AVOID VOIDANCE: HOW TO DRAFT OIL AND GAS LEGAL DESCRIPTIONS IN COMPLIANCE WITH THE TEXAS STATUTE OF FRAUDS

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The Center for American and International Law
TEXAS MINERAL TITLE COURSE
May 2-3, 2013
JW Marriott Hotel
Houston, Texas

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Every oil and gas practitioner in Texas lives with the horrible thought that sooner or later he or she will create an instrument that is partially or totally void under the Statute of Frauds. Although the legal description in an oil and gas lease, mineral or royalty deed or similar documents is often overlooked or dismissed as a mere formality, failure to comply with this age old statute can have disastrous results. This paper offers guidelines and practical tips as to how to "Avoid Voidance" in drafting legal descriptions in oil and gas instruments.

The Statute of Frauds as it Applies to Legal Descriptions[1]

One of the oldest conveyancing doctrines is the requirement of the certainty in land descriptions. For centuries, courts have held that land being conveyed must be described with sufficient certainty that a person who is familiar with the land and the locality can identify the tract upon the ground.[2] This requirement is reflected in the Texas Statute of Frauds, which provides that a contract for the conveyance of land is not enforceable unless the agreement or a memorandum of it is in writing and signed by the person to be charged.[3] As Texas courts have interpreted and applied the statute, the writing must furnish within itself, or by reference by some other existing writing, the means or data by which the particular land to be conveyed may be identified with reasonable certainty.[4] Parol evidence may be used to explain or clarify the written agreement, but not to supply the essential terms.[5] The validity of the legal description of the property that is subject to the conveyance is not affected by the knowledge or intent of the parties.[6]

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[1] For a more extensive review of Texas case law as it pertains to the Statute of Frauds, see "Legal Descriptions – A Little Background and a Few New Issues," by George A. Snell, III, available online at http://www.dallasbar.org/sites/default/files/2legal_descriptions_-_a_little_background.pdf (last viewed April 10, 2013).

[2] Ernest Smith, "Recent Developments in Oil and Gas Conveyancing," Fourth Advanced Oil, Gas and Mineral Law Course, San Antonio, Texas September 18, 1986, at G-1.

[3] Tex. Bus. & Com. Code Ann. §26.01(b)(4)(West 2009).

[4] *Texas Builders v. Keller*, 928 S.W.2d 479, 481 (Tex. 1996).

[5] *Wade v. XTO Energy, Inc.* 2013 Tex. App. LEXIS 676, *10 (Tex. App. –Fort Worth 2013, no. pet. h.) citing *Texas Builders*, 928 S.W.2d at 481.

[6] *Id*. citing *Morrow v. Shotwell*, 477 S.W.2d 538, 540-541 (Tex. 1972).

The Texas Statute of Frauds, which oddly is found in the Texas Business and Commerce Code, applies to a contract for the sale of real estate.[7] A similar statute, but less often cited, in the Texas Property Code provides that a conveyance of an estate for more than one year in land must be in writing and must be subscribed and delivered by the conveyor or by the conveyor's authorized agent in writing.[8]According to Texas court decisions, oil and gas leases,[9] assignments of working interests,[10]overriding royalty interests,[11] and mineral and royalty deeds[12] are considered conveyances of interests in real property and, as such, must comply with the Statute of Frauds to be valid. The statute also applies to area of mutual interest agreements,[13] farmout agreements,[14] and other oil and gas contracts and agreements. [15]

Early Texas Cases

In a classic early case, Mrs. Fisher and Mrs. Wilson each drafted contracts, which were signed by both parties, for the purchase by Mrs. Wilson of a brick duplex and garage apartment located on Lot 13, Black N/2047, Perry Heights Addition to the City of Dallas, Texas. [16] As the case describes:

> The instrument drafted by Mrs. Fisher is as follows:
>
> July 21/43 Contract of Sale. Recd of Mrs. Josephine Wilson $ 300 in part payment on brick duplex & garage apt located at 4328-30 Cedar Springs on this 21st July 1943 at a price of Sixty Three Hundred & Fifty dollars including furniture at 4330 except one hexagon large table in living room, this also included rollaway bed in garage apt. Terms all cash, abstract to be furnished by seller. Room at back not included.
>
> The one drafted by Mrs. Wilson is as follows:

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[7] §26.01(B)(4)
[8] Tex. Prop. Code §5.021
[9] See *Long Trusts v. Griffin*, 222 S.W.3d 412 (Tex. 2006).
[10] See *May v. Buck*, 375 S.W.3d 568 (Tex. App. – Dallas 2012, no pet. h.).
[11] See *Pecos Development Corp. v. Hydrocarbon Horizons, Inc.*, 803 S.W.2d 266 (Tex. 1991); *Quiqley v. Bennett*, 227 S.W.3d 51 (Tex. 2007).
[12] See *Stovall v. Poole*, 382 S.W.2d 783 (Tex. Civ. App. – Waco 1964, writ ref'd n.r.e.).
[13] *Westland Oil Development Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903 (Tex. 1982).
[14] *Stekoll Petroleum Co. v. Hamilton* 255 S.W.2d (Tex. 1953)
[15] *Beverly Foundation v. W.W. Lynch*, 301 S.W.3d 734 (Tex. App. – Amarillo 2009, no pet. h.); *Thompson v. Clayton*, 346 S.W.3d 650 (Tex. App. – El Paso 2009, no pet. h.)
[16] *Wilson v. Fisher*, 144 Tex. 53, 55-56; 188 S.W.2d 150 (Tex. 1945).

> Dallas, Texas July 21, 1943 Received of Mrs. Josephine G. Wilson $ 300.00 in cash as earnest money on the purchase of property at 4328-4330 Cedar Springs Road total consideration being $ 6,350.00, including entire furnishings of north side apartment (excepting one antique library table), furniture included one frigidaire and 3 Murphy beds -- (1 without mattress). This is a cash consideration when all papers, abstract, etc. have been examined & accepted by Josephine G. Wilson. Full possession of property to be given by Aug. 15th, 1943. [17]

Mrs. Fisher sued Mrs. Wilson for specific performance of the alleged agreement of the parties reflected in the above contracts. Each party tendered into the court the amount of money alleged to be due to the other.[18] The trial resulted in a judgment for specific performance.[19] The Court of Civil Appeals at Dallas, by a majority opinion, held the alleged agreement was not sufficiently specific to identify the property and was thus within the statute of frauds and nonenforceable either in a suit for specific performance or for damages.[20] The court further held that Mrs. Wilson take nothing by her suit except for the amount she had paid into the registry of the court and tendered to Mrs. Fisher.[21] The Texas Supreme Court affirmed the judgment of the Court of Civil Appeals. In the court's opinion, the only questions presented were whether or not the agreement signed by Mrs. Wilson and Mrs. Fisher was within the Statute of Frauds and, if so, whether the description of the property to be sold was sufficient so as to identify it with reasonable certainty. It held that a contract to sell real property was clearly within the Statute of Frauds and that the description was, "palpably insufficient to support a suit either for specific performance or for damages."[22] The court noted that neither of the instruments specifically indicated that Mrs. Fisher was the owner of the property. The lot and block number and amount of land were not stated, nor was the property designated as any particular named tract or located in connection with any named city, county or state.[23]

In reaching its decision in this case, the Texas Supreme Court reviewed the historical development of precedent in Texas regarding legal descriptions of land. Mrs. Wilson cited a line of cases including *Morrison v. Dailey* (1887)[24], *Fulton v. Robinson* (1881)[25], *Cunyus v. Hooks*

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[17] *Id*.
[18] *Id.* at 151.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id.* at 154.
[23] *Id*.
[24] 6 S.W. 426 (Tex. 1887)

Lumber Co. (1899)[26], *Sorsby v. Thom* (1938)[27], and *Kruger v. W.K. Ewing & Co*. (1940)[28], which held that a description of land by the particular name it is known in the locality is sufficient to satisfy the statute of frauds. For example, in *Morrison*, the court held a reference in a memorandum to "the James Perry Tract of land" as sufficient because it designated the owner of the property and specified it as a particular named tract in a known locality.[29] The case followed a similar decision in *Fulton* in which the court upheld the validity of a receipt which recited that the money received was "in partial payment of a certain tract of land, being my own headright lying on Rock Creek, in the cross timbers."[30] The *Fulton* court concluded that the reference to the grantor's headright furnished the means by which the identity of the land might be made certain.[31] The Supreme Court cited similar cases on point with *Morrison* and *Fulton*, such as *Cunyus* where the contract entitled "Kountze, Tex." was to sell "one certain tract of land, known as the Vanmeter Survey,"[32] *Sorsby*, where the description was "Rock Island Plantation,"[33] and *Krueger* where the property was described as "the San Gabriel Apartments."[34]

In *Wilson*, the Texas Supreme Court found no reference to any particular named tract to bring the case under *Morrison*, nor to a headright as in *Fulton*, or any other writing by which the land might be identified.[35] Instead, it examined early cases with facts similar to *Wilson*, such as *Jones v. Carver* (1883),[36] *Rosen v. Phelps* (1913),[37] *Penn v. Yellow Pine Lumber Co.* (1904),[38] and *Osborne v. Moore* (1923).[39]

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[25] 55 Tex. 401 (Tex. 1881).
[26] 48 S.W.1106 (Tex. 1899).
[27] 122 S.W.2d 275 (Tex. Civ. App. -- Galveston 1938, writ dism'd).
[28] 139 S.W.2d 836 (Tex.Civ.App.--El Paso 1940, no writ).
[29] *Morrison*, 6 S.W. at 426; See also *Living Christ Church, Inc. v. Jones*, 734 S.W.2d 417 (Tex. App. – Dallas 1987, writ denied)(holding that a description of land by a particular name which is known locally when supported by evidence as to the common name may be a sufficient description); But see *Dunworth Real Estate Co. v. Chavez Properties*, 2008 Tex. App. LEXIS 5079 (Tex App. – San Antonio 2008, no pet.)(holding that the description "Airport Security Parking" contained in a hand written memorandum argued to be the commonly known name of the property by the buyer was an inadequate description because there was no city, state or county listed, there was ambiguity as to whether the description referred to the land or the business, and the description did not refer to all the land owned by seller in the area).
[30] *Fulton*, 55 Tex. at 404.
[31] *Id.*
[32] *Cunyus*, 48 S.W. at 1106 (Tex. 1899).
[33] *Sorsby*, 122 S.W.2d at 275.
[34] *Krueger*, 139 S.W.2d at 836.
[35] *Wilson*, 188 S.W.2d at 153.
[36] 59 Tex. 293 (Tex. 1883)
[37] 160 S.W. 104 (Tex. Civ. App. - Fort Worth 1913, writ ref)
[38] 79 S.W. 842 (Tex. Civ. App. 1904, writ ref.)
[39] 247 S.W. 498 (Tex. 1923)

In *Jones*, the contract was to survey "a piece of land supposed to be forty acres."[40] The grant or size of the grant from which the tract was to be taken was not mentioned nor was the county or state where the land was located.[41] The court held that parol evidence was not admissible to show what land was intended by the parties.[42] In *Rosen*, the agreement concerned the exchange of two parcels of land.[43] One party agreed to convey "a certain three thousand acres in Bosque County, Texas" with no designation of the owner or data as to the location in the county.[44] The other party agreed to convey certain lots described only by lot and block number, with no reference to the city, county or state in which they were found.[45] Although prior to execution the parties inspected the lots and studied a plat of the acreage and undoubtedly knew the exact lands involved, the court refused to enlarge the contract by extrinsic evidence and held the description insufficient.[46] Likewise, the court in *Penn* held that the description in a memorandum of "the 6100 acres under consideration" was insufficient.[47] It held that the appellant could not show by parol proof what land was "under consideration." [48]

Lastly, the Texas Supreme Court reviewed the *Osborne* case, which it found to be "parallel in essential points" to *Wilson*.[49] In that case, a memorandum of a contract referenced a house to be purchased on "North Oak St."[50] Neither the contract nor a check given to secure it stated the owner of the property, nor the town, city, county or state in which the house was located.[51] The court thus held the contract and check insufficient to describe the house under the statute of frauds.[52]

Although the review of the early Texas statute of frauds cases in *Wilson* is not exhaustive, the case provides a guideline as to sufficiency standards for legal descriptions in the past. The lesson to be learned is that it typically does not matter if the seller and buyer know the location of the land concerned, the test is whether or not a third party can find the land upon the ground based upon the information presented. Despite the fact that the rule requires the land to be

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[40] *Jones*, 59 Tex. at 294.
[41] *Id*.
[42] *Id*. at 296.
[43] *Rosen*, 160 S.W. at 105.
[44] *Id*.
[45] *Id*.
[46] *Id*. at 106.
[47] *Penn*, 79 S.W. at 184.
[48] *Id*. at 185.
[49] *Wilson*, 188 S.W2d at 154.
[50] *Osborne*, 247 S.W. at 498.
[51] *Id*. at 499.
[52] *Id*. at 500.

identified with "reasonable certainty," the courts appear to apply a more rigorous standard similar to "beyond a reasonable doubt." For drafters of oil and gas instruments, specificity and attention to detail are essential.

References to Other Writings and Use of Maps and Plats

The reference to some other existing writing for a legal description often arises in drafting an area of mutual interest clause in a farmout agreement. Such a clause usually provides that both parties to a farmout will be entitled to certain interests in future leases which either acquires.[53] Unless the right to share interests in future lease acquisitions is limited to a defined area, it violates the statute of frauds.[54] However, by referring to other writings, such as the oil and gas leases attached to the farmout agreement, which do contain adequate legal descriptions, the area of mutual interest can be properly defined. Satisfying the statute of frauds becomes more difficult if the parties also attempt to create areas of mutual interest in other adjoining, unleased areas by use of a map or plat.[55] When properly incorporated into the agreement and properly drawn, a map or plat can provide a good property description which complies with the statute of frauds; however, if not properly prepared or identified, a plat is an insufficient description.[56] According to one drafter of such agreements, care should be taken to outline the plat along recognizable survey lines, and include within it a specific description of the exact lands covered by section, block, survey and county signed by all parties to the agreement. [57]

Probably the most frequently cited case involving references to other writings and legal descriptions in area of mutual interest clauses is *Westland Oil Development Corp. v. Gulf Oil Corp.*[58] In that case, a 1966 letter agreement read as follows:

> If any of the parties hereto, their representatives or *assigns*, acquire any additional leasehold interests affecting any of the lands covered by said farmout agreement, or any additional interest from Mobil Oil Corporation under lands in the area of

[53] Ernest Smith, "Recent Developments in Oil and Gas Conveyancing," Fourth Advanced Oil, Gas and Mineral Law Course, San Antonio, Texas September 18, 1986, at G-1.; See also, Rick G. Strange, "Areas of Mutual Interest," 21st Annual Advanced Oil, Gas & Energy Resource Law Course, October 16, 2003, Houston, Texas.
[54] *Id*.
[55] *Id.*
[56] Terry N. McClure, "Overlooked Formalities," (1995) at 3, available at http://www.oilgas.org/Private/Content/Documents/9/UTOGMI94McClure.pdf (last viewed April 10, 2013).
[57] *Id*.
[58] 637 S.W.2d 903 (Tex. 1982).

> the farmout acreage, such shall be subject to the terms and provisions of this agreement.[59]

The Texas Supreme Court analyzed the letter agreement as an attempt to create two separate descriptions of land.[60] The first description covered "leasehold interests affecting any of the lands covered by said farmout" and the second description covered "lands in the area of the farmout acreage."[61] It held that the first description was legally sufficient to satisfy the statute of frauds because the words "said farmout" referenced a farmout agreement which was attached to the letter agreement and did contain an adequate legal description.[62] On the other hand, it held that the second description violated the statute of frauds because "lands in the area of the farmout acreage" simply means lands in close proximity to the farmout acreage and was not legally sufficient. It found nothing within the 1966 letter agreement identifying the word "area" as "the Rojo Caballos Area" claimed by Westland.[63]

The rationale of *Westland* is that it is permissible, but dangerous, to rely on "other writings" in describing the lands covered by an agreement.[64] Additionally, if maps and plats are used, they should be carefully drawn and should include a written description of the lands covered.

Applications of the Statute of Frauds to the Era of the Oil Boom

With the increased oil and gas activity in Texas in recent years, practitioners have continued to run afoul of the statute of frauds in a variety of interesting ways. The boom town atmosphere and entry on to the scene of relatively inexperienced oil and gas landmen, company personnel and attorneys appear to have diminished the close scrutiny required for legal descriptions in oil and gas instruments. The following are only a few examples.

The Signing Party

[59] *Id* at 905.
[60] *Id*. at 909.
[61] *Id*. at 905.
[62] *Id. at 909.*
[63] *Id*. at 910.
[64] See *Preston Exploration Company, L.P. v. Chesapeake Energy Corporation*, 669 F.3d 518 (5th Cir. 2012)

In recent years, it has become common for oil and gas companies seeking to obtain leases in or adjacent to population centers or in vast areas of the countryside to conduct "signing parties." Such events usually involve free barbeque for the participants, a promotional talk by the representative of the oil company, and the presentation of leases to be signed by the attending landowners in return for bonus checks.

In a 2013 case, the plaintiff homeowners lived in a subdivision in Tarrant County.[65] The oil company engaged an agent to obtain oil gas leases on property in the subdivision who sent out lease offers by mail.[66] The plaintiffs signed a lease but did not turn it in.[67] After a time, the plaintiffs received a second, better offer, but did not execute the new lease.[68] The plaintiff's husband attended a signing party hosted by the company agent and brought both the executed and unexecuted leases with him.[69] He was prepared to sign the new lease and asked if his wife needed to come up to the party to sign it as well. The agent, however, told him their signatures to the new lease were unnecessary since they could just use the signature page from the prior lease and "not to worry about it."[70] The new lease form left blanks for the block and lot owned by the plaintiffs in the Overton Woods Addition to the City of Fort Worth. The bonus check plaintiffs received at the party contained a stub which did include the lot and block number of the plaintiff's property, but also showed that the check was preprinted and dated two days prior to the signing party.[71] After the party, the oil company stopped payment on the bonus check for the new lease. The plaintiff sued for breach of contract and specific performance. After a jury trial and verdict in favor of the plaintiffs, the trial court entered a judgment notwithstanding the verdict for the defendant.[72] On appeal, the Fort Worth Court of Appeals affirmed the judgment of the trial court. It held that even though the parties knew and understood what property they were leasing, the lease had to furnish within itself, or by reference to another writing, the means to identify the leased premises with reasonable certainty.[73] The court refused to look to the bonus check stub, previous offer letters, or other extrinsic documents not referenced in the lease to

[65] *Wade v. XTO Energy, Inc.* 2013 Tex. App. LEXIS 676 (Tex. App. – Fort Worth Jan. 24, 2013)
[66] *Id.* at *4.
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *Id*.
[71] *Id*.
[72] *Id*. at *6.
[73] *Id.* at *15.

supply the necessary legal description.[74] In so many words, the plaintiffs "signed a lease which they did not accept and allegedly accepted a lease, without a property description, that they did not sign."[75]

The moral of the holding in this case is that practitioners and landowners do need "to worry about" proper lease forms and legal descriptions.

Depth Restrictions and Limitations

In the new world of oil and gas exploration, it has become commonplace for some leases, assignments and even deeds to contain a reservation or conveyance of ownership as to certain depths and horizons. Problems arise, however, when those depths and horizons are generally described by reference to a particular formation (i.e. "the Cline Shale Formation") without a more specific description as to how that formation is to be identified with "reasonable certainty." While not directly addressing the statute of frauds, a very recent case from the Waco Court of Appeals provides some direction.[76] In *Key Production Co.* the trial court determined that Quality Operating Inc. was the present owner of certain depths of mineral interests in three leases obtained by its predecessor in interest.[77] The leases were assigned from Quality Operating's predecessor in title to Key's predecessor.[78] The Waco Court of Appeals held that the language "insofar as and only insofar as" as used in the assignment unambiguously established and defined the geographic area and the second use of the same phrase then described the depths that were to be conveyed in the agreement.[79] While the case directly addresses the ambiguity of the conveyance, a telling and helpful explanation appears for the practitioner seeking to reserve or convey depths within a specified formation. In explaining its holding the court notes that the "Smackover Formation" is defined by a geographic location combined with a depth range below the surface and pointed out that "The definition of the Smackover Formation is contained in a recorded instrument referenced in the Gasoven Assignment."[80] The statute of frauds was

[74] *Id*. at *10.
[75] *Id*. at *11.
[76] *Key Production Co., Inc. v. Quality Operating Inc.*, 2013 Tex. App. LEXIS 4074 (Tex. App. – Waco 2013, no pet. h.)
[77] *Id*. at *1.
[78] *Id. at* *3
[79] *Id*. at *13.
[80] *Id*. at * 14 n.2

therefore never an issue in the case because the Smackover Formation was clearly defined in an existing recorded instrument referenced by the assignment.

Description of Lands Covered by Wells and Proration Units in Retained Acreage and Continuous Development Clauses and Letter Agreements

Almost all modern oil and gas leases include contained acreage and continuous development clauses which state that at the end of the primary term or cessation of continuous development the lease will terminate except as to a specified number of acres assigned to each producing proration unit on the lease. Likewise, letter agreements for the acquisition of oil and gas properties refer to a specific number of acres covered by the well proration units being acquired. The lack of a means to describe or identify the actual acreage assigned to a proration unit can be fatal.

In the recent case of *May v. Buck,* the Dallas Court of Appeals examined a letter agreement between two oil operators in which Buck would assign to May certain mineral rights and a "100 acre spacing centered around the David Morris Gas Unit #1 in Leon County, Texas."[81] The court was confronted by the problem, "where is the hundred acres?"[82] Testimony at the trial revealed that the acreage could, at the same time, be described as a circle, square, or oblong feature.[83] It was also disputed as to whether or not the "David Morris Gas Unit #1" referred to the unit itself or to just the wellbore.[84] The trial court found that the letter agreement did not satisfy the statute of frauds and the court of appeals affirmed. The Dallas Court of Appeals held that a legal description must not only furnish enough information to locate the general area, as in identifying it by tract survey and county, it should also contain information regarding size, shape and boundaries. The court noted that there was no information in the letter agreement, or any other document, about the shape or boundaries of the one hundred acres in the David Morris Gas Unit #1.[85]

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[81] *May v. Buck*, 375 S.W.3d 568, 572 (Tex. App.-Dallas 2012, no pet. h.)
[82] *Id*.
[83] *Id*. at 573.
[84] *Id*. at 575. For a more complete discussion on the "thorny" issue of wellbore assignments see George A. Snell, III, "Legal Descriptions – A Little Background and a Few New Issues," State Bar of Texas, Oil, Gas and Energy Resource Law Section Report, March 2011, referenced above.
[85] See also *Reiland v. Patrick Thomas Properties, Inc.*, 213 S.W.3d 431 (Tex. App. – Houston [1st Dist.] 2006).

An exception to the rule in *May v. Buck*, may be found in a prior opinion by the Texarkana Court of Appeals in *Tiller v. Fields* (1957).[86] In that case, the court found that a pooling provision, although not specific with respect to the details of a pooling arrangement, did not violate the statute of frauds because the statute was met where a contract, instrument, or agreement gave either party the unqualified right or power to make a selection or determination of the details without the necessity of further agreement or approval of either party.[87]

In referencing the size of well proration units, practitioners are well advised to devise some method or description by which the well unit can be determined or, at the least, grant one party or the other the unqualified discretion to make the determination at a later date without further agreement.

Memoranda of Oil and Gas Leases

Most oil companies elect to file memoranda of leases in lieu of the actual leases themselves in order to prevent disclosure of the lease terms to the general public. In some counties these memoranda are often incomplete. In such cases, the date, parties and recording information of the actual lease is abbreviated or omitted. In other instances, instead of memoranda, some companies have filed "affidavits" regarding their leases which are not signed by the mineral owner lessors. There are no reported cases to date, but claims in this area can certainly be expected in the future. The practice of obtaining legal descriptions from tax rolls and use of "lease affidavits," instead of memoranda with complete legal descriptions," is almost sure to cause problems with the statute of frauds at some point as the "boom" continues.

Conclusion

Although there have been many cases involving the Texas Statute of Frauds in the history of Texas jurisprudence regarding legal descriptions of land, all of the cases appear to follow a central theme. The writing must by itself, or by clear reference to another existing writing, provide the information to identify the property conveyed with reasonable certainty. As a result,

[86] *Tiller v. Fields*, 301 S.W.2d 185 (Tex. App. – Texarkana 1957, no writ).
[87] *Id.*

legal descriptions should be drafted and scrutinized carefully. An insufficient description alone usually voids the conveyance. It is a harsh remedy that oil and gas practitioners should avoid at all costs. Hopefully this paper will assist the practitioner in doing so.