

The banner features a dark background with a glowing lightbulb held in a hand, surrounded by various icons representing energy and technology. The text 'Energy Market Drivers Series' is written in a white serif font. A red square with a white letter 'G' is positioned on the right side of the banner.

# Energy Market Drivers Series

## **The Hidden Time Bomb: Mitigating Rule Against Perpetuities Risk in Energy Transactions**

**By: Ethan T. Mock and Alex R. Telarik**

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In energy and land transactions, few legal doctrines create as much hidden risk as the Rule Against Perpetuities (RAP). Often overlooked during drafting and diligence, RAP can quietly invalidate valuable property interests or trigger costly disputes years after a deal closes. This Alert outlines how RAP applies to oil and gas transactions and what landmen and deal professionals can do to avoid unintended consequences.

### **Key Takeaways**

#### **1. RAP Is Designed to Prevent Long-Term Uncertainty in Property Rights**

The rule requires that property interests must vest, if at all, within 21 years after a “life in being” at the time the interest is created. Its purpose is to prevent indefinite control of property (“dead-hand control”) and ensure assets remain transferable and commercially usable.

**Key risk:** Interests tied to uncertain future events may violate RAP at inception, even if the issue doesn’t surface immediately.

#### **2. Oil & Gas Interests Are Not Exempt**

Oklahoma courts treat many energy-related interests as real property, meaning RAP applies to:

- Overriding royalty interests (ORRIs)
- Non-participating royalty interests (NPRIs)
- Working interests and related assignments

Common transaction documents impacted include:

- Mineral deeds

- Leases
- Assignments

**Implication:** Routine deal structures can unintentionally trigger RAP violations.

### 3. Violations Can Be Severe, But Outcomes Are Evolving

Historically, RAP violations rendered interests void from the outset. Modern Oklahoma statutes allow courts to reform defective provisions and attempt to honor the original intent of the parties.

**Reality check:** Judicial reformation is unpredictable and should not be relied upon as a primary safeguard.

### 4. Drafting Missteps Are the Most Common Trigger

High-risk provisions include:

- Open-ended contingencies (e.g., tied to indefinite future events)
- Delayed-commencement “top leases” or other interests transferred only upon uncertain future occurrences
- Poorly structured renewal or extension clauses

Even protective mechanisms like anti-washout provisions can create fiduciary obligations and fail if not carefully limited within RAP-compliant timeframes.

**Bottom line:** Precision in drafting is critical—small ambiguities can create major legal exposure.

### 5. Recent Case Law Highlights Ongoing Uncertainty

In a recent appellate opinion, the Oklahoma Court of Civil Appeals found certain lease structures violated RAP due to indefinite commencement triggers but ultimately upheld the transaction because related unrecorded agreements imposed a defined time limit and saved the transaction from a RAP violation.

**Takeaway:** While courts may evaluate transactions holistically, outcomes remain fact-specific and unsettled. In fact, the dissent in *Tributary Resources* argued the unrecorded instruments should not have been considered because, in the dissent’s view, RAP compliance is determined only by recorded instruments.

### 6. Proactive Risk Management Is Essential

Best practices include:

- **Due diligence:** Identify RAP risks early (via comprehensive title work) and account for them in deal pricing
- **Portfolio review:** Audit existing assets for latent issues
- **Drafting discipline:**
  - Tie contingencies to clear, finite time periods
  - Include RAP savings clauses
  - Avoid vague or open-ended triggers

**Don't rely on courts:** Reformation is a fallback, not a strategy

### The Bottom Line

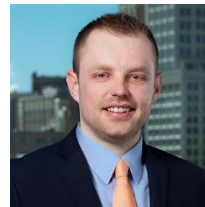
The Rule Against Perpetuities remains a powerful, and often underestimated, constraint on energy transactions. Left unaddressed, it can undermine deal value, cloud title, and disrupt operations long after closing.

Companies and land professionals who proactively identify and mitigate RAP risk through careful drafting and diligence will be far better positioned to protect their investments and avoid costly surprises.

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[Ethan T. Mock](#)



[Alex R. Telarik](#)

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