



Texas Land & Mineral Owners Association

Official Newsletter

Volume 9, Number 2

2nd Quarter 2009

THANK YOU REPRESENTATIVE GALLEGO AND REPRESENTATIVE GATTIS

Inactive oil and gas wells are causing major problems for Texas landowners. The wells need to be plugged to prevent further damage to land and water quality. In light of this problem, TLMA worked closely with Representative Dan Gattis (R-Georgetown) and Representative Pete Gallego (D-Alpine) to offer an amendment to HB 2259, a bill that attempts to strengthen financial bonding requirements for oil and gas wells. The amendment was needed to ensure that over 110,000 inactive wells are actually plugged.

The amendment offered would have taken away the incentive to let inactive wells languish and move down the chain to operators who cannot afford to plug the wells. The amendment would have required every operator to make sure a bond, letter of credit or cash is on hand at all times with the Railroad Commission to cover the cost of plugging each individual well. Current law requires a blanket bond across an operator's inventory of wells. As a fairness mechanism, it would have also provided that each operator is only responsible for their proportionate share of the cost of plugging the well, so that a single operator does not have to bear the entire cost of plugging.



Representative Pete Gallego

we have seen in the past. TLMA was specifically mentioned a number of times during the debate.

Almost every member of the legislature visited with mentioned they were getting emails from around the state on this issue. You should be proud of all the time and effort our membership put into it and thank the Texas and Southwest Cattle Raisers Association (TSCRA) for their efforts as well.

Continued on Page 3



Representative Dan Gattis

As you may have learned, the TLMA amendment was tabled – meaning it did not get added to the bill. While the vote obviously wasn't what we wanted, Representatives Gallego and Gattis did a fantastic job bringing the issue of unplugged wells before the entire House of Representatives.

Both members were very thoughtful in their approach and understood the issue at a level deeper than

INSIDE THIS ISSUE

- Thank you to Reps Gallego and Gattis
- New Mexico Supreme Court Case
- Thank you Sen Hinojosa
- 4,000 Bills Expire
- New Oil and Gas Blog
- Paperless TLMA Newsletter an Option
- 81st Legislative Session Update
- Jasper Event a Success
- RRC's Kids' World
- *Exxon v. Miesch* Opinion
- The Meaning of Minerals

Got Internet? Be sure to check out our web site at: www.tlma.org

BOARD OF DIRECTORS

Chairman

Roger F. Welder
J. F. Welder Heirs, Ltd.

Vice Chairman

Carolyn Frost Keenan
Keenan Family Interests

Hon. Dolph Briscoe, Jr.
Briscoe Ranch, Inc.

Jack Hunt
King Ranch, Inc.

J. A. Whittenburg, III
Turkey Track Ranch

Hon. Cullen R. Looney
EIA Properties, Ltd.

Scott Petty, Jr.
Petty Ranch Company

George E. Tanner
Mesteña Operating, Ltd.

Chaunce O. Thompson, Jr.
C&S Cattle Co.

Barry Coates Roberts
Coates Energy Trust

VICE PRESIDENTS

Morgan Dunn O'Connor
Bissett Ranch Partnership

Mike Gillelan
Provident Minerals

Dr. John S. Baen
University of North Texas

Billy K. Lemons
Resource Analyst & Management Group

EXECUTIVE DIRECTOR

Kitty-Sue Quinn, Ph.D.

TLMA's mission is to create a business and legal environment that is accommodating to the continued exploration for and production of oil and natural gas by ensuring that the rights of both the mineral and surface owners are protected, reduce litigation and to protect our precious groundwater resources.

1005 Congress Ave., Suite 360
Austin, Texas 78701
(512) 479-5000 (phone)
(512) 479-5066 (fax)
info@tlma.org (email)
www.tlma.org

NEW MEXICO SUPREME COURT ADDRESSES OIL FIELD CONTAMINATION ISSUES

Last April, the New Mexico Supreme Court decided *McNeill v. Burlington Resources*, changing New Mexico law on the measure of damages for oil-field contamination and who is entitled to sue to recover such damages. In doing so, New Mexico's highest court departed from Texas courts' recent pronouncements on those same issues in *Senn v. Texaco*, 555 S.W.2d 222 (Tex.App.-Eastland 2001, review denied), and *Primrose Operating Company, Inc. v. Senn*, 161 S.W. 3d 258 (Tex.App.-Eastland 2005, review denied). *McNeill* involved contamination caused by an unlined open reserved pit used to dispose of produced water on the McNeills' 31,000-acre ranch in Lea County, New Mexico. The evidence showed that it would cost \$1.4 million to remediate the site, but that the reduction in value of the land was only \$135,000. Prior New Mexico case law (like Texas') held that, because the damage to the land was "permanent," the measure of damages was limited to the reduction in value of the property, so the McNeills were awarded only \$135,000. But the New Mexico Supreme Court decided that the old law of "temporary" vs. "permanent" damages was "obscure," "artificial" and "rigid." It held that evidence of the cost of repair was clearly relevant and should have been admitted for the jury to consider.

The Court in *McNeill* also addressed an issue that defeated the landowners' claim for contamination damages in *Senn v. Texaco*: whether a cause of action for contamination damages passes with the land when the land is sold. Burlington argued that, since the McNeills had not acquired the ranch until after the contamination had occurred, and because the conveyance did not expressly assign any cause of action for contamination of the land, the McNeills had no claim against it for the contamination, even though the contamination was not discovered until after the McNeills' purchase. The Court held that, because the contamination was discovered after the conveyance, the McNeills owned the claim. This holding is directly contrary to Texas courts' holdings, e.g., *Texaco v. Senn*.

The two issues addressed by the New Mexico Supreme Court in *McNeill* have substantially hindered Texas landowners' efforts to recover for oilfield contamination. The New Mexico court was willing to re-examine these issues in a practical and enlightened way and to overrule old legal concepts that served only to confuse lower courts and hinder fair adjudication of claims.

This article was provided by John B. McFarland an attorney with Graves, Dougherty Hearon & Moody, P.C. in Austin, TX. In the last twenty years, Mr. McFarland has negotiated oil and gas leases and lease options covering more than 235,000 acres of land in Texas. His practice also includes negotiation of seismic survey permits, data use licenses, purchase and sales agreements, pipeline easements, and financing agreements covering leasehold, mineral and royalty interests. He obtained Board Certification as a Specialist in Oil, Gas and Mineral Law in December 1986. Mr. McFarland is the author of the Texas Land & Mineral Owners Association oil and gas lease form.

TLMA ALERTS GO OUT VIA E-MAIL AND FAX.

Due to the rising cost of printing, ALERTS are only sent to those membership without e-mail and fax addresses when it is urgent.

If you have not provided us with a correct e-mail or fax number you may be missing out on educational opportunities, legislative updates, and other information.

SEND US YOUR E-MAIL ADDRESS OR FAX NUMBER TODAY!

Also note, if you have spam filters be sure to add @tlma.org to your safe list.

THANK YOU SENATOR HINOJOSA

Senator Juan “Chuy” Hinojosa (D – Mission) offered an amendment to SB. 1378 the senate version of HB 2259 (See Page 1 of this TLMA Newsletter).

Senator Hinojosa was working hard to solve the problem of unplugged oil wells. He wanted to take a bill that makes small improvements to oil and gas bonding laws and make it better.

Thank you Senator Hinojosa for always championing the rights of landowners in Texas.



Senator Hinojosa

NEARLY 4,000 HOUSE BILLS EXPIRED

Out of approximately 7,100 bills filed, 4,000 died. The Texas House adjourned shortly after a midnight deadline the night of May 14th, leaving thousands of bills to die in the last leg of the 81st Legislative Session. House bills had to be approved by midnight May 14th to survive. Unless these bills were amended on other bills, they will have to wait two more years for another chance to become law.

NEW OIL AND GAS BLOG

John B. McFarland an attorney with Graves, Dougherty Hearon & Moody, P.C. in Austin, TX has created a blog with comments and articles geared to land and mineral owners. Check it out for interesting and informative information!

<http://www.oilandgaslawyerblog.com/>

Mr. McFarland is the author of the Texas Land & Mineral Owners Association oil and gas lease form.

THANK YOU REPRESENTATIVE GALLEGO AND REPRESENTATIVE GATTIS

Continued from Page 1

TSCRA members passed policy in March 2009 that calls for this more aggressive approach to plugging inactive oil and gas wells.

Although the amendment failed, we feel we have laid the ground work for a more aggressive approach to well plugging in future policy.

It is particularly interesting to note that the bill sponsor pulled the bill down for 24 hours to allow industry time to work against us on this issue. Without the extra time for them to get their votes, we may have pulled it off. We believe the most compelling issue to legislators was that the sponsor said she would pull the bill down if our amendment was adopted.

Both Representative Gallego and Representative Gattis were also pleased with the debate and our efforts.

THANK YOU!



TLMA NEWSLETTER AVAILABLE VIA E-MAIL

In an effort to save resources and money, the TLMA newsletter is now available via e-mail. Instead of receiving the Quarterly TLMA Newsletter in the mail, you can opt to receive a link to the web site when the newsletter is available. The most recent TLMA Newsletter as well as those dating back about one year are always available on the TLMA website at: www.tlma.org/news but now you can have the option of receiving notice when the most recent version has just been posted.

If you would like to receive the TLMA Newsletter via a link on an e-mail rather than receiving the print copy please e-mail the TLMA office at info@tlma.org.



81st LEGISLATIVE UPDATE

While TLMA had some true champions in the legislature and a few oil and gas bills and minor landowner protections squeaked through the process, the overarching theme to the 81st Legislative Session is that gridlock has finally hit Austin. Democrats and Republicans both waged a war of attrition that led to the demise of many pieces of legislation. Democrats were upset that the Republican leadership in the House set a Voter ID bill ahead of a Sunset bill dealing with the Texas Department of Insurance. As a result, they spent several days in the waning moments of the session talking extensively, or “chubbing,” on non controversial bills, thus running out the clock. A few major pieces of legislation that would have continued some major state agencies for two years also died when the Senate refused to consider them on the last day and adjourned Sine Die. The Governor has stated his intention to call a special session to deal with these outstanding issues.



Below is a synopsis of what happened on legislation important to you and TLMA:

HB 2259: This was the oil and gas bonding bill you heard so much about during the last several months. It raises bonding requirements and sets some junk removal requirements associated with wells that have been inactive for certain periods of time. It is a small improvement in current law. However, TLMA hoped Legislators would want to find a more effective solution to the problem of junk and unplugged wells. Representative Pete Gallego (D-Alpine), Representative Dan Gattis (R-Georgetown) and Senator Juan “Chuy” Hinojosa (D-Mission) all did a great job trying to help us get an amendment that would have required all operators in the chain of title bear some responsibility for plugging the wells, but industry fought tooth and nail to keep it off. We also worked very closely with the Texas and Southwestern Cattle Raisers Association on the issue. It has been **sent to the Governor for his consideration.**

HB 834: This bill would have set up a procedure whereby mineral interests would have vested to the state if they were not used within a certain period of time. TLMA expressed opposition to this bill as soon as it was filed. It was **referred to the House Committee on Energy Resources and never received a hearing.**

HJR 62: This is the joint resolution that would have changed the make up of the Railroad Commission from three elected to commissioners to one single elected railroad Commissioner. It died on the **House floor by a vote of 53 to 89.**

HB 1405: Would have required the registration and licensing of Landmen with the Texas Real Estate Commission. **Died in Committee.**

HB 1533: Would have required operators in the Barnett Shale to give notice of their application to drill to all locally elected officials. **Passed the House but died in Senate Committee.**

SB 540: Would have required permitted operators to provide notice of application for commercial injection well to landowners and landowners to notify their tenants. **Passed the Senate but died in House Committee.**

HB 4246: Would have established a definitive system for first purchasers and gatherers when they report lost and unaccounted for gas. **Died in House Committee.**

SB 341: Would have changed the name of the Railroad Commission to the Energy Commission. **Passed the Senate but died in House Committee.**

SB 1387: Provides that RRC has authority of injection of CO2 into a reservoir that is initially productive of oil, gas, or geothermal resources or a saline formation directly above or below that reservoir. Sets other reporting and regulation guidelines. **Signed by the Governor. Effective September 1, 2009.**

SB 2432: Would have allowed the City of Ft. Worth to pool their mineral interests. **Died on the Senate floor. Failed to suspend the 2/3 rule.**

LANDOWNER PROTECTION LEGISLATION

HB 2685: Provides that an entity with eminent domain power must provide a landowner with a Landowner Bill of Rights statement before or at the same time the entity first represents that it has eminent domain power. **Sent to the Governor.**

SB 18: This was the big eminent domain bill that passed the Legislature last session but was vetoed by the Governor. It contained language dealing with the diminished access issue. **Passed the Senate but died on the House Calendar.**

HJR 14: Creates a constitutional amendment to specify when the taking of private property is authorized. Specifically it modifies the definition of “public use” to not include the taking of property to transfer of a private entity for the purpose of economic development or enhancement of tax revenues. This is in response to the *Kelo* decision. **Election will be held November 3, 2009.**



TLMA CO-SPONSORED EVENT A SUCCESS IN JASPER, TX

TLMA hosted an educational seminar for East Texas land, mineral and royalty owners in Jasper, Texas on May 16th. A crowd of more than 40 persons gathered at Pavilion In The Pines for the event, which featured three minerals management, legal and surface damages experts and included a catered BBQ lunch. Proceeds from the event benefited Texas Lions Camp, which provides camping experiences at no charge to children with medical conditions. Speakers donated their time.

The morning session featured Billy K. Lemons, Principal Consultant with Resource Analyt & Management Group, a Nacogdoches-based minerals management and natural resource consulting firm that represents land, mineral and royalty owners, exclusively, in matters of oil and gas leases, pipeline and roadway easements, surface damages, seismic permits, and royalty audits. Lemons is well-known for his down-to-earth talks and print articles on stewardship of oil, gas and mineral assets. He is also Vice President for Region 6 of TLMA.

Ben Elmore, an oil and gas attorney with the firm of Perdue and Kidd, LLP, of Houston, began the afternoon session with a talk on post-leasing legal issues that affect land, mineral and royalty owners, including royalty owner rights, lease provisions, implied covenants in leases, and surface damages issues. Elmore’s law practice focuses on helping land and royalty owners who are oftentimes at a disadvantage when it comes to leasing and oil and gas production activities affecting their interests.

Ralph Day, ASA, ACF, President of Day Forest Management & Appraisal, Inc., of Jasper, finished the seminar with a talk on surface and surface damage appraisal issues. Day is a State Certified General Real Estate Appraiser in Texas, Louisiana and Arkansas, a Licensed Real Estate Broker, and a Registered Senior Property Tax Consultant.

The event was co-hosted by the First Judicial Bar Association and the Texas Forestry Association.

WELCOME TO THE TX RAILROAD COMMISSION’S WEBSITE: “KIDS WORLD”

With a link to the welcome page of the Railroad Commission of Texas an interactive website for kids is now available. The most fun part of the site is seeing the three Railroad Commissions as children. Check it out at:

<http://kids.rrc.state.tx.us/index.html>

EXXON V. MIESCH: TEXAS SUPREME COURT OPINION NOT GOOD NEWS FOR LANDOWNERS

Written by David P Wilson, Provost Umphrey Law Firm LLP

The long awaited opinion from the Texas Supreme Court in Emerald v Exxon is finally in and there is not good news for Texas land and mineral owners. In a trial back in November of 1999 Emerald Oil along with royalty owners from the O'Connor, Dunn, and Miesch families tried their case against Exxon. Humble Oil then Exxon held an oil and gas lease and produced from a field in Refugio County for over 40 years. In the late eighties Exxon tried to renegotiate its lease with the royalty owners and failed. Instead of allowing the families to find another operator, Exxon shut down the field by plugging and abandoning the field.

In the plugging and abandoning operation Exxon intentionally sabotaged the wells, making it impossible for any subsequent operator to re-enter those wells and produce the natural resources.

A Refugio County jury found that Exxon not only breached its lease with the mineral owners, it committed torts of waste when it sabotaged the wells. The jury awarded the royalty owners \$18.7 million in damages and the state district judge entered a judgment for over \$20 million with interest.

Exxon appealed the verdict and judgment to the court of appeals. The three judge panel hearing the case at the appeals court affirmed the judgment and wrote a published opinion that outlined what was then Texas law on waste and oil companies' duties to mineral owners.

Exxon again, appealed, this time to the Texas Supreme Court. The case was argued before that court over two years ago. The issue was considered so significant that even the Texas Land Commission joined the royalty owners in an amicus brief which supported the royalty owner position.

Ten years after twelve Texas jurors found against Exxon, their verdict, the judge's judgment, and an appeals court opinion, were thrown out, Texas law in several areas has been changed, and Texas property owners' rights have been severely curtailed. The Court actually based their opinion on issues that weren't even appealed. In one part of the opinion, the Court found that the royalty owners waited too long to file a lawsuit saying they had actual knowledge of Exxon's conduct almost two years before Exxon committed the conduct, which of course is impossible. In the breach of lease opinion, the Court actually found that Exxon did not breach the lease and then miss-quoted the language in the lease to support their position.

The only hope royalty owners have now in this case is for the Court to rehear it. A motion has been filed for a rehearing. This type of motion is usually summarily denied, but with the number of discrepancies in the opinion, they may want to take a second look.

David P. Wilson was born in Bay City, Texas, graduated from Lamar University with a B.S. degree in Criminal Justice in 1975. Dave received his law degree from South Texas College of Law in Houston, Texas in 1990. He is licensed to practice before all state courts in Texas as well as the U.S. District courts of the Eastern, Southern, Northern, and Western Districts and the Fifth U.S. Circuit Court of Appeals. He also has been admitted pro hac vice in state and federal courts throughout the country including Michigan, Ohio, Missouri, Mississippi, Virginia, and Louisiana.

Dave is a senior partner and has been a member of Provost Umphrey Law Firm LLP since being admitted to the bar in 1991. Dave was certified in personal injury trial law by the Texas Board of Legal Specialization in 1996 and was re-certified in 2001. Dave specializes in maritime law, railroad law and aviation law. He represents injured offshore oil workers, seaman, and railroad workers.

Dave is involved in many social and civic organizations. He taught torts at Lamar University. He is also a member of the State Bar of Texas, College of the State Bar of Texas, Texas Trial Lawyers Association, Jefferson County Bar Association, Port Arthur Bar Association (past President), and the Million Dollar Advocates Forum. Dave served eight years in the United States Air Force and before becoming a lawyer had a successful career as a television journalist in Texas, Mississippi, Louisiana, Ohio, and the Middle East.

TLMA filed an amicus brief in this case (see TLMA Newsletters, 2nd Quarter 2006, v.1, no.2 and 1st Quarter 2007, v.7, no.1)



THE MEANING OF "OTHER MINERALS"

Taken with permission from Blog by John McFarland dated April 27, 2009 (www.oilandgaslawyerblog.com).

Conveyances of minerals in Texas usually describe the interest conveyed or reserved as an interest in "oil, gas or other minerals." Texas courts have struggled mightily to try to discern what the parties meant by the term "other minerals." "If the parties did not specifically name a particular mineral, such as coal or uranium, did they intend that substance to be included in their reference to "other minerals"?"

Making the matter more complicated, the Texas Supreme Court has changed its mind on how to approach the problem. At one point, the Court adopted a "surface destruction test" to determine whether a substance was intended to be a "mineral." Under this rule, the Court reasoned that the parties would not intend to sever ownership of a substance from the surface estate if the commercial way to mine the mineral was by strip mining, so a near-surface substance would not be considered a "mineral." Then the Court decided that such a test was not workable, and it adopted (but only for reservations or conveyances of "other minerals" after the date of its opinion) a different test, the "ordinary and natural meaning" test. Under this test, a substance is a mineral if it is within the "ordinary and natural meaning" of the word "mineral." In effect, each substance must be tested by litigation to determine if it is a "mineral" within the ordinary and natural meaning of that term. Once a court has decided that a particular substance is a mineral under this test, it is a mineral for all reservations and conveyances of "oil, gas and other minerals" to which the test applies.

Because of all of the confusion about the term, I have created a short-hand decision tree to use when looking at a conveyance or reservation, to help me remember how to apply these tests. My decision tree is below.

Rules applying to an instrument that severs a mineral (or a royalty interest in a mineral) from the surface estate:

1. Does the grant or reservation describe a specific mineral?
 - (a) If so, then the substance is a "mineral" *for purposes of that grant or reservation*, and the rules relating to the right of the owner of the mineral to use the surface estate for the exploration for and extraction of that mineral apply.
 - (b) If not, then different rules apply depending on whether the instrument severing the minerals was executed before or after June 8, 1983:
2. If the instrument severing the mineral from the surface was executed **prior to June 8, 1983**, then the "surface-destruction test" applies:
 - (a) If the substance is at or near the surface so that any reasonable method of extraction requires the destruction of the surface, the substance is a part of the surface estate as a matter of law.
 - (b) Deposits of lignite within 200 feet of the surface are "near surface" as a matter of law.
 - (c) If a any deposit of a substance is "near surface," then additional deposits of the same substance found at other depths are also deemed part of the surface
 - (d) In determining whether the method of mining would destroy the surface, the availability of restoration is immaterial.
 - (e) The owner of the mineral has no obligation to compensate the surface owner for damage to or destruction of the surface caused by removal of the mineral
3. If the instrument severing the mineral from the surface was executed **after June 8, 1983**, then (except for iron ore and lignite -- see below) the "ordinary and natural meaning" test applies (*Moser v. U.S. Steel*):
 - (a) A substance is a mineral if it is within the ordinary and natural meaning of the word "mineral."
 - (b) the mineral owner will be required to compensate the surface owner for destruction of the surface unless the substance removed was expressly granted or reserved in the instrument
 - (c) Building stone, limestone, caliche, surface shale, water, sand, and gravel are a part of the surface estate as a matter of law. Uranium is a mineral, regardless of its depth.
4. **Special rule for iron ore and lignite:** As to iron ore and lignite, the surface-destruction test still applies to instruments executed after June 8, 1983 (see above): if any deposit of lignite or iron ore is within 200 feet of the surface, or if not within 200 feet then shallow enough that any reasonable method of extraction would destroy the surface, then the substance is not a mineral.

Increased membership is very important to the mission of TLMA Please help us recruit new members!

TLMA Membership Request Form

I would like to join TLMA, please
send me membership information

I'm a member, please update
my contact information

Name _____

Organization/Ranch Name _____

Address _____

City _____ State _____ Zip _____

Telephone Number _____ Fax Number _____

Email Address _____

Please return to: TLMA, 1005 Congress Ave., Suite 360, Austin, TX 78701

Have you moved recently?

If so, be sure to update your contact information with TLMA. Otherwise you may experience delays in receiving your newsletters, renewal notices, and other membership correspondence.

To change your address, contact Robbie Querner at (512) 479-5000, mail the attached form, or send an email to

membership@tlma.org.



Texas Land & Mineral Owners Association
1005 Congress Ave., Suite 360
Austin, TX 78701