

NO. 09-0270

IN THE SUPREME COURT OF TEXAS

XTO ENERGY INC.,

Petitioner,

vs.

SMITH PRODUCTION INC.,

Respondent.

SMITH PRODUCTION INC.'S RESPONSE TO PETITION FOR REVIEW

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RESPONSE ISSUES PRESENTED

ISSUE ONE

The court of appeals correctly held that as a matter of law, the unambiguous language of Article VI.B of the JOA does not permit a non-operating working interest owner to change its election regarding participation in proposed wells.

ISSUE TWO

XTO's contrary interpretation is unreasonable as a matter of law because it adds new language to Article VI.B, is internally inconsistent, and would ordinarily create a disputed issue of material fact whenever a working interest owner attempts to change its election, undercutting the primary advantage of an industry-wide form contract like the JOA and exposing operators to the risk of double liability.

ISSUE THREE

The court of appeals correctly held that XTO failed to raise a fact issue as to the alleged custom and usage of changing an election under Article VI.B, because XTO's summary judgment evidence fell far short of the degree of general understanding in the industry necessary to establish custom and usage under Texas law.

STATEMENT OF FACTS

XTO's version of the facts begins acceptably, but ultimately devolves into pure argument. As its very caption reveals, the final section, "Custom And Usage In The Industry Allows a Party to Change An Election During The 30-Day Notice Period," is merely a regurgitation of XTO's own summary judgment arguments and proof, (Pet. at 4-5), not a statement "without argument" of "the facts pertinent to the issues or points presented" under the applicable standard of review. TEX. R. APP. P. 38.1(g). For a more balanced, accurate, and useful recitation of the facts, Smith urges the Court to rely on Section I of the court of appeals' opinion. *See XTO Energy, Inc. v. Smith Prod., Inc.*, 282 S.W.3d 672, 674-75 (Tex. App. - Houston [14th Dist.] 2009, pet. filed). A few of XTO's assertions do bear correction here, however.

First, XTO's petition devotes a lot of space to arguing that Chevron's initial election was made "in error," because Chevron did not consult with XTO before notifying Smith that it would not participate in the four proposed wells. (Pet. at 2-3.) But it is undisputed that Chevron was not legally obligated to consult XTO before deciding whether to participate, (II CR 309, 345, 389), because the proposed transaction between Chevron and XTO had not closed (and might never have closed), and Chevron - not XTO - was the owner of the interest to participate in the wells. Chevron's Non-Operated Joint Ventures group deliberately chose to "go non-consent" after studying the relevant geological data and economic models and determining that the wells did not meet Chevron's participation criteria. (III CR 679, 681-98.) More importantly, the issue of whether Chevron's initial election was "erroneous" (Pet. at 2) is simply not "pertinent to

the issues or points presented” in this appeal—the proper construction of Article VI.B of the American Association of Petroleum Landmen (AAPL) Form 610 Model Form Operating Agreements that the parties signed here (collectively, “the JOA”).

Second, XTO emphasizes that Chevron notified Smith of its attempted second election to participate in the new wells only one week after it initially declined to participate. (Pet. at 3-4.) But as the court of appeals observed, all of the other non-operating working interest owners had already both consented to participate in the wells *and* agreed to assume a proportionate share of non-consenting Chevron’s interests by June 22—before Chevron tried to elect a second time on June 24. 282 S.W.3d at 674. (*See* III CR 647.)

Third, XTO relies heavily on Chevron’s July 15, 2004 letter stating that it disagreed with Smith’s decision and “wanted to be billed for its share of the costs of the Wells.” (Pet. at 4 (citing II CR 383).) But it is undisputed that Chevron did not bother to remit a check for its share, even though the amount due was expressly stated on both Smith’s original notices, (III CR 660-75), and the “authority for expenditure” (AFE) forms Chevron signed and returned to Smith. (III CR 735-39.) More significantly, neither Chevron nor XTO made further complaints or took any legal action whatsoever for nearly five months, until XTO filed this lawsuit. (I CR 2.) By then, it was public knowledge that the wells were a commercial success. (IV CR 871-76.) By seeking to enjoy the full benefits of participation without assuming any of the initial risks, XTO’s suit contravenes the basic purpose of Article VI.B as articulated by XTO itself. *See* Pet at 6 (“The purpose of Article VI, B, is straightforward and self evident: (1) to provide

deadlines . . . and (2) to ensure that a non-consenting party does not benefit from a successful outcome of risks that the non-consenting party did not take. *See, Valence Operating Company v. Dorsett*, 164 S.W.3d 656 (Tex. 2005)’’).

SUMMARY OF THE ARGUMENT

This case does not warrant the Court’s review for several reasons. First and foremost, the court of appeals got it right. The court construed an industry-wide form JOA in accordance with both the JOA’s plain language and the intent of the drafter, the AAPL, an organization that represents both operators and non-operators. The court’s holding that Article VI.B of the JOA permits non-operating working interest owners only one election to participate in proposed operations provides an appropriately bright-line rule by which all parties can safely and efficiently structure their conduct under the JOAs.

Second, XTO’s assertion of error is premised on a patently unreasonable interpretation of the JOA. In contending that Article VI.B permits an owner to change its election anytime within the 30-day period unless other owners “have materially changed their positions based upon the initial election,” XTO impermissibly adds language that is nowhere to be found in the plain words or the underlying purpose of the JOA.

Third, XTO’s unsupported, nebulous “absence-of-harm” standard has dire implications for the industry, creating a fact issue anytime a non-operating working interest owner attempts to change its election. This “let the jury sort it out” approach will needlessly inject uncertainty, delay, and expense into the already risky and difficult business of oil and gas development, exposing operators to double liability and inconsistent results. The Court should decline XTO’s invitation to wreak such havoc in

Texas law and industry.

ARGUMENT

I. The court of appeals correctly held that Article VI.B of the JOA unambiguously permits each non-operating working interest owner only one election whether to participate in proposed drilling operations.

Under Article VI.B of the JOA, an operator is required to advise each non-operating working interest owner of its intent to drill subsequent well(s), and each may participate in the proposed well(s) by timely notifying the operator of its election to do so. (III CR 571, 604.) Under both the plain language of this provision and the clear purpose it seeks to achieve, only one election is allowed. Accordingly, the court of appeals' opinion and judgment were correct, and the petition should be refused or denied.

As a matter of simple grammar, Article VI.B speaks of one election, not multiple ones. To “elect” is “[t]o make deliberate choice of (*a* course of action, *an* opinion, etc.) in preference to *an* alternative.” 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 841 (1971) (emphasis added). If you cast your ballot for Norm Coleman on the first day of early voting, then recall that you wanted Aunt Agnes's views on the contest, you do not get to switch your vote to Al Franken before the polls close on Election Day based on her advice, even if you meant to defer to your aunt.

And so it is here. When Article VI.B gave Chevron “thirty (30) days after receipt of the notice [from the operator] within which to notify the party wishing to do the work whether they elect to participate in the cost of the proposed operation,” (III CR 571, 604), it set a deadline by which Chevron could take one particular action. *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005) (observing that under Article

VI.B of an earlier but substantially similar version of AAPL Form 610 JOA, “the thirty-day notice period sets a deadline for [non-operating working interest owners] to decide whether to participate in proposed operations”). That election is a singular event, not a month-long drama. *See id.* at 663 (discussing “the working interest owner’s right to thirty days notice before being required to make *a decision*”) (emphasis added); John R. Reeves & J. Matthew Thompson, *The Development of the Model Form Operating Agreement: An Interpretative Accounting*, 54 OKLA. L. REV. 211, 246 (2001) (stating that “each version of the AAPL Form 610 Model Form Operating Agreement provides that a party’s receipt of written notice triggers the time period for a party to make *an election* as to a proposed subsequent operation”) (emphasis added).

Chevron made its choice under Article VI.B on June 17, when it notified Smith it did not wish to participate. (III CR 708-12.) The court of appeals correctly held that Chevron’s attempt to cast a second vote on June 24 (*id.* at 735-39) was not valid under the plain terms of the JOA. 282 S.W.3d at 674.

Importantly, the court’s interpretation of Article VI.B. has been confirmed by the drafters of the form, the American Association of Petroleum Landmen (the AAPL). In an amicus brief filed in *Nearburg v. Yates Petroleum Corp.*, 943 P.2d 560 (N.M. Ct. App. 1997), the AAPL could not have been clearer that Article VI.B contemplates one election, and one election only:

The AAPL Model Form Operating Agreement contains no provision allowing a party to retract or change its election not to participate in the drilling of a new well. This is true regardless of whether the election is by an express declaration of nonparticipation or is the result of a failure to reply to a

properly given notice.

Br. of Amicus Curiae AAPL at 13-14 (filed in Cause No. 16,783 (N.M. Ct. App. Mar. 22, 1996)) (attached as Appendix A).¹ The court of appeals' interpretation is correct.

II. XTO's contrary interpretation is unreasonable as a matter of law.

XTO's contrary interpretation is, on its face, manifestly unreasonable: it inserts language into an unambiguous contract, is internally inconsistent, and substitutes certainty with litigation whenever this issue arises.²

A. Well-established Texas law precludes XTO's attempt to add words to the plain language of an unambiguous contract.

XTO has never gone so far as to claim that Article VI.B allows an owner always, under any circumstances, to change its mind at any time within the 30-day period. Instead, recognizing the bizarre and unfair circumstances that could result from a literal adherence to a 30-day "termination date[]," (Pet. at 7), XTO merely claims that Article VI.B permits a party to change its election within those 30 days if "the other parties have not materially changed their positions." (*Id.* at 9.) Obviously, XTO knows that allowing non-operating working interest owners to change their election at any time within the 30-day period would unreasonably disadvantage the operator in many situations. Time is often of the essence in the oil patch; an operator might need to drill

¹ Although *Nearburg* involved an attempt to change an election more than 30 days after notice had been given, 943 P.2d at 569-70, nothing in the AAPL's amicus brief indicates that its interpretation of Article VI.B as precluding a change in election was dependent on whether the deadline had passed or not.

² Because XTO's proffered interpretation is not reasonable, the court of appeals correctly rejected XTO's alternate claim that Article VI.B is ambiguous. 282 S.W.3d at 680-81; see *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006) ("[A] contract is not ambiguous merely because the parties disagree on its meaning. 'An ambiguity exists only if the contract language is susceptible to two or more reasonable interpretations.'" (quoting *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003)) (other citation omitted).

before the end of the election period, *e.g.*, if other wells are draining a field, if prices have temporarily spiked, if favorable financing is immediately available, or if scarce equipment and qualified crews are already on site. As this Court explained in *Valence*, the JOA permits an operator to commence operations before the end of the 30-day period—or even before any other working interest owner has made an election—because of the “potential benefits” to all owners of “an early start,” such as avoiding “the draining of an oil field by a neighboring operator or the expiration of an oil and gas lease.” 164 S.W.3d at 662-63. But in such instances, “the risk of early commencement of such operations falls entirely on the operator because if none of the working interest owners consent to participation within thirty days, the operator bears the full cost of operations.” *Id.* at 663. If the working interest owners could opt in or out of a project as early indications of its success appear, they would all consent to successful ventures and all go non-consent to dry holes. Under such constraints, few prudent operators would bear the onus of undertaking costly operations if they must share in the profits of a successful outcome yet bear all the costs of a failure.

XTO’s position is simply untethered to the actual terms of the JOA. It adds words—lots of them—, in contravention of the settled rule that Texas courts will “neither rewrite the parties’ contract nor add to its language.” *Schaefer*, 124 S.W.3d at 162.³

³ As the court of appeals pointed out, XTO’s addition of the “materially changed” language also impermissibly robs Article VI.B’s 30-day deadline of real meaning. *See* 282 S.W.3d at 679 (“[I]f a party could change its election if the other parties had not materially changed their positions in reliance on the initial election, it is not clear why the ability to exercise such a privilege would be limited to thirty days after receipt of the proposing party’s notice.”); *see also Seagull Energy*, 207 S.W.3d at 345 (holding that courts should “examine and consider the entire writing in an effort to harmonize and give effect to all the

In its *Nearburg* amicus brief, the AAPL warned against the type of departure from contractual text that XTO advocates here. It urged the New Mexico Court of Appeals “to read and construe the clear language of the AAPL Model Form Operating Agreement as it is written and signed by the parties, *with no implications of additional terms*, to establish the rights and obligations of the parties to the contract.” (App. A at 15 (emphasis added).) The AAPL stated, “There is no reason why such a provision [permitting a change of election] must be contained in the contract or construed into the contract.” (*Id.* at 14.) On the contrary, it warned that “[t]he ultimate result [of implying such a provision] will be less certainty and more litigation . . . over this commonly used contract form and more business risk to the parties to such transactions, which unnecessarily adds to the cost of oil and gas exploration and operations.” (*Id.* at 11.)

As the court of appeals observes, another form operating agreement that is less commonly used in the industry *does* expressly permit working interest owners to change their election.⁴ The parties could have used that form, or rewritten this particular section of the JOA to allow for a re-election. Since they did neither, the courts below properly refused XTO’s invitation to make a new contract.

B. XTO’s interpretation is internally inconsistent.

XTO’s interpretation is also unreasonable because it contains a fatal internal inconsistency. On one hand, XTO maintains that it was common knowledge,

provisions of the contract so that none will be rendered meaningless”) (emphases omitted) (quoting *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)).

⁴ See 282 S.W.3d at 680 (citing ROCKY MOUNTAIN OIL & GAS ASS’N FORM 3, ART. 9, § 9.2 (1959) & FORM 2, ART. 8, § 8.6 (1955), *reprinted in* 7 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW §§ 920.4, 920.5 (1995)); *see also* *Nearburg*, 943 P.2d at 570 (citing same).

throughout the industry and perforce to all parties, that owners can change their position on going consent or non-consent up until the last day of the 30-day period. (Pet. at 4-5.) On the other hand, XTO concedes that, if an owner materially changes its position in reliance on another owner's initial election, then that initial election becomes binding. (*Id.* at 9, 11, 14.) This concession betrays XTO's true lack of confidence in its position. If everyone in the industry already knows that elections are provisional until the last moment, then how could they reasonably rely to their detriment on a mere expression of current sentiment?

The answer, of course, is that an election to go consent or non-consent is not some passing fancy, but serious business. Consistent with the JOA, Smith's notice asked for cash within 30 or 15 days of receipt, (III CR 660-75), and the AFEs to be signed and returned by consenting owners specified the amount owed for participation. (*Id.* at 735-39.) All parties thus had to consider their options carefully, deciding whether the known risk was worth the potential gain. This decision would not normally be made in a vacuum, but in light of all surrounding circumstances—competing opportunities, financing availability, and, in some instances at least, the choices made by other owners.⁵ Yet under XTO's approach, such planning would always be tentative, since one's share of the total investment could always change—up or down—because elections are merely tentative for a 30-day period. As both a practical and textual matter, XTO's interpretation makes no sense.

⁵ (See III CR 571, 604 (art. VI.B.2, entitled "Operations by Less than All Parties").)

C. XTO’s interpretation would ordinarily create a disputed issue of material fact whenever an owner attempts to change its election.

XTO’s strained interpretation of the JOA is cloaked in the mantle of “fairness”—that a second election should be permitted unless someone is harmed. (Pet. at 9, 11, 14.) In asserting that a jury should apply this absence-of-harm standard, however, XTO ignores not merely the expense, delay, and uncertainty that would be suffered by all parties, but the very real risk of exposing operators to possible double liability.

1. XTO’s litigation-based approach undercuts the very purpose and advantage of an industry-wide form JOA.

This is not a situation where the parties negotiated and drafted their own contract, presumably forming a mutual or at least a unilateral intent as to each provision. In those circumstances, a fact finder is peculiarly able to discern the true meaning of any disputed terms. Conversely, if one party drafted the contract with little or no opportunity for negotiation, it makes sense to use the familiar rule of resolving ambiguity against the drafter to decide the case. Because only one party presumably had any real intent, the law places upon it an obligation to use very precise language.

In this case, however, entirely different policy considerations obtain. The AAPL led a comprehensive, arduous effort to develop the original 1956 Form 610 Model JOA. *See* Reeves & Thompson, 54 OKLA. L. REV. at 214. Since then, the AAPL has promulgated several revised versions of the JOA, including the 1982 version used here. *Id.* at 214-15. Unlike some form agreements available in other industries, the JOA does not reflect the perspective of any particular “side,” since landmen and their employers

may be operators on some leases and non-operating working interest owners on others.

The great advantage of the AAPL's form JOA is that parties can employ it without negotiating, discussing, or even reading most of its provisions. All sides trust the JOA because it has been used for more than 50 years on leases large and small throughout the nation. (*See* App. A at 10 (explaining that “landmen . . . usually use the preprinted Model Form Operating Agreement published by AAPL” and that “thousands of oil and gas transactions are entered into annually using the AAPL Model Form Operating Agreement”).) Parties can save the time, expense, and exposure of individual negotiations about a complex relationship because they regard the JOA as fair, balanced, and clear. (*Id.* at 16.) The parties here left Article VI.B's relevant terms unchanged, and there was no evidence these terms were discussed or even considered during negotiations.

Parties who sign a JOA should not have to fear that that they are “buying a lawsuit,” at least not regarding the type of non-technical provisions at issue here. If at all possible, courts should construe the JOA as a matter of law, adding to the body of law that enhances the certainty and usefulness of the form agreement for everyone.

2. XTO's “let a jury sort it out” approach places an operator faced with a change in election in an untenable position.

XTO's litigation-based approach has another, equally damning flaw: it inevitably risks inconsistent results and the imposition of double liability on an operator. Here, for example, XTO has sued only Smith. If XTO were to prevail, it would recover all the profits of full participation from Smith—even though Smith has already paid a substantial portion of those profits to the three owners who agreed to carry their

proportionate share of Chevron's costs before Chevron tried to change its election.

To defend itself, Smith has three unpalatable choices: bring third-party actions against the consenting parties during XTO's primary suit, sue the consenting parties later if XTO secures a judgment, or pay XTO's newly-determined profit share twice. The first choice would directly inject the other owners, who had paid their share and shared the risk along with Smith, into a dispute to which they are only tangentially related. The second choice would oblige Smith to litigate XTO's case all over again, with the attendant risk of inconsistent results. *See Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1990) (recognizing rule that "collateral estoppel cannot be asserted against a party who was not a party or in privity with a party in the prior litigation") (emphasis omitted). The third choice would cost Smith a substantial portion of the profits it earned from its operations.

In fact, XTO's "leave it to the jury" interpretation leaves no "safe" option for an operator confronted with an attempted second election. Had Smith allowed Chevron to change its election—and correspondingly reduced the interests of the other owners who had already elected to assume Chevron's share—those other owners could presumably have sued for profits they lost after Smith "improperly" allowed the second election. But if the new wells had not produced in paying quantities, the other consenting parties could presumably have sued for the additional costs they incurred when Smith "improperly" refused to allow Chevron's second election. Since, under XTO's "fairness" approach, only the fact finder can decide whether parties "have materially changed their positions based upon the initial election," an operator can never be sure which course

might subject it to liability. An interpretation of a form contract that does not permit even careful operators to structure their conduct to avoid liability cannot be correct.

III. The court of appeals correctly held that XTO did not prove that custom and usage permits a non-operating working interest owner to change its election under Article VI.B.

XTO attempts to supplement its strained interpretation by claiming that expert “custom and usage” testimony supports its version, and that the lower courts erred in refusing to consider the affidavits it proffered from Owen M. Barnhill, a landman. (Pet. at 4-5, 12-15; *see* IV CR 878-84, 924-25.) XTO is wrong on both counts.

Texas courts permit testimony to explain technical terms in a specialized contract, even in the absence of ambiguity. *See, e.g., Mescalero Energy, Inc. v. Underwriters Indem. Gen. Agency, Inc.*, 56 S.W.3d 313, 320 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (in construing term “formation” in insurance policy definition of well “blowout,” stating that “a specialized industry or trade term may require extrinsic evidence of the commonly understood meaning of the term within a particular industry”); *Sivert v. Cont’l Oil Co.*, 497 S.W.2d 482, 489 (Tex. Civ. App.—San Antonio 1973, writ ref’d n.r.e.) (permitting custom and usage to explain technical terms “secondary recovery” and “waterflood”). In some circumstances, Texas courts may permit testimony to assist in the interpretation of ordinary terms as well. *See Holmes v. Beatty*, ___ S.W.3d ___, Nos. 07-0784 & 07-0785, 2009 WL 1817398, at *6 (Tex. June 26, 2009) (citing RESTATEMENT (SECOND) OF CONTRACTS § 222 cmt. b to permit “reference to the common law or trade usage” to interpret right of survivorship in brokerage account agreements and securities certificates). But even if such testimony could have been

admissible here, the court of appeals correctly held that XTO's summary judgment proof failed to raise a genuine issue of material fact on custom and usage. 282 S.W.3d at 682.

Texas has long set a rigorous standard for establishing the meaning of certain terms through custom and usage; conclusory expert testimony simply will not suffice. "The general rule in the case of contract is that the custom and usage must be so general that both [contracting parties] are presumed to be aware of them, or that they have actual knowledge of them, to be charged with having contracted with reference to such custom and usage." *Barreda v. Milmo Nat'l Bank*, 252 S.W. 1038, 1039-40 (Tex. Comm'n App. 1923, judgment adopted) (citing 27 R.C.L. §§ 9 & 10). This remains the rule in Texas. *See, e.g., Energen Res. MAQ, Inc. v. Dalbosco*, 23 S.W.3d 551, 556 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *Fry v. Guillote*, 577 S.W.2d 346, 349 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ refused n.r.e.). As one treatise explains:

When a usage or custom is relied on it must be established by clear and satisfactory proof. A usage or custom cannot be established by proof of specific instances or its recognition unless they are *sufficiently numerous to indicate a regular course of business*. . . . It is only where the evidence clearly establishes a fixed habit or custom that it possesses *any evidentiary* force. Lack of definiteness and certainty is fatal to its existence.

37 TEX. JUR. 3d *Evidence* § 913 (2009) (footnotes omitted) (emphases added).⁶

Yet, as the court of appeals held, Barnhill's affidavits offer only general

⁶ This is the general rule in other American jurisdictions as well. *See* 21A AM. JUR. 2d *Customs and Usages* § 44 (2009) ("Evidence that . . . fails to establish the custom by proof of certain and uniform usage is insufficient to establish the validity or effectiveness of the custom. A custom or usage can only be proved by numerous instances of actual practices, and not by the opinion of a witness.") (footnote omitted); 25 C.J.S. *Customs and Usages* § 10 (2009) (stating that "a party must be shown either to have had actual knowledge of a general usage of trade among carriers, or it must be shown to have been so general and notorious that the person is presumed to have known it") (footnote omitted).

and conclusory assertions, falling woefully short of the minimum requirements of the Texas rule. 282 S.W.3d at 682. Barnhill recalls that three companies at unspecified times and places on some unspecified number of occasions have successfully changed their elections as non-operating working interest owners. (IV CR 880.) But what he does not say is fatal to his claim. He does not say whether:

- The operators sought or welcomed these changes;
- There were other non-operating working interest owners;
- Any such other working interest owners acceded to or resisted such change or had already changed their circumstances in reliance on the initial election; or
- There were other instances where such attempted changes have been disallowed by the operator.

Three anecdotes lacking any of these specifics cannot constitute custom and usage sufficient to overcome the plain meaning of Article VI.B.⁷

PRAYER

For all these reasons, Smith respectfully requests the Court to deny XTO's petition without further briefing, or alternatively to refuse it outright.

⁷ The Oklahoma authority relied on by XTO, *Oxley v. General Atlantic Resources, Inc.*, 936 P.2d 943 (Okla. 1997), has nothing to say about the sufficiency of Barnhill's testimony under Texas proof requirements for custom and usage. See *Oxley*, 936 P.2d at 944-46 (after determining that a different provision of the JOA was ambiguous, remanding for consideration of custom and usage evidence, without determining the sufficiency of the testimony previously submitted). By statute, Oklahoma courts look much more freely to custom and usage evidence than most jurisdictions. See 15 OKLA. STAT. ANN. § 162 (1993) ("A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."); see also *Oxley*, 936 P.2d at 946 (citing statute).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing response to petition for review was served by certified mail, return receipt requested, on the following counsel of record on July 23, 2009:

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INDEX OF APPENDIX

TAB A Brief of Amicus Curiae AAPL, filed in Cause No. 16,783 (N.M. Ct. App. Mar. 22, 1996)