COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

PPC ACQUISITION COMPANY LLC, LOWE ROYALTY PARTNERS, LP, WHITE STAR ENERGY, INC., COLT DEVELOPMENT, L.L.C., THE NORTHERN TRUST COMPANY, AS TRUSTEE FOR THE EDWARDS LIVING TRUST DATED DECEMBER 4, 2007, MICA RESOURCES, LLC, BIDWELL MINERALS, LLC, BASIN 16 LLC and THE NORTHERN TRUST COMPANY, AS TRUSTEE FOR THE SARAH ZOLLER SEPARATE PROPERTY TRUST,	§	No. 08-19-00143-CV
Appellants,	§	Appeal from the
v.	§	143rd Judicial District Court
DELAWARE BASIN RESOURCES, LLC, OXY DELAWARE BASIN, LLC, OXY USA WTP LP, and OXY USA INC.	§	of Reeves County, Texas
Appellees.	§	(TC#17-09-22150-CVR)

O P I N I O N

This oil and gas case focuses on the interests that several parties have--or do not have--in three separate mineral leases on the same 640-acre section of land. The lessees claim to hold the

640 acres based on one producing well that was completed in 2003. The lessors contend that the failure to develop additional wells, the re-classification of the single well from gas to oil, and the failure to timely file a "Form P-15" for that well, along with its limited designation of acreage, terminated the lease for all or at least part of the acreage in the section. We agree in part and disagree in part with the trial court's resolution of these issues below.

I. FACTUAL BACKGROUND

The leased premises consists of a 640-acre parcel located in Reeves County, Texas. The mineral interests are owned in varying degrees by different entities, including Appellants Northern Trust Company ("Northern Trust"), [1] Lowe Royalty Partners, LLP ("Lowe"), and Colt Development LLC ("Colt"). In three different leases, these entities in 2000 leased their respective mineral interests to Lyle Canon who later assigned his rights in the leases to Tom Brown. In 2002, Brown spudded a gas well on the property known as the Colt 1 Well. Brown filed an application for a permit to drill the well with the Railroad Commission that attached a plat outlining the 640 acres that are the subject of the three leases. The Railroad Commission issued a permit to drill the well in accordance with Brown's application. Brown completed the gas well on June 1, 2003 and thereafter filed a Form P-15, (known as a "Statement of Productivity of Acreage Assigned to Proration Units"), designating a 640-acre proration unit for the Colt 1 Well in the D.A. (Devonian) Field.[2]

[1] Over the course of several years, Appellant Northern Trust Company conveyed fractional interests in the parcel to Appellants: White Star Energy, Inc.; Mica Resources, LLC; Bidwell Minerals, LLC; and Basin 16 LLC. As the interests of these Appellants align with each other, we refer to them globally as "Northern Trust."

[2] As discussed in more detail below, a Form P-15 is the "means by which an operator designates the configuration, size, and location of acreage attributable to a given well for purposes of obtaining a production allowable from the Railroad Commission." *Endeavor Energy Res., L.P. v. Discovery Operating, Inc.*, 554 S.W.3d 586, 596 n.3 (Tex. 2018).

From our record, the Colt 1 Well continually produced, but another subsequent assignee, J. Cleo Thompson, reworked and reclassified the Colt 1 Well into an oil well in December 2010. He thereafter filed another Form P-15 with the Railroad Commission, stating that the Colt 1 Well had been recompleted as an oil well in the Wolfbone (Trend Area) Field, and designated a 160-acre proration unit for the reclassified well. It is undisputed that the Colt 1 Well was the only well drilled on the parcel during the relevant time periods.

Following additional assignments, the leases are currently held by Appellees, Delaware Basin Resources, LLC ("DBR") and OXY Delaware Basin, LLC, OXY USA WTP LP, and OXY USA, Inc. ("OXY"). We identify the leases as follows:

> 1. The Northern Trust Lease provides for a primary term of three years, and a secondary term for "as long thereafter as oil and gas, or either of them, is produced in paying quantities from said land . . . ."
>
> 2. The Lowe Lease also provides for a primary term of three years, and a secondary term for "as long thereafter as oil or gas are produced from the leased premises in paying quantities."
>
> 3. The Colt Lease provides for a primary term of three years, and a secondary term for "as long thereafter as oil and/or gas is produced from said land hereunder."

In 2017, Northern Trust, White Star, Lowe, and Colt learned that the well had been reclassified to an oil well in 2010, and that the Form P-15 was filed designating the well as holding only 160 acres. That same year, Northern Trust entered into oil and gas leases with White Horse Exploration, purporting to give White Horse the exclusive right to explore, drill, operate, and produce oil and gas in the entire 640-acre parcel. On the same date, Lowe also entered into an oil and gas lease with White Horse as lessee, purporting to give White Horse the right to explore, drill, operate, and produce oil and gas on the parcel, except as to the "160 acres in the NW corner held

by the Colt#1 Oil Well . . . ." And finally, in April of 2017, White Horse assigned its interests in these two leases to Appellant PPC Acquisition Company LLC ("PPC").

II. PROCEDURAL BACKGROUND

Faced with demands to release acreage under the leases, DBR filed a petition to quiet title in the three leases, claiming that its interest encompassed the entire 640-acre parcel. OXY was later joined in the lawsuit as an involuntary plaintiff and filed its own petition to quiet title in the leases, and for trespass-to-try-title. DBR and OXY both sought a declaration that their leases were in full force and effect for the entire parcel and sought to remove the cloud on their title created by Appellants' actions. The several Appellants countered that the retained-acreage clauses in all three leases caused the leases to terminate in 2010, except as to 160 acres surrounding the Colt 1 Well after it was reclassified as an oil well. They eventually filed motions for summary judgment seeking that relief. However, in its second amended motion for summary judgment, Appellant PPC additionally argued that the Lowe Lease partially terminated in 2003--at the end of its primary term--as to all but 160 acres surrounding the Colt 1 Well because the field rules in which the well was located did not "prescribe" a 640-acre proration unit. Rather, the lease's retained acreage-clause only allowed the lessee to claim a 160-acre proration unit around the well.

DBR and OXY filed cross-motions for summary judgment, seeking a declaration that none of the three leases terminated or partially terminated in either 2003 or 2010, and that they retained an interest in all 640 acres under the three leases. Accordingly, they sought a judgment quieting title in all three leases in their name and removing the cloud of title allegedly placed on their leases by Appellants. In response to DBR and OXY's motions for summary judgment, Appellants PPC, and Northern Trust now argued that the Northern Trust Lease terminated in its entirety in 2003

because the then operator failed to timely dedicate a proration unit with the Railroad Commission. Similarly, Colt also argued for the first time in its response to DBR and OXY's motions, that the Colt Lease partially terminated in 2003, except as to 160 acres, based on the timeliness of the designation.[3]

The trial court granted DBR and OXY's motions for summary judgment and denied Appellants' motions. In its final judgment, the trial court ruled that DBR and OXY retained a full interest in the entire 640-acre parcel with respect to all three of the original leases. As a corollary, the trial court ruled that the leases PPC had received from Lowe and Northern Trust were ineffective to create any leasehold interest in the parcel, declaring that those leases were to be removed as clouds on DBR and OXY's title. The trial court denied all other relief requested by Appellants, and this appeal follows.

The issues on appeal can be grouped into two broad categories. The first asks whether the timing or substance of the designation of a proration unit in the Railroad Commission filings terminates all or a part of the leases as of 2003 or in 2010. The second category of issues asks whether the reclassification of the Colt 1 well from a gas well to an oil well in 2010 terminates a portion of the leases under their respective habendum and retained acreage clauses in the three leases.

III. STANDARD OF REVIEW

We review the granting of a motion for summary judgment de novo. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). When a party files a traditional motion for

[3] Appellant Lowe did not file a separate response to DBR and OXY's motions for summary judgment.

summary judgment, as did all the parties here, a trial court may properly grant the judgment only when the movant shows that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX.R.CIV.P. 166a. In deciding whether that burden has been met, we treat all evidence favorable to the non-movant as true, and we indulge every reasonable inference and resolve all doubts in the movant's favor. *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). When opposing parties file cross-motions, moving for summary judgment on the same issues, and the trial court grants one motion and denies the other, the reviewing court considers the summary judgment evidence presented by both sides, determines all questions presented, and renders the judgment the trial court should have rendered. *Merriman*, 407 S.W.3d at 248; *see also Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

IV. APPLICABLE LAW

This case, however, is less about factual disputes, and more about determining the meaning of the lease provisions as applied to mostly undisputed facts. We therefore turn to how we interpret mineral lease terms.

A. Contractual Nature of a Mineral Lease

"A mineral lease is a contract, and as such, its terms define the parties' respective rights and duties." *Endeavor Energy Resources, L.P. v. Discovery Operating, Inc.*, 554 S.W.3d 586, 595 (Tex. 2018). Contracting parties are free to choose their own terms and courts should "respect and enforce" those chosen terms given the law's "strong public policy favoring freedom of contract." *Id.*, *quoting Philadelphia Indem. Ins. Co. v. White*, 490 S.W.3d 468, 471 (Tex. 2016). "[W]e review lease-construction questions *de novo*." *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2002).

When asked to interpret a contract, our primary duty is to ascertain the parties' intent as expressed within the four corners of the document. *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991); *see also Burlington Res. Oil & Gas Co. LP v. Texas Crude Energy, LLC*, 573 S.W.3d 198, 200 (Tex. 2019) ("the decisive factor in each case is the language chosen by the parties"). "We begin with the most important consideration in interpreting any contract: 'the plain meaning of the [agreement's] operative language.'" *Endeavor Energy Resources, L.P. v. Energen Resources Corp.*, No. 18-1187, 2020 WL 7413727, at *4 (Tex. Dec. 18, 2020), *quoting RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 121 (Tex. 2015). We also attempt to harmonize all parts of the lease, even if different parts of the lease appear contradictory or inconsistent. *Luckel*, 819 S.W.2d at 461-62. Doing so honors the parties' intent that every clause has some effect and evidences their agreement. *Id.* at 462.

B. Regulatory Context of Mineral Leases

Mineral leases are, however, subject to legal and regulatory restrictions imposed by the State such that "the rights of the contracting parties to an oil and gas lease will be subordinated to the regulatory authority of the State even though the contractual rights or obligations may be affected in so doing." *Gulf Oil Corp. v. Southland Royalty Co.*, 478 S.W.2d 583, 590 (Tex.App.--El Paso 1972), *aff'd*, 496 S.W.2d 547 (Tex. 1973); *see also Endeavor*, 554 S.W.3d at 595. To further the State's goals of "preventing waste and conserving natural resources," the Legislature has delegated rule-making authority to the Texas Railroad Commission. And pursuant to that authority, the Commission has adopted statewide spacing rules that impose minimum distances between wells. *Endeavor*, 554 S.W.3d at 595-596, *citing* 16 TEX.ADMIN.CODE §§ 3.37, 3.38. The Commission has also adopted specific "production allowables" based on "proration units"

assigned to each well. A proration unit is the "acreage assigned to a well for the purpose of assigning [production] allowables and allocating allowable production to the well." *Id.* § 3.38(a)(3). The "production allowables" define the maximum amount of hydrocarbons that can be recovered from a well "in order to control the rate of production from the field." *Browning Oil Co. v. Luecke*, 38 S.W.3d 625, 634 (Tex.App.--Austin 2000, pet. denied). To accommodate the unique circumstances existing within particular production areas, the Commission has adopted specific "field rules," which provide "detailed regulations for a specific field," and in effect replace the statewide rules. *Endeavor*, 554 S.W.3d at 596.

In general, when an operator completes a well, the operator must file various forms with the Railroad Commission in order to "designate [a well's] proration unit and the acreage assigned to it [and] certify that the acreage is productive before receiving the well's production allowable." *Id*. An operator typically does so by filing a "Statement of Productivity of Acreage Assigned to Proration Units," also known as a "Form P-15," with the Commission, together with certified plats showing the acreage assigned to the well. *Id., citing, inter alia*, 16 TEX.ADMIN.CODE § 3.31(c)(1) (requiring gas-well operators to file a "certified plat showing the acreage assigned to the well for proration purposes"); 16 TEX.ADMIN.CODE § 3.40(i); (permitting operators to "file proration unit plats for individual wells in a field"); *see also XOG Operating, LLC v. Chesapeake Expl. Ltd. P'ship*, 480 S.W.3d 22, 25 (Tex.App.--Amarillo 2015), *aff'd*, 554 S.W.3d 607 (Tex. 2018) (recognizing that a "Statement of Productivity of Acreage Assigned to Proration Units" is customarily referred to as a Form P-15). The Commission reviews the operator's filings to ensure they comply with its applicable rules, and then generates a "maximum allowable for a well," which

is "the largest allowable that can be assigned under applicable rules." *Endeavor*, 554 S.W.3d at 596, *citing* 16 TEX.ADMIN.CODE §§ 3.31(c)(1), 3.31(g)(9).

V. THE NORTHERN TRUST LEASE

A. Did the Northern Trust Lease Terminate in 2003?

In Issue One, Appellants PPC and Northern Trust argue that the Northern Trust Lease automatically terminated in its entirety in 2003, when Tom Brown allegedly failed to "dedicate" acreage to a proration unit by the deadline specified in the lease.[4] We disagree.

1. The relevant provisions in the Northern Trust Lease

The Northern Trust Lease's habendum clause[5] provides for a primary term of three years, and a secondary term lasting for "as long thereafter as oil and gas, or either of them, is produced in paying quantities from said land[.]" The lease's habendum clause is modified by the retained-acreage clause[6] found in Paragraph 13, which provides that:

> Notwithstanding anything to the contrary contained herein, after the expiration of the primary term and after all continuous operations have ceased, Lessee and/or its heirs, successors and assigns shall release all acreage not then dedicated to a proration unit designated by the appropriate regulatory body. Lessee, and/or its

[4] Neither PPC nor Northern Trust raised this issue in their counterclaims or in their motions for summary judgment. However, they did raise this argument in their responses to DBR and OXY's motions for summary judgment. Accordingly, we may consider this argument only in determining whether the trial court properly granted summary judgment in favor of DBR and OXY, and not in considering whether the trial court should have granted Appellants' motions for summary judgment.

[5] Generally, a lease's habendum clause defines the duration of the mineral-lease estate. *Endeavor*, 554 S.W.3d at 597. The habendum clause typically divides a lease's duration into two parts, a primary term and a secondary term. *Id.* The primary term usually lasts for a fixed period of time stated in the lease, while the secondary term continues the lease after the primary term expires, generally for "as long thereafter as oil, gas or other mineral is produced." *Id.* Under a typical habendum clause of this nature, a lease will automatically terminate during the secondary term if production ceases on the leased premises. *Id.*

[6] "While a habendum clause generally extends the entire lease so long as some production is occurring on the lease, and a continuous-development clause further extends the entire lease so long as the operator remains engaged in the required development efforts, a retained-acreage clause typically divides the leased acreage such that production or development will preserve the lease only as to a specified portion of the leased acreage." *Id.* at 597-598.

> heirs, successors and assigns, shall also release all acreage which may be included within the boundaries of a producing proration or spacing unit covering all depths and horizons 100 feet below the deepest depth drilled, in any well commenced during the primary term of this lease or at such time continuous operations have ceased as provided in paragraph five (5) herein above.

In turn, the continuous operations clause[7] in the lease provides in relevant part that:

> If at the expiration of the primary term oil or gas is not being produced on said land but Lessee is then engaged in operations for drilling or reworking of any well, this Lease shall remain in force so long as drilling or reworking operations are prosecuted with no cessation of more than ninety (90) consecutive days, and if they result in production, so long thereafter as oil or gas is produced . . . .

2. Northern Trust and PPC's arguments

Northern Trust and PPC construe the lease's retained acreage clause to mean that Tom Brown could only "dedicate" acreage to a proration unit by filing a Form P-15 with the Railroad Commission. And they further contend that Brown's Form P-15 was not timely filed. In particular, they argue that the primary term of the lease ended on June 1, 2003, and because Brown was not engaged in any continuous operations at that time, he was required to file his Form P-15 on or before June 1, 2003 in order to dedicate any acreage to a proration unit.[8] Brown's Form P-15, however was received by the Railroad Commission on September 15, 2003. Accordingly, Northern Trust and PPC argue that the Northern Trust Lease terminated in its entirety due to Tom

[7] Continuous-development clauses in general permit a lease to be perpetuated at the expiration of the primary term even when there is no oil or gas being produced on the leased premises, if the lessee is then engaged in some form of continuous operations for drilling or reworking of a well. *BP Am. Prod. Co.*, 526 S.W.3d 389, 394-95 (Tex. 2017).

[8] DBR contends that Brown was engaged in continuous operations on the day the primary term of the lease expired because he was still completing the well on June 1, 2003. DBR therefore contends that the lease was extended another 90 days under the continuous operations clause, which would have given Brown until August 31, 2003 to dedicate acreage to a proration unit. But even if we agreed with that argument, Brown's Form P-15 filing was not filed by that later date and therefore could not be considered timely.

Brown's failure to timely "dedicate" a proration unit to the Colt 1 Well through its regulatory filings. One foundation of the argument, however, is that the term "dedicate" as used in the lease is the same as what a timely and correctly filed Form P-15 would claim as the proration unit. PPC and Northern Trust support that proposition by relying on how the Texas Supreme Court has interpreted the term "assign" in a similar lease provision.

In *Endeavor*, the lease's retained-acreage clause provided that at the end of the lease's primary term or upon the cessation of continuous development, whichever was later, the lease would "automatically terminate as to all lands and depths covered herein, *save and except* those lands and depths located within a *governmental proration unit assigned to a well* producing oil or gas in paying quantities." *Endeavor*, 554 S.W.3d at 600. In that case, the lessee had filed a Form P-15 claiming only 81 acres for its producing wells, despite the fact that the field rules governing the location where the wells were located allowed a maximum 160-acre proration unit. *Id.* at 600-601. The lessor claimed that when the retained-acreage clause was triggered at the cessation of continuous development, the lease automatically terminated except for the 81 acres surrounding the producing wells. *Id*. at 594. The lessee, however, argued that its filings were irrelevant, as the Commission had already "assigned" acreage to the wells by establishing the 160-acre maximum proration unit in its field rules, and that the parties intended for the lessee to retain that amount of acreage when the retained-acreage clause was triggered. *Id*. at 601-602. The court, however, rejected the lessee's argument, concluding that the Commission does not "assign" acreage to a well, and that by using the term "assigned" in the retained-acreage clause, the parties intended for the lessee to affirmatively make the assignment through its regulatory filings. *Id*. at 603. As in *Endeavor*, Northern Trust and PPC contend the retained-acreage clause required the

lessee to timely file a Form P-15, stating the amount of acreage it was claiming as a proration unit for the Colt 1 Well, in order to keep the lease from terminating.

In response, DBR points out that the retained-acreage clause in the Northern Trust Lease, unlike the lease in *Endeavor*, refers to proration units that have been "designated" by the Railroad Commission; DBR contends that this reflected the parties' intent to allow the lessee to retain any acreage included in a proration unit established by the Commission's field rules governing the D.A. (Devonian) Field in which the Colt 1 Well was located. And in turn, DBR contends that those field rules provide for a maximum proration unit of 640 acres for a gas well, and that Tom Brown was therefore entitled to retain the entire 640 acres surrounding the Colt 1 Well as the "designated" proration unit when the retained-acreage clause was triggered at the cessation of continuous operations. In other words, DBR contends, as the lessee did in *Endeavor*, that the lessee's actual regulatory filings were irrelevant in determining the amount of acreage the lessee was entitled to retain at the cessation of continuous operations, and that the Commission's field rules instead governed that determination.[9]

We need not resolve this conundrum, however, as we disagree with the Northern Trust and PPC's claim that the retained-acreage clause created a special limitation on the lease that caused

[9] As an alternative argument, OXY contends that Tom Brown did in fact "dedicate" 640 acres to the Colt 1 Well when he filed a form W-1 in September of 2002 with the Railroad Commission, in which he designated a 640-acre proration unit for the Colt 1 Well. PPC and Northern Trust point out, however, that although the Administrative Code provides that an operator must obtain a drilling permit from the Railroad Commission before beginning any drilling operations for a proposed well, a permit does little more than establish the location of the proposed well, and there is nothing in the Code to suggest that a drilling permit grants an operator any rights with respect to the proration unit a producing well will ultimately hold. 16 TEX.ADMIN.CODE § 3.37 (no operator shall commence the drilling of a well . . . until first having been notified by the Commission that the regular location has been approved); 56 TEX.JUR. 3D OIL AND GAS § 782 (recognizing that a drilling permit simply grants an operator permission to drill in a particular location, and nothing more).

the lease to automatically terminate when the retained acreage clause was triggered. Instead, we agree with OXY and DBR that the clause merely contained a covenant made by the lessee to release acreage upon the triggering event, the breach of which did not automatically terminate the lease, either in whole or in part.

3. The retained acreage clause was not a special limitation on the lease

Because oil and gas leases affect title to real-property interests, "they are subject to special construction rules that apply particularly to agreements governing property rights." *Endeavor*, 554 S.W.3d at 595. One of those rules dictates that contractual language will not be held to automatically terminate the leasehold estate unless that "language . . . can be given no other reasonable construction than one which works such result." *Knight v. Chicago Corp.*, 188 S.W.2d 564, 566 (Tex. 1945). Stated otherwise, Texas draws a distinction between a special limitation in an oil and gas lease (also referred to as a "condition" on the lease) and a covenant. *See Sutton v. SM Energy Co.*, 421 S.W.3d 153, 156 (Tex.App.--San Antonio 2013, no pet.) (discussing distinction between special limitations and covenants); *Parten v. Cannon*, 829 S.W.2d 327, 329-330 (Tex.App.--Waco 1992, writ denied); *see also Rogers v. Ricane Enterprises, Inc.*, 772 S.W.2d 76, 79 (Tex. 1981). "A special limitation in an oil and gas lease provides that the lease will automatically terminate upon the happening of a stipulated event," such as the cessation of production in contravention of the lease's terms or failure of the operator to commence drilling or reworking operations within the time the lease required. *Endeavor*, 554 S.W.3d at 606; *see also Rogers*, 772 S.W.2d at 79. A covenant, on the other hand, is merely a promise made by the lessee to perform a certain action, and the lessee's failure to perform the action does not cause the lease to automatically terminate; instead, any such failure only subjects the lessee to a lawsuit for

damages resulting from the breach of contract or to obtain specific performance of the covenant. *Rogers*, 772 S.W.2d at 79; *see also Parten*, 829 S.W.2d at 330-31 (breach of covenant in oil and gas lease did not result in termination of the entire lease, and instead only gave rise to a cause of action allowing the lessor to recover damages for breach of contract); *Mitchell v. Mesa Petroleum Co.*, 594 S.W.2d 507, 513 (Tex.App.--San Antonio 1979, writ ref'd n.r.e.) ("The remedy for breach of covenants is the suit for damages, not automatic termination.").

As the Texas Supreme Court has recognized, although the question of whether a lease has terminated "is always a question of resolving the intention of the parties from the entire instrument," a court will not find a special limitation in a lease "unless the language is so clear, precise, and unequivocal that [the court] can reasonably give it no other meaning." *Endeavor*, 554 S.W.3d at 606, *quoting Anadarko*, 94 S.W.3d at 554 (internal quotation marks omitted). Thus, when there is any doubt regarding how the parties intended for a lease provision to be categorized it should be resolved in favor of finding the provision to be a covenant. *Rogers*, 772 S.W.2d at 79.

In general, courts have found that a lease provision constitutes a special limitation when it contains express language indicating that the lease or the lessee's rights "shall terminate" or "shall automatically terminate" upon the happening of a stipulated event. *See, e.g.*, *Endeavor*, 554 S.W.3d at 606 (where lease provided that it "shall automatically terminate" as to all acreage not assigned to a producing well, the court noted this was "precisely the type of clear and unequivocal language that imposes a special limitation on a lease."); *XOG*, 480 S.W.3d at 28 (holding that provision in an oil and gas lease was a special limitation, where it stated that the lessee's rights "shall terminate" at the expiration of the lease's primary term except for the acreage included

within a proration unit); *Sutton*, 421 S.W.3d at 159 (construing provision in the parties' retained acreage clause as a special limitation, where it expressly provided that if the lessee failed to commence drilling additional wells within a certain time period, the lease "shall automatically terminate" except for acreage included within each existing well tract); *Mayfield v. de Benavides*, 693 S.W.2d 500, 502 (Tex.App.--San Antonio 1985, writ ref'd n.r.e.) (provision providing that "this lease shall terminate" at the expiration of the primary term except for such land that has been allocated to a well for production purposes was a special limitation). Conversely, when a lease provision imposes a duty on the lessee to take a certain action, the provision is considered a "covenant," and the lessee's failure to fulfill the covenant does not result in automatic termination of the lease. *See Rogers*, 772 S.W.2d at 78-79; *Sutton*, 421 S.W.3d at 159 (recognizing that unless there is explicit language to the contrary, a retained acreage clause requiring a lessee to make a designation of acreage to a well creates a covenant, rather than a limitation, so that the lessee's failure to comply with the designation requirement may entitle the lessor to damages but will not result in automatic lease termination).[10]

The retained-acreage clause in the Northern Trust Lease lacks the clear or unequivocal statement that the lease "shall terminate" upon the lessee's failure to designate a proration unit.

[10] Illustrating this distinction, some cases have addressed leases with both types of language and have enforced the "shall terminate" clauses as special limitations, and the directive language as covenants. *See Parten*, 829 S.W.2d at 330-331 (portion of lease where it expressly provided that the lease "shall terminate" as to land lying outside the allotted area was a special limitation while another provision which required the lessee to file a written designation in the county property records by a certain date was a covenant, and therefore the failure to file a designation did not cause the automatic termination of the lease); s*ee also Bank of Am., N.A. as Tr. of Florence Thelma Hall Testamentary Tr. v. Devon Energy Prod. Co., L.P.*, No. 4:15-CV-38-DAE, 2017 WL 11001832, at *5, *7 (W.D. Tex. July 11, 2017) (provision in a lease's retained-acreage clause was a special limitation, where it expressly provided that the lease "shall automatically terminate" on a certain date "save and except those lands and depths located within a governmental proration unit assigned to a well" but provision in the same clause, which required the lessee to file a "written designation of a Production Unit" with the county for each well, was a covenant.

Instead, the clause provides only that the lessee "shall release" acreage that has not been "dedicated" to a proration unit prior to the cessation of continuous operations. Yet a provision imposing a duty on a lessee to release acreage in the absence of a timely designation of a proration unit is not the equivalent of providing for the automatic termination of the lease. *See TransTexas Gas Corp. v. Forcenergy Onshore, Inc.*, No. 13-02-387-CV, 2004 WL 1901717, at *7-8 (provision in lease's retained acreage clause, stating that lessee "must reassign" any acreage not allocated to a producing or proration unit upon the triggering event, was a covenant rather than a special limitation on the lease, as it did not clearly call for a termination of the lease upon the lessee's failure to reassign the acreage); *see also* A.W. Walker, Jr., *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 8 Tex.L.Rev. 483, 484-88 (1930) (recognizing that where a retained-acreage clause creates a duty to release acreage, that is the hallmark of a covenant, rather than a special limitation on title); *but see ConocoPhillips Co. v. Vaquillas Unproven Minerals, Ltd.*, No. 04-15-00066-CV, 2015 WL 4638272, at *5 (Tex.App.--San Antonio Aug. 5, 2015, pet. granted, judgment set aside) (mem. op.) (court of appeals held that clause stating lessee "covenants and agrees to execute and deliver to Lessor a written release" of certain undeveloped acreage at the end of continuous development was deemed a special limitation).

Our conclusion is bolstered by the fact that the parties used clear and unequivocal language in other provisions in the lease expressly providing for the automatic termination of the lease in the case of other specified events. In Paragraph 3(d) of the lease, the parties agreed that the lessee could perpetuate the lease beyond its primary term by making shut-in royalty payments and expressly provided that the lease "shall terminate" if such payments are not timely made. Also, in Paragraph 5 of the lease, the parties agreed that if the lessee drilled a producing well within a

certain number of feet outside the leased premises, the lessor had the right to request that lessee drill an offset well in the same formation where the off-premises well was producing, and it expressly provided that the lessee's failure to do so in a timely manner would cause the lease to "terminate, ipso facto." These provisions evidence that the parties knew how to create a special limitation, but instead chose not to.

Accordingly, we conclude that the Northern Trust Lease's retained-acreage clause created a covenant, rather than a special limitation or condition on the lease, and that any breach of that covenant by the lessee did not cause the lease to automatically terminate in 2003, as claimed by the Northern Trust and PPC. Instead, a breach of that covenant would have only entitled these Appellants to bring a claim for damages for the alleged breach or an action for specific performance. But Northern Trust did not pursue that claim in the trial court. And, similarly, on appeal, their issues are limited, to whether the trial court erred in finding that the Northern Trust Lease did not automatically terminate upon the triggering of the retained-acreage clause. Based on the limited issue before us, we conclude that the Northern Trust Lease did not automatically terminate in 2003 when the retained-acreage clause was first triggered.

Appellant Northern Trust and PPC's Issue One is overruled.

B. Did the Northern Trust Lease Partially Terminate in 2010?

In Issue Five, Northern Trust and PPC alternatively contend that the Northern Trust Lease partially terminated, except as to 160 acres, in 2010 when the Colt 1 Well was reworked and reclassified to an oil well that only held a 160-acre proration unit. In particular, the Northern Trust and PPC contend that the parties to the lease clearly intended for the lease's retained-acreage clause to be "rolling" in nature, and to thereby cause a continuing termination, or partial

termination, of the lease in the event that a well's proration unit was reduced. Important to this appeal, a retained-acreage clause may be classified as either a "snapshot" in time or a "rolling" provision. *See generally Apache Deepwater, LLC v. Double Eagle Dev., LLC*, 557 S.W.3d 650, 657 (Tex.App.--El Paso 2017, pet. denied) (discussing distinction between the two types of clauses). A retained-acreage clause functions as a "snapshot" provision when it can only be triggered once, such as at the end of the primary term or when all continuous operations have ceased, requiring the lessee to release the designated amount of unretained acreage at that time. Conversely, a "rolling" retained-acreage clause may be triggered at various specified times throughout the life of the lease. For example, a retained-acreage clause may call for the lessee to continually release acreage to the lessor any time a well's proration unit is reduced. *Id.* However, a retained acreage clause in a lease will not be considered to be rolling unless it contains clear and unequivocal language to that effect. *Id.*; *see also Chesapeake Expl., L.L.C. v. Energen Res. Corp.*, 445 S.W.3d 878, 883 (Tex.App.--El Paso 2014, no pet.).

We reject Northern Trust and PPC's claim that the retained acreage clause here is rolling for two reasons. First, we have already concluded that the retained-acreage clause was not a special limitation on the lease that could cause an automatic termination, or partial termination, of the lease upon a triggering event. Therefore, even if the retained-acreage clause could be triggered more than once, it would not cause an automatic termination of the lease on any such occasion. In other words, if the retained-acreage clause could not cause an automatic termination of the lease in 2003, it could not do so in 2010.

Second, the retained-acreage clause specifies only one date on which the clause would be triggered, i.e., at the end of the primary term and after all continuous operations have ceased.

Conversely, it contains no language indicating that the lease would continually terminate, or partially terminate, upon the happening of any future events, such as when an existing well's proration unit is reduced. In the absence of clear and precise language indicating that the parties intended for a retained-acreage clause to require the lessee to relinquish acreage on a continuing basis, we will not construe a retained-acreage clause to be rolling in nature. *See Apache*, 557 S.W.3d at 656 (retained-acreage clause was not rolling in nature where it stated that the lessee agreed to partially release the lease at the expiration of the primary term except as to proration units of producing wells, but contained no language providing for continuing relinquishment of nonproducing proration units after that time); *Chesapeake*, 445 S.W.3d at 883 (retained acreage clause was not rolling in nature, where it stated that the lease would terminate as to all unproductive acreage not contained in a proration unit at the end of the primary term and the lessee's failure to continuously develop the leased premises, but contained no clear language addressing what would occur if a proration unit subsequently ceased to exist); *see also Humphrey v. Seale*, 716 S.W.2d 620, 622 (Tex.App.--Corpus Christi 1986, no writ) (holding that if the parties to a lease had wished to provide for a continual relinquishment of nonproducing acreage, it would have been simple to include such language).

We therefore conclude that the Northern Trust Lease did not partially terminate in 2010 when the Colt 1 Well was reclassified from a gas well to an oil well holding a smaller proration unit. Appellant Northern Trust and PPC's Issue Five is overruled.

VI. THE LOWE LEASE

A. Did the Lowe Lease Partially Terminate in 2003?

In Issue Two, Appellants Lowe and PPC argue that the Lowe Lease terminated in 2003 as to all but the 160 acres surrounding the Colt 1 Well, primarily based on the language used in the lease's retained acreage clause. We disagree.

1. The relevant provisions in the Lowe Lease

The Lowe Lease's habendum clause provided for a primary term of three years, and a secondary term for "as long thereafter as oil or gas are produced from the leased premises in paying quantities." The lease's habendum clause is modified by the retained-acreage clause that provides:

> (a) In the event Lessee fails to continuously develop the leased premises in accordance with Paragraph 6, this lease shall terminate as to all of the leased premises except as to:
>
> (i) each well then producing or capable of producing oil and gas, or either, in paying quantities, and
>
> (ii) 40 acres around each such well which is classified as an oil well and 160 acres around each such well which is classified as a gas well or, in each case, *such larger area as may be prescribed by the Railroad Commission of Texas* (or such Governmental Agency having jurisdiction) as the proration unit for such well 'Well Production Unit' . . . (emphasis added)."
>
> (iii) . . . Thereafter operations on or production from . . . any Well Production Unit will perpetuate this lease only as to that Well Production Unit. This lease shall terminate as to each Well Production Unit, respectively, sixty (60) days after the date that production from and operations with respect to such Unit cease; unless, within such sixty (60) day period, Lessee re-establishes production or commences drilling or workover operations on said Well Production Unit or tenders a shut-in payment in accordance with Paragraph 5 above.

(b) Lessee shall release all of the leasehold premises terminated under Paragraph 7(a) and furnish such release to Lessor within 60 days after such leasehold premises have terminated.

Paragraph 6 defined the term, "continuous drilling operations," to mean the prosecution of drilling operations with no lapse of more than 180 days between the completion of or abandonment of any well, and the commencement of additional drilling operations. Unlike the Northern Trust Lease, the parties agree that the Lowe Lease's retained-acreage clause is a special limitation on the lease, as it expressly states upon the lessee's failure to continuously develop the land, the lease "shall terminate" except as to either 160 acres surrounding a gas well or such larger area as may be prescribed by the Railroad Commission. In addition, the parties do not dispute that the retained-acreage clause was triggered in 2003, due to Tom Brown's failure to continuously develop the leased premises after completing the Colt 1 Well in June of 2003. Nor do they dispute that the D.A. (Devonian) Field Rules applied to the Colt 1 Well at that time. The parties, however, disagree on whether those field rules "prescribed" a unit larger than the 160 acres specified in the retained acreage clause, with Lowe and PPC contending that the field rules did not "prescribe" a proration unit of any particular size, while DBR contends that the rules prescribed a 640-acre proration unit for a gas well.[11] We agree with DBR on this issue.

[11] Appellant Lowe expressly acknowledged in its trial court pleadings that the D.A. (Devonian) Field Rules did "prescribe" a 640-acre proration unit around gas wells and that Brown therefore retained the "entire" acreage around the Colt 1 Well until it was reclassified as an oil well in 2010. As the parties do not raise the issue, we decline to address whether this constitutes a judicial admission that would bar Appellant Lowe from making a contrary argument on appeal.

2. The field rules prescribed a 640-acre proration unit for gas wells

The Lowe and PPC argument is based primarily on their interpretation of three Texas Supreme Court cases, *Jones v. Killingsworth*, 403 S.W.2d 325 (Tex. 1965), *XOG Operating, LLC v. Chesapeake Expl. Ltd. P'ship*, 554 S.W.3d 607 (Tex. 2018), and *Endeavor*, 554 S.W.3d at 600. According to Lowe and PPC, these three cases stand for the proposition that the Railroad Commission's field rules "prescribe" a proration unit only when they set out a "minimum" proration unit. Conversely, they do not "prescribe" a proration unit when the field rules set forth a "maximum" proration unit. And in turn, they argue that the D.A. (Devonian) Field Rules only established a "maximum" proration unit of 640 acres (subject to exceptions) for a gas well. We disagree with Appellants' interpretation of these cases, as well as with their interpretation of how the cases apply to the Lowe Lease.

a. Jones v. Killingsworth

In *Jones*, the majority found that the field rules at issue "prescribed" a proration unit of 80 acres for a gas well, despite the fact that the field rules never used that term. *Jones*, 403 S.W.2d at 327. In reaching this conclusion, the court noted that the field rules provided for a minimum proration unit of "at least" 80 acres. *Id.* The court's conclusion was based on the distancing and spacing rules contained in the rules which permitted only one well to each 80 acre proration unit. *Id.* at 329, (J. Hamilton, dissenting) (quoting Rule 1 of the field rules). The field rules, however, not only set a minimum proration unit, but also provided a maximum unit size, stating that "[n]o proration unit shall consist of more than eighty (80) acres except as hereinafter provided," which in turn allowed an operator to elect to assign up to 160 acres to a proration unit for a gas well. *Id.* (quoting Rule 2 of the field rules). In interpreting these seemingly conflicting rules, the court

concluded that the Commission had "prescribed" a proration unit of 80 acres, but "permitted" an operator to designate a larger unit of 160 acres. *Jones*, 403 S.W.2d at 327; *see also Hunt Oil Co. v. Moore*, 656 S.W.2d 634, 638 (Tex.App.--Tyler 1983, writ ref'd n.r.e.) (interpreting the same field rules as "prescrib[ing]" an 80-acre proration unit).

The field rules in *Jones* are similar to the D.A. (Devonian) Field Rules. As in *Jones*, Rule 1 of the D.A. (Devonian) Field Rules provides distancing and spacing rules for the field, which set "minimum distances" between gas wells, and were established, in part, "for the purpose of permitting only one well to each six hundred forty (640) acre proration unit." In addition, the field rules provide that "each unit containing less than six hundred forty (640) acres shall be a fractional proration unit," making it clear that a 640-acre proration unit was the minimum size proration unit designated for the field. And similar to the field rules in *Jones*, the D.A. (Devonian) Field Rules set forth a maximum proration unit of 640 acres for a gas well (and also permit an operator, under certain circumstances, to designate a larger unit not to exceed 704 acres). Therefore, in accordance with the holding in *Jones*, we conclude that the D.A. (Devonian) Field Rules "prescribe" a 640-acre proration unit for gas wells, while "permitting" larger units under specified circumstances, and denominating anything less than 640 acres to be a "fractional unit."

b. <u>The holdings in XOG and Endeavor</u>

The Supreme Court's more recent holdings in *XOG* and *Endeavor* do not alter our conclusion. In *XOG*, the lease's retained acreage clause provided that at the end of the lease's primary term, all land reverted to the lessor except as to acreage included within the proration unit of each well as "prescribed by field rules." *XOG*, 554 S.W.3d at 612. The lessee in that case completed four wells in a field governed by rules that expressly prescribed a proration unit of 320

acres but permitted the operator to designate a 10% larger unit, and further stated that a smaller unit would be designated as a "fractional unit." *Id.* After completing the wells, the lessee filed a Form P-15 for all four wells, assigning a total of 800 acres for the four wells in the field, which, in effect, amounted to 200 acres per well, despite the fact that the field rules prescribed a much larger unit. *Id.* at 611.

At the end of the primary term, after the retained-acreage clause was triggered, the lessor argued that it was entitled to a reversion of all of the acreage outside the 200 acres designated in the lessee's Form P-15 filings. The lessee, however, argued that the retained-acreage clause expressly allowed it to retain all acreage, "prescribed by field rules," i.e., 320 acres per well, regardless of whether its regulatory filings designated a different amount. *Id.* at 612. The court agreed with the lessee, finding that the parties had clearly elected to be governed by the field rules in determining the amount of acreage the lessee was entitled to retain at the end of the primary term. *Id.* at 613 (recognizing that parties were "free to incorporate the field rules' prescribed proration unit size . . . to govern the retained-acreage provision, and that is what they plainly did."). And, in turn, the court found that the field rules expressly "prescribed" a 320-acre proration unit, while "permitting" larger units of up to a maximum of 352 acres and designating anything smaller as being a fractional unit. *Id.* at 612-613. In reaching this conclusion, the court cited its holding in *Jones*, noting that "the Railroad Commission may 'prescribe' the size of a proration unit while at the same time permitting operators to designate other sizes." *Id.* at 613, *quoting Jones*, 403 S.W.2d at 328.

The field rules construed in *XOG* also share similarities to the D.A. (Devonian) Field Rules. Both sets of rules "prescribe" a standard proration unit (in our case a 640-acre proration unit for a

gas well), but "permit" larger units as an exception (in our case up to 704 acres), and further permit smaller units, which in both sets of rules are similarly deemed to be "fractional units." The only true distinction between the two sets of field rules lies in the fact that the D.A. (Devonian) Field Rules, unlike the field rules in *XOG*, do not expressly use the term "prescribe." However, the court in *Jones* found that the Commission had in fact "prescribed" a proration unit in its field rules even though the rules did not expressly use that term. *See Jones*, 403 S.W.2d at 329. We therefore conclude that by clearly establishing a 640-acre proration unit as both the minimum and maximum proration unit for a gas well in the D.A. (Devonian) Field, the Commission intended for this to be the "prescribed" proration unit for the field. *See generally Prescribe*, BLACK'S LAW DICTIONARY (10th ed. 2014) (recognizing that the plain meaning of the word "prescribe" is "to establish authoritatively (as a rule or guideline)."

And finally, nothing in the court's holding in *Endeavor* alters our conclusion. As explained above, the court interpreted the retained-acreage clause in the parties' lease in *Endeavor* as requiring the lessee to release any acreage which the lessee had failed to timely "assign" to a proration unit by virtue of its regulatory filings, on the date the clause was triggered. *Endeavor*, 554 S.W.3d at 602-03. Therefore, unlike the retained-acreage clauses in both the *XOG* lease and the Lowe Lease, the *Endeavor* lease did not link the amount of acreage the lessee was entitled to retain to the proration units established by the field rules, and instead linked it solely to the lessee's regulatory filings. *Id.* Accordingly, the court in *Endeavor* did not make any pronouncement regarding whether the field rules in that case prescribed a proration unit, nor did it need to do so, as that issue was not germane to its analysis.

Appellants' twist on the cases, however, is that the court in *XOG,* which was decided the same day as *Endeavor,* stated in passing that the field rules in *Endeavor,* unlike those in *XOG*, did not "prescribe" a proration unit. *XOG*, 554 S.W.3d at 613. And Appellants contend that the field rules in *Endeavor* were identical to those in the D.A. (Devonian) Field, and that we must therefore conclude that the D.A. (Devonian) Field Rules similarly do not "prescribe" a proration unit. There are several problems with the argument.

First, the differing retained-acreage clauses distinguishes *XOG* and *Endeavor*. The *XOG* lease expressly tied the amount of retained acreage to the field rules, while the *Endeavor* lease tied it to the operator's assignment of acreage. Second, the language used in the field rules in *Endeavor* is not unlike other field rules that courts have construed to establish "prescribed" units. The field rules in *Endeavor* govern the Spraberry (Trend Area) Field, which provide that "*standard* drilling and proration units are established hereby to be eighty (80) acres (emphasis added)." *Endeavor*, 554 S.W.3d at 599. The Commission's use of the term "standard" is in effect the same as its use of the term "prescribed." *See generally XOG Operating, LLC*, 480 S.W.3d at 25 (treating a "prescribed proration unit" as being the same as a "standard proration unit"). Moreover, the Spraberry Field Rules establish 80 acres as the maximum proration unit that can be assigned to a well, but also "permit" an operator to "elect to assign a tolerance" of additional acreage as specified in the rules (of no more than 160 acres). *Endeavor*, 554 S.W.3d at 599. And finally, the Spraberry Field Rules also provide that 80 acres is the minimum proration, as the rules state that anything less than 80 acres would be considered a "fractional" proration unit. *See* Rule 3 of the "Final Order Amending Field Rules For the Spraberry (Trend Area) Field Various Counties, Texas," dated December 2, 2014, found at https://stage.rrc.state.tx.us/media/25459/7c-91169-

1171afr-ord.pdf (allowing operator to request an exception, under certain specific conditions, to form "fractional units of less than [80] acres.").

The Spraberry (Trend Area) Field Rules are therefore not unlike the field rules at issue in *Jones* and *XOG*, as the "standard" proration unit described in the Spraberry Rules constitutes both the minimum and maximum proration unit allowed, save for the exceptions permitting an operator to elect a smaller or larger unit; and in both *Jones* and *XOG*, the Court found that rules of this nature do in fact "prescribe" a proration unit. *XOG*, 554 S.W.3d at 612; *Jones*, 403 S.W.2d at 327. And, as explained above, the D.A. (Devonian) Field Rules are substantially similar to the rules under consideration in all three of these cases, as the rules provide that 640 acres is both the maximum and minimum size for a gas well's proration unit, subject to exceptions allowing for slightly larger units of 704, as well as "fractional" units of a smaller size. We therefore conclude that the D.A. (Devonian) Field Rules did in fact "prescribe" a 640-acre proration unit for a gas well. And in turn, we conclude that when the retained-acreage clause in the Lowe Lease was first triggered in 2003, Tom Brown, as the then-lessee, was entitled to retain the 640 acres surrounding the Colt 1 Well in accordance with the lease's retained-acreage clause. Accordingly, we conclude that the Lowe Lease did not partially terminate in 2003.

Appellants' Issue Two is overruled.

B. Did the Lowe Lease Partially Terminate in 2010?

In Issue Four, Lowe and PPC contend that, even if the Lowe Lease did not partially terminate in 2003, it did partially terminate except as to 160 acres when Thompson reclassified the Colt 1 Well to an oil well in 2010, which admittedly held only a 160-acre proration unit. In making this argument, Lowe and PPC argue that the Lowe Lease contains clear and unequivocal

language evidencing the parties' intent to create a "rolling" retained-acreage clause, which required the lessee to release acreage on a continuing basis in the event of a reduction in the size of an existing well's proration unit. OXY counters that the clause was not rolling in nature, and that it was instead a snapshot provision, which was triggered only once in 2003, when continuous development ceased. DBR, however, concedes that the retained acreage clause was "rolling" in nature, but contends that it was not triggered upon the reclassification of the well. We examine each contention separately.

1. The parties intended for the retained-acreage clause to be rolling in nature

In the absence of any language clearly indicating that the parties intended to require the lessee to continually release acreage based on changes in a well's productivity, we would not find that the retained-acreage clause was rolling in nature. *See Chesapeake*, 445 S.W.3d at 883. However, in the present case, we find such language.

As set forth above, Paragraphs 7(a)(i) and (ii) in the Lowe Lease's retained-acreage clause provide that upon the lessee's failure to continually develop the leased premises, the lease "shall terminate" as to all leased premises except the amount of acreage contained in a prescribed proration unit, which the lease referred to as the "Well Production Unit." These paragraphs clearly refer to only one specific event that would trigger the clause, i.e., the failure to continually develop the leased premises. However, Paragraph 7(a)(iii) of the lease clearly and unequivocally provides that the clause can also be triggered at other times in the future. In particular, after delineating the lessee's rights to retain acreage at the time continuous development ceases, Paragraph 7(a)(iii) provides that: "*Thereafter* operations on or production from (or payments [of a shut-in royalty in lieu of production]) any Well Production Unit will perpetuate this lease *only* as

to that Well Production Unit (emphasis added)." Moreover, the paragraph ends with the following statement: "This lease *shall terminate* as to each Well Production Unit, respectively, sixty (60) days after the date that production from and operations with respect to such Unit cease; unless, within such sixty (60) day period Lessee re-establishes production or commences drilling or workover operations on said Well Production Unit or tenders a shut-in payment in accordance with Paragraph 5 above." This language clearly indicates that the parties intended for the retained-acreage clause to be triggered on more than one occasion, first, when continuous development has ceased, and thereafter, when "production from and operations with respect to [a particular Well Production] Unit cease[.]"

2. The retained acreage clause was triggered in 2010

DBR and OXY contend that, based on the plain language in Paragraph 7(a)(iii), the retained-acreage clause could only be triggered if operations *and* production had completely "ceased" on the well, and they contend that the reclassification of the Colt 1 Well did not cause either production or operations on the well to cease. In particular, they point out that the Colt 1 Well was producing gas or oil at all times, except when Thompson was actively engaged in "operations" on the well while he was reworking it. And they point out that the retained-acreage clause did not specify what type of production was required to maintain the lease and did not specify that a change in the type of production would cause the lease to terminate. In other words, they contend that the retained-acreage clause allowed production of any kind from a well to effectively perpetuate the lease, and that only a complete cessation in production from the well would trigger the clause; therefore, they contend that the Colt 1 Well's reclassification to an oil well was not a triggering event.

Nonetheless, the retained-acreage clause does not allow the lease to be perpetuated by operations on or production from a "well" as used in a generic sense, but expressly provides that such operations and production must be from a previously-established "Well Production Unit," which in turn, the parties all appear to agree is the equivalent of a proration unit. Paragraph 7(a)(ii) of the lease states that the size of a proration unit will be determined, in part, by whether the well is a gas well or an oil well. Thus, when read together, these two provisions demonstrate that the parties intended to link the perpetuation of the lease to the size of a proration unit, and in turn, intended for the lease to partially terminate upon a reduction in the size of a previously-established proration unit upon the cessation of operations or production from that unit. And, in this case, Tom Brown had previously established a proration unit of 640 acres surrounding the Colt 1 Well when it was classified as a gas well. When the Colt 1 Well was reworked and reclassified as an oil well, the lessee was no longer maintaining either operations or production on that particular unit, and the lease was no longer perpetuated as to that unit, as required by Paragraph 7(a)(iii). And since operations and production had ceased on that particular unit, with no attempt by the lessee to commence drilling or workover operations on the unit within the specified 60 day period, the lease terminated as to the previously-designated 640-acre proration unit.

Our sister court's holding in *Parten* is instructive. *Parten*, 829 S.W.2d at 332-33. In *Parten*, the lease's retained-acreage clause provided that after an "allotted area" was established for a well, the lease "shall terminate as to such part or parts of the leased land lying outside the allotted area unless this lease is perpetuated as to such land outside the allotted area by operations conducted thereon or by production[.]" *Id.* at 329 The lessee in that case completed four wells on the property, one of which had initially been producing as a gas well at the end of the primary

term with an allotted 650 acres. *Id.* at 331. However, the well's operator thereafter reclassified the well to an oil well, which was allotted an area of only 161 acres. *Id.*, at 331. The court held that the lease would not be perpetuated merely because production continued on the reclassified well, as the lease clearly indicated that only operations on or production from the *allotted area* perpetuated the lease. *Id.* at 331. Therefore, once the well was reclassified and could no longer hold the original "allotted area," the lease terminated as to the unproductive acreage lying outside that area. *Id.*

Although the Lowe Lease uses different language than the parties did in *Parten*, we believe that language evinces an intent to create a rolling retained-acreage clause that required the lessee to continually release acreage upon the reduction in a well's proration unit. Accordingly, when the Colt 1 Well was reclassified to an oil well in 2010, it held only a 160-acre proration unit and the Lowe Lease partially terminated as to the remaining 480 acres.

Appellants' Issue Four is sustained.

VII. THE COLT LEASE

A. Did the Colt Lease Terminate in 2003?

In Issue Three, Appellant Colt argues that the Colt Lease automatically terminated in 2003, except as to the 160 acres surrounding the Colt 1 Well, because of the lessee's alleged failure to timely designate a larger proration unit for the well, or because the field rules did not establish a larger proration unit for a gas well. We disagree.

1. The relevant provisions in the Colt Lease

The Colt Lease's habendum clause provided for a primary term of three years, and a secondary term for "as long thereafter as oil and/or gas is produced from said land hereunder."

The Colt Lease's retained-acreage clause, found in Paragraph 10 of the lease, modifies the habendum clause as follows:

> 10. Subject to the provisions of Article 4 hereto, Lessee shall, within thirty (30) days of the earlier of (i) the expiration of the primary term hereunder or (ii) expiration, termination or forfeiture of all Lessee's rights hereunder, designate and be entitled to retain only the following acreage, if any, around each well located on lands covered by this lease or on lands unitized therewith by action of governmental authority and producing, drilling or being reworked in accordance with the provisions hereof.
>
> (a) If drilling or producing units have not been established for the field in which such acreage is located by order of any State or Governmental authority, Lessee shall have the right to designate and retain forty (40) acres of land around each oil well producing, being worked on, or drilling for oil hereunder and one hundred sixty (160) acres around each gas well producing, being worked on, or drilling for gas, each such forty (40) acre or one hundred sixty (160) acre tract . . . .
>
> (b) If drilling or producing units have been established by order of any State or Governmental authority, Lessee shall be entitled to retain around each well so much of the leased premises as is included under such order in the unit on which such well is located.
>
> In the event Lessee shall cease to conduct continuous operations on the leased premises as provided in Paragraph 4, the rights of Lessee hereunder shall ipso facto terminate and be forfeited without notice, demand or putting in default, except as to those portions of the leased premises which Lessee may be permitted to retain under 10(a) and 10(b) above.

In turn, Paragraph 4 of the lease, the continuous drilling operations clause, provides that:

> 4. Lessee may maintain its rights after the primary term (whether or not Lessee obtains or has obtained the production of oil or gas in paying quantities) only by conducting continuous drilling operations on the leased premises in the sense that not more than one hundred twenty (120) days shall elapse between the completion or abandonment of one (1) well and the commencement of operations for the drilling of another well.

2. The designation requirement was a covenant rather than a special limitation

The first portion of the retained-acreage clause provides that within 30 days after the expiration of the primary term or the termination of the lessee's rights in the lease, whichever is earlier, the lessee shall "designate and be entitled to retain" the specified amount of acreage in either Paragraph 10(a) or 10(b). This provision, which we refer to as the "designation provision," required the lessee to make a designation within 30 days after the primary term ended. However, we disagree with Colt's contention that the designation provision created a special limitation on the lease that would cause the lease to terminate, whether partially or in full, if the lessee failed to make a timely designation. As the Colt Lease does not expressly state that a failure to designate a "drilling or producing unit" would automatically terminate the lease, we conclude that it was a covenant for which Colt could sue the lessee for damages and/or for specific performance, but was not a special limitation that would automatically terminate the lease. *See, e.g. Endeavor*, 554 S.W.3d at 606; *Parten*, 829 S.W.2d at 330-31.

Colt was thus limited to suing on the breach of the condition, and it indeed brought claims for breach of contract and specific performance in its counterclaim. But Colt failed to address these two claims in its motion for summary judgment and its response to DBR and OXY's motions. Instead, it focused solely on whether the lease partially terminated in either 2003 or 2010. Moreover, despite the fact that the trial court's final judgment dismissed all of Colt's claims, Colt does not contend on appeal that the trial court erred by dismissing its claims for breach of contract or specific performance. Accordingly, Colt has waived its right to challenge the trial court's dismissal of its claims for both breach of contract and specific performance. *See* TEX.R.APP.P. 38.1(f) (Appellant's brief must state concisely all issues or points presented for review); *see also*

Curnutt v. Conocophillips Co., 508 S.W.3d 641, 644 (Tex.App.--El Paso 2016, no pet.) (in a civil case, appellate court has no discretion to consider an issue not raised in the appellant's brief, even if the ends of justice so require).

We conclude that any failure on Tom Brown's part in not timely designating a drilling unit or producing unit for the Colt 1 Well did not cause the Colt Lease to terminate in whole or in part, and at most constituted a breach of contract which, as explained above, is an issue that is not before us in this appeal.

3. Brown retained 640 acres at the cessation of continuous operations

Although the "designation provision" in the Colt Lease is not a special limitation, the lease contains a second provision which can be categorized as a special limitation. This additional provision, found at the end of Paragraph 10, expressly states that when the lessee ceases to conduct continuous operations on the leased premises, as provided in Paragraph 4, the lease "shall ipso facto terminate . . . except as to those portions of the leased premises which Lessee may be permitted to retain under 10(a) and 10(b) above." This provision (the "allotment provision") is the type of clear and precise language that is the hallmark of a special limitation. Our last question is whether and how it applies to DBR and OXY's interest in the lease.

By its terms, the provision was triggered when the lessee ceased continuous operations on the leased premises, as provided in Paragraph 4 of the lease. And in turn, Paragraph 4 allowed a lessee to maintain its rights after the expiration of the lease's primary term "only by conducting continuous drilling operations on the leased premises," allowing for a 120 day lapse in operations between the completion of one well and the commencement of drilling operations on another well. Tom Brown completed the Colt 1 Well on June 1, 2003, and he therefore had 120 days thereafter

(until September 29, 2003), to commence drilling another well before continuous operations ceased. Because Brown failed to commence drilling another well within the required timeframe, continuous operations ceased at that time, thereby making September 29, 2003 the trigger date for this provision in the retained-acreage clause.

Having set the trigger date, our second task is to determine how much acreage the lessee was entitled to retain on that date, which turns on whether Tom Brown was "permitted to retain" the amount of acreage described in Paragraph 10(a), i.e., 160 acres surrounding the Colt 1 Well, or 10(b), i.e., the amount of acreage included in a "production unit" (which Colt concedes is the equivalent of a "proration unit") for a gas well as established by the Railroad Commission's field rules, if any were established at that time.[12] Colt argues that we should apply Paragraph 10(a) in determining the amount of acreage Brown retained, contending that the Railroad Commission did not establish either "drilling or producing units" in the D.A. (Devonian) Field, thereby making Paragraph 10(b) inapplicable. While Colt correctly points out that the field rules did not prescribe or otherwise establish a "drilling unit" in the field, we have already concluded that the field rules did prescribe a proration unit of 640 acres for a gas well.

Colt, however, contends that even if the D.A. (Devonian) Field Rules established a 640-acre proration unit for a gas well, the Colt 1 Well was not initially permitted in that field, and was instead permitted as a "wildcat" well that was not assigned to any particular field. Colt therefore contends that the well was therefore not initially located in the D.A. (Devonian) Field or subject

[12] Both subparagraphs in the Colt Lease's retained acreage clause refer to "producing units," but provide no definition of either term. Nevertheless, Colt consistently treats the term "producing unit" as being the equivalent of a "proration unit," and we do as well, as the parties have not offered, nor have we found, any other definition for the term.

to its rules until Tom Brown filed his Form P-15 on September 15, 2003, claiming to have completed the well in that field. This argument does not aid Colt for two reasons. First, as set out in Brown's 2003 regulatory filings, he finished drilling the Colt 1 Well on January 4, 2003 when he reached a depth of 15,811 feet in the D.A. (Devonian) Field, and the well itself was completed as a gas well in that field on June 1, 2003, as documented by Brown's regulatory filings with the Railroad Commission. Moreover, as Colt recognizes, Brown filed his Form P-15 with the Railroad Commission on September 15, 2003, expressly stating that the Colt 1 Well was located in the D.A. (Devonian) Field, and that he was claiming a 640-acre proration unit for the well. As such, those field rules applied to the Colt 1 Well at the time the retained-acreage clause was triggered on September 29, 2003.

We therefore conclude that Tom Brown was "permitted to retain" the amount of acreage established by the D.A. (Devonian) Field Rules in accordance with Paragraph 10(b) of the lease. And in turn, since the field rules established a 640-acre proration unit for a gas well, Brown was entitled to retain all 640 acres surrounding the Colt 1 Well at the time the allotment provision in the retained-acreage clause was triggered on September 29, 2003. Accordingly, we conclude that the Colt Lease did not terminate, or partially terminate, in 2003.

Appellants' Issue Three is overruled.

B. Did the Colt Lease Terminate in 2010?

In Issue Six, Colt alternatively contends that the Colt Lease partially terminated in 2010, except as to 160 acres surrounding the Colt 1 Well, after the well was reclassified as an oil well. Colt contends that we should interpret the retained-acreage clause to "operate on a rolling basis," as the clause only allows a lessee to retain the amount of acreage contained in a well's proration

unit, which can change over time, i.e., by changes in the Commission's field rules or by changes in a well's classification. Colt therefore argues that the parties intended for the retained-acreage clause to be "tied to changing proration units," thereby requiring the lessee to release acreage on a continuing basis any time a well's proration unit is reduced, such as, in the case of the Colt 1 Well, by a reclassification of the well from a gas well to an oil well holding a smaller proration unit.

As DBR and OXY point out, however, the Colt Lease's retained acreage clause only addresses two distinct times at which the clause would be triggered, first, at the end of the primary term, and second, at the cessation of continuous drilling operations on the premises. Thus, while it is true that the amount of acreage the lessee may retain at those two times is determined, at least in part, by the size of a well's proration unit, there is no clear or express language in the lease indicating that the parties intended for the lessee to relinquish acreage at any other time, such as when a reduction in a proration unit occurs.

Colt, however, advocates that no such express language is needed to create a rolling retained-acreage clause, and that we can infer the parties' intent to create such a clause from other, more general, provisions in the Colt Lease. In particular, Colt points out that the lease in general reflects the lessors' intent to maximize production on the lease, and to ensure that the lessee continually developed the property. And, as Colt points out, this was in fact the approach arguably taken by our sister court almost sixty years ago in *Hunt Oil Co. v. Dishman*, 352 S.W.2d 760, 764 (Tex.App.--Beaumont 1961, writ ref'd n.r.e.) (holding that when viewed holistically, the lease and a related settlement agreement released any acreage not assigned to a proration unit upon the reclassification of the well). But the *Dishman* opinion was issued without consideration of the Texas Supreme Court's recent guidance on the subject of special limitations, warning that a

court should not find that a lease contains a special limitation requiring automatic termination of a lease, "unless the language is so clear, precise, and unequivocal that we can reasonably give it no other meaning." *Endeavor*, 554 S.W.3d at 606. And it further contradicts this Court's recent holdings in *Chesapeake* and *Apache*, as set forth above, in which we refused to find that a retained-acreage clause was "rolling" in nature in the absence of "clear, precise and unequivocal" language evidencing the parties' intent to do so. *Chesapeake*, 445 S.W.3d at 883; *Apache*, 557 S.W.3d at 652. There is no clear language in the Colt Lease evidencing the parties' intent to create a rolling retained-acreage clause. Accordingly, we conclude that the Colt Lease did not partially terminate in 2010 when the Colt 1 Well was reclassified to an oil well.

Appellants' Issue Six is overruled.

VIII. CONCLUSION

We conclude that the Northern Trust Lease and the Colt Lease did not terminate, or partially terminate, in either 2003 or 2010. We further conclude that although the Lowe Lease did not terminate in 2003, it partially terminated in 2010, except as to the 160 acres surrounding the reclassified Colt 1 Well, thereby allowing Lowe and PPC to claim their respective interests in the remaining 480 acres. We therefore affirm the trial court's judgment in part and reverse in part and enter a judgment quieting title in the three leases in the manner reflected in our opinion.

JEFF ALLEY, Justice

February 19, 2021

Before Rodriguez, C.J., Palafox, and Alley, JJ.