

**PRESENTED AT**

14th Annual Gas and Power Institute

September 10-11, 2015

Houston, Texas

**SELECTED DRAFTING ISSUES IN  
MIDSTREAM CONTRACTS**

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# SELECTED DRAFTING ISSUES IN MIDSTREAM CONTRACTS

By Michael Pearson<sup>1</sup>

## I. INTRODUCTION

I will share a small secret – or perhaps, it is not a secret at all. As CLE presentations go, “drafting tip” presentations tend to be very practical in their orientation and are, therefore, more enjoyable and less stressful to prepare than, say, a comprehensive conceptual survey of a complex legal issue (I am currently working on one of those for a program later this fall). And so, when the Planning Committee for the Gas and Power Institute invited me to give this presentation, I was pleased to accept.

Fortunately, in recent times, my practice has given me an opportunity to think about the best way to address many different contract drafting issues that have particular applicability to midstream contracts. For purposes of this presentation, four such issues have been selected. Each section of this paper will identify a particular drafting issue, provide as concise a legal analysis of the issue as possible, and conclude with suggested contract language. Except where expressly indicated otherwise, the discussion will focus on Texas law.

## II. ACREAGE COMMITMENTS

Many midstream transactions with oil and gas producers that are performed at the wellhead – i.e., gas purchase, gathering, processing, and similar agreements (collectively, “Wellhead Contracts”) – are structured so that the gas purchaser, gatherer, or processor (each, a “Midstream Company”) purchases, gathers, or processes all of the gas produced from certain oil and gas leases or lands that are owned or controlled by the oil or gas producer. In most cases, the Midstream Company’s obligation to receive and purchase, gather, or process the producer’s gas on a daily basis is firm<sup>2</sup> up to the maximum capacity on or at the Midstream Company’s gathering system or processing plant that the Midstream Company has agreed to make available to the producer. In consideration for this commitment by the Midstream Company, Wellhead Contracts customarily provide for the commitment by the oil and gas producer to the performance of the contract of all gas produced from or attributable to its interests in the relevant oil and gas leases or lands (in each case, an “Acreage Commitment”).

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<sup>1</sup> Partner and Co-Chair of the Energy Practice Group, Jackson Walker L.L.P. Past Chair of the Oil, Gas and Energy Resources Law Section of the State Bar of Texas. The author wishes to thank Danielle Mirabal, an associate in the Energy Practice Group, and Bruce Ruzinsky and Jennifer Wertz, a partner and an associate in the Bankruptcy Practice Group of Jackson Walker L.L.P., for their help in the preparation of this paper.

<sup>2</sup> “Firm” sales service is a higher class of service for gas that is continuous without curtailment except upon the occurrence of force majeure or other occasional, extraordinary circumstances. 8 Patrick H. Martin & Bruce M. Kramer, WILLIAMS & MEYERS OIL & GAS LAW, *Manual of Terms*, at 381 (2014).

A typical Acreage Commitment provides, in pertinent part:

Subject to the terms of this Agreement, Producer commits and dedicates to the performance of this Agreement, during the Contract Term, all of the Gas now or hereafter Owned or Controlled by Producer that is produced from all current and future wells located on the lands covered by the oil and gas leases described on Exhibit A, including any extensions or renewals of such oil and gas leases and any new oil and gas leases taken in replacement thereof prior to or within six (6) months after the expiration of any such oil and gas lease (collectively, the "Dedicated Leases"). For purposes of this Agreement, Gas is "Owned or Controlled" by Producer if Producer has title, whether by virtue of its ownership of a Dedicated Lease or otherwise, or, if Producer does not have title to such Gas, Producer has the right, under any joint operating agreement, unit operating agreement, or other contractual arrangement or arising by operation of Law, to commit and dedicate such Gas to the performance of this Agreement.

There are, of course, many other variations of this type of provision.

For purposes of clarity, it is important to note that the quoted Acreage Commitment is a purely contractual commitment by the oil and gas producer to deliver to the Midstream Company, for sale, gathering, or processing, gas produced from described leases or lands. It does NOT effect a dedication of the described leases or lands that survives either the expiration or termination of the Wellhead Contract or the underlying oil and gas lease(s) (or any renewals, extensions, or replacements thereof).<sup>3</sup> As such, it differs from the utility-style dedication of leases and lands pursuant to a Federal Power Commission certificate of public convenience and necessity once (but no longer) required under the Natural Gas Act<sup>4</sup> for wellhead sales of gas in the "interstate" market that would survive the expiration of the original gas purchase contract and the underlying leases and continue to burden the land covered thereby until formally abandoned.<sup>5</sup>

Against this background, we will consider two issues with respect to Acreage Commitments:

- 1) Does the Acreage Commitment in a conventional Wellhead Contract create a covenant running with the land? If so, what actions should a Midstream Company take

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<sup>3</sup> See, e.g., *Northern Natural Gas Co. v. Conoco, Inc.*, 939 S.W.2d 676, 678 (Tex. App.—El Paso 1996), *aff'd*, 986 S.W.2d 603 (Tex. 1998).

<sup>4</sup> 15 U.S.C. § 717, *et seq.* (West 2013).

<sup>5</sup> See, e.g., *California v. Southland Royalty Co.*, 436 U.S. 519 (1978).

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First appeared as part of the conference materials for the  
14<sup>th</sup> Annual Gas and Power Institute session  
"Selected Drafting Issues in Midstream Contracts"