SALTY STANDING: AN ANALYSIS OF STANDING AS IT RELATES TO ASSIGNEES OF OIL AND GAS INTERESTS

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I. INTRODUCTION

A recent series of cases out of Texas and New Mexico will rub salt in the wound of the oil and gas industry by easing the ability of subsequent landowners/lessors to have standing to bring a cause of action for environmental damages.2 Most of the early cases in Texas, New Mexico, and Louisiana favor industry, stating that only the owner at the time of the injury has standing to sue for property damages, regardless of whether the damages are permanent or temporary.3 But a 2006 New Mexico Court of Appeals decision opens the floodgates for subsequent landowners to have standing by applying concepts of the discovery rule

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and statutes of limitation. Additionally, a 2005 Texas Court of Appeals case allows subsequent owners to sue for temporary damage if the damage occurred while they owned the land. Texas is leading the way in developing case law on the subject. But New Mexico and Louisiana seem soon to follow.

In synthesizing this area of law, Part II discusses the permanent and temporary damage distinction, which has become exceedingly important in relation to the standing issue. Part III considers Texas’s more developed case law. Part IV provides a look into New Mexico’s less developed case law, and Part V continues the discussion for Louisiana. Lastly, Part VI concludes that the courts in Texas, New Mexico, Louisiana, and other oil and gas states should allow standing room only for property owners who owned the property when the injury occurred.

II. THE PERMANENT & TEMPORARY DAMAGE DISTINCTION

The type of compensation awarded in a suit on real property depends on the nature of the injury. The purpose of an award of property damage is to compensate the landowner for the injury. Therefore, the way in which the property is damaged will determine both the value of the property and the damage sustained. The question is whether the injury is permanent or temporary—permanent/temporary injury gives rise to permanent/temporary damages. The distinction between permanent and temporary damages is becoming the most significant inquiry for parties bringing suit for property damage. As discussed in further detail in Part III.D.3, the distinction may be the reason a landowner may or may not be compensated at all.

The measure of damages for permanent injury is “the difference in the value of the property before and after the injury,” or in other words, “the decreased value of the land.” The measure of damages for temporary injury is “the cost of restoring the land to its former condition

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6. See discussion infra Part V.
7. See discussion infra Parts III-IV.
8. See discussion infra Part II.
9. See discussion infra Part III.
10. See discussion infra Part IV.
11. See discussion infra Part V.
12. See discussion infra Part VI.
14. 28 TEX. JUR. 3D Damages § 107 (Supp. 2006).
15. Id.
16. DORSANEKO, supra note 13, ¶1.
17. See discussion infra Part V.
18. DORSANEKO, supra note 13, ¶1.
19. 56 TEX. JUR. 3D Oil and Gas § 482 (2004).
and the value of its use during the period of injury.”

Thus, temporary damages are normally the cost of the repairs. Clearly, the distinction affects the amount and possibility of recovery.

“Permanent” and “temporary” are mutually exclusive—meaning damages for both may not be obtained in the same cause of action. Therefore, a practitioner should be careful to allege both theories in the alternative. In Texas, failure to recognize this distinction has led to unnecessary results, which would have otherwise produced a favorable outcome. For instance, in *Lone Star Development Corporation v. Reilly*, the jury question limited the recovery of damages to pretrial damages, which was inappropriate because that is a consideration only for temporary damages and not for permanent damages. That court of appeals recommended that the reasonable cost of repairs necessary to restore the property to its prior condition plus damages for loss of use is proper only for temporary injury, not permanent injury.

The damage distinction is also important in determining whether a statute of limitations bars recovery. In most states, the statute of limitations period begins to run at the time a person’s property rights are invaded—at the time of the wrongful act. However, when the initial act is lawful, the cause of action will not accrue until injury results. In Texas, for both permanent and temporary damages, the action is governed by a two-year statute of limitations. In Texas, a permanent damage action may be brought within “two years from discovery of the first actionable injury, even though the extent of the damages may not be fully ascertainable at that time.” When the damage is temporary in nature, the party may recover damages “for two years prior to filing suit.”

Conversely, Texas’s bordering state New Mexico does not make any distinction between the type of injury for statute of limitations purposes. For any action for damages related to real property, it is governed by a

20. Id.
22. DORSANEO, supra note 13, ¶ 2 (citing Kraft v. Langford, 565 S.W.2d 223, 227 (Tex. 1978)).
23. DORSANEO, supra note 13, ¶ 1.
24. DORSANEO, supra note 13, ¶ 3; see Lone Star Dev. Corp. v. Reilly, 656 S.W.2d 521, 526 (Tex. App.—Dallas 1983, ref’d n.r.e.).
25. *Lone Star Dev.*, 656 S.W.2d at 526.
26. Id.
27. DORSANEO, supra note 13, ¶ 4.
28. Id.
29. Id.
30. T EX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon 2002); see also DORSANEO, supra note 13, ¶ 4 (explaining the importance of the nature of damages in relation to applicable statutes of limitation).
31. DORSANEO, supra note 13, ¶ 4.
32. Id.
four-year statute of limitations. A cause of action for damages to real property in New Mexico is not deemed to have accrued until it “shall have been discovered by the party aggrieved.” As discussed in Part IV.C, New Mexico has recently relied upon its discovery rule to determine that a damage distinction is irrelevant and that a subsequent landowner has standing.

Determining the type of damage is sometimes complex. The difference in Texas is mostly characterized in reference to the continuum of the injury. As such, injuries that are constant, continuous, and lasting indefinitely are permanent. Temporary injury, however, is more sporadic and results from an irregular force. Rain is a great example of an irregular force that often brings injury, such as toxic run-off. Additionally, a temporary injury is “capable of being avoided in the future without permanent damage to the land.” Thus, a measure often utilized to remedy temporary injury is a court-ordered injunction. Temporary injury is essentially a series of injuries occurring over a period of time. If there is evidence that the injured property could be restored to its original condition, it is probably temporary. On the other hand, damage is permanent when it is not perpetual in nature and may be compensated only by the value of the property. Permanent injury can never be remedied by injunctive relief.

Texas courts seem to focus on the reoccurring nature of the injury in determining the damage distinction. New Mexico, however, appears to focus more on whether the injury can be repaired. In New Mexico, permanent damages are measured by “the difference between the fair market value of the land prior to the injury and the fair market value of the land after the extent of the injury has been determined.” Temporary damages in New Mexico result when the property can be repaired;

33. N.M. STAT. § 37-1-4 (1953).
34. N.M. STAT. § 37-1-7 (1953).
35. See discussion infra Part IV.C.
36. DORSANEO, supra note 13, ¶ 5.
37. 28 TEX. JUR. 3D Damages § 107 (Supp. 2006); DORSANEO, supra note 13, ¶ 5.
38. 28 TEX. JUR. 3D Damages § 107 (Supp. 2006); DORSANEO, supra note 13, ¶ 5 (citing Bayouth v. Lion Oil Co., 671 S.W.2d 867, 868 (Tex. 1984)).
39. See Cook, 145 S.W.3d at 784.
40. 28 TEX. JUR. 3D Damages § 108 (Supp. 2006).
41. See Cook, 145 S.W.3d at 784.
42. See id.
43. DORSANEO, supra note 13, ¶ 5.
44. 28 TEX. JUR. 3D Damages § 109 (Supp. 2006).
45. DORSANEO, supra note 13, ¶ 6.
46. See supra notes 36-47 and accompanying text.
48. Id.
therefore, the damages are “the cost of repair or restoration if the cost of restoration does not exceed the value of the property.”

The importance of this distinction is highlighted in various oil and gas cases when a subsequent landowner tries to sue an oil and gas lessee for environmental damages. If the damage is reoccurring and repairable, the damages are temporary. If the owner did not own the land at the time of the injury, he may, in some courts, still having standing if the damage is temporary. But if the damages are permanent, as will be discussed further below, the subsequent owner is going to have a difficult time proving standing in Texas. Most oil and gas states have not developed this issue. But New Mexico and Louisiana are on the verge of developing litigation. First, this article discusses the developed Texas law, which will shed light on the pros and cons of the development of the law in New Mexico and Louisiana. Then the article focuses on the laws in New Mexico and Louisiana—their history and their future and how other oil and gas states are likely to follow.

III. TEXAS

A. Early Texas Cases

Texas has a long history of case law dealing with a subsequent purchaser’s standing to sue. Beginning as early as 1936, the Commission of Appeals of Texas considered this issue in a nuisance action. In that case, Vann and his wife sued Bowie for damages in the form of personal injuries based on nuisance allegedly caused by Bowie. In 1925, Vann bought 100 acres of land near the city of Bowie. A drainway/creek crossed the land. Upstream and across the road was a tract of land belonging to the sewerage company. On the banks of the creek next to Bowie Sewerage Co., stood a septic tank constructed in 1916. The sewage from the city flowed into the septic tank, which, after some settling in the tank, flowed into the creek, which flowed onto the Vann’s property. Prior to purchasing the land, Vann inspected the creek, finding no pollution or offensive odors.

49. Id.
50. See Denman II, 2005 WL 2316177, at *1.
51. See infra notes 52-218 and accompanying text.
52. Vann v. Bowie Sewerage Co., 127 Tex. 97, 90 S.W.2d 561 (1936, no writ).
53. Id. at 98, 90 S.W.2d at 561.
54. Id.
55. Id.
56. Id., 90 S.W.2d at 561-62.
57. Id. at 99, 90 S.W.2d at 562.
58. Id.
59. Id.
purchase, Vann discovered pollution and noxious odors. Vann complained to the company, which later tried to remedy the problem by digging some pits on the land to catch the polluted water. But when the pits overflowed, the polluted water again drained onto Vann’s land. Bowie’s witnesses testified in court that the condition of the sewer had been the same since the installation of the tank in 1916. Experts for Vann testified that the septic tank was “inherently inefficient to purify sewer water flowing into it.” Based on these facts, the jury awarded the Vanns damages, but Bowie appealed. The court of appeals reversed in favor of Bowie, and the Vanns appealed that decision.

When considering these issues, the court immediately cited to older cases that stood for the proposition that

[where injury to land results from a thing that the law regards as a permanent nuisance, the right of action for all damages resulting from the injury accrues to the owner of the land at the time the thing that causes the injury commences to affect the land. In legal contemplation, the injury to the land occurs at that time.]

The court determined that the thing that caused the injury, the pollution, had been discharged by the tank since 1916, which led to the conclusion that the nuisance had already injured Vann’s land before he purchased it. Vann’s deed did not include an assignment of claims; therefore, the Vanns could not recover for damages to the land, but could for personal injuries. This court’s approach to property damage continued through the case of Lay v. Aetna Insurance Co.

Lay amounted to an insurance indemnity suit. J. & J. Oil Venture employed appellant Lay to find a location for and to oversee the drilling of a well on a lease in Caldwell County. The well produced, but because of Lay’s negligence in reading the surveying stakes, the well had been drilled on an adjoining tract not leased by J. & J. J. & J. reached a settlement agreement with the adjoining landowner, but J. & J. sued Lay

60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
65. Id. at 98, 90 S.W.2d at 561.
66. Id.
67. Id. at 100, 90 S.W.2d at 562.
68. Id., 90 S.W.2d at 563.
69. Id.
71. Id. at 685.
72. Id.
73. Id.
to recoup its losses.\textsuperscript{74} Appellant was insured by appellee Aetna Insurance Co., whom he compelled to defend him in the suit under a general liability insurance policy.\textsuperscript{75} Aetna refused coverage based on its interpretation of the term “property damage” as defined in the policy, saying it did not cover incidents such as this.\textsuperscript{76} Lay then hired his own counsel, seeking indemnification from the Aetna.\textsuperscript{77} The trial court entered judgment for Aetna, and Lay appealed.\textsuperscript{78}

The court considered when a right of action accrues, determining that it accrues when injury occurs.\textsuperscript{79} The court opined that this right is a personal right that belongs to the property owner at the time of the injury, and that without an express assignment of claims, the right does not pass to a subsequent purchaser.\textsuperscript{80} Therefore, “a mere subsequent purchaser cannot recover for an injury committed before his purchase.”\textsuperscript{81} In application, J. & J. sought damages for “injury to property to which it had no claim when the injury occurred.”\textsuperscript{82} This right of action did not pass to J. & J. when it acquired the mineral estate.\textsuperscript{83} The \textit{Lay} case was not the only early case that considered standing as applied to owners of mineral interest.\textsuperscript{84}

The Supreme Court of Texas took up the issue in \textit{Bayouth v. Lion Oil Co.}.\textsuperscript{85} Like the New Mexico \textit{McNeill v. Rice Engineering} case, \textit{Bayouth} also regarded damages from saltwater migration.\textsuperscript{86} Applying the same rule as in \textit{Lay}, the court fashioned that the real issue in the case regarded whether the saltwater injuries were temporary or permanent.\textsuperscript{87} The plaintiffs alleged that in 1970 and 1971 they observed moisture and saltwater crystals on their land, which they alleged caused permanent damage to their properties.\textsuperscript{88} But they did not file suit until 1976, four years after the applicable statute of limitations.\textsuperscript{89} The oil companies won on summary judgment, and the court of appeals “held as a matter of law
the damages to the land were permanent and barred by the two year statute of limitations."\(^{90}\)

The Texas Supreme Court explained that permanent damages accrued “upon discovery of the first actionable injury and not on the date when the extent of the damages to the land are fully ascertainable[,]” requiring that the action be brought within two years of discovery.\(^{91}\) Ultimately, the Supreme Court reversed both the trial court and the court of appeals, remanding to the trial court finding that there was a fact issue as to whether the damages were permanent in nature.\(^{92}\) This was the first case to recognize the significance in the distinction between permanent and temporary property damage—to whether a subsequent purchaser has standing to sue and valuation of the amount of damages.

As all of these early Texas cases point out, from the beginning Texas' standing analysis has been based on several important factors:

1. Standing is a subject matter jurisdiction question;
2. Any claim for damage to real property is a personal property right which belongs to the owner of the land at the time the damage occurs;
3. A claim for injury to real property accrues when the injury is committed;
4. Any subsequent landowner lacks standing to sue for the damage unless that landowner obtained an express assignment of the cause of action from the seller/original landowner; and
5. The distinction between permanent and temporary damage may be important in determining the nature of recovery and standing.\(^{93}\)

The first four factors are considered by a Texas court almost twenty years later in the Eastland Court of Appeals’ 2001 decision in Senn v. Texaco, Inc., where subsequent purchasers of land lacked standing to sue oil companies.\(^{94}\) The fifth factor is completely ignored by the Texas courts of appeals for five more years.\(^{95}\)

**B. Senn v. Texaco, Inc.—Eastland Court of Appeals**

In Senn, the Senns sued Texaco and other oil companies alleging surface damages from oil and gas drilling operations to their ranch located in three counties.\(^{96}\) They alleged the defendants’ oil and gas

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\(^{90}\) Id.

\(^{91}\) Id.

\(^{92}\) Id.

\(^{93}\) See infra notes 194-209 and accompanying text.

\(^{94}\) Senn, 55 S.W.3d 222.

\(^{95}\) See Denman II, 2005 WL 2316177 at *1.

\(^{96}\) Senn, 55 S.W. 3d 222.
operations contaminated the aquifer beneath their land. The trial court granted summary judgment in favor of Texaco, stating that the Senns did not have standing to bring suit. The Senns appealed. The Senns argued that because they discovered the injury, they should have the right to sue for damages based on that injury.

In considering the issue, the court cited to the Vann and Lay cases, repeating that the right of action for damages to property is in the property owner at the time the injury commences. The court further noted that “the right to sue for injury to the land is not a right that runs with the land,” it is a personal property right. The court relied on the principles of standing, a component of subject matter jurisdiction, which arises when a person has injury-in-fact to his interests, not “merely as a member of the general public.” Furthermore, the court stated that if a plaintiff has no legal right breached, the plaintiff has no standing.

In combating the Senn’s discovery argument and affirming the trial court’s grant of summary judgment, the court opined that the discovery of an injury does not act to transfer a right of action from the original owner to the subsequent purchaser. The court did not allow the Senns to profit from the discovery rule. Applying the Vann and Lay rules simply, the Senns did not have standing. Although this holding may appear harsh, the court stated that the Senns could have bargained and contracted for an assignment of the prior owner’s causes of action for injuries that occurred before the Senns’ purchase. The Senns also could have inspected the land more carefully. Additionally, in considering whether the injuries were permanent or temporary, the court said the distinction was meaningless to the issue of standing. Temporary or permanent, the injuries occurred before the Senns’ purchase.

The Senn case is a great example of why lessors/landowners should insert simple boilerplate assignment-of-claims clauses in their leases in order to avoid

97. Id. at 224.
98. Id.
99. Id.
100. Id.
101. Id. at 225.
102. Id.; see also 6 JOHN S. LOWE, WEST’S TEXAS FORMS: MINERALS, OIL & GAS § 3.52 (2005) (explaining the court’s reasoning in Senn).
103. Senn, 55 S.W.3d at 226.
104. Id.
105. Id.
106. Id.; 6 JOHN S. LOWE, supra note 102.
107. Senn, 55 S.W.3d at 226.
108. Id.
109. Id.
110. Id.
111. Id.
this very problem. The Tyler Court of Appeals applied the Eastland court’s reasoning in Exxon Corporation v. Pluff.

C. Tyler Court of Appeals

1. Exxon Corporation v. Pluff

Exxon Corp. v. Pluff involved a property owner who sued Exxon for property damage caused by oilfield materials being left on the property. In 1930, Pluff’s predecessor-in-interest executed an oil and gas mineral lease with Exxon (formally known as Humble Oil & Refining Company) covering 331 acres of land. Exxon subsequently drilled four oil wells on the lease. At that time, because portable drilling equipment was not yet available, Exxon used a permanent standard rig called a derrick, which was grounded using four concrete-corner structures. Exxon also utilized various other drilling equipment on the property. After about fifty years of production, in 1984 the oil wells ceased producing. At that time, Exxon removed all of the oil and gas structures except for the concrete structures, pipes, and a few other materials. In 1984, Exxon assigned some of its deep rights in the lease to Gene Powell Investments. Later in 1991, Exxon assigned its rights from the surface to the Woodbine formation to Maxwell Oil and Gas Corporation. It follows that after the Maxwell assignment, Exxon no longer owned any interest in the abandoned wells, the formation, or any personal property previously used in the production. Thereafter, in 1992, Pluff purchased the surface estate but not the mineral estate. When he purchased the property, abandoned oilfield materials were still on the property. Pluff ultimately determined that the materials prevented him from fully utilizing his property and decided to remove them. He sued the current operator of the lease, Relico Oil & Gas, as

112. See id.; 6 JOHN S. LOWE, supra note 102.
113. See infra Part V.C.1.
115. Id.
116. Id.
117. Id. at 25; at trial, the witnesses agreed that given the technology at the time, it was reasonable for Exxon to use permanent structures. Id. at 25 n.1.
118. Id. at 25.
119. Id.
120. Id.
121. Id.
122. Id.
123. Id.
124. Id. at 22.
125. Id.
126. Id.
well as other defendants, including Exxon, alleging unreasonable use of the surface estate.\textsuperscript{127}

At trial, with Exxon remaining as one of the defendants, one of Pluff’s experts testified that due to saltwater damage, erosion, and the type of materials, it would require about $36,000 to restore the property.\textsuperscript{128} The trial court found that Exxon had a duty to remove the materials and clean up the area after its use.\textsuperscript{129} The jury awarded Pluff $30,000 in damages.\textsuperscript{130} Exxon appealed.\textsuperscript{131} Exxon argued on appeal that Pluff did not have standing to sue Exxon for injury to the property.\textsuperscript{132}

The court stated the well-settled law that the person whose legal right has been breached has the right to bring a cause of action.\textsuperscript{133} Generally a cause of action accrues to a property owner when the injury occurs on the property.\textsuperscript{134} Citing Lay v. Aetna Ins. Co., the court reiterated that “the right to sue is a personal right that belongs to the person who owns the property at the time of the injury.”\textsuperscript{135} Without an express provision in the transferring instrument, the right does not pass to a subsequent purchaser.\textsuperscript{136} The court found that if a continuing condition exists, and no new injury has occurred on the property since the purchase, the purchaser will not have standing.\textsuperscript{137} In relying on the above rules and the Eastland Court of Appeals’ Senn v. Texaco decision, the Tyler Court of Appeals determined that Pluff did not have standing because the injury to the property occurred prior to his purchase and because there was no assignment of any cause of action in the deed.\textsuperscript{138} The Tyler Court affirmed their same position in 2003 in its decision in Exxon Corp. v. Tyra.\textsuperscript{139}

2. Exxon Corporation v. Tyra

Tyra also concerned a landowner suing for damages to his property arising from oil and gas operations.\textsuperscript{140} In 1930, the land in issue in the case was subject to an oil and gas lease with Humble Oil Company, which

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id. at 26.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Id. at 26-27 (citing Nobles v. Marcus, 533 S.W.2d 923, 927 (Tex. 1976) and Nootsie Ltd. v. Williamson County Appraisal Dist., 925 S.W.2d 659, 661 (Tex. 1996)).
\item \textsuperscript{134} Id. at 27.
\item \textsuperscript{135} Id. (citing Abbott v. City of Princeton, 721 S.W.2d 872, 875 (Tex. App. – Dallas 1986, writ ref’d n.r.e.); Lay, 599 S.W.2d at 685).
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Id. at 28.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Exxon Corp. v. Tyra, 127 S.W.3d 12, 14 (Tex. App.—Tyler 2003, pet. denied).
\item \textsuperscript{140} See id. at 13-14.
\end{enumerate}
\end{footnotesize}
was later assigned to Exxon. Tyra purchased the property in 1973. After Exxon’s operations ceased, it left wells, concrete slabs, unit foundations, and derrick corners on the property. It also left pits that contained oil, water, and salt water, which allegedly contributed to Tyra’s surface damages. Tyra sued Exxon in 1994 citing these and other various damages, complaining that Exxon had failed to properly and reasonably clean up the property, causing nuisance and trespass and failing to adhere to the reasonable prudent operator standard. The jury found that “Exxon created a nuisance, the damage was a temporary injury, and that Tyra knew of the injury at the time he bought the land. It awarded Tyra $30,000 in damages.” Exxon appealed, arguing that Tyra did not have standing to sue.

Relying on Pluff and other previously stated cases, the court considered the following evidence: (1) the 1930 lease terminated before Tyra purchased the property; (2) before Tyra purchased the property, Exxon had plugged and abandoned the wells and equipment on the land, and therefore all of it became property of the surface owner; (3) all injury to the property occurred prior to Tyra’s purchase; and (4) the previous owner did not assign any rights to causes of action to Tyra. Therefore, based on these factors, the court held that Tyra did not have standing to bring a tortious cause of action against Exxon. The same day the Tyler court decided Tyra, the same justice issued a very similar opinion in OXY USA, Inc. v. Cook.

3. OXY USA, Inc. v. Cook

The OXY case regarded virtually the same set of facts as Tyra. Like the oil company in Tyra, OXY appealed a jury verdict in favor of Cook based on the issue of Cook’s standing to sue as a subsequent purchaser. Because Cook could not overcome his standing problem based on the rules outlined in the Tyra case, the court limited his recovery to contract claims. The court also noted that even though the lease gave the lessee the option to remove its own equipment from the property, it was not

141. Id. at 13.
142. Id.
143. Id. at 13-14.
144. Id. at 14.
145. Id.
146. Id.
147. Id. at 13.
148. Id. at 14-15.
149. Id. at 15.
150. OXY USA, Inc. v. Cook, 127 S.W.3d 16 (Tex. App.—Tyler 2003, pet. denied).
151. Id. at 18.
152. Id.
153. Id. at 19.
required to do so.\textsuperscript{154} This case illustrates why, although the standing rule may protect previous owners from tort claims by subsequent purchasers, subsequent purchasers may still sue based on contract claims.\textsuperscript{155} Later, in 2003, the Texarkana Court of Appeals decided to get in on the action with its \textit{Denman I} decision.\textsuperscript{156}

\textbf{D. Texarkana Court of Appeals}

The Texarkana Court of Appeals followed the reasoning of the Tyler Court of Appeals in considering a subsequent purchaser’s standing to sue in most of the following decisions. However, in 2005, this court of appeals decided to take a different approach in allowing subsequent owners of land standing to sue for temporary damages.\textsuperscript{157} But to appreciate this development, a discussion of the originating case law is helpful, starting with \textit{Denman I}.

\textbf{1. Denman I}

In \textit{Denman v. Citgo Pipeline Co. (Denman I)}, the Denmans purchased property that was subject to a 1932 oil or gas pipeline easement owned by Citgo.\textsuperscript{158} Around February 1999, the Denmans allege they discovered soil contamination, “became aware of concrete pillars, deadmans, and asbestos-covered pipelines on their land.”\textsuperscript{159} The Denmans sued Citgo and several other defendants, alleging nuisance, trespass, negligence, and unjust enrichment.\textsuperscript{160} Citgo moved for summary judgment, arguing that the Denmans lacked standing to sue, and the court granted it.\textsuperscript{161} Citgo established that it had not done any operations on the Denmans’ property since before the Denmans purchased the property.\textsuperscript{162} The Denmans filed a motion for reconsideration contending that Citgo had recently done operations on the property by introducing photographs that depicted a Citgo sign warning of the pipeline.\textsuperscript{163} But the trial court denied the Denman’s motion and granted Citgo’s motion for severance.\textsuperscript{164} The Denmans appealed.\textsuperscript{165}

\begin{itemize}
\item \textsuperscript{154} \textit{Id.} at 21; 6 JOHN S. LOWE, \textit{supra} note 102.
\item \textsuperscript{155} \textit{See} OXY USA, 127 S.W.3d at 21.
\item \textsuperscript{156} \textit{See infra} Part III.D.1.
\item \textsuperscript{157} \textit{See Denman II}, 2005 WL 2316177 at *1.
\item \textsuperscript{158} \textit{Denman I}, 123 S.W.3d at 730.
\item \textsuperscript{159} \textit{Id.} at 731. (A “deadman” refers to “a timber or concrete block buried in the ground to which guy or stay wires are attached to secure derricks.”) \textit{Id.} at 731 n.2.
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.}
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} \textit{Id.} at 730.
\end{itemize}
In considering the standing issue, the court of appeals quoted case law stating that “a right of action ‘depends on the existence of what is termed a cause of action, which involves the combination of a right on the part of the plaintiff and a violation of such right by defendant.’”166 Citing the previously mentioned Bayouth case,167 the court affirmed that a cause of action for damages to real property accrues when the injury occurs.168 Moreover, without an express assignment of a cause of action in the transferring instrument, the right does not pass to a subsequent purchaser.169 Citgo relied on holdings of the Senn and Pluff decisions, and the court agreed because the facts of those cases were similar to the present case.170 But finding that Citgo did not have ongoing operations on the Denman property or any new injury to the property, the court held that the Denmans did not have standing to sue “because any injury to their property occurred before they purchased it and their deed contains no assignment of action.”171 The court reaffirmed the Senn court’s position that whether the damages are temporary or permanent is inconsequential to whether a party has standing.172 In 2004, another oil and gas standing case ensued.173

2. Cook v. Exxon Corporation

In Cook v. Exxon Corporation, Cook sued Exxon alleging damages from equipment Exxon left on the property prior to Cook’s purchase.174 H.A. and Callie Piercy leased the mineral rights on the property in question to Humble Oil and Refining Company, Exxon’s predecessor-in-interest.175 Humble developed the lease in the 1930’s, and Exxon ceased operations and ownership of the lease in 1991.176 In May of 1994, Cook bought the property from the Piercy family.177 Cook sued Exxon for “breach of contract, negligence, excessive use, nuisance, and trespass in connection with abandoned oilfield equipment left on his property.”178 Exxon filed a motion for summary judgment, alleging, among several

166. Id. at 732 (citing Am. Nat’l Ins. Co. v. Hicks, 35 S.W.2d 128, 131 (Tex. Comm’n App. 1931)).
167. See discussion supra Part III.A.
168. Denman I, 123 S.W. 3d at 732 (citing Bayouth, 671 S.W.2d at 868.).
169. Id.
170. Id.
171. Id. at 734 (emphasis added).
172. Id. at 734-35.
173. See discussion infra Part III.D.2.
174. Cook, 145 S.W.3d at 778.
175. Id. at 779.
176. Id.
177. Id.
178. Id.
things, that Cook lacked standing to sue.\footnote{179} The trial court granted Exxon’s summary judgment, and Cook appealed.\footnote{180}

Recognizing that the facts of the case were practically identical to the Denman I case, the Court followed the precedent set forth in Denman I,\footnote{181} Senn,\footnote{182} and Pluff,\footnote{183} finding that Cook lacked standing because: (1) the injury occurred before Cook’s purchase, (2) his deed did not contain an assignment of a cause of action, and (3) no new injury occurred to Cook’s property.\footnote{184} As noted in Senn, the court regarded the distinction between permanent and temporary damages as irrelevant to the issue of standing.\footnote{185}

Temporary damages and permanent damages have inherent differences.\footnote{186} Citing Bayouth, the court stated that “[t]emporary injuries give rise to temporary damages, which are the amount of damages that accrued during the continuance of the injury covered by the period for which the action is brought.”\footnote{187} Temporary damages accrue when each individual injury occurs.\footnote{188} The distinction is significant for cases involving issues surrounding the applicable statute of limitations.\footnote{189} Permanent damages accrue from the date of the injury, while temporary damages “may be recovered for the two years prior to filing suit.”\footnote{190} Cook had contended that because temporary damages occur with every new injury, a subsequent purchaser could be personally aggrieved.\footnote{191} However, applying the rules from precedent, the court determined that Cook still lacked standing even if he could prove temporary damages.\footnote{192} But the court must have been uncomfortable with its position in Cook, because one year later, it took a whole new approach to the issue of standing and how the distinction between permanent and temporary damage affects it in its Denman II decision.\footnote{193}

\footnote{179} Id. at 778.
\footnote{180} Id.
\footnote{181} Denman I, 123 S.W.3d at 730.
\footnote{182} Senn, 55 S.W.3d 222.
\footnote{183} Pluff, 94 S.W.3d 22.
\footnote{184} Cook, 145 S.W.3d at 780.
\footnote{185} Id. at 781-82 (citing Senn, 55 S.W.3d at 226).
\footnote{186} Id. at 782.
\footnote{187} Id. at 783 (quoting Bayouth, 671 S.W.2d at 868).
\footnote{188} Id.
\footnote{189} See id.
\footnote{190} Id.
\footnote{191} Id.
\footnote{192} Id. 784-85.
\footnote{193} See infra Part III.D.3.
3. The New Damage Distinction Approach—Denman II

Don and Peggy Denman seemed not to tire of litigation with Citgo\textsuperscript{194} when they filed suit against SND Operating, L.L.C., for alleged damages caused by oil spills on the property they purchased.\textsuperscript{195} This case is one of the most recent cases in Texas dealing with the standing issue and points Texas in a new, less strict direction.\textsuperscript{196} The issue again was whether the plaintiffs had standing to bring the cause of action.\textsuperscript{197} But this time the Denmans would prevail.\textsuperscript{198} In considering the standing rules outlined in the precedent cases above, the Denmans proved one necessary element this time—temporary injury occurred to their property since their purchase.\textsuperscript{199} The court of appeals disagreed with its own court’s prior opinions, which held that the distinction between permanent and temporary damages was irrelevant.\textsuperscript{200} On the contrary, the court stated that the time in which a cause of action accrues is significant in determining standing, saying a landowner may have standing if a temporary and new injury occurred on his property since his purchase.\textsuperscript{201} In its reasoning, the court distinguished the permanent injury landowner from the temporary injury landowner by explaining that

\begin{quote}
[t]he reason a subsequent landowner lacks standing for injuries before his or her ownership is because the prior landowner was the party who was actually harmed by the prior injury. The injury to the land will affect the price the prior landowner was able to obtain for the land and, therefore, the cause of action belongs to the prior landowner.\textsuperscript{202}
\end{quote}

Logically, temporary damages harm only the current landowner.\textsuperscript{203} But the court drew a distinction on what it regarded as the types of damages that it thought were permanent or temporary.\textsuperscript{204} Citing Schneider Nat’l Carriers, Inc. v. Bates, the court said that pipelines, equipment, and improperly plugged wells were permanent injuries, and therefore, the Denmans lacked standing as to these injuries.\textsuperscript{205} However, the injuries caused from oil and saltwater leakage had occurred since the Denmans’

\begin{flushleft}
\textsuperscript{194} See Denman I, 123 S.W.3d at 730.  \\
\textsuperscript{195} Denman II, 2005 WL 2316177, at *1.  \\
\textsuperscript{196} Id.  \\
\textsuperscript{197} Id.  \\
\textsuperscript{198} Id.  \\
\textsuperscript{199} Id. at *2.  \\
\textsuperscript{200} Id. at *4.  \\
\textsuperscript{201} Id.  \\
\textsuperscript{202} Id.  \\
\textsuperscript{203} Id.  \\
\textsuperscript{204} Id. at *5.  \\
\textsuperscript{205} Id.  
\end{flushleft}
Therefore, the injuries were temporary, and the Denmans had standing. The new rule set out in this decision, although not yet upheld by the Texas Supreme Court, drastically changes the direction Texas is taking. Texas, from its line of recent cases from 2001 to 2004, had consistently not allowed recovery for any type of damage if the owner did not have standing—therefore wholly precluding litigation and compensation for subsequent landowners. But now the door has swung wide open for landowners to bring suit for temporary property damage, specifically, saltwater leakage. The cases are still pouring into the Texarkana Court of Appeals, as in the most recent 2006 decision, *Vial v. Gas Solutions, Ltd.*

**4. Vial v. Gas Solutions, Ltd.**

The facts of the *Vial v. Gas Solutions* case originate in the 1800’s. In 1887, T.M. Campbell purchased land in and around an easement originally acquired by the Texas & Pacific Railway Company in 1872. Vial and other current appellants, Campbell’s successors in interest, claimed ownership in the easement. Gregg Oil and its successors have been producing oil from the Campbell tract since 1931. A dispute arose as to whether Campbell’s lease to Gregg Oil was valid due to fraudulent inducement by Tidal Oil. One of the issues surrounded whether appellants, because they inherited the property, had standing to sue for damage to real property and for fraud. The court’s opinion omitted any mention of actual property damage and focused on personal damages due to fraud. Distinguishing from its prior *Cook* and *Denman I* opinions, the court reasoned that this case centered on a suit for fraud and not property damage—the real issue being whether a suit for fraud survives the death of the decedent and passes to his heirs. The court determined the fraud does survive a decedent under common law, and therefore the appellants had standing to bring suit. Although *Vial* did not center on temporary damages and standing, it points to the fact that suits will continue to develop in Texas and other oil and gas states.

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206. *Id.*
207. *Id.*
208. See *id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at *2.*
216. *Id.*
217. *Id.* at *3.*
218. *Id.* at *4.*
concerning standing and permanent and temporary property damage. There have, however, been several new developments in the Texas Courts of Appeals that may aid practitioners in the development of their causes of action.

E. New Developments and Important Considerations

1. The Discovery Rule

Back in 2002, the Texarkana Court of Appeals decision in Taub v. Houston Pipeline Co. may shed a little more light on the discovery rule as it relates to standing and actions for damages to real property. In that case, the court included a lengthy discussion about when a cause of action arises. It noted that a cause of action accrues “when a wrongful act causes some legal injury, even if the fact of the injury is not discovered until later and even if all resulting damages have not yet occurred.” This is the “Texas discovery rule.” The Texas discovery rule generally applies in two situations:

(1) in cases where the nature of injury incurred is inherently undiscoverable and the evidence of the injury is objectively verifiable; and

(2) in cases of fraud and fraudulent concealment.

The court defined “inherently undiscoverable” as an injury that is not necessarily “absolutely impossible to discover” but is dependent solely on the circumstances surrounding the occurrence of the injury and the diligence of the plaintiff. It is inherently undiscoverable if “it is by nature unlikely to be discovered within the prescribed limitations period despite due diligence.”

The court found in that case that the injury was not inherently undiscoverable. In that case, the injury regarded tangible things, i.e., oil and gas exploration activities on the surface. The court put the duty on the plaintiff to exercise reasonable diligence as to the oil and gas activities on its property. Plaintiffs, as owners of some interest in the mineral estate and surface estate, visually saw oil and gas operations on their

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220. Id. at 619.
221. Id.
222. Compare id. with N.M. STAT. § 37-1-7 (1978) and McNeill II, 153 P.3d 46 (stating that the injury does not accrue until the plaintiff knows or should know of the injury).
223. Taub, 75 S.W.3d at 619.
224. Id.
225. Id.
226. Id.
227. Id.
228. Id.
property and should have actively determined the extent of those operations.\textsuperscript{229} It is unclear whether if the plaintiffs had been \textit{only} owners of the surface estate if the court would have required the same due diligence in discovery.\textsuperscript{230} However, it seems apparent that when a landowner, through a visual inspection, can see past or present oil and gas activities on the property, he or she should inquire into the extent of those activities, especially before purchasing the property. The plaintiffs in this case argued that the nature of the activities conducted on the land was not the type that is fully ascertainable through visual inspection.\textsuperscript{231} However, the court rejected that argument by stating that the evidence indicated that the plaintiffs were “sophisticated and active participants in oil and gas matters.”\textsuperscript{232} This case should be given much consideration by practitioners in Texas and New Mexico for standing cases involving issues of discovery. This case rebuts an argument by a surface and mineral owner plaintiff that he or she could not discover the injury until recently and it points out that a surface/mineral owner plaintiff is sophisticated enough to ascertain the extent of oil and gas activities on a property when acquiring the property. It can also be argued that even a mere surface owner can ascertain whether there have been oil and gas activities on the property through a visual inspection and should exercise due diligence in discovering the extent of those activities.

2. Assignments of Causes of Action and Covenants

As discussed previously throughout all of the Texas case law, an express assignment of a cause of action in a deed can remedy the entire standing situation. The Corpus Christi Court of Appeals first discussed the standing issue and assignments of causes of action in 2006 in \textit{Brooks v. Chevron USA, Inc.}\textsuperscript{233} The court stated that even if an exception existed where the injury was inherently undiscoverable, the evidence in that case reflected that the plaintiff’s predecessor-in-interest had notice and information relating to possible remediation issues; therefore, an assignment of a cause of action would be necessary in order to give the plaintiff standing.\textsuperscript{234} The plaintiffs in this case argued that their general warranty deed transferred all of their predecessors’ interests in the land.\textsuperscript{235} The language relied upon by the plaintiffs was “together with all and singular the rights and appurtenances thereto in anyways belonging

\begin{flushleft}
\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Id. at 620.
\textsuperscript{232} Id.
\textsuperscript{234} Id. at *21.
\textsuperscript{235} Id. at *23.
\end{flushleft}
However, the court rejected that argument by stating that even a general warranty deed cannot pass ownership of a cause of action; there must be express language assigning this particular right. Alternatively, the plaintiffs argued that assignments of causes of action arise through implied covenants running with the land. But the plaintiffs failed to consider that this type of cause of action is a personal property right, not a real property right. Therefore, it logically flows that a personal right cannot run with the land. This case reiterates the discussion of all of the prior Texas cases—that in order for a subsequent landowner to have standing to sue, which is a personal property right, there must be an assignment of the cause of action. Additionally, it cannot be a covenant running with the land.

3. Breach of Contract Claim

In 2006, the U.S. District Court for the Eastern District of Texas, Beaumont Division, applied Texas law when it analyzed standing. The court repeated the fact that causes of action for injury to property arising out of tort belong to the person owning the property at the time of the injury. This precludes compensation for many subsequent assignees of injured property. However, these assignees should not dismiss the fact that they may still have a cause of action arising under contract law. When a subsequent landowner purchases property that is subject to an existing oil and gas lease, he or she may have standing to sue for breach of contract for “failure to remove oil field debris” or other breaches of the lease even though he or she may lack standing to sue in tort. A breach of contract claim is an important cause of action to consider for practitioners when their client appears not to have standing to sue for tort damages. Most of these clients have purchased property that is subject to an existing oil and gas lease. Practitioners should be careful to review the lease agreement to determine whether their client has any valuable breach of contract claims and should include these claims along with any tort claims in the petition.

236. *Id.*
237. *Id.* at *24 (explaining that this type of cause of action vests in the predecessor of title and is not extinguished simply by conveyance of the subject property).
238. *Id.* at *25.
239. *Id.*
240. *Id.*
242. *Id.* at 805.
243. *Id.*
244. *Id.*
4. Permanent and Temporary Damage Developments and Analysis

The Denman II 2006 decision was not the last case to state that if the injury occurs during the subsequent owner’s ownership, he or she shall have standing.245 The Haire v. Nathan Watson Co. 2007 case highlighted several important standing components as well: (1) it is necessary for proper subject matter jurisdiction; (2) a person has standing to sue when that person is personally aggrieved; and (3) a person has standing if:

a. he has sustained, or is immediately in danger of sustaining, some direct injury as a result of the wrongful act of which he complains;
b. he has a direct relationship between the alleged injury and the claim sought to be adjudicated;
c. he has a personal stake in the controversy;
d. the challenged action has caused the plaintiff some injury in fact, either economic, recreational, environmental, or otherwise; or
e. he is an appropriate party to assert the public’s interest in the matter, as well as his own.246

In other words, there must be "a real controversy among the parties which will be actually determined by the judicial declaration sought."247 The court in this case reiterated the Exxon Corporation v. Pluff court’s analysis that a cause of action for injury to real property belongs to the person who owns the property at the time of the injury.248 Based on this, the plaintiffs in this case did have standing to sue for damages to their property because evidence showed that the damage did occur while they owned the property.249 Although this case did not deal with permanent or temporary damages from oil and gas operations, it bolsters the foundation of a determination of standing for real property damages—that if the injury occurs while a person owns the property, he has standing.250 This is the very reasoning behind the new Denman II decision.251

As discussed in Part III.D.3 of this article, the Denman II decision has its merits to some extent.252 To recall, the Denman II decision states that a subsequent landowner does not have standing to sue for permanent damages that occurred before he acquired the property.253 But the

246. Id. at *6-7.
247. Id. at *7.
248. Id. at *8.
249. Id.
250. See id.
252. See discussion supra at Part III.D.3.
landowner does have standing to sue for temporary damages because the damage is new and occurred during his ownership of the property. Although this rule of law seems to be a very equitable approach—that landowners can sue for damages while they owned the land—it forgets a significant problem when determining the nature of the damages.

Generally, the type of damage, either permanent or temporary, is not known until these issues are developed at trial through experts. In this type of litigation, neither the landowner nor the oil and gas operator knows what exact type of damage has occurred. This is determined through the hiring of experts to conduct tests and make determinations regarding the nature and extent of the injury. Through a battle of the experts, a court then determines whether the injuries are permanent or temporary. The Denman II court neglected to realize that it is at this time that a determination is made on whether a party has standing.

Although standing is a subject matter jurisdiction question and can be raised at any time, standing is generally an issue that is dealt with at the beginning of the case—whether this particular party has standing to bring this particular claim. Waiting until trial to determine whether the plaintiff has standing goes against the efficiency of the administration of justice. Therefore, Denman II is problematic for practitioners. Although standing can be argued through a plea to the jurisdiction or on a motion for summary judgment, it is unlikely that at such an early stage in the litigation, there will be sufficient evidence on which to base a determination and likely, the presence of many issues of material fact. It seems as though the Denman II decision muddies the waters for practitioners instead of clearing them up. For practitioners in New Mexico, recent New Mexico cases blur the lines even more than Denman II did.

IV. NEW MEXICO

A look at New Mexico’s subject-matter-jurisdiction law will give insight into New Mexico’s future. If a party fails to have standing, the court lacks subject matter jurisdiction over the party, making standing an available defense under Rule 1-012(B)(1) NMRA, and that may be raised at any time. In general, a party demonstrating standing to sue in New Mexico must show three elements: “(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a

254. Id. at *3-4.
255. Rule 1-012(B)(1) NMRA (2004); see Town of Mesilla v. City of Las Cruces, 120 N.M. 69, 70, 898 P.2d 121, 122 (Ct. App. 1995); see also Becenti v. Becenti, 2004-NMCA-091, ¶ 13, 94 P.3d 867, 871 (holding that the issue of subject matter jurisdiction cannot be waived and can be raised at any time).
likelihood that the injury will be redressed by a favorable decision.”256
Standing is usually conferred by a statute or constitutional provision.257
Prudential considerations may affect standing by placing limitations on a
party to qualify.258 Just who has the right to sue has been an issue in a
couple of property cases in New Mexico, one as early as 1911.259

A. New Mexico Early Cases

In that early case, Caledonian Coal Co. v. Rocky Cliff Mining Co., the
Supreme Court of the Territory of New Mexico established that only the
owner of the land had any right to sue for damages to that land.260 In that
case, Rocky Cliff mined and later disposed of coal on lands owned in a
portion of interest by Caledonian.261 Caledonian brought an action
against Rocky for trespass, claiming damages for the removal of the
coal.262 The court determined that Caledonian did not actually own the
land but owned only a purchase agreement and license to mine the
coal.263 Because Caledonian did not have title to the land, it was not
entitled to recover for damages.264 The court held that “the right of action
was in the owner of the land.”265 For Caledonian to have been successful,
it would have had to “show some property right or interest in the coal
which is not established by possession of the land merely,” because
trespass is damage to the fee owner only.266 Therefore, Caledonian did
not have standing to recover.267

Fifty-five years later, the New Mexico Supreme Court followed the
same line of reasoning in Garver v. Public Service Co. of New Mexico.268
Garver involved an inverse condemnation case in which the power
company was negligent in allowing its power lines to sag and cause
potential harm to the landowner.269 Regarding the issue of recovery of
damages for trespass, the court stated that a purchaser of land does not

256. City of Sunland Park v. Santa Teresa Services Co., 2003-NMCA-106, ¶ 40, 134 N.M.
243, 252, 75 P.2d 843, 852 (citing John Does I through III v. Roman Catholic Church of
257. Id. ¶ 41.
258. Forrest Guardians v. Powell, 2001-NMCA-028, ¶ 16, 130 N.M. 368, 375, 24 P.3d 803,
810.
259. Caledonian Coal Co. v. Rocky Cliff Coal Mining Co., 16 N.M. 517, 120 P. 715 (1911).
260. Id. at 718.
261. Id. at 716.
262. Id.
263. Id. at 718; see also P. G. Adams v. Heisen, 77 N.M. 374, 378, 423 P.2d 414, 416 (1967)
(discussing the facts of Caledonian Coal).
264. Caledonian Coal, 16 N.M. at 526, 120 P. at 719; P. G. Adams, 77 N.M. at 378, 423 P.2d at
417.
266. Caledonian Coal, 16 N.M. 517, 120 P. at 717-18.
267. Id.
269. Id. at 270, 421 P.2d at 793.
have a cause of action for trespass that occurred prior to his purchase.\textsuperscript{270} A purchaser, however, may sue based on trespass damages that continued after purchase.\textsuperscript{271} The \textit{Garver} court set forth a more thorough history in New Mexico jurisprudence—that the landowner at the time of the injury is the only one who may recover for tort damages to his property.\textsuperscript{272} If this was the law for ninety years in New Mexico, why has New Mexico recently chosen to ignore it? A discussion of the two most recent cases in New Mexico highlights New Mexico’s recent diversion. Recently in 2006, the New Mexico Court of Appeals briefly dealt with the standing issue as it relates to subsequent assignees of oil and gas interest, saying only that they must have standing, but did not mention the prior New Mexico case law.\textsuperscript{273}

\textbf{B.  \textit{McNeill v. Rice Engineering \& Operating, Inc.}}

To appreciate the full implication of this brief note on standing for the oil and gas industry in New Mexico, the facts of the case should be understood. In \textit{McNeill v. Rice Engineering \& Operating, Inc. (McNeill I)}, issues arose over the saltwater disposal in oil and gas drilling.\textsuperscript{274} In 1957, Pan American Petroleum Corporation (Pan America) drilled a well called “E-15” on a ranch owed by Will Terry (Terry).\textsuperscript{275} Pan America and Terry negotiated a surface damage agreement.\textsuperscript{276} The next year, Rice Engineering and Operating, Inc. (Rice) took over operating the saltwater disposal system.\textsuperscript{277} Terry granted Rice a right-of-way over the ranch for the disposal’s pipelines.\textsuperscript{278} Terry died in 1968, leaving the ranch to various now plaintiffs (McNeill).\textsuperscript{279} McNeill sued Rice for subsurface trespass caused when salt water leaked into E-15 due to Rice’s pipelines on the ranch.\textsuperscript{280}

The issue that originally arose was whether the release covered the initial construction of the well and pipelines or the entire system of disposal on the ranch.\textsuperscript{281} The procedural history of this case is complex. In short, the parties settled as to damages prior to the date of filing suit, and

\begin{footnotes}
\item 270. \textit{Id.} at 271, 421 P.2d at 794.
\item 271. \textit{Id.}
\item 272. \textit{See id.}
\item 274. \textit{Id.} at 49, 128 P.3d at 477. (In defining saltwater disposal, the court explained that “[s]alt water is a waste product from oil and gas drilling operations. It is disposed of in wells used to reinject the water into geological formations comparable to those from which the product originated.”)
\item 275. \textit{Id.} at 50, 128 P.3d at 478.
\item 276. \textit{Id.}
\item 277. \textit{Id.}
\item 278. \textit{Id.}
\item 279. \textit{Id.}
\item 280. \textit{Id.}
\item 281. \textit{Id.}
\end{footnotes}
this appeal related to whether McNeill could claim damages from the date of filing suit, October 27, 1994, to the present.\(^{282}\) As is in many of these cases, there was no factual dispute as to whether the leakage occurred.\(^{283}\)

Rice argued that McNeill did not have standing to sue for tortious conduct that occurred prior to his obtaining title, citing *Caledonian Coal*.\(^{284}\) Moreover, Rice argued that McNeill could not invoke the doctrine of fraudulent concealment or the discovery rule in order to escape the statute of limitations for damages prior to filing suit in 1994 because they did not acquire title until 1995.\(^{285}\) In contrast, McNeill argued the continuing trespass theory, which would allow a new cause of action for each injury with the statute of limitations running from each injury even though the basis was that of an original wrong.\(^{286}\) Rice defended the continuing trespass theory by asserting that even if this was a viable claim, recovery is limited to the “period immediately preceding the filing of the complaint.”\(^{287}\) But McNeill ultimately succeeded against Rice’s standing defense by asserting that Rice had not raised this defense in the district court.\(^{288}\) Because Rice raised standing for the first time on appeal, the court held that Rice did not preserve this issue.\(^{289}\)

This court’s brief handling of this issue reveals that the court did not appreciate the basics of the standing issue and certainly the complex issues involved in oil and gas operations. The court of appeals disregarded the very essence of subject matter jurisdiction—that it cannot be waived and can be raised at *any* time.\(^{290}\) For first-year law students, this is an embedded civil procedure concept. An attack on subject matter jurisdiction may be made at any time during the proceedings.\(^{291}\) It certainly may be made for the first time on appeal.\(^{292}\) Because standing regards whether a court has subject matter jurisdiction over a party, the standing defense may be raised solely on appeal.\(^{293}\) According to the long-

\(^{282}\) *Id.* at 51, 128 P.3d at 479.

\(^{283}\) *Id.*

\(^{284}\) *Id.*

\(^{285}\) *Id.*

\(^{286}\) *Id.* (citing Valdez v. Mountain Bell Tel. Co., 107 N.M. 236, 239-40, 755 P.2d 80, 83-84 (Ct. App. 1988)).

\(^{287}\) *Id.*

\(^{288}\) *Id.* at 52, 128 P.3d at 480.

\(^{289}\) *Id.* at 53, 128 P.3d at 481 (citing Rule 12-216(A) NMRA and W. Farm Bureau Mut. Ins. Co. v. Barela, 79 N.M. 149, 152, 441 P.2d 47, 50 (1968)).

\(^{290}\) See *Becenti*, 136 N.M. at 128, 94 P.3d at 871 (holding that the issue of subject matter jurisdiction cannot be waived and can be raised at any time); *Weddington v. Weddington*, 2004-NMCA-034, ¶ 13, 135 N.M. 198, 202, 86 P.3d 623, 627 (Ct. App. 2004); *Chavez v. Valencia*, 86 N.M. 205, 209, 521 P.2d 1154, 1158 (N.M. 1974).

\(^{291}\) *Chavez*, 86 N.M. at 209, 521 P.2d at 1158 (citing Bd. of County Comm’rs of Dona Ana County v. Sykes, 74 N.M. 435, 394 P.2d 278 (1964)).

\(^{292}\) *Id.*

\(^{293}\) *Id.*
standing rule of law in New Mexico, the court of appeals clearly erred in dismissing the issue of standing in the
McNeill case.

Although the court restrained from considering the issue of standing, standing was a viable defense for Rice to raise. If the court had not erred in dismissing the defense, it seems clear that the court would have been forced to consider the issue of standing as it relates to oil and gas interests. But McNeill I would not be its last chance: the plaintiff McNeill was not tired of litigating.


1. Case Brief

The court of appeals got another stab at the standing issue in McNeill v. Burlington Resource Oil & Gas Co. During the same time period as the first McNeill case, the same plaintiffs sued Burlington Resource Oil & Gas Company, who was the former oil, gas, and mineral lessee under a portion of plaintiff’s property, the McNeill Ranch, which covers approximately 31,000 acres of land in Lea County, New Mexico. Burlington’s predecessor-in-interest owned and operated an oil well on the McNeill Ranch since around 1950. The customary practice when digging an oil well “is to dig a pit in the ground in the immediate vicinity of the oil well in order to contain waste by-products of oil production . . . known as ‘produced water,’ [which contained] many types of petroleum, hydrocarbons, salt water, and other contaminants.” The well stopped producing in 1986. Therefore, in 1992, Burlington closed the pit, which resulted in the surface area looking like any other abandoned oilfield operation. The court stated that to the untrained eye, the surface area did not reveal an oil pit buried beneath the surface. At some point during this time period, McNeill and other plaintiffs conveyed their interest in the real property to the “Black Trust” by quitclaim deed, whose beneficiaries consisted of McNeill and the other plaintiffs. The court stated that in 1996 McNeill/the Black Trust “learned” that there might be an old pit beneath the surface. Just how McNeill obtained this information is conveniently never mentioned, and neither is the fact that

294. See id.
295. See id.
297. Id. at *3.
298. Id.
299. Id.
300. Id. at *4.
301. Id.
302. Id.
303. Id. at *12.
304. Id. at *4.
McNeill and the Black Trust are the same person or persons. After receiving this information, McNeill contacted Burlington asking that the contaminated materials be removed. Burlington, however, did not remove the materials. There had been no additional deposits into the pit since 1986, and the contamination had existed since the 1950s. McNeill filed suit in 1999, and then filed a second amended complaint in 2000 alleging three tort theories: negligence, trespass, and private nuisance due to Burlington and Burlington’s predecessor-in-interest’s operation of the oil well. McNeill also claimed that the contamination affected the ranch’s water supply, resulting in the cattle not drinking the water.

The district court ruled in Burlington’s motion in limine that the experts at trial could only discuss the measure of damages as the diminution in value of the fair market value of the property at issue and not remediation costs. The court viewed the property damages as permanent damages, so temporary damages were never considered. At the close of the evidence, Burlington moved for directed verdict on the private nuisance claim because it was not a recognized cause of action in New Mexico, and the court granted it. Therefore, the issues left for the jury were negligence and trespass. The jury returned a verdict for McNeill and damages in the amount of $135,000. McNeill appealed the district court’s ruling on the private nuisance claim and damages, such as the trial court’s error in excluding a discussion of costs of repairs from in front of the jury. Burlington cross-appealed and raised other issues, such as: (1) that all claims for surface damages were waived by deed; (2) that the Black Trust plaintiffs did not own the causes of action they asserted, or in other words, did not have standing; and (3) plaintiff’s claims were barred by the statute of limitations.

With regard to issue number two, standing, Burlington argued that the plaintiffs lacked standing to assert their causes of action because the language in the quitclaim deed that conveyed the property was insufficient to convey personal property causes of action. The language

305. Id.
306. Id.
307. Id.
308. Id.
309. Id. at *5.
310. Id.
311. Id.
312. Id. at *6.
313. Id.
314. Id.
315. Id.
316. Id. at *7.
317. Id.
318. Id. at *12.
in the quitclaim deed stated that “the grantor quitclaims all of his or her ‘right, title, and interest’ in the property to the Black Trust.” The deed did not contain any express assignment of causes of action language, which, according to Texas case law, would be necessary in order to assign personal property rights.

The court of appeals held that in New Mexico, “a cause of action arises not necessarily at the time of the injury, but rather at the time a plaintiff knows or should have known of the claims.” This is the discovery rule. Because the jury had found that the plaintiffs knew or should have known of the contamination on or after July 1, 1995, and because plaintiffs presented testimony that they discovered the contamination in 1997, by bringing the lawsuit in 1999, they were within the statute of limitations time period. Therefore, plaintiffs had standing to bring their causes of action.

The court of appeals also included a long discussion of the measure of damages for injury to real property, focusing on the distinction between permanent and temporary damages. The court cited Amoco Production Co. v. Carter Farms Co. for the proposition that the correct measure of damages depends on whether the damage is permanent or temporary. The court held that the determination of the nature of the damage is a fact question to be decided by a jury and not as a matter of law. As such, the jury instruction excluding instruction as to temporary damage was in error. But the court’s damage to New Mexico’s case law did not stop there. It expanded the Carter Farms measure of damages rule to include diminution in value of the entire property, not just the portion of land that is physically injured. The court’s discussion of measurement of real property damages has wide, harmful implications to the standing issue as well. See Part IV.C.3 infra for a more detailed discussion of the harm done to the standing issue.

319. Id.
320. Id.
321. Id. at *14 (citing N.M. STAT. § 37-1-7 (1880)).
322. Id.
323. Id. at *17.
324. Id.
325. Id. at *20.
326. Id. at *25.
327. Id. at *29.
328. Id.
329. Id. at *34.
330. See discussion infra Part IV.C.3.
331. See discussion infra Part IV.C.3.
2. Analysis of Apples and Oranges

Although it is true that plaintiffs arguably discovered the contamination in 1997, the court of appeals focused on the wrong object for analysis. Real property damage deserves a wholly different analysis than personal damages. Additionally, concomitant with the discussion of damages is that the concept of standing is entirely different than the concept of statutes of limitations. It is like comparing apples to oranges.

   a. **Standing, Not Statute of Limitations**

   Standing has nothing to do with whether a statute of limitations period accrues. Standing is a component of subject matter jurisdiction.\(^{332}\) A party demonstrating standing must not only prove an injury in fact and the likelihood of redressability in the courts, the party must also show a *causal relationship* between the injury and the challenged conduct.\(^{333}\) The causal relationship is key, not discovery. Discovery of an injury does not transfer the right from the original owner to the subsequent owner. Only a conveyance of that right accomplishes this act. A person’s relationship to property is through ownership in the property. Without this fact, a person has no standing to bring a cause of action arising out of injury to the property that occurred prior to its purchase. Ownership is achieved only one way—through a deed conveying fee simple absolute ownership or something less. Without this, a person has no property damage claim. Either through a general warranty deed or a quitclaim deed, a real property interest is conveyed. Neither type of deed convey personal property rights. A right to bring a cause of action is a personal property right. Therefore, language assigning all right, title, and interest in certain property conveys all right, title, and interest to the real property, not personal property. Consequently, personal property rights must be conveyed through its own granting language—an express assignment of a cause of action. A mere purchaser of real property must have been assigned the right to bring a cause of action based on property damage that occurred prior to ownership in order to have standing. The statute of limitations has nothing to do with this analysis. This underpinning of real property law should not be ignored by the courts in New Mexico.

   b. **The Party Aggrieved in Real Property Damages**

   Even if New Mexico insists on relevance of the discovery rule to standing, it must consider the wording of the statute. As discussed previously, when looking at property, the focus is on the injury to the

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\(^{332}\) Rule 1-012(B)(1) NMRA (2004).

property, not the injury to the person. The court of appeals cites to New Mexico’s discovery rule for guidance, but it seems to disregard the last five words of the statute: “discovery by the party aggrieved.” The party aggrieved in a real property damages action is the party who owned the property at the time of the damage. The injury is to the property, not the person. This analysis is supported by ninety years of precedent in New Mexico. Precedent mandates that New Mexico courts recognize that only the owner of the land at the time of the injury to the property has any right to sue for damages to the land. The party aggrieved is the owner at the time of the injury.

3. Measure of Real Property Damages

As discussed previously, the court of appeals expanded the *Carter Farms* measure of damages rule to create a watershed moment for case precedent in New Mexico. First, it stated that the determination of whether damages are permanent or temporary is a fact question for the jury. Second, it announced that the measure for real property damage is for the entire tract of land and not just the portion of the land injured. Both of these concepts have large implications for New Mexico. As discussed in the analysis of Texas law in Part III.E.4, determining the nature of damages at trial with the aid of a jury is terribly problematic for standing purposes should New Mexico courts consider whether temporary damages occurred during the ownership of the subsequent landowner. Waiting until the jury verdict to deal with the damage distinction and the standing issue results in improper administration of the judicial process. These issues should be determined as a matter of law before the case gets to the jury. Second, awarding damages based on the entire McNeill Ranch instead of just the small area injured is unsound. This type of measurement of damages has never been contemplated by the New Mexico courts, and certainly not by the supreme court in *Carter Farms*. If a defendant did not unreasonably use the surface estate of the entire ranch, damages should not be apportioned based on the entire ranch.

4. The Future for New Mexico

The New Mexico Court of Appeals will not have the final word on standing in New Mexico. The New Mexico Supreme Court granted defendant Burlington’s Petition for Writ of Certiorari in February of

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2007. It is now up to the supreme court to determine whether the court of appeals properly considered long-standing precedent in New Mexico with regard to the standing issue and the damages issue. Either way, the court will align New Mexico with three possible standing schemes. First, the court could choose to follow Texas’ well-developed strict approach to standing—that only the owner of the property at the time of the injury, whether permanent or temporary, has standing to sue. Second, the court could choose to follow Texas’s most recent line of case law, which urges the concept of standing to sue for temporary damages because the subsequent owner owns the property during reoccurring injury. Lastly, the court could decide to distance itself from Texas and Louisiana by choosing to allow subsequent landowners to have standing to sue for property damage. The Supreme Court should give careful consideration to New Mexico’s existing case law on this subject and conservatively enforce it to close the floodgates of litigation. A bright-line rule should be adopted to give parties and their practitioners confidence on the issue of standing as it relates to assignees of various real property interests. Notably, New Mexico is not the only other state besides Texas to consider this issue. Louisiana currently chooses to align itself with Texas.

IV. LOUISIANA

Louisiana, like Texas, recognizes that if the owner of land did not actually own the land at the time of the injury, he does not have standing. An early Louisiana court affirmed this premise in Dickson v. Arkansas Louisiana Gas Co. in 1939, in which a gas company damaged plaintiff’s property during installation of a gas main. In that case, the court affirmed the long-standing common-law rule that a right of action for damages to real property accrues to the person owning the land. It is a personal right, attaching to the original owner regardless of subsequent disposition of the land.

Later, in 1985, the Fifth Circuit, applying Louisiana law, affirmed this rule in Dorvin Land Corporation v. Parish of Jefferson. In that case, Jefferson Parish enlarged a canal adjacent to the plaintiff Dorvin’s property. In enlarging the canal, Dorvin alleged that the parish dumped spoil on his property, damaging a tree line that Dorvin was preserving for

338. See Senn, 55 S.W.3d 222; Denman I, 123 S.W.3d at 730; Pluff, 94 S.W.3d 22.
340. See infra notes 342-60 and accompanying text.
342. Id. at 250.
343. Id.
345. Id. at 1012.
a golf course. Dorvin sued the parish for damages, and the parish defended on the ground that Dorvin had no right of action because he was not the owner of the property at the time the damage occurred. Finding that the Act of Sale did not include an assignment of a cause of action, the trial court agreed with the parish, and Dorvin appealed.

According to Louisiana’s Code of Civil Procedure, “an action can be brought only by a person having a real and actual interest which he asserts.” The court reasoned that the landowner at the time of the injury is the only person who has a real and actual interest in the land, saying it is a personal right that does not run with the land absent an express assignment. Because Dorvin was not the owner of the property at the time of the injury and because the deed did not contain an assignment of a cause of action, Dorvin did not have standing to bring this suit. Accordingly, applying Louisiana law, the Fifth Circuit took a strict approach.

In 2004, the Third Circuit Court of Appeals of Louisiana took up the issue in Margone, L.L.C. v. Addison Resources, Inc., in which a lessee of a hazardous waste site brought an action for the environmental damages. Plaintiff Margone was the current lessee of the waste site. Originally, a couple of oil companies and their successor leased the property, contributing to the contamination problem. Eventually, this suit arose when Margone sued the various oil companies complaining that they contributed to the waste and were liable for some of Margone’s costs associated with the cleanup. After evaluating certain hazardous waste statutes and tort claims, the court had to resolve the issue of Margone’s standing to sue. The court explained that only “the landowner at the time of the alleged damages is the person with real and actual interest to assert the claim for damages to the land.” Citing Dorvin, the court recognized that this rule has been expanded to include lessees—that “the right of action still belongs to the lessee at the time of the alleged

346. Id.
347. Id.
348. Id.
349. Id. at 1013.
350. Id. (citing Gumbel v. New Orleans Terminal Co., 197 La. 439, 1 So.2d 686 (1941); Prados v. South Central Bell Telephone Co., 329 So.2d 744 (La. 1975)).
351. Id. at 1014.
352. See id.
354. Id. at 116.
355. Id.
356. Id. at 116.
357. Id. at 120.
358. Id. (quoting Rowan v. Town of Ardaudville, 2002-882 (La. App. 3 Cir. 12/11/02); 832 So.2d 1185, 1188).
Because Margone did not lease the property at the time of the injury, it did not have standing to bring a cause of action against the prior lessees. With the application of this recent 2004 case, Louisiana seems determined to align with Texas to follow a strict approach. However, it has yet to be determined in Louisiana whether the distinction between permanent and temporary damages affects a party’s standing to bring suit.

V. CONCLUSION

No matter what side a party takes in this debate, several key principles can be taken from the above case law from all three states. First, landowners must take care to include in their deeds an assignment of a cause of action clause, which would allow them to bring a suit for both permanent and temporary damages regardless of when they acquired the property. Second, if landowners can prove injury to their property since their purchase, they will have a viable cause of action regardless of what rule is applied in court. Third, industry should be aware of contract and personal injury claims because these claims will be viable in court whether or not the property damage issue is. Fourth, if states follow Texas’s Pluff, Tyra, Cook, Denman I, and OXY line of cases, the law will be strictly applied in favor of industry. But if states follow Texarkana’s new Denman II case or New Mexico’s court of appeals decision in McNeill v. Burlington, the law will favor landowners. Based on the above analysis, efficiency of the administration of justice, confidence in a bright-line rule, and long-standing precedent, the courts in Texas, New Mexico, Louisiana, and other oil and gas states should allow standing room only for property owners who owned the property when the injury occurred.

359. Id. at 7-8; 896 So.2d at 120 (citing Dorvin, 469 So.2d at 1013 (emphasis in original). This right obviously extends to lessees of mineral interests, as their interests are possessory. See id.

360. Id.

361. See id.; see also LA. CIV. CODE ANN, art 1764 (1984) (stating that “a particular successor is not personally bound, unless he assumes the personal obligations of his transferor with respect to the thing.”).