Top 10 Texas Oil and Gas Cases in the first 10 months of 2017

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This article discusses significant oil and gas decisions from state courts in Texas during the first 10 months of 2017. It is not intended to be a strict legal analysis, but rather a useful guide for landmen in their daily work. Therefore, a complete discussion of all legal analyses contained in the decisions are not always included.

1. ***BP America Production Company v. Red Deer Resources, LLC*, 526 S.W.3d 389 (Tex. 2017).**

In *BP America Production Co. v. Red Deer Resources LLC*, the Texas Supreme Court considered the effect of a retroactive shut-in royalty clause. In 1962, BP acquired a lease covering approximately 2,000 acres in Lipscomb and Hemphill counties. By 2009, the lease was being held by just one marginal gas well. By 2011, that well was producing less than 10 Mcf per day. Red Deer discovered the situation in 2011, and secured a top lease for the BP property.

On June 4, 2012, the only well holding the BP lease produced 10 Mcf of gas, and then went eight straight days with no production. BP shut off the well valve on June 12, 2012. The following day, BP sent a notice to the lessors that it was invoking the lease's shut-in royalty clause, enclosing checks for the shut-in royalty. BP designated June 13, 2012 as the beginning of the shut-in period. The well remained shut in at all times thereafter.

In August 2012, Red Deer sued BP alleging the lease had terminated due to a failure to produce in paying quantities and a total cessation of production. The primary dispute in the case was the operation of the lease's shut-in royalty clause, which provided as follows:

> Where gas from any well or wells capable of producing gas …is not sold or used during or after the primary term and this lease is not otherwise maintained in effect, lessee may pay or tender as a shut-in royalty …payable annually or on or before the end of each twelve-month period during which such gas is not sold or used and this lease is not otherwise maintained in force, and if such shut-in royalty is so paid or tendered and while lessee's right to pay or tender the same is accruing, it shall be considered that gas is being produced in paying quantities, and this lease shall remain in force during each twelve-month period for which such shut-in royalty is so paid or tendered.

The trial court and Court of Appeals held the shut-in royalty clause required the well to be capable of production in paying quantities on the date it was shut in (June 13, 2012) to maintain the lease. Accordingly, when the jury found the well was not capable of PPQ on June 13, 2012, the trial and appellate courts held the lease expired due to a total cessation of production, which the shut-in royalty clause did not save.

The Texas Supreme Court reversed, finding the lower courts misapplied the lease's retroactive shut-in royalty provisions. The shut-in royalty clause provided the lease would be maintained if a shut-in royalty was paid at any time within 12 months from the date gas from the well was last sold or used, and that "while lessee's right to pay or tender [the shut-in royalty] is accruing, it shall be considered

that gas is being produced in paying quantities." The court referred to this clause as providing for "retroactive constructive production" dating back to the last day on which gas from the well was sold or used. Thus, the court held that as long as (1) the well was capable of PPQ on the last date that gas from the well was sold or used and (2) BP paid the shut-in royalty within 12 months of that date, the shut-in royalty clause would maintain the lease.

The last date on which gas from the well was sold or used was June 4, 2012. Thus, when BP tendered the shut-in royalty on June 13, 2012, it clearly did so within 12 months of the date on which the well's gas was last sold or used. Accordingly, the shut-in royalty clause would maintain the lease with constructive production so long as the well was capable of PPQ on June 4, 2012. To terminate the lease, Red Deer bore the burden of proving the well was *not* capable of PPQ on that date. However, Red Deer did not obtain such a finding in the trial court. Rather, Red Deer obtained a jury finding that lease was not capable of PPQ on June 13, 2012 (the date the well was shut in). Based on this error, the Texas Supreme Court reversed the lower courts, held that Red Deer failed to prove the lease had terminated, and entered a take-nothing judgment in favor of BP.

2. ***Samson Exploration, LLC v. T.S. Reed Properties Inc., et al.*, 521 S.W.3d 766 (Tex. 2017).**

This case involved a dispute over a mistaken, overlapping pooling designation. In 2001, Samson created a gas unit covering certain depths in East Texas. Samson then drilled and obtained production from two wells in the unit. The first well was produced at approximately 12,300 feet. The second well produced at approximately 13,000 feet. Samson then unilaterally amended its unit designation to change the unit's depth to "12,400 feet and below." Thus, the amendment had the effect of removing well No. 1 from the pooling unit.

The unit owners at depths above 12,400 feet sued, alleging Samson did not have authority to unilaterally amend the unit designation to exclude them. However, these unit owners received notice of the designation amendment at the time it was made and accepted royalty checks from Samson based on the amended designation for years without complaint. Accordingly, the Texas Supreme Court held that these excluded unit owners ratified the designation amendment and dismissed their claims.

However, the excluded unit owners were not Samson's only problem. After amending the first pooling unit, Samson filed a second unit designation covering much of the same acreage as the first. This second unit covered "production occur[ing] below a depth of 12,000 feet." Due to an error by Samson's lawyer, this second unit designation did not include a depth limitation (it included all depths below 12,000 feet, period). Thus, the second unit overlapped with the first unit at depths below 12,400 feet. And, because well No. 2 was producing at approximately 13,000 feet, it was within the boundaries of *both* pooling units.

Samson claimed its failure to include a depth limitation on the second pooling unit was an error, and refused to pay royalties from well No. 2 to the owners in the second pooling unit at depths between 12,000 and 12,400 feet. Not surprisingly, these overlapping unit owners filed suit.

Samson asserted three defensive theories to the overlapping unit owners' claims. First, Samson argued its failure to include a depth limitation on the second pooling unit was a "scrivener's error," i.e., a mistake. It claimed the evidence clearly showed the second pooling unit was only intended to

cover depths between 12,000 and 12,400 feet, and therefore, it should not have to pay royalties on production from well No. 2 (which produced at 13,000 feet) to the overlapping unit owners.

Second, Samson argued a valid pooling designation requires a "cross-conveyance of title." That is, each mineral interest owner within a pooled unit effectively transfers a portion of its mineral interest to every other mineral interest owner within the unit. And, because an interest owner cannot transfer its property twice, the second pooling unit designation failed and never actually came into existence due to cross-conveyance of title failure.

Finally, Samson argued that if it was required to pay royalties to the overlapping unit owners, the money should not come from Samson's working interest but, rather a disgorgement of part of the royalties Samson had paid to those unit owners who owned depths below 12,400 feet.

The Texas Supreme Court rejected all three arguments. First, the court held that a "scrivener's error" only excuses a party from the express terms of their contract if it evidences a *mutual* mistake in documenting the parties' agreement. Though Samson presented evidence that *Samson* made a mistake by failing to include a depth limitation in the second pooling designation, it presented no evidence the *overlapping unit owners* made a mistake.

Next, the court explained that although pooling designations do affect a cross-conveyance of title, oil and gas leases and pooling designations are subject to basic contract law in addition to the law of real property. Thus, the fact that a cross-conveyance of title may fail does not excuse operators from paying royalties in accordance with the express contractual terms of their mineral leases' pooling clauses. Because the express terms of the overlapping unit owners' leases required Samson to pay them on well No. 2, Samson was required to do so, cross-conveyance failures notwithstanding.

Finally, the court held that Samson's claim for reimbursement was barred by the "voluntary payment rule," which provides: "[M]oney voluntarily paid on a claim of right, with full knowledge of all the facts, in the absence of fraud, deception, duress, or compulsion, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability." Accordingly, the unit owners at depths below 12,400 feet who had been paid a full royalty on well No. 2 were allowed to keep the overpayments, and Samson was forced to pay the overlapping unit owners out of its working interest revenues. A very expensive "scrivener's error" indeed.

3. ***Apache Deepwater LLC v. Double Eagle Development LLC*, No. 08-16-00038-CV, 2017 WL 3614298 (Tex. App. — El Paso Aug. 23, 2017)**

This case analyzed whether a retained acreage clause provided for "rolling terminations" after the expiration of a lease's primary term or "snapshot termination" at the expiration of a lease's primary term. In 1975, Apache's predecessor leased a 640-acre tract in Regan County. The lease provided a four-year primary term and a secondary term for "as long thereafter as oil, gas, or other minerals or leased substances or any of them are produced from the leased premises." The lease defined the "leased premises" as the entire 640-acre tract.

Consistent with the regulatory scheme at the time, Apache divided the lease into four 160-acre proration units. Each unit had one producing well within its boundaries. At the end of the lease's primary term, all four wells were producing. However, in the ensuing years, three of the four wells ceased production.

In 2012, the property owner leased the property within the three nonproducing proration units to Double Eagle, which Double Eagle then demanded that Apache execute releases for the property in the nonproducing units. Apache refused, contending production from the well in the producing unit held the entire 640-acre tract. Double Eagle then sued for a declaration the lease expired within the nonproducing units.

The crux of the dispute was the interplay between the lease's habendum and retained acreage clauses. The habendum clause provided

> TO HAVE AND TO HOLD the leased premises [i.e., the entire 640-acre tract] for a term of three (3) years from the date hereof, hereinafter called the 'primary term,' and as long thereafter as oil, gas or other hydrocarbons or other minerals or leased substances, or either or any of them, are produced from the leased premises or from lands with which the leased premises are pooled or unitized.

However, the lease's retained acreage clause provided

> Notwithstanding anything to the contrary in the foregoing, Lessee covenants to release this lease after the primary term except as to each producing well on said lease, operations for which were commenced prior to or at the end of the primary term and the proration units as may be allocated to said wells under the rules and regulations of the Railroad Commission of Texas or 160 acres, whichever is greater, insofar as said proration units cover from surface to base of the deepest formation penetrated by the deepest of said wells. The description of said tracts around said well shall be compiled and prepared by the Lessee for purpose of executing such release.

Apache contended this retained acreage clause provided for "snapshot termination." That is, Apache contended this clause required a single snapshot-in-time evaluation as of the end of the lease's primary term, and because each of the four proration units had a producing well in it on that date, the termination obligation in the retained acreage clause did not apply. Conversely, Double Eagle contended the retained acreage clause provided for "rolling terminations." That is, Double Eagle contended that following the primary term, the lease would expire as to any proration unit that did not have a producing well within it at any time (to the extent not saved by the continuous operations clause).

The El Paso Court of Appeals sided with Apache. The court first noted the habendum clause unambiguously provided the entire 640-acre tract would be held by production from any well within the tract's boundaries. Thus, for the retained acreage clause to modify the habendum clause and provide for rolling proration unit terminations during the lease's secondary term, it had to contain "clear, precise, and unequivocal language" expressing a "clear intent" to do so. The court held that the lease's retained acreage clause did not contain such language. Instead, the court held that the retained acreage clause provided that *after* the end of the primary term, the lessor could insist that any part of the leasehold that was not within a proration unit that had either a producing well or a well under development that later came into production *at* the end of the lease's primary term, must be released. Though Double Eagle correctly pointed out the retained acreage clause used the phrase "after the primary term" not "at the expiration of the primary term," it still limited the lessor's right

to demand a release "after the primary term" to acreage not within a proration unit with a producing well or continuous operations leading to a producing well "prior to or at the end of the primary term." Thus, the court held that the lease did not contain "clear, precise, and unequivocal" language negating the habendum clause and providing for rolling terminations, and that production from any well within the leased tract would hold the lease on the entire tract.

4. *Richardson, et al. v. Mills, et al.*, 514 S.W.3d 406 (Tex. App. — Tyler 2017).

This case presented the question of how to distinguish an oil and gas lease from a mineral deed. The instrument is a deed when it uses words like "forever" and imposes no duty to explore for and develop minerals.

A 1906 instrument was between Mills on one hand and Lindsey and Harris on the other. The document referred to the parties' "desire" for "development, tests and demonstrations" and for Lindsey and Harris to manage the property so it would be developed for oil and gas or be sold.

The granting language referred to "an undivided one half interest in the oil, gas and other minerals … to Harris and Lindsey, and further rights and privileges necessary and proper for the performance of the work of prospecting, testing, operating," etc.

A 1908 release referred to "said contract or lease the time for said development has expired rendering null and void said lease." There was a complete relinquishment of any right or claim held by Nacogdoches Land Co.

The trial court determined that the instruments were ambiguous and allowed extrinsic evidence to determine the parties' intent. Alternatively the 1906 instrument was released when Lindsey and Harris did not perform their obligations. Mills also offered the opinion of an attorney who reviewed the contract (over 100 years after it was executed) and opined about what the deceased parties possibly intended.

The Court of Appeals reversed and rendered that the 1906 instrument was not ambiguous. It was a deed, for these reasons:

- Harris and Lindsay had the right but not the duty to develop the minerals.
- There was no time within which actions must be taken.
- The consideration was services rendered.
- The granting clause said "grant, bargain, sell and convey … ."
- The habendum and warranty clauses specified "forever".

This was language of an unconditional conveyance, not for exploitation of minerals.

The 1908 release referred to an instrument dated July 9, 1907, whereas the instrument in question was dated July 9, 1906. The 1908 release described the document as a "contract or lease" but not as a deed. There were other discrepancies. There was no recording information for the 1906 document in the 1908 release. Mills argued that there was a latent ambiguity (an ambiguity appearing by reason of some collateral matter). Mills contended that reference to 1907 really meant 1906.

Mills' efforts were rejected, including the testimony from the lawyer. The 1908 release was unambiguous and there was no connection between the two instruments.

In an odd twist, the parties stipulated that if Mills lost they would nevertheless own a small interest in the property. Thus, Mills took nothing from the court but ended up with 4 percent of the minerals from the stipulation.

5. *Wenske v. Ealy*, 521 S.W.3d 791 (Tex. 2017).

In this case, the Texas Supreme Court decided whether a deed passed the entire burden of a nonparticipating royalty interest to the grantees or proportionately burdened the grantor and grantees' interest with the NPRI. In so doing, the court highlighted the distinction between a "reservation from" and "exception to" a mineral conveyance and purported to overturn decades-long precedent about the default rules for allocating NPRI's.

In 1988, the Wenskes purchased a 55-acre mineral estate from Marian Vyvjala, Margie Novak and others. Vyvjala and Novak each reserved a 1/8 NPRI (i.e., a total 1/4 NPRI) for 25 years. In 2003, the Wenskes conveyed the property to the Ealys by warranty deed. The deed stated the conveyance was "subject to the Reservations from Conveyance and Exceptions to Conveyance and Warranty" listed in the deed. The deed then *reserved* a 3/8ths royalty to the Wenskes and *excepted* the Vyvjala NPRI from the conveyance and warranty. The "Reservation" and "Exception" clauses read as follows:

> ***Reservations from Conveyance***:
>
> For Grantor and Grantor's heirs, successors, and assigns forever, a reservation of an undivided 3/8th of all oil, gas, and other minerals in and under and that may be produced from the Property. If the mineral estate is subject to existing production or an existing lease, the production, the lease, and the benefits from it are allocated in proportion to ownership in the mineral estate.
>
> ***Exceptions to Conveyance and Warranty***:
>
> Undivided one-fourth (1/4) interest in all of the oil, gas and other minerals in and under the herein described property, reserved by Marian Vyvjala, et al for a term of twenty-five (25) years in instruments recorded in Volume 400, Page 590 of the Deed Records of Lavaca County, Texas, together with all rights, express or implied, in and to the property herein described out of or connected with said interest and reservation, reference to which instrument is here made for all purposes.

Eventually, a dispute arose about whose interest was burdened by the Vyvjala NPRI. The Wenskes claimed their 3/8ths interest was not burdened by the Vyvjala NPRI at all while the Ealys claimed

the Vyvjala NPRI burdened the parties' mineral estates in proportion to their fractional ownership in the minerals. The trial Court granted summary judgment in favor of the Ealys, and the court of Appeals affirmed.

The Texas Supreme Court affirmed as well. The court focused on the deed's subject-to clause, noting it made the Wenskes' conveyance of their mineral interest "subject to" both the "Reservations from Conveyance" and "Exceptions to Conveyance and Warranty." The deed clearly "reserved" to the Wenskes a 3/8 royalty interest. And, by listing the Vyvjala NPRI as an "Exception[] from Conveyance and Warranty," the court held that the deed put the Ealys on notice the conveyance did not include that portion of the mineral interest subject to the Vyvjala NPRI, thus protecting the Wenske's from a warranty claim. It did not, as the dissent argued, make the 5/8 royalty interest conveyed to the Ealys "subject to" the entire Vyvjala NPRI. The court noted that a "severed fraction of a royalty interest" — like an NPRI — generally burdens the entire mineral interest from which it is carved out. The court held that the deed from the Wenskes to the Ealys did not contain any language that would alter that general rule and cause the 5/8ths mineral interest conveyed to the Ealys responsible for the entire Vyvjala NPRI.

The confusion this case creates stems from the court's continued efforts to discourage the use of default rules when interpreting oil and gas documents. The Court of Appeals based its decision on a decades-old default rule that in the absence of language to the contrary, a deed conveying a portion of a mineral estate subject to an NPRI subjects the conveyed and reserved mineral interest to the NPRI proportionately. The Texas Supreme Court held that the use of such a "mechanical rules of construction" was improper. Instead, reviewing courts must engage in a "careful and detailed examination" of a deed "in its entirety" to determine to whom to allocate an NPRI.

The court then stated, "Going forward, drafters of deeds should endeavor to plainly express the parties' intent within the four corners of the instrument they execute." But, the court ignored the fact that its own holding was based on a default rule. That is, the rule that in the absence of language to the contrary, an NPRI burdens the conveyed and reserved mineral estate proportionately. In so doing, the court created a source of uncertainty for interpreters of mineral deeds—the exact opposite of what it sought to do.

6. ***Town of Dish et al v. Atmos Energy Corp. et al.*, No. 519 S.W.3d 605 (Tex. 2017).**

Town of Dish is one of several important nuisance opinions the Texas Supreme Court issued in 2017. The defendants in *Dish* were Atmos Energy Corp., Enbridge Gathering (North Texas) L.P., Enterprise Texas Pipeline LLC, and Texas Midstream Gas Services LLC. Together, these energy companies owned four natural gas compressor stations and a metering station located adjacent to each other just outside of Dish, Texas.[1] Between February 2005 and May 2008, the energy companies brought each of the compressor stations online, and in 2009, Enterprise brought the metering station online. The four compressor stations and metering station were commonly referred to collectively as the "Ponder Station."

The Town of Dish and 18 of its residents sued the energy companies on Feb. 28, 2011, for trespass and nuisance alleging the noise, odors, and natural gas molecules had unlawfully entered their

[1] Dish, Texas is a small town north of Fort Worth, formerly known as Town of Clark. Town of Clark changed its name to Town of Dish in 2005 in exchange for complimentary satellite television for its resident provided by Dish Network.

properties and caused an unreasonable interference with their property. The trial court granted a series of summary judgments dismissing Dish and the residents' claims on limitations grounds.

On appeal, Dish and the residents argued that even though they first complained about the Ponder Station no later than 2006 and all the individual compressor stations were online by May 2008, their nuisance claims did not accrue until the Ponder Station was "completely finished" in summer 2009. According to Dish and the residents, their claims did not accrue until "the full force and cumulative effect of all of the parts of the completed [Ponder Station] came to bear" because only then did they believe a "substantial interference with their property use and enjoyment was taking place." Dish and the residents contended that prior to 2009, the "noises [from the Ponder Station] were occasionally loud and sometimes annoying, but [they] did not feel they rose to the level of a nuisance." The Court of Appeals sided with the Town of Dish and the residents, holding the trial court failed to address the "synergistic effect" that all four compressor stations operating together might have on the town and its residents once they were all completed.

The Texas Supreme Court reinstated the trial court's rulings and dismissed the entire case on limitations. The court noted that Dish and its residents sued on Feb. 28, 2011, so their nuisance claims must have accrued no earlier than February 28, 2009, to survive the two-year statute of limitations applicable to nuisance and trespass claims. A cause of action accrues "when a wrongful act causes a legal injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur." And, a "permanent nuisance claim accrues when the condition first 'substantially interferes with the use and enjoyment of the land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities.' " The standard is an objective one, judged not by what the plaintiffs could tolerate before filing suit, but by what a person of "ordinary sensibilities" would consider an "unreasonable discomfort or annoyance."[2] Similarly, a trespass claim accrues when the "known injury begins," not when it rises to a level the plaintiff considers actionable.

The energy companies presented evidence that the residents began complaining about the Ponder Station in 2006. In January 2007, a Dish resident (and the town's eventual mayor) sent an email to several other residents discussing potential litigation against Atmos, stating its compressor station was "preventing [the residents] from enjoying our property with the noise and smell, and destroying [the residents'] property values."
In March 2008, another resident sent an email stating that the Ponder Station had "transformed [the area] into a living hell with unbearable, unending noise from thundering compressor engines, noxious fumes, blazing alarms, and roaring blast of gasses released into the air, louder than a jet engine at maximum takeoff thrust." Between 2008 and 2009, residents filed complaints about the Ponder Station with the Texas Commission on Environmental Quality, the Texas Pipeline Association, and several state legislators, yet they did not file suit until more than two years later. Based on these facts, the Texas Supreme Court held that Dish and the residents' claims accrued, at the latest, in May 2008, more than two years before they filed suit. Accordingly, the court dismissed the case on limitations.

7. *Denbury Green Pipeline Texas LLC v. Texas Rice Land Partners Ltd.*, 510 S.W.3d 909 (Tex. 2017)

[2] The court also noted that "[c]laims for nuisance 'normally do not accrue when a potential source is under construction,' but 'once operations begin and interference occurs, limitations run against the nuisance claim just as any other.' "

What it takes to be a common carrier pipeline in Texas has been resolved. The Texas Supreme Court ruled that all that is required is a reasonable probability that the pipeline will, at some point after construction, serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier. A "reasonable probability" is "more likely than not".

Summary judgment evidence established a reasonable probability that at some point after construction, the carbon dioxide pipeline known as the Green Line would serve the public, and thus Denbury Green is a common carrier as a matter of law. This means no jury trial in Jefferson County at which common carrier status would be the issue.

In its original opinion, the court held that "checking the box" on Railroad Commission Form T-4 was insufficient to establish that a pipeline is a common carrier. After remand the Court of Appeals found that the facts did not establish common carrier status. The record showed only the possibility of future customers, which is not the same as a probability. Plus, there was objective evidence — from Denbury's own website — of its intent to use the pipeline solely for its own purposes.

On remand, Denbury presented evidence necessary to make its case. For example:

- Testimony that the line was designed to be close to refineries, plants and other facilities that could use the line to transport and store CO_2.
- Transportation agreements with two unaffiliated entities and a sister company acting on behalf of itself and working interest owners unaffiliated with Denbury.

This was "reasonable proof of a future customer," thereby demonstrating that the line will transport to or for the public for hire and is not limited in its use to the wells, stations, plants and refineries of the owner.

The Supreme Court removed two Court of Appeals-imposed hurdles to common-carrier status. The Court of Appeals determined that the agreements with third parties were not sufficiently substantial to establish common carrier status as a matter of law. The Supreme Court disagreed; the public interest need not be "substantial." Evidence of a "reasonable probability" of serving the public is substantial enough to satisfy the public use requirement. The evidence before the trial court was no longer limited to consideration of Denbury's subjective beliefs.

Second, Denbury's intent at the time of its plan to construct the Green Line is not all that can be considered. Post-construction contracts are relevant to the analysis.

Left for another day is whether a contract between affiliated entities that may benefit unaffiliated working interest owners is sufficient to establish common carrier status.

8. *Lightning Oil Co. v. Anadarko E&P Onshore LLC*, 520 S.W.3d 39 (Tex. 2017).

For years, the energy industry has been grappling with the following subsurface trespass question: Whose permission is necessary for an oil and gas operator to drill through a mineral estate it does

not own or lease to reach minerals under an adjacent tract? In *Lightning Oil Co. v. Anadarko E&P Onshore*, the Texas Supreme Court finally provided the answer: Only the surface owner of the tract on which the well will be located is required to authorize pass-through drilling; not the mineral estate holder whose mineral estate will be drilled through to reach the adjacent tract.

In *Lightning*, Anadarko entered into an oil and gas lease with the state of Texas for the mineral estate underlying the Chaparral Wildlife Management Area in South Texas. Anadarko's lease limited its drilling locations and required it to drill from off-site "when prudent and feasible." Anadarko then entered into a Surface Use and Subsurface Easement Agreement with the surface owner of the adjacent tract, Briscoe Ranch, Inc., which permitted Anadarko to locate wells on the Briscoe Ranch to access the minerals under the Chaparral WMA through horizontal drilling. Before reaching the Chaparral mineral estate, Anadarko's wellbore would pass through the subsurface of the Briscoe Ranch.

Lightning Oil Co. leased the mineral estate underlying the Briscoe Ranch. Lightning was not a party to the Surface Use and Easement Agreement and did not consent to Anadarko's pass-through drilling plan. Thus, Lightning sued Anadarko for subsurface trespass and tortious interference with its Briscoe Ranch lease and sought an injunction to stop Anadarko from drilling on the Briscoe.

Lightning claimed the Briscoe Ranch, as a mere surface owner, could not consent to Anadarko drilling through Lightning's leased mineral estate. Lightning's legal arguments were as follows: (1) The holder of the dominant mineral estate has the right to exclude others from passing through it and to hold otherwise would transform a mineral lease from a conveyance of minerals in place into a "mere license to hunt for the minerals"; (2) Anadarko's proposed drilling activity and underground well structures would interfere with Lightning's ability to develop its mineral estate, and (3) Anadarko's wellbore would remove at least some minerals from Lightning's mineral estate (i.e., the minerals embedded within the dirt and rock that would be removed by Anadarko's wellbore), and the removal of even that minimum volume of minerals is an actionable subsurface trespass.

In response, Anadarko argued: (1) The surface owner — not the mineral estate owner — "controls the matrix of earth underlying the surface." Thus, the only person Anadarko needs permission from to drill through Lightning's mineral estate is the Briscoe Ranch. And, (2) because the surface owner owns the earth below the surface, Anadarko has an absolute right to remove the dirt and rock in its drill path, so long as the surface owner consents.

In its opinion, the Texas Supreme Court noted two basic principles of the law of oil and gas: (1) The surface owner, and not the mineral owner, owns all nonmineral molecules of land, i.e., the mass of earth that undergirds the surface estate, and (2) the mineral estate owner is only entitled to a "fair chance to recover the oil and gas in place or under" the surface estate. Thus, the court held that "[t]he rights conveyed by a mineral lease generally encompass the rights to explore, obtain, produce, and possess the minerals subject to the lease; they do not include the right to possess the specific place or space where the minerals are located." Accordingly, Lightning, as the mineral estate holder, had no right to exclude others from traversing through the subsurface, and Anadarko will not commit trespass by doing so with the surface owner's permission.

Importantly, Lightning produced no evidence that Anadarko's drilling activities would interfere with Lightning's development of its mineral estate. And, though Anadarko's drilling activities would necessarily remove *some* minerals from Lightning's mineral estate, that minimal volume of minerals is

not large enough to be actionable. Thus, the court left open the possibility that a mineral estate holder could prevent pass-through drilling if it can show the drilling activity would either (1) unreasonably interfere with the mineral estate owner's development of the estate or (2) remove or destroy a sizeable quantum of minerals from the mineral estate.

9. *Longview Energy Co. v. The Huff Energy Fund L.P. et al.*, No. 15-0968, 2017 WL 2492004 (Tex. June 9, 2017).

In *Longview Energy Co. v. The Huff Energy Fund L.P. et al.*, the Texas Supreme Court reversed a $95.5 million jury verdict in favor Longview Energy Co. against its investment backer, the Huff Energy Fund LP, and its principals. The court also reversed the trial court's judgment imposing a constructive trust on over 50,000 acres Riley-Huff or entities associated with it had leased in the Eagle Ford Shale and an order requiring the HEF entities to turn those leases over to Longview.

HEF became one of Longview's biggest investors in 2006. HEF's CEO Bill Huff and Lead Investment Evaluator Rick D'Angelo sat on Longview's board of directors. In September 2009, Huff and D'Angelo encouraged Longview to consider investing in the Eagle Ford Shale. Longview claimed Huff told Longview that if it located an investment in the Eagle Ford that HEF liked, HEF would fund the investment. Based on this representation, Longview devoted "a substantial part of its resources" to investigating potential Eagle Ford investments.

In December 2009, Longview and its consultants met with lease brokers to discuss potential Eagle Ford acquisitions. At the meeting, the lease brokers drew circles on a map outlining about 250,000 acres in South Texas that were available for lease. The lease brokers did not identify specific tracts or leases but only general areas of interest. The parties referred to these areas of interest as "blobs." D'Angelo asked Longview to mail him copies of the blob map, which it did on Dec. 23, 2009.

At Longview's January 2010 board of directors meeting, it considered a proposal to invest about $40 million to lease 21,000 acres in the Eagle Ford, drill one well per lease tract to prove up production capability and then sell off the leases in the areas that produced. Longview's proposal did not identify or target any specific acreage or leases. Rather, it was a general investment plan.

After the board meeting, D'Angelo advised Longview that HEF would not support Longview's investment in the Eagle Ford. As a result, Longview never voted on the Eagle Ford proposal. At its next meeting in February 2010, Longview's board discussed selling some of its Oklahoma acreage to fund an Eagle Ford acquisition. Longview claims that at that meeting, D'Angelo "strongly objected to selling the Oklahoma assets."

Unbeknownst to Longview, in summer 2009, HEF had begun discussions with Oklahoma oilman Bobby Riley about potential investment opportunities in the Eagle Ford. In October 2009, HEF and Riley formed a company called Riley-Huff Energy Group LLC, which then investigated potential Eagle Ford investments. Riley-Huff's manager was D'Angelo.

Also unbeknownst to Longview, two days before its January board meeting, Riley-Huff agreed to purchase certain Eagle Ford leases from a company owned by one of the lease brokers who presented the "blob map" to Longview in December 2009. Riley-Huff eventually acquired mineral leases covering approximately 50,000 acres in the Eagle Ford, 5,200 of which were within the blobs that Longview's board considered and sent to D'Angelo to review.

When Longview discovered Riley-Huff's leases, it sued Huff, D'Angelo, Riley-Huff and others for fraud, breach of fiduciary duty, misappropriation of trade secrets and other causes of action. The case was tried with a jury, which found Huff and D'Angelo breached their fiduciary duties to Longview by usurping a corporate opportunity and competing with Longview and that Riley-Huff wrongfully acquired its Eagle Ford acreage. Accordingly, the trial court rendered judgment, awarding Longview $95.5 million, imposing a constructive trust on substantially all of Riley-Huff's Eagle Ford acreage and ordering Riley-Huff to transfer the leases to Longview.

The San Antonio Court of Appeals reversed and rendered a take nothing judgment in favor of the Riley-Huff defendants. The San Antonio Court held that Longview's general plan to invest in the Eagle Ford was not detailed enough to constitute a corporate opportunity. The court stated that to hold otherwise would give Longview "a virtual monopoly" on the Eagle Ford Shale from "which its officers and directors were forever precluded from entering."

The Texas Supreme Court affirmed, but for slightly different reasons. The court held that even if Huff and D'Angelo breached their fiduciary duties, Longview failed to "trace" Riley-Huff's acquisition of any specific leases to Huff and D'Angelo's actions. That is, because Longview never considered any specific leases — just general areas of interest or "blobs" on a map — Longview could not prove Huff and D'Angelo's actions resulted in Riley-Huff acquiring a "[d]efinitive, designated property." And, without evidence to trace Huff and D'Angelo's actions to a "definitive, designated property," there can be no constructive trust. Likewise, the court held that the jury could not award money damages to Longview based on the profits Riley-Huff made off the leases it wrongfully acquired because there was no evidence to trace Huff and D'Angelo's actions to any specific leases. Accordingly, the Texas Supreme Court affirmed the lower court's take nothing judgment in favor of the Riley-Huff defendants.

10. ***Enterprise Products Partners L.P. and Enterprise Products Operating LLC v. Energy Transfer Partners L.P. and Energy Transfer Fuel L.P.*, No. 05-14-01383, 2017 WL 3033312 (Tex. App. — Dallas July 18, 2017)**

In this case, the Dallas Court of Appeals reversed one of the largest jury verdicts in Texas history. In 2011, Enterprise approached **Energy Transfer Partners L.P. and Energy Transfer Fuel L.P.** (ETP) to discuss a project to retrofit and eventually build a crude oil pipeline from Cushing, Oklahoma, to Houston. ETP agreed to work with Enterprise to determine the viability of the project. The parties called the proposed pipeline the Double E Pipeline.

Enterprise and ETP then entered into a series of preliminary agreements, including a letter agreement and term sheet. The letter agreement stated:

> ***Neither this letter nor the JV Term Sheet create any binding or enforceable obligations between the Parties and … no binding or enforceable obligations shall exist between the Parties with respect to the Transaction unless and until the Parties have received their respective board approvals and definitive agreements memorializing the terms and conditions of the Transaction have been negotiated, executed and delivered by both of the Parties***.

Enterprise and ETP then attempted to secure enough shipping commitments to ensure the Double E Pipeline's viability. They agreed they needed commitments for at least 250,000 barrels per day for 10 years to go forward with the project.

About two weeks before the open season[3] for the Double E Pipeline closed, Enterprise contacted Enbridge (U.S.) Inc. to discuss an alternative pipeline. Enbridge already operated a pipeline system from Alberta, Canada, to Cushing and was considering extending its pipelines from Cushing to Houston. Enterprise told Enbridge that if the Double E open season did not garner sufficient shipping commitments Enterprise was interested in a Cushing-to-Houston pipeline with Enbridge.

The Double E open season closed without sufficient shipping commitments, and Enterprise terminated its participation in the project. Enterprise and Enbridge then agreed to work together on the alternative Cushing-to-Houston pipeline. Enterprise and Enbridge received sufficient shipping commitments, and announced plans for their pipeline on Sept. 29, 2011.

The very next day, ETP sued Enterprise for breach of joint enterprise and breach of fiduciary duty, among other claims. ETP alleged it and Enterprise entered into a partnership to "market and pursue a pipeline from Cushing, Oklahoma to the Texas Gulf Coast" and that Enterprise usurped a business opportunity of that partnership by joining with Enbridge on the alternative pipeline. ETP claimed damages equal to the present value of the profits Enterprise would receive during the life of its pipeline with Enbridge. After a four-week trial, the jury found for ETP and the trial court awarded ETP over $500 million in damages.

There was just one problem with ETP's partnership theory: The parties never received the board approvals or signed the definitive agreements required by the letter agreement. Thus, on appeal, Enterprise argued ETP's claims were barred by the failure of conditions precedent. That is, Enterprise argued that before a partnership or joint venture could be formed (1) both parties' boards of directors had to approve the joint venture and (2) the parties had to execute and deliver definitive joint venture agreements. Because these things never happened, Enterprise agued the conditions precedent to formation of a joint venture were never fulfilled, and ETP's claims should have been dismissed as a matter of law.

ETP did not deny the conditions precedent did not occur, but argued that whether a partnership was formed is controlled solely by the five-factor test set out in the Texas Business Organizations Code. These factors include "an expression of an intent to be partners in [a] business."[4] Thus, ETP

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[3] As the Court of Appeals explained, "Before pipeline developers break ground on construction of a new pipeline, which can cost billions of dollars, the developers seek long-term commitments to ship oil through the pipeline. Shippers are allowed to sign long-term contracts during a period called an 'open season.' During the open season, a shipper can sign a Transportation Services Agreement, or TSA, agreeing to ship a certain quantity of oil at a certain rate for a certain time if a pipeline is built. Before the pipeline company commits to building a pipeline, the company tries to obtain a minimum level of shipping commitments through TSA's. The benefit to the shipper from committing during the open season is that the rates offered during an open season to shippers willing to make long-term shipping commitments are usually lower than the rates charged to 'walk up' shippers who do not commit."

[4] The complete list of factors indicating persons have established a partnership

expressly set forth in the Texas Business and Commerce Code are: (1) receipt or right to receive a share of profits of the business; (2) expression of an intent to be partners in the business; (3) participation or right to participate in the control of the business; (4) agreement to share or sharing: (A) losses of the business; or (B) liability for claims by third parties

argued the unfulfilled conditions precedent did not preclude the formation of the partnership because the letter agreement, other preliminary agreements and the parties' conduct were evidence of "an expression of an intent to be partners in a business." Thus, ETP argued the jury was entitled to determine a partnership was formed notwithstanding the unfulfilled conditions precedent.

The Dallas Court of Appeals disagreed. The court held that the factors set forth in the code are not exclusive and must be supplemented by the "principles of law and equity." One of those "principles of law" is the law of conditions precedent. And, a condition precedent is "an event that must happen or be performed before a right can accrue to enforce an obligation."

The Court of Appeals then held that because it was undisputed that the letter agreement's conditions did not occur, ETP could only recover if it provided Enterprise waived them. And, because ETP did not request a jury finding on waiver, the court held that ETP had to prove waiver as a matter of law. Because ETP did not meet this burden, the Court of Appeals reversed the trial court and entered a take nothing judgment in favor of Enterprise.

CONCLUSION

We hope this will help you address the legal issues presented by modern oil and gas activities. As always, if you believe one of these decisions might have a bearing on an action you are about to take or a decision you might make, consult a lawyer.

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against the business; and (5) agreement to contribute or contributing money or property to the business. TEX. BUS. ORG. CODE § 152.052 (Vernon Ann. 2016).