HAPL Newsletter

March 1, 2022

"LAND IS THE BASIS OF ALL WEALTH"

IN THIS ISSUE

Register for the luncheon here
Register for the live webcast here

Upcoming Events:

HAPL Events:

March 1
HAPL March Luncheon, Petroleum Club
Speaker: Todd Morgan, Morgan Capitol Consulting

March 8
HAPL Past Presidents Reception & Dinner, Good Co. Seafood

March 15
HAPL Scholarship Applications Due

March 18
HAPL Teacher Nominations Due

March 30
HAPL 23rd Annual South Texas Social, Armadillo Palace

April 5
HAPL April Luncheon, Petroleum Club
Speaker: Tim Duncan, Talos CEO

April 7
HAPL 5th Annual Women's Spring Networking Social, Grotto Downtown

April 26
HAPL 53rd Annual Technical Workshop, Live Seminar & Webinar

April 26
HAPL 20th Annual Rockies Social, St. Arnold Brewery

Other Industry Events:

March 9
AAPL Geothermal Resource Development History & Legal Considerations, Webinar

March 10
AAPL Held by Production and Royalty Issues, Webinar

March 14
AAPL Royalty Deductions, Webinar

March 24
2022 STCL Oil & Gas Career Expo, South Texas College of Law Houston

April 6
AAPL's Code of Ethics and Standards of Practice - II, Webinar

April 21
Texas Energy Council's 33rd Annual Symposium, Dallas Petroleum Club

April 26
SPE-GCS Spring 2022 Energy Professionals Hiring Event, Steve Radack Community Center – Houston, TX

June 15 -18
AAPL 68th Annual Meeting & Conference, Chicago

You can view more events and their details on the HAPL website at www.hapl.org.

HAPL APRIL LUNCHEON & LIVE WEBCAST

APRIL 5, 2022
11:30AM - 1:00PM
PETROLEUM CLUB OF HOUSTON

Speaker: Tim Duncan - President & CEO of Talos Energy Inc.
Topic: "How Independent O&G Companies Can Lead Decarbonization"

Luncheon Registration:
HAPL Members: $35
Non-Members: $40

Price goes up after April 1, 2022.
Register today to get early registration pricing.

Live Webcast Registration:
HAPL Members: $10
Non-Members: $15

AAPL
Powering The Profession

1 RPL/CPL credit will be available.

Register Online

In-Person Luncheon

Registration closes Monday, April 4, 2022 at 7:00 pm

Live Webcast

Registration closes Tuesday, April 5, 2022 at 11:00 am

www.hapl.org

2021-2022 HAPL Officers, Directors & Committee Chairmen

President – Wade Edington, CPL
Surprise Valley Resources, LLC
wedington@surprisevalleyresources.com
713-834-2415

First VP - Amanda L. Van Deusen, CPL
Jackson Walker LLP
avandeusen@jw.com
713-752-4315

Second VP – Vernon Henry
Mineralbox.com
vhenry@mineralbox.com
713-859-8566

Third VP – John Gerrish, CPL
Outrun Resources, LLC
john.gerrish@gmail.com
281-620-3583

Secretary – Claire Morse
Chevron USA, Inc.
morsech@chevron.com
281-536-7119

Treasurer – Kyle Lesak, CPL
Percheron, LLC
kyle.lesak@percheronllc.com
832-300-6400

Assistant Treasurer – Darshan Naik, CPL
ConocoPhillips Company
darshan.m.naik@conocophillips.com
281-647-1849

Immediate Past President – Eric Thomas, CPL
SunCoast Land Services, Inc.
erict@suncoastland.com
337-265-2900

Director – Hunter M. Arbuckle, CPL
EP Energy
Hunter.arbuckle@epenergy.com
713-997-5424

Director – Lacy Clark, RPL
QuarterNorth Energy LLC
Lacy.Clark@qnenergy.com
713-969-1237

Director – Josh Gautreau, CPL
Chevron USA, Inc.
JoshGautreau@chevron.com
713-372-4393

Director – Rob Lee, CPL
Oxy
robert_lee@oxy.com
713-497-2268

Director – Emily McMahon, CPL
Magnolia Oil & Gas
emcmahon@mgyoil.com
713- 842-9084

Director – Briana Pantel, CPL
Widmer Energy Inc.
widmerenergy@yahoo.com
318-834-6860

Director – Chris Shannon, CPL
Bode & Werner PLLC
cshannon@bodewerner.com
713-443-2516

Director – Ash Shepherd
Talos Energy
ash.shepherd@talosenergy.com
713-380-4944

Director – Christine Touchstone, CPL
LeFrak Energy
ctouchstone@lefrakenergy.com
713-302-0042

Director – Lance Young, RPL
Independent
lanceyoung1033@gmail.com
405- 642-9097

AAPL Director, Region IV –
Allyson Howard, CPL
Howard Consulting, LLC
Allyson@Howard-Consulting.net
512-619-1358

2021-2022 HAPL Committee Chairmen

AAPL Awards – Claire Morse
Chevron USA, Inc.
morsech@chevron.com
281-536-7119

Annual Gala – Randi Walsh
Randi L. Walsh Co., LLC
RLWalshCo.LLC@outlook.com
702-686-3807

Co-Chair - Christine Touchstone, CPL
LeFrak Energy
ctouchstone@lefrakenergy.com
713-302-0042

Audit – Kyle Lesak, CPL
Percheron, LLC
kyle.lesak@percheronllc.com
832-300-6400

Company of the Year Nominating Committee - Wade Edington, CPL
Surprise Valley Resources, LLC
wedington@surprisevalleyresources.com
713-834-2415

Executive Night – Daniel Negron, RPL
Chevron USA, Inc.
danielnegron03@gmail.com
972-898-4112

Golf – Darshan Naik, CPL
ConocoPhillips Company
darshan.m.naik@conocophillips.com
281-647-1849

Governmental Affairs – Eric Thomas, CPL
SunCoast Land Services, Inc.
erict@suncoastland.com
337-265-2900

Luncheons – Vernon Henry
Mineralbox.com
vhenry@mineralbox.com
713-859-8566

Membership –Luke McCarley, CPL
Magnolia Oil & Gas
lmccarley@mgyoil.com
713- 842-9083

Mentorship Program – Everett Grossman, CPL
EQT Corporation
Everett.Grossman@eqt.com
412-651-6106

NAPE (Winter/Summer) – Lindsey Griffith
HAPL
hapl@hapl.org
713-622-6868

Newsletter & Website Oversight –
John Gerrish, CPL
Outrun Resources, LLC
john.gerrish@gmail.com
281-620-3583

Offshore Liaison – Ford Peters
W&T Offshore, Inc.
fpeters@wtoffshore.com
713-513-8621

Offshore Seminar – Bailey Fee
W&T Offshore, Inc.
bcoe@wtoffshore.com
713-624-7303

2021-2022 HAPL Committee Chairmen

Outstanding Landman Nominating Committee – Allyson Howard, CPL
Howard Consulting, LLC
Allyson@Howard-Consulting.net
512-619-1358

Outstanding Senior Landman Nominating Committee– Eric Thomas, CPL
SunCoast Land Services, Inc.
erict@suncoastland.com
337-265-2900

Past Presidents Council –
Grant Johnson, RPL
Lone Star Production Company
grant@lonestarproduction.com
713-784-7474

Saltwater Fishing Tournament –
Chris Shannon, CPL
Bode & Werner PLLC
cshannon@bodewerner.com
713-443-2516

Saturday Seminar (Fall) –
Chris McGuirt, CPL
Independent
chrismcguirt@yahoo.com
337-258-6254

Saturday Seminar (Spring) –
Darshan Naik, CPL
ConocoPhillips Company
darshan.m.naik@conocophillips.com
281-647-1849

Scholarship – Ashlee Hansen
ConocoPhillips Company
ashlee.hansen@cop.com
832-486-6022

Service– Mimi McGehee
Independent
mrm1915@aol.com
713-784-0166

Shale Seminar – Jonathan Click, CPL
Click Energy
jt_click@hotmail.com
832-725-9910

Skeet Shoot – Lance Young, RPL
Independent
lanceyoung1033@gmail.com
405- 642-9097

Social (Bridging the Gap) – Hunter M. Arbuckle, CPL
EP Energy
Hunter.arbuckle@epenergy.com
713-997-5424

Social (Gulf Coast) – Lacy Clark, RPL
QuarterNorth Energy LLC
Lacy.Clark@qnenergy.com
713-969-1237

Social (Louisiana) – Joe Chaney, RPL
INPEX Americas, Inc.
joseph.chaney@inpex.co.jp
713-600-2511

Social (Permian Basin) – Katherine Vairin Edwards
Marathon Oil Company
kvedwards22@gmail.com
281- 253-7560

Social (Rockies) – Mark Metz, CPL
Phoenix Energy Advisors, LLC
phoenixenergyadvisors@gmail.com
832-526-2400

Social (Shale Play) – Jonathan Click, CPL
Click Energy
jt_click@hotmail.com
832-426-4386

Social (South Texas) – Joe Dichiara, RPL
Independent
jadichiara@msn.com
713-907-0147

Social (Spring Swing Membership Drive) –
Will O'Neal, CPL
Castex Energy, Inc.
woneal@castexenergy.com
281-447-8601 Ext. 145

Co-Chair - Kris Korte
Texas Petroleum Investment Company
kriskorte@gmail.com
832-485-4348

Social (Women's Networking – Fall/Spring)
Briana Pantel, CPL
Widmer Energy Inc.
widmerenergy@yahoo.com
318-834-6860

Co-Chair - Emily McMahon, CPL
Magnolia Oil & Gas
emcmahon@mgyoil.com
713- 842-9084

Technical Workshop – Amanda L. Van Deusen, CPL
Jackson Walker LLP
avandeusen@jw.com
713-752-4315

Co-Chair – Tegan Wisnosky, CPL
XTO Energy, Inc.
tegan.wisnosky@gmail.com
570-690-2376

Tribute to Education – Bailey Booher, RPL
C.H. Fenstermaker & Associates, Inc.
baileyb@fenstermaker.com
903-243-6606

University Liaison – Michelle Llanes, RPL
Senall Sabres, LLC
mfllanes@gmail.com
281-543-6848

HAPL 23rd Annual South Texas Social

Come join us for BBQ, open bar, and door prizes!

On Wednesday, March 30, 2022, the Houston Association of Professional Landmen (HAPL) will be hosting its Annual South Texas Social from 5:30 p.m. to 9:30 p.m. The social will be held at Goode's Armadillo Palace at 5015 Kirby, which has a terrific dance hall and patio that provides a great networking opportunity.

We are requesting sponsor commitments in advance to reserve this exciting venue! A financial contribution by you or your company will ensure the success of this very special event. All sponsoring companies will be recognized at the event with the company name and level of sponsorship prominently displayed. In addition, the sponsor information will appear in the HAPL newsletter and on social media. The following sponsorship levels are available:

PLATINUM LEVEL: $1,000 or above

GOLD LEVEL: $500-$999

SILVER LEVEL: $250-$499

BRONZE LEVEL: $249 or less

PLEASE CONTACT JOE DICHIARA DIRECTLY TO DISCUSS OTHER SPONSORSHIP OPPORTUNITIES.

2022 HAPL South Texas Social sponsor checks can be made payable to "HAPL" and sent to:

HAPL South Texas Social
c/o Joe Dichiara, RPL
Chairman
713-907-0147
11402 Oak Spring
Houston, Texas 77043
jadichiara@msn.com

Sponsor Online Here

Let us make this another great year!
The success of this event is made possible by your sponsorships!

HAPL 23rd Annual South Texas Social

THANK YOU TO THE FOLLOWING SPONSORS:

Gold:

Surprise Valley Resources, LLC
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Bronze:

Jerry D. Niekamp
Houston Professional Land Training LLC

The success of this event is made possible by your sponsorships!
Please send your logos to Joe Dichiara at jadichiara@msn.com.

HAPL Officer Forum

Eric Thomas, CPL
2021-2022 HAPL Immediate Past President

My friend and associate, Lindsey Griffith (Executive Administrator), noted that this would be my last and final officer forum article. It's a bittersweet moment in truth. It has truly been an honor and a privilege to serve the HAPL for the last (9) years, now serving in the capacity of Immediate Past President. I have enjoyed my experience on the HAPL Executive Board, which has certainly paid BIG dividends by way of friendships, opportunities, and great memories!

And since I already have one foot out of the door, I would like to give you the inside scoop on some HAPL happenings.

DID YOU KNOW:

- **HAPL membership is steadily coming back, now 1,031 strong!**
  - *Encourage your co-workers to join our association, and make HAPL, the largest local association out there!*
- **HAPL has a Smart Phone App!**
  - *Download the HAPL App today to stay up to date on events and more.*
- **HAPL annually recognizes and awards our local Educators!**
  - *Do you know a teacher(s) that goes above and beyond? We want to know!*
    - ***Teacher nominations are due March 18, 2022:*** **(Apply Here)**
  - *Teachers must be secondary education level (Junior, Middle, or High School). Elementary school teachers who work in specialized areas (all sorts of special needs) will be eligible.*
  - *Don't miss this special Tribute to Education Luncheon held on Tuesday, May 3, 2022.*
- **HAPL supports exemplary students of HAPL members through our Scholarship Committee!**
  - *This is perhaps the best-kept membership benefit.*
    - ***Student applications are due March 15, 2022:*** **(Apply Here)**
  - *The student scholarship program was created to recognize graduating high school seniors of current members, and to support qualifying college students enrolled in an AAPL accredited undergraduate program pursuing a career in land management. The student scholarship program provides monetary aid to the selected recipients for their pursuit of higher education.*
- **HAPL Student Memberships are now free!**
  - *Student membership is offered to those students currently pursuing a career in land management at an AAPL recognized university.*
- **HAPL is represented by Austin Lobbyist, Todd Morgan, Morgan Capital Consulting.**
  - *Todd Morgan will be speaking at the March Luncheon, held March 1, 2022*
- **HAPL Honorary Life Membership is extended to past Presidents.**
  - *Honorary Life membership shall be extended to all past Presidents of HAPL.*
  - *Such recipients of the Honorary Life membership shall not be required to pay annual dues and shall be entitled to the same privileges as an Active member.*
- **Life Membership available for $30/annually**
  - *Life membership is extended to any active member of the association upon reaching sixty-five (65) years of age, who retires from his status as being directly, primarily, and regularly engaged as a Landman*

- **How can you get involved?**
  - *We are always seeking assistance with event volunteers, committee chairmen, directors, and more!*
    - ***Reach out to Lindsey Griffith at lindsey@hapl.org to sign up today!***

Lastly, I am happy to report that much like the HAPL, our industry is showing grit and resiliency once again, slowly getting back on its feet after a global pandemic, and arguably the worst (2020) Oil Crash ever. I recently attended the 2022 NAPE Summit, and left feeling optimistic and re-energized after seeing over 6,100 maskless faces in attendance, including so many friends, colleagues, and clients alike!

Similarly, the HAPL will be returning to our regularly scheduled Networking Events and Educational Seminars. Mark your calendars, we have some great sponsorship opportunities coming up quickly.

UPCOMING (do not miss!) EVENTS:

- HAPL South Texas Social – Wednesday, March 30, 2022
- HAPL April Luncheon – Tuesday, April 5, 2022
- HAPL Annual Women's Spring Networking Social – Thursday, April 7, 2022
- HAPL 53rd Annual Technical Workshop – Tuesday, April 26, 2022
- HAPL 20th Annual Rockies Social – Tuesday, April 26, 2022
- HAPL Tribute to Education & Scholarship Luncheon – Tuesday, May 3, 2022
- HAPL 26th Annual Louisiana Social – Thursday, May 5, 2022
- HAPL 33rd Annual Gala – Thursday, May 19, 2022
- HAPL 27th Annual Fishing Tournament – Saturday, June 11, 2022

HAPL Scholarship Applications

HAPL Student Scholarship Applications – Due March 15

HAPL scholarships are available for graduating high school seniors of current members and qualifying college students enrolled in an AAPL accredited undergraduate program pursuing a career in land management. The criteria for applying and online application can be located by visiting our website at http://www.hapl.org/scholarships/.

The fully completed scholarship application, transcript (if required), and two letters of recommendation must be submitted online or received by the HAPL Office located at 800 Bering Dr., Ste. 120, Houston, TX 77057 postmarked on or before March 15. Late or incomplete applications will not be considered.

Scholarship recipients will be honored at the HAPL Scholarship and Tribute to Education Luncheon on May 3, 2022.

For questions, please contact the Scholarship Chairman – Ashlee Hansen at ashlee.hansen@conocophillips.com or 832-486-6022, or the HAPL Office at hapl@hapl.org.

HAPL Tribute To Education - Teacher Nominations

The Houston Association of Professional Landmen (HAPL) Tribute to Education Event is scheduled for May 3, 2022, at the Petroleum Club in Downtown Houston (subject to cancellation/postponement). This event honors local area teachers who have gone above and beyond their normal role as an educator in promoting education, creativity, self-discipline, and motivation to the hundreds of students whom they have touched during their tenure as an educator.

We are accepting nomination submissions for honorees for worthy teacher candidates from our members. **Nominations are due by March 18th**. Please submit your online nominations forms on the HAPL website at https://www.hapl.org/teacher-excellence-awards/.

We are currently seeking sponsors for this event. If you or your organization is interested in being a sponsor, please contact Bailey Booher via e-mail at baileyb@fenstermaker.com or by phone at 902-243-4036 or donate online at https://www.hapl.org/donations/ and select "Tribute to Education Luncheon" from the dropdown menu.

BE SURE TO E-MAIL YOUR NAME OR YOUR COMPANY'S NAME/LOGO AS YOU WOULD LIKE IT TO APPEAR ON THE SPONSOR BOARD TO BAILEY BOOHER ONCE YOU DONATE. COMPANY NAME/LOGOS MUST BE IN BY APRIL 15, 2022.

HAPL Teacher Nominations

PURPOSE:
To acknowledge those teachers who have gone above and beyond in their field of education and have a strong dedication to their work facing the challenges of today. Each recipient will be honored at the Tribute to Education luncheon where they will be allowed to bring a guest at no cost to them or their guests, plaques to display at home and school, and a nice gift basket.

NOMINATIONS:
Landman must be an Active, Life, or Honorary Life member of HAPL (dues current). If the HAPL member has been transferred to Houston within the last three years, said Landman should be a member of HAPL for a minimum of six months and be able to provide proof of membership of the local organization from which they were transferred.

ELIGIBILITY:
- Teachers who work in private or public school systems within the Houston Metro area, this includes North, West, South, East Houston, and the surrounding suburban areas.
- Teachers must be secondary education level (Junior, Middle, or High School). Elementary school teachers who work in specialized areas (autism, special needs) will be accepted. If you are unsure whether or not the educator you have in mind qualifies, send in the nomination.
- Teachers may be related to the nominating Landman. All submittals will be held in strictest confidence.
- Each recipient will be honored at the Tribute to Education Luncheon where they will be allowed to bring a guest at no cost to themselves or their guests. The recipient will receive a plaque to display at home and/or school and a nice gift basket.

RSVP ONLINE HERE

Til Death Do Us Part: Joint Tenancy by Quasi-Estoppel and Revisiting the Wagenschein Decision

By: Brad Gibbs, Eli Kiefaber, Zachary Oliva, Kiefaber & Oliva LLP

In Wagenschein v. Ehlinger, 581 S.W.3d 851 (Tex. App.—Corpus Christi 2019, pet. denied) the Corpus Christi Court of Appeals interpreted a royalty reservation in a warranty deed. The disagreement turned on whether the reservation created a joint tenancy or a tenancy in common. The Court held that all but one of the plaintiffs were quasi-estopped from arguing that the deed created a tenancy in common. This was because those plaintiffs had previously "accepted the benefits" of a joint tenancy. Further, the Court determined that the deed's language was unambiguous and that the parties had intended to create a joint tenancy. Importantly, the Court held that various "words of survival" used in the deed reservation were determinative when concluding that the parties intended to create a joint tenancy rather than a tenancy in common.

Texas recognizes two types of co-tenancies: a joint tenancy and a tenancy in common. A joint tenancy is distinguished by the "right of survivorship." Thus, upon the death of one joint tenant, his interest will automatically vest in the remaining joint tenants (as opposed to passing through inheritance). Under a tenancy in common, a decedent's interest will instead pass to the heirs and beneficiaries of the decedent (as opposed to passing to the remaining co-tenants).

In Wagenschein, the defendants were the surviving members of a group of seven siblings (the "Heirs") who inherited a 241.69-acre tract of land from their parents. In 1989, the Heirs executed a warranty deed (the "Deed") conveying the surface and mineral estates to Harvey and Jane Mueller (the "Muellers"). The Deed included the following reservation (emphasis added):

> THERE IS HEREBY RESERVED AND EXCEPTED from this conveyance for Grantors and the survivor of Grantors, a reservation until the survivor's death, of an undivided one-half (1/2) of the royalty interest in all the oil, gas and other minerals that are in and under the property and that may be produced from it. Grantors and Grantors' successors will not participate in the making of any oil, gas and mineral lease covering the property, but will be entitled to one-half (1/2) of any bonus paid for any such lease and one-half (1/2) of any royalty, rental or shut-in gas well royalty paid under any such lease. The reservation contained in this paragraph will continue until the death of the last survivor of the seven (7) individuals referred to as Grantors in this deed.

In 2006, the Muellers executed an oil, gas and mineral lease with Trinity Energy Services, who subsequently assigned the lease to Pioneer Natural Resources ("Pioneer"). Clara, one of the original seven Heirs, died in 2009, leaving Carol Edwards (one of the plaintiffs) as one of her heirs. In 2010, Pioneer obtained production from its first well on the property and each of the surviving Heirs signed a division order "accepting and receiving their respective shares of what would have been Clara's interest." Id. at *853. Essentially, by executing the division order the Heirs implicitly "accepted" a benefit of the right of survivorship inherent in a joint tenancy. Over the next five years, several more of the original seven Heirs died. "After each death, Pioneer [similarly] distributed the decedent's interest by signed division orders to the then-surviving Wagenschein Heirs." Id. at *853. Thus, in each instance the surviving heirs executed a division order in which their interest was increased consistent with joint ownership.

In 2015, the children of some of the original seven Heirs petitioned the Court to declare that the 1989 Deed created a tenancy in common. These plaintiffs argued that the interests in question should have passed to them through inheritance instead of being divided among the surviving Heirs. The plaintiffs relied on the Deed's use of the word "successor" in claiming that the Deed created a tenancy in common and that they were the intended recipients of their deceased parents' interests. The defendants argued that the 1989 Deed unambiguously created a joint tenancy, and alternatively that the plaintiffs were estopped from bringing their claims because the plaintiffs' parents received the benefits of the deed reservation as joint tenants. Id. at *854.

Under the theory of quasi-estoppel, a party is precluded "from asserting, to another's disadvantage, a right inconsistent with a position previously taken." Id. at *856. In order to prevail on a defense of quasi-estoppel, the party must prove that

(1) the opposing party acquiesced to or benefited from a position inconsistent with the opposing party's present position; (2) it would be unconscionable to allow the opposing party to assert their present position; and (3) the opposing party had knowledge of all material facts at the time of the conduct on which the estoppel is based.

Here, the Court found that all three factors of quasi-estoppel were satisfied. Upon the death of each presumed joint tenant the surviving Heirs received an increase in their respective interest and executed a corresponding division order. To allow the plaintiffs to argue now that the 1989 Deed created a tenancy in common would be to allow plaintiffs to assert a right that was inconsistent with the position taken by their parents. Further, a finding that the Deed created a tenancy in common would certainly be to the detriment of defendants, who would lose a significant portion of their interest if plaintiffs were allowed to assert the rights of a tenancy in common. Such a finding would thus be unconscionable. Finally, because the surviving Heirs signed a division order each time, there is no evidence that plaintiff's parents lacked knowledge of the material facts.

Because the Court determined that defendants were successful in claiming the defense of quasi-estoppel, the Court held that all of the plaintiffs except for Carol, the daughter of Clara, were barred from making their claims. Because Clara was the first of the original Heirs to die, Clara (and Clara's daughter Carol as her heir) did not receive the benefits of a joint tenancy. As such, the Court held that Carol was not barred from claiming that the Deed created a tenancy in common and thus considered her claim.

In interpreting a deed, a court will ascertain the intent of the parties from all of the language within the four corners of the instrument, examining and harmonizing the entire instrument to give effect to all provisions so that none will be rendered meaningless. Though plaintiff Carol argued that the Deed's use of the word "successor" indicated the original Heirs' intent to make the interests inheritable, the Court found that such an interpretation would render meaningless the reservation provision of the Deed. The opening and closing statements indicated that the interest was reserved "for Grantors and the survivor of Grantors" and that the reservation would continue "until the death of the last survivor of the seven (7) [original Heirs]." Id. at *858. The Court found that the reservation's language implied that the survivors of the original seven Heirs were the intended beneficiaries of the reservation – not the heirs of the original seven Heirs. Because the Court determined that "successor" and "survivor" could be read as synonymous, a finding that the 1989 Deed created a joint tenancy would allow all of the provisions of the Deed to be harmonized.

Wagenschein was ultimately another study in deed interpretation. It underscored the notion that although there are no magic words that will create a joint tenancy with rights of survivorship, once such joint ownership is established it can have a profound impact on the later disposition of interests. Of greater import was the Court's finding of a joint tenancy by quasi-estoppel. In so finding, the Court necessarily took certain surrounding circumstances under consideration such as the execution of division orders consistent with a joint tenancy. A petition for review of the Appellate Court's decision was denied by the Texas Supreme Court.

Top Ten Texas Oil & Gas Cases of 2021 - Part III of III

By: *Ethan Wood, Gray Reed*

This is the final installment of the three-part series discussing significant oil and gas decisions, in chronological order, from state courts in Texas during 2021. It is not intended to be a strict legal analysis, but rather a useful guide for landmen in their daily work. Therefore, a complete discussion of all legal analyses contained in the decisions is not included.

Opiela v. Railroad Comm'n of Texas, No. D-1-GN-20-000099 (53rd Dist. Ct., Travis County, Tex. May 12, 2021)

Decided May 12, 2021

In this case, an Austin district court determined that the Texas Railroad Commission's final order granting a permit for a PSA well in Karnes County did not comply with the Administrative Procedure Act.

Opiela was the owner of the executive rights under a 637 acre tract of land in Karnes County and 1/4 of the royalty interest. Enervest Operating applied to drill an allocation well across the 637 acre tract as well as two additional tracts (a 175.69 acre tract and a 2.42 acre State Highway tract). Thereafter, the permit was amended to and the proposed well was identified as a Production Sharing Agreement Well. The Opiela lease does not permit pooling, nor did Opiela sign a PSA, a consent to pool or a ratification of any unit. But, 65.625% of the royalty interest owners in the 637 acre tract (together with 68.993% of the owners of the 175.69 acre tract and 100% of the State Highway tract) consented to pool either by ratification, signing a PSA or leasing with a pooling clause.

Opiela filed a complaint with the Railroad Commission against Magnolia (successor to Enervest), claiming that because the Railroad Commission has no formal rules that mention PSA or allocation wells, there is no statutory or administrative authority to issue permits for such wells. Opiela also asserted that allocation wells violate Statewide Rule 26 (which requires that all liquid hydrocarbons be measured before leaving a lease) and Statewide Rule 40 (which requires that pooled units must be established if operators want to combine acreage from separate leases to form a drilling unit). The Commission's Administrative Law Judge and Technical Examiner recommended that the Commission find that it had authority to grant drilling permits and the Commission agreed. Opiela sued for judicial review in the Travis County District Court.

The District Court concluded that the Commission erred by (1) adopting rules for allocation and PSA well permits without complying with the Administrative Procedure Act, (2) applying those rules and issuing well permits for the well, (3) determining it had no authority to review whether an applicant seeking a well permit has authority under a lease or other relevant title documents to drill a well, (4) failing to consider the pooling clause of the lease in deciding whether an operator had a good-faith claim to operate a well and (5) finding that the operator showed a good faith claim of right to drill the well.

The case was remanded to the Railroad Commission for further proceedings. While far from over, this case is notable in that it is the first challenge to allocation wells that has led to a District Court decision. Whether (and to what extent) the Railroad Commission will revise its practices with respect to issuing PSA and allocation well permits remains to be seen.

Broadway Nat'l Bank, Tr. of Mary Frances Evers Tr. v. Yates Energy Corp., 631 S.W.3d 16 (Tex. 2021)

Decided May 14, 2021

In this case with far-reaching implications for the industry, the Texas Supreme Court reversed a lower court ruling interpreting the requirements of Texas' Correction Deeds Statute.

In 2005, Broadway Bank, Trustee of the Mary Frances Evers Trust executed a mineral deed that conveyed mineral interests in DeWitt and Gonzales Counties to John Evers in fee simple. In 2006, Broadway executed a correction deed that attempted to change the interest conveyed to a life estate, but John did not sign the correction instrument. In 2012, John conveyed his interest to Yates.

In 2013, Broadway, John and all of the original grantees of the 2005 deed executed a second correction deed, which again attempted to change the fee interest conveyed to John to a life estate interest. But, the 2013 correction deed was not executed by Yates.

After John died, Broadway sued Yates for declaratory judgment in the probate court. The probate court granted summary judgment for Broadway. Yates appealed. The appellate court looked to the requirements of Texas' Material

Correction Statute (Texas Property Code Section 5.029) and concluded that the 2013 correction deed did not replace the 2005 deed because the successor to the original deed—Yates—did not join in the correction. The Bank appealed.

Because the correction to the 2005 involved changing the amount of interest conveyed (a "material" correction), the correction instrument must comply with Section 5.029, which provides that a correction instrument "must be … executed by each party to the recorded original instrument of conveyance … *or, if applicable*, a party's heirs, successors, or assigns." Thus, the dispute centered on when a party's heirs, successors, or assigns are "applicable" such that they must sign a correction deed. Broad way argued that successors are only required when one of the original parties is unable to sign. Yates argued that the parties who control the property at the time of the proposed correction are the proper parties.

Turning to the rules governing statutory construction, the Texas Supreme Court reasoned that "or if applicable" offered parties a choice between two equally viable alternatives, stating that "a party's heirs, successors, or assigns may be relevant when the original party is unavailable and, in that case, may serve as a substitute." But, the Court also concluded that Yates was not without any protections—the Correction Deeds Statute specifically provides that correction deeds are subject to the protections afforded to bona fide purchasers under the recording statute. Because the appellate court failed to consider whether Yates was protected under the recording statutes, the Texas Supreme Court remanded the case for further consideration.

This case is also notable for its strong dissent by four justices. According to the dissenters, the majority effectively read the words "if applicable" out of the statute, and the Court's holding would allow property owners to be stripped of their land without notice or consent. Until the Texas legislature further amends the Correction Deed Statute, lawyers and landman should look to the original parties to deeds for material corrections but should also seek the ratification of the correction by all successors-in-interest.

BPX Operating Co. v. Strickhausen, 629 S.W.3d 189 (Tex. 2021)

Decided June 11, 2021

In this case, the Texas Supreme Court considered whether acceptance of royalty payments alone was enough to evidence an intent to ratify improper pooling.

Strickhausen leased her interests in a tract of land in La Salle County to BPX's predecessor-in-interest. Her lease expressly prohibited pooling without consent, but despite this prohibition, BPX pooled her tract with others. BPX sent Strickhausen a letter asking her to ratify the unit, and Strickhausen's lawyer contacted BPX to resolve the issue. Multiple offers and counteroffers were made, but no resolution was reached. During this period, BPX began sending Strickhausen royalty checks, which she deposited.

Strickhausen sued BPX for breach of contract (among other claims). In its summary judgment motion, BPX argued that Strickhausen had impliedly ratified the pooling by accepting royalty checks and was therefore estopped from challenging the pooling of her tract. The trial court ruled in favor of BPX, the appellate court reversed, and BPX appealed to the Texas Supreme Court.

Ratification is the adoption or confirmation of a prior act which was not legally binding by a person with knowledge of all material facts. Full knowledge of those facts combined with intent to adopt the unauthorized act is a crucial element. Ratifications can be express or implied. But, a party asserting an implied ratification must show actions that "clearly evidence an intention to ratify."

BPX argued that a lessor's acceptance of royalty alone always amounts to a ratification as a matter of law, citing to recent Texas Supreme Court decisions with similar facts (*Hooks v. Samson Lone Star, LP* and *Samson Expl., LLC v. T.S. Reed Props., Inc.*). But, the Court disagreed, rejecting such a bright line rule in favor of a look at the "totality of the circumstances" to ascertain intent.

In this instance, Strickhausen did deposit royalty checks while her attorney attempted to negotiate a settlement. Because there was production from her tract—*i.e.*, she was not only owed money because of the pooling—Strickhausen knew BPX owed her significant royalties regardless of whether she agreed to pooling. The Court reasoned that she could have viewed the royalty checks as payment towards what was owed to her. Noting that ratification is not a game of "gotcha", the Court concluded that acceptance of royalties combined with the surrounding circumstances did not objectively evidence an intent to ratify.

But, similarly situated parties should note that four Justices dissented in this case. Looking to the fact that Strickhausen knew the royalty checks were calculated based on pooling and

not on allocation principles, the dissent would have concluded that her conduct "conveyed nothing less than her intention to accept the benefits of the pooling and thereby ratify the pooling agreement."

Going forward, lessees should be mindful that acceptance of royalty payments may evidence an intent to ratify, but such actions alone are no guarantee. Also, Lessors should be careful in accepting any benefits under a lease where there is a dispute about pooling provisions.

Stingray Pressure Pumping, LLC In re Gulfport Energy Corp., BR 20-35562, 2021 WL 4026291 (S.D. Tex. Sept. 3, 2021)

Decided September 3, 2021

In this decision from the Federal District Court in the Southern District of Texas, parties to a master services agreement ("MSA") argued over whether a subsidiary who did not sign an amendment extending the term of the MSA was still a party after the original expiration date.

Stingray and Gulfport Energy signed an MSA for oilfield services in October of 2014. The MSA was amended twice in 2016, adding Gulfport Buckeye, LLC (predecessor to Gulfport Appalachia, LLC) as a party. The MSA was amended for a final time in 2018 to extend the term until the end of 2021, but the last amendment was only signed by Stingray and Gulfport Energy.

In December 2019, Gulfport Energy sued Stingray in Delaware state court for breach of contract and Stingray countersued. In November 2020, Gulfport Energy and its subsidiaries (including Gulfport Appalachia) filed for bankruptcy in the Southern District of Texas. In the bankruptcy proceedings, Stingray filed proofs of claim against both Gulfport Energy and Gulfport Appalachia. Gulfport objected to the proof of claim against Gulfport Appalachia, claiming that it no longer remained a party to the MSA after it was extended in 2018. After reviewing the MSA and its amendments, the bankruptcy court held that Gulfport Appalachia was not liable after September 30, 2018—the day it would have ended without the 2018 amendment. Stingray appealed.

Gulfport Energy argued that Gulfport Appalachia was not liable after September 30, 2018 because it was not a party to the 2018 amendment. The court disagreed, finding that after the 2016 amendment, both Gulfport Energy and Gulfport Appalachia represented "Company" and that either party was effectively a "partner" that could bind the other in future amendments. The court also reasoned that without an explicit provision removing Gulfport Appalachia as a party to the MSA, it remained in the agreement and was bound by the 2018 amendment. The district court reversed the bankruptcy court and held that Stingray could pursue its claims against both Gulfport Energy and Gulfport Appalachia that arose after September 30, 2018.

An appeal is currently pending before the U.S. 5th Circuit, but oil and gas practitioners should remember this cautionary tale—don't forget the original terms of agreements when amending them.

Conclusion

We hope this series has helped 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 Author

Ethan Wood, an associate at Gray Reed, advises upstream and midstream energy clients on the entire range of transactions and issues that arise during oil and gas operations in Texas and many states across the country. He has guided clients through a variety of multi-million-dollar deals and other operational transactions,

with a strong emphasis on the acquisition, divestiture and financing of producing assets, private securities offerings, oil and gas leases and joint operating agreements. Ethan is Board Certified in Oil, Gas and Mineral Law by the Texas Board of Legal Specialization.

Ethan also conducts title examinations and renders opinions for producers with drilling operations throughout Texas and coordinates identical activities with local counsel in multiple jurisdictions, including New Mexico, Ohio, Pennsylvania and Oklahoma. As a former independent petroleum landman, Ethan has a unique perspective on the most important aspects of title examination, which allows him to focus on identifying practical ways for landmen to address issues quickly and proactively in the field.

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HAPL Mentorship Program Participant Spotlight

By: Everett Grossman, Mentorship Program Chairman

Ele Stewart – Pecos Solutions

Ele Stewart is an Independent Landman and Business Development Specialist at Pecos Solutions' Houston, Texas location. She grew up in Magnolia, Texas where she participated in track and field as well as UIL Debate. In 2011, Ele graduated with an International Commerce degree from Texas A&M, where she competed in archery, enjoyed recreational Texas BBQ cook-offs, and spent a summer studying abroad in Lima, Peru. After graduating, Ele moved to Shanghai to complete a contract negotiation internship with Chipolbrok.

Following her internship, Ele shifted her career to the energy industry as a Texas-based contract landman. In her current position, she focuses on expanding Pecos' community outreach program, which provides computer science skills to young students at no cost, as well as building the new user base for Pecos' digital public records platform. Ele is an active member of the HAPL and AAPL.

In addition to her community outreach efforts, Ele enjoys challenging herself with the occasional ultra-marathon and taking some time to backpack America's National Scenic trails with her dog Rowdy, a shared interest with program mentor Sara Worsham, CPL who is also an avid outdoorswoman.

More information about the HAPL Mentorship Program can be found online at https://www.hapl.org/mentorship-program/.

HAPL Service Committee

By: Mimi McGehee, Committee Chairman

No matter what team wins the Super Bowl, Christian Community Service Center's clients are always winners in the Souper Bowl of Caring. Hundreds of bags of groceries were donated to CCSC's Emergency Services during the Souper Bowl of Caring 2022 food drive. Thanks to the help of members of HAPL, on Saturday, February 19th the vast majority of these donations were unpacked and put on shelves for distribution to those in need. Those members participating in this event were Michael Mann, Jan Carter, Robert Mongole, Eric Thomas, Diane Snyder, Mimi McGehee, and Wade Edington. Both Wade and Eric brought future landmen with them. CCSC was very pleased with the amount of work these landmen were able to accomplish in one morning.

Christian Community Service Center ("CCSC") is a coalition of churches that assist those who are in need in the an area of town that covers the Sharpstown community to the University of Houston neighborhoods and from the north portion of the Heights to Braes Bayou. The Emergency Services part of CCSC provides pantry stable foods and fresh meat and vegetables to clients living in these areas and assistance with rent, mortgage, or utility payments. For the past two years because of the pandemic, CCSC has been giving two bags of nutritious food to any client who comes in its doors. This agency has long been a recipient of HAPL Service Committee funds.

Service Volunteers Needed!

Please register online at https://www.hapl.org/events/949/ to join the HAPL Service Committee on Saturday, May 7th, for our Final Service Project of the Term!! We will be helping Casa de Esperanza de Los Ninos ("Casa") with some outdoor projects needed in their community. More information about "Casa" can be found online at https://www.casahope.org/.

Current needs include:

- Clean, varnish, coat doors
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To protect the children in the care of Casa, all volunteers must be fully vaccinated against COVID-19 (including booster, if eligible).

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HIGHWAY TO LEASING HELL – A Guide to Determining Ownership and Leasing Minerals Under Texas Roadways[1] (Part I)

By: D. Bradley Gibbs, Kiefaber & Oliva, LLC

I. Introduction

Our firm was once confronted with a question regarding an expired oil and gas lease. The lease had been executed by the judge of an East Texas county commissioner's court and it purported to cover "certain roads and portions of roads" lying within a platted subdivision. The two-part question was (i) how the county came to own (or at least purport to own) the minerals underlying the "roads and portions of roads" in this platted subdivision, and (ii) whether the county judge had the authority to execute a new roadway lease.

It turned out that the county's fee simple roadway ownership originated from broadly worded (and virtually illegible) roadway dedication language contained in a 1956 subdivision plat. But, as explained in more detail below, the county judge was not the proper party to execute the lease on the mineral acreage underlying these roadways.

In another instance, our firm was tasked with determining who owned the minerals under a railroad right-of-way. The original deed was to a railroad company, and the subsequent chain of title involved the railroad's successor-in-interest. It was ultimately determined that the railroad deed was for the surface only, and it thus was necessary to examine ownership on either side of the right-of-way to determine who owned the minerals thereunder.

Following several additional roadway leasing and ownership inquiries, it became apparent that there was some general misinformation on these topics. Further, as attested to by the cases of *BNSF Ry. Co. v. Chevron Midcontinent, L.P.*[2] and the two-part *Crawford v. XTO Energy, Inc.*,[3] issues involving the ownership and leasing of minerals under Texas roadways are still prevalent. This article will discuss common matters related to roadway and mineral ownership, supply some historical context and provide practical guidelines on how to proceed when faced with roadway leasing obstacles. Nonetheless, it is important to remember that this area of law can often be fact-intensive and the outcome will likely vary with each chain of title.

II. State Roadway Ownership & Highway Deed Construction

In Texas there are millions of acres of minerals lying beneath narrow strips of land. These slivers of land often are (or were at one time) roads, highways, railroads, utility easements or other rights-of-way. The minerals beneath these strips of land may be owned by the State of Texas, a railroad company or its successors in interest, a city or municipality, an individual, or by the abutting landowners. As directional drilling has become prevalent, horizontal wellbores often must traverse these strips of land.

Once an oil and/or gas well is drilled nearby, these often-overlooked parcels may suddenly increase in importance and value. They have therefore become a rich source of title disputes and discrepancies across the state. Many of the rules discussed below developed in the context of railroad conveyances, but they apply equally to highway deeds, deeds between individuals and deeds to the State of Texas. Further, these rules apply to both fee simple conveyances and mineral deeds.

A. Roadway (and Railway) Deeds

The State of Texas may own or acquire the minerals underlying roadways in a number of situations. The most obvious authority by which the State can claim ownership is if the minerals underlie state-owned lands such as Public School Lands, Port Authority Lands, lands allocated to the Parks and Wildlife Department or lands claimed by other state agencies. However, the State may also acquire mineral title by a roadway or highway deed, a plat dedication to a county or through its power of eminent domain. Similar principles also apply to railroad conveyances.

Roadway deeds are generally taken in preparation for building a new highway across private lands or in connection with widening an existing road. These deeds may grant an easement only, an interest in the surface estate (expressly reserving oil, gas and other minerals), or they may

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[1] **D. Bradley Gibbs, Partner, Kiefaber & Oliva LLP**. Mr. Gibbs received his J.D. from the University of Houston Law Center in 2011, and is Board Certified in Oil, Gas and Mineral Law by the Texas Board of Legal Specialization. He is licensed to practice law in Texas, North Dakota, Kansas and Wyoming.

[2] *BNSF Ry. Co. v. Chevron Midcontinent, L.P.*, 528 S.W.3d 124 (Tex. App.—El Paso 2017, no writ).

[3] *Crawford v. XTO Energy, Inc.*, 509 S.W.3d 906 (Tex. 2017); *Crawford v. XTO Energy, Inc.*, No. 02-18-00217-CV, 2019 Tex. App. LEXIS 11066 (Tex. App.–Fort Worth 2019, pet. denied).

convey fee simple absolute in the surface and minerals.

Occasionally, a practitioner will encounter a roadway deed in which the grantor likely *intended* to convey the surface or an easement only, but unwittingly conveyed the minerals as well. These conveyances are sometimes the result of imprecise or hasty draftsmanship. In other instances, the parties may not have specifically contemplated ownership of the minerals under the roadway at the time the deed was drafted. Either way, such "inadvertent" conveyances have become the subject of innumerable controversies, and these controversies generally arise once an oil and/or gas well has been planned or drilled near or under the road.

As a preliminary matter, it should be emphasized that in modern disputes involving conveyances of most mineral properties, courts will generally look within the "four corners" of a deed or other conveyance and will attempt to ascertain the intent of the parties.[4] Courts will start by looking at the "granting clause" of the instrument: the section of the deed that contains words of present grant, such as "Grantor hereby grants, bargains, sells, conveys, transfers and assigns unto Grantee[.]"[5] They will then attempt to harmonize the other provisions in the conveyance with the goal of giving effect to the parties' intent.

Conversely, an alternate method of deed interpretation has developed that is specific to roadway and railroad deeds. Historically, two primary canons of construction have been applied to such conveyances to determine intent. The first canon suggests that a granting clause that explicitly grants a "right-of-way" conveys an easement only.[6] The second canon suggests that a granting clause that grants a specific tract of land generally conveys title in fee, often despite subsequent deed provisions referencing a right-of-way. This second canon of construction evolved from the line of Texas cases discussed below.

B. The *Calcasieu* and *Brightwell* Cases

In the early case of *Calcasieu Lumber v. Harris*,[7] the Supreme Court of Texas recognized that railroads *could* purchase or receive land in fee simple.[8] In *Calcasieu*, the granting clause of a deed stated that the grantors therein did "grant, bargain, sell and release to the Houston and Texas Central Railroad Company a strip of two hundred feet of land over the tracts of land particularly described as follows . . ."[9] The granting clause was immediately followed by a description of the conveyed parcel.[10]

An additional clause in the deed stated that the grantor did "hereby grant to said Company a full release from all claims against said Company for damages that may be sustained by their work in the construction and for the ***right-of-way*** of said Railroad, over any of the said lands" (emphasis added).[11] The Supreme Court held that the reference to a right-of-way in the additional clause was "descriptive of the land over which a railway runs" only and did not overcome the language of the granting clause.[12] The railway deed therefore conveyed fee title to both the surface and the minerals.[13]

The background and facts of *Calcasieu* were analogized and described in more detail in *Brightwell v. International-Great N. R.R. Co.*[14] In *Brightwell*, W.J. Brightwell, *et al.* sought to enjoin the International-Great Northern Railroad Company from drilling or permitting to be drilled any well for oil and gas on a portion of the Railroad Company's right-of-way in Rusk County, Texas.[15] Similar to *Calcasieu*, the Supreme Court was faced with a deed containing fee conveyance language in its granting clause, and a passing reference to a right-of-way later in the deed. Essentially, if the deed conveyed fee simple title, the injunction should have been refused. If it conveyed an easement or right-of-way only, it should have been granted.[16]

The *Brightwell* court denied the injunction, holding that *Calcasieu* controlled and that the deed had conveyed to the Railroad Company an estate in fee.[17] More importantly, the court held that the *Calcasieu* decision had "become a rule of property under which titles and securities of immense value have been acquired in this State, and it should not now be disturbed or changed."[18] The holdings of *Calcasieu* and *Brightwell* were subsequently upheld and expanded.

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[4] *See Luckel v. White*, 819 S.W.2d 459 (Tex. 1991).

[5] *See id.*

[6] *Right of Way Oil Co. v. Gladys City Oil, Gas and Mfg. Co.*, 157 S.W. 737 (Tex. 1913).

[7] *Calcasieu Lumber Co. v. Harris*, 13 S.W. 453 (Tex. 1890).

[8] As noted in *Brightwell v. International-Great N. R.R. Co.*, 49 S.W.2d 437 (Tex. 1932), "[i]t is the settled law of this State that a railroad, when it secures its right-of-way by condemnation proceedings, acquires a mere easement, but it may secure and hold a fee simple estate in the land across which it constructs its road."

[9] *Brightwell,* 49 S.W.2d 437, 438 (citing the actual language in the deed under construction in *Calcasieu Lumber v. Harris*).

[10] *Id.*

[11] *Id.*

[12] *Calcasieu*, 13 S.W. 453, 455.

[13] *Id*.

[14] *Brightwell,* 49 S.W.2d 437.

[15] *Id*.

[16] *Id.* at 438.

[17] *Id.*

[18] *Id.*

C. *Texas Electric Ry. Co. v. Neale*

In *Texas Electric Ry. Co. v. Neale*, William F. Neale and E. C. Street sued the Texas Electric Railway Company to quiet title to a 6.06-acre strip of land that had been conveyed for an electric interurban railway.[19] The deed at issue contained the following granting clause: "We Geo. S. McGhee, [*et al.*], do by these presents grant, sell and convey unto Chas. H. Allyn, [*et al.*], the following described piece or parcel of land, to-wit: . . ."[20]

The granting clause was immediately followed by a metes and bounds description of the conveyed parcel.[21] An additional clause stated that "this deed is made as a ***right-of-way*** for an interurban railway from Dallas to Waco, Texas and in case said railway shall not be constructed over said land then this conveyance shall be of no effect" (emphasis added).[22]

The Supreme Court of Texas cited its decisions in *Calcasieu* and *Brightwell* and stated that "a deed which in the granting clause grants, sells and conveys a tract or strip of land conveys the title in fee, even though in a subsequent clause or paragraph of the deed the land conveyed is referred to as a right-of-way." [23] The Court went further to state that "there do appear in the deed words which show the purpose for which the grant is made, but those words do not undertake to reduce or debase what has been granted from a fee title to a mere easement."[24]

Therefore, although the additional clause affirmatively asserted that the deed was conveying a "right-of-way" and conditioned the perpetuation of the grant on the actual construction of the railway, the Court looked at the granting clause in isolation and found that the deed conveyed fee simple title.

Following *Calcasieu, Brightwell* and *Neale*, it seemed that Texas courts were committed to taking a narrow and technical stance on the interpretation of highway and railway deeds. Under these cases, unless the granting clause specifically states that only a right-of-way is being conveyed, or that the minerals underlying the conveyed land are specifically reserved, there is a good chance that the deed passed title to the minerals, whether or not this was the intended effect.

However, as noted above, in recent years Texas courts have trended toward a more holistic approach in interpreting oil and gas conveyances.[25] This trend, coupled with a 2017 opinion out of El Paso, has cast a shadow of doubt on an area of Texas law that for years was considered to be settled. This holistic approach to deed interpretation may merely stand for the notion that if the granting clause of a roadway deed contains an "ambiguity," later descriptors *could* influence a court's interpretation of intent. Or perhaps, in light of recent trends, the strict *Neale* approach will ultimately be laid to rest in favor of the less restrictive four-corners approach of *Luckel v. White* and its progeny.

As noted by the El Paso Court of Appeals in the case discussed below, "*Neale* makes clear that a statement of purpose does not debase what is conveyed in a granting clause if that statement of purpose appears in a *subsequent* clause or paragraph of the deed. *Neale* does not say that a statement of purposes contained *in a granting clause* is similarly unavailing."[26]

D. A Shift Away from *Neale*? – *BNSF Ry. Co. v. Chevron Midcontinent, L.P.*

In *BNSF Ry. Co. v. Chevron Midcontinent, L.P.*, Chevron had struck oil underneath some railroad tracks in Upton County, Texas.[27] In suing for trespass to try title, BNSF Railway Company ("BNSF") argued that a 1903 conveyance (the "1903 Deed") had granted to its predecessor-in-interest a strip of land in fee simple absolute and not merely an easement.[28]

The granting clause of the 1903 Deed conveyed "[for] benefits which will accrue to the party of the first part by reason of the construction of a line of railroad for a *right-of-way* . . . that certain *strip of land* hereinafter described, as the same has been finally located *over, through or across* the following tracts of land situated in Upton County . . ." (emphasis added).[29] The 1903 Deed concluded with a habendum clause stating that the Grantee, and its successors and assigns, "shall have and hold the said premises, together with all appurtenances thereunto belonging, in *fee simple* . . . forever" (emphasis added).[30] The trial court determined that BNSF held only an easement over the land.

In its *de novo* review of the trial court's decision, the El Paso Court of Appeals was tasked with reconciling the grant of a "right-of-way" across a "strip of land" with a reference to a "fee simple" in the habendum clause to determine the actual interest conveyed. In doing so, the Court of Appeals looked to the precedent set by *Calcasieu, Brightwell* and *Neale.*

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[19] *Tex. E. R. Co. v. Neale*, 252 S.W. 2d 451, 452 (Tex. Civ. App.–San Antonio, 1942, writ ref'd).

[20] *Id.*

[21] *Id.*

[22] *Id.* at 453.

[23] *Id*.

[24] *Id*. at 454.

[25] *See, e.g., Luckel v. White*, 819 S.W.2d 459 (Tex. 1991); *Hysaw v. Dawkins*, 483 S.W.3d 1 (Tex. 2016); *Wenske v. Ealy*, 521 S.W.3d 791 (Tex. 2017).

[26] *BNSF Ry. Co. v. Chevron Midcontinent, L.P.*, 528 S.W.3d 124, 131 (Tex. App.—El Paso 2017, no writ)

[27] *Id.*

[28] *Id.* at 126.

[29] *Id.* at 127.

[30] *Id.* at 126.

The Court first recognized that in Texas, the term "right-of-way" is not a legal term of art with a definitive meaning when used in a deed.[31] Rather, it may be used in two senses. First, it may describe a right of passage over a tract belonging to a particular party. Second, it may describe a strip of land that railroad companies take for the construction of their road-bed.[32] The Court next made clear that in Texas, unlike in other states, railroad companies have been permitted by statute to own Texas land outright since at least 1877.[33] The Court thus conceded that it must interpret the specific language of the 1903 Deed.[34]

Chevron and BNSF's conflicting interpretations of the 1903 Deed focused on whether the term "right-of-way" modified and restricted the grant of a "strip of land." The Court of Appeals was not persuaded by BNSF's argument that "right-of-way" was a meaningless descriptive phrase. After all, it reasoned, Texas, unlike other states, does not "indulge a presumption" of creating an easement as a matter of policy.[35]

Subsequently, in a seeming departure from the mechanical *Neale* standard, the Court of Appeals stated that because there was inherent ambiguity in the *granting clause itself*, it must look to the other provisions of the deed in order to ascertain the parties' intent. The Court specifically cited to the seminal deed interpretation case of *Luckel v. White*[36] and stated that:

> We pause to note an anomaly that has emerged in the intervening years since *Neale* was decided. *Neale* emphasizes that we must look primarily to the granting clause when deciding whether a deed conveys a fee estate or an easement. This approach to deed analysis was consistent with a canon of interpretation stating the granting clause specifically overrode any other conflicting portions of the deed. But in 1991, the Texas Supreme Court in *Luckel v. White* walked back from a clause-driven constructional approach, emphasizing that courts should look to all four corners of a document and not place undue, formalistic stock in the value of some clauses over others or the relative location of language. Whether Neale's clause-driven approach to deed construction survived the *Luckel* shift to a four corners approach is an open question. Indeed, it would seem that while *Neale* set out a bright-line test, *Luckel* blurs the line between when language appearing outside a granting clause functions as a non-restrictive recital of purpose or a restriction on the conveyance.[37]

Despite recognizing this jurisprudential shift towards a "four-corners" method of deed interpretation, the Court of Appeals ultimately refrained from applying *Luckel*. It instead held that, even under the *Neale* approach, the ambiguity in the granting clause of the 1903 Deed *itself* required the Court to consider the remainder of the deed.[38] The result was that the Court applied a quasi-four-corners approach it found inherent in *Neale*. Per the Court, this approach is appropriate when there is a perceived ambiguity in the granting clause.[39] The Court was thus able to "thread the needle between the approaches taken by *Neale* and *Luckel* without upsetting decades of railroad deed case law."[40]

In applying this "needle-threading" standard to the 1903 Deed, the Court held that a right-of-way had been conveyed. This, it asserted, was the only reasonable reading of the conveyance based on several persuasive factors. Among these factors were the Deed's use of the phrase "*over* [the lands]" in the opening clause, the repeated use of the words "*right-of-way*" throughout the deed and the use of the words "*through and across*." The Court further relied on a specific grant of the right and privilege to take wood, water, stone, timber and other minerals (rights which would otherwise pass with the fee estate).[41]

One of the more compelling portions of the *BNSF* opinion begins with the Court attempting to reconcile the "fee simple" language in the habendum clause with the creation of a right-of-way only. After

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[31] *Id.* at 129.

[32] *Id*.

[33] *Id.* (citing that certain Act approved Aug. 15, 1876, 15th Leg., R.S., ch. 98 § 23, 1876 Tex. Gen. Laws 141, 147, *reprinted in* 8 H.P.N. Gammel, THE LAWS OF TEXAS 1822-1897, at 980, 984 (Austin, Gammel Book Co. 1898) (granting a railroad company, as a power incident to its incorporation, the rights to "[t]o take and hold such voluntary grants of real estate and other property as shall be made to it in aid of the construction and use of its railway" and "[t]o purchase, hold and use all such real estate and other property as may be necessary for the construction and use of its railway and the stations . . . ").

[34] *Id.* at 130.

[35] *Id.* at 131.

[36] *Luckel v White,* 819 S.W.2d 459 (Tex. 1991).

[37] *BNSF Ry. Co.*, 528 S.W.3d 124, 132 n.7.

[38] *Id.*

[39] *See id.* (citing to *Gulf Coast Water Co. v. Hamman Expl. Co.*, 160 S.W.2d 92, 95 (Tex. Civ. App.—Galveston 1942, writ ref'd) (holding that where the granting clause used ambiguous "property and premises" language that could have conveyed either a fee estate or an easement, the remainder of the deed clarified what was conveyed in the granting clause).

[40] *BNSF Ry. Co.*, 528 S.W.3d 124, 132 n.7.

[41] *Id.* at 133.

seemingly distinguishing *Neale*, the Court next applied *Neale* in order to abandon the habendum clause language entirely. This was done in the apparent light of policy.

The Court maintained that, in the presence of "mixed" deed language, *Neale* still applies and mandates that the granting clause will control when determining the intent of the parties.[42] Although *Neale's* clause-driven analysis is in tension with the current four-corners approach of *Luckel*, the Court elected to apply the *Neale* constructs.[43] The Court thus held that, with regard to railroad deeds:

> The granting clause approach has become a rule of property under which titles and securities of immense value have been acquired in this state, and it should not be disturbed or changed. . . . We will not inject further ambiguity into this already confused area of law. Instead, we summarize our analysis under *Neale* as follows: *Neale* directs us to look at the granting clause to determine what was conveyed. But the granting clause in this deed is ambiguous, which requires us to glean intent from the remainder of the deed. In interpreting the deed under a four corners approach, we will find the deed ambiguous if more than one reasonable interpretation emerges, but if only one reasonable interpretation *persists*, we will render judgment.
>
> Here, when we read just the focus from the granting clause to the deed as a whole, we find that the language evinces a clear intent to convey only an easement. As we explained previously, this is the only reasonable reading of the deed when taking the majority of its provisions together. And while we must endeavor to give every word meaning if we can, *we can also disregard portions of a deed that contradict the overall intent of the deed*. It would be irrational to allow two words in the habendum clause to control the disposition in this case. *So, to the extent the words "fee simple" conflict with clear intent expressed by the rest of the deed, they must be disregarded*. This deed conveys only a railroad right-of-way easement (paragraph break and emphasis added).[44]

Thus, despite its attempt to avoid "injecting further ambiguity into an already confused area of law" by selectively disregarding a "conflicting" portion of the 1903 Deed, the El Paso Court of Appeals may have inadvertently done just that. On the other hand, another interpretation could be that the Court merely took a slightly different path to the same destination. Specifically, the Court ultimately arrived at the conclusion that the language of the granting clause is still the penultimate factor under *Neale*. Thus, under *BNSF*, it could be said that the granting clause still controls unless there is both some ambiguity in the granting clause itself *and* unequivocal evidence of contrary intent in the remainder of the deed.

What remains unclear in light of *BNSF* is exactly how many provisions of a deed can be disregarded if they "contradict the overall intent." At what threshold does "one reasonable interpretation" begin to "persist?" Perhaps the Court is correct in that sometimes a commonsense approach must be taken, and that words that seem clearly out of place "must be disregarded" as surplusage. However, until such time as the Supreme Court provides guidance on this issue, it seems that the tension between *Neale* and *Luckel* will continue to require a needle-threading approach in the context of roadway and railway deeds.

To be continued in the April Newsletter…

About the Author: D. Bradley Gibbs

Bradley Gibbs' practice involves advising clients regarding due diligence, complex mineral titles, pooling issues, lease analysis, joint operating agreements, surface use issues, title curative and general upstream matters. He is licensed to practice law in Texas, North Dakota, Kansas, and Wyoming.

Mr. Gibbs is Board Certified in Oil, Gas and Mineral Law by the Texas Board of Legal Specialization. He is a member of the Oil, Gas, and Energy Resources Section of the State Bar of Texas, the College of the State Bar of Texas, the Oil, Gas & Mineral Law Section of the Houston Bar Association, the Association of International Petroleum Negotiators (AIPN), the American Association of Professional Landmen (AAPL), and the Houston Association of Professional Landmen (HAPL). He received his J.D. from the University of Houston Law Center in 2011 where he was an editor for the Houston Journal of International Law and received multiple awards for excellence in legal research and writing, including the HJIL Writing Award for an Outstanding Comment on a Topic in International Law. He was selected as a Super Lawyers Rising Star and a Top-Rated Energy & Natural Resources Attorney in Houston in 2018-2021.

[42] *Id.* at 135.

[43] *Id.*

[44] *Id.*

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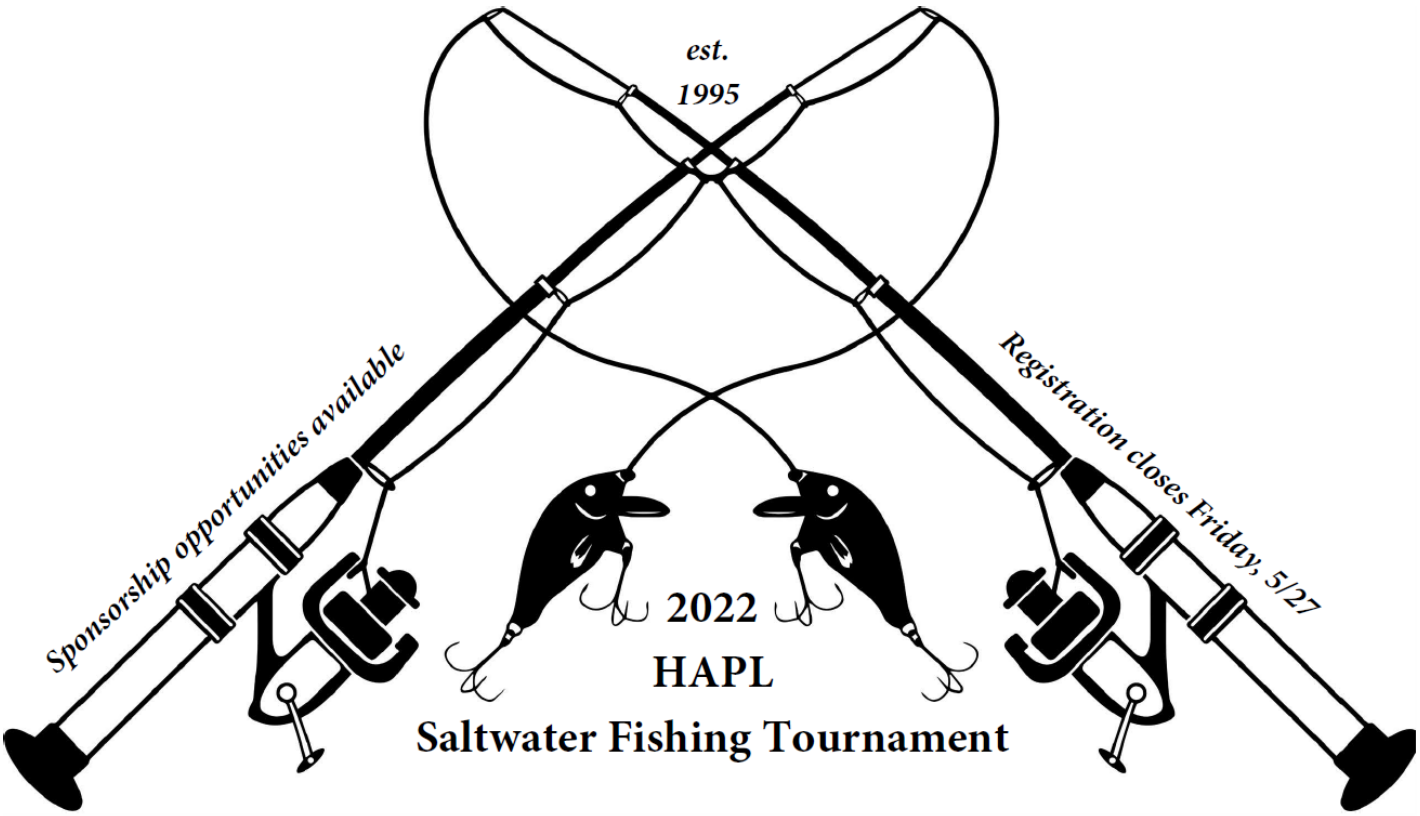

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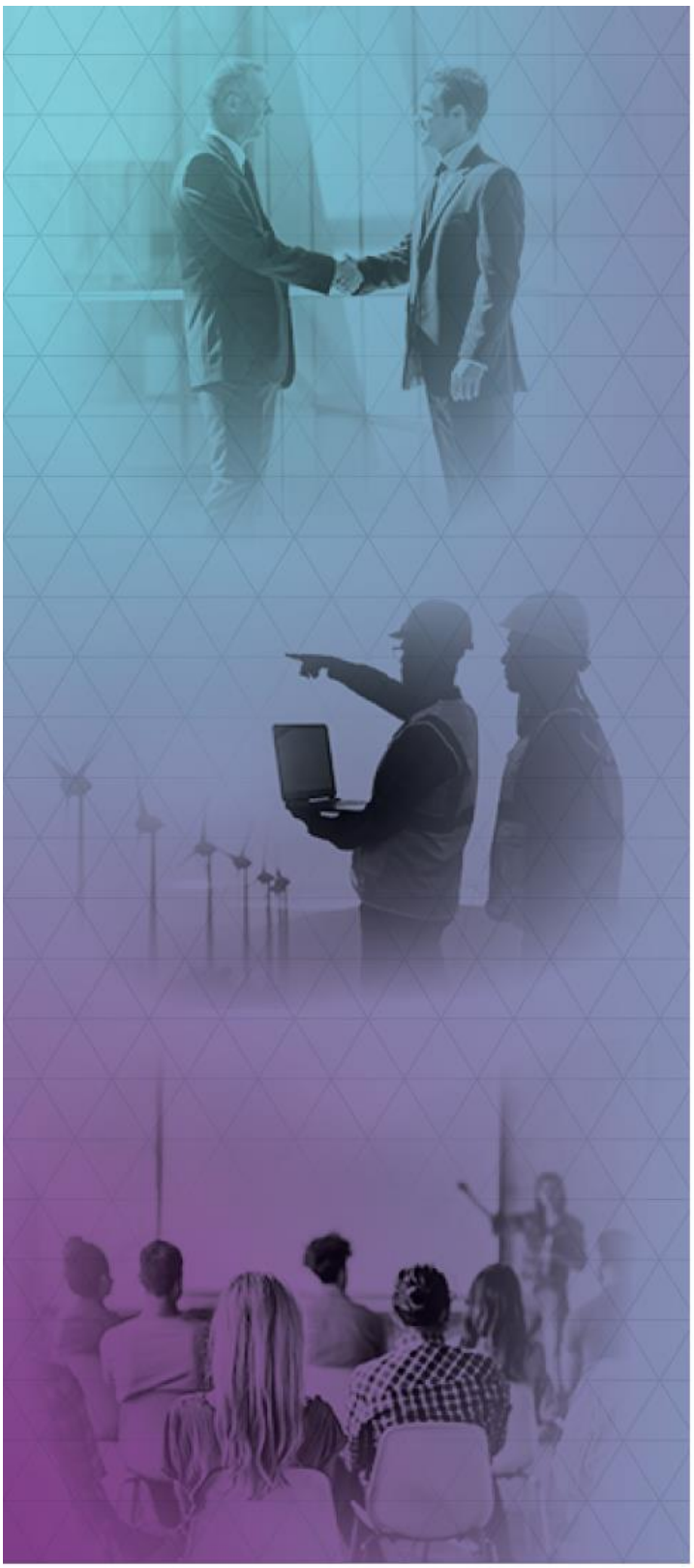

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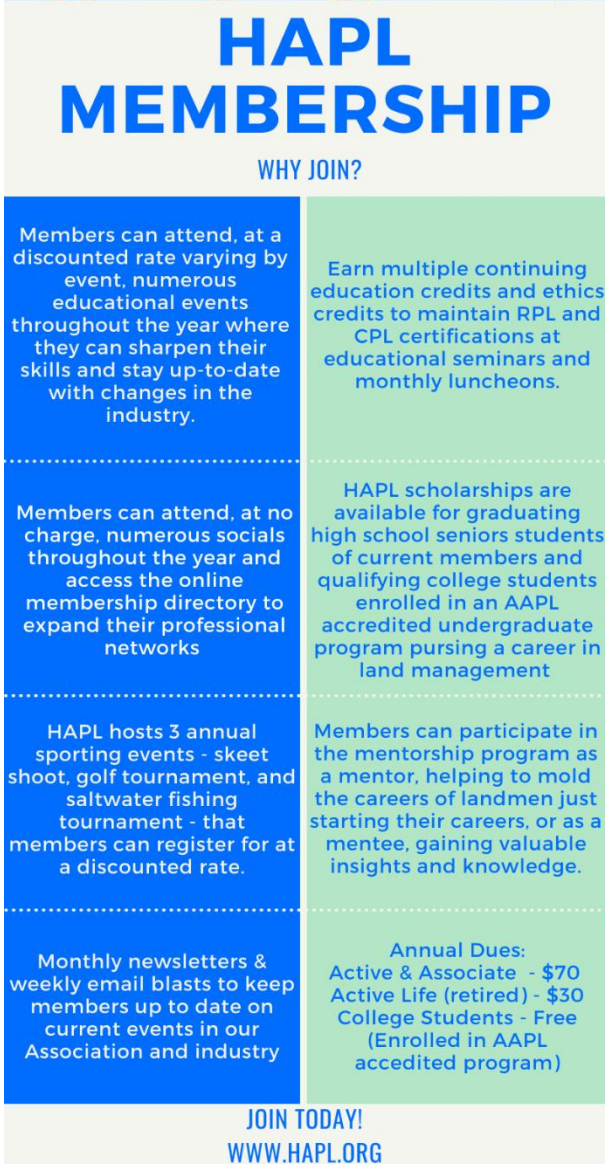

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Lindsey Griffith
HAPL Executive Administrator/
Newsletter Editor

HAPL
800 Bering, Suite 120
Houston, Texas 77057
713-622-6868
FAX: 713-622-3723
Email: hapl@hapl.org
www.hapl.org

Find us on LinkedIn & Facebook

John Gerrish, CPL
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