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**The Sand Paper: The Anatomy of Acquiring,
Divesting, and Leasing Sand**

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ABOUT THE AUTHORS

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Reagan M. Marble's practice focuses on complex energy litigation and transactions.

In his energy litigation practice, Reagan regularly represents oil and gas operators, mineral and royalty buyers, high-net-worth family trusts and partnerships, and renewable energy developers in their litigation matters throughout South and West Texas. Reagan's extensive experience in the field ranges from achieving summary dismissal of multimillion dollar title disputes in the Eagle Ford Shale and Permian Basin to favorably resolving renewable energy contract disputes along the Gulf Coast.

In his energy transactions practice, Reagan frequently drafts and negotiates agreements affecting all aspects of upstream oil and gas exploration and production including oil and gas leases, purchase and sale agreements, farmouts, and joint operating agreements.

Reagan has particular experience helping clients develop, produce, and dispose of other natural resources including water (water leases, water sales contracts, water operating agreements, and saltwater disposal agreements) and sand (sand supply contracts and purchase and sale agreements). A national award-winning advocate, Reagan takes pride in being a professional, efficient, and successful advocate in the courtroom or the boardroom.

Education

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Peter has more than 40 years of experience representing clients in the energy and natural resources area. He has advised clients concerning all aspects of exploration, production, transportation, processing, sale and marketing of oil and gas and other natural resources. Peter not only advises clients with regard to oil and gas matters, but also has many years experience with regard to the exploration, production, transportation and leasing of hard minerals, including coal and uranium. Peter has also advised clients concerning the sale and purchase of natural gas storage facilities and secondary recovery operations. He advises clients regarding the formation of and use of various entities, both public and private, and the financing of the acquisition and development of oil and gas, coal, uranium, and related assets.

Peter represents clients in the preparation and negotiation of merger and acquisition agreements, purchase and sale agreements, joint exploration agreements, lease acquisition agreements, seismic option agreements, leases, operating agreements, farmouts, oil and gas sales contracts, transportation agreements, processing agreements, pipeline construction and operating agreements, easement agreements, and other related documents. In addition, he advises and prepares surface use agreements to provide for the protection and development of both the surface and mineral estates and has more than 40 years experience in title examination and the preparation of title opinions, title curative documents, conveyancing instruments and other land title related agreements. Peter also has many years of experience with regard to regulatory matters concerning the oil and gas industry.

Peter also represents many landowners, including owners of large Texas ranches, negotiating and preparing oil and gas leases, surface use agreements, rights of way, easements and royalty agreements.

Peter also represents landowners in land title and royalty litigations and serves as a mediator of oil and gas and land title disputes. Peter's experience in oil and gas matters includes not only Texas but other states where he has been instrumental in advising parties concerning oil and gas interests located in the Marcellus Shale areas of New York, West Virginia and Pennsylvania.

Education

B.A., University of Texas at El Paso

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I. LIKE SAND THROUGH AN HOURGLASS, SAND AS A COMMODITY IN TEXAS

The more things change, the more they stay the same. It is a tale as old as time that, when “the gettin’ is good” in oil and gas, other commodities enjoy record high prices. However, the recent (unprecedented) fall in the price of oil and gas has significantly affected the price of commodities tangential to oil and gas production. Fueled by the demand for its use as a proppant in hydraulic fracturing, sand reached a peak high in 2014 selling for almost \$65 per ton. But like oil and gas, the price of sand has also fallen sharply in recent months and currently trades from some plants at under \$20 per ton.

Despite such price volatility, there remains renewed interest in lease activity for sand. “Renewed” is a loose reference to the days of a high demand for aggregate sand like the famed “Brady Brown” in McCulloch County. Lawyers may once again be confronted with determining the best way to structure and draft sand leases, sand supply contracts, and ultimately, the sale of sand mines (or partial interests therein) from one party to another.

This paper strives to be your quick reference guide to most things sand, will generally discuss the ins and outs of sand mining, and provide a basic framework including some important issues to spot for acquiring, divesting, and leasing sand.

II. SAND: WHAT THE FRAC IS IT USED FOR?

A. Sand as a Proppant

Using sand as a “proppant” is nothing new in the oil and gas world. Sand was used as early as 1947 in Standard Oil’s test of the Hugoton Gas field when 1,000 pounds of gelled gasoline and sand were injected into a limestone formation.¹ After George P. Mitchell

revolutionized hydraulic fracturing, sand saw increased demand when it was used to “prop” open fractures or fissures in shale and was pushed down the wellbore along with water and other chemicals.

In 2014, during the “boom” of the Permian Basin, operators imported a type of sand known as “Wisconsin White” by rail from Western Central Wisconsin. Wisconsin White made up almost 75% of the sand used downhole in oil and gas wells in the Permian Basin in 2014. The rest of the market was made up of some combination of Brady Brown and very little “in-basin” sand.² Over the next three years, as the demand for frac sand increased to some 1500 lbs. of sand per lateral foot, companies discovered the value in-basin sand provided logistically and downhole. Companies rushed to secure valuable sand deposits throughout West Texas (particularly in Winkler County) leading the summer of 2017 to become known in the industry as the “summer of sand.”³ Hi-Crush, High Roller, Atlas, US Silica, Black Mountain, and other sand mining companies invested hundreds of millions of dollars into sand mines across West Texas’s Permian basin and became key players in the new gold rush.

Fast forward to the present year 2020, the oil price war between Russia and the Saudis as well as COVID-19 seem here to stay.⁴ It is now projected that only 43% of sand used in oil and gas wells in Texas is from Wisconsin; the sand mines in and around Brady, Texas are all but shuttered; and “Winkler White” makes up arguably the largest part of what goes down the wellbore today.⁵ For example, a lateral Wolfcamp

¹<https://www.blackmountainsand.com/what-is-proppant/>.

²<https://www.kut.org/post/hill-country-town-picks-pieces-after-sand-plants-head-west>

³<https://www.ogi.com/home/article/17294226/a-summer-of-sand-regional-sand>

⁴ For help navigating the legal challenges presented by this novel virus, please visit: <https://www.jw.com/coronavirus/>.

⁵<https://apnews.com/0f0e3b4d2b6741a38c4a38bf490786cd>

horizontal well will use 13 million tons of sand;⁶ that's over 300 trucks!

So what does it take to get sand from the ground down the hole?

B. The Frac Sand Chain

The frac sand chain appears relatively simple, but is a complicated chain of heavy equipment, logistics, and (lawyer's favorite thing) paperwork.

The first step in the chain is the mining of sand with heavy equipment including backhoes and bulldozers and then transporting the sand to the plant with dump trucks. The second step in the chain is the processing of sand. Processing can be broken down into three segments. Segment one is the wet plant where sand is washed to remove silt, debris, and clay. The sand slurry is then put through a series of screens and separators and finally placed in a stockpile where excess water is drained and (hopefully) recycled. Segment two is the dry plant where the drained sand is dried and sifted through screens. Segment three is storage where the sand is often placed into silos or a "load-out" facility and awaits pick-up. The third step in the frac sand chain is transportation. Until recently, millions of tons of sand were transported by rail car from Wisconsin each year. Now, thousands of trucks carry sand in trailers (or boxes) designed to haul around tens of thousands of pounds of sand down the highway to the well-site.

This frac sand chain begs the question: as lawyers, what documents will we be tasked to prepare to acquire the rights to the sand, help facilitate the movement of sand from the ground, through the mine, onto the truck, and down the hole?

⁶<https://www.blackmountainsand.com/perman-basin-frac-sand-infographic/>

III. ACQUIRING, DIVESTING, AND LEASING SAND: THE SAND LEASE, SAND SUPPLY CONTRACT, AND UNIQUE STRUCTURES

Oversimplified, the legal documents governing the frac sand chain can be broken down into the Sand Mining Lease, the Sand Supply Contract, and a few other documents specific to divestiture structures unique to the sand business. The following is a brief overview of each document including issues to spot and important clauses to consider. This brief overview is not exhaustive, but is intended to highlight issues particular to sand. Capitalized phrases used throughout the examples below are defined terms within each document but those terms may not be defined in this paper.

A. The Sand Mining Lease⁷

The Sand Mining Lease is a document that finds its genesis in many other forms of mining leases (uranium, lignite, caliche) that have developed over time in Texas. Below are a few basic (and not so basic) provisions to include in your next Sand Mining Lease.

1. Option Period or Preliminary Agreement. Like other mining leases, a Sand Mining lease may begin with an "option" or "inspection" period or the parties may negotiate a separate "coring agreement." The purpose of the option or inspection period (or separate coring agreement) is that the lessee is provided time, in exchange for a sum of money, to take core samples and evaluate the potential deposits of sand on the tract of land. This preliminary agreement may also include the right to conduct soil tests, engineering studies, or environmental studies. The primary term of the Sand Mining Lease would not begin until after the lessee elects to proceed and tenders an additional sum of money.

⁷ The majority of this paper will focus on provisions in a sand lease considering parties to the sand supply contract and unique divestitures are likely sophisticated and will be driven by in-house counsel guiding outside counsel.

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