12,000 miles that serves a customer base of 380,000 metered customers. CenterPoint CEO Jeff Wells said the deal "…will allow us to optimize our portfolio of utility operations and efficiently recycle approximately $1 billion in after-tax cash proceeds into our service territory…"

As mentioned earlier, natural gas prices have crashed to about $1.60 per MMBtu at the time of this writing in late February, about 80 cents (nearly 1/3) off from last month's report. The 52-week extremes for natural gas prices were $1.58 and $3.58. On that same day in late February, West Texas Intermediate Crude Oil closed at $78.44, relatively unchanged from a month ago. Natural gas futures strips for the next 12 months range from $1.75 for April delivery, up to $ 3.68 for January 2025, then dip slightly to 3.17 for March 2025. That same range for crude oil futures shows a gradual slide to $72.27 in March 2025.

Drilling activity in our area has again slipped slightly from our last report. As of the fourth Friday in February, and according to Baker-Hughes, 52 drilling rigs were running in the Ark-La-Tex area (down 1 from last report). There were 31 rigs running in North Louisiana (up 3 from our last report). In East Texas, 19 rigs were running in Railroad Commission Zone 6 (the easternmost zone, down 3 from our last report), and 2 rigs were running in Zone 5 (the westernmost zone of East Texas down 1 from last month). As has been the case for years, no rigs were reported running in Arkansas or Mississippi. The total (onshore and offshore) U.S. rig count was 626, up 5 from last report. Fourteen offshore rigs were working in Louisiana's coastal waters, same as last report. There were 4 rigs running in the coastal waters of Texas, up 1 from our February report.

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- Comfortable cold-calling
- Proficient with Microsoft Office applications including Word and Excel
- Entrepreneurial and highly motivated
- Ability to work independently

Ken's Corner *(continued)*

Hats off to the ALTAPL Directors for yet another well run seminar. I would like to express my gratitude to said board, and especially Adam Choate and Drew Burnham for allowing me to still be a part of this great organization of ours.

That's all for this month, I hope to see you all at the past-president's meeting, in the evening on Monday, March 4, at the P Club. Robert Mills, a past president himself, will speak.

Ken Womack, CPL
Independent Landman
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Top Ten Texas Oil & Gas Cases of 2023 – Part 2 of 2

By Charlie Sartain, Philip Jordan and Tiffany Taylor, Gray Reed

This is the installment of the two-part series discussing significant oil and gas decisions from Texas state and federal courts in 2023. This article is not intended to be a strict legal analysis or complete discussion of all effects of each case, but a useful guide for landmen in their daily work.

6. *Railroad Commission of Texas v. Opiela*, No. 03-21-00258-CV, 2023 WL 4284984 (Tex. App. — Austin, June 30, 2023).

Issue

Did a Railroad Commission final order granting a drilling permit for a production sharing agreement well in Karnes County comply with the Texas Administrative Procedure Act?

Facts/Events/Transactions

A well was permitted as a PSA wellbore after the previous operator had permitted it as an allocation well. The plaintiffs in their oil and gas lease did not consent to pool their lease, sign a PSA or ratify a pooled unit. In a contested hearing before the commission, the examiners recommended that the commission find that it had authority to grant drilling permits for wells on tracts covered by PSAs. The commission agreed and lessors sued.

Result

Where did the 65% rule come from? The court traced the commission's authority to a 2008 minute entry in which two of the three commissioners approved a permit while directing staff that wells that are permitted based on PSAs should be approved when the operator certifies that at least 65% of the working and mineral interest owners in each component tract have signed a PSA. That announcement did not say that multiple different PSAs could be signed or that other documents, such as a lease pooling clause, could be the equivalent of a PSA for purposes of the 65% threshold.

Pooling and PSAs

The court examined the relationship between pooling and PSAs and determined that the assertion by the operator, Magnolia, of the right to drill under a PSA did not infringe on the anti-pooling clause in the Opiela lease. The commission ignored the anti-pooling clause as irrelevant to the well permit, concluding that a permit for horizontal drilling under a PSA is not pooling under Texas law and thus the lease's anti-pooling clause was not implicated.

RRC Authority Over Title and Contract Questions

The court affirmed that the commission does not have the authority to adjudicate questions of title, rights of possession or matters of contract when it grants a drilling permit. The commission's conclusion that Magnolia made the requisite showing of a good faith claim of right to operate the well rested on satisfaction of the 65% threshold that is not found in the Texas Administrative Code.

Is a PSA Required?

The evidence showed that only 15.625% of the interest owners signed a PSA. The other written agreements Magnolia relied on included consents to pool and pooling ratifications. Substantial evidence did not support a finding that 65% of the interest owners signed a PSA.

Even while granting deference to the commission's expertise in regulating the industry, the court was not persuaded that a consent to pool can substitute for a PSA absent a good faith showing that consents and the PSAs call for the same sharing of production for a well across tracts that are not pooled. Magnolia did not so certify, and the commission did not make such a finding. The definition of a PSA from the commission's 2019 Form P-16 allows proof of a PSA to include certification that 65% of interest owners have signed an agreement as to how proceeds will be divided. But Magnolia's permit was based on applications predating that definition. Neither the form nor the instructions used to complete the application contained the expanded definition of the agreements that would make a 65% threshold.

The court reversed the trial court in part and affirmed in part:

- It reversed the judgment that the commission erred in concluding that it had no authority to review whether an applicant seeking a permit has authority under a lease or other relevant title documents.
- It reversed the judgment that the commission erred in failing to consider the pooling clause of the lease in deciding that Magnolia had a good faith claim to operate the well.
- It affirmed the judgment that the commission erred in finding that Magnolia showed a good faith claim of right to drill the well under the 65% rule.
- It remanded the case to the commission for further proceedings to determine whether the well may properly be permitted as an allocation well.

The court acknowledged the 65% rule may be in violation of the Texas Administrative Procedure Act but does not definitively hold that it is in violation.

Dissent
Justice Kelly would conclude that an operator's certification that the requisite owners from each tract have agreed on how production would be shared, when supported by signed agreements, is sufficient to show a good faith claim to operate. Because royalty calculations are specific as to each lease, the exact share or method for dividing proceeds under any particular agreement is immaterial. He would resolve whether the 65% threshold standard complies with the APA.

7. *Permico Royalties LLC v. Barron Properties Ltd*, No. 08-22-00168-CV, 2023 WL 4442007 (Tex. App. — El Paso, July 10, 2023).

Issue
Did a nonparticipating royalty interest reserved in a 1937 deed result in a fixed percentage of royalty or royalty that floated with the current oil and gas lease?

Facts/Events/Transactions
Permico, successor to grantors in a 1937 deed for a tract of land in Ward County, argued that the NPRI reservation was of a 1/2 floating royalty. Barron, successor to grantee and owner of the mineral estate subject to the reservation, claimed that the deed reserved a 1/16th fixed royalty.

Grantors reserved "a one-sixteenth (1/16) free royalty interest (being 1/2 of the usual 1/8th free royalty). … And the Grantors … shall be entitled to receive 1/16th of the oil and/or gas produced, saved and sold from said land, being 1/2 of the usual 1/8th royalty therein."

In dueling motions for summary judgment, the trial court denied Permico's motion and granted Barron's, ordering that Permico take nothing.

Result
The Court of Appeals reversed and rendered judgment that the deed reserved a 1/2 floating royalty.

The Double-Fraction Question and the Usual Doctrines
The court cited *Hysaw v. Dawkins*, 483 S.W.2d 1 (Tex. 2016). Under the "legacy of the 1/8th royalty," use of "1/8th" has a special meaning. In deeds of that era, the parties had an erroneous belief that a royalty in a lease would always be 1/8th. The fraction was used as a placeholder for future royalties generally. It was "shorthand" for what the mineral owner believed was the entire royalty a lessor could retain under a mineral lease. The fraction had no mathematical value.

The court then addressed the estate misconception doctrine recognizing that in that era mineral owners erroneously believed that they only retained a 1/8th interest in their mineral estate after leasing for a 1/8th royalty, citing *Van Dyke v. Navigator Group*, 668 S.W.3d 353 (Tex. 2023), reh'g denied.

Barron urged the court to reject the legacy doctrine, arguing that it is incorrect to presume that all mineral interest owners at the time believed that their royalty interest would always be 1/8th. By the 1930s, oil and gas leases existed providing for royalties other than 1/8th. The court responded that *Van Dyke* shows continued reliance on the legacy doctrine.

Barron also argued there was no need for the legacy doctrine because there were no inconsistencies in the deed that required harmonization of provisions.

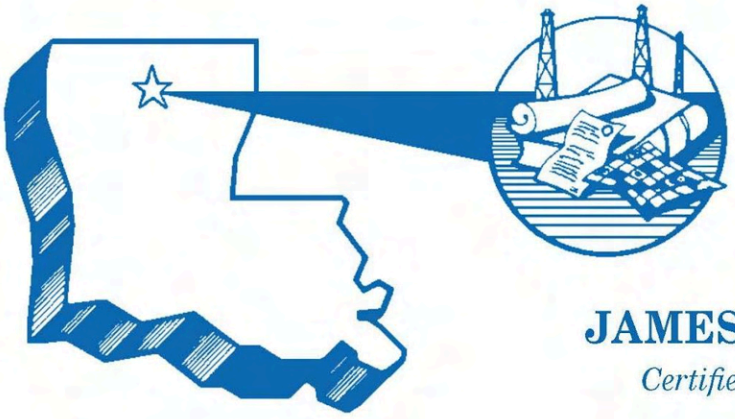
The court responded: That is not true here, but even if so, *Hysaw* says the courts can use the doctrine even if there are no internal inconsistencies. Under the estate misconception doctrine the use of a double fraction created the rebuttable presumption that the parties intended to use the 1/8th as a placeholder for the grantor's entire mineral estate.

Barron also urged the court to ignore the double fractions as nonessential to the deed, and therefore to grantor's intent, because the double fractions were in nonrestrictive clauses. The court rejected that assertion as taking a grammatical argument to an extreme. Applying grammatical rules may be helpful in interpreting a deed, but the focus is still on harmonizing the provisions of the entire deed.

If grantors had meant to reserve a fixed 1/16th royalty interest, there would have been no reason for them to use the double fractions in not one, but two clauses. The only way to give meaning to all of the deed's provisions was to apply the legacy doctrine and find that grantors' use of the 1/8th fraction was a placeholder.

The deed consistently demonstrated the parties' intent to reserve a 1/2 floating royalty interest given its repeated use of the "usual 1/8th royalty" in the double fraction describing that interest.

JAMES R. SLEDGE, CPL, L.L.C.



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Professional Land Services in the Ark-La-Tex

8. *Cactus Water Services LLC v. COG Operating LLC,* 676 S.W.3d 733 (Tex. App. — El Paso, July 28, 2023)

Issue
Is produced water groundwater that belongs exclusively to the surface owner or is it oil and gas waste that belongs to the operator or others making a beneficial use of such produced water?

Facts/Events/Transactions
Along with its rights under oil and gas leases, COG has agreements with surface owners giving it the right to gather, store and transport oil and gas waste; lay lines on the surface for fresh water and produced water; and lay pipelines for transportation of oil and gas, produced water and other oilfield-related liquids or gases. Under the leases COG is not allowed to sell produced water to third parties for off-premises use.

The surface owners granted Cactus Water the right to own and sell all water produced from oil and gas wells on the property, defining "water" as all water produced from geologic formations.

COG sued for declaratory judgment that it has the sole right to the produced water by virtue of its leases and surface use agreements and common law. Cactus Water counterclaimed that it had ownership of produced water under its own agreements.

Result
A divided Court of Appeals answered the question by concluding that the oil and gas producer prevails over the purchaser of the surface owner's right to own and sell produced water.

The majority discussed the composition of produced water, which has harmful substances that present a danger to the surrounding environment. Historically, it was disposed of as an expense to the producer, but recent water treatment technologies have made what was once a cost for operators into a new industry in which treated wastewater can be sold back to operators.

Regulations
The regulatory scheme governing handling and disposing of produced water includes these provisions:

- Texas Natural Resources Code § 91.1011: Oil and gas waste includes salt water and other liquids.
- TNRC §122.001(2): Fluid oil and gas waste is water containing salt or other mineralized substances from hydraulic fracturing, including flowback water, produced water, etc.
- Water Code §27.002(6): Oil and gas waste includes salt water, brine and other liquid or semiliquid waste material.
- 16 Texas Administrative Code §3.8(a)(26): Oil and gas waste includes salt water, other mineralized water and other liquid waste material.
- Water Code §27.002(8): Fresh water means water having properties that make it suitable for beneficial use.
- Water Code §35.0029(5): Groundwater is water percolating below the surface.
- 16 TAC §3.8(a)(29): Surface or subsurface water is groundwater, percolating or otherwise.

The majority concluded that in the regulatory lexicon, produced water cannot be groundwater. There is a clear distinction in the law between the two. And industry practice characterizes produced water as oil and gas waste rather than groundwater.

Given the legal framework, produced water is categorized within the former and places the burden of safe disposal on operators. For years operators have had the rights and duties associated with processing, transporting and disposing of oil and gas waste, including produced water.

COG's leases were executed before the parties saw produced water as having value. The majority concluded that parties' knowledge of the value or even the existence of a substance at the time a conveyance is executed is irrelevant to its inclusion or exclusion from a grant of minerals.

Dissent
The dissenting justice made these unsuccessful arguments:

- Water recovered from operations was not conveyed by the leases' granting language. It is well settled that groundwater is part of the surface estate that can be severed and conveyed similar to the mineral estate.
- Characterizing produced water as waste does not automatically make it subject to the granting clause in the leases. Under case law, even deep, mineralized water produced from a well belongs to the surface estate and is only transferred by specific conveyance. "Water by any name, even mixed with other substances, still remains water."
- The Texas Supreme Court "has not distinguished between different types of groundwater indicating that some water does not belong to the surface estate."
- The regulatory framework and industry practice should have nothing to do with ownership of produced water. Just because an operator has a duty to dispose of this waste does not mean it has ownership.

9. *Echols Minerals LLC v. Green, Trustee of Donald & Betty Lou Irrevocable Trust*, 675 S.W.3d 344 (Tex. App. — Eastland, August 17, 2023).

Issue
Did the Duhig rule render ineffective a reservation of a nonparticipating royalty interest from a conveyance?

Facts/Events/Transactions
In a 1952 general warranty deed, Haynes et al. conveyed 278.5 acres in the north half of Section 1 to Madison, reserving a 33.25/278.5 nonparticipating royalty interest. The deed stipulated that grantors did not own the minerals in the NW/4 of the NE/4 and the deed did not convey those minerals. There was no reference to a prior 1944 mineral deed conveying half of the minerals to Regan. In 1949 Haynes et al. had stipulated that Roselyn Haynes, a minor, owned 1/6th and the others together owned 5/6ths.

In another 1952 deed, Floyd Haynes, guardian for Roselyn, conveyed to Madison all of Roselyn's right, title and interest in the N/2 of Section 1, described as a 1/6th interest, "subject to all outstanding royalty or mineral conveyances."

Echols claimed an interest through the Haynes et al. grantors for half of the 33.25/278.5 NPRI retained in the 1952 Haynes et al. deed. Defendants Green and Fortis counterclaimed as successors to Madison that the NPRI reservation by Haynes et al. in the 1952 deed was ineffective under the Duhig rule because the Haynes et al. grantors failed to except the 1/2 mineral interest conveyed to Regan in 1944.

The trial court granted summary judgment in favor of Green/Fortis that the reservation was ineffective, applying Duhig.

Result
The Court of Appeals reversed and rendered judgment for Echols. The Duhig rule did not apply.

In *Duhig v. Peavy Moore Lumber Co,* 144 S.W.2d 878 (Tex. 1940), the grantor of a general warranty deed warranted title and reserved half of the minerals. The deed did not mention that a third party owned half of the minerals. Duhig breached the warranty the moment he conveyed the property because he could not both retain half of the minerals and also convey half when the third party owned that half. Duhig was estopped from claiming ownership of the mineral interest he had reserved for himself.

There is a two-part test to determine if *Duhig* applies to a warranty deed that reserves an interest. First, did the grantor convey an interest greater than what he or she possessed such that there is an overconveyance and therefore a failure of title?

If the answer is yes, then under *Trial v. Dragon*, 593 S.W.3d 313 (Tex. 2019), *Duhig* does not apply if the grantor did not own the interests required to remedy the breach at the time of execution. *Duhig* is narrow in scope and confined to the specific facts in that case, say the courts.

The Haynes et al. grantors in the 1952 general warranty deed conveyed more interest in the mineral estate than they owned by reserving a mineral interest. This created a "*Duhig* problem." But there was no remedy available. The exact mineral interest to remedy the grantors' failure of title would be 1/2. They conveyed a 5/6th interest to Madison while they only owned 1/3rd. The Haynes et al. grantors did not own the exact interest to remedy their failure of title.

The court also denied Echols' argument that the 1952 deed on behalf of Roselyn and the 1952 NPRI deed should be read together as a single, unified transaction. The deeds had different grantors, conveyed different interests and had different terms.

A concurring opinion would have read the two transactions together.

10. *Iskandia Energy Operating Inc. v. SWEPI LP*, No. 08-22-00103-CV, 2023 WL 7168241 (Tex. App. — El Paso Oct. 31, 2023).

Issues
In a suit alleging trespass for injection of produced water into the plaintiff's producing formation, were the plaintiff's experts qualified to render opinions, was their testimony based on unreliable foundational data and flawed methodology, and did they fail to rule out possible alternative causes of damage? Did the plaintiff sustain its burden on summary judgment to present more than a scintilla of evidence on causation and damages?

Facts/Events/Transactions
Iskandia produces oil from 100 wells over 5,000 acres from a shallow zone, the Delaware Mountain Group, in the Dimmitt Field in Loving County. SWEPI produces from the deeper Bone Springs and Wolfcamp formations.

Iskandia sued SWEPI for trespass, alleging that Iskandia produces and disposes of less than 6,000 barrels of salt water per day, maintaining equilibrium in the formation, while SWEPI produces more than 110,000 barrels per day, injecting exponentially more salt water than the area would accommodate without adverse effects and injecting salt water into Iskandia's producing zone, "swamping" Iskandia's oil reserves. Iskandia alleged that in some cases salt water spills over the top of the wellheads and makes Iskandia's reserves uneconomic.

The trial court granted SWEPI's no-evidence motion for summary judgment. In considering the motion, the trial court excluded the testimony of two of Iskandia's expert witnesses, Meehan and Bintu, granted the motion and dismissed Iskandia's suit.

Result
The trial court erred in granting SWEPI's motion. Iskandia's only burden was to present more than a scintilla of evidence creating material fact issues. The testimony of Meehan and Bintu was sufficient to create a material fact issue that SWEPI's wastewater damaged Iskandia's wells.

Iskandia's experts, using the reservoir simulation system FracMod, testified that high-pressure high-volume salt water injected into the DMG migrated onto Iskandia's leases and adversely affected the production potential of Iskandia's wells, damaging 15 wells beyond repair and others to varying degrees.

SWEPI argued that Meehan was not qualified, his testimony was based on unreliable foundational data and flawed methodology, and he failed to rule out possible alternative causes of damage. The Court of Appeals discussed each challenge in turn and reversed the trial court.

The court accepted Meehan as qualified by experience and training (see the opinion for details) and applied the Supreme Court's six factors under Rule of Evidence 702 for determining the reliability of scientific expert testimony:

- The extent to which the theory has been or can be tested.
- The extent to which the technique relies upon the subjective interpretation of the expert.
- Whether the theory has been subjected to peer review and all publication.
- The technique's potential rate of error.
- Whether the theory or technique has been generally accepted as valid by the relevant scientific community.
- Nonjudicial uses that have been made of the theory or technique.

The court recognized that reservoir simulations have been used in the industry and litigation for decades and are generally accepted as valid in the relevant scientific community. The court accepted the data underlying the opinions as sufficiently reliable for the expert to form an opinion.

On the substantive issues, the parties disagreed on the elements needed to prevail on a trespass claim. In arguing that Iskandia had no evidence of one or more elements of its claim, SWEPI noted that the Supreme Court of Texas has never recognized a cause of action for trespass based on deep subsurface water migration.

The court noted that in *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W. 3d 1 (Tex. 2008), the Supreme Court made several pronouncements that could affect Iskandia's claim: A trespass against a possessory interest does not require an actual injury to be actionable, and the rules for trespass on the surface of the earth are different from those that apply above or below it.

The court concluded that a trespass claim based on unauthorized interference with a lessee's right to develop minerals was recognized in *Lightning Oil v. Anadarko E&P Onshore*, 520 S.W.3d 39 (Tex. 2017). and *Regency Field Services LLC v. Swift Energy Operating LLC*, 622 S.W.3d 807 (Tex. 2021), as long as the injury is not outweighed by competing interests in the oil and gas context. The parties did not address that question in this appeal.

Causation

Causation in fact was an element of Iskandia's claim. To establish that an event is the cause in fact of damages, the plaintiff must establish that the defendant's act or omission was a substantial factor in bringing about the injuries and without it the harm would not have occurred.

The court determined that, in order to survive summary judgment on the element of causation, Iskandia had to demonstrate exposure of its wells to water originating from SWEPI at levels sufficient to cause the loss claimed by its pleading. Iskandia presented evidence of exposure to excessive amounts of salt water by several means established by its experts.

An expert's failure to rule out other causes of the damage renders his opinion little more than speculation; however, alternative causes need not necessarily be ruled out entirely. The expert's analysis of alternative causes must be sufficient for the fact-finder to reasonably conclude that the defendant's conduct was a substantial factor in causing the injury. Meehan accounted for the plausible alternatives before reaching his conclusions.

Damages
Using the discounted cash flow method to determine the fair market value of Iskandia's property, Meehan calculated the net present value of future cash flows and ultimately calculated Iskandia's damages by comparing the fair market value of the leases in question before and after SWEPI's alleged trespass.

CONCLUSION
We hope this two-part series will help you address the legal issues presented by modern oil and gas activities. As always, if you believe one of these decisions might have a bearing on an action you are about to take or a decision you might make, consult a lawyer.

About the Authors
Charlie Sartain, leader of Gray Reed's energy industry team, is an experienced trial lawyer who primarily focuses on resolving complex energy disputes in Texas and Louisiana through litigation, arbitration and negotiation. His clients include oil and gas producers and investors, midstream transportation operators, and mineral and royalty owners involved in all types of contractual, payment and operational disputes. Sartain is the author and editor of Energy & The Law, a blog focused on exploring critical developments in the energy industry and how they impact clients from a legal and business perspective. He is based in Gray Reed's Dallas office and can be reached at csartain@grayreed.com.

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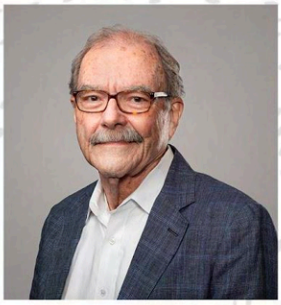

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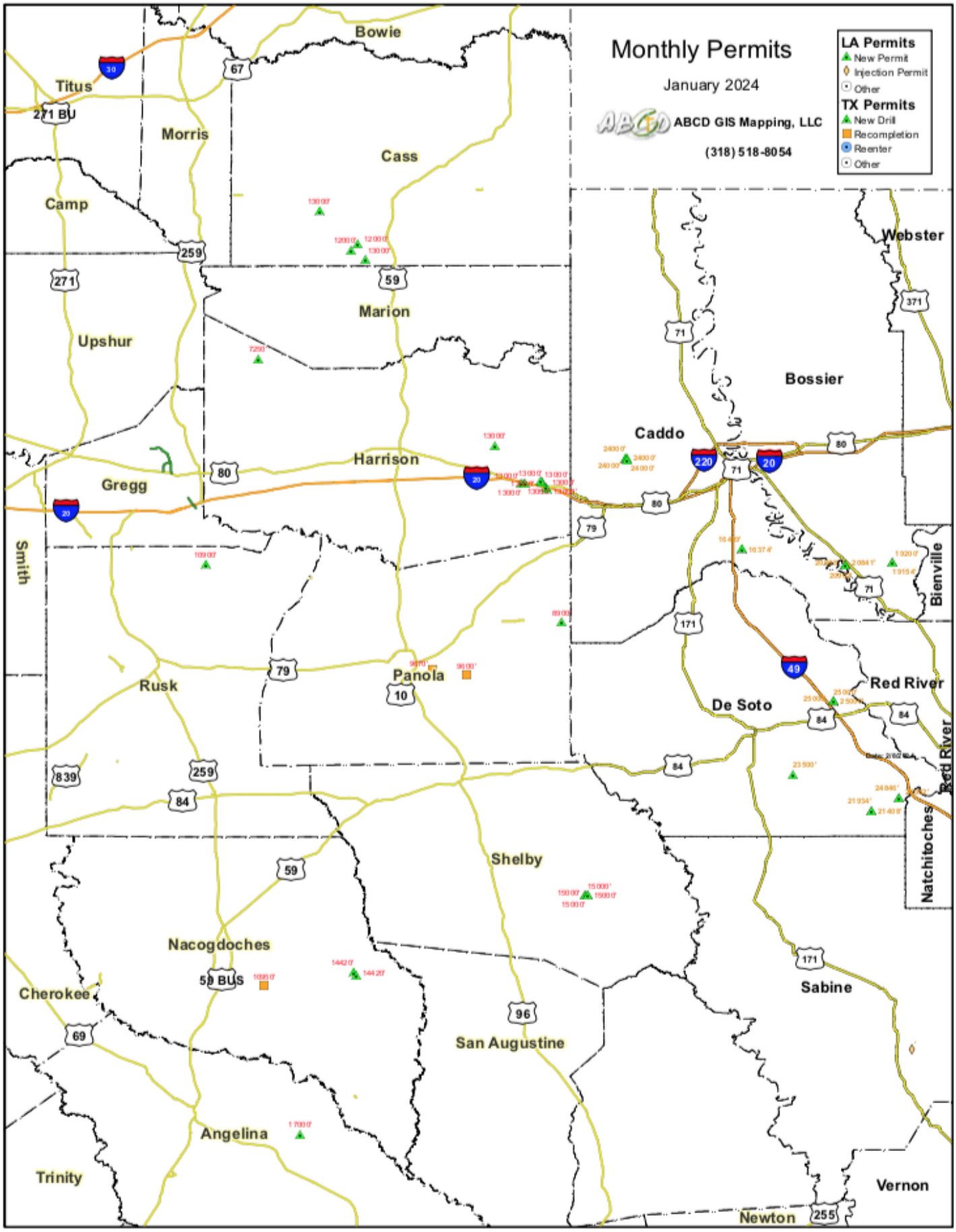
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Louisiana Permits – January 2024

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County	Permit Date	Well SN	Depth
BOSSIER	1/4/2024	254513	20902
BOSSIER	1/4/2024	254514	20841
BOSSIER	1/4/2024	254515	20868
BOSSIER	1/31/2024	254541	19154
BOSSIER	1/31/2024	254542	19200
CADDO	1/3/2024	254511	16439
CADDO	1/3/2024	254512	16374
CADDO	1/4/2024	254518	24000
CADDO	1/4/2024	254519	24000
CADDO	1/4/2024	254520	24000
CADDO	1/4/2024	254522	24000
DE SOTO	1/4/2024	254516	21934
DE SOTO	1/4/2024	254517	21408
DE SOTO	1/9/2024	254524	23500
DE SOTO	1/11/2024	254526	24846
DE SOTO	1/11/2024	254527	24982
DE SOTO	1/31/2024	254535	25000
DE SOTO	1/31/2024	254536	25000
DE SOTO	1/31/2024	254537	25000
RED RIVER	1/30/2024	254538	24000
RED RIVER	1/30/2024	254539	24000
RED RIVER	1/30/2024	254540	23500
SABINE	1/17/2024	976120	0

Texas Permits – January 2024

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App Date	County	API	TD
1/3/2024	HARRISON	20335534	13000
1/4/2024	PANOLA	36538895	8900
1/8/2024	PANOLA	36531964	9670
1/9/2024	HARRISON	20335641	13000
1/9/2024	HARRISON	20335642	13000
1/10/2024	RUSK	40135477	10900
1/10/2024	CASS	06730930	13000
1/11/2024	HARRISON	20335644	13000
1/11/2024	HARRISON	20335645	13000
1/12/2024	SHELBY	41931857	15000
1/12/2024	SHELBY	41931858	15000
1/12/2024	SHELBY	41931859	15000
1/12/2024	SHELBY	41931860	15000
1/12/2024	HARRISON	20335643	13000
1/16/2024	PANOLA	36530635	9600
1/19/2024	HARRISON	20335646	13000
1/19/2024	HARRISON	20335647	13000
1/22/2024	ANGELINA	00530505	17000
1/23/2024	NACOGDOCHES	34733503	14420
1/23/2024	NACOGDOCHES	34733504	14420
1/23/2024	HARRISON	20335648	13000
1/24/2024	CASS	06730931	12000
1/24/2024	CASS	06730896	12000
1/24/2024	HARRISON	20335649	7250
1/25/2024	NACOGDOCHES	34732852	10950
1/25/2024	CASS	06730932	13000

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