Top 10 Oil & Gas Cases of 2017 – Part 2

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This is a continuation of the three-part series that began last month discussing significant oil and gas decisions from state courts in Texas during 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.

***4. 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 four midstream companies. Together, they 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 defendants brought the compressor stations online, and in 2009, brought the metering station online. These facilities were collectively known as the "Ponder Station."

The Town of Dish and 18 of its residents sued the midstream companies on Feb. 28, 2011, for trespass and nuisance alleging the noise, odors, and natural gas molecules had unlawfully entered their properties and caused an unreasonable interference with their property. The trial court dismissed 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." The court of appeals sided with Dish and the residents, holding the trial court failed to address the "synergistic effect" that all four compressor stations operating together might have once they were all completed.

The Texas Supreme Court reinstated the trial court's rulings, dismissing 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. 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.' " Similarly, a trespass claim accrues when the "known injury begins," not when it rises to a level the plaintiff considers actionable.

The midstream companies showed 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 stating the Ponder 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 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." 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.

***5. 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.

In *Lightning*, Anadarko entered into a lease with the state of Texas for the mineral estate underlying the Chaparral Wildlife Management Area. Anadarko's lease limited its drilling locations and required it to drill from off-site "when prudent and feasible." Anadarko then entered into an easement agreement with the surface owner of the adjacent tract, Briscoe Ranch, Inc., permitting 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

[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.

wellbore would pass through the subsurface of the Briscoe Ranch.

Lightning Oil Co. leased the minerals 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. In response, Anadarko argued 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.

In its opinion, the Texas Supreme Court noted that 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 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.

***6. 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. and dissolved a constructive trust on over 50,000 leased acres in the Eagle Ford Shale.

The Huff Energy Fund (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 invest 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.

In December 2009, Longview 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 but only general areas of interest. The parties referred to these areas as "blobs." Pursuant to his request, Longview mailed D'Angelo a copy of the blob map on Dec. 23, 2009.
At Longview's January 2010 board meeting, it considered a proposal to invest about $40 in the Eagle Ford. However, after the 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, 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 this plan.

Unbeknownst to Longview, in summer 2009, HEF began discussions with Oklahoma oilman Bobby Riley about potential 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 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, and misappropriation of trade secrets. The case was tried with a jury, which found for Longview. The trial court then awarded Longview $95.5 million, imposed a constructive trust most of of Riley-Huff's Eagle Ford acreage and ordered Riley-Huff to transfer the leases to Longview.

The court of appeals reversed, holding 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 specific 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.

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

In this case, the Texas Supreme Court highlighted the difference 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 therein. The deed then *reserved* a 3/8ths royalty to the Wenskes and *excepted* the Vyvjala NPRI from the conveyance and warranty.

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 for the Ealys. 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" a 3/8 royalty interest to the Wenskes. 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 the 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 confusion this case creates stems from the Texas Supreme Court's continued efforts to discourage the use of default rules when interpreting mineral 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 interests 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." However, 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.

Stay Tuned….

Next month, we will discuss the final three cases that may have an impact on your daily work. We hope this series 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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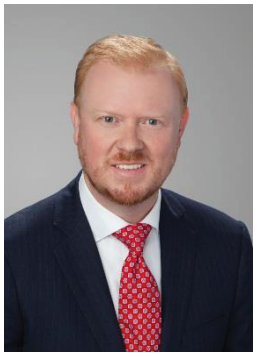

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