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No. 03-21-00258-CV

IN THE THIRD COURT OF APPEALS OF TEXAS
AUSTIN, TEXAS

RAILROAD COMMISSION OF TEXAS and
MAGNOLIA OIL & GAS OPERATING LLC,
Appellants,

v.

ELSIE OPIELA AND ADRIAN OPIELA, JR.,
Appellees.

ON APPEAL FROM THE 53RD JUDICIAL DISTRICT COURT OF TRAVIS COUNTY, TEXAS, CAUSE NO. D-1-GN-20-000099

BRIEF OF AMICUS CURIAE TEXAS OIL & GAS ASSOCIATION

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IDENTIFICATION OF AMICUS CURIAE

This amicus brief is tendered on behalf of the Texas Oil & Gas Association ("TXOGA"), which is paying the fee for its preparation.

TXOGA is a statewide trade association representing every facet of the Texas oil and natural gas industry, including small independents and major producers. Collectively, the membership of TXOGA produces in excess of 80 percent of Texas's crude oil and natural gas, operates over 80 percent of the state's refining capacity, and is responsible for the vast majority of the state's pipelines. In fiscal year 2021, the oil and natural gas industry employed more than 422,000 Texans in direct jobs and paid $15.8 billion in state and local taxes and state royalties, funding our state's schools, roads, and first responders.

As a frequent amicus curiae in this Court, TXOGA offers input on legal, policy, and practical questions in important cases affecting the oil and gas industry. *See, e.g.*, *Energy Serv. Co. of Bowie, Inc., v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190,196 (Tex. 2007) ("[A]micus curiae Texas Oil and Gas Association has explained . . . significant policy and practical considerations . . . ").

This is such a case.

SUMMARY OF ARGUMENT

Twenty-two years ago, this Court recognized that horizontal drilling was a "promising technology" and declined to adopt legal principles that would discourage its use. *Browning Oil Co., Inc. v. Luecke*, 38 S.W.3d 625, 647 (Tex. App.—Austin 2000, pet. denied). Since that decision, the promise of horizontal drilling has been fulfilled, and Texas oil and gas production has grown dramatically using this technique. The Railroad Commission of Texas ("RRC") has encouraged this growth by allowing oil and gas operators to permit production sharing agreement ("PSA") wells and allocation wells. These wells now make up more than half of all new, horizontal oil and gas wells permitted in Texas.

But the district court's Final Judgment—if upheld—threatens to undermine this progress. It would call into question the legality of every existing PSA and allocation well permit and cast doubt on the legality of such permits issued by the RRC in the future. The promise offered by horizontal drilling could be threatened right at the time that the Texas oil and gas industry is finally recovering from the effects of the pandemic lockdowns of 2020 and acting as a supplier of energy around the world.

The district court's Final Order also threatens to upset the role of the RRC in issuing permits. Since the Texas Supreme Court's decision in *Magnolia Petroleum Co. v. Railroad Commission*, 141 Tex. 96, 170 S.W.2d 189 (1943), the RRC has not

had jurisdiction to decide disputed questions of title or contract rights. But the district court's Final Order will require the RRC to weigh parties' competing lease-construction arguments before issuing a permit. This is not the RRC's role.

Finally, the district court's Final Order stems from Elsie Opiela and Adrian Opiela, Jr.'s (collectively "Appellees") incorrect argument that PSA and allocation wells are a form of pooling. But that belief fails to consider the numerous, material differences between the pooling of leases and the drilling of a PSA or allocation well.

The district court's Final Order is incorrect and could have dramatic consequences for the Texas oil and gas industry. This Court should reverse the Final Order.

ARGUMENT AND AUTHORITIES

I. PSA and allocation wells are critical to developing oil and gas resources and reducing waste.

The heart of the Appellees' case imperils the drilling of PSA wells and allocation wells across Texas.[1] Were this Court to affirm the district court, it could cast doubt on every permit that the RRC has issued for allocation and PSA wells in Texas. It could also undermine the RRC's ability to issue allocation and PSA well

[1] While the Audioslave Well is a PSA well and not an allocation well, the Appellees have made clear that their argument should be equally applicable to both kinds of wells. *See* Appellees' Brief at 55.

permits going forward. But these wells have become the backbone of oil and gas operations in Texas. The arguments that Appellees advance (and that the district court adopted) have the ability to critically injure Texas oil and gas production and cause needless waste of natural resources.

a. PSA and allocation wells have become prolific throughout Texas.

It is hard to overstate the importance of allocation and PSA wells to the Texas oil and gas sector. Since the RRC's *Klotzman* decision in 2013,[2] operators have taken to permitting these wells throughout the state. Per the RRC's Drilling Permit Query system,[3] the RRC has approved more than 20,000 allocation well permits and more than 3,600 PSA well permits.[4] The RRC granted more than 4,900 allocation well permits and nearly 600 PSA well permits since the start of 2021.[5]

[2] Discussed in Magnolia Oil & Gas Operating LLC's Appellant Brief at 12–13.

[3] This can be found at http://webapps2.rrc.texas.gov/EWA/drillingPermitsQueryAction.do.

[4] All RRC Query data is between January 1, 1990, and March 28, 2022, as found on the RRC's website on March 29, 2022 ("RRC Query Data"). The RRC Query Data has been limited to include either PSA wells or allocation wells. This RRC Query Data reflects that the RRC has issued 20,944 allocation well permits and 3,617 PSA well permits. If this data set is limited to include only unamended permits, the RRC Query Data shows that the RRC granted 15,317 allocation well permits and 2,721 PSA well permits.

[5] This information also comes from RRC Query Data, as described above and date limited to dates between January 1, 2021, and March 28, 2022, as found on the RRC's website on March 29, 2022. This RRC Query Data reflects that the RRC has issued 4,924 allocation well permits and 591 PSA well permits during this time period. If the data set is limited to include only unamended permits, the RRC Query Data shows that the RRC granted 3,650 allocation well permits and 453 PSA well permits during this time period.

These wells make up a large portion of horizontal wells permitted in Texas. During the same period discussed above (January 1, 2021 to the present), the RRC approved 10,737 horizontal wellbore permits, more than 5,500 of which were for PSA or allocation wells.[6] Thus, **more than half of all horizontal well permits that the RRC issued since 2020 were for allocation wells or PSA wells**, like the Audioslave A 102H (the "Audioslave Well"). Adopting a rule barring such wells would directly undermine the horizontal technology that this Court has acknowledged as promising. *Browning Oil Co., Inc. v. Luecke*, 38 S.W.3d 625, 647 (Tex. App.—Austin 2000, pet. denied) ("We decline to apply legal principles appropriate to vertical wells that are so blatantly inappropriate to horizontal wells and would discourage the use of this promising technology.").

Since PSA wells and allocation wells were introduced, Texas has seen a jaw-dropping increase in oil and gas production. In 2011, when the RRC adopted the first Form PSA-12,[7] oil production in Texas was 1,452,000 barrels of crude oil per day.[8] Only eight years later, in 2019, Texas was producing 5,101,000 barrels of crude oil per day, **a more than 300% increase**.[9] Daily dry natural gas production also climbed from 6,631,555 million cubic feet ("MCF") in 2011 to 8,170,468 MCF in

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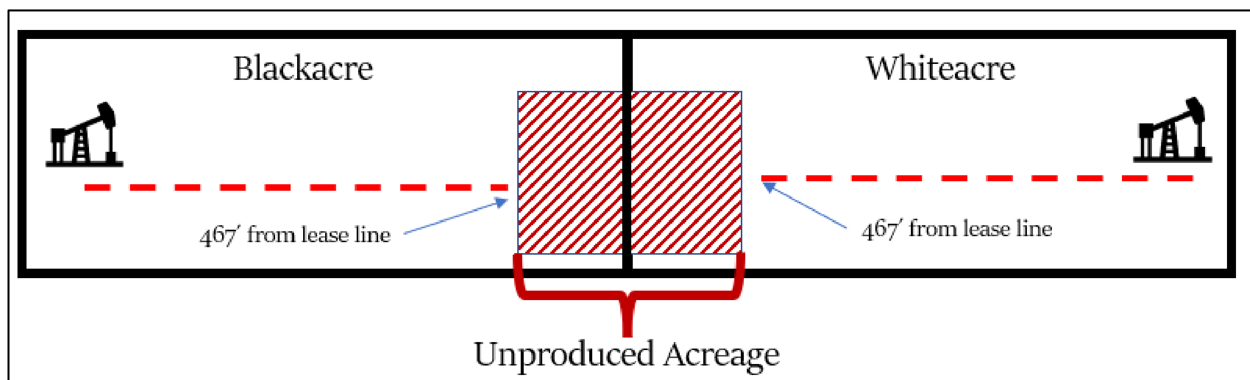
[6] *Id.* This RRC Query data has been limited to only wells with a horizontal wellbore profile.
[7] *See* 36 Tex. Reg. 5835 (publication date of March 25, 2011).
[8] This is based off U.S. Energy Information Administration ("USEIA") Data found at https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=mcrfptx2&f=a.
[9] *Id.*

2019.[10] This remarkable growth in Texas oil and gas production has gone hand-in-hand with the growth of PSA and allocation well permits.

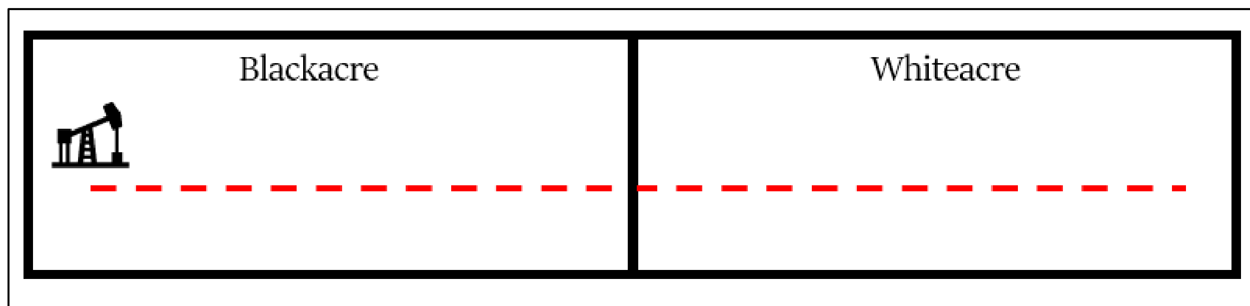
b. PSA and allocation wells reduce unnecessary waste.

Allocation wells and PSA wells like the Audioslave Well are essential to ensuring that waste is eliminated during oil and gas horizontal drilling. Under Statewide Rule 37, an operator cannot drill a well (including horizontal wells) "nearer than 467 feet to any property line, lease line, or subdivision line" without an exception from the RRC. 16 Tex. Admin. Code § 3.37(a)(1). Thus, an operator holding a lease on two adjacent tracts that cannot be pooled may be forced to drill two different wells and to leave oil and gas in the ground simply because it is too close to a lease line.



[10] This is also based on USEIA data, found at https://www.eia.gov/dnav/ng/hist/na1160_stx_2a.htm.

PSA and allocation wells eliminate this waste. Rather than having to stop 467 feet from the lease line, these wells can traverse the entirety of the two tracts, securing oil and gas from the portion of the tracts near the lease line:



While reaching this extra production, the operator will also be able to use a single well rather than two wells. The combination of reduced cost and increased production reduces waste and unnecessary expenses.

The Texas Supreme Court has openly expressed its view that such advances in oil and gas drilling should be promoted. *See Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 51 (Tex. 2017) ("[T]his Court has always viewed waste-reducing innovations favorably."). That Court has also recognized that it "is the longstanding policy of this state to encourage maximum recovery of minerals and to minimize waste." *Id.* Waste in the production of oil and gas is unlawful in Texas. Tex. Nat. Res. Code Ann. § 85.045 ("The production, storage, or transportation of oil or gas in a manner, in an amount, or under conditions that constitute waste is unlawful and is prohibited."); *Key Operating & Equip., Inc. v. Hegar*, 435 S.W.3d 794, 798 (Tex. 2014) ("[T]he Legislature has made waste in the

production of oil and gas unlawful.”). As detailed above, PSA and allocation wells help reduce this unlawful waste in oil and gas production.

Relatedly, Texas state policy is “to encourage the recovery of minerals” such as oil and gas, *Key Operating*, 435 S.W.3d at 798, and this policy is embedded in the state constitution, Tex. Const. art. XVI, § 59 (“The conservation and development of all of the natural resources of this State, . . . and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties.”). PSA and allocation wells promote this goal.

II. The district court improperly ordered the RRC to engage in detailed lease interpretation to issue a permit.

The district court’s Final Order also improperly expands the scope of the RRC’s review to go beyond the bounds of its authority. When issuing the permit for the Audioslave Well (the “Permit”), the RRC properly engaged in the limited, good-faith review needed under Texas law and the RRC declined to exceed its jurisdiction in reviewing the Permit in response to the Appellees’ challenge. But the district court’s Final Order would require the RRC to engage in a full review of the leases at issue and parse disputed provisions in those leases before issuing a permit. This Court and the Texas Supreme Court have been clear that such a review is the purview of only the courts, not the RRC.

a. The RRC's issuing of the Permit merely removed regulatory bars to drilling and did not adjudicate the parties' contract rights.

The district court's error can be seen through the lens of the Texas Supreme Court's decision in *Magnolia Petroleum Co. v. Railroad Commission*, 141 Tex. 96, 170 S.W.2d 189 (1943). As all parties have noted in their briefs, this decision set out the good-faith standard applicable to the RRC's decision to grant an operator a permit. *See infra* Argument § II.b. But it also provides the context in which to consider the RRC's role when issuing a permit like the one for the Audioslave Well.

Before addressing the permit at issue in the appeal, the Court in *Magnolia Petroleum* determined that it "must first consider the situation as it was at common law before the conservation statutes were enacted." *Id.* at 190. Before those laws, "[n]o permit was then required to drill for oil." *Id.* Disputes over whether an oil and gas operator had permission to drill on a tract were decided in the court system. *Id.*

The Court determined that this situation was "not materially changed by the conservation laws." *Id.* A RRC permit issued under these laws (and related regulations) did not necessarily mean the permit-holder had title to the property at issue. *See id.* at 190–91. The RRC's permit merely "removes the conservation laws and regulations as a bar to drilling the well, and leaves the permittee to his rights at common law." *Id.* at 191; *see also FPL Farming Ltd. v. Envtl. Processing Sys., L.C.*, 351 S.W.3d 306, 310 (Tex. 2011) ("[A] permit is a 'negative pronouncement' that

'grants no affirmative rights to the permittee.'" (quoting *Magnolia Petroleum*, 170 S.W.2d at 191)). "Where there is a dispute as to those rights, it must be settled in court." *Magnolia Petroleum*, 170 S.W.2d at 191.

Viewed through this lens, the RRC's decision to grant the Permit was clearly correct (as was the RRC's later decision to reject the Appellees' challenge to that Permit). Without conservation laws and Rule 37,[11] an oil and gas operator could drill the entire length of a property upon which it held a lease as a lessee will receive the entirety of the mineral estate conveyed from a lessor unless a reservation says otherwise. *See Cockrell v. Tex. Gulf Sulphur Co.*, 157 Tex. 10, 15, 299 S.W.2d 672, 675 (1956) (discussing how a deed transfers "all of the estate owned by the grantor at the time of the conveyance unless there are reservations or exceptions which reduce the estate conveyed").[12] If a lessor disagreed that such a well was properly permitted (as the Appellees do), they could settle that dispute in Court. *Id.* The RRC's granting of the Permit would not alter this dispute; it merely "remove[d] the conservation laws and regulations as a bar to drilling the well." *Id.* The district court

[11] 16 Tex. Admin. Code § 3.37.

[12] *See also* Ernest E. Smith, *Applying Familiar Concepts to New Technology: Under the Traditional Oil and Gas Lease, A Lessee Does Not Need Pooling Authority to Drill A Horizontal Well That Crosses Lease Lines*, 12 Tex. J. Oil Gas & Energy L 1, 6 (2017) ("The typical oil and gas lease imposes virtually no restrictions on where, within the leased tract, the lessee is allowed to drill, or what technologies the lessee may use to drill. . . . In other words, under the typical oil and gas lease, the lessee is entitled to use whatever technologies are available. And the lessee is entitled to drill anywhere in the leased tract, whether vertically or horizontally.").

is the proper forum for this argument (as the Lessors implicitly recognize through their lawsuit in Karnes County District Court),[13] not the RRC.

b. The RRC cannot adjudicate contractual disputes.

Turning to the standard developed in *Magnolia Petroleum*, the Court in that case limited the scope of the RRC's inquiry when issuing a permit and held that the district court should not determine questions of title when there is a good-faith basis to claim title.

> The function of the Railroad Commission in this connection is to administer the conservation laws. **When it grants a permit to drill a well it does not undertake to adjudicate questions of title or rights of possession. These questions must be settled in the courts**. When the permit is granted, the permittee may still have no such title as will authorize him to drill on the land.

Id. (emphasis added). While courts often discuss this rule in the title-document context, the same standard applies to contractual documents that might affect an operator's right to drill: the RRC is not to "adjudicate the validity of [those] agreement[s] any more than it can adjudicate title." *Cheesman v. Amerada Petroleum Corp.*, 227 S.W.2d 829, 832 (Tex. Civ. App.—Austin 1950, no writ); *see also Pan Am. Prod. Co. v. Hollandsworth*, 294 S.W.2d 205, 211–12 (Tex. Civ. App.—Austin 1956, writ ref'd n.r.e.) (noting that the RRC does not have "authority

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[13] No. 18-06-00153-CVK, *Opiela v. EnerVest Operating LLC*, in the 81st District Court of Karnes County, Texas.

to determine substantive questions relating to title or possession or other rights affecting the property involved" (emphasis added)).

While the parties disagree whether the Lease's no-pooling language bars PSA or allocation wells (it does not, *see infra*), this question turns on a legal construction of the Lease's language and the intent of the parties as discerned from that language. Such an inquiry belongs in district court, not the RRC. *Pan Am. Petroleum Corp. v. R.R. Comm'n*, 318 S.W.2d 17, 21 (Tex. Civ. App.—Austin 1958, no writ) (rejecting argument seeking to reject permit based on deed language because "[it] is the duty of a court of competent jurisdiction to determine if the deed is ambiguous and if not to determine from the terms and provisions of the deed itself the intent of the parties" rather than the RRC). Put another way, when a question depends on competing constructions of an agreement or conflicting evidence, that question belongs in court, not the RRC. *Rosenthal v. R.R. Comm'n*, No. 03-09-00015-CV, 2009 WL 2567941, at *9 (Tex. App.—Austin Aug. 20, 2009, pet. denied) ("[R]elying on the jurisdictional limitations identified in *Magnolia Petroleum*, we have rejected challenges to commission permits based on the good-faith-claim requirement where the challenge has instead turned on construction of the deed under which the applicant claims the subject property, or conflicting evidence from competing surveys." (citing *Pan Am. Petroleum Corp.*, 318 S.W.2d at 19–21)).

Under this standard, the RRC did not have jurisdiction to decide whether the Lease allowed for the drilling of an allocation well. That same jurisdictional limit applies "to trial and appellate courts when reviewing commission orders granting or denying permits." *Rosenthal*, 2009 WL 2567941, at *6 (citing *Trapp v. Shell Oil Co.*, 145 Tex. 323, 198 S.W.2d 424, 437 (1946) and *Hollandsworth*, 294 S.W.2d at 211–12).

c. Courts, rather than regulatory bodies, are the proper venue for thorny questions of oil and gas lease interpretation.

There is a practical reason for the jurisdictional rules articulated above: the RRC should not be in the business of making complex legal rulings about oil and gas lease terms. Whether a lessee is complying with the terms of its lease can be incredibly complicated. What if there is a question of whether a lessor ratified an action that the lease at issue may have prohibited?[14] What if the facts surrounding the execution of the lease might change the way a lease is read?[15] What if industry custom and practice might impact the interpretation of a lease?[16] Thorny contractual questions are for the courts, not the RRC. The district court (and Appellees) are

[14] This issue recently resulted in a 5-4 split at the Texas Supreme Court. *BPX Operating Co. v. Strickhausen*, 629 S.W.3d 189 (Tex. 2021), *reh'g denied* (Oct. 15, 2021).
[15] This issue also recently resulted in a 5-4 split at the Texas Supreme Court. *Murphy Expl. & Prod. Co.-USA v. Adams*, 560 S.W.3d 105 (Tex. 2018), as corrected (Nov. 30, 2019).
[16] This issue also recently resulted in a 5-4 split at the Texas Supreme Court. *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471 (Tex. 2019).

wrong to require the RRC to address these issues instead of correctly having them decided in a district court.

III. PSA and allocation wells are not a form of pooling.

The District Court also erred by implicitly finding that PSA and allocation wells are a form of pooling under Texas law. If this Court finds it has jurisdiction to examine this issue, this Court should reverse this incorrect conclusion.

a. Preeminent authorities on oil and gas law agree PSA and allocation wells are not a form of pooling.

Perhaps the clearest sign that the district court erred in its determination comes from the leading voices in oil and gas law. Professor Ernest E. Smith—the co-author of *Texas Law of Oil and Gas*, the Rex G. Baker Centennial Chair Emeritus in Natural Resources Law at the University of Texas Law School and the leading voice in Texas oil and gas law[17]—wrote an entire article dedicated to the premise that "pooling authority is not required for a lessee to drill a horizontal allocation well that crosses lease lines, so long as the lessee holds leases on each tract crossed by the horizontal well."[18]

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[17] Indeed, one of the leading conferences in Texas for oil and gas law continuing legal education is called the "Annual Ernest E. Smith Oil, Gas and Mineral Law Institute." *See* https://utcle.org/conferences/OG22.

[18] Ernest E. Smith, *Applying Familiar Concepts to New Technology: Under the Traditional Oil and Gas Lease, A Lessee Does Not Need Pooling Authority to Drill A Horizontal Well That Crosses Lease Lines*, 12 Tex. J. Oil Gas & Energy L 1, 4 (2017).

Additionally, the leading treatise on pooling itself—*The Law of Pooling and Unitization*—does not track the district court's conclusion.[19] The Treatise dedicates a chapter to "Pooling Agreements," referring to contractual agreements on pooling. 1 The Law of Pooling and Unitization, 3d Ed. § 7.05[1]. The chapter has a subsection dedicated to "Innovative ***Alternatives*** to Pooling," noting that developments in horizontal drilling have led to these innovations:

> The widespread advent of horizontal well technology and the ability to extend a lateral for distances well in excess of a mile has created a need to utilize other mechanisms other than voluntary or compulsory pooling to efficiently develop unconventional hydrocarbon resources. In many situations, leasehold pooling clauses are ill-designed to deal with horizontal well drilling or spacing units. . . . In response to these difficulties both the private and public sectors have developed alternatives to traditional pooling and unitization.

1 The Law of Pooling and Unitization, 3d Ed. § 7.05[6] (footnotes omitted). The two "alternatives" discussed are allocation wells, *see id.* § 7.05[6][a], and PSA wells, *id.* § 7.05[6][b]. The treatise expressly discusses how production sharing agreements are not pooling agreements. *Id.* ("PSAs are not like pooling agreements described in the earlier portions of this Chapter, but are merely agreements between the interested parties as to how to share or allocate the production from a horizontal well."). These sources underscore the widespread view that pooling and PSA or allocation wells are materially different.

[19] The Texas Supreme Court has cited this treatise when discussing pooling law. *See Samson Expl., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 776 n.28, 777 nn.32, 34 (Tex. 2017).

b. Many material differences exist between pooling and PSA or allocation wells.

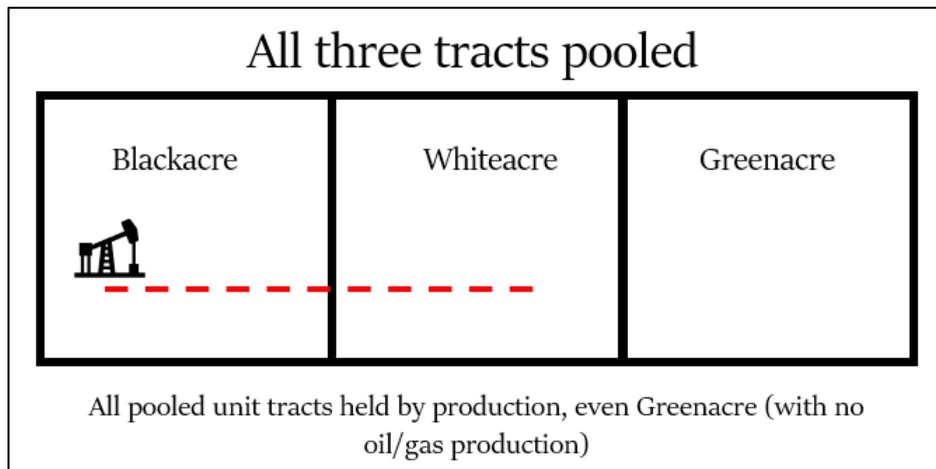
The argument that the Lease's pooling clause prohibited the RRC's issuing of a PSA well permit (or an allocation well permit) ignores several fundamental differences between pooling and a PSA well (or allocation well).

i. PSA and allocation wells do not bring about the "primary legal consequence" of pooling under Texas law.

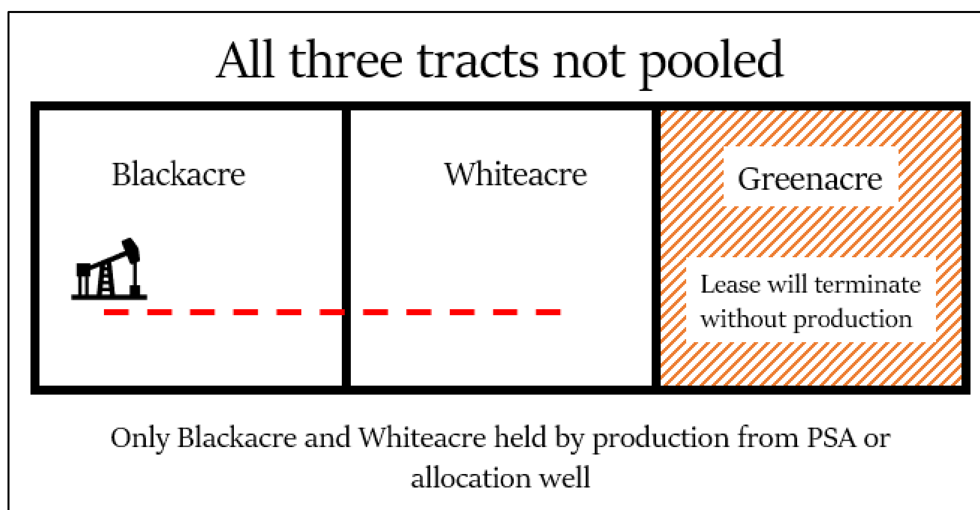
Most oil and gas leases contain a habendum clause that clarifies how long an oil and gas lease will stay in effect. *See Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2002) ("A lease's habendum clause defines the mineral estate's duration."). "[A] typical habendum clause states that the lease lasts for a relatively short fixed term of years (primary term) and then 'as long thereafter as oil, gas or other mineral is produced' (secondary term)." *Id.* "In Texas, such a habendum clause requires actual production in paying quantities." *Id.* Thus, if an oil and gas lease is in its secondary term and there is no oil and gas production from that lease, it will terminate.

But this is not necessarily the case when it comes to pooled units. As this Court has recognized, when tracts are pooled into a unit, "[o]perations anywhere within the unit are treated as if they occurred on all the land within the unit, and production from a well on the pooled unit is treated as occurring on all the tracts pooled into the unit." *Luecke*, 38 S.W.3d 625, 634 (Tex. App.—Austin 2000, pet.

denied). The Texas Supreme Court has declared this aspect of pooling to be its "primary legal consequence." *See Se. Pipe Line Co., Inc. v. Tichacek*, 997 S.W.2d 166, 170 (Tex. 1999) ("The primary legal consequence of pooling is that production and operations anywhere on the pooled unit are treated as if they have taken place on each tract within the unit."). This primary legal consequence of pooling—that *actual production* is not needed from each pooled tract—transforms ownership of oil and gas leases. If three tracts are pooled as part of a unit and a horizontal well is drilled across only two of the three tracts, all three tracts will be held by production from the horizontal well (even the tract that has no oil and gas production).



But this is not the case when it comes to a PSA or allocation well drilled across unpooled tracts. Without *actual production* from each tract, there is no *constructive production* that will count from a PSA or allocation well drilled across other tracts.



Because PSA and allocation wells do not carry out the "primary legal consequence" of pooling, *see Tichacek*, 997 S.W.2d at 170, it cannot be the case that they are a form of pooling.

ii. PSA and allocation wells do not cross-convey interests like with pooling.

Another key distinction between pooling and PSA or allocation wells comes through cross-conveyance of ownership. This Court has recognized this key point for pooling:

> With regard to the royalty interest owners, pooling results in "a cross-conveyance of interests in land by agreement among the participating parties, each of whom obtains an undivided joint ownership in the royalty earned from the land in the 'block' created by the agreement."

Luecke, 38 S.W.3d at 634 (quoting *MCZ, Inc. v. Triolo*, 708 S.W.2d 49, 52–53 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.)); *see also Montgomery v. Rittersbacher*, 424 S.W.2d 210, 213 (Tex. 1968) ("This Court has held that pooling effects a cross-conveyance among the owners of minerals under the various tracts of

royalty or minerals in a pool . . . ."). But this cross-conveyance of interests does not occur with PSA or allocation wells on unpooled tracts.[20]

Relatedly, pooling also changes how royalties are allocated by a lessee to its lessors. "Royalty is distributed on the basis of the proportion each party's acreage bears to the whole block." *Luecke*, 38 S.W.3d at 634 (quoting *MCZ, Inc.*, 708 S.W.2d at 52–53); *Montgomery*, 424 S.W.2d at 213 (stating that pooled unit owners "all own undivided interests under the unitized tract in the proportion their contribution bears to the unitized tract"); *Chambers v. San Augustine Cnty. Appraisal Dist.,* 514 S.W.3d 420, 424 (Tex. App.—Tyler 2017, no pet.) ("Through cross-conveyance, all the parties subject to a pooling agreement own an undivided interest in the pooled mineral interests in proportion to their contribution to the unitized tract."). This can alter the amounts of royalties paid to lessors.

An example can be seen through a horizontal wellbore drilled across two tracts of equal size—Whiteacre and Blackacre—but with more of the wellbore drilled in the correlative interval on Blackacre:[21]

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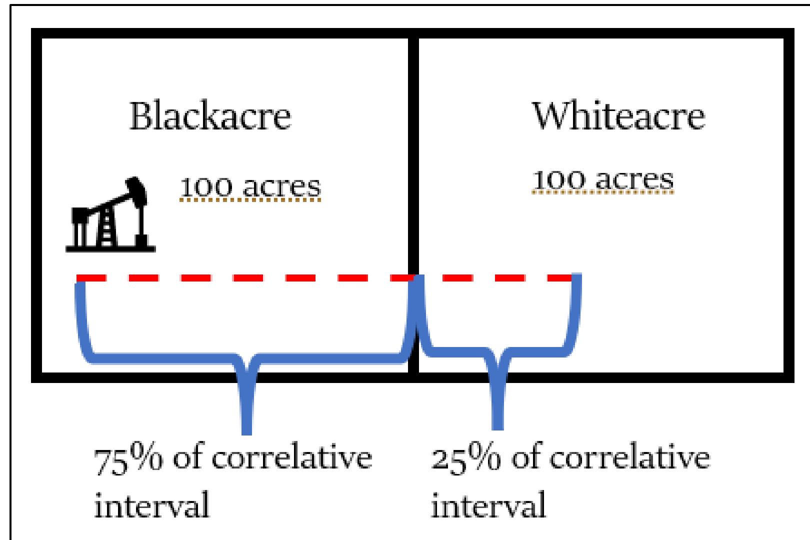
[20] Pooling can be accomplished without a cross-conveyance of interests if there is a contractual disclaimer. *See, e.g.*, *San Augustine Cnty. Appraisal Dist. v. Chambers,* 618 S.W.3d 398, 402 (Tex. App.—Tyler 2021, pet. denied). But there is still "a presumed intent to cross-convey participating lessors' interests" when pooling. *Id.*

[21] Production from such a well "is not obtained from the entire length of the well, but from the part of the well that pierces and drains the reservoir in which the hydrocarbons reside." *Springer Ranch, Ltd. v. Jones*, 421 S.W.3d 273, 285 (Tex. App.—San Antonio 2013, no pet.). "A horizontal well only produces hydrocarbons from the part of the well that lies within the hydrocarbon-bearing reservoir, or 'correlative interval.'" *Id.* "Along the horizontal displacement are takepoints through



There is almost certainly more oil and gas being taken from Blackacre than Whiteacre from this horizontal well. But this will be of no consequence if the entirety of Blackacre and Whiteacre are pooled. Both lessors will receive equal royalty payments because the tracts are the same size, regardless of the placement of the horizontal well.

But if pooling is removed from the equation, the method of payment differs dramatically. If a PSA or allocation well was drilled in the same position, Blackacre and Whiteacre would not share equally in royalties. Instead, under this Court's standard, each tract would receive royalty payments based on "what production can be attributed to their tracts with reasonable probability."[22] *Luecke*, 38 S.W.3d at 647.

which hydrocarbons flow into the well." *Id.* The more takepoints inside the correlative interval on a given tract, the more oil or gas likely produced from that tract.

[22] Based on the expert calculation referenced in *Springer Ranch*, 421 S.W.3d 273, this would be the "length of open drainhole situated on each respective tract" across which an allocation or PSA well was drilled. *Id.* at 286.

Yet again, there are substantial differences for the treatment of a PSA or allocation well versus a horizontal well drilled across pooled acreage.

iii. Pooling forecloses certain breach claims related to the duty to protect against drainage that would apply to PSA or allocation wells.

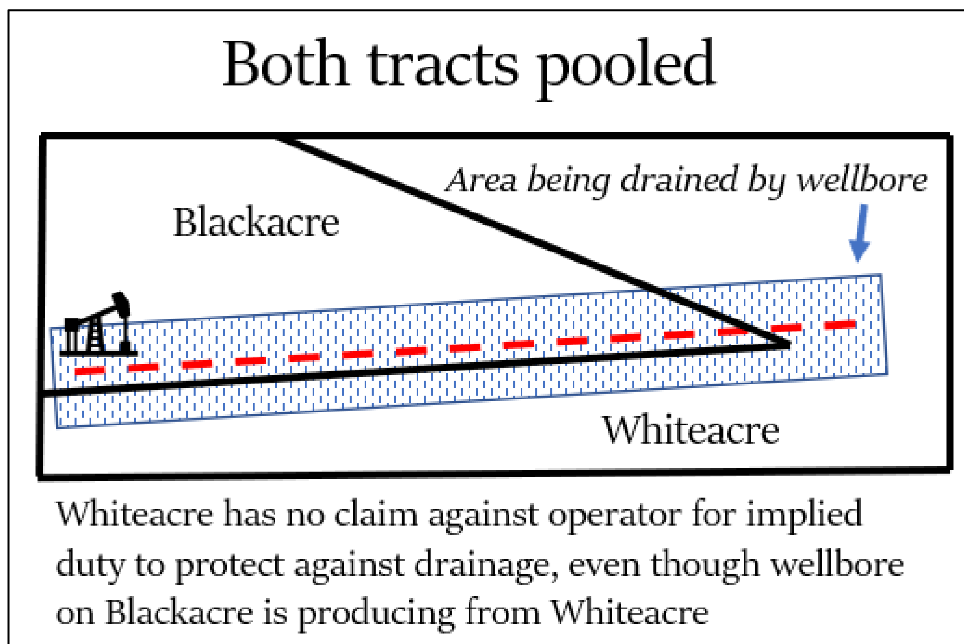
The Texas Supreme Court has established several implied covenants that apply to oil and gas leases, including a covenant to "protect the leasehold." *HECI Expl. Co. v. Neel*, 982 S.W.2d 881, 889 (Tex. 1998). This implied covenant is based on the migratory nature of oil and gas. "[O]il and gas are fugaceous minerals that will migrate without regard to property lines," and "a landowner owns all the oil and gas produced by a well drilled on her land, even though the well may be draining minerals from nearby properties." *Luecke*, 38 S.W.3d at 632. Because adjacent tracts may drain nearby properties, a part of the "broad implied covenant to protect the leasehold" includes an "implied covenant to protect against drainage." *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 568 (Tex. 1981); *see also Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 253 (Tex. 2004) ("An oil and gas lessee has an implied obligation to protect the leasehold from drainage."), *abrogated on other grounds by Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1 (Tex. 2008).

Again, pooling under Texas law impacts this key part of oil and gas jurisprudence by relieving a lessee of this obligation when it comes to pooled tracts:

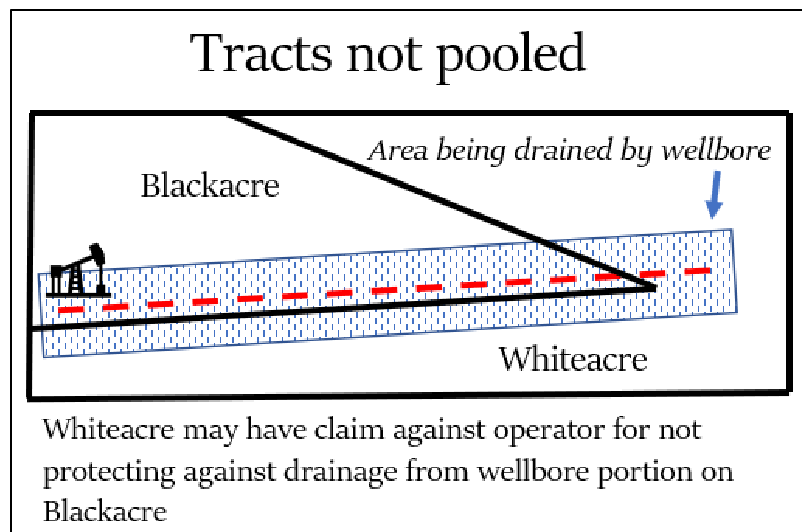
> If the lessee pools in good faith, the lessee is relieved of the obligation to reasonably develop each tract separately, or to drill off-set wells on

> other tracts included in the unit to prevent drainage by a well on one or more of such tracts. In other words, there can no longer be drainage of the individual leases by a unit well, only drainage of the unit by wells located outside the unit.

Tichacek, 997 S.W.2d at 170 (internal citations omitted); *see also Southland Royalty Co. v. Humble Oil & Ref. Co.*, 151 Tex. 324, 329, 249 S.W.2d 914, 916 (1952). Consider a horizontal well drilled mostly inside one tract (Blackacre) along its property line with another tract (Whiteacre), with only some of the wellbore extending into Whiteacre and producing from that tract. The wellbore portion on Blackacre may be draining migratory oil and gas from Whiteacre. But if Blackacre and Whiteacre are pooled, this scenario will not give rise to a claim for breach of the implied duty to protect against drainage by Whiteacre against the lessee of that tract, as part of the production from the wellbore will be shared with (*i.e.,* paid to) all parties in the pooled unit, including Whiteacre.



But this situation becomes less certain if Blackacre and Whiteacre are not pooled and a PSA or allocation well is drilled in the same location. If the lessor of Whiteacre can prove that the PSA or allocation well is draining its property and a reasonably prudent operator would have acted to prevent the drainage, that lessor may try to make a claim for breach of the implied covenant.[23] *Kerr-McGee Corp.*, 133 S.W.3d at 253.



Thus, without pooling in place, a lessor may demand that a lessee drill an offset well to prevent perceived drainage. *Tichacek*, 997 S.W.2d at 170. But not if Whiteacre and Blackacre are pooled. A PSA or allocation well differs dramatically from pooling in the same situation when it comes to this implied covenant.[24]

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[23] Nothing in this brief should be construed to suggest that such a claim would succeed. Rather, it is merely noting the possibility of a lessor making such a claim.

[24] Other implied duties can be affected by pooling as well. For example, Texas courts "generally have recognized the implied covenant to reasonably develop the premises after production is obtained." *Clifton v. Koontz*, 160 Tex. 82, 93, 325 S.W.2d 684, 693 (1959). But when tracts are

iv. PSA and allocation wells do not alter the rule of capture.

Pooling also alters a key principle of oil and gas law in Texas—the rule of capture—in a way that does not necessarily apply to PSA or allocation wells. "The rule of capture is simply this—that the owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though part of such oil or gas may have migrated from adjoining land." *Ryan Consol. Petroleum Corp. v. Pickens*, 155 Tex. 221, 230, 285 S.W.2d 201, 207 (1955). "The rule of capture is an ancient doctrine in oil and gas law that serves as a basis for many statutory and regulatory provisions." *Luecke*, 38 S.W.3d at 632.

But pooling of tracts upends this ancient doctrine. "Effective pooling in essence abrogates the rule of capture by allowing owners of non-producing tracts to share in production from the producing tract." *Id.* at 634; *XTO Energy Inc. v. Goodwin*, 584 S.W.3d 481, 493 (Tex. App.—Tyler 2017, pet. denied) (same); *Russell v. City of Bryan*, 846 S.W.2d 389, 391 (Tex. App.—Houston [14th Dist.] 1992, writ denied) ("The Rule of Capture simply does not apply to production from land within the pool."). There is no equivalent Texas rule when it comes to PSA or allocation wells.

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pooled, such a duty no longer applies to each tract separately but rather to the entire pooled unit. *Tichacek*, 997 S.W.2d at 170 ("If the lessee pools in good faith, the lessee is relieved of the obligation to reasonably develop each tract separately, or to drill off-set wells on other tracts included in the unit to prevent drainage by a well on one or more of such tracts.").

c. Under the Appellees' cited sources, PSA and allocation wells do not constitute pooling.

Appellees' primary definition of pooling comes from a 1952 law review article, written more than fifty years before the first PSA and allocation wells were drilled.[25] Not surprisingly, this cherrypicked quote matches the Appellees' argument. But the more authoritative sources cited by the Appellees—such as the leading treatise *The Law of Pooling and Unitization* and Texas caselaw—show that pooling is generally done to combine tracts to meet well-spacing requirements:

- "Pooling, or a pooled unit, will describe the joining together of small tracts or portions of tracts **for the purpose of having sufficient acreage to receive a well drilling permit under the relevant state or local spacing laws and regulations**, and for the purpose of sharing production by interest owners in such a pooled unit." 1 *The Law of Pooling and Unitization*, 3d Ed. § 1.02 (emphasis added).

- "Technically, 'pooling means the bringing together of small tracts **sufficient for the granting of a well permit under applicable spacing rules**,' and 'unitization means the joint operation of all or some part of a producing reservoir.'" *Circle Dot Ranch, Inc. v. Sidwell Oil & Gas, Inc.*, 891 S.W.2d 342, 347 (Tex. App.—Amarillo 1995, writ denied) (cleaned up) (emphasis added) (quoting 6 H. Williams & C. Meyers, Oil and Gas Law § 901 (1994)).

- "Often, if a tract is of insufficient size **to satisfy the state's spacing or density requirements**, lessees will 'pool' acreage from different leased tracts." *Luecke*, 38 S.W.3d at 634 (emphasis added).

[25] Appellees' Brief at 47 (citing Robert E. Hardwicke, *Oil-Well Spacing Regulations and Protection of Property Rights in Texas*, 31 Tex. L. Rev. 99 (1952)).

Under these definitions, the key for pooling is that tracts or leases are being brought together to meet the requirements of Texas's spacing rules.

But that is simply not the case with allocation wells or PSA wells as a general matter. Nor have Appellees shown that the Permit was acquired to meet Texas RRC spacing rules. Thus, Appellees cannot rely on this authority to show that PSA or allocation wells are considered a form of pooling under Texas law.

d. Appellees are trying to improperly rewrite their Lease's "no pooling" language to apply to allocation wells.

Appellees also seek to transform their lease's pooling language into something it is not. To begin, the lease's "no pooling" language is not a transformative provision; it merely restates existing Texas law on pooling. *Cf. Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 122 (Tex. 1996) (finding that an oil and gas lease's postproduction clauses "merely restate existing law"). Without express authorization, an operator cannot pool a lease. *See Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 860 (Tex. 2005) ("A lessee has no power to pool without the lessor's express authorization, usually contained in the lease's pooling clause."); *Tichacek*, 997 S.W.2d at 170. Thus, if a lease does not have a provision authorizing pooling, pooling is not permitted absent ratification from the lessor. *See Samson Expl.*, 521 S.W.3d at 774 ("A pooled unit that does not comply with the terms of the pooling agreement is invalid and unenforceable absent the lessor's ratification.").

More importantly, Appellees seek a rewrite of their "no pooling" language to cover more than originally intended. There is nothing express about PSA wells in the Lease. Nor is there anything express about allocation wells or other horizontal wells that traverse multiple leases. Nor is there a provision in the Lease that prohibits the drilling of a horizontal well at any location on the leased premises that would traverse the Lease from border-to-border. *See Cockrell*, 157 Tex. at 15, 299 S.W.2d at 675.

But this is not the case with all leases. For example, the General Land Office's model lease[26] expressly deals with both pooling and horizontal wells that cross lease boundaries:

> **POOLING; ALLOCATION**: (a) Lessee is hereby expressly prohibited from pooling or unitizing the Leased Premises or any interests therein with any other leasehold or mineral interest for the exploration, development and production of Oil or Gas or either of them without the express consent of the School Land Board and the Commissioner. A well, whether or not classified as an allocation well, that traverses multiple leases or units including the Leased Premises hereunder, one or more of which leases or units contains Oil and Gas owned by the state, and which well is not associated with an agreement approved by the GLO and owner of the soil specifying the allocation of the production of state-owned Oil and Gas, is hereby expressly not permitted and may not operate on or under this lease or a unit containing state-owned Oil and Gas without the prior written consent of the Commissioner or his authorized designee, which consent may be granted or withheld in the Commissioner's sole discretion.

[26] This lease can be located at https://www.glo.texas.gov/energy-business/oil-gas/mineral-leasing/leasing/forms/Form_Relinquishment_Act_Lease.pdf.

Other Texas oil and gas leases expressly bar horizontal wells drilled between leases that have not been pooled or bar horizontal wells without approval in advance from the lessor.[27]

Appellees' Lease contains no such language, and Appellees' attempt to use "no pooling" language to cover this situation is trying to force a round peg in a square hole. "Courts may not rewrite the parties' contract, nor should courts add to its language." *In re Davenport*, 522 S.W.3d 452, 457 (Tex. 2017); *see also Tier 1 Res. Partners v. Delaware Basin Res. LLC*, 633 S.W.3d 730, 737 (Tex. App.—El Paso 2021, pet. filed) ("[I]t is not within a court's purview to rewrite the leases and alter the parties' contract." (quotation omitted)). The district court rewrote the Lease to include a "no PSA well" clause, and this Court should reverse such an improper rewrite.

CONCLUSION

This Court should reverse the district court's decision in this matter. The district court's decision poses a grave threat to Texas oil and gas operations that could undermine horizontal drilling, contravening this Court's rejection of legal principles that would discourage the use of this technology. *Luecke*, 38 S.W.3d at

[27] *Let's Make a Deal: Selected Issues when Negotiating a Modern Oil and Gas Lease*, 67 RMMLF-INST 21, 21–32 (discussing how "[s]ome landowners in Texas will propose that express prohibitions of allocation wells be written into their leases" and including an example from the Texas Land & Mineral Owners Association).

647. Further, the district court's Final Order runs afoul of long-standing Texas Supreme Court precedent limiting the RRC's scope when reviewing oil and gas well permits. Finally, the district court's implicit finding that PSA and allocation wells are a form of pooling simply does not match the law.

Respectfully submitted,

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