

**LEGAL DESCRIPTIONS - A LITTLE BACKGROUND AND  
A FEW NEW ISSUES**

**STATE BAR OF TEXAS  
OIL, GAS AND ENERGY RESOURCE LAW SECTION  
SECTION REPORT  
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LEGAL DESCRIPTIONS

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**I. EVERYTHING YOU EVER WANTED TO KNOW ABOUT THE STATUTE OF FRAUDS BUT WERE AFRAID TO ASK.**

Since its inception, the law of Texas has recognized that to promote the stability of land titles and to avoid fraud in transactions involving land, such transactions should be in writing. For these reasons, the Texas Statute of Conveyances and Texas Statute of Frauds require that conveyances and contracts for sale of real property be in writing and signed by the parties. *Tex. Prop. Code Ann. §5.021* (Vernon’s 2004); *Tex. Bus & Com. Code Ann. §26.01(b)(4)*(Vernon’s 2002). *Reiland v. Patrick Thomas Properties, Inc.*, 213 S.W.3d 431 (Tex. App. - Houston [1<sup>st</sup> Dist.] 2006, pet denied). To comply with the Statute of Frauds the writing must contain all of the essential elements of an agreement (time of performance, etc.) and be *complete within itself in every material detail*. Most folks remember the writing part of the rule. It is the part of the rule that relates to the fact that the writing must be complete within itself in every material detail that causes all of the trouble. No part of a transaction involving land is more essential than the description of the property (or interest in property) to be conveyed, *Smith v. Griffin*, 131 Tex. 509, 116 S.W.2d 1064, 1066 (1938), and one of the most common sources of litigation in the oil and gas industry stems from disputes about the sufficiency of the description (the material detail) of the property or interest transferred.

This presentation is intended to be a survey of cases addressing the sufficiency of descriptions in oil and gas related conveyances and contracts, as well as some thoughts on potential consequences that may arise from imprecise descriptions. While this paper may not reveal anything new to experienced oil and gas lawyers, our hope is that it will remind the practitioner why care should be taken when drafting descriptions in contracts and conveyances relating to oil and gas interests. <sup>1</sup>

**A. THE GENERAL RULE**

In Texas, the test for sufficiency of a writing is essentially the same in both the Statute of Frauds and the

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<sup>1</sup>  
We appreciate the valuable contributions to this paper of Charles W. Sartain and other firm members of Loper Reed & McGraw, P.C., who authored *Statute of Frauds in Oil and Gas Transactions: What Does It Really Mean?*, Oil, Gas and Energy Law Section Newsletter, March 2007, William Osborn of Osborn & Griffith, Sandra Bolz Buch, of McElroy, Sullivan & Miller, LLP. and Flip Whitworth of Scott, Douglass & McConnico, L.L.P.

Statute of Conveyances. *See, e.g. Broaddus v. Grout*, 152 Tex. 398, 258 S.W.2d 308, 309 (1953). Thus, when referring to Texas statutes requiring that a contract conveying real property be in writing, for the sake of simplicity the courts refer generally to the Statute of Frauds. *West Beach Marina, Ltd. v. Erdelijac*, 94 S.W.3d 248 (Tex. App. - Austin 2002, no pet.).

The **Statute of Conveyances** provides:

*“Instrument of Conveyance.* A conveyance of an estate of inheritance, a freehold, or an estate for more than one year, in land and tenements, must be in writing and must be subscribed and delivered by the conveyor or by the conveyor’s agent authorized in writing.”

*Tex. Prop. Code Ann. §5.021* (Vernon’s 2004)(formerly Art. 1288, V.A.C.S.).

The **Statute of Frauds** provides:

*Promise or Agreement Must Be in Writing*

(a) A promise or agreement described in Subsection(b) of this section is not enforceable unless the promise or agreement, or a memorandum of it , is

- (1) In writing; and
- (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

(b) Subsection (a) of this section applies to ...:

\* \* \* \*

- (4) a contract for the sale of real estate;
- (5) a lease of real estate for a term longer than one year;
- (6) an agreement which is not to be performed within one year from the date of making the agreement;
- (7) a promise or agreement to pay a commission for the sale or purchase of:

- (A) an oil or gas mining lease;
- (B) an oil or gas royalty;
- © minerals; or
- (D) a mineral interest; ...

UCC Bus. & C. Code §26.01 (Vernon’s 2002)(formerly Art. 3995, V.A.C.S.).

The Statute of Frauds requires that a memorandum of an agreement, in addition to being signed by the party to

be charged, must be complete within itself in every material detail and contain all of the essential elements of the agreement so the terms can be ascertained from the writing without resorting to oral testimony. *Cohen v. McCutchin*, 565 S.W.2d 230, 232 (Tex. 1978).

Various types of documents may constitute a “memorandum.” Some examples are:

1. a receipt of the sale of land signed by the owner and describing the property *Fulton v. Robinson*, 55 Tex. 401, 405 (1881);
2. a letter from the buyer and an unsigned deed describing the conveyance and giving the price. *Black v. Hanz*, 146 S.W. 309, 311 (Tex. Civ. App. - Austin 1912, no writ);
3. a letter countersigned by the property owner, describing the property and the sale price. *Taggart v. Crews* 521 S.W.2d 703, 708 Tex. Civ. App. - San Antonio 1975, writ ref’d n.r.e); and
4. an executed earnest money contract modified by an oral agreement *Joiner v. Elrod*, 716 S.W.2d 606, 609 (Tex. App. - Corpus Christi 1986, no writ).

## **B. THE STATUTES AND OIL AND GAS AGREEMENTS**

The most frequently used contracts in the oil and gas business are undergirded by the Statutes of Frauds and Conveyances.

### **A. Oil and Gas Leases**

An oil and gas lease conveys an interest in real estate and must be in writing. *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S.W. 290 (1923);

### **B. Mineral Deeds**

Severed minerals constitute a separate and distinct real property estate. Conveyances of real property must be in writing. *Humphreys-Mexia Co. v. Gammen*, 113 Tex. 247, 254 S.W.2d 296 (1923); *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S.W. 290 (1923); *Grissom v. Anderson*, 125 Tex. 26, 79 S.W.2d 619 (1935).

### **C. Royalty Interests**

Royalties, whether payable in money or in kind, are an “interest of land” within the Statute of Frauds provision precluding recovery on an oral agreement to convey an interest. *Sheffield v. Hogg*, 124 Tex. 290, 77 S.W.2d 1021

(1934); *Stoval v. Poole*, 382 S.W.2d 783 (Tex. Civ. App. - Waco, 1964, writ ref’d n.r.e.) See also, *Johnson v. Texas Gulf Coast Corp.*, 359 S.W.2d 91 (Tex. Civ. App - San Antonio 1962, no writ). (Also overriding royalty).

### **D. Oil Payment out of a Fractional Share in Minerals**

The rights of a grantee to an oil payment out of a fractional share in minerals if, as and when produced, saved, and sold, as set forth in a lease, are governed by the Statute of Frauds requirements, and must be evidenced by written instruments. *Minchen v. Fields*, 162 Tex. 73, 345 S.W.2d 282 (1961); citing Prop. Code §5.021.

### **E. Farmout Agreements**

Farmout Agreements usually contain an obligation to convey or assign acreage under oil and gas leases. Accordingly, they are governed by the Statute of Frauds. *Eland Energy, Inc. v. Rowden Oil & Gas, Inc.*, 914 S.W.2d 179 (Tex. App. - San Antonio, 1995, writ denied).

### **F. Area of Mutual Interest Agreements**

However phrased, agreements creating areas of mutual interest ordinarily are promises to transfer leases or mineral interests, governed by the Statute of Frauds. *Westland Oil Dev. Corp. v. Gulf Oil Corp.* 637 S.W.2d 903 Tex. 1982) (acreage contribution letter); *Crowder v. Tri-C Resources, Inc.*, 821 S.W.2d 393 (Tex. App. - Houston [1<sup>st</sup> Dist.] 1991, no writ).

### **G. Easements**

An easement is an interest in land subject to the Statute of Frauds. *Anderson v. Tall Timbers Corporation* , 378 S.W.2d 16, 24 (Tex. 1964); *Pick v. Bartel*, 659 S.W.2d 636 (Tex. .1983). The Rule relating to sufficiency of descriptions of easements is the same as required in conveyances of land. *Vrabel v. Donahoe Creek Watershead Authority*, 545 S.W.2d 53 (Tex. Civ. App. - Austin, 1977, no writ); *West v. Giesen*, 242 S.W. 12 (Tex. Civ. App. - Austin 1922, writ ref’d.); *Bear v. Houston & T. C. Ry. Co.*, 265 S.W.2d 246, 249 (Tex. Civ. App. - Galveston 1924, no writ).

### **H. Joint Operating Agreements**

A joint operating agreement (“JOA”) is often, but not always, subject to the Statute of Frauds. For example, in a dispute over whether the parties to a JOA orally agreed

to share the costs of a certain well, the JOA was subject to the Statute of Frauds because the JOA incorporated oil and gas leases by reference. *Hill v. Heritage Resources, Inc.*, 964 S.W.2d 89, 135 (Tex. App. - El Paso 1997, pet. denied); *See also, Eland Energy, Inc. v. Rowden Oil & Gas, Inc.*, 914 S.W.2d 179 (Tex. App. - San Antonio 1995); *Crowder v. Tri-C Resources, Inc.*, 821 S.W.2d 393 (Tex. App. - Houston [1<sup>st</sup> Dist.] 1991, no writ).

## II. THE COURTS EXPLAIN

### A. The Rule - What is a Sufficient Property Description?

While the Statutes of Frauds and Conveyances provide that all contracts for the sale of real estate must be in writing, no requirements for the writing, other than it be signed by the grantor, are set out. Thus the courts must determine the substance and the form necessary for the written instrument to be enforceable. Insofar as the description of the property to be conveyed is concerned, the most fundamental/often stated rule is that a conveyance or contract must include within itself, or by reference to another existing writing, the means or data to identify the particular property with reasonable certainty, *Wilson v. Fisher*, 144 Tex. 53, 188 S.W.2d 150 (1945). *See also Kmiec v. Reagan*, 556 S.W.2d 567 (Tex. 1977); *Pick v. Bartel*, 649 S.W.2d 636, 637 (Tex. 1983); *Morrow v. Shotwell*, 477 S.W.2d 538, 539 (Tex. 1972).

Another way to state the general rule is that a legal description is sufficient if it contains enough facts for a party familiar with the locality to identify the premises with reasonable certainty. *Gates v. Asher*, 154 Tex. 538, 280 S.W.2d 247, 248-49, (1955). Under this theory, words of description are given a liberal construction in order that a conveyance may be upheld. (See discussion of *Howland v. Hough*, *infra*). Where the instrument contains the “nucleus of description”, parol evidence will be admitted to explain the descriptive words and to identify the land. This means that “the contract must, at least, furnish the property description within itself or by reference to *other identified writing then in existence.*” *Pick v. Bartel*, 659 S.W.2d 636, 637, (Tex. 1983)(emphasis added). *Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.* 48 S.W.3d 865 Tex. App. - Houston[14th Dist.], 2001, pet. denied).

Multiple writings can constitute a contract sufficient to satisfy the statute of frauds. *Adams v. Abbott*, 151 Tex. 601, 254 S.W.2d 78 (1952). However, if the memorandum consists of two documents, the second document must refer to the first one. *Morrow v. Shotwell*, 477 S.W.2d

538, 539 (Tex. 1972); *Owen v. Hendricks*, 433 S.W.2d 164, 166-167 (Tex. 1968); *Tabor v. Pettus Oil & Refining Co.*, 139 Tex. 395, 162 S.W.2d 959, 961 (1942).

### B. The Test - When can Extrinsic Evidence Be Used?

The Texas Supreme Court has explained the role of parol evidence with regard to the property description contained in a contract for the conveyance of real property:

The certainty of the contract may be aided by parol only with certain limitations. The essential elements may never be supplied by parol. The details which merely explain or clarify the essential terms appearing in the instrument may ordinarily be shown by parol. But the parol must not constitute the framework or skeleton of the agreement. That must be contained in the writing. Thus, resort to extrinsic evidence, where proper at all, is not for the purpose of supplying the location or description of the land, but only for the purpose of identifying it with reasonable certainty from the data in the written instrument.

*Wilson v. Fisher*, 144 Tex. 53, 188 S.W.2d 150, 152 (1954); *see also Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983) (Extrinsic evidence may not be used for the purpose of supplying the location or description of the property.)

### C. Cases Studies - What is a “sufficient/adequate ” description?

A sampling of decisions offers some assistance in the understanding of how the courts apply the various rules of construction to determine whether a property description is sufficient. The cases indicate a practiced and intentional lack of imagination by the courts in interpreting a property description, and they do not always follow a consistent pattern. Often, even when it appears from the trial record that everyone involved in the transaction knows what property is involved, if the requisite elements are not all present, the description will be deemed insufficient. Generally speaking, when courts review property descriptions their emphasis is on the objective (what the title examiner can see or inquire/learn from the instruments themselves) rather than the subjective (what the parties to the instruments knew or intended).

#### 1. No City, County and/or State

**Wilson v. Fisher, 144 Tex. 53, 188 S.W.2d 150 (1945)**

The description of an earnest money receipt prepared by the purchaser read: "... brick duplex and garage apt. located at 4382-30 Cedar Springs..., room at back not included". The buyer's receipt read: "4328- 4330 Cedar Springs Road ...". The parties intended to convey "Lot 3, Block N/2047, Perry Heights Addition, City of Dallas".

This description was insufficient under the Statute of Frauds and recovery for specific performance was denied. The description was deficient because it did not:

- a. specifically indicate that the seller was the owner;
- b. identify the lot and block number or amount of land;
- c. the property was not designated as any particular tract;
- d. locate the land in any city, county or state, and the portion to be excluded was not shown. *Wilson*, 188 S.W.2d at 155.

**Broadus v. Grout, 152 Tex. 398, 258 S.W.2d 308 (1953).**

Homer Vaughn, et ux, of Jefferson County, Texas, conveyed to E. A. Grout, also of Jefferson County, "our undivided interest amounting to a 1/7, of the following described tract or parcel of land, as follows:

Beginning at a stake in the west line of said 160 acre survey 172.8 11ths varas from its NW corner.  
Thence south with west line of said survey 86.4 11<sup>th</sup> varas to a stake in west line of said survey from corner.  
Thence east 950 varas to east line of said survey, stake for corner.  
Thence North with east line 86.4 11<sup>th</sup> varas to SE corner of Lot No. 2, thence west with said south line of Lot No. 2, 950 varas to place of beginning, containing 14.6 11<sup>th</sup> acres of land. Said land is undivided.

The deed contains no reference whatever to a survey, county or state in which the land intended to be conveyed is situated. There are no words of description except the words "our undivided interest amount to a 1/7, of the below-described tract or parcel of land", and a metes and bounds description. The land in question was in fact in Hardin County and the deed was recorded there.

The trial court and the Court of Civil Appeals allowed the grantee to introduce parol evidence

identifying the land in Hardin County and thus awarded the land to the grantee. The Supreme Court reversed and rendered declaring that the description was "wholly insufficient to identify the land, and the deed does not furnish within itself the means or data by which the particular land to be conveyed may be identified with reasonable certainty".

**2. Street address**

**Hoover v. Wukasch, 152 Tex. 111, 254 S.W. 2d 507 (1953).**

This suit was brought to enforce a lease whereby Wukasch leased an apartment to Hoover located at:

2270 Guadalupe Street, in the City of Austin, County of Travis, and being the same property now occupied by lessee herein as a tenant of lessors.

Lessor sued to enforce the lease because lessee vacated the premises after two years of a five year term. The tenant claimed the lease was unenforceable because the description failed to comply with the Statutes of Frauds. The court, citing this as a case of first impression in Texas, concluded that the description was sufficient only because the phrase "now occupied by lessees herein as a tenant of lessors" provide the means or data by which the lessor could introduce evidence locating the property on the ground.

**Apex Financial Corp. v. Garza, 155 S.W.3d 230 (Tex. App. - Dallas 2004, pet. denied).**

By quitclaim deed LaCross conveyed "2330 Ardwick, Dallas, TX 75208" to Garza, which was not recorded until after a Sheriff's Deed, executed pursuant to a judgment lien against LaCross, was delivered to Apex. After reciting the general rules, the court concluded that the description provided the means or data by which the land could be identified with reasonable certainty. The court relied on its precedents, *Butler v. Benefield*, 598 S.W.2d 778, 780 (Tex. Civ. App. - Dallas 1979, writ ref'd n.r.e.); and *Henderson v. Priest*, 591 S.W.2d 635, 636 (Tex. Civ. App. - Dallas 1979, writ ref'd n.r.e.) which held that a street address or a commonly-known name for property may be a sufficient property description if there is no confusion. Usually, the absence of confusion is settled when there is extrinsic evidence showing that only one tract of land can satisfy the description.

The author surmises that most title examiners would not be this liberal.

### 3. Transfer of a Portion of a Larger Tract

If a deed conveys a certain number of acres without describing the land conveyed, out of a larger tract described, the grantee becomes a tenant in common with a fractional interest in the larger tract, the numerator being the acres conveyed and the denominator being the total acres in the larger tract. *Williams v. Kirby Lumber Corp*, 355 S.W.2d 761 (Tex. Civ. App. - Beaumont 1962, writ ref'd n.r.e.) *Turner v. Hunt*, 131 Tex. 492, 116 S.W. 688, 690 (1938), 117 A.L.R. 1066, 1070.

When an unidentifiable portion of land within a larger identifiable tract is described in a conveyance, the transaction is voidable for lack of certainty and does not satisfy the Statute of Frauds. *Texas Builders v. Keller*, 928 S.W.2d 478, 482 (Tex. 1996); *Greer v. Greer* 144 Tex. 528, 191 S.W.2d 848, 850 (1946); *Smith v. Sorrelle*, 87 S.W.2d 703, 705-706 (Tex. 1935).

#### **Matney v. Odom, 147 Tex. 26, 210 S.W.2d 980 (1948)**

Matney granted a lease with an option to purchase the following property:

“...four (4) acres out of the East end of a 10-acre block on the P. Chireno Survey about 2 miles East from the courthouse of the city of Tyler, Smith County, Texas, located on the North side of the Kilgore highway.”

Matney owned only one four-acre tract on the 10-acre block. In determining that the description failed to identify the property with sufficient certainty, the court held: “[A] deed purporting to convey land, which describes it only by quantity and as being part of a larger tract, with nothing whereby to identify what specific portion of the larger tract is intended to be conveyed, is void for uncertainty of description.” *Matney*, 210 S.W.2d at 983. The Court noted that there were no words in the lease saying directly or indirectly that Odom owned a piece of land containing the same acreage. The description at issue did not contain a “nucleus of description.” *Id.*

#### **Morrow v. Shotwell, 477 S.W.2d 538 (1972)**

The second tract described in a contract of sale covering land in Jones County, Texas was:

The north acreage (to be determined by survey) out of 145.8 acre tract of the Jefferson McGrew Survey No. 245, which acreage lies north of a line beginning at the NE corner of the first tract above-described and running north 75 east to a point in the west boundary line of public Highway No. 277, commonly known as to the Anson-Hawley-Abilene Highway, ... .

The Supreme Court held that the contract was void as to the second tract because the description did not refer to any other existing writing or contain any other “means or data by which the tract may be identified with reasonable certainty”.

The trial record reflected that the parties understood what property was intended to be conveyed as the Second Tract. The evidence included a plat prepared upon directions from an attorney that showed the tract’s location and boundaries. “However, the knowledge and intent of the parties will not give validity to the contract, *Rowson v. Rowson*, 154 Tex. 216, 275 S.W.2d 468, 470 (1955); and neither will a plat made from extrinsic evidence. *Matney v. Odom* 147 Tex. 26, 210 S.W.2d 980, 984 (1948).” *Id* at 541. The legal description itself must not only furnish enough information to locate the general area as in identifying it by tract, survey and county, it should contain information regarding the size, shape and boundaries.

Previous Supreme Court cases cited by this Court supporting its decision are *Greer v. Greer*, 144 Tex. 528, 191 S.W.2d 848 (1935)(holding insufficient a description that included acreage, survey, county, patent, volume, and abstract numbers) and *Pfeiffer v. Lindsay*, 66 Tex. 123, 1 S.W. 264, 266 (1986)(holding insufficient a description that included acreage, survey, county and abstract number).

#### **Smith v. Sorelle, 126 Tex. 353, 87 S.W.2d 703 (1935).**

A royalty deed from Smith, et ux to Busby conveyed 1/4 of the royalty in:

100 acres out of Blocks 8 and 9 of the Subdivision of Jose Maria Pineda Survey, which was patented to Adolphus Stern ... Upshur County ... .

No attempt was made to define the land by field notes. The fact that Blocks 8 and 9 contained more than 100 acres of land was stipulated.

The Court held that the deed which described the land conveyed as a quantity of acres out of a larger tract, with nothing to identify what specific portion of the larger tract was intended to be conveyed, was void for uncertainty of description. While descriptive words in an instrument should be given a liberal construction in order that the writing may be upheld, parol evidence may be admitted to explain the descriptive words and identify the land. This is possible only when the instrument itself contains a “nucleus of description”. The parol evidence must be directly connected to the descriptive data. When there is no “nucleus of description” then the description is insufficient.

#### 4. Means to Locate the Tract on the Ground

##### **Siegert v. Seneca Resources Corp., 28 S.W.3d 680 Tex. App. - Corpus Christi 2000, no pet)**

The description in a 1932 mineral reservation was:

Also 100 acres of land, now situated in Burleson County, Texas, and was formerly part of the Walter Sutherland League, and is lying in the bend of the old Brazos River, on the Burleson County side, as it now runs. This tract of land was formerly part of the Walter Sutherland League in Brazos County, Texas. But now since the Brazos River has changed its course, this land is in Burleson County, Texas, and almost surrounded by the Fisher League. An actual survey made by W. B. Francis on the 26<sup>th</sup> day of May, 1931 shows the land, contained inside the banks of the old river to be 98.2 acres of land. If one half of the old river bed should be included in the survey, then the acreage would be 130 acres of land.

No formal field note description was made part of the instrument. The court found that under the nucleus of description theory a field note description was not necessary, citing *Morrow v. Shotwell*, 477 S.W.2d 538, 539 (Tex. 1972).

The land described in the deed was not an unidentifiable portion of a larger tract, which would render it unenforceable. The description had enough detail by which the land could be identified with reasonable certainty. A surveyor testified at trial that at that time - some 70 years later – he would not have been able to locate the property, but that in 1932 the information on the deed would have been sufficient to locate the property. Also, the land had been re-surveyed since 1932 and better descriptions had appeared in later deeds.

##### **Pick v. Bartel, 659 S.W.2d 636 (Tex. 1983)**

The deed by which Truebenach sold a 165 acre tract to Pick guaranteed “... a right-of-way across the 25-acre tract sold to Walter Bartel.” The deed to Bartel, executed five days later and prepared by the same attorney, said: “... [T] his conveyance directs that the grantors are designating that a right-of-way for a road shall be allowed to be had through and over the said 25 acres at a location which will least interfere with the use of the 25 acres.. .”

There was testimony at trial regarding use of the roadway, and it appears that the trial court could have relied on that testimony to designate the location of the easement. The appellate court disagreed, holding that in order to meet the requirements of the Statute of Frauds, the instrument must furnish within itself or by reference to other identified writings an existence, the means or data by which the particular land to be conveyed may be identified with certainty. *Id.* at 637.

The court would not infer that the “25-acre tract sold to Walter Bartel” referred to the alleged servient estate. The owner of the property referred to in the Pick deed was not identified. Moreover, since the Pick and Bartel deeds are dated five days apart, the 25-acre tract had *not* been sold to Bartel at the time the Pick deed was executed. No city, county or state was mentioned in connection with its location. No lot or block number was given, nor was there any indication as to the amount of land. No description by any particular name appeared. In fact, the Court found that every essential element of the description was left to inference or to be supplied by parol. To permit the Picks to show by parol evidence what land was under consideration would be, in effect, to abrogate the rule requiring contracts for the conveyance of land to be in writing. The court held that, as a matter of law, the description of the land subject to the alleged easement would not support a suit to establish a roadway easement. *Id.* at 638.

##### **Wiggins v. Cade, 313 S.W.3d 468 (Tex. App. - Tyler, review denied September 24, 2010).**

In this recent case, Cade asserted that two royalty deeds violated the Statute of Frauds because they contained neither the name of the survey nor the district number in which the property was situated, making it impossible to locate the property on the ground “with reasonable certainty.” This was a summary judgment proceeding. The deed holders responded with an affidavit from a petroleum landman who testified that he had taken the description from the royalty deeds, in combination

with an examination of the public records for the county and concluded that the 45 acres at issue were the only 45 acres ever owned by the original landowner in that county. He further testified that the county record described the survey and abstract, and he was thus able to locate the land described with reasonable certainty. Citing *Braddux v. Grout, infra*, the Court found the recital of ownership in the deeds could be used as an element of description and “serve as a means, together with some other elements [in this case the county records], identifying the land with reasonable certainty.” *Wiggins* at 472.

## 5. Selection at a Later Time.

### **NO - *Stekoll Petroleum Co. v. Hamilton*, 152 Tex. 192, 255 S.W.2d 187 (1953).**

A provision in a contract for the assignment of oil and gas leases was deemed unenforceable giving the assignee the right to acquire 4,000 acres from a 5,000 acre tract “... to be selected by Buyer leaving Sellers 1,000 acres equitably checkerboarded in a fashion similar to the checker-boarding in the first block above identified” when the court was unable to find a definite pattern of checker-boarding in the first block. *Stekoll* at 192.

### **NO - *Williams v. Ellison*, 493 S.W.2d 734 (Tex. 1973)**

In one instrument, Williams sold Ellison’s assignor a 10 acre tract “... in the form of a square with each side being 660 feet in length ... located adjacent to and at the intersection of Medina Base Road and Holm Road.” *Williams*, 493 S.W.2d at 736. The contract made no reference to the 97.81 acre tract, out of which the 10 acre tract was taken.

The instrument also guaranteed an option to purchase “... an additional 10 acres. In order to exercise this option ... at least a portion of the boundary line of the 10 acre tract so purchased shall be contiguous to a portion of the boundary line of the 10 acres described above in this contract; provided, however, no portion of such option tract shall include the water well presently located on sellers land nor any portion of an area one acre square centered on such water well.”

The court found the description of the option tract to be insufficient, finding that the description provided a site of origin, but “ ... no hint as to the distance for which these two tracts were intended to be adjacent or as to which one or more of the first tract’s four boundaries the option tract was intended to be abutting.” *Id.* The court

found that a surveyor could not go on the premises and locate the option tract on the ground.

The court rejected the optionor’s contention that the instrument was a type of conveyance where the property would be selected at a later time, finding that the larger tract out of which the selected would be made (known by the court to be the 97.81-acre tract) was not described. Further, the instrument did not say who would make the selection: buyer, seller or someone else.

### **YES - *Eland Energy, Inc. v. Rowden Oil & Gas, Inc.*, 914 S.W.2d 179 (Tex. App. - San Antonio 1995, writ denied)**

A farmout provided that if Cox drilled a producing well on the Perez lease, Rowden would assign him “40 acres in the form of a square as nearly as possible” where the well was located. Thereafter, the parties agreed that rather than a series of assignments of 40-acre production units as each well was completed, it would be easier if Rowden assigned the entire lease, which would be reassigned when drilling ceased. There was an assignment to Cox which was made subject to the farmout. Eland then succeeded to the rights of Cox.

Eland claimed the obligation to reassign undeveloped portions of the Perez lease was unenforceable under the Statute of Frauds. Eland contended that it was impossible to determine at the time of the assignment what would have to be reassigned upon termination of drilling because the parties did not know where the wells and their corresponding 40-acre tracts were going to be. The court disagreed.

The assignment incorporated the Cox farmout, which adequately described the Perez lease. But the court believed the pertinent issue to be whether the title instruments provided an adequate description of the 40-acre tracts that were earned when Cox drilled producing wells.

The farmout agreement granted Cox the unrestricted right and authority to locate his wells anywhere on the Perez lease that he desired. The farmout also gave Cox an equitable right to perfect his title in those tracts by selecting the boundaries of the forty-acre tracts he had earned. (citing *Stekoll Petroleum Co. v. Hamilton*, , 152 Tex. 182, 255 S.W.2d 187, 191 (1953). The right to make the designation, coupled with the interest in doing so, satisfied the requirements of the Statute of Frauds.

As a practical matter, designations by a co-owner, Prudential-Bache, perfected the equitable title of all interested parties in their respective interests in the Perez lease. Rowden, Prudential-Bache, and Eland were all able at that time to identify the boundaries of their real property interest. The property interests in the Perez lease being adequately described, the court found the Statute of Frauds did not bar the claims.

## 6. Use of map/plat to identify tract

**NOT SUFFICIENT - *Gunether v. Amer-Tex Const. Co.*, 534 S.W.2d 396 (Tex. Civ. App. - Austin 1976, n.w.h.).**

Suit was brought to enforce a contract to convey the following land:

Reference is made to that certain tract of land adjoining Potter's Creek Park at Canyon Lake in Comal County, Texas, as shown on the attached Exhibit A, herein called "The Land".

The trial court entered a judgment for specific performance but the appellate court reversed and rendered holding that the map attached as Exhibit A did not describe the land with sufficient certainty to meet the requirements of the Statute of Frauds. The court stated that the map, which was not drawn to scale, was deficient in that:

- 1) it did not show the width or length of the boundary lines;
- 2) there was no indication that the boundary lines were to be parallel;
- 3) it did not show the approximate size of the tract or the number of acres contained within it;
- 4) there was no recitation that the seller owned the property; and
- 5) there was no reference in the contract or map to a prior recorded deed or other instrument which might identify the land.

The court also held that the fact that the parties to the contract knew what land was intended to be conveyed would not breathe life into an invalid description, *Morrow v. Shotwell*, *Rowson v. Rowson*, *supra*; and neither will a plat made up from extrinsic evidence. *Matney v. Odom*, 147 Tex. 26, 210 S.W.2d 980 (1948).

For another case reaching the same result see *U. S. Enterprises, Inc. v. Dauley*, 435 S.W.2d 623 (Tex. 1976).

**WAS SUFFICIENT - *Dickson v. Amoco Production Co.*, 150 S.W.3d 191 (Tex. App. - Tyler 2004, pet denied).**

In 1963 Amoco acquired leases from Dickson, Witcher, and others in Upshur County, Texas. In July of 1995 Amoco drilled a producing well on Dickson's land. On August 10, 1995 Amoco filed a Unit Designation in Upshur County containing two exhibits. The first exhibit listed 44 leases covering 1,500 acres of land. The second exhibit was a Tobin Map marked with a bold outline encircling 11 tracts creating the pooled 645 acre unit. On August 1, 1996 Amoco filed a First Amendment to the Unit Designation which contained a metes and bounds description of the perimeter of the 645 acre pooled unit. After the amended designation of unit was filed two other producing wells were drilled on the Dickson unit.

In 1999 Dickson and Witcher sued Amoco claiming that the unit designation was void because it did not contain a sufficient legal description of the 645 acres. The plaintiffs claimed that neither of the exhibits to the unit designation, stating alone, contains a legally sufficient description, while Amoco claimed that the list of leases and the unit designation map should be considered together in determining whether or not there was a sufficient legal description of the pooled acreage. The court agreed with Amoco. First, the record showed that the references in the leases led to other writings in the official records of Upshur County (or previous land records) that helped to identify on the ground the location of each tract on the Tobin Map. Then, the Tobin Map itself included:

- 1) names of surveys;
- 2) General Land Office Abstract Numbers
- 3) names of owners in the chain of title
- 4) acreage amounts in each tract
- 5) survey lines for each tract
- 6) the lessors of oil, gas and mineral leases covering each tract; and
- 7) well sites.

Acknowledging that Tobin Maps were the standard for map making in the oil and gas industry, the court concluded that the combination of the instruments throughout the chain of title for each of the 44 leases identified by volume and page number in the official records and the detail of the Tobin Map was enough to provide a sufficient legal description for the unit designation.

Plaintiffs also argued that there were defects in various instruments throughout the chain of title including survey calls, boundary markers, and boundary lines that invalidated the legal description in the unit designation by creating gaps between various tracts. The court held that where there are mistakes or discrepancies in instruments in the chain of title, a court must, if practical, correct errors to give legal effect to later instruments conveying an interest in the subject real property. *Howland v. Hough*, 570 S.W.2d 876, 882 (Tex. 1978).”

## 7. Reliance upon description in prior deed

***Klein v. Humble Oil & Refining Co.*, 126 Tex. 450, 86 S.W.2d 1077 (1935).**

The lease in question contained a metes and bounds description which referred to a prior deed. The court held that the general reference to the land covered as being the same tract in the prior deed could not control over the specific description.

***Sharp v. Fowler*, 151 Tex. 490, 252 S.W.2d 153 (1952).**

Grantor conveyed to Grantee:

50 acres of land situated in Panola County, Texas and being 20.3 acres of the John Simpson Headright Survey, and 29.7 acres of the T. C. Railway Company No. 13, and being the same land described in a deed from Frost Lumber Industries, Inc. of Texas to A. D. Cockrell (**The Frost Deed**), dated the 4<sup>th</sup> day of February, A.D. 1935, and of record in Vol. 102, Page 462, Deed Records, Panola County, Texas.”

The grantor owned all of the surface and 1/4 of the minerals in the 50 acres conveyed. The referenced Frost Deed only conveyed the surface estate. The question was did the reference to The Frost Deed limit this conveyance to surface only, or did it convey grantor’s 1/4 minerals. The court pointed out that a conveyance of “land” conveys the surface and mineral estate owned by the grantor, unless limited. The court affirmed the Appellate Court by concluding that courts do not favor reservation by implication, thus a reservation of minerals must be expressed in clear or straight forward language to be effective. *Sellers v. Texas Central Ry. Co.*, 81 Tex. 458, 17 S.W. 32; *State v. Black Bros.*, 116 Tex. 615, 297 S.W. 213, 53 A.L.R. 1181.

## 8. Attempt to utilize only lessees’, tax assessors’, or Railroad Commission description fails.

***Hanzel v. Herring*, 80 S.W.3d 167 (Tex. App. - Fort Worth 2003, no pet.), 157 O&GR 1203.**

Ray Herring, royalty payee, filed an interpleader action involving Herald E. O’Connor, debtor in bankruptcy/mineral owner, D.O.H. Oil Company, royalty payor, and Alice Hanzel, purchaser of O’Connor’s minerals at a sheriff’s sale. The trial court set aside the sheriff’s sale and Hanzel appealed.

The sheriff’s deed conveyed four tracts belonging to O’Connor. The descriptions of all tracts contained the same type of information as for Tract 1, which was described as:

Tract #1 - .025000 overriding royalty interest, Crumpton - Williams Wells, Lease 1404, Texas Railroad Commission No. 19281, T. H. Wooley Survey, Abstract 1634 and James Carcher Survey, Abstract 276, Palo Pinto County, Texas (Tax Accounts Nos. 140420007515, 1404200075151).

The Appellate Court agreed with the trial court that the description within the deed itself did not furnish means or data by which the particular land to be conveyed might be identified, neither did the deed refer to another existing writing by which the particular land could be identified with specific certainty. Appellant argues that the deficiency could be supplied by referring to the Texas Railroad Commission number. A former employee of the Texas Railroad Commission testified that the Railroad Commission identifies property with the use of numbers, not legal descriptions. He stated that a five digit number identifies an oil lease and a six digit number identifies a gas lease. Gas leases are segregated on a well by well basis, while oil leases are identified by the producing zone and by the land covered by the lease or leases under which the operator is operating and producing wells from the zone in question. The witness identified Railroad Commission file documents connecting Railroad Commission numbers and property descriptions. However, the lease that the Railroad Commission number represented was not a part of the trial record. Therefore, the court affirmed the trial court’s decision that the property descriptions in the sheriff’s deeds were inadequate, thus the instruments were void under the Statute of Frauds. *Republic Nat’l Bank v. Stetson*, 390 S.W.2d 257, 261, (Tex. 1965).

The court distinguished the Appellant’s challenges that the following cases required a different result:

1) *Maupin v. Chaney* involved a description which

referred to a prior deed dated 4/18/29. Parol evidence was allowed to show that the only deed involving the parties was actually dated 4/9/29. The court held that if pursuing a conflict/inquiry resulted in identifying the particular property to the exclusion of other property, then the description was sufficient.

- 2) *Kmiec v. Reagan* contained a description wherein the Grantor acknowledged ownership of the property conveyed. If parol evidence showed that the grantor only owned one property in the county in question then that was a sufficient description of the land.
- 3) *Gates v. Asher* involved a conveyance shown to be the only property owned by the grantor in the county. Parol evidence was admitted when the description contained a “nucleus” that promoted further inquiry. The court further held that the description is sufficient if it allows a party familiar with the locality to identify the premises.

The description in this case did not refer to another instrument with a sufficient description and it did not state that the royalty interest conveyed were the only royalty interests owned by O’Connor in Palo Pinto or Young Counties.

**9. Where land is described as acreage out of a corner or off the side of a larger tract, the Court can construct the tract by drawing parallel lines**

***Diffie v. White, 184 S.W. 1095 (Tex. Civ. App. - Texarkana 1916, n.w.h.)***

By Deed dated December 3, 1954 Benjamin Gooch conveyed to Anderson King 580 acres in Red River County, on Pecan Bayou on the waters of the Red River, part of which was described as:

420 acres out of the northeast portion of the Robert Hill Survey ... .

The plaintiffs contended that this tract was too indefinite and uncertain to enable a surveyor to locate the land. The court first points out that reference to the Robert Hill Survey allows the court to resort to the field notes of that survey for the purpose of ascertaining its location, form and number of acres. Upon examining the patent, the trial court noted that the Robert Hill Survey contained 836 acres in the form of a square, with all of its boundary lines being 2,173 varas long and running toward the four cardinal points of the compass. Since the deed in question stated that the 420 acres was out of the northeast portion, the court concluded that the word “portion” was synonymous with “part” so that the description could be

restated as “420 out of the northeast part of the Robert Hill Survey”. The court then concluded that the parties must have intended that this tract be out of the northeast quarter of the survey. After determining that the northeast corner of the survey would be the northeast corner of the tract at issue, the court concluded that it has a starting point from which to construct the new survey. The principle applied in construction the new survey was:

That corner is a base point, from which two sides of the land conveyed shall extend an equal distance, so as to include by parallel lines the quantity conveyed. From this point the section lines extend north and east so as to fix the boundary west and south. The east and north boundaries only are to be established by construction, and the rule referred to gives them with sufficient certainty.

This allowed the court to conclude that the 420 acres in question was a square block bounded by four sides 1,539.8 varas long.

***Clayborn v. Gambill, 87 S.W.2d 508 (Tex. Civ. App. - Texarkana 1935, writ ref’d)***

By deed dated August 6, 1877 M. E. Berry conveyed to Cain Clayborn a 340 acre tract. Clayborn conveyed away portions of the 340 acre tract until he had remaining 109.4 acres in the southeast corner of the I. Baity Survey in the form of a parallelogram. On August 8, 1901 Cain Clayborn conveyed to Will Rather the following land in Gregg County, Texas:

Being on the waters of Prairie Creek and Penns Branch and being a part of the I. Baity Survey and being the East part of the same and is all of said survey except 200 acres conveyed to Geo. D. Northcutt and wife, off the West part of same survey and 9 acres conveyed to W. R. Causey, and being 50 acres out of the remaining 131 acres on the East end, commencing at Josh Cleburn’s southeast corner and running South \_\_\_\_\_ yards to a stake for corner. Thence West \_\_\_\_\_ yards to a stake for corner. Thence North \_\_\_\_\_ yards to a stake for corner; Thence East to place of beginning, containing 50 acres of land. Being the same land conveyed to Cain Cleburn by M. E. Barry, et al and recorded in Book D, Pages 260-61, in the Records of Deeds, Gregg County, Texas.

The heirs of Cain Clayborn claimed that the legal description was void. Sustaining the deed, the court concluded that the northeast corner of the 109.4 acre

tract provided a beginning point for determining the 50 acres conveyed and said:

With this information and the further fact that the 109.4 acres is in the form of a parallelogram, the rule is that the courts will construct a survey of the designated acreage by lines drawn parallel to the designated line or lines of the 109.4 acre tract.

and reversed and rendered the trial court.

## 10. What Lease? What Assignment?

***Cantrell v. Garrard*, 240 S.W. 533 (Tex. Comm. App. 1922, judgm't adopted).**

On February 3, 1919 Garrard agreed to sell to Cantrell "an oil and gas lease" on 20 acres of land in Wichita County, Texas. The land was particularly described so the legal description was not an issue. Cantrell, the buyer, deposited \$10,000.00 in escrow in a bank in Wichita Falls and agreed to pay the balance of \$40,000.00 upon approval of title. The only description of the lease to be sold contained in the contract was:

"A lease or an assignment of a lease is hereby proposed to be sold, what is known as a commercial lease, providing for 1/8 royalty to the landowner."

The trial court rendered judgment for the defendant which judgment was reversed and rendered by the Court of Appeals.

The Supreme Court affirmed the trial court on the following principle:

The rule is that a written agreement for the sale of land must contain the essential terms of a contract, expressed with such certainty that it may be understood without recourse to parol evidence to show the intention of the parties; and no part of such contract is more essential than that which identifies the subject matter of the agreement.

Since the subject matter of the contract was not described in a legally sufficient manner, the contract could not be enforced.

Also see *Smith v. Sabine Royalty Corp*, 556 S.W.2d 365 (Tex. Civ. App. - 1977, no writ) wherein the court held that an offer to farmout was not enforceable where the farmee responded by drilling the proposed well before attempting to accept the offer formally.

***Taber v. Pettus Oil & Refining Co.*, 139 Tex. 395, 162 S.W.2d 959 (Tex. Com. App. 1942), 141 A.L.R. 808**

By agreement dated December 11, 1937 Taber agreed to purchase from Ranco Oil Corporation, the predecessor to Pettus Oil, leases covering 160 acres of land described in Live Oak County, Texas, upon Ranco's completion of a test well to a depth of 5,300', or the Yegua Sand.

Upon completion of the test well, the assignor was to provide a photostat of the leases, and the assignments were to be on "...the regular Texas Standard Form N.86." *Id.* The price was specified.

The description of the assignment was deemed insufficient because it lacked the essential elements of a proper description. The deficiency was not in the description of the lands, but in the leases to be assigned and the terms of the assignment. The court found that neither the terms of the leases nor the terms of the assignment could be ascertained at the time the memorandum was executed without resort to parol testimony. *Id.* at 963. The court concluded that the principle in *Smith v. Sorelle*, 126 Tex. 353, 87 S.W.2d 703, 705 applied which stated that "if the subject matter sought to be conveyed is not described sufficiently to identify same, the requirements of the statute have not been met" and that "the subject granted must be identified by the description given of it in the instrument itself" or by other writing referred to.

***Oakrock Exploration Co. v. Killam*, 87 S.W.3d 685 (Tex. App. - San Antonio 2002, pet. denied), 162 O&GR 747.**

On March 7, 1998 Oakrock submitted the following letter/offer:

Oakrock Exploration Company proposed to offer you, and all of the remaining members of your family who own mineral interests under the 154 acre Oscar Ramirez Tract in Southern Zapata County, a bonus of \$300.00 per acre for a one year oil, gas & mineral lease with a 25% royalty on the acre described and shown on the attached plat and lease description. (This lease is just south of the El Tigre Chiquito Bridge approximately 20 miles out of Zapata, Texas.)

which was accepted by the offerees.

The trial by Oakrock to enforce this offer as a contract resulted in a judgment notwithstanding the verdict in favor of the offerees. On appeal, the court affirmed the trial court stipulating that a party cannot accept an offer to form a contract unless the terms of that contract are reasonably certain. The subject matter of this offer was an oil and gas lease and the March 7 letter did not contain the essential terms describing the lease. The court stated that the essential elements in describing an oil and gas lease were:

The term of the lease, the drilling commencement date, time and amount of payments in lieu of drilling operations, and amounts to be paid for produced gas... .

Citing *Cantrell*, 240 S.W. at 534 and *Taber*, 162 S.W.2d at 961.

## 11. Reference to Another Agreement

### **IT WORKED - *Westland Oil Development Corp. v. Gulf Oil Corp.* 637 S.W.2d 903 (Tex. 1982)**

At issue was a letter agreement containing two different descriptions, separated by the word “or”. For the purpose of analyzing the agreement, the court treated each description separately. If each description were inserted separately into the body, the first description would read as follows:

If any of the parties hereto, their representatives or assigns, acquire *any additional leasehold interests affecting any of the lands covered by said farmout agreement*, ... such shall be subject to the terms and provisions of this agreement, (emphasis added).

In the introductory paragraph to the letter agreement, the parties expressly agreed that a certain Mobil/Westland farmout read as follows:

Proposed farmout of Mobil’s leasehold interest in the drillsite section and an undivided one-half of our leasehold interest in Sections ... 19, ... and 13, 23, and 24, ... less the drillsite section for the drilling of a projected Ellenburger test to be located in the SE 1/4 Section 13, ... Pecos County, Texas ...

The question was whether this description rendered an area of mutual interest agreement enforceable as to section 19, 23, and 24. The Court found the description to be legally sufficient to satisfy the Statute of Frauds. The operative words were “leasehold interest affecting

any of the lands covered by said farmout”. The court believed that the words “said farmout” sufficiently provided the nucleus of description. The introductory paragraph defined “said farmout” and the reader was expressly directed to an instrument which contained an adequate legal description. Therefore, the AMI agreement provided a description of sections 19, 23, and 24 which was legally sufficient.

Applying the same method, the second description would say:

If any of the parties hereto, their representatives, or assigns, acquire ... any additional interest from Mobil Oil Corporation *under lands in the area of the farmout acreage*, such shall be subject to the terms and provisions of this agreement; ... (emphasis added).

Sections 25, 26, and 30 were in the vicinity of the farmout acreage. Therefore, Westland contended that this second description applied to those three sections and was legally sufficient to permit enforcement of the AMI agreement. The court reached a different conclusion with respect to this description. The phrase “lands in the area of the farmout acreage” did not meet the test. Westland argued that the court should substitute “Rojo Caballos Area” for the word “area” contained in the phrase recited above and argue that parol evidence could be introduced to supply a legal description for “Rojo Caballos Area”. The court rejected the argument, reasoning that the description cannot be arrived at “from tenuous references and presumptions of doubtful validity.” *Id.* at 909-910.

### **IT DIDN’T WORK - *Crowder v. Tri-C Resources, Inc.* 821 S.W.2d 393 (Tex. App. - Houston [1 Dist.] 1991, no writ)**

The parties executed a participation agreement and a joint operating agreement, neither of which contained an AMI provision. After execution of the agreements, Tri-C’s landman drew an AMI boundary on a plat. Later, Crowder was not given the opportunity to participate in additional acreage, so he sued.

Even though the AMI agreement was not part of the participation agreement, Crowder contended that the Statute of Frauds was met because Tri-C acknowledged and referred to an AMI in a September 16, 1986 letter, and the Tri-C landman prepared the land plat showing the AMI.

The court found that the alleged AMI agreement

failed to comply with the Statute of Frauds. The plat, which may have been a sufficient description of the land included in the alleged AMI, was not signed by a representative of Tri-C and did not refer to the September 16 letter signed by Tri-C. The September 16 letter did not refer to the plat nor did it otherwise describe the land in the AMI. Neither taken together nor standing alone did the plat and the September 16 letter contain the essential elements from which an AMI boundary could be ascertained.

**IT WORKED - Construe separate instruments together - Transfer of portion of larger tract - *Jones v. Kelley*, 614 S.W.2d 95 (1981).**

The Joneses thought they owned 127.55 acres in Shelby County, but the trial determined it was actually 116 acres. They contracted to sell all the land they owned in Shelby County to Kelley by two conveyances covering:

Tract 1 - 36 acres out of the W. W. Wagstaff Survey, A-796 and

Tract 2 - 91.55 acres out of the W. W. Wagstaff Survey, A-796 and D. G. Green Survey, A-263 ...

The Court held that neither description, taken alone, would be sufficient, but the court sustained the conveyance by concluding that the two contracts/deeds were a part of one transaction and that the grantors were conveying all of the property they owned in Shelby County. The claim of ownership was contained, not in the contracts for sale and deeds, but in an affidavit the grantors delivered to the Veterans Land Bank as a part of the financing. *Pickett v. Bishop*, 148 Tex. 207, 223 S.W.2d 222 (1949) holds that the stated ownership of property is in itself a matter of description (“nucleus of description”) which would provide the means or data by which other evidence can be admitted to create reasonable certainty.

**12. Insufficient Information in the Exhibits.**

**Long Term Joint Venture Agreements Undone - *The Long Trusts v. Griffin*, 222 S.W. 3d 412 (2006).**

For over 20 years these parties had participated in a joint venture whereby the plaintiffs/investors had participated in wells drilled by the defendants/operators and received assignments on a “project by project or well by well basis”. Plaintiffs brought this suit to enforce 1992 letter agreements requiring them to pay their proportionate part of legal expenses to Long Trusts so that plaintiffs could participate in any “take or pay” settlement

defendants obtained against Tegas Gas Company, which was purchasing the gas produced from the wells in question. (The defendant ultimately obtained an 11 Million dollar settlement from Tegas.) The defendants responded by calling into question the basic agreements that created their relationship.

This case addressed two separate letter agreements between the parties. The 1978 letter agreement stated that the subject leases were located:

“in the Northeast portion of Rusk County, Texas, and consist[ed] of 50+ leases covering approximately 2100 + net mineral acres in the Dirgin and Oak Hill Fields area” as “described in the attached Exhibit ‘A’”.

Exhibit A provided the lessor name, the survey name, the term, and the net acreage for each lease at issue. The Exhibit A did not supply the date, recording, or the name of the lessee.

\_\_\_ The Court held the information was insufficient to identify the exact location of the lease with reasonable certainty. It described land only by quantity as part of a larger tract, with nothing to identify what specific portion was intended to be conveyed. Therefore, it was voidable for uncertainty of description, citing *Smith v. Sorelle* and *Matney v. Odom*, see *infra*.

COMMENT - In the author’s opinion, the best format for describing an oil and gas lease is to include:

1. the date of the lease.
2. recording
3. name of lessor
4. name of lessee
5. property covered, or if less than all, conveyed.

In the authors’ opinion, this practice has progressed into an industry custom. What our jurisprudence does not provide for practitioners is a definitive case that identifies which, if any, of the five elements listed can be omitted and the description be legally insufficient. It is the hope of these authors, and others with whom we have visited, that this case is not the definitive case sought.

The 1982 letter agreement stated that the subject leases were:

“... located in the Northcentral portion of Rusk County, Texas, in the North Henderson Field Area,

and consist[ed] of 143 leases covering approximately 2100 net mineral acres” as “described in the attached Exhibit ‘A’”, and “[a]ll of the acreage as shown on Exhibit ‘A’ (attached) is dedicated to a Gas Contract with Tejas Gas Corporation.”

No Exhibit A was attached to the 1982 agreement.

The Tejas gas contract referred to in the agreement was in the appellate record, but the court determined that it failed to sufficiently identify the leases, even assuming that was the reference’s purpose. The Tejas gas contract defined the term “contract acreage” as “all of the leases and lands described in Exhibit ‘A’ and outlined on Exhibit ‘B’. Exhibit “A” to the gas contract stated the leases were “more fully described as follows” and contained (only) headings for items like leases name, description, and acreage, and was blank below the headings. Exhibit B provided a plat. Another document, also entitled “Exhibit ‘A’,” was attached at the end of the contract and provided the name and legal description of each lease, but stated that it was “attached to and made a part of” a separate seemingly unrelated agreement.

The court concluded that Exhibit A and B to the Tejas gas contract were insufficient to identify the leases at issue. Exhibit A identified no leases and Exhibit B alone (the plat) was insufficient. In the court’s view, the Tejas gas contract only provided confusion, not reasonable certainty, as to the identity of each lease in the 1982 agreement. Thus, the court deemed the 1982 agreement unenforceable under the Statute of Frauds.

COMMENT - The authors summarize the lesson of the *Westland* case to be that reference to an instrument in an assignment creates the duty to examine the instrument referred to and pursue the inquiry as to additional instruments referenced. Failing this inquiry, the assignee is charged with constructive notice of the facts a diligent inquiry would have revealed. This opinion makes no reference to *Westland* and neglects to discuss the duty to inquire. It appears that in this case, an inquiry was made, sufficient facts were identified, but the connecting links between the instruments located pursuant to the inquiry were too ambiguous to allow the court to connect the dots. (Over 20 years of performance reflects that the parties themselves had no trouble connecting the dots.) It is interesting that the Supreme Court does not list any case citation for its conclusions in its interpretation of the 1982 letter agreement. The Appellate opinion, 144 S.W.3d 99, 103, (Tex. App. - Texarkana 2004) reaches the opposite/correct conclusion but also provides no analytical support.

The lesson to exploration companies is that their exhibits must be complete, unambiguous and that utilization of different exhibits must contain clear contractual connections.

**PSA Not Enforced - *Preston Exploration Co. v. Chesapeake Energy Corp.*, 716 F. Supp. 2d 656 (S.D. Tex. 2010)**

This recent case concerned whether the description of oil and gas leases in first, the PSA, then in the proposed Assignment, were sufficient to be statute of frauds compliant. The Court points out that the leases described in the Exhibit A to the PSA were more descriptive than the Long Trust leases. Specifically, the Exhibit A describing the Long Trust leases provided:

1. The lessor’s name
2. The survey name
3. The primary term
4. The net acreage for each lease.

The Preston PSA Exhibit A additionally described:

5. The name of the lessee
6. The effective date of the lease
7. The gross acres leased
8. The royalty of the lease
9. The net revenue of the property
10. A “Lease ID” for each lease. (While the Exhibit A did not state this, the Lease ID referenced a Preston lease file which contained a hard copy of each lease.)

The Court defined all of the above as “characteristic data”.

The Court held that all of these facts did not satisfy the Statute of Frauds because the data would, at best, require a search of the public records to determine the location of the property covered by each lease. In other words, the Exhibit A did not contain the volume and page of each lease. The Court held that to be Statute of Frauds compliant a description must “explicitly reference a document or public record containing location information”.

The Court also held that as a matter of law the Exhibit A to the proposed Assignment, which was referenced in the PSA, could be considered a part of the land covered by the PSA, if the Exhibit A was used in the closing. Preston emailed the Assignment Exhibit A to Chesapeake prior to the execution of the PSA on 10/7/08.

The Assignment Exhibit A contained volumes and pages of all leases. This hopeful scenario did not benefit Preston because, pursuant to the due diligence requirements in the PSA, the parties made numerous changes to the leases contained in the Assignment Exhibit A prior to closing, which was scheduled for 11/7/08. While Preston could not enforce its PSA, it was entitled to keep the 10% of the purchase price Chesapeake paid in order to extend the scheduled closing date an additional month.

### 13. Can Mis-Description be Cured?

#### **Reference to abstract number - *Reserve Petroleum Co. v. Harp*, 148 Tex. 448, 226 S.W.2d 939 (1950).**

The description in question was: W/2 of Section #7, Block A4, Abstract No. 1304, E. R. Harp Survey, Hale County, Texas. The problem was the parties thought they were conveying Section 70, not Section 7. The Court applied the rule that:

The part of a description that is false will be disregarded or rejected as surplusage and the deed will be sustained as valid if, after the rejection of what is false, the remaining words of the description are sufficient to identify the land with certainty. *Arambula v. Sullivan*, 80 Tex. 615, 619-620, 16 S.W. 436; *Cartwright v. Trueblood*, 9 Tex. 535, 538-539, 39 S.W.930; *Maupin v. Chaney*, 139 Tex. 426, 431, 163 S.W.2d 380 (1942).

The remaining words of the description allowed the court to revise the bad description by acknowledging two important facts. First, there could be no Section 7, E. M. Harp Survey, because the alternate/odd numbered surveys were granted to the railroad companies and the even numbered surveys were set apart to the Public School Fund, to be sold to individuals. Section 7 then would have been patented to a railroad, not to E. M. Harp, an individual. Secondly, the abstract number identified the specific tract in question. The court took judicial notice that the General Land Office issues abstract numbers consecutively as each tract in a county is patented. "Thus always the abstract number originally given to the survey continues to be the abstract number of that survey or of some part of it. The abstract number first given the survey never applies or belongs to any other survey or to any part of any other survey." *Id* at, 841.

#### **Error describing block cured - *Gates v. Asher*, 154 Tex. 538, 280 S.W.2d 247 (1955).**

Grantor intended to convey his homestead, which he had owned for many years in Galveston County, Lots 10,

11 and 12 in Block 2, Denver Resurvey... . Instead, the deed contained the following description:

All of Lots 10, 11 and 12 in Block 175, in Denver Resurvey 2 ...

The court sustained the description holding that the description itself contained a "nucleus of description" which would allow the introduction of parol evidence to explain the deficiencies and thus accurately identify the land. *Smith v. Sorelle*, 126 Tex. 353, 87 S.W.2d 703 (1935). If enough appears in the description so that a party familiar with the locality can identify the premises with reasonable certainty, it will be sufficient. *Pickett v. Bishop*, 148 Tex. 207, 223 S.W.2d 222 (1949). The extrinsic evidence was that:

- 1) While there was no Denver Resurvey No. 2, the Denver Resurvey was a replat of a portion of the original subdivision and Block No. 2 of Denver Resurvey was also designated as "Org. (original) 175".
- 2) There was testimony from a surveyor and the County Assessor and Collector that they could locate the land from the description.

The court held that this holding was not contrary to *Wilson v. Fisher*, 144 Tex. 53, 188 S.W.2d 150, 152 (1945) because the description herein provided the "means or data" to comply with the Statute of Frauds.

#### **Description referring to wrong survey held void - *Wiseman v. Watters*, 106 Tex. 96, 174 S.W. 815 (1915).**

H. Frederich conveyed to C. O. Maddox 306.5 acres out of the E. Smith and M. Ximines Surveys in Guadalupe County. Subsequently, Maddox executed a deed of trust to Watters:

Being a tract of 101 2/3 acres of land, a part of the Y. H. Mannus Survey, and being 1/3 of the H. Sulise Tract, the north 1/3, lying and situate 1 2/3 miles north of the town of Lavernia on the New Berlin and Seguin Road, and being more particularly described in a certain deed from H. Frederich to C. O. Maddox of record in Guadalupe County, to which reference is here made for more particular description.

A year later Maddox conveyed to R. A. Wiseman 151.8 acres out of the E. Smith Survey. The question was whether the description contained in the deed of trust was sufficient to provide constructive notice to Wiseman that the land he purchased was burdened by the deed of trust. The trial court and the Court of Civil Appeals rendered a

judgment against Wiseman.

The Supreme Court reversed and rendered. The description contained in the deed of trust was not sufficient to charge the subsequent purchaser, Wiseman, with the duty to inquire as to the discrepancy.

**Reference to “my land” makes incomplete description sufficient - *Pickett v. Bishop*, 148 Tex. 207, 223 S.W.2d 222 (1949).**

A memorandum signed by Bishop authorized Pickett, et ux to be his realtors and sell the following land:

My property described on the opposite side hereof;

and the reverse side of the memorandum stated:

20.709 acres out of John Stephens 640 Survey in Tarrant County, Texas.

The court held that without the reference to “my property” the description would have failed. The court stated that:

The settled rule in the state is that such a description, by reason of the use in the memorandum of contract of such words as “my property”, “my land”, or “owned by me”, is sufficient when it is shown by extrinsic evidence that the party to be charged and who has signed the contract or memorandum owns a tract and only one tract of land answering the description in the memorandum. *Ragsdale v. Mayes*, 65 Tex. 255; etc. The stated ownership of a property is in itself a matter of description which leads to the certain identification of the property and brings the description within the terms of the rule that “the writing must furnish within itself, or by reference to some other existing writing, the means or data by which the particular land to be conveyed must be identified with reasonable certainty”. *Wilson v. Fisher*, 144 Tex. 53, 56-57, 188 S.W.2d 150, 152 (1945).

**Reference to “my land” cures defective description - *Kmiec v. Reagan*, 556 S.W.2d 567 (1977).**

Kmiec, as optionee, sued Reagan for specific performance of the option to purchase 493.5 acres described as:

It is understood and agreed that Sellers also own other lands in said Marquez 11 Leagues Grant in Robertson County, Texas, the same lying south of

and across said gravel county road from the premises above-described (referring to 300 acres previously purchased), said premises being described as containing 493.5 acres of land, more or less, being 150 acres of land, more or less, lying in the southeast corner of Section No. 31 of said 11 Leagues; 168.25 acres of land, more or less, and 168.25 acres of land, more or less, situated in the northeast and southeast corners of Section No. 42 of said 11 Leagues; and a tract of approximately 7 acres lying adjacent to said County Road between Steel’s Creek and the west boundary line of Section No. 32 of said 11 Leagues.”

The trial court granted specific performance but the Court of Appeals reversed and rendered. The Supreme Court reversed and rendered ordering specific performance concluding that the description could be made reasonably certain by applying the rule as set out in *Pickett v. Bishop*, 148 Tex. 207, 223 S.W.2d 222 (1944). When the grantor is stated to be the owner of the property to be conveyed and it is proved that the grantor owns only a single tract answering the description, the land is identified with reasonable certainty.

**The Court has the duty to correct incorrect calls; confirms presumption of grant doctrine**

***Howland v. Hough*, 570 S.W.2d 876 (Tex. 1978)**

Howland filed a trespass to try title suit against Hough to recover an 8.36 acre tract of land in Travis County, Texas. The trial court rendered judgment vesting title in Hough but the Court of Appeals reversed and remanded because of the erroneous exclusion of evidence. The Supreme Court reversed and rendered vesting title and possession in the plaintiff, Howland.

Howland attempted to prove title to the disputed tract of land by regular chain of title from the sovereign and, alternatively, pled for title by adverse possession. Howland introduced into evidence the Patent and 9 deeds establishing his chain of title from the sovereign. The deeds had two important defects. First, there was a gap in title from the 1845 Patent to James O. Irvine until the 1874 deed from Henry Hill to August Meissner. Second, the tract in dispute is not accurately described by the literal calls of the deed from Hill to Meissner, nor any of the subsequent deeds in Howland’s chain of title.

As to the first defect, Howland claimed that the missing link in his chain of title could be eliminated by applying the Presumption of a Grant Doctrine, pointing out that the gap was 96 years prior to the filing of the suit.

The court agreed that the presumption of a grant can arise from long continued possession of property under a claim of title, coupled with other corroborating circumstances. This is a presumption of fact. Thus, the trier of fact must usually determine whether the inference of a grant is warranted by the evidence. *Swilley v. McCain*, 374 S.W.2d 871 (Tex. 1964); *Herndon v. Vick*, 89 Tex. 469, 35 S.W. 141 (1896); *Page v. PanAmerican Petroleum Corp.*, 381 S.W.2d 949 (Tex. Civ. App. - Corpus Christi 1964, writ ref'd n.r.e.); *F. Lange Land Titles and Title Examination §405* (Texas Practice 1961).

“Although the presumption of the lost grant or conveyance is usually one of fact, it has been sufficiently established in this case to presume it as a matter of law because the deeds are so ancient and the evidence is undisputed.” *Id* at 879. The evidence the court relied upon in reaching this conclusion is:

- 1) Howland’s chain of title showed a continuous record of conveyances of the land described from the Patent until the present, excepting the period from 1845 to 1878. The defendant’s claim to title was based upon a deed to defendant in 1947 plus a “Correction and Supplemental Deed” dated 1954. The deed to defendant referred to a 1904 sheriff’s deed which was not introduced into evidence.
- 2) Because the gap in Howland’s title occurred 96 to 129 years before the suit was filed there was no direct evidence of the possession of the land during the gap. However, proof of possession is not an absolute pre-requisite to the presumption of a lost conveyance. *McGee v. Paul*, 110 Tex. 470, 479, 221 S.W. 254, 257 (1920). The court considered Howland’s unbroken chain of title since 1878 as evidence of the assertion of ownership to the land. The court applied the rule that a long and continuous claim of title and ownership, which is undisputed by any adverse claim, with indicia of ownership by payment of taxes, successive conveyances, etc. was sufficient. This rule can be applied where the parties are all dead and there has been a sufficient length of time where it is not reasonable to expect other more satisfactory evidence to be available. *Brewer v. Cochran*, 45 Tex. Civ. App. 179, 99 S.W.1033, 1035-36 (Galveston 1907, writ ref’d.); *Baldwin v. Goldfrank*, 88 Tex. 249, 31 S.W.1064 (1895); *Garner v. Lasker*, 71 Tex. 431, 9 S.W.331 (1888).

Howland acknowledged his second problem, that the disputed tract was not accurately described by the literal calls of the deeds within his chain of title. After discussing the obvious defects in the metes and bounds

descriptions, the court applied the rule pronounced in *William Carlisle & Co. v. King*, 103 Tex. 620, 624-26, 133 S.W. 241, 242-43 (1910) wherein the Supreme Court said:

“The rule of construction of deeds is that where there is an evident mistake in the calls, the court must, if practicable, find out from the deed itself and correct errors so as to give effect to the deed.” *Poitevent v. Scarborough*, 103 Tex. 111, 124 S.W. 87; *Mansel v. Castles*, 93 Tex. 414, 5 S.W. 559; *Coffey v. Hendricks*, 66 Tex. 676, 2 S.W. 47. ... This purpose must be observed in the construction of the deed, and it cannot be effectuated in any other manner than by correcting the palpable errors which appear in the calls as expressed in that instrument. We believe that there is no difficulty in reconciling all of these calls, thereby giving a true and correct expression of the intent and purpose of the makers of this instrument.”

### III. STRIPS AND GORES

#### A. The General Rule/Presumption

The Strip and Gore Doctrine is a presumption applied where a grantor owns land, adjacent to a strip of land (which could be an easement, road, railroad, or non-navigable stream), who conveys all of the land with a description that abuts, but does not include, the adjacent strip. The doctrine answers the question:

Does the grantor retain title to the undescribed easement tract/strip?

This well established common law rule/presumption was adopted by the Supreme Court of this state when it provided that:

A conveyance of land bounded on a public highway carries with it the fee to the center of the road as part and parcel of the grant. Such is the legal construction of the grant, unless the inference that it was so intended is rebutted by the expressed terms of the grant. The owners of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. *Mitchell v. Bass*, 26 Tex. 372 (1862).

Another way of stating the rule is that the courts will extend the actual boundaries of the land described, deeded as extending to and along the sides of highways and non-navigable streams, to the middle of such

highway and stream, if it can be done without manifest violence to the words used in the conveyance. *Texas Bitulithic Co. v. Warwick*, 293 S.W. 160 (Tex. Com. App., 1927)

*Warwick* extended the rule to cover streets and alleys abutting city lots where the court considered a deed describing the lot by metes and bounds, not lot and block, stopping at the edge of the street. The rule was extended to railroad rights of way in the case of *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S.W.2d 1080,(1932), 85 A.L.R. 391. The court in *Cox v. Campbell*, 135 Tex. 428, 143 S.W.2d 361 (1940), which affirmed the conclusion in *Rio Bravo v. Weed*, stated that “perhaps no other case was ever considered more seriously and for a greater length of time by this Court than was the *Weed* case.” The *Weed* case was decided, in part, based upon the rule that, where there is a conflict between a specific description by metes and bounds and the lot and block number by which a tract of land is conveyed, the latter description will usually prevail. *Arambula v. Sullivan*, 80 Tex. 615, 16 S.W. 436, 437 (1891).

There are the following reasons to appreciate the presumption:

1) The public policy underlying the presumption is that separate ownership of long narrow strips of land distinct from the adjoining land on each side promotes disputes and litigation. An arbitrary rule compelling the grant of ownership to the middle of the easement is thus in the public interest.

2) As a practical matter, when a person conveys a piece of property abutting a public highway or non-navigable stream it is natural to assume, in the absence of an express reservation to the contrary, that he intends to convey the property with all of the beneficial rights enjoyed by the grantor. These beneficial rights pass whether or not the term “appurtenances” is used. This idea normally comports with the intention of the parties.

While the presumption is very clear and easy to apply, the value of the strips of land are often greatly enhanced by oil and gas drilling so that litigation over title to the strips continues. See *Cantley v. Gulf Production Co.*, 135 Tex. 339, 143 S.W.2d 912 (1940) and *Reagan v. Marathon Oil Co.*, 50 S.W.3d 70 (Tex. App. - Waco 2001, no pet.), 153 O&GR 71.

The Texas Supreme Court has held that the presumption will not apply where:

- 1) the adjacent tract/strip is both not referenced in the deed as an easement and the tract/strip is, in fact, not an easement. *Goldsmith v. Humble Oil & Refining Co.*, 145 Tex. 549, 199 S.W.2d 773 (1947);
- 2) the adjacent tract/strip consists of an abandoned railroad right-of-way. *Angelo v. Biscamp*, 441 S.W.2d 524 (Tex. 1969).

**B. Rebutting the Presumption:** The presumption that a conveyance adjoining a road conveys land to the center of the road is a rule of construction and is a presumption that is rebuttable. If the intention to exclude the road from the conveyance is clear, explicit, and unequivocal or if the deed expressly declares its intent not to convey the strip, the intent to exclude the highway will be enforced. If the language is doubtful, the deed will convey the land to the center of the road.

#### IV. Mother Hubbard/Adjacent-Acreage Clauses

##### A. What it is?

A Mother Hubbard clause is an attempt to create the same result by contract that the Strip and Gore Doctrine creates as a legal presumption. While the Strip and Gore Doctrine applies to strips of land underlying easements, etc. the Mother Hubbard language, while including land underlying easements, etc. includes small adjacent tracts, particularly those resulting from incorrect surveying, careless location of fences, or other mistakes.

An example of a Mother Hubbard clause (cited in the Legal Form Manual for Real Estate Transactions - 1996 - State Bar of Texas) at §101.19:5 is as follows: “including, but not limited to, all interest of Grantor, if any, in (1) strips and gores, if any, between the property and any abutting properties, whether owned or claimed by deed, limitations, or otherwise, and whether located inside or outside the property and (2) any land lying in or under the bed or any creek, stream, or waterway or any highway, avenue, street, road, alley, easement, or rights-of-way, open or proposed, in on, across, abutting, or adjacent to the property”.

While Mother Hubbard clause is the traditional title for this concept, for the purpose of my discussion I will use the more descriptive term “adjacent-acreage” clause. For the purpose of briefly illustrating how Texas courts have interpreted the adjacent-acreage clause I summarize the following cases emphasizing the granting clauses:

*Sun Oil Co. v. Burns*, 84 S.W.2d 442, 443 (1935).

Specific - 106.25 acres in the Juan Vargas League in Smith County

General - 3.736 acres;  $3.736/106.25 = 3.5\%$

Clause: - "It being the intention, however, of lessor, to include within the terms of this lease *not only* the above-described land, *but also* any and all other land owned or claimed by lessor *in said survey or surveys* in which the above-described land is situated or *in adjoining surveys* and *adjoining* the above-described land."

Result - 3.736 acre tract held to be covered by oil and gas lease; Trial Court and Appellate Court reversed and rendered.

*Sun Oil Co. v. Bennett*, 84 S.W.2d 447, 448 (1935).

Specific -  $34 + 42 = 76$  acres in the J. B. Cadena League in Rusk County

General - 2.59;  $2.59/76 = 3.4\%$

Clause - Same as *Burns*

Result - 2.59 acre tract held to be covered by oil and gas lease; Trial Court and Appellate Court reversed and rendered.

*Gulf Production Co. v. Spear*, 84 S.W.2d 452, 454 (1935)

Specific - 6 acres in the S. P. Hollingsworth Survey, \_\_\_\_\_ County

General - 1.81 acres;  $1.81/6 = 30.2\%$

Clause - "It being the intention to include all land owned or claimed by lessor *in said survey or surveys*."

Result - 1.81 acre tract covered by oil and gas lease; Trial Court and Appellate Court reversed and rendered, but remanded to Trial Court for development of damages.

*Alexander v. Byrd*, 114 S.W.2d 915 (Tex. Civ. App. - El Paso 1938, writ refused)

Specific - 100 acres in Mary Van Winkle Survey, Gregg County

General - 6.2 acres;  $6.2/100 = 6.2\%$

Clause - "It is the intention of the lessor to include in this instrument all land owned by us, either by deed, inheritance, limitation or otherwise *in said survey, surveys, adjoining surveys, or in the neighborhood thereof*, whether properly described herein or not."

Result - 6.2 acres covered by oil and gas lease; affirms Judgment NOV.

*Dennis v. Pace Petroleum Co.*, 230 S.W.2d 585, 588 (Tex. Civ. App. - Ft. Worth 1950, writ refused n.r.e.)

Specific - 34 + another tract in the Pope Survey, Cooke County

General - 10.9 acres

Clause - "Notwithstanding any particular description, it is nevertheless the intention of lessor to include within this lease, and he does hereby lease, not only the land so described but also any and all other land owned or claimed by lessor *in the herein named survey or surveys, or in adjoining surveys, and adjoining the herein described land up to the boundaries of the abutting landowners*."

Result - 10.9 acre covered by oil and gas lease; affirms Trial Court.

*Smith v. Allison*, 301 S.W.2d 608, 611 (1956)

Specific - SE/4 & NW/4 of Section 124, Block 25, H&TC Ry. Co., Scurry County

General - NE/4 of Section 124,  $160/320 = 50\%$ ; or also Sections 123 and 145,  $1,440/320 = 450\%$

Clause - "The parties however intend this deed to include and the same is hereby made to cover and include not only the above-described land, but also any and all other land ... owned ... by the grantor *in said survey* (124) ... and in which the above-described land (NW/4 and SE/4) *is situated in or adjoining the above-described land* ..."

Result - General description was ambiguous and claim for coverage of NE/4 failed.

The Supreme Court reached a similar result on similar reasoning in *Jones v. Colle*, 727 S.W.2d 262 (Tex. 1987). In that case, Curry owned a portion of the minerals under two adjoining tracts of land. One tract contained 68.72 acres; the adjoining tract contained 49.34 acres. Curry owned a total of 49.54 mineral acres under the two tracts. In 1978 Colle obtained a receivership lease covering Curry's mineral interest in the first tract. The lease contained an adjacent-acreage clause which provided that:

... This lease also covers and includes, in addition to that above-described, all land, if any, contiguous or adjacent to or adjoining the land above-described and (a) owned or claimed by lessor by limitation, prescription, reversion, or unrecorded instrument or (b) as to which lessor has a preference right of acquisition.

In holding that the lease did not cover both tracts the court noted that the parties were aware of the existence of both tracts at the time of the lease and yet chose not to include the adjoining tract in the granting clause. The court then cited *Allison*, with approval for the proposition that "a Mother Hubbard Clause would only serve to cover

property not described in the deed when that other property consists of small unleased pieces or strips of land which may exist without the knowledge of one or both parties”. *Colle* at 263.

The common denominator in all of the cases referenced is that:

The clause is not misleading, and it contains no inherent unfairness. Its apparent purpose is to prevent the leaving of small unleased pieces or strips of land, like the tract herein controversy, which may exist without the knowledge of one both of the parties by reason of incorrect surveying, careless location of fences, or other mistakes.

This explanation of the purpose of the clause makes perfect sense provided the clause is one that, by its terms, only covers land that is adjacent to the described property. That is the context in which strips of land attributable to surveying errors, careless fence lines, and such would be an issue. In other words, if the clause is not, by its terms, expressly limited to adjacent lands, then it must serve some other purpose because surveying errors and concerns about fence lines are simply not an issue. *Bennett* at 452.

Therefore, the Supreme Court has consistently held that the purpose of an adjacent-acreage clause is to pick up small pieces or strips of land that may exist without the knowledge of one or both of the parties by reason of incorrect surveying, careless location of fences, or other mistakes.

## **B. What it isn't.**

A Mother Hubbard or adjacent-acreage clause should not be confused with a cover-all, global, area-wide clause which is explained *infra*.

## **V. Cover-All/Global/Blanket/Area-Wide Description (as in “all my land in Harris County”)**

### **A. A General Description Alone Satisfies the Statute of Frauds.**

It is well settled that a general/blanket/global/cover-all/area-wide description of all of the grantor's real property wherever located, or wherever located within a specified area such as a particular city, county or state, is sufficient in a deed to convey whatever land, or interest in land, the grantor owns in the geographic area described.

*Texas Consolidated Oils v. Bartels*, 270 S.W.2d 708 (Tex. Civ. App. - Eastland 1954, writ ref'd);

General - All the oil, gas and mining leases, royalties and overriding royalties located anywhere within the United States, most of which are located within the states of New Mexico, Kansas, Oklahoma, Louisiana and Texas ...

Result - “It has long been the rule that a deed purporting to convey all lands owned by the grantor in the state or in a named county is sufficient description to effect a conveyance.” *Id* at 711.

*Best Investment Co. v. Francis*, 453 S.W.2d 893, 897 (Tex. Civ. App. - Eastland 1970, writ ref'd n.r.e.)

General - All of the interest of the Estate of J. A. Irwin, Inc. in the properties conveyed to Geo. V. Basham, Jr. by Emery Wiley, Trustee in the bankruptcy of the Estate of J. A. Irwin, Inc. by said instrument of conveyance dated ...

Result - “It is held that a deed based upon ownership of property by the grantor in a certain county, even though it does not describe any land in particular other than such ownership of the grantor, passes title to such property owned by the grantor.”

*Baker v. Smith*, 407 S.W.2d 4, 6 (Tex. Civ. App. - Fort Worth 1966, writ ref'd n.r.e.)

General - All real estate grantor owned in Jack County, Texas, including, but not limited to all minerals.

Result - The description was deemed sufficient to pass title.

### **B. A Specific Description Followed by a General Description Satisfies the Statute of Frauds.**

The fact that a general grant of all property owned by the grantor in a defined area follows a specific grant should not be material.

*Holloway's Unknown Heirs v. Whatley*, 131 S.W.2d 89, 90 (1939)

Specific - All of grantor's interest in the Elizabeth Munson League, BBB & C Ry. Co. Survey, and the Moses Donohoe League, Liberty County

General - All of the land grantor owns in Liberty County

Clause - "If there is any other land owned by me in *Liberty County, Texas*, or any land, the title to which stands in my name, it is hereby conveyed, the intention of this instrument being to convey *all land owned by me in said county*."

Result - Interest Grantor previously reserved in Moses Donohoe League conveyed by deed in question; affirms Trial Court and Appellate Court.

*Smith v Westall*, 76 Tex. 509, 13 S.W.540 (1890)

Specific - All land inherited by me from my deceased parents, situated in Brazoria County.

General - "This conveyance is meant to convey and carry with it every possible interest that I now have or may have to any property in this county, or any other county in the State of Texas."

Result - The court acknowledged/confirmed and sustained two grants. "The description in the deed was thus sufficient, and it passed all lands in the state vested by inheritance in Westall at its date."

*Cook v. Smith*, 107 Tex. 119, 174 S.W. 1094, 3 A.L.R. 940.

Specific - A large number of lots plus come tracts by metes and bounds within the town of Paducah, Cottle County.

General - "It is my intention here now to convey to the said A. A. Neff all the real estate that I own in said town of Paducah in Cottle County, Texas, whether it is set out above or not.

Result - The deed conveyed all property grantor owned, not just the property specifically described.

Thus, in *Whatley*, *Smith* and *Cook*, the Supreme Court gave full effect to the area-wide clause. In *Whatley*, the area-wide clause made the grant effective as to all of the grantor's land in Liberty County, in *Smith* the clause covered Brazoria County, and in *Cook* the clause encompassed all of the grantor's property in the town of Paducah.

A cover-all/global/blanket/area-wide description

constitutes constructive notice to subsequent purchasers of the land conveyed. *Texas Consolidated Oils vs. Bartels*, 270 S.W.2d at 713.

## VI. Three Cautionary Tales

The following cases serve to illustrate our contention that the importance of the language used in legal descriptions in oil and gas related conveyances cannot be overstated. These three cases demonstrate that the Courts will not rescue parties from the consequences of their own drafting choices.

### A. Standard Boiler Plate 'Fixes' Shouldn't Replace Careful Drafting - *J. Hiram Moore, Ltd. v. Greer*, 172 S.W.3d 609 (Tex. 2005).

This case concerns the effect of an area-wide clause in a royalty deed. Mary Greer and her three sisters partitioned their mother's 80-acre tract located in the I. & GN Ry. Co. Survey No. 6 in Wharton County into four 20 acre tracts. Each sister received the entire surface of her tract, the executive rights to the mineral estate in her tract, and a 1/4 non-participating royalty interest (NPRI) in all four tracts. Mary Greer received Tract 3. The sisters who owned Tracts 1 and 2 granted oil and gas leases on those tracts and those leases were included in a pooled unit for the SixS Frels Gas Unit, which included lands in the W. M. Barnard Survey No. 14 and the I. & GN Ry. Co. Survey No. 6. That unit included Greer's NPRI in Tracts 1 and 2, but it did not include her NPRI in Tracts 3 and 4. Greer executed an oil and gas lease on her own tract (Tract 3). Four months later, she executed a royalty deed to Steger Energy Company. That royalty deed was later assigned to J. Hiram Moore, Ltd. The specific property description in the Greer royalty deed to Steger was:

All of that tract of land out of the A. B. 801 Sec 14/W M Barnard #14 Survey, Wharton County, Texas, known as the Medallion Oil-SixS Frels Unit.

The typed property description was followed by this typed catch- all/global/area-wide clause:

... Reference is made to this unit(s) for descriptive purposes only and shall not limit this conveyance to any particular depths or wellbores. *In addition to the above-described lands, it is the intent of this instrument to convey, and this conveyances does so include, all of grantor's royalty and overriding royalty interest in all oil, gas and other minerals in the above-named county or counties, whether*

*actually or properly described herein or not, and all of said lands are covered and included herein as fully, in all respects, as if the same had been actually and properly described.*

The issue in the case centered on whether this catch-all language conveyed Greer's royalty interest in a well drilled on the lease she executed on her Tract 3, which was a part of a pooled unit called the Greer #1 Gas Unit. Moore claimed that the royalty deed did include that royalty interest by virtue of the area-wide clause, but Greer contended that the royalty deed did not include her interest in Tract 3. The trial court rendered a summary judgment in Moore's favor. The Court of Appeals and the Supreme Court disagreed.<sup>2</sup>

Although numerous Supreme Court decisions have held that the general/global/area-wide description is effective as a separate grant, in *Greer*, the Supreme Court concluded that the combination of the ambiguous specific grant when read with the general grant in the legal description rendered the deed itself ambiguous. The Court relied upon the precedent of *Smith v. Allison*, 301 S.W.2d 608, 611 (Tex. 1956) wherein it held that a deed was ambiguous when its general description conveyed a significantly greater interest than it conveyed in its specific description. The court found that the specific description in the Greer deed covered land in which Greer owned no interest. The Court's basis for this conclusion is that Greer, who owned an NPRI in Tracts 1 and 2 which was pooled into the SixS Frels Unit, did not own any land in the W. M. Barnard Survey which was specifically described. "Therefore, the specific description either does not describe any royalty interest owned by Greer, or it incorrectly describes her royalty interests in Tracts 1 and 2 that are part of the SixS Frels Unit by stating that they are in the W. M. Barnard Survey, instead of the I &GN Ry. Co. Survey. The general description conveys all of grantor's royalty and overriding royalty interest ... in the above-named county or counties ... . *The deed in effect states that Greer conveys nothing, and that she conveys everything. We cannot construe this deed as a matter of law.*" (emphasis added).

We suggest that this case serves as a warning that practitioners should not rely on general catch all clauses to correct more specific but poorly drafted legal descriptions.

### **B. When Drafting, Say What You Mean – *EOG Resources, Inc. v. Wagner & Brown, Ltd.*, 202 S.W.3d**

<sup>2</sup> Both the Supreme Court and the Court of Appeals opinions appear to have relied on cases that arose from analyses of adjacent-acreage clauses, which the Greer deed did not contain.

### **338 (Tex. App. - Corpus Christi 2006, pet denied).**

In *EOG v. Wagner & Brown*, the legal description in the assignment to which EOG had succeeded stated that the assignment would be "limited in depth to 100' below the deepest producing interval obtained in the test well." The parties agreed that this grant was intended to establish a horizontal subsurface boundary. A test well was drilled pursuant to the agreement and it was undisputed that the test well produced from perforations at depths between 9679' and 9729' in a formation known as the Morris Sand. After EOG succeeded to the interest, as it was preparing to drill a second well, it discovered two unrecorded assignments which altered the subsurface horizontal boundary by referring to the depth as 9779'. The parties acknowledged the error and entered into a Correction Assignment changing the language regarding the depth limitation back to "100 feet below the deepest producing interval as obtained in the test well." EOG drilled its second well and completed it as a producing well in the Morris Sand. At the location of the No. 2 well, the Morris Sand was encountered at a depth between 10230' and 10266'. Wagner & Brown filed a declaratory judgment seeking construction of the Farmout Agreement and Correction Assignment, to determine EOG's rights to produce the Morris Sand in the No. 2 well.

Both EOG and Wagner & Brown insisted that the phrase "deepest producing interval as obtained in the test well" was unambiguous, but each disagreed with the other's unambiguous construction. Wagner & Brown contended that the conveyance granted EOG an interest from the surface to 100' below the depth of the deepest producing interval in the No. 1 well, which was identified as 9,7,729' + 100', or 9829'. EOG contended that the term "deepest producing interval" was not limited to the specific vertical depth at which the Morris Sand was found in the No. 1 well, but to the interval from which the No. 1 well produced, at whatever depth that might be. In other words, the term "deepest producing interval" applied to the Morris Sand, not merely the perforations in the No. 1 wellbore. In upholding the grant of summary judgment in favor of Wager & Brown, the Court of Appeals stated "[w]e do not look to what the parties contend was their intent, but rather to that intent as it was expressed in the final Correction Assignment." *Id* at page 345. (emphasis supplied).

This case illustrates the unintended consequence of using a general term (interval), even where commonly accepted, in a legal description rather than a more specific one. It is clear that the Court considered that this was a dispute that could have been entirely avoided with careful drafting, since the court expressly noted that if the

parties had intended to express the intent to encompass the entire Morris Sand, they could have elected to use readily available alternative terms such as formation, horizon, field, reservoir or stratigraphic layer.

**C. The Legal Description Really Describes What You Get – *Geodyne Energy Income Prod. Part. I-E v. Newton Corp*, 161 S.W.3d 482 (Tex. 2005).**

Newton Corp paid \$300 at auction to purchase Geodyne’s interests in an offshore mineral lease (a 10 percent working interest). The lease was operated by another company, Xplor. At the time of the auction, Geodyne was unaware that production from the lease had ceased. (Xplor continued to send out joint interest billings statements covering the lease which Geodyne paid.) Sometime after Newton had acquired the interest of Geodyne, Xplor notified Newton and the other interest owners in the well that the lease had terminated and sought recovery of plugging costs associated with the abandonment of the wellbore. Newton refused to pay and Xplor brought suit. Newton cross-claimed against Geodyne, alleging Geodyne had misrepresented its interests at auction.

When the matter finally reached the Texas Supreme Court, the Court found that the language of the Assignment and Bill of Sale identified the lease, but never stated the nature or percentage interest of what was being conveyed. Instead, it conveyed to Newton “all of [Geodyne’s] right, title and interest” in the described lease “AS IS, AND WHERE IS, WITHOUT WARRANTY OF MERCHANTABILITY.” This, the Court said, was a quitclaim deed, as a matter of law. The Supreme Court found there was no misrepresentation, and that Newton was liable for its share of the plugging costs, stating (with little evident sympathy):

[A] 10 percent interest is exactly what Newton got. While the lease may have expired before the auction, the rights and duties of interest owners thereunder had not; indeed, it is precisely the 10% share of plugging costs that Newton is trying to avoid. ... Just because Newton got a 10% interest in liabilities rather than assets that does not make the [auction] catalog listing a misrepresentation.

The Supreme Court’s position is clear. Read the conveyance. You own what is described therein. 3

3 See also *Masgas v. E. D. Anderson*, 310 S.W.3d 567 (Tex. App. - Eastland, rehearing denied, May 6, 2010, pet. for review filed June 9, 2010). In *Masgas*, the Eastland Court of Appeals found that an assignment which conveyed “all rights title and interest to leases in Exhibit A” was not limited by working interest

**VII. The Unusually Thorny Legal Description - Wellbore Only Assignments**

**A. The Setting**

The opinion issued June 14, 2007 by the Amarillo Court of Appeals, in *PetroPro. Ltd. v. Upland Resources, Inc.*, 279 S.W.3d 743, (Tex. App. - Amarillo 2007, pet denied), is the first opinion in the country to discuss the rights of an assignee in a wellbore only assignment<sup>4</sup> If ever a legal description required precision, it is the legal description involving a wellbore only conveyance. It is our observation that wellbore only assignments, which originally arose in Oklahoma, but have become steadily more common in Texas, were originally created for economic reasons<sup>4</sup> Leasehold owners with multiple wells, choose to convey individual wells that do not meet their economic criteria, while continuing to retain the rights to develop remaining leased acreage. They are, in essence, the narrowest of farm outs.

To set the stage for a discussion of the *PetroPro v. Upland Resources* case we offer the following examples of assignments of interests to illustrate the effect of different types of legal descriptions involving partial conveyances of interests in oil and gas property. We anticipate a title examiner would reach the following results when reviewing these legal descriptions:

Example 1

Grant - All or part of assignor’s interest in the leases identified in Exhibit A.

Exhibit A - Identifies leases.

Result - Conveys leasehold.

Example 2

Grant - All or part of Assignor’s interest in the leases identified in Exhibit A.

Exhibit A - Leases identified plus wells referenced, may or may not include WI and NRI for each well.

percentages listed on Exhibit A, nor by the reference to those working interest percentages in the warranty provision of the assignment. According to the court, pursuant to the plain terms of the assignment, grantors granted all interests, but only warranted the fractional interests described in Exhibit A. *Masgas* at 57.2.

4 Appendix A contains a brief description of this Oklahoma background.

Result - Conveys leases.

Example 3

Grant - All or part of Assignor's interest in the Smith #1 well.

Exhibit A - No Exhibit A and no identification of leases.

Result - Conveys wellbore only.

Example 4

Grant - All or part of Assignor's interest in the Smith #1 wellbore.

Exhibit A - Identifies leases supporting the Smith #1 wellbore.

Result - Conveys the wellbore.

Example 5

Grant - All or part of Assignor's interest in the leases identified in Exhibit A.

Exhibit A - Identifies Leases, then states that they are limited to the Smith #1 wellbore only.

Result - Conveys the wellbore.

Example 6

Grant - All or part of Assignor's interest in the leases identified in Exhibit A, but only "insofar as they cover the wellbore of the Smith #1 well."

Exhibit A - Identifies leases

Result - Conveys the wellbore.

Until the Court of Appeals issued its opinion in the *PetroPro* case, title examiners and practitioners had no case law to follow in order to determine what estate legal descriptions such as those in Examples 3 through 6 would actually convey.<sup>5</sup>

The legal description in the auction assignment at issue in *PetroPro* provided as follows:

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<sup>5</sup> The form template for a wellbore only assignment in West's Texas Forms follows the directive in and specifically refers to the *Upland Case*.

All of Seller's right, title and interest in and to the oil and gas leases described in Exhibit "A" attached hereto and made a part hereof ("Subject Leases") *insofar and only insofar as said leases cover rights in the wellbore of the King "F" No. 2 Well*. (emphasis added).

The King "F" No. 2 well was producing gas from the Cleveland formation, approximately 6,500' to 6,600'.

Neither the parties nor the Court considered that the legal description, relying solely on the term "wellbore," was either ambiguous or insufficient as a legal description under the Statute of Frauds. Indeed, each of the parties affirmatively contended that the conveyance was valid and unambiguous. Problems arose when the second operator, Upland, took an assignment of the remaining acreage in the section and drilled two horizontal wellbores in the Brown Dolomite, producing at approximately 3,400' to 3,600'. Petropro argued that the absence of express limiting language in the grant set out above meant that the assignment of the wellbore was intended to transfer a leasehold interest in the entire existing 704 acre pooled gas unit, including the right to extend one or more horizontal drainholes from the King F No. 2 wellbore into other productive areas of the lease. PetroPro also claimed that by drilling its horizontal Skeeterbee wells, Upland had committed trespass and was liable for conversion. Upland contended that the assignment conveyed only what existed at the time of the conveyance, that is, production of gas from the King F No. 2 wellbore through the existing perforations in the Cleveland formation and that Upland retained all other rights to develop the acreage. The Trial Court granted a Motion for Summary Judgment in Upland's favor. Both parties, as well as the royalty interest owners, appealed.

The language in the assignment itself contained neither vertical nor horizontal limitations. Since the assignments were only limited to "rights in the wellbore" the Court of Appeals set out to define that term. After looking to industry standard texts for definitions, the court concluded the PetroPro's leasehold rights "extend horizontally only to the area of the hole identified as the King "F" No. 2 well, and , by implication, such surface area adjacent thereto as is reasonably necessary to operate the well."

In an attempt to define the rights appurtenant to the horizontal and vertical limitations of PetroPro's wellbore interest, the court concluded that PetroPro had the right to develop the leased premises for the purpose of "exploring, drilling, mining, operating for and producing oil and/or gas and other minerals", as stated in the leases. This right was limited to the right to rework the King

well, so as to produce from any formation that might possibly be reached from the existing wellbore, but not the right to extend the present well beyond its current depth, or the right to drill horizontally beyond the confines of the existing well.

Another appurtenant right the court recognized was the right to produce. The court said PetroPro has the exclusive right to produce oil and gas from the King well, but PetroPro does not own an interest in the oil and gas in place outside the confines of the King well. For this reason, Upland's completion of the Skeeterbee wells did not constitute a trespass upon any property which PetroPro owned. Therefore, Upland's production of gas from the Skeeterbee wells did not constitute conversion of property belonging to PetroPro, and PetroPro is also not entitled to an accounting.

In summary, the court said that PetroPro owns the exclusive right to produce oil, gas or other minerals from the King wellbore, and the right to develop the wellbore and conduct any operations within the wellbore, subject to governmental regulations, including the right to produce from other formations. Upland retained the exclusive right, subject to the terms of the leases and governmental regulations, to produce oil, gas or other minerals from the leases, other than through the King No. 1 wellbore. Despite the court's aim to set out an interpretation of the assignment that gave effect "to the intent expressed within the 'four corners' of the instrument," a key portion of the court's interpretation of the extent and character of the estate conveyed derives, of necessity, not from express language but from implication. The court acknowledged that the legal effect of its interpretation "is to allow Petro the right to produce gas that it does not own until it captures it" which the court noted is a result that "may seem inconsistent with what reasonable people would consider fair." *Id* at page 8

Justice Campbell issued a concurring and dissenting opinion wherein he stated that the assignments should be interpreted as limiting PetroPro's rights to the production of gas from the Cleveland formation, the formation which was producing at the time of the assignments.

As of this writing, PetroPro has filed a Motion for Rehearing asking the court to explain how it can obtain a drilling permit to perforate uphole without owning any oil and gas leasehold around the wellbore.

## **B. Draft Around The Problem**

It is clear that the import of the legal description of rights granted in a wellbore-only conveyance may raise many questions if the parties do not identify with some

detail what they intend to grant. Even as it answers certain questions, as the *PetroPro* opinion currently stands, other unintended consequences arise. For example, Upland owns the gas reserves, but PetroPro has the right to produce what comes out of its wellbore. Presumably then, only Upland will be liable for ad valorem taxes. While PetroPro would seem to have been given a pass on taxes, if it owns no reserves, what does it identify as its "asset" and how does it quantify its value? What is the value of PetroPro's "property" to a bank or an insurance company? Whether this opinion will be revised by the Court of Appeals and whether this opinion or a revised opinion is appealed to the Supreme Court for its review, we consider that careful drafting can minimize potential disputes between parties to a wellbore only conveyances and perhaps avoid litigation like the *PetroPro* case, or at least mitigate the effects of unintended consequences.

We suggest that the best description in a wellbore only assignment should identify, in as much detail as the parties believe necessary (and can agree to), the rights of the wellbore assignee with respect to at least the following operations:

1. Produce existing producing formation;
2. Drill deeper;
3. Move up or down the borehole, perforate *and stimulate*;
4. Move up or down the borehole and drill a horizontal well;
5. Drill a replacement well if the producing well ceased to produce because of mechanical problems;
6. Assign acreage necessary to ensure compliance with applicable Railroad Commission rules.<sup>6</sup>

The grant should include some acreage, if only for regulatory purposes, and the number of acres covered by the assignment should be clear. The parties should discuss and address what surface area the assignee may use for future facilities, such as tanks, flow lines, and treatment equipment. If the borehole assignment were

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Flip Whitworth of Austin, in a letter to George, has offered the following language to address this issue:

For regulatory purposes only, assignee shall have the right to use and assign as much as \_\_\_\_ acres around such borehole for permitting and allowable purposes, provided the use or assignment of such acreage does not impede, impair or curtail assignor's rights to acquire drilling permits or to maximize allowables for assignor's wells, including wells assignor may drill on acreage otherwise assigned to said borehole by assignee.

interpreted to include the area that may be drained by multiple formations, the shape of the surface acreage covered by the assignment could be nearly impossible to determine, because of future expanding or contracting depending upon the particular formation from which oil or gas is produced at any given time. If the borehole assignment is construed to transfer the assignor's leasehold rights with respect to the area that can be drained by the borehole drilled, then the question arises whether such area means:

1. The area that can be drained as to the formation in which the well is currently or initially producing;
2. The area that can be drained with respect to formations in the wellbore which are known to be productive, whether or not currently producing;
3. The area that can be drained from any formation in the wellbore as it currently exists; or
4. The area that can be drained from any formation by the existing well or any deepening thereof;

Parties to a wellbore only conveyance may not be able to resolve these questions to everyone's mutual satisfaction, but raising the questions should minimize future disputes, and will certainly make those who are drafting the conveyance consider the level of detail necessary for the legal description they prepare.

### VIII. SOME EXAMPLES OF UNINTENDED CONSEQUENCES TO CONSIDER

Even vanilla assignments and farm out agreements give rise to unintended consequences when legal descriptions, especially with respect to the geographic extent of the estate conveyed, are imprecise or incomplete. These consequences can arise in areas as varied as regulatory rights, duties and obligations, environmental obligations, contractual rights and duties, (lease and non-lease) operations, tax and access.

#### A. Earned Acreage, Retained Acreage, Pooled Acreage Farmout Agreements and Retained Acreage

Carefully drafted legal descriptions become especially important in the development of reserves which depend on horizontal well technology because the drainage concepts that underlie traditional (vertical) well acreage descriptions may not apply. For example, be careful when identifying the geographic area to be conveyed as a "unit" (i.e. in a farm out agreement, where the farmee earns acreage in some set amount) in a legal description. Some may presume that references to terms such as "drilling unit" "development unit" and "proration unit" in a legal description are "more definite" because such terms have a fixed meaning. Not necessarily.

"Drilling unit" and "proration unit" have certain specific meanings within the context of applicable Railroad Commission regulations:

- 1 A drilling unit is defined as "the acreage assigned to a well for drilling purposes." Rule 8(a)(2);
- 2 A proration unit is "the acreage assigned to a well for the purpose of assigning allowables and allocating allowable production to the well." Rule 38(a)(3);
- 3 The commission does not define the term "development unit" at all.

Moreover, drilling units and proration units can and do change over time. Thus, a legal description in a farmout that provides for the earning of the "drilling unit" or the "prescribed proration unit" for an oil or gas well may, in fact, be too indefinite. Indeed, in some fields, there may never be any proration unit adopted in a special field rule order, and any references to such a unit in a conveyance or contract would be impossible to honor.

We recommend that if the parties intend to transfer acreage in an amount equal to the drilling unit or prescribed proration unit for a gas or oil well *in effect under the applicable Commission regulations at the time of the conveyance*, the legal description should so state. Moreover, to ensure that everyone understands what is being transferred, a plat depicting the area to be earned and conveyed should be included. We suggest that drafters of transfer documents specifically define the geographic area to be conveyed within the legal description itself rather than rely on terms, even those defined in commission rules, which could inject ambiguity into the conveyance. Many conveyances specify different acreage amounts depending on whether the well is an oil well or a gas well. Although this seems simple enough, drafters should consider that it is possible that many wells could be recompleted to another zone and change classification, or could be re-classified by the Commission because of changes in producing characteristics over time. Again, including a time frame for determination of the acreage component in the legal description will help, (i.e. permanent acreage assignment is based on classification of the well at initial completion.) Fix the term in the document itself for purposes of interpretation relating to the conveyance and prevent later problems. We also note that similar problems can arise with other clauses that rely on identification of a specific geographic area such as a lessee's authority to pool or the identification of retained acreage at the end of the primary term. Again, reference to a specific, geographic area where possible, fixed in time at a date certain, can help to avoid disputes.

## **B. Operations**

Failure to precisely identify the geographic area to be conveyed may cause other unintended regulatory consequences. The operator must, at a minimum, be capable of identifying the geologic extent of his ownership in order to ensure he is compliant with applicable Commission rules and regulations. An operator must know the size and shape of the tract he proposes to develop in order to accomplish even the most basic of tasks in Texas, applying for a permit to drill a well. If the assignee cannot identify what formations he has legal rights to develop, he risks obtaining an invalid permit, either because he has obtained a permit in a field in which he has no rights, or he has failed to honor the application of the Commission's spacing and density rules in the permitted field. Moreover, for gas wells, the commission presently takes the position that all operators must file a Form P-15 (Statement of Productive Acreage) and plat showing the acreage assigned to a well for proration purposes when the well is completed in order to obtain the authority to produce the well. If, as a result of imprecise or indefinite drafting of a legal description the operator has no acreage, or there is a dispute as to what acreage he has rights to assign, the operator may be legally entitled to produce a well but legally unable to obtain authority to do so.

## **C. Hypothetical**

As an illustration, we offer the following example of the effect of a geographic description, or lack thereof, in a farm out agreement covering a 640 acre section with one existing gas well, located near the center of the section. Farm out agreements come in two varieties. Some farmout agreements assign all oil and gas lease rights in an area conditioned on the drilling of a well. If no drilling occurs, the farmee must re-assign the acreage to the farmor (Scenario A). Others provide that the farmee will earn the assignment of a set amount of acreage (40 acres for oil and 160 acres for gas, for example) after the well is drilled (Scenario B).

Here are some of the questions that can arise after the conveyance has been drafted, executed and acted upon.

1. When the farmee files an application for a permit to drill, the application requires identification of the acreage in the lease, pooled unit or unitized tract. Under Scenario A, where the farmee has the present possessory right to develop the entire 640 acres, the farmee can identify that 640 acres as the leased area. But in the drill-to-earn farmout, where the farmee has the right to earn an

assignment of something less than the 640-acre section, should he show the entire 640 on the drilling permit or the amount he has the right to earn (40 or 160 acres, in our Scenario B). Why does this matter? Because the acreage identified on the application to drill determines the boundaries to which the Commission's spacing rules apply.

2. Let us assume that there are no special field rules for any field a well in the section could possibly encounter, and only the spacing provisions of Statewide Rule 37 will apply. This means that any well for which the farmee seeks an application to drill must be a minimum of 467' from the nearest lease or boundary line, and at least 1200' from any other well on the same lease drilled or permitted in the same field. Under Scenario A, the farmee's proposed well must be 467' from the boundaries of the 640-acre section lines and, if the farmee seeks a permit for the same field that the existing farmor's well is completed in, at least 1200' from the existing well. Under Scenario B, the parties may intend to grant the farmee the right to show the entire 640 acres or they could intend to limit his rights to identify only the specific acreage that the proposed well will earn (40 or 160 acres) depending on what the parties intended to convey. If the farmee is only entitled to show 40 acres or 160 acres, depending on the classification of the well, the acreage should be specifically identified in the legal description in order to properly apply the spacing rules. (The proposed well will be required to be located 467' from the perimeter of the acreage and will require the filing of two separate plats with the drilling permit application.) Moreover, the Commission will consider each individually earned acreage portion to be its own lease. Each well would have its own identification number (for purposes of the Form P-4), and would require treatment as a separate lease. No common tank batteries or metering would be authorized without a special exception and required testing and reporting would be on an individual well basis. As described above, if the well were a gas well, the operator would have to file a Form P-15 and plat showing the acreage to be assigned for proration purposes before receiving authority to produce.

None of these required regulatory actions would be possible if the grant fails to identify a geographic area in the legal description, or if the legal description is ambiguous.

## **D. CONCLUSION**

In closing, we urge practitioners to remember the following general considerations when drafting legal descriptions in relating to transfers of interests in oil and

gas properties

1. Specifically identify the geographic area to be conveyed. (see *Westland Oil Dev. Corp. v. Gulf Oil Corp.* 637 S.W.2d 903 (Tex. 1982)
2. Specifically identify the depth limitations, if any, to be conveyed. (see *EOG Resources, Inc. v. Wagner & Brown, supra*)
3. Specifically identify any limitations regarding the kinds of production to be conveyed (see *Oil Co. v. Energy-Agri Prod. Inc.* 794 S.W.2d 20 (Tex. 1990)
4. Specifically identify the interest, including the amount (percentage), to be conveyed (see *Rogers v Ricane Enterprises, Inc.* 884 S.W. 2d 763. (Tex. 1994)
5. Specifically identify the objective conditions for commencement and termination of the interests to be conveyed. *EOG Resources, Inc. v. Killam Oil Co., Ltd.*, 239 S.W.3d 293, (Tex. App. - San Antonio 2007, pet denied).<sup>7</sup>

Read what you write. Read what the other party writes. Don't sign it unless you mean it.

#### Appendix A

Part of George's Letter Amicus to the Trial Court in PetroPro.

From an examiner's prospective, there are three types of oil and gas assignments:

Type 1: Assigning all or part of assignor's interest in identified leases. Unless specific wellbores are reserved, an examiner would conclude that assignor's interest in producing wellbores were conveyed.

Type 2: Assigning all or part of assignor's interest in specifically identified wellbores, and may or may not identify the rights of the wellbore assignee (The PetroPro case involves the assignee's right to further develop/produce granted in a Type 2 assignment.) The assignment may or may not also identify the leases that support the wellbores.

Type 3: Assigning all or part of assignor's interest in

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<sup>7</sup> See e.g. Lowe, John S., "Analyzing Oil and Gas Farmout Agreements," 41 Sw. L.J. 759 (1987) and Smith, E., and Weaver, J., Texas Law of Oil and Gas, v. III, Chapter 16, 2d Ed. Matthew Bender, 1998. Professors Lowe, Smith and Weaver identify most of these same criteria within the context of the drafting of farmout agreements, but we consider that the caveats apply to any legal description an oil and gas practitioner may be called on to draft.

identified leases, adding additional references to producing wells, but not expressly limiting the conveyance to the wellbores of the identified wells.

The PetroPro assignment is clearly wellbore only. In my experience, there are may more assignments that convey leases, but in doing so identify/refer to a well. It is my custom to interpret these assignments as conveying leases, not wellbores only. In other words, for me to conclude that an assignment conveys a wellbore only the language must be unambiguous.

#### **1. As a matter of perspective, the vertical wellbore assignment originated in Oklahoma oil and gas practice and is treated differently than in Texas.**

In order to understand the Texas regulatory scheme for oil and gas drilling, your author believes it is helpful to first understand the Oklahoma regulatory scheme which is more straight forward.

The Oklahoma regulatory scheme begins and ends with the drilling and spacing unit (DSU). Prior to the drilling of a well in Oklahoma, the Oklahoma Corporation Commission (OCC) enters a Drilling and Spacing Order (DSO) covering the common source of supply (in Texas we would call this a formation) identifying the quantity in acres and configuration (usually square or rectangular) of land which will be attributed to a producing well (the DSU). The Texas equivalent is the density rule, Rule 38, which describes only the quantity of land, not the configuration. A DSU also identifies the spacing requirements for wells. This issue is covered in Texas by Rule 37. The creation of a DSU has, at least, the following title consequences:

1. All royalty owners within the DSU, to the extent of 1/8 royalty, are pooled for payment purposes;
2. All owners of the right to drill, usually the lessees of leases, become tenants in common within the DSU, which is a new tract for title purposes.

The pooling that occurs is not the result of the pooling clauses in leases, but is the result of an order by a governmental agency having jurisdiction over the right to drill for and produce oil and gas. DSUs are created prior to drilling and are a condition precedent to applying for a force pooling order (FPO).

A DSU is similar to the Texas proration unit but it is different in at least the following respects:

1. A proration unit has no title consequence. It is simply, in Texas, the operator's statement (a plat) of the land claimed to be drained from the well.

2. A Texas operator can conform a proration unit so as to include all available acres not previously attributed to a producing well in the same formation.
3. A DSU is not changed in shape except by a subsequent order of the Oklahoma Corporation Commission, while a Texas operator can change the configuration of a proration unit at its discretion as subsequent drilling dictates.

Once an Oklahoma operator decides to drill a well within an existing DSU, the Oklahoma operator attempts to have all parties with the right to drill, usually lessees but also any unleased mineral owners, execute a Joint Operating Agreement (JOA). If all parties with the right to drill execute the JOA, then there is no need to obtain a Force Pooling Order (FPO). The usual factual circumstances that cause an Oklahoma operator to apply for a FPO are:

2. One or more lessees or unleased mineral owners will not execute the JOA;
2. One or more lessees or unleased mineral owners cannot be located;
3. There is a mineral interest within the DSU that is subject to a pending probate and the operator does not wish to obtain a lease from the probate estate by public bidding in the county where the probate is pending.

If there is a hearing and the entry of a FPO, then the parties with the right to drill who have not signed the JOA, are typically given an election consisting of:

1. Lease to the operator for a bonus and a 1/8 royalty; or
2. Lease to the operator for no bonus but a larger royalty; or
3. Participate in drilling the test well.

In my opinion, the FPO proceeding should more accurately be called a "forced election" proceeding because pooling of the 1/8 royalty was accomplished, as previously stated, by the DSU. The FPO forces the participation of each owner's remaining mineral interest. The FPO also appoints the operator and confirms an AFE (Authority for Expenditure) for drilling the initial test well.

This background is important to understand because the wellbore interest in an oil and gas lease was created by Oklahoma operators in dealing with the FPO. Early in the 1980's, the legal effect of the first election within a DSU was uncertain. The question was: would the election by the parties to participate in drilling the first well be binding only as to that well, or would that election be binding as to subsequent wells drilled within the same

DSU? The Oklahoma Supreme Court ultimately decided that the election was binding as to both the initial well and subsequent wells. While this issue was pending in the Courts for some time, Oklahoma companies started conveying and reserving wellbore interests only. During the late 1980's and 1990's this concept moved across the Red River so that Texas lessees began to convey and reserve wellbore interests only. The difference in the legal effect of the assignments between the two states is caused by the legal effect/consequence of Oklahoma's DSU v. the legal effect/consequence of the proration unit in Texas.

While there is no reported Oklahoma case that provides this, it is your author's opinion, supported by my observation of industry custom, that:

1. The conveyance of leases as to an identified DSU (my Type 1 assignment) conveys all of assignor's interest in the wellbores within the DSU, unless they are specifically reserved (same result as Texas).
2. A conveyance in Oklahoma of a wellbore (my Type 2 assignment) conveys, as a matter of law, the leases support the existing DSUs surrounding the wellbore, unless limited by the assignment. In other words, the wellbore and the DSU become one (different result in Texas).
3. An assignee of either Oklahoma assignment would, as a matter of law, be able to produce within his borehole any formation subject to an existing DSO.

Your author believes that the above stated reasons explain why this issue has not yet required judicial resolution in Oklahoma.

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