Do Words have Meaning?
Reflections on the Interpretation of Oil and Gas Transactions

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Introduction - Personal reflections

It is an honor and pleasure to be selected for this talk. In trying to decide how to approach this, I rummaged around in the mess of papers under my desk and found the answer. It was what I wrote when I introduced our first honoree 10 years ago, Judge Joe Morris.

Here's what my notes say:

> We have something new this year: the Deans of Oil and Gas Practice Lectures. The idea is to ask an experienced oil and gas practitioner to share his or her thoughts with us on the subject of which they are a master. They will pass on their wisdom – which is generally more valuable than a whole book of papers on particular topics. It is worthwhile in the middle of a busy schedule to look to the timeless rather than the timely.

So that is the task I have. Whether it rises to the level of wisdom is a matter about which doubt may be entertained. But I will try to put our industry in perspective.

It is the norm to begin by reflecting on one's career in oil and gas. However, I've not had so much a career as a series of adventures in oil and gas.

The strength of the industry has been its people – and the finest people I have known have been in this industry. My immediate contacts were within the law department of Gulf Oil: Jesse Luton, Merle Minks, Booth Kellough, Jimmy Boone, Milton Duveilh, Jerry Bonhagen, Paul Brandimarte, Bob Thomas, Cathy McCulley and many others. And also my clients, like Red Thomas, Hubie Braunig, and Bama Fowler. Jesse I'll single out with 2 stories. I thought one of the funniest things I had ever heard was when he hired me and said "We're going to make you an oil and gas lawyer." I resisted and my good friend Milton Duveilh affectionately called me a "looseleaf lawyer" in my first months of employment – that's a regulatory lawyer who doesn't know what the law is that day until the mail brings in

the looseleaf services with the latest Federal regulations – environmental agency rules and decisions, and price control regs etc.

My first day on the job with Gulf Oil in New Orleans was an adventure. After the first few hours, all the other lawyers in the office left to attend a funeral. Around mid-morning a distressed person from the marketing office came into the law department and talked to the only lawyer around. At least I was the only guy in a coat and tie so I had some of the trappings of an attorney. There was an emergency, a crisis: one of the Gulf stations in the city was being decommissioned – the machines were now breaking up the concrete. The blows were shaking the adjacent buildings and disturbing a certain member of the City Council who had his office next door. He had called, threatening to cancel all business between Gulf and the City if the demolition didn't cease. What should they do? I pondered the facts for a few minutes and used my years of training in the principles of contract, property, administrative law, and constitutional law to come to a judgment and a course of action. With as much authority as I could muster and not revealing to the client I was as yet unadmitted to the bar, I counseled: "Stop the machines." And lo, the machines stopped. The client was grateful that he had been relieved of the onus of responsibility, and the project was deferred for a day or two. I looked around and thought – Hey this could be cool. I can stop the machines. No one will know I'm improvising.

I accepted an offer to go teach in January 1975. It came out of the blue from my former associate dean at Duke who had become Dean of Tulsa. It was an awful moment for me when this came out prematurely while I still had 8 months before I could go on the payroll at Tulsa. Jesse Luton and Jimmy Boone were very kind in letting me continue at Gulf in the interval.

Within a few weeks of joining the Tulsa faculty, I began my association with this organization, and it has been a most fruitful association. In September 1975 Ed Cage called me and invited me to do a paper on implied covenants. Foolishly I said sure, I can handle it. I called up a company called Matthew Bender and they kindly provided me with a set of books called Williams and Meyers on Oil and Gas Law. I soon realized that if I spent my time talking about Charlie Meyers in my talk and sounded authoritative, no one would realize I was improvising. I made my first acquaintance then with Armine Ernst who edited my paper for publication.

The following year, Ken Dickerson drew me on to the planning committee for the annual Institute and I've been involved with the organization ever since. I've taken part in short courses, special institutes, the Oil and Gas Reporter as well as the annual institute and a variety of other activities. I've gotten to know many people at the Foundation among them France McCoy, David Winn, David Elwanger, Mark Smith, Mike Marchand, Cindie Burkel, Pam Hooper, Carol Holgren, Anita Stover and Marissa Kramer – all of whom are dear friends. It's been a rewarding association on many levels. One of the greatest rewards are the friends I've made through the activities of the group – to call it "networking" is incomplete. These have been both personally and professionally rewarding. It was my teaching in the summer short course that led to my association with Bruce Kramer. I was teaching the conservation portion and mentioned the treatise by Raymond Myers on Pooling and Unitization and said Professor Kramer was doing a fine job of keeping it up to date. One of his friends reported this back to him and he called. When he told me he had a deal with Matthew Bender to do a new edition, we undertook a collaboration that is approaching its 30 year anniversary.

As I was going over the recipients of this award I was struck by how the linkages I have had with most of them have been both through this organization and professionally. Among them are all three of the lawyer-arbitrators from PBUOA #2 – Judge Morris, John McCollam and me. The three of us have all been associated on multiple occasions.

Through my association with Fred Ellis, another Gulf Oil Law Department alum, I came to LSU Law in the fall of 1977 and have taught continuously since then. I was given enough latitude that I have had many oil and gas adventures, including a period as a Special Assistant U S attorney investigating certain Louisiana officials, oil and gas work for the Serious Fraud Office of Scotland Yard, law reform in Russia and Kazakhstan, various arbitrations and mediations and others.

At the beginning of July 1982, Governor Dave Treen appointed me to be Commissioner of Conservation for the State of Louisiana. I was sworn in and went home to get ready to come to the first day on the job the next morning. But I was alerted to the fact that there was trouble brewing. A natural gas bubble had been building and was now collapsing. A familiar cycle. A local entrepreneur named Ken Martin had been drilling Tuscaloosa Trend wells in the area north of Baton Rouge, and his drilling contractor was now about to walk off the job on one of the wells without completing the well or doing a proper p & a. The morning newspaper so reported. I drove

by the well site on my way in to work and found that a drilling rig was being dismantled, and trucks were preparing to load up drill pipe and other equipment. I walked to the supervisor's trailer and introduced myself as the Commissioner of Conservation, and politely suggested he should refrain from further efforts to decommission the well operations. He made a phone call to his superiors. And lo, the machines stopped. I looked around and thought – Hey this could be cool. I can stop the machines. If I sound authoritative, no one suspects I'm improvising.

By happenstance, I have some video shots of a few of the more memorable moments and experiences in my oil and gas career. You may not believe me if I say they are actual shots of me along the way. Let's say they could have been. Almost. Perhaps. Let's engage in what opera fans do: The willful suspension of disbelief.

Video Powerpoint here

Let's turn now to the more serious side of oil and gas law for a few reflections. I would be remiss if I didn't. What follows will be a longer paper with many footnotes and arcane terminology and parts will find their way into Williams and Meyers along the way.

Do Words have Meaning?

The quick answer to the question I pose in my title is that Words don't have meaning. People have meanings that they attach to words. The dark markings on a page of paper or a computer screen have no intrinsic meaning. The linguists call them *graphemes*. Words may have generally accepted meanings (or definitions) in the general population in a particular context. Even then we have difficulties. House as a noun may generally mean a residence but it can also mean a family – as the House of Tudor or House of York. A *fault* is one thing in tennis, another in geology and another in a divorce. Linguists call these examples of *polysemy*. People have meanings when they use words, and we can usually understand their intent in context. A tennis-playing geologist in the middle of nasty divorce will easily use the term *fault* in three different ways perhaps in a single conversation.

The second answer to the same question I pose is yes, Words have meaning and the Words can be separated from the intentions of the persons issuing them. This approach to words should especially take hold when the persons who issued them are no longer around to be affected by their intentions and when our concerns are with the effects of those words on others who were not responsible for their utterance. Good order requires that people be able to rely upon certain words being given effects that they

reasonably attach to those words. This is especially true of statutes, ordinances, and public signs. As we know all too well of late, members of Congress often do not write a statute or even read it before voting on it. Most members cannot be said to have an "intent" that is found in the words and the only collective "intent" is that the words of the statute themselves will control the behavior of their audience, the citizenry. When our focus is on the audience for words because the words are meant to control them rather than merely express the thoughts of the speakers, we must be able to attach some uniformity of treatment to those words. Those affected by words have a legitimate expectation for stability in attaching consequences to the words used.

Contracts are expressions of people's intentions. Property transactions are legal acts with numerous public consequences; they are public acts, more like statutes than expressions of intentions.

What we are concerned with is the tension between property rules and contract rules. We typically should and do approach interpretation of words differently for contract purposes and for property law purposes. Unfortunately contract and property are often intertwined. What are the differences between property and contract?

Word Acts - Types of statements:

I wish to build on the work of philosopher/linguists who include John Langshaw Austin, John Searle and Steven Pinker. Of particular interest in law are "Speech Acts" and here we do not mean necessarily oral speech. Sentences are of certain types as we remember from grammar school: We can string words together to make statements about facts, to make requests, to pose questions, to order another to act and so forth. Austin described various types of performative utterances; he distinguished verdictives, exercitives, commissives, behabitives, and expositives, but I will avoid the technical language of the linguist. Instead of seeking the breadth of coverage that Austin sought, I will have a narrow focus. I will distinguish between statements of things to come and statements of present effect. It is easier to illustrate with a familiar example than to explain. It is the distinction between "I promise to marry you" and "I do thee wed." The former contemplates an act in the future that one will endeavor to perform. The latter is a present act, which if meeting the requisites as to form and circumstance (age, consent, presiding authorized official) brings about an immediate change in legal status. This distinction is what allows us in most instances to distinguish between Contract and Property. Contracts are

constituted primarily by promises, at least on one side but generally on both. Property transactions are constituted primarily by acts that presently do something.

Historically we have interpreted statements of promise differently from the way we interpret statements that presently perform an official act. To anyone who might start to ask “Hasn’t this ninny ever heard of covenants running with the land?” The answer is yes. I’m also familiar with primogeniture, estates in fee tail, coparceny and even the Law Salic but I do not wish to encourage them nor their mischief.

Features of Contract

We are free to order our relations with others with as few limitations as are compatible with organized society.

We cannot be compelled to make contracts.

Within legislative and public policy constraints, our contracts reflect our commitments to act, as embodied in our words.

Contracts are the most efficient means of self-ordering in and of society.

Because they are generally terminable in a fixed time or at death, there is little problem of fragmentation.

Features of Property

Constituted by the words of an autonomous text.

Numerus clausus: the concept that the "number is closed.”

Disputes are typically between persons remote from the original parties (“standing in their predecessors’ shoes” is a bad metaphor; and they certainly can’t know their minds).

Without clear understandings of rights in property, contracts cannot effectively organize use of property.

Because property pertains to land and not the person, the rights are generally alienable and heritable, hence problems of fragmentation.

The Model of Contract

Who are agreements/texts for? This is a simple model of Contract.

A →🗐←B ------ J [Judge/Jury]

The parties reduce their agreement to a document to reflect their understanding between themselves, and they are aware that the document may be read and interpreted by judge and jury. The primary concern we have with such a document is what have the parties done in regard to each other. What have they undertaken between themselves? **What did they intend?** We presume freedom of contract: you can bind yourself to whatever you want, so long as it is not illegal, and you can refuse to be bound if you choose not to enter into an engagement or a particular detail of an engagement. Once we fix this model in our head, it is very difficult to shift to another model.

The Model of Property.

[A + B] →🗐→ The World ------ J [Judge/Jury]

This is the model of Property. A and B have participated in a transaction, often by agreement. Our question is not "what did they intend?" but **"What did they do?"** The agreement need not be a jointly signed paper; we recognize that a grant or conveyance of property can be made by A to B, in which B participates by accepting the grant. A can transfer property to B in a will. There are no mutual obligations and no continuing relations in either situation.

Because we recognize that there are things we will not let people do in Property, the question might be **"Is this a transaction that society will give effect to?"** For example, if A and B agree that B shall own Blackacre but that Blackacre can only descend to the senior male heir of B for the next 1000 years and that in default of a male heir of B Blackacre shall descend to the senior male heir of the Duke of Marlborough. The alert student here says, I know that one: Rule in Shelly's case and Rule against Perpetuities. Meaning, you can't do in Property what A and B tried to do. In Louisiana, A might sell B all the minerals in place for 1000 years. As long as A owns the same tract that poses no problem but beyond a certain limit, the attempt will not be allowed. That would violate the regime of liberative prescription. Instead of calling such misguided efforts as "prohibited transactions," let us term them as J. L. Austin would have: they are *infelicitous*. To be felicitous performative utterances must invoke an existing convention (i.e. recognized estate) and be invoked in the right circumstances

Our confusion in oil and gas law arises from the fact that contract and property are closely associated. A single text can have elements of both property and contract. It may establish relations between the parties and rights pertaining to third parties - the world at large. The most familiar of

these is the oil and gas lease. It is both contract and property. And it is difficult if not impossible to differentiate between the contract aspects and the property aspects of the oil and gas lease. A new word that could be used here: disambiguate – it means to establish a single semantic or grammatical interpretation for a term.

Example of numerus clausus:
Louisiana Mineral Servitude

Landowners in Louisiana tried to sever oil, gas and other minerals from land. The intent of the words was not in question.

Frost-Johnson Lumber Co. v. Salling's Heirs (1922)-Held: Landowners may only create a servitude to develop minerals; it is subject to 10 years prescription for non-use.

Non-ownership theory was secondary to prescription:

> –"Except for the question of prescription, the question whether the owner of a tract of land owns the physical or corporeal property in the oil and gas running at large beneath the surface, or owns merely the exclusive right to drill and explore for the oil and gas and to become the owner of such oil and gas as he may find and reduce to possession, is a matter of no importance whatever." (O'Neil J.)

Mineral Code continued the servitude doctrine, and forbade parties contracting around it; nor can they create a future interest in the expectancy of prescription (Arts 74-75).

The Oil and Gas Lease – A Hybrid Instrument

There is much confusion in litigation over oil and gas leases because they're both contract and property.

What terms are personal and which ones run with the land? Why can't we make any promise we want run with the land?

Problems of venue, choice of law, joinder of parties.

Class actions adjudicating fundamental questions affecting title across state lines. (Why should Oklahoma courts decide Texas royalty issues? Why should a Kansas court adjudicate Oklahoma titles?).

Johnson Special Trust v. El Paso E & P Co., L.P.,
2010 WL 3076193, 2010 U.S. Dist. LEXIS 78636 (W.D.La.)

The Lease, "a standard, printed form oil and gas contract printed on an M.L. Bath form that is Louisiana Bath form 14-BRI-24,"

It “grants, leases and lets exclusively unto lessee for the purpose of investigating, exploring, prospecting, drilling, and mining for and producing oil, gas and all other minerals” approximately 1230 acres located in Desoto Parish, Louisiana.

Granted August 2, 1950 - neither the plaintiffs nor defendants are the original parties to the lease.

Ambiguity

The court uses standard contract interpretation rules to interpret the agreement:

Interpretation of a contract requires the Court to determine the common intent of the parties. La. C.C. Art.2045.

When the terms of the written contract are ambiguous, the Court may look beyond the four-corners of the document to ascertain the parties' intent. “A contract is considered ambiguous on the issue of intent when it lacks a provision bearing on that issue or when the language used in the contract is uncertain or is fairly susceptible to more than one interpretation.”

What was Ambiguous?

Technology: “Plaintiff contends the intention to exclude the Haynesville Shale and other deeper formations from the Lease agreement is evidenced by the lack of technology necessary to extract gas from the shale and the fact that, for at least fifty-five (55) years after execution of the Lease, ‘no attempts were made by Lessee ... to investigate, explore, prospect, drill, mine or produce oil and gas’ from the Haynesville Shale.”

Depth: “the clauses specifically describing the [Lease]'s purpose and the Lessee's duties and obligations there under are doubtful because they do not specifically describe which mineral formations are to be included and which are to be excluded in the Contract and it is unclear as to which mineral formations Lessee's bilateral duties and obligations were to apply.”

Effects of Decision

If one old lease is ambiguous on these grounds, then most of the other leases are too. In fact, almost every oil and gas lease in Louisiana is subject to the same attacks.

Must each old lease be litigated to establish the knowledge and intentions of the parties at the time of leasing?

Regardless of the outcome of any particular litigation, the value of existing leases is diminished by their uncertain status. Large drilling commitments may be jeopardized.

Multi-State Phenomenon

Advent of class-action litigation on contracts.

Estate of Tawney v. Columbia Natural Resources, LLC, 633 S.E.2d 22 (W. Va. 2006). Ambiguity of "at the well."

Garman v. Conoco, Inc., 886 P.2d 652 (Colo.1994).

Because finding "intent" of actual parties is impossible in class action, courts tend to impose duties of their own choosing.

Paradox: While using contract interpretation, some courts create a new sort of property rule – the Marketable Product Rule.

Conclusion

Do not anticipate judicial reform in favor of "property" side. Most law school teaching in property law has been anti-textualist and anti-formalist for decades, and most judges don't have depth of property law background.

Consider legislative solutions. It may seem painful and fraught with peril, but you're more likely to achieve longer term stability than with a group of judges whose momentary focus on fairness exceeds their capacity to perceive longer term needs and interests in a whole field of law.

For the younger attorneys – You are here today as part of a great organization. Contribute generously to its activities and they will repay you many times over.

You are in a wonderful profession in a magnificent industry. Oftentimes your role will be to stop the machines. If you sound authoritative, no one will know you're improvising. I can't imagine a more satisfying career.