The Proof is in the Public Record . . . or is it? Navigating Evidentiary Issues Related to Texas Railroad Commission Documents

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I. Introduction

The Texas Railroad Commission ("TRC") generates and maintains a litany of information related to the oil and gas industry. Such information exists in the form of rules, regulations, reports, administrative findings, routine filings, complaints, permits, and the like. The information is used in a wide-variety of circumstances and business transactions. When these transactions breakdown and result in litigation, oil and gas attorneys often turn to the information on file with the TRC as evidence to prove or rebut legal claims. The following presents a survey of the types of information maintained by the TRC, the relevant case law on the use of said information in various oil and gas-business and litigation settings, and some legal hurdles in using this information.

II. Who is affected?

The use of TRC records goes far beyond the obvious. The TRC maintains records related to the oil and gas industry. Those records are searched routinely by lessors, lessees, and other mineral and royalty owners to determine whether oil and gas leases have been maintained by production past their primary terms. Production information is not maintained by the various courthouses where the land is located, and therefore, such information can only be found through the TRC. The TRC records also include information on the wells drilled that are perpetuating the oil and gas leases. The operator of each well must file forms showing to what depth the well is drilled, perforated, fracted and later plugged. Subsequent lessees and operators use that information to determine the viability of subsequent prospects for drilling as well as whether old wells may be re-entered. Accordingly, oil and gas drilling depends upon access to the TRC records and reliability of those records.

In a broader sense, the oil and gas information found at the TRC is utilized by not only the oil and gas companies and various interest owners, but also the oil and gas title examiner, the oil and gas transactional attorney, the real estate attorney, buyers of property, salt water disposal companies, pipeline companies, and the attorneys who represent these clients in litigation. Moreover, information regarding confirmation of whether a lease is held by producers who operate a well, whether a well has been plugged "properly," where the casing is set on a well, whether the pipeline is considered a common carrier or gas utility, and whether a certain pipeline has experienced a leak, rupture, or other incident is all found in the TRC forms and reports. Thus, the extent of information compiled and maintained by the TRC is multifaceted and may directly or indirectly affect many individuals and business entities in Texas.

III. Overview of the Texas Railroad Commission

The TRC has been delegated the duty and authority to set forth and carry out just and reasonable conservation policies for the State of Texas. In this connection, the TRC is the administrative agency charged with regulating the Texas oil and gas industry in order to prevent waste and protect correlative rights within the state.[1] Currently, the TRC oversees five major petroleum-industry segments: oil and natural gas exploration and production, natural gas and hazardous liquids pipeline operations, natural gas utilities, LPG/LNG/CNG industries, and coal surface mining operations.[2] The TRC's powers are primarily governed by the statutes set forth in the Texas Natural Resources Code.[3]

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[1] *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008); *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 60 S. Ct. 1021, 84 L. Ed. 1368 (1940); *Bullock v. Shell Pipeline Corp.*, 671 S.W.2d 715 (Tex. App.–Austin 1984, writ ref'd n.r.e.).

[2] http://www.TRC.state.tx.us/about/divisions/TRC2012-13LAR.pdf.

[3] TEX. NAT. RES. CODE ANN. §§ 81.001 to 103.046; *see also Rowan & Nichols Oil Co.*, 310 U.S. 573.

A. Jurisdiction

As part of its duties, the TRC oversees the production, storage, and transportation of oil and gas within the state of Texas.[4] Therefore, the TRC has jurisdiction over all common carrier pipelines transporting petroleum-related products within the state. Similarly, the TRC has jurisdiction over all oil and gas wells in the state, all persons owning or operating pipelines in the state, and all persons owning or engaged in drilling or operating oil or gas wells in the state.[5] In all matters, the TRC acts as the state's agency and not as the agent of interested private persons.[6]

B. Authority

Texas statutes authorize the TRC to develop, enact, and enforce rules, procedures, and orders for governing and regulating persons and activities subject to the TRC's jurisdiction for conservation purposes.[7] Said rules and orders may be general in their nature or applicable only to particular oil and gas fields.[8] Moreover, TRC orders are similar to a court's judgment and are therefore subject to review by the courts.[9]

More specifically, with respect to the conservation of oil and gas, the TRC is required by statute to adopt and enforce rules:

- to prevent waste of oil and gas in drilling and producing operations and in the storage, piping, and distribution of oil and gas;
- to require dry or abandoned wells to be plugged in a manner that will confine oil, gas, and water in the strata in which they are found and prevent them from escaping into other strata;
- for the drilling of wells and preserving a record of the drilling of wells;
- to require wells to be drilled and operated in a manner that will prevent injury to adjoining property;
- to prevent oil and gas and water from escaping from the strata in which they are found into other strata;
- to provide rules for shooting wells and for separating oil from gas;
- to require records to be kept and reports made;
- to provide for the issuance of permits, tenders, and other evidences of permission when the issuance of the permits, tenders, or permission is necessary or incident to the enforcement of the commission's rules or orders for the prevention of waste.[10]

Similarly, with respect to the conservation and regulation of natural gas, in particular, the Railroad Commission is required to adopt and enforce rules and orders to:

- conserve and prevent the waste of gas;

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4 *Gulf Land Co. v. Atlantic Refining Co.*, 131 S.W.2d 73 (Tex. 1939); *Frost v. Sun Oil Co. (Delaware)*, 560 S.W.2d 467 (Tex. Civ. App.–Houston [1st Dist.] 1977, no writ); *Railroad Commission v. Humble Oil & Refining Co.*, 193 S.W.2d 824 (Tex. Civ. App.–Austin 1946, writ ref'd n.r.e.).

5 TEX. NAT. RES. CODE ANN. § 81.051(a).

6 *Magnolia Petroleum Co. v. Edgar*, 62 S.W.2d 359 (Tex. Civ. App.–Austin 1933, writ ref'd).

7 TEX. NAT. RES. CODE ANN. §§ 85.201 and 81.052; *Shell Oil Co. v. Stansbury*, 401 S.W.2d 623 (Tex. Civ. App.–Beaumont 1966, writ ref'd n.r.e.); *Delhi-Taylor Oil Corp. v. Gregg*, 337 S.W.2d 216 (Tex. Civ. App.–Austin 1960) jdgmt aff'd, 162 Tex. 26, 344 S.W.2d 411 (1961).

8 *Magnolia Petroleum Co. v. Blankenship*, 85 F.2d 553 (C.C.A. 5th Cir. 1936); *Bullock*, 671 S.W.2d 715 (Tex. App.–Austin 1984, writ ref'd n.r.e.); *Carr v. Stringer*, 171 S.W.2d 920 (Tex. Civ. App.–Fort Worth 1943, writ ref'd w.o.m.).

9 *Corzelius v. Harrell*, 186 S.W.2d 961 (Tex. 1945); *Johnson Refinery v. State*, 85 S.W.2d 948 (Tex. Civ. App.–El Paso 1935, no writ).

10 TEX. NAT. RES. CODE ANN. §§ 85.201, 85.202(a)(1), 85.202(a)(2) 85.202(a)(3), 85.202(a)(4), 85.202(a)(5), 85.202(a)(6), 85.202(a)(7), 85.202(b), 86.042(1), 86.042(2), 86.042(3), 86.042(4), 86.042(5), 86.042(6), 86.042(7), 86.042(9).

- prevent the waste of gas in drilling and producing operations and in the piping and distribution of gas;

- require dry or abandoned wells to be plugged in a way that confines gas and water in the strata in which they are found and prevents them from escaping into other strata;

- provide for drilling wells and preserving a record of them;

- require wells to be drilled and operated in a manner that prevents injury to adjoining property;

- prevent gas and water from escaping from the strata in which they are found into other strata;

- require records to be kept and reports made;

- provide for the issuance of permits and other evidences of permission when the issuance of the permit or permission is necessary or incident to the enforcement of its blanket grant of authority to make any rules necessary to effectuate the law;

- otherwise accomplish the purposes of the statutory provisions relating to regulation of natural gas.[11]

These TRC regulatory functions are carried out through various activities, including:

> emergency response; plugging abandoned wells; cleaning up abandoned oilfield sites; public education; alternative fuels research and education, public information, dispute resolution, promulgation of rules; maintaining financial assurance of operators; filings by operators; granting permits and licenses; monitoring performance; inspecting facilities; maintaining records and maps; reviewing various requests; investigating complaints; conducting hearings, and rendering decisions.[12]

As one would assume, a litany of paperwork accompanies these activities. As such, the TRC maintains an extensive compilation of public records upon which many persons in different settings rely. As set forth in detail herein, oil and gas litigation often involves the use of TRC documents as proof of some element of a party's claim.

C. Status of the TRC – 2011 Sunset Review

Every twelve (12) years, the Texas Legislature reviews the status and efficiency of its state agencies under the Sunset Act.[13] The Sunset Act establishes a Sunset Advisory Committee, which conducts a review and makes recommendations to the state legislators.[14] This year, the TRC is up for its Sunset Review.

The major TRC issues under review are an agency name change and a restructuring of the governing body. Specifically, upon recommendation of the Sunset Advisory Committee, the Texas Senate passed Senate Bill 655 on April 4, 2011, approving a name change from the "Texas Railroad Commission" to the "Texas Oil and Gas Commission"[15] SB 655 would also reduce the size of the commission from three elected members to one elected commissioner.[16] Said bill would further require the commissioner to stop accepting campaign contributions a year before the general election, to make the State Office of Administrative Hearing more accessible to the public, and to

[11] *Id.*

[12] http://www.TRC.state.tx.us/about/divisions/TRC2012-13LAR.pdf

[13] TEX. GOV'T CODE § 325.001 et. seq.

[14] *Id.*

[15] 82 Leg. Session, SB 655; *see also* http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=82R&Bill=SB655

[16] *See id.*

allow the commission to include surcharges on licenses.[17]

It does not appear that the Sunset Review will significantly alter the TRC's regulatory authority. Thus, the TRC will continue to promulgate and enforce rules to regulate the oil and gas industry. As such, the use and effect of the various documents maintained by the agency should remain the same.

IV. Case law:

A. Public Record Evidence in General – Hearsay, authenticity, and notice:

As noted, the public records related to the TRC regulation are voluminous and multifaceted. Nevertheless, they are still public records and thus generally governed by rules applicable thereto. For example, under the evidentiary hearsay rule, a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted, is inadmissible.[18] The hearsay rule is designed to prohibit the use of a person's assertion unless the person is available to be placed under oath and cross-examined.[19] Numerous exceptions, however, have developed in response to the harshness of the hearsay rule.[20] One such exception involves public records.[21]

The hearsay exception for public records and reports, known as the "official written statements" exception, rests on public necessity and convenience.[22] Records, reports, statements, or data compilations of public offices or agencies are excepted from the operation of the hearsay rule when such records set forth: (1) the office's or agency's activities; (2) matters observed pursuant to a duty imposed by law, which result in a recorded report; and (3) in civil cases, factual findings resulting from an investigation made pursuant to authority granted by law.[23] Said exception applies unless the sources of information or other circumstances indicate lack of trustworthiness.[24] The exception is further limited in its application to official public documents or records, prepared pursuant to a duty imposed by law, of a routine nature concerning events, acts, reports, or returns of public officers and employees.[25]

In addition, the Texas Rules of Evidence require that documentary evidence be authenticated prior to admission. However, a public record is considered self-authenticated as said records are authorized by law to be recorded or filed and are in fact recorded or filed in a public office.[26] The sole requirement is that such record be certified as correct pursuant to the Texas Rule of Evidence respecting self-authentication of certified copies of public records.[27] Certified copies are generally admissible in all cases where the records themselves would be admissible.[28] The copy is subject only to those objections applicable to the original document or record and is otherwise entitled to the same force and verity as said original.[29]

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17 *See id.*

18 TEX. R. EVID. 801.

19 TEX. R. EVID. 801 and 802.

20 TEX. R. EVID. 803 and 806.

21 TEX. R. EVID. 803(8).

22 *Stephensen v. Perry*, 590 S.W.2d 558 (Tex. Civ. App–Houston [1st Dist.] 1979, writ ref'd n.r.e.); *Krenz v. Strohmeir*, 177 S.W. 178 (Tex. Civ. App.–Austin 1915, writ ref'd).

23 TEX. R. EVID. 803(8).

24 *Id.*

25 *Roberts v. Dallas Ry. & Terminal Co*., 276 S.W.2d 575 (Tex. Civ. App.–El Paso 1953, writ refused n.r.e.); *General Acc. Fire & Life Assur. Corp. v. La Fair*, 294 S.W. 247 (Tex. Civ. App.–Texarkana 1927, no writ).

26 TEX. R. EVID. 901(b)(7).

27 TEX. R. EVID. 1005.

28 *May v. Missouri-Kansas-Texas R. Co*., 583 S.W.2d 694 (Tex. Civ. App.–Waco 1979, writ ref'd).

29 *Porter v. State*, 578 S.W.2d 742 (Tex. Crim. App. 1979); *Gattison v. Meyer*, 297 S.W. 900 (Tex. Civ. App.–Texarkana 1927, writ dism'd w.o.j.; *Holmes v. Anderson*, 59 Tex. 481 (Tex. 1883); *Allen v. Hoxey's Adm'r*, 37 Tex. 320 (Tex. 1873).

Similarly, public records, under some circumstances, constitute "constructive notice" of certain statuses or events. Particularly, instruments recorded in the public deed records of individual Texas counties serve as constructive notice to the public of the status of a landowner's "chain-of-title" to a piece of real property in said county.[30] The need for stability and certainty regarding real property titles has led courts to hold that public property records should serve as notice of the facts surrounding properties.[31]

B. Case Law Related to Use of TRC Public Records

Parties in litigation have attempted to apply and extend the rules related to public record evidence to the public records kept by the TRC. The extent that a party can rely upon TRC records, however, appears to turn on the type of record and its proposed use. Unfortunately, the case law has not always been consistent or easily reconciled, and thus, the use of TRC public records in litigation may not be as full-proof as the general rule presumes.

1. Early decisions

In a series of Texas court of appeals cases in the mid-to-late 1990s, Texas courts had multiple opportunities to consider whether public TRC records constituted constructive notice for purposes of applying the discovery rule to legal claims barred by statutes of limitations.[32] In 1994, the Corpus Christi Court of Appeals first considered the issue in *Harrison v. Bass Enterprises Production Company, Inc*.[33] *Harrison* involved a suit by a non-participating royalty interest owner ("Harrison") against a working interest owner/operator and various other non-participating royalty owners (hereinafter collectively "defendants") for unpaid royalties.[34] The operator wrongfully pooled Harrison's royalty interest and for many years, under incorrect division orders, wrongfully paid the other royalty interest owners Harrison's portion of royalties.[35]

Upon discovery of the wrongful pooling and payments, Harrison filed suit.[36] The defendants raised the affirmative defense of limitations as to that portion of the unpaid royalties outside of the applicable 4-year statute of limitations.[37] In response, Harrison argued that limitations were tolled by the discovery rule because his injury was difficult, if not impossible, to discover.[38] The trial court granted summary judgment in favor of defendants, and Harrison appealed.[39]

The Corpus Christi court of appeals affirmed, holding that Harrison's claims were barred by limitations and that the discovery rule did not apply.[40] In so holding, the appellate court reasoned:

> Suits for recovery of royalties will primarily involve documentary evidence. Evidence of production is available through public records and through mandatory filings with the [TRC]. Such considerations weigh against the susceptibility of fraudulent or stale suits.

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30 *See Sherman v. Sipper*, 152 S.W.2d 319, 321 (Tex.1941) (holding in a fraud case that purchasers had constructive notice of matters reflected in real property records and that limitations barred the claim); *see also "Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 939 (Tex.1972) (holding that a subsequent purchaser of real property had constructive notice of all it would have learned if it had inquired of one who was in actual possession of the property and who claimed a superior interest).

31 *See Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex.1981).

32 *See Shivers v. Texaco Exploration and Production, Inc.*, 965 S.W.2d 727 (Tex. App.–Texarkana 1998, pet. denied); *Rogers v. Ricane Enterprises, Inc.*, 930 S.W.2d 157 (Tex. App.–Amarillo 1996, pet. denied); *Koch Oil Co. v. Wilbur*, 895 S.W.2d 854 (Tex. App.–Beaumont 1995, pet. denied); *Harrison v. Bass Enter. Prod. Co., Inc.*, 888 S.W.2d 532 (Tex. App.–Corpus Christi 1994, no pet.).

33 *Harrison*, 888 S.W.2d 532.

34 *See id*. at 535.

35 *See id*.

36 *See id.*

37 *See id.*

38 *See id.*

39 *Harrison*, 888 S.W.2d at 535.

40 *See id.* at 538.

However, they also indicate that the cause of action was discoverable by the plaintiff within the limitations period.[41]

A year later, in 1995, the Beaumont Court of Appeals considered the same issue with respect to unpaid royalties.[42] In agreeing with the *Harrison* opinion, the Beaumont court held that the discovery rule did not apply because (among other forms of notice), production records are maintained by the TRC and thus readily available to mineral interest owners for inspection and review.[43] In a similar case the following year (which involved conversion and wrongful payments between various working interest owners as opposed to non-participating royalty interest owners), the Amarillo Court of Appeals reached the same conclusion --- public TRC production records preclude the availability of the discovery rule to toll limitations in oil and gas proceed-payment disputes.[44]

In 1998, the Texarkana court of appeals followed suit in the *Shivers v. Texaco Exploration & Production, Inc*[45] case. *Shivers* also involved a dispute between royalty interest owners and their lessee, but, unlike *Rogers*, *Koch Oil Company*, and *Harrison*, the dispute in *Shivers* did not involve unpaid proceeds.[46] *Shivers* involved the issue of whether a lessee owes a duty to notify royalty interest owners of the availability of tax credits related to their mineral interests.[47]

In particular, the issue in *Shivers* stemmed from Internal Revenue Code Section 29, which provides a credit for natural gas produced from a "tight formation."[48] The wells in *Shivers* were producing from the Cotton Valley formation, which the TRC classifies as a tight formation.[49] The royalty interest owners in *Shivers* did not become aware of the existence of the tax credit until years after the wells began producing.[50] Unfortunately, though, the IRS rules do not allow amendments to tax forms after four years.[51] Thus, the royalty interest owners sued their lessee for failure to notify them of the available tax credit and attempted to recover damages for loss of the credit during those years outside of the four-year amendment bar.[52]

The lessee defended against the suit, claiming it did not owe the royalty interest owners such a duty and that even if it did owe a duty, the royalty interest owners' claims were barred by the four-year statute of limitation for breach of implied duties under a lease.[53] The trial court granted summary judgment for the lessees without stating the grounds upon which it ruled.[54] On appeal, the royalty interest owners argued (among other things) that the discovery rule tolled limitations.[55]

The appellate court avoided the duty question and rendered on the limitations issue.[56] The court first noted that the royalty owners had "constructive knowledge" of the tax credit based upon the wells' public-record certification and production reports on file at the TRC.[57] Citing to *Rogers*, *Koch Oil Company*, and *Harrison*, the court held that public records on file with the TRC are sufficient to render the information discoverable.[58] In this connection, the court held

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41 *Id.*

42 *Koch Oil Co.*, , 895 S.W.2d at 863-64.

43 *See id.*

44 *Rogers*, 930 S.W.2d at 169.

45 965 S.W.2d 727, 735 (Tex. App.—Texarkana 1998, pet. denied).

46 *See id.* at 730.

47 *See id.*

48 *See id.*

49 *See id.*

50 *See id.*

51 *Shivers*, 965 S.W.2d at 730.

52 *See id.*

53 *See id.*

54 *See id.*

55 *See id.*

56 *See id.* at 733-34.

57 *Shivers*, 965 S.W.2d at 735.

58 *See id.*

that the discovery rule did not apply to toll limitations.[59]

2. ***HECI Exploration Company v. Neel***

After denying review in *Shivers*, *Rogers*, and *Koch Oil Company*, the Texas Supreme Court finally rendered an opinion on the discovery rule as it relates to TRC public records in the 1998 case, *HECI Exploration Company v. Neel*.[60] Like *Shivers* and *Koch Oil*, *HECI Exploration Company* involved a suit by royalty owners ("the Neels") against their lessee ("HECI").[61] Likewise, *HECI Exploration Company* involved a claim for breach of duty to notify by *HECI*.

Specifically, the lessee, HECI, and an adjacent leasehold-estate owner both produced oil and gas from a common reservoir underlying the adjoining tracts.[62] In violation of TRC rules, however, the adjoining leasehold estate owner periodically overproduced the reservoir, leading HECI to institute TRC actions, which ultimately resulted in an injunction being issued against the adjoining leasehold-estate owner.[63] The injunctive relief, however, was too little, too late. The overproduction had already permanently damaged the reservoir by causing "oil to migrate into the gas cap overlying the oil reserves, which diminished the amount of oil and gas" that could be recovered by all producers of the common reservoir.[64]

HECI then sued the adjoining leasehold estate owner in district court. In prevailing on said suit, HECI recovered actual damages, punitive damages, and a permanent injunction. The suit was thereafter settled, and the judgment released in 1989.[65] The Neels later learned of the suit, and in turn, sued HECI for breach of contract, negligent misrepresentation, breach of implied duty, and unjust enrichment, seeking a 1/6th royalty on the amount of damages awarded HECI in the judgment against the adjoining producer.[66] The Neels' suit, however, was not instituted until more than four years after the judgment release was filed of record.[67] In an attempt to circumvent the untimely filing, the Neels alleged that the discovery rule had tolled limitations.[68]

HECI moved for summary judgment on its limitations defense, which the trial court granted.[69] A final judgment was rendered, disposing of the Neels' claims.[70] The Neels appealed. The court of appeals reversed, holding that the oil and gas lease included an implied covenant, requiring HECI to notify its royalty interest owners of suits, and that the discovery rule applied to toll limitations.[71] HECI then sought and was granted review from the Texas Supreme Court.

In reviewing the claims, the high court first set out to determine the date that the Neels' causes of action accrued.[72] The court noted that claims based upon a lessee's duty to notify royalty owners that they have potential claims against a third party arise contemporaneously with the injury inflicted by the third party.[73] Thus, the high court held that the Neels' claims arose when the adjoining leasehold-estate owner damaged the reservoir.[74] As the illegal overproduction ceased in 1988, the Neels' claims,

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59 *See id.*

60 982 S.W.2d 881 (Tex. 1998).

61 *See id*. at 883.

62 *See id*. at 884.

63 *See id*.

64 *Id.*

65 *See id.*

66 *HECI Exploration*, 982 S.W.2d at 884.

67 *See id*.

68 *See id.*

69 *See id*.

70 *See id*.

71 *HECI Exploration*, 982 S.W.2d at 885.

72 *See id*. at 885.

73 *See id*

74 *See id*

filed in 1993, were thus outside the applicable limitations period.[75]

The court next turned to the application of the discovery rule to determine whether the Neel's lack of knowledge of the injury tolled their claims.[76] In reviewing this issue, the court first reaffirmed that the discovery rule typically only applies to cases where the alleged injury is inherently undiscoverable.[77] In the context of injuries to mineral interests, the court reasoned that mineral-interest owners have some obligation to exercise reasonable diligence to protect their interests.[78] Such diligence, according to the Texas Supreme Court, includes determining the existence of other operators in the area, determining the existence of a common reservoir, and determining whether the other operators in the area are injuring the common reservoir.[79]

The court next noted that the TRC keeps records about operations in a common reservoir. In this connection, the court held:

> While some records of the [TRC] in certain circumstances may provide constructive notice, the records regarding illegal production [by the adjoining producer] are not of that character in the context of the Neels' claims against HECI. Nevertheless, filings and other materials publicly available from the [TRC] are a ready source of information, and a cause of action for failure to provide that same information is not inherently undiscoverable.[80]

At first glance, the court appears to hold that although the discovery rule does not apply to the Neels' claim against HECI, it might have tolled limitations had the Neels sued the adjoining producer because, as the court states, illegal production records are not a type that would provide constructive notice. However, in the very next sentence, the court goes on to say: "[a]s demonstrated in this case, the information that the Railroad Commission maintains regarding fields in which there is competing production indicates that injury to a common reservoir by an adjoining operator is not inherently undiscoverable."[81]

These two statements appear to be somewhat contradictory. If the records do not constitute constructive notice of illegal production, how, then, is an injury related to said illegal production discoverable through said records? Asked otherwise, if the injury is not inherently undiscoverable due to the existence of the records, how are the records not "constructive notice?" The court attempts to reconcile this apparent contradiction in a footnote, partially overruling the *Shivers* case, in which the court states: "[t]o the extent that *Shivers* could be read as indicating that all [TRC] records are constructive notice (as distinguished from discoverable for discovery rule purposes) simply because they are a matter of public record, we disagree."[82] The court appears to be drawing a fine-line distinction between constructive notice, generally, and constructive notice for purposes of applying the discovery rule in litigation, particularly. Whether this is a distinction without a difference is debatable.

Nevertheless, since *HECI*, Texas courts have consistently declined to apply the discovery rule in instances where information related to claim as issue is readily available at the TRC.[83] Thus, despite the confusing language of *HECI*, the holding appears to have provided sufficient guidance to the lower courts. Recently, however, the Texas Supreme Court has had another opportunity to review the use of TRC public records in other contexts. In the 2010 *Exxon Corporation v. Emerald Oil & Gas Company &*

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75 *See id*

76 *See id*.

77 *HECI Exploration*, 982 S.W.2d at 886.

78 *See id.*

79 *See id.*

80 *See id.* at 887.

81 *See id.*

82 *See id.*

83 *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 735 (Tex. 2001); *Kerlin v. Sauceda*, 263 S.W.3d 920, 925 (Tex. 2008); *Hunt Oil Co. v. Live Oak Energy, Inc.*, 313 S.W.3d 384, 388 (Tex. App.–Dallas 2009, no pet.).

Miesch case, the Texas Supreme Court issued an opinion addressing a litigant's ability to rely on public TRC records to prove a fraud claim.[84]

3. ***Exxon Corporation v. Emerald Oil & Gas Company & Miesch***

The facts of *Exxon Corporation*, pertinent to the TRC public-record issue, are as follows: Exxon and its predecessor drilled and operated numerous wells for several decades on oil and gas leases, covering a large area of land in south Texas.[85] When production decreased in the early 1990s, Exxon unsuccessfully attempted to renegotiate lease terms.[86] Thereafter, Exxon began plugging and abandoning the wells, and in conjunction therewith, Exxon filed the necessary plugging reports with the TRC.[87] The TRC reports indicate that the wells were plugged and abandoned in accordance with applicable TRC rules and standards.[88]

After the leases terminated, the lessors executed new leases with Emerald Oil & Gas Co.[89] Emerald then attempted to re-enter the abandoned wells and discovered that Exxon had effectively sabotaged the holes by pumping pollutants into the producing zones, cutting casing without attempting to pull the casing, and leaving materials in the well-bore to prevent others from successfully re-entering the holes.[90] Emerald and the lessors then brought suit against Exxon for various claims, including fraud and negligent misrepresentation related to the TRC plugging reports.[91]

At the trial court level, Exxon was granted directed verdict on the fraud and negligent misrepresentation claims.[92] Emerald and the lessors appealed.[93] On appeal, the Corpus Christi Court of Appeals reversed and remanded the trial court's ruling on the fraud-related claims.[94] The appellate court located evidence in the record, which demonstrated Exxon knew that subsequent lessees and operators might rely on TRC public records to make business decisions.[95] Such evidence, the appellate court held, was sufficient to satisfy the intent-to-induce reliance element of fraud.[96]

Exxon then sought review from the Texas Supreme Court,[97] which the high court granted.[98] Exxon argued that the appellate court decision was in error.[99] First, Exxon disputed there was evidence in the record to support a finding that future operators might rely on the TRC records because, according to Exxon, the records were solely designed to assist the state in protecting against pollution.[100] Second, Exxon urged that

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84 *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, – S.W.3d –-, 2011 WL 1226100 (Tex. 2011).

85 *Exxon Corp.*, 2011 WL 1226100 *1.

86 *Exxon Corp.*, 2011 WL 1226100 *1.

87 *Exxon Corp.*, 2011 WL 1226100 *1-2.

88 *Exxon Corp.*, 2011 WL 1226100 *2.

89 *Exxon Corp.*, 2011 WL 1226100 *2.

90 *Exxon Corp.*, 2011 WL 1226100 *2-3.

91 *Exxon Corp.*, 2011 WL 1226100 *2-3.

92 *Exxon Corp.*, 2011 WL 1226100 *3.

93 *Exxon Corp.*, 2011 WL 1226100 *3.

94 *Exxon Corp.*, 2011 WL 1226100 *17.

95 *Exxon Corp.*, 2011 WL 1226100 *17.

96 *Exxon Corp.*, 2011 WL 1226100 *17.

97 An opinion on a companion case, *Exxon Corporation v. Emerald Oil and Gas Co., L.C.*, 331 S.W.3d 419, 420 (Tex. 2010), was issued the same day. In that case, the issue was whether the subsequent lessee, Emerald, had a private cause of action against Exxon Corp. under statute for negligence per se. The Texas Supreme Court initially issued an opinion on November 20, 2009, which was subsequently withdraw after rehearing and replaced by a new opinion (see *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 2009 WL 795760 (Tex. Nov. 9, 2009). While the original reasoning changed between the initial opinion and the new opinion, the result remained the same. Ultimately, the court determined that Texas Natural Resources Code Section 85.321 allows a party with proper standing to maintain a cause of action for damages to a mineral interest but concluded that Emerald, as a subsequent lessee, did not have standing to bring such a claim.

98 *Exxon Corp.*, 2011 WL 1226100 *3.

99 *Exxon Corp.*, 2011 WL 1226100 *18.

100 *Exxon Corp.*, 2011 WL 1226100 *18.

the appellate court decision reduced the intent-to-induce reliance element of fraud to mere foreseeability.[101]

In considering Exxon's arguments, the high court first noted that evidence in the record indicated that Emerald had reviewed the TRC filings prior to leasing the properties.[102] The court next acknowledged the existence of some evidence in the record, which revealed Exxon knew future operators were likely to rely on the inaccurate plugging reports.[103] The court then analyzed the statutory and regulatory purposes of requiring the operators to file plugging reports with the TRC.[104]

The court began by citing to the statutory duty of operators to plug wells properly, pursuant to the Texas Administrative Code.[105] In disagreeing with Exxon's contention that plugging reports are filed solely to protect state interests against pollution, the court acknowledged:

> One of the objectives of the plugging regulations is to prevent plugging of wells that hinder or prevent re-entering wells, which could be desired by the same or subsequent owners or operators. To police this regulation, the [TRC] requires that the W–3 plugging reports be verified under oath, be filed within thirty days after the plugging is completed, and disclose the methods used to plug a well. Thus, the purpose of requiring operators to file plugging reports with the [TRC] is to ensure that operators follow a plugging procedure that not only prevents pollution, but also allows re-entry into the wells for commercial purposes.[106]

The court next determined whether the mere existence of the false plugging reports could serve as proof of Exxon's intent-to-induce reliance on same.[107] In holding it could not, he court reaffirmed a previous holding that the intent-to-induce standard requires "more than mere foreseeability; the claimant's reliance must be 'especially likely' and justifiable, and the transaction sued upon must be the type the defendant contemplated."[108] In this connection, the court reasoned that evidence of a party's reliance on false public information as:

> a general industry practice is insufficient, as a matter of law, to prove an intent to induce reliance . . . The standard is not met if a defendant merely foresees that some party may rely on statements made in a public filing . . . Therefore, if the evidence shows only that Exxon made material misrepresentations in its plugging reports to the [TRC] and knew that lessors and operators in the future may rely on the filings, such evidence would fail as a matter of law.[109]

In further reviewing the record, the court determined that evidence existed, demonstrating Exxon knew of an especial likelihood that Emerald would rely on the false reports at the time they were filed.[110] Accordingly, the Texas Supreme Court agreed with the appellate court that the trial court erred in granting a directed verdict on the fraud claims. Therefore, the case was remanded for further proceedings.[111]

Exxon Corporation presents an interesting quandary. The court was clearly attempting to reconcile its previously analysis and holding related to the intent-to-induce reliance element. In so doing, however, does the court implicitly condone falsification of TRC records because the

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[101] *Exxon Corp.*, 2011 WL 1226100 *18.

[102] *Exxon Corp.*, 2011 WL 1226100 *17-18.

[103] *Exxon Corp.*, 2011 WL 1226100 *19.

[104] *Exxon Corp.*, 2011 WL 1226100 *19.

[105] *Exxon Corp.*, 2011 WL 1226100 *18-19.

[106] *Exxon Corp.*, 2011 WL 1226100 *19 (citations omitted).

[107] *Exxon Corp.*, 2011 WL 1226100 *19.

[108] *Exxon Corp.*, 2011 WL 1226100 *19.

[109] *Exxon Corp.*, 2011 WL 1226100 *19 (citations omitted).

[110] *Exxon Corp.*, 2011 WL 1226100 *20-21.

[111] *Exxon Corp.*, 2011 WL 1226100 *21.

complaining party must prove something more than the falsehood of the records? If, as the court admits, operators have a duty to properly plug wells, and the purpose, in part, of filing correct plugging reports is to give information to future lessors and operators so they may reenter wells, how then does the falsification of same not demonstrate an intent to induce future lessors and operators to rely upon the false records to their detriment? The increased burden placed on the injured party to establish additional facts of an "especial likelihood" of reliance seems unreasonably onerous. Additionally, in a more global sense, if parties cannot rely upon TRC public filings designed to be relied upon, are said records not rendered somewhat meaningless?

> In such a case, the jury is not asked to decide whether the defendant acted as a reasonable, prudent person would have acted under the same or similar circumstances. The statute itself states what a reasonable, prudent person would have done. If an excuse is not raised, the only inquiry for the jury is whether the defendant violated the statute or regulation and, if so, whether the violation was a proximate cause of the accident.[117]

4. ***Discovery Operating, Inc. v. BP America Production Company***

Another recent decision, *Discovery Operating Inc. v. BP America Production Company*, addresses whether violations of RRC statutes can serve as the standard of care in negligence per se cases.[112] An oil driller, Discovery Operating, Inc. ("Discovery"), encountered a highly pressurized water flow in an area where it was drilling a well.[113] Because no previous water-flow issues had occurred, and after investigating injection projects in the area, Discovery concluded a nearby operation by BP America Production Company ("BP") caused the water flow.[114] The actions necessary to control the water flow prevented Discovery from completing its well.[115] As a result, Discovery sued BP for various actions including negligence per se.

The Texas Supreme Court has held that negligence per se is a concept in which a legislatively imposed standard of conduct is adopted to define the conduct of a reasonable and prudent person.[116]

In the *Discovery Operating, Inc.* case, the TRC had issued permits for BP's injection wells.[118] The permits allowed BP to inject fluids into the certain formations at certain depths.[119] Discovery alleged that pressures and waters injected into the BP well escaped "the interval allowed by the Railroad Commission permit for the well and had moved pressures and brine water into the area where Discovery encountered the water flow."[120] Accordingly, Discovery contended that BP violated the TRC permits terms in operating its injection wells.[121]

In this connection, Discovery alleged negligence per se claims based on BP's violations of Texas Natural Resources Code Section 85.045 and 91.143 and BP's violations of TRC Statewide Rules 9 and 46.[122] Section 85.045 specifically prohibits waste.[123] Section 91.143 specifically prohibits filing false applications, reports, and documents with the TRC.[124] Rule 9 applies to disposal well operations.[125] And, Rule 46 applies

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[112] 311 S.W.3d 140 (Tex. App.–Eastland 2010,).

[113] *Id*. at 145.

[114] *Id*. at 146-48.

[115] *See id*.

[116] *Carter v. William Sommerville & Son, Inc.*, 584 S.W.2d 274, 278 (Tex. 1979).

[117] *Mieth v. Ranchquest, Inc*., 177 S.W.3d 296 (Tex. App.–Houston [1 Dist.] 2005, no pet.).

[118] *Discovery Operating, Inc*., 311 S.W.3d at 147.

[119] *Id*.

[120] *Id*.

[121] *Id*.

[122] *Id*. at 159-160.

[123] *Id*.

[124] *Discovery Operating, Inc*., 311 S.W.3d at 159-160.

[125] *Id*.

to fluid injection operations in productive reservoirs.[126]

In response, BP filed a no-evidence summary-judgment motion claiming there was no evidence it had committed conduct constituting negligence per se.[127] The trial court granted the motion.[128] Discovery appealed.

In reversing the trial court's ruling, the Eastland Court of Appeals relied upon the withdrawn *Exxon Corporation v. Emerald Oil and Gas Co., L.C.* opinion.[129] Although that opinion was withdrawn, the Eastland appellate court's reasoning appears to also comport with the new opinion issued by the Texas Supreme Court in *Exxon Corporation v. Emerald Oil and Gas Co., L.C.*[130] Specifically, the Eastland court pointed out that Exxon Corporation stood for the proposition that: "the clear language of Section 85.321 creates a private cause of action for damages resulting from violations of (1) provisions of Chapter 85, (2) other laws of this state prohibiting waste, and (3) valid rules and orders of the Railroad Commission."[131] Again, while the first *Exxon Corporation* companion opinion was withdrawn, on this particular issue, the high court reached the same conclusion.

Per this reasoning, the Eastland court held that Discovery owned the mineral interests when the alleged injury occurred.[132] In this connection, the court concluded that Discovery had the right under Section 85.321 to assert its negligence per se claims against BP, "whether the claims are labeled as a private cause of action for violations of statutes and Railroad Commission rules and orders or as negligence per se claims for violations of the same statutes, rules, and orders."[133] Accordingly, the case was remanded so that Discovery could trial its case on a theory of negligence per se.[134]

5. ***Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC***

Presently, another case, *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, which involves reliance on TRC public records, is pending before the Texas Supreme Court.[135] One of the issues in *Texas Rice Land Partners, Ltd.* is whether proof that a pipeline entity has submitted itself to the regulation of the TRC is enough to establish common carrier status and thus the right of eminent domain in a pipeline-taking case.[136] Historically, such submission was established by the introduction of certified copies of TRC public records, which demonstrate: 1) the entity has applied for common carrier status, and 2) the TRC has approved the application.[137]

Texas Rice Land Partners, Ltd. ("Texas Rice") is a landowner in Jefferson County, Texas.[138] Denbury Green Pipeline-Texas, LLC ("Denbury") is an entity in the business of constructing pipelines for the transportation of carbon dioxide ("CO2") across the state of Texas.[139] Denbury unsuccessfully sought to enter Texas Rice's land for the purpose of conducting surveys (a right ancillary to Denbury's alleged right of eminent domain as a common carrier of CO2) related to the location and construction of a

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126 *Id*.

127 *Id*.

128 *Id*.

129 *Id*. (*citing to Exxon Corp. v. Emerald Oil and Gas Co., L.C*., 2009 WL 795760, at *1).

130 *See Exxon Corporation v. Emerald Oil & Gas Co., L.C*., 331 S.W.3d 419, 422-424 (Tex. 2010).

131 *Discovery Operating, Inc*., 311 S.W.3d at 161.

132 *Id*.

133 *Id*.

134 *Id*.

135 296 S.W.3d 877 (Tex. App.–Beaumont 2009, pet. granted).

136 *See id*. at 879.

137 *See id*. at 879-80 (citing to *Vardeman v. Mustang Pipeline Co*., 51 S.W.3d 308, 312 (Tex. App.-Tyler 2001, pet. denied) and *Lohmann v. Gulf Ref. Co*., 682 S.W.2d 612 (Tex. App.-Beaumont 1984, no pet.).

138 *See id*. at 877-78.

139 *See id*.

pipeline to transport CO2 across the state of Texas for use in tertiary-recovery operations.[140]

To increase the development of Texas' depleted oil and gas fields, in 1981, the Texas Legislature added CO2 pipelines to the existing common carrier statutory scheme in the Texas Natural Resources Code § 111.002.[141] As such, entities owning/operating CO2 pipelines in the state of Texas are now deemed "common carrier" pipelines if they are transporting CO2 "to or for the public for hire."[142] Ancillary to common-carrier status, CO2 pipeline entities have the power of eminent domain for purposes of constructing CO2 pipelines.[143]

Pursuant to this statutory delegation, Denbury applied for a permit to operate a CO2 pipeline as a common carrier.[144] The TRC issued Denbury a T-4 Permit to Operate and a letter confirming same.[145] Denbury then filed its necessary tariff as a common carrier with the TRC.[146] Thereafter, Denbury attempted to enter Texas Rice's property under its right to conduct surveys for locating and marking the route of the proposed CO2 pipeline.[147] Texas Rice prevented Denbury from entering, and Denbury thus sought injunctive relief from the district court.[148]

The parties filed cross-motions for summary judgment.[149] Texas Rice claimed that Denbury was not a common carrier because Denbury was allegedly intended to use the unbuilt pipeline for private purposes only.[150] Conversely, Denbury contended it was a common carrier and attached certified copies of its TRC filings and the TRC's permit and letter to establish same.[151] The trial court granted Denbury's summary judgment motion and denied Texas Rice's motion.[152] Texas Rice appealed.

In a published opinion, the Beaumont Court of Appeals affirmed the trial court's judgment.[153] The appellate court first restated long-standing Texas law that holds "[w]hether a pipeline company is a common carrier is a question of law."[154] The court further restated well-established Texas law, which holds that in determining common carrier status, "the courts must give great weight to determinations made by the [TRC]."[155]

The Beaumont court relied upon and quoted at length from a virtually identical case out of the Tyler Court of Appeals – *Vardeman v. Mustang Pipeline Co.* [156] Like Denbury, the common carrier pipeline in *Vardeman* presented TRC public records as evidence that it was, in fact, a common carrier.[157] Based upon this evidence, the *Vardeman* court held:

> A review of Commission records indicates that Mustang has met the requirements of § 111.02(6) of the Texas Natural Resources Code for common carrier status. First, Mustang has subjected itself to the jurisdiction of the Commission by declaring on its T–4 application for permit to operate a

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140 *See id.*

141 *See* TEX. NAT'L RES. CODE § 111.002; *see also* Committee on Energy Resources, H.B. 1199, Tex. Legislative Acts 1981, 67th Leg., p. 199, ch. 93, § 1 (eff. Aug. 31, 1981).

142 *See id.*

143 TEX. NAT'L RES. CODE § 111.019.

144 *Texas Land Rice Partners, Ltd.*, 296 S.W.3d at 877-88.

145 *See id.* at 880.

146 *See id.*

147 *See id.*

148 *See id.*

149 *See id.* at 878.

150 *Texas Land Rice Partners, Ltd.*, 296 S.W.3d at 878.

151 *See id.* at 880.

152 *See id.* at 878.

153 *See id.*

154 *Id.* at 879.

155 *Id.*

156 51 S.W.3d 308, 312 (Tex. App.–Tyler 2001, pet. denied).

157 *Texas Land Rice Partners, Ltd.*, 296 S.W.3d at 879.

> pipeline that it is a common carrier. Second, Mustang has held itself out to the public for hire as evidenced by its Texas Local Tariff No. M–3 on file with the Commission. Therefore, Mustang is a common carrier subject to the jurisdiction of the Commission.[158]

Texas Rice argued that evidence existed in the record, which established that Denbury's pipeline was actually a private line as opposed to a pipeline to transport to or for the public for hire. Therefore, Texas Rice alleged a fact issue existed that should have defeated Denbury's summary judgment motion.[159] The Beaumont Court disagreed, holding Denbury's common carrier evidence conclusively established its right to take.

Texas Rice filed a petition for review. The Texas Supreme Court granted review, and oral arguments were presented on April 19, 2011. With no opinion to date, it is impossible to know exactly why the Texas Supreme Court granted review of this issue. The Beaumont opinion was not unanimous, and the dissent took a very different view of the case than the majority. Whereas the majority couched the issue as determining an entity's status, the dissent concluded that an additional constitutional question of public use existed.[160] The majority found it was unnecessary to address the public use question because it held proof that Denbury was a common carrier was likewise determinative of the public use issue --- a common carrier pipeline was, as a matter of law, a pipeline for the public.[161] The dissent considered the issues to be separate and distinct and would have required something more than proof of common-carrier status when inquiring into public use.[162]

The Beaumont majority and the Tyler opinion clearly provide for the most practical result. Hopefully, the high court simply intends to flush out the public-use issue raised by the dissent but will continue to uphold long-standing law that actual use is not determinative of said issue.[163] If, however, the high court aims at instituting a policy change in eminent-domain law, the potentially-detrimental consequences to the oil and gas industry are far-reaching, and the future of reliance on TRC records as evidence in industry-related litigation could be thrown into further confusion.

As noted, the current scheme allows entities with eminent-domain authority to enter landowners' properties to conduct surveys for proposed pipelines routes. Said right may be relied upon prior to the need for actually instituting a condemnation proceeding, as demonstrated in *Texas Rice*. To prevent landowner interference with this right, the pipeline company simply files its injunctive relief request in the district court, submits its TRC records, demonstrating its eminent-domain authority, and the trial court, giving deference to the TRC's determination, uniformly grants the injunctive relief, as the trial court did in *Texas Rice*. The entity may then enter the property, conduct its surveys, and determine its proposed routes. If, thereafter, the pipeline entity is unable to agree with the landowners on the purchase of an easement across the surveyed route, the entity may then be forced to institute a condemnation proceeding.

This process has been effective for over 100 years in balancing the interests of the public's needs with that of landowners' rights. An adoption of Texas Rice's position would create a chilling effect on the oil and gas industry in Texas. Consider the following scenario:

The Eagle Ford Shale is a relatively new area of production in South Texas. Currently, the pipeline infrastructure in the area is minimal. Thus, numerous wells are being drilled, but without a pipeline, production from these wells cannot be transported to market.

Suppose a pipeline company proposes to construct a natural-gas pipeline from Laredo to

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158 *Id.*

159 *See id*. at 880.

160 *Id*. at 882-84.

161 *Id.*

162 *Id.*

163 *Id.*

Houston, where the gas produced from Eagle Ford Shale wells can be transported for processing, marketing, and public use. The pipeline company enters numerous contracts with independent contractors for the surveying, clearing, digging, laying, covering, and clean-up of the proposed lines. Gas purchasing agreements are entered with mid-stream/downstream entities for refining, marketing and ultimately distributing the natural gas to the public.

Each contract involves long-term investments, duties, and obligations, which demand a certain level of assurance that the pipeline will ultimately be constructed. Without the power of eminent domain, however, there would be no such assurance; therefore, the investment risk would outweigh the need to construct the pipeline. Without investors to build pipelines, the public is deprived of the natural gas and the related drilling/production activities become meaningless.

In order to provide the necessary assurances to the investors to ensure the pipeline will be constructed, our hypothetical pipeline company applies for a T-4 permit to operate the pipeline as a "gas utility," subjecting itself to TRC regulation and increasing its responsibilities/obligations in exchange for the right of eminent domain. Under existing law, once the TRC issues the permit, the pipeline company is considered a gas utility.[164] As such, the pipeline company has the power of eminent domain and thus begins its surveying activities. If landowners interfere, the pipeline company files suit and obtains injunctive relief from the district court (as occurred in *Texas Rice Partners, Ltd.*)

Following the grant of injunctive relief, the pipeline route is surveyed. In the meantime, as the route is determined, the pipeline company negotiates with landowners along the proposed route for the purchase of a pipeline easement. If negotiations are unsuccessful, the pipeline company then institutes condemnation suits.

The condemnation process is set up to protect landowners' rights, while at the same time avoid delay in public projects.[165] Thus, within twelve (12) days of filing its condemnation petitions, the pipeline company is entitled to a special commissioner's hearings.[166] Said hearing will result in an award of just compensation to the landowner for the taking.[167] The pipeline company can then immediately deposit the award and acquire possession of the easement for pipeline construction.[168] If the landowner is not satisfied, he/she may object to the award and is entitled to a full-blown trial on just compensation.

This near century-old process will be brought to a screeching halt if the Texas Supreme Court adopts Texas Rice's position. Any landowner along the hypothetical pipeline's route could refuse to allow surveyors onto their lands. Instead of having a quick injunction hearing where the pipeline company produces its TRC submission evidence, every district court along the route will be making case-by-case fact findings as to the pipeline company's gas utility status. As such, the pipeline company must then introduce evidence in each court of something "more" than submission to TRC regulation.

It is at this stage that Texas Rice's position becomes wholly impractical. Most pipelines traverse multiple counties and multiple properties within each county. Some counties have multiple district courts, and the condemnation statutes require the court clerks to rotate eminent-domain filings such that the pipeline company's suits against various landowners in a county will be considered by multiple judges.[169] Under existing

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[164] *Arcola Sugar Mills Co. v. Houston Lighting & Power Co.*, 153 S.W.2d 628, 633 (Tex. Civ. App.–1941, writ ref'd); *Grimes v. Corpus Christi Transmission Co.*, 829 S.W.2d 335, (Tex. App.–Corpus Christi 1992, writ denied); *Loesch v. Oasis Pipe Line Co.*, 665 S.W.2d 595, 598 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

[165] *John v. State*, 826 S.W.2d 138, 140 (Tex. 1992); *State v. Giles*, 368 S.W.2d 943, 946 (Tex. 1963); *Rabb v. La Feria Mut. Canal Co.*, 130 S.W. 916, (Tex. Civ. App.–1910, writ ref'd).

[166] TEX. PROP. CODE §. 21.016.

[167] TEX. PROP. CODE §§ 21.014-21.018.

[168] TEX. PROP. CODE §21.021.

[169] TEX. PROP. CODE §21.013.

law, the test for common carrier or gas utility status is objective and uniform. Proof of submission to the TRC conclusively establishes one's common carrier or gas utility status as a matter of law.[170] Therefore, the various judges considering the requests for injunctive relief on the same pipeline necessarily reach the same conclusion based upon the same evidence. Under Texas Rice's position, however, each court makes an independent, subjective inquiry into the pipeline company's status for the same pipeline.

A pipeline is a contiguous physical object. It cannot simply skip individual tracts. Without existing uniformity in the law, mandating district courts to give deference to the TRC's determinations, court findings will inevitably result in a "patchwork quilt" pattern where the pipeline company has the right to cross one tract but not the adjoining tract. Under such a scenario, it will be impossible to construct a pipeline. The consequences of a Texas Supreme Court decision adopting Texas Rice's proposed evidentiary standard would thus be devastating to both the oil and gas industry and the public. And, like the questions remaining after the *Exxon* opinion, practitioners would likewise be left once again wondering: if we cannot rely upon the mandatory filings and documents maintained by the industry regulator, the TRC, what can we rely upon?

V. Other Areas of Potential Concern

Based on the existing and potential precedents set forth above, practitioners should seriously evaluate whether reliance on TRC public records in particular situations will be sufficient to prove the elements of their causes of action. Moreover, as noted at the outset, many individuals and entities rely upon TRC documents in making business decisions. Persons entering business ventures, which involve oil and gas-related activities, should further consider the nature and reliability of such documents as many contracts and relationships ultimately break down and result in litigation.

For example, as a result of production activities in the Barnett Shale, many real-estate purchasers and developers in the Fort Worth area are finding it necessary to review leasehold activities prior to entering into purchase-sales agreements. Suppose a real estate contract between a seller and buyer calls for the seller to provide to the buyer proof that old wells drilled on the property have been properly plugged. The seller (generally not the operator of oil and gas properties) will provide the buyer with the only available proof of plugging activities, which are the TRC plugging reports filed by the prior operators. But, what if it's later determined that the operator falsified the reports? Pursuant to *Exxon Corp.*, parties cannot rely upon such reports. The question then arises, what type of assurances are available to real-property purchasers and developers if they cannot rely upon public records?

Another related issue, which is an extension of the issue raised in *Discovery Operating, Inc.*, is how far a party can rely on TRC administrative findings or TRC rules and regulations in different types of litigation. For example, suppose that a salt-water disposal company wishes to inject salt water into a well located in a highly productive field. The TRC requires salt-water disposal companies to apply for permits prior to injection. As part of the application, the salt-water disposal company must provide information on nearby oil and gas wells in the field so that the TRC may determine whether said nearby wells are cased and cemented in such a way as to withstand the pressure associated with a nearby salt-water injection well. The salt water disposal company is relying on the information submitted by the oil and gas operator as to the location of the cement on the wells.

In this connection, suppose that the salt-water disposal company provides false information on the nearby wells in order to acquire the permit, knowing the nearby wells are not adequately cemented. Relying on this information, the TRC then grants the permit, and salt-water injection begins. Soon thereafter, the salt-water floods and destroys a nearby well for which false information was provided as to cementing.

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[170] *Arcola Sugar Mills Co*, 153 S.W.2d at 633; *Grimes..*, 829 S.W.2d 335; *Loesch,* 665 S.W.2d at 598; s*ee also Vardeman*, 51 S.W.3d at, 312; *Lohmann.*, 682 S.W.2d 612.

Upon complaint by the nearby well owner, a TRC administrative proceeding is instituted. The TRC tribunal makes administrative findings that by knowingly supplying incorrect information on the permit application, the salt-water disposal company misled the TRC into granting the permit. The TRC thus revokes the permit. The question now becomes, in a suit for damages in district court by the nearby well owner, to what extent can the well owner rely upon the administrative findings?

Clearly, the administrative findings should constitute res judicata evidence, preventing the salt-water disposal company from claiming complete insulation from liability by the mere grant of the TRC permit. But, do the administrative findings constitute evidence of tortious conduct? For instance, could the nearby well owner use the TRC administrative findings to prove a claim for bad-faith trespass or negligence per se? Discovery Operating, Inc. may be somewhat instructive on the negligence per se issue, but as to bad-faith trespass, if *Exxon Corporation* is any indication, the nearby well owner would be advised to supplement the TRC findings with other evidence, demonstrating the necessary elements of its claims.

A similar consideration involves how far a party in litigation can rely upon TRC rules and regulations. Suppose the TRC defines the depths of certain productive underground geological formations within a field. Suppose further that an oil and gas lessee drills a well within the geological formation as defined by the TRC. Following drilling and production, the TRC redefines the depths of said formation. Suppose the lease under which the lessee is drilling contains a horizontal Pugh clause, severing non-producing formations after the primary term.

Unfortunately, this situation may not be unique. In recent years, the shale plays have been the source of concentrated natural gas development as well as significant litigation. Shale gas is typically found thousands of feet below the earth's surface. In East Texas, specifically, significant production has resulted from drilling in the Cotton Valley and Haynesville formations. Where the Cotton Valley formation ends and the Haynesville (Bossier Shale) formation begins, or whether one is actually a part of the other, is a source of more than scholarly debate.[171] Adding to the debate is the fact that the TRC defined, and then later redefined, the depths of said formations in different fields throughout East Texas.[172]

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[171] *EOG Resources, Inc. v. Chesapeake Energy Corp.*, 605 F.3d 260 (5th Cir. 2010); *Wilcox Operating Corp. v. Gemini Explorations, Inc.*, 56 So.3d 316, (La. App. 2 Cir. 2010).

[172] Tex. R.R. Comm'n, *In Re Conservation and Prevention of Waste of Crude Petroleum and Natural Gas in the Waskom (Cotton Valley) Field, Harrison and Panola Counties, Texas*, Docket No. 6-34,639 (Oil and Gas Division Jan. 7, 1957) (special order adopting rules and regulations); Tex. R.R. Comm'n, *In Re Conservation and Prevention of Waste of Crude Petroleum and Natural Gas in the State of Texas*, Docket No. 6-70,070 (Oil and Gas Division Oct. 16, 1978) (special order adopting rules and regulations); Tex. R.R. Comm'n, *In the Waskom Fields, Harrison County Texas*, Docket No. 6-78,845 (Oil and Gas Division Jan. 31, 1983) (final order consolidating); Tex. R.R. Comm'n, *Application of Samson Lone Star, L.P. to Adopt Rules and Regulations for the Carthage, North (Cotton Valley) Field, Harrison and Panola Counties, Texas*, Docket No. 06-0230602 (Office of the General Counsel Apr. 9, 2002) (final order approving application); Tex. R.R. Comm'n, *Application of Devon Energy Production Co., L.P. to Consolidate the Elysian, N. (Cotton Valley) Field into the Waskom (Cotton Valley) Field and Amend the Field Rules for the Waskom (Cotton Valley) Field, Harrison and Panola Counties, Texas*, Docket No. 06-0252470 (Office of the General Counsel Jan. 28, 2008) (final order approving application); Tex. R.R. Comm'n, *Application of Forest Oil to Amend the Field Rules for the Carthage, North (Cotton Valley) Field, Harrison and Panola Counties, Texas*, Docket No. 06-0255750 (Office of the General Counsel Hearing Mar. 19, 2008) (examiner's report and recommendation); Tex. R.R. Comm'n, *Application of Comstock Oil & Gas, LP to Amend the Field Rules for the Waskom(Cotton Valley) Field, Harrison and Panola Counties, Texas*, Docket No. 06-0256302 (Office of the General Counsel Hearing Apr. 22, 2008) (examiner's report and recommendation); Tex. R.R. Comm'n, *Application of Comstock Oil & Gas, LP to Amend the Field Rule No. 1 in the Waskom (Cotton Valley) Field and Consider a Blanket Exception to Statewide Rule 10 For All Current and Future Wells in the Waskom (Cotton Valley) and Carthage, North (Bossier Shale) Fields, Harrison, Marion and Panola Counties, Texas*, Docket No. 06-0258678 (Office of the General Counsel Oct. 7, 2008) (final order approving application); Tex. R.R. Comm'n, *Application of Samson Lone Star, LLC to Amend the Field Rule No. 2 in the Waskom (Cotton Valley) Field and Consider a Blanket Exception to Statewide Rule 10 For All Current and Future Wells in the Waskom (Cotton Valley) and Waskom (Haynesville) Fields, Harrison, Marion and Panola Counties, Texas*, Docket No. 06-0261366 (Office of the General Counsel Jun. 18, 2009) (final order approving application); and Tex. R.R. Comm'n, *Application of Devon*

For instance, in January 2008, TRC field rules defined the Cotton Valley as the correlative interval of 7,720 feet to 11,095 feet for the Waskom Field in East Texas.[173] In October 2008, however, the TRC issued new field rules, redefining the Cotton Valley as the correlative interval of 7,720 feet to 9,400 feet.[174] In the interim between issuance of the original field rules and issuance of the amended field rules, producers in the field drilling numerous gas wells to depths originally defined by the TRC as within "Cotton Valley" depths.

Following the amendment to the field rules, those wells producing from depths between 9,400 and 11,095 feet are now producing from the Haynesville formation. For those producers, operating under oil and gas leases outside their respective primary terms and with horizontal Pugh clauses limiting the lease to "producing formations," the question arises as to whether the leases are still in effect as to the Haynesville formation. The well was drilled as a Cotton Valley well, producing from the Cotton Valley, per the TRC rules. Thus, arguably, at the expiration of the primary term of the lease, all formations below the Cotton Valley were severed, including the Haynesville formation. Thus, the lease is no longer in effect as to the Haynesville formation. If the lease has terminated as to the Haynesville formation, an even more troubling question is whether the producing well, now classified by the TRC as a Haynesville well, is trespassing.

Arguably, a lessee should be able to rely upon TRC field rules as to depth, and if such rules change after a well has been drilled, said well should not be considered trespassing. Specifically, if the well was classified as a Cotton Valley well at the time it was drilled, said classification should not change to the lessee's detriment because the TRC redefines the formation's depths. The converse argument, however, is that the TRC defines formation depths solely for conservation purposes. Therefore, presumably, said rules are not intended for operators and lessees to rely upon in order to keep leases (subject to horizontal Pugh clauses) in effect. In this connection, lessees should not be relying upon the TRC field rules but instead on industry standards and seismic geological data to define formations.

Of course, this entire inquiry begs a much broader question. As the industry regulatory, should not the TRC field rules, themselves, constitute evidence of "industry standards?" *Exxon Corporation* may be partially instructive. The courts would likely treat the TRC field rules as "some" evidence of industry standards. Thus, the use of industry contract terms, the meanings of which may change subject to TRC rule amendment, is yet another issue oil and gas producers face in relying upon TRC public information.

IV. Summary and Conclusion

The TRC issues rules, regulations, and administrative findings for the oil and gas industry. The TRC requires the oil and gas industry players to collect and file information to obtain permits for activities as they are being contemplated. Similarly, routine filings are required by the TRC throughout the life of the activity. Different industry members rely on the accuracy of the filed information in preparing for or performing their proposed activities on the properties.

Energy Production Co., LP for a New Field Designation and Adopting Temporary Field Rules for the Carthage (Haynesville Shale) Field and Consolidating Various Bossier and Haynesville Shale Fields Into the Carthage (Haynesville Shale) Field, Harrison, Nacogdoches, Panola, Rusk, and Shelby Counties, Texas, Docket No. 06-0262000 (Office of the General Counsel Dec. 15, 2008) (final order approving application).

[173] Tex. R.R. Comm'n, *Application of Devon Energy Production Co., L.P. to Consolidate the Elysian, N. (Cotton Valley) Field into the Waskom (Cotton Valley) Field and Amend the Field Rules for the Waskom (Cotton Valley) Field, Harrison and Panola Counties, Texas*, Docket No. 06-0252470 (Office of the General Counsel Jan. 28, 2008) (final order approving application).

[174] Tex. R.R. Comm'n, *Application of Comstock Oil & Gas, LP to Amend the Field Rule No. 1 in the Waskom (Cotton Valley) Field and Consider a Blanket Exception to Statewide Rule 10 For All Current and Future Wells in the Waskom (Cotton Valley) and Carthage, North (Bossier Shale) Fields, Harrison, Marion and Panola Counties, Texas*, Docket No. 06-0258678 (Office of the General Counsel Oct. 7, 2008) (final order approving application).

Case law is presently evolving regarding the use of information generated and maintained through the TRC. Some courts are allowing litigants to cite and rely on TRC records and information. Other courts are requiring that proof of the facts stated in the TRC records need further verification. Accordingly, persons relying upon information issued or maintained by the TRC should seriously consider the purpose of such information and whether, under their particular circumstances, such reliance is advisable.