Lightning in a Wellbore: The Supreme Court Settles an Unsettled Question in *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*

Dallas Bar Association Energy Law Section
Annual Review of Oil and Gas Law August 11, 2017

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"Your rights extend under and above your claim
Without bound; you own land in Heaven and Hell;
Your part is of earth's surface and mass the same,
Of all cosmos' volume, and all stars as well"[1]

Settling the Unsettled Question

In *Lightning Oil Company v. Anadarko E&P Onshore, LLC*[2] the Texas Supreme Court answered a question that had been pondered by many an oil and gas practitioner over the years. It is well settled that the mineral estate owner has the right to explore for and produce oil, gas and other minerals. But who has the authority to grant or deny an off-lease operator the right to drill through the mineral estate to reach minerals under an adjacent tract? Absent pooling or some other contractual arrangement, we now know that it is the owner of the surface estate.

As a result, Lightning Oil Company, as the owner of the mineral estate in land, had no right to exclude others from traversing through the subsurface of that land. Anadarko would not be committing trespass by doing so if it had the surface owner's permission.

The Law Before Lightning – the 800 Pound Gorilla Named *Howell*

Prior to *Lightning*, Texas courts had generally held that a mineral interest owner whose lands were crossed to reach oil or gas on an adjoining tract of land may be entitled to an injunction if it could be shown that the drilling of the well interfered with his right to produce minerals from his tract.[3] But, as to what constituted "interference with the right to produce minerals," Texas courts offered little guidance and at least one court suggested that almost

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[1] William Empson, *Legal Fiction, in* POETRY OF THE LAW: FROM CHAUCER TO THE PRESENT 107, 107 (David Kader & Michael Stanford, eds., 2010)
[2] No. 15-0910, 2017 WL 2200343 (Tex. May 19, 2017).
[3] *See, e.g. Humble Oil & Ref. Co. v. L & G Oil Co.*, 259 S.W.2d 933, 938 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.).

any drilling operation would damage a mineral interest owner's ability to produce his minerals.[4]

In one of the first cases to weigh in on the question, *Humble Oil & Ref. Co. v. L & G Oil Co.*, an operator purchased a surface location to drill to a bottomhole location under a railroad right-of-way lease.[5] The lessee of the minerals underneath the surface location sought an injunction to block the issuance of Railroad Commission permits, arguing among other things that the use of the surface location interfered with its rights under an oil and gas lease.[6] The Austin Court of Civil Appeals ultimately held that the lessee of the minerals underlying the surface drillsite had no right to enjoin the drilling of the well absent a showing that the drilling well would interfere with its leasehold rights.[7]

In a later case, *Atlantic Ref. Co. v. Bright & Schiff*, the mineral lessee sought to enjoin the use of a surface location to drill a directional well onto adjacent lands.[8] The San Antonio Court of Civil Appeals further refined the general principle stated in *L. & G.*: although the surface estate is servient to the mineral estate, a surface owner may use his land in such manner as is consistent with the right of the mineral owner to drill and produce oil and gas, and consequently, a lessee who seeks to enjoin surface uses by a lessor or other surface owner must prove that the use interferes with "the reasonable exercise of his own rights under his own lease."[9] The court further stated that in order to show that such surface use would interfere with his rights, the mineral owner or his lessee "must prove that he needs the surface at the time and place then being used by the other user."[10] Because the lessee failed to prove its need of the surface tracts, denial of injunctive relief was appropriate.[11]

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[4] *See* H. Philip Whitworth & D. Davin McGinnis, *Square Pegs, Round Holes: The Application and Evolution of Traditional Legal and Regulatory Concepts for Horizontal Wells*, 7 TEX. J. OIL GAS & ENERGY L. 178, 200-01 (2012); *Chevron Oil Co. v. Howell*, 407 S.W.2d 525, 528 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.).
[5] 259 S.W.2d at 934.
[6] *Id*. at 934-38.
[7] *Id*. at 938.
[8] 321 S.W.2d 167, 168 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.).
[9] *Id.* at 169.
[10] *Id.*
[11] *Id.*

However, one Texas court concluded that since it is inevitable that damage will occur to subsurface formations when a well is drilled, any such operations are a trespass.[12] In *Chevron Oil Co. v. Howell*, Chevron drilled a directional well on the west bank of Lake Texoma that would be bottomed on a lease owned by Chevron beneath the waters of Lake Texoma.[13] Howell owned a five-year agriculture and grazing lease from the Corps of Engineers, revocable at will, covering the surface rights of a large tract, including 189 acres where Chevron began its drilling operations.[14] Magna Oil Corporation had an oil and gas lease on the 189 acres.[15] Neither Howell nor Magna gave Chevron permission to penetrate the subsurface under the 189 acres.[16] The Corps of Engineers as surface owner of the land under the lake had no objection to the location.[17] The Corps made no determination about whether the operations would conflict with Magna's rights.[18] Howell protested when Chevron began its operations.[19]

The trial court granted a temporary injunction against the drilling operation.[20] Chevron's points on appeal were (1) Howell's surface lease required him to grant ingress and egress to licensees of the United States, (2) directional drilling did not interfere with Magna's rights under its mineral lease and, (3) there was no evidence of damage to the surface or the formation.[21] The court disagreed.[22] According to *Howell*, the appropriate remedy is an injunction; a continuous trespass to mining property is not likely to be cured by monetary damages.[23]

Howell has been criticized for not citing *L. & G.* or any other directional drilling cases and has never been cited by a Texas appellate court, so its authority on the matter was questionable.[24] Commentators have frequently noted the

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[12] 407 S.W.2d at 528.
[13] *Id.* at 526.
[14] *Id*.
[15] *Id.*
[16] *Id*.
[17] *Id.* at 527.
[18] *Id*.
[19] *Id*.
[20] *Id.* at 526.
[21] *Id.* at 527-28.
[22] *Id.* at 528.
[23] *See id*.; *Hastings Oil Co. v. Texas Co.*, 234 S.W.2d 389, 398 (Tex. 1950).
[24] *See* James N. Cowden, *Surface-Subsurface Rights and Obligations Incidental to Exploration, Drilling and Production Operations*, *State Bar of Texas Advanced Oil, Gas and Mineral Law Course* (August 1987) at N-24.

troubling conclusion of the *Howell* court and its inconsistency with *L. & G.* and *Bright & Schiff*.[25] In the past, many oil and gas practitioners (including the authors of this paper) have advised clients to obtain subsurface easements from both the surface owner and the mineral owner out of an abundance of caution because of the 800 pound gorilla in the room that is the *Howell* decision. Although given a few opportunities to weigh in more definitively on subsurface trespass, the Texas Supreme Court had until recently declined to do so.[26] That is, until *Lightning* struck…

The Supreme Court Weighs In – *Lightning v. Anadarko*

The Facts

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.[27] The lease required Anadarko to drill from off-site locations when "prudent and feasible".[28] Anadarko was unable to reach an agreement with the State for surface locations in the Chaparral, so it entered into a Surface Use and Subsurface Easement Agreement with the surface owner of the adjacent tract, Briscoe Ranch.[29] In accordance with that agreement, Anadarko placed a drilling rig on the Briscoe Ranch surface estate and drilled vertically under the Briscoe Ranch before deviating to go horizontal in order to access the minerals on the Chaparral lease.[30]

Lightning Oil Company was lessee under the "Cutlass lease", which covered the severed mineral estate under the Briscoe Ranch.[31] Lightning was not a party to the Surface Use and Easement Agreement.[32]

Lightning sued Anadarko for trespass and tortious interference with the Cutlass lease, and sought to enjoin Anadarko from drilling through the

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[25] *See, e.g.*, Bruce M. Kramer, *Horizontal Drilling and Trespass: A Challenge to the Norms of Property and Tort Law*, 25 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 291, 330 (2014).
[26] *See, e.g.*, *Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414 (Tex. 2015); *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008).
[27] 2017 WL 2200343, at *1.
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*.

Briscoe Ranch subsurface to reach the Chaparral.[33] The claim was that the Briscoe Ranch, as a mere surface owner, could not consent to drilling through Lightning's mineral leasehold estate.[34]

Presenting the issue

Both sides moved for summary judgment, each filing traditional and no-evidence motions.[35] Lightning offered three principle arguments: First, Texas law firmly establishes that the dominant mineral estate has the right to exclude those who want to pass through it.[36] To hold otherwise would transform the absolute ownership right of a mineral owner (and its lessee) into a mere license to hunt for minerals.[37] Second, the court of appeals holding greatly expanded the accommodation doctrine by requiring a mineral lessee to accommodate surface uses for the benefit of an adjacent mineral estate.[38] Third, express language in the original conveyance severing the mineral estate reserved to the subsurface owner the right to lease the subsurface.[39] As a result of all of this, said Lightning, the Briscoe Ranch owners did not have the authority to transfer to Anadarko the right to drill through Lightning's mineral estate.[40]

Lightning also argued that Anadarko's activities would interfere with Lightning's ability to develop its minerals, that Anadarko's wellbore would remove at least some minerals, and that removal of even a small volume is an actionable trespass.[41]

Lightning argued in support of its tortious interference claim that Anadarko was not acting under a legal right, as a result the justification defense was not available.[42] Finally, Lightning was entitled to injunctive relief because

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[33] *Id.* at *2.
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id.*
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] *Id*.

Anadarko's activities would cause irreparable injury to Lightning's leasehold rights in the mineral estate.[43]

Anadarko responded that the surface owner, not the mineral owner, controls the matrix of the earth underlying the surface.[44] Thus, all Anadarko needed was the surface owner's permission to drill through Briscoe Ranch's subsurface.[45] This, in concert with the legal justifications underlying the rule of capture, means that Lightning does not own specific oil and gas molecules, and thus the bundle of rights it owns in connection with its leasehold interests does not include the right to exclude pass-through drilling.[46] Finally, Anadarko argued that the court of appeals' ruling on the accommodation doctrine was not relevant to this dispute.[47]

The court framed the issue this way: The question was not whether Briscoe Ranch, the surface owner, was completely subject to Lightning's lease.[48] The question was whether a lessee's rights in the mineral estate include the right to preclude a surface owner or the adjacent lessee's activities that are not intended to capture the lessee's minerals, but rather to bore through the formations in which the lessee's minerals are located.[49]

The Ruling

Trespass

The court addressed Lightning's trespass claim, stating first that the owner of realty in Texas generally has the right to exclude all others from use of the property,[50] but also acknowledging that "ownership of property does not necessarily include the right to include *every* invasion of or interference based on what, at first blush, might seem to be rights attached to the ownership."[51]

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[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id.* at *3.
[49] *Id.*
[50] *Id*. at *4 (citing *Envtl. Processing Sys., L.C.*, 457 S W 3d at 427.
[51] *Id*. (citing *Coastal Oil*, 268 S.W 3d at 11.

1. Reservoir space

The Supreme Court generally agreed with the court of appeals' threefold position regarding subsurface control: First, as recognized by the Supreme Court, the rights overlying a leased mineral estate is the surface owner's property and those rights include the geological structures beneath the surface.[52]

Second, the Fifth Circuit held that the surface owner owns "all non-mineral 'molecules' of the land, i.e the mass that undergirds the surface" estate.[53] Third, referring to *Coastal Oil,* the appeals court ruled that under the rule of capture the mineral estate owner is entitled only to "a fair chance to recover the oil and gas in place or under" the surface estate.[54]

The court determined that the subsurface control cases relied upon by the court of appeals did not address the issue.[55] For example, in *West*, the analysis focused on balancing the public policy of conserving natural resources and the surface owner's right in the matrix of the earth against the royalty interest holder's rights.[56] The court concluded in *West* that the surface owner had the right to inject and store non-native gas in the formation before all of the native gas was produced.[57] The court also concluded in *West* that the surface owner's ownership of the matrix included the reservoir storage space.[58] But *West* and the subsurface control cases did not determine whether the surface owner has the right to exclusive control and use of subsurface materials if those materials contain recoverable minerals.[59]

2. Minerals.

The mineral lease gives the lessee a determinable fee, which includes the exclusive right to possess and appropriate gas and oil.[60] The rules for

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[52] *Id.* (citing *Humble Oil & Refining Co. v. West*, 508 S.W.2d 812, 815 (Tex. 1974)).
[53] *Id*. (citing *Dunn-McCampbell Royalty Interests Inc. v. Nat'l Park Serv.*, 630. F 3d. 431, 441 (5th Cir. 2011)).
[54] *Id.* (citing *Coastal Oil*, 268 S.W. 3d at 15).
[55] *Id.* at *5.
[56] *Id.* (citing 508 S.W.2d at 815-16).
[57] *Id.* (citing 508 S.W.2d at 817).
[58] *Id.* (citing 508 S.W.2d at 815).
[59] *Id.*; *see also Springer Ranch, Ltd. v. Jones*, 421 S.W.3d 273, 283 (Tex. App.—San Antonio 2013, no pet.); *Dunn-McCampbell*, 630 F.3d at 442.
[60] *Id.* at *6 (citing *Stevens Cty. v. Mid Kan Oil & Gas Co.*, 254 S.W. 290, 293 (Tex. 1923), and *Coastal Oil*, 268 S.W.3d at 11).

trespass are different on the surface of the earth from those that applied to miles above or below it.[61] The right to exclude all others in the use of property is one of the most essential sticks in the bundle of rights that are commonly characterized as property.[62] A trespass is not just an unauthorized interference with physical property, but also is an unauthorized interference with one of the rights the property owner holds.[63]

A severed mineral estate owner has five rights: (1) to develop, (2) to lease, (3) to receive bonus payments, (4) to receive delay rentals, and (5) to receive royalty payments.[64] As lessee Lightning is generally only granted the right to develop under a lease, which has been described, among other ways, as the exclusive right to possess, use and appropriate gas and oil.[65]

a. Lightning's right to develop

The right of the lessee does not include the right to possess the specific place or space where the minerals are located.[66] An unauthorized interference with the *place* where the minerals are located constitutes a trespass as to the mineral estate only if the interference infringes on the mineral lessee's ability to exercise its rights.[67] Lightning's speculation that Anadarko's proposed wellsite and drilling activities would interfere with the surface and subsurface spaces necessary for Lightning to exercise its rights is not enough.[68] Lightning produced no evidence that Anadarko's activities would interfere with Lightning's development of its mineral estate and thus Lightning was not entitled to injunctive relief.[69] The court took comfort in the fact that Anadarko's drilling activities would be subject to the regulations of the Railroad Commission.[70]

b. Minerals lost during drilling

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[61] *Coastal Oil*, 268 S.W.3d at 11.
[62] 2017 WL 2200343 at *6 (citing *Severance v. Patterson*. 370 S.W.3d 705, 709 (Tex. 2012)).
[63] *Id.*
[64] *Id.* (citing *Hysaw v. Dawkins* 483 S.W.3d 1, 9 (Texas 2016)).
[65] *Id.* (citing *Stephens Cty.*, 254 S.W. at 293-94.
[66] *Id.*
[67] *Id.*
[68] *Id.* at *7.
[69] *See id.*
[70] *See id.*

Lightning asserted that Anadarko was interfering with the minerals themselves by drilling through and extracting a quantum of minerals as part of its drilling process, and therefore, the court of appeals' reliance on the rule of capture was misplaced.[71] The court agreed, "to an extent".[72] The court said it must weigh the interests of society and the interests of the oil and gas industry as a whole against the interests of the individual operator.[73] The court reckoned that Lightning would lose the amount of minerals embedded in 15 cubic yards of dirt and rock for each thousand linear feet drilled with an 8 inch wellbore.[74] The court recognized an operational principle that when an operator drills a horizontal well from the surface under which the minerals lie, blind spots occur beneath the transition intervals that may never be fully produced by that well.[75] Drilling from an adjacent surface location is an advantage because the wellbore is nearly or completely horizontal as it enters the productive formation, and consequently, fewer wells are drilled.[76] Waste-reducing innovations are viewed favorably by Texas courts.[77]

The court balanced Lightning's small loss of minerals with the long-standing policy of the state to encourage maximum recovery of minerals and to minimize waste.[78] Lightning's interests are outweighed by the interests of the industry as a whole and society's in maximizing oil and gas recovery.[79]

3. Lightning's other arguments.

Lighting argued that allowing Anadarko's planned activities would legitimize the type of trespass the court impliedly recognized in the FPL Farming and Environmental Processing Systems cases.[80] The question there was whether a landowner could bring a trespass action against an operator who

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[71] *Id.*
[72] *Id.*
[73] *Id.* (citing *West*, 508 S.W.2d at 816).
[74] *Id.*
[75] *Id.* at *8.
[76] *Id.*
[77] *Id.* (citing *Coastal Oil*, 268 S.W.3d at 15-16; *West*, 508 S.W.2d at 816; *R.R. Comm'n of Tex. v. Manziel*, 361 S.W.2d 560, 568 (Tex. 1962)).
[78] *Id.* (citing Tex. Const. art. XVI, § 59(a) ("The conservation and development of all of the natural resources of this State … are each and all hereby declared public rights and duties"); *Key Operating & Equip., Inc. v. Hegar*, 435 S.W.3d 794, 798 (Tex. 2014)("The policy of Texas is to encourage the recovery of minerals, and the Legislature has made waste in the production of oil and gas unlawful.")).
[79] *Id.*
[80] *Id.* (citing *FPL v. EPS*, 351 S.W 3d at 313-14; *Envtl. Processing Sys., LC v. FPL Farming Ltd.*, 457 S.W.3d 414, 426 (Tex.2015)).

injected wastewater into a well, allegedly resulting in the wastewater migrating across the landowner's property line and contaminating the landowner's water supply.[81] In those cases the court assumed (without deciding) that a trespass cause of action for deep subsurface water migration existed and decided the case based on what had the burden of establishing lack of consent in a trespass action.[82] The court did not impliedly recognize such a claim; It simply did not address it.[83]

Lightning further argued that affirming the court of appeals judgment would depreciate the mineral estate's dominance.[84] The court construed Lightning's argument to be that it should have the right to prevent any surface or subsurface use that might later interfere with its plans.[85] The court reasoned that such a conclusion would render the mineral estate absolutely dominant and significantly alter the balance achieved through the flexible nature of the accommodation doctrine.[86]

Lightning next argued that the mineral estate's dominant nature would be diluted because the mineral owners and lessees would have to allow uses of the mineral estate to benefit adjacent estates and that this is an expansion of the accommodation doctrine that would benefit adjacent mineral owners.[87] The court responded that as because Anadarko is the surface owner's assignee, Anadarko's activities are a surface used for accommodation doctrine purposes.[88] The mineral estate owned by Lightning remains dominant.[89]

Tortious Interference

Anadarko's defense to Lightning's claim of tortious interference with its Cutlass lease was that a defendant may justify its actions based on the exercise of either its own legal rights or a good faith claim to a colorable legal

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[81] *Id.*
[82] *Id.* (citing *EPS v. FPL*, 457 S.W.3d at 418-25).
[83] *Id.*
[84] *Id.*at *9.
[85] *Id.*
[86] *Id.* (citing *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 623 (Tex. 1971).
[87] *Id.*
[88] *Id.*
[89] *Id.*

right.[90] Confirming that a claim for tortious interference sounds a lot scarier than it really is, the court believed that Anadarko was justified in drilling through the Cutlass lease to get to the Chaparral lease.[91] As a matter of law Anadarko could not commit a trespass by traversing subterranean structures in which Lightning's hydrocarbon molecules may lie.[92] Anadarko was exercising its rights under the surface agreement with Briscoe Ranch and its drilling plans were within the rights granted in that agreement.[93] Thus, there was no tortious interference.[94]

Has *Lightning* Changed the Law?

In arriving at its conclusion, the court considered several of its past decisions that circled around, but did not address, the issue presented in *Lightning.* One example is the litigation between FPL Farming LLC and Environmental Processing Systems, which made its way to the high court twice.

FPL was a rice farmer and owned the surface and non-mineral subsurface of land in Liberty County.[95] Operating under a permit from the TNRCC, EPS injected wastewater 8,000 feet subsurface into the Frio formation from an adjacent wastewater disposal facility.[96] The well was nonhazardous, but contained substances such as acetone and naphthalene.[97] There was a previous settlement between FPL's predecessor and EPS.[98] FPL sued EPS on the theory that deep subsurface wastewater trespassed beneath the landowner's property. [99]

In *FPL Farming Ltd. v. Environmental Processing Systems, L.C.* the court found that FPL had no right to exclude others from the deep subsurface, FPL's rights would not be impaired by the permits and the operation of the wells were not amount to an unconstitutional taking.[100]

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[90] *Id.* at 10.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *FPL v. EPS*, 351 S.W.3d at 308.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 310-14.

In a related appeal by FPL of the TNRCC's grant of the permit, the Austin Court of Appeals upheld the agency's grant of the permit and concluded that should the waste plume migrate to the subsurface of FPL's property and cause harm, FPL could seek damages.[101]

As a general rule a permit granted by an agency does not immunize the permit holder from civil tort liability from private parties for actions arising out of the use of the permit.[102] This is because a permit is a negative pronouncement that grants no affirmative rights to the permittee.[103] A permit merely removes the government imposed barrier to the particular activity.[104] The statute under which the permit was granted was for the purpose of maintaining the quality of freshwater in the state and has nothing to do with ownership of deep subsurface rights or whether unauthorized migration invades private property rights.[105] The court also relied on Texas Administrative Code Section 305.122 (c):

> The issuance of a permit does not au theorize any injury to persons or property or an invasion of other property rights, or any infringement of state or local law or regulations.[106]

Between the Injection Well Act, the Texas Administrative Code and the common law, the mere fact that an administrative agency issues a permit to undertake an activity does not shield the permittee from third-party tort liability stemming from consequences of the permitted activity.[107]

The court reserved the question of whether subsurface wastewater migration can constitute a trespass, or whether it did so.[108]

After the first appeal the dispute returned to the trial court.[109] The issues at trial were whether EPS's injected wastewater had actually entered beneath

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[101] *FPL Farming, Ltd. v. Tex. Natural Res. Conservation Comm'n*, No. 03–02–00477–CV, 2003 WL 247183, at *5 (Tex. App.—Austin Feb. 6, 2003, pet. denied) (mem. op.).
[102] *FPL v. EPS*, 351 S.W.3d at 310.
[103] *Id.*
[104] *Id.* at 310-311.
[105] *Id.* at 312 (citing Tex. Water Code §§ 27.001-27.105).
[106] *Id.* (citing 30 Tex. Admin. Code § 305.122(c)).
[107] *Id.* at 314.
[108] *Id.*
[109] *Id.*

FPL's land, whether FPL consented to the alleged entry, and the amount of damages, if any.[110]

The question in *Environmental Processing Systems, L.C. v. FPL Farming Ltd.* was, "Is lack of consent an element of a trespass cause of action on which the plaintiff has the burden or is it an affirmative defense, in which case the defendant bears the burden?"[111] The jury charge stated it as an element of the cause of action.

> "Trespass" means an entry on the property of another *without having consent of the owner*. To constitute a trespass, entry upon another's property need not be in person, but may be made by causing or permitting a thing to cross the boundary of the property below the surface of the earth. Every *unauthorized* entry upon the property of another is a trespass, and the intent or motive prompting the trespass is immaterial.
>
> Answer yes or no.[112]

The jury sided with the facility and answered "no".[113] Thus, the verdict and judgment was that FPL take nothing.[114]

The Supreme Court pointed to a century and a half of Texas law holding that the general definition of trespass is that every unauthorized entry on one's land is a trespass.[115] The court recognized that consent or authorization is rarely contested in trespass cases.[116] The assumption is that landowners normally have no reason to expect trespassers or to know about them.[117] The court concluded that it makes sense to treat consent or lack thereof as an element of the trespass cause of action rather than as an affirmative defense.[118]

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[110] *EPS v. FPL*, 457 S.W.3d at 417-418.
[111] *Id.*
[112] *Id.* at 417.
[113] *Id.*
[114] *Id.*
[115] *Id*. at 419-22.
[116] *Id.* at 422-23.
[117] *Id.* at 423-24.
[118] *Id.* at 424-25.

The court held that to maintain an action for trespass the plaintiff has the burden to prove that the entry was wrongful and the plaintiff must do so by establishing that entry was unauthorized or without his consent.[119]

However, the court avoided the question of whether Texas law recognizes a trespass cause of action for deep subsurface water migration. They were able to sidestep the question because the jury answered "no" to the question of whether there was a trespass.[120]

Coastal Oil & Gas Corp. v. Garza Energy Trust is, essentially, a rule of capture case.[121] The rule addresses the ownership of minerals based on their production and vests title in whoever brings minerals to the wellhead, even if the minerals flow into the production area from outside the lease or property boundaries.[122] The primary issue was whether subsurface hydraulic fracturing of a gas well that extends onto another's property is a trespass for which the value of the gas drained as a result may be recovered in damages.[123] The rule of capture barred recovery of such damages.[124]

The *Coastal* court also recognized that, while the mineral estate is dominant, the rights of a surface owner are in some ways more extensive than those of the mineral lessee.[125] This was reiterated in *Lightning*.

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[119] *Id.* at 425.
[120] *Id.* at 426.
[121] *See* 268 S.W.3d 1.
[122] *Id.* at 15.
[123] *Id.* at 4.
[124] *Id.* at 42-43.
[125] *Id.* at 11.

Going Forward –How *Lightning* Affects the Rights of the Parties in the Real World

When Might the Mineral Owner Prove Imminent, Irreparable Harm and be Entitled to Injunctive Relief?

Although an injunction was not granted to prevent Anadarko's use of the Briscoe Ranch, the *Lightning c*ourt did leave open the door for such relief provided that a mineral owner or his lessee can show "that absent such relief, it will suffer imminent, irreparable harm" by "non-speculative" use by the surface owner or his surface lessee.[126] *Howell*'s reasoning that "any time you drill into something there is bound to be some damage" has clearly been overridden by *Lightning*'s emphasis on "balancing…the interests of society and the interest of the oil and gas industry as a whole against the interest of the individual operator."[127] But at what point will a mineral owner or his lessee suffer irreparable harm? At what point will the interests of the individual operator outweigh those of the industry as a whole?

Scenario: An old, unused padsite sits on the surface from which an operator/lessee wants to drill; however, the surface/mineral owner's lease contains special surface use provisions and the surface/mineral owner is threatening to lease the padsite to an adjacent operator in order to extract concessions from the operator/lessee. The operator/lessee clearly would prefer to use the existing padsite because it will allow him to drill across his planned unit without the costs associated with preparing another location.

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[126] 2017 WL 2200343, at *7.
[127] *See id.; see also* 407 S.W.2d at 528.

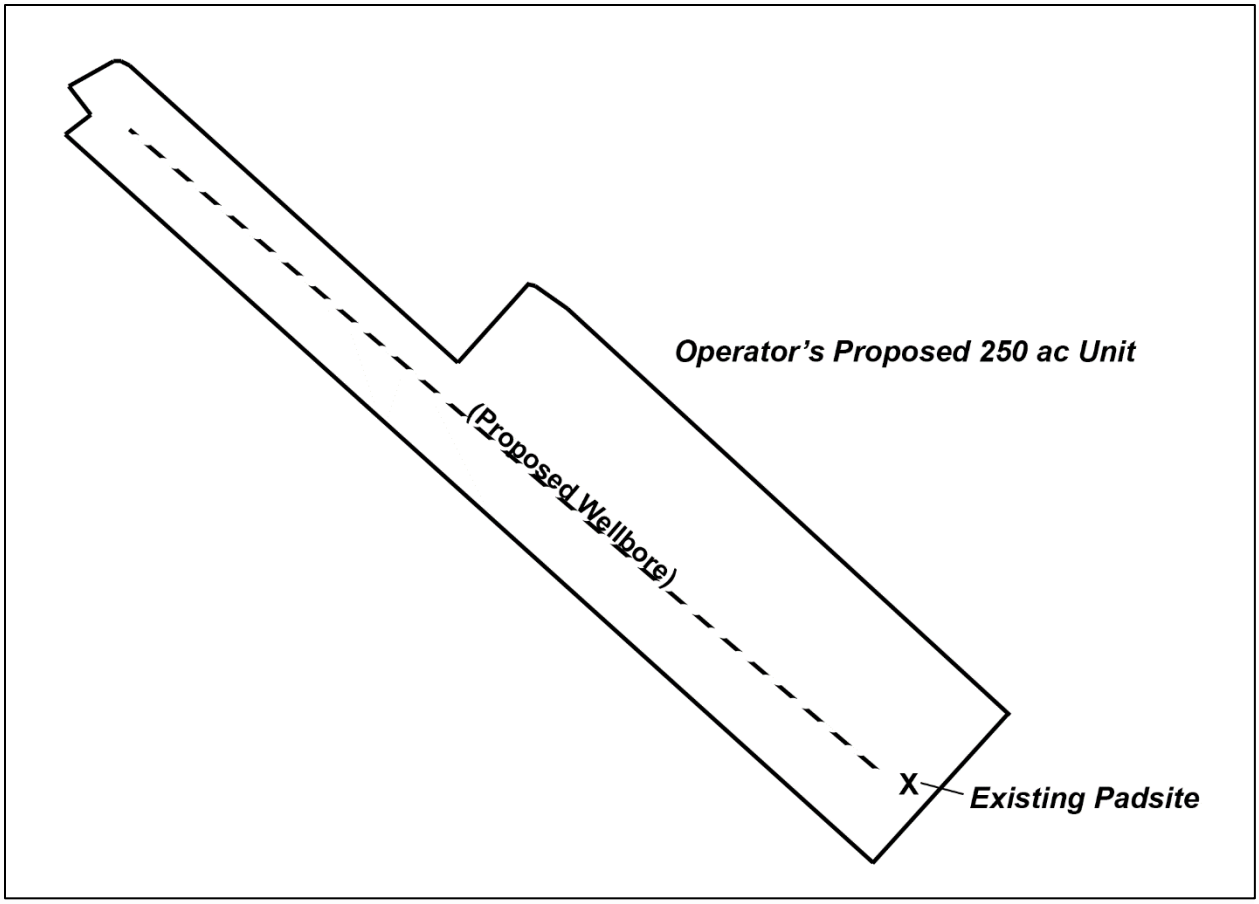

Figure 1 – Existing Padsite

How does Lightning *affect the rights of the parties?*

Generally, the right to develop the mineral estate includes an implied right to use the surface in ways that are reasonably necessary to develop the minerals.[128] This implied right to use the surface can be limited by contractual restrictions, the accommodation doctrine, and restrictions imposed by statutes, regulations and ordinances.[129] In general, a mineral lessee may select any portion of the surface estate covered under the oil and gas lease as a place for a well, subject to whatever restrictions there may be in the lease itself.[130] Although *Lightning* confirms the right of the surface owner to

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[128] *Sun Oil Company v. Whitaker*, 483 S.W.2d 808, 810-11 (Tex. 1972).

[129] *See e.g.*, *id.*; *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971); Ernest E. Smith & Jacqueline Lang Weaver, 1 *Texas Law of Oil and Gas* § 2.1[B][2][c] (LexisNexis Matthew Bender 2010).

[130] For instance, where a lease provides that "the use of the surface of any contiguous land the surface of which is owned in whole or in part by Lessor shall be approved in advance in writing by Lessor, which locations and routes shall not unreasonably be withheld," a question of fact would exist as to whether the Lessor is "unreasonably withholding" permission. *See Ridgeline Inc. v. Crow-Gottesman-Shafer # 1,* 734

grant a third party the right to drill from his tract, the decision does not deviate from *Bright & Schiff* in that a lessee who can show that surface use will interfere with the "reasonable exercise of his own rights under his own lease," can obtain injunctive relief.[131] If the lessee can show that the he needs the surface at the time and place the adjacent operator is using it (or plans to use it), he is likely to be able to obtain injunctive relief. In this scenario, assuming the lessee's proposed use of the pad site is not "speculative," he can likely prevent the lease of the padsite to the adjacent operator.

What About Subsurface Trespass in General?

Clearly, the *Lightning* decision is most applicable to scenarios like the one discussed above—scenarios in which an operator wishes to use a surface tract to extract minerals from an adjacent tract of land. But the implications of *Lightning* go far beyond just that set of facts. The court's analysis of scenarios in which "minerals [are] lost during drilling" is applicable to a number of subsurface trespass questions that have been perplexing oil and gas practitioners for years.[132]

Scenario: You, the shallow lessee, own the leasehold down to the base of the Cotton Valley formation. You will want to drill through, run logging tools, and possibly perforate to the bottom of the formation. To do that will require a rathole (the extra hole drilled at the end of the well, beyond the last zone of interest, to ensure that the zone of interest can be fully evaluated).[133] The logging tool string may be as much as 120 feet in length. The rathole allows tools at the top of the logging string to reach and measure the deepest zone of interest. Also, there is usually a small amount of extra hole drilled to allow for junk, hole fill-in and other conditions that may reduce the effective depth of the well prior to running logging tools.

S.W.2d 114, 116 (Tex. App.—Austin 1987, no writ); *see also Mitchell's Inc. v. Nelms,* 454 S.W.2d 809, 813 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.); *Ottis v. Haas*, 569 SW2d 508, 513 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

[131] *See* 2017 WL 2200343, at *7 ("to obtain injunctive relief, [the lessee] must have proved that absent such relief, it will suffer imminent, irreparable harm."); *see also* Bright *& Schiff*, 321 S.W.2d 167 at 169.

[132] *See* Whitworth & McGinnis, *supra*, 202-03.

[133] Schlumberger Oilfield Glossary, last accessed on July 25, 2017.

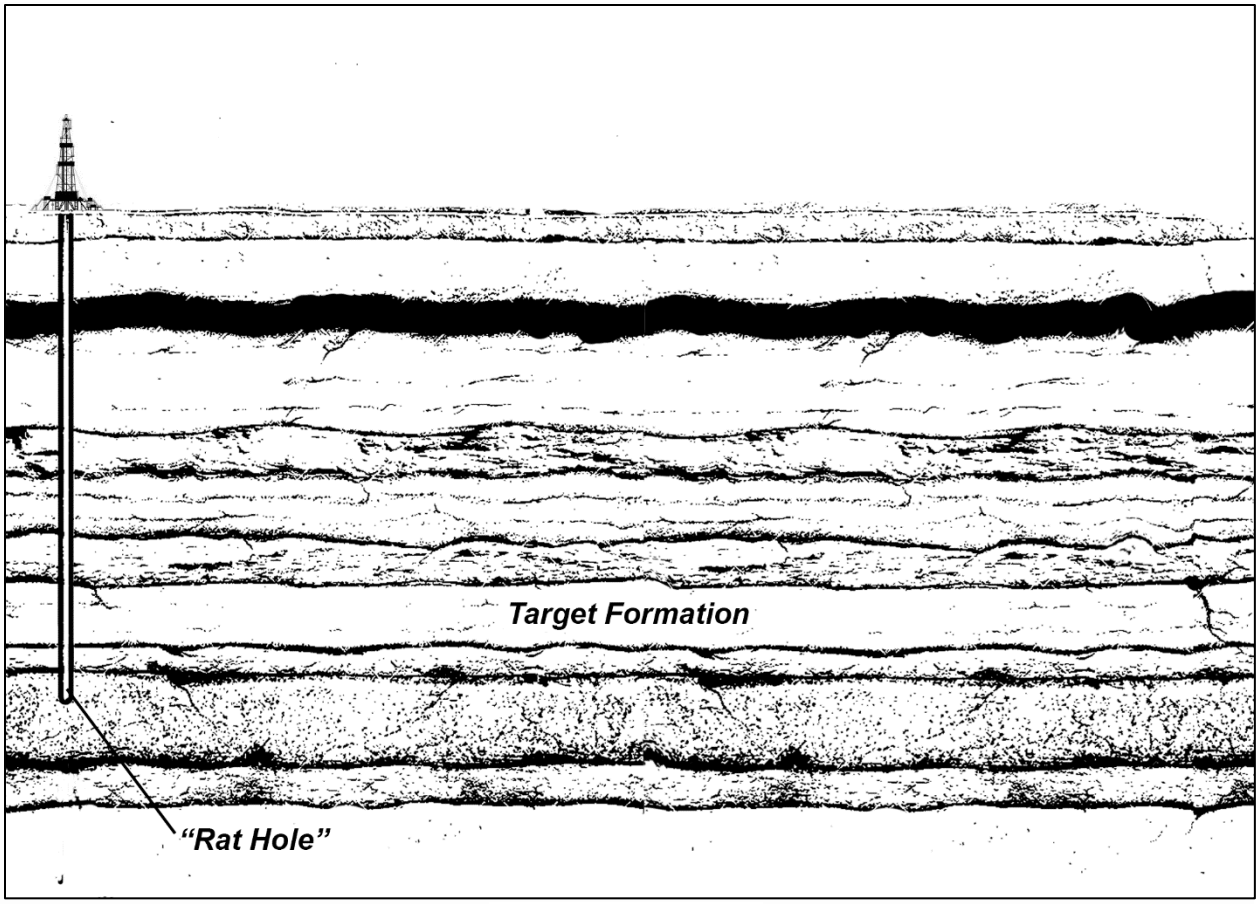

Figure 2 – "Rat Hole"

How does Lightning *affect the rights of the parties?*

As noted above, prior to *Lightning*, it was at least arguable that if a "trespass" occurs in a productive formation, the shallow lessee in this scenario has interfered with the deep-rights owner's "fair chance to recover" hydrocarbons.[134] However, *Lightning*'s emphasis on balancing the rights of the parties when a "small amount of minerals [are] lost," favors the shallow lessee's position.[135] In balancing the rights of the parties in this scenario, courts will look to "the interests of society and the interest of the oil and gas industry as a whole against the interest of the individual operator."[136] If the Supreme Court does not have a problem with the loss of "fifteen cubic yards of dirt and rock for each thousand linear [foot] drilled," it is unlikely that Texas

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[134] *See Dunn-McCampbell*, 630 F.3d at 441-42 (citing *Coastal Oil*, 268 S.W.3d at 15).
[135] 2017 WL 2200343, at *7
[136] *Id*.

lower courts would think that the amount of minerals extracted with an additional 120 feet of rathole would outweigh the general need to properly log potentially productive formations.

Scenario: Your leasehold ownership is limited to the Haynesville formation. To access your oil and gas in the Haynesville formation you have to drill through the Cotton Valley formation, in which the leasehold is owned by the shallow lessee.

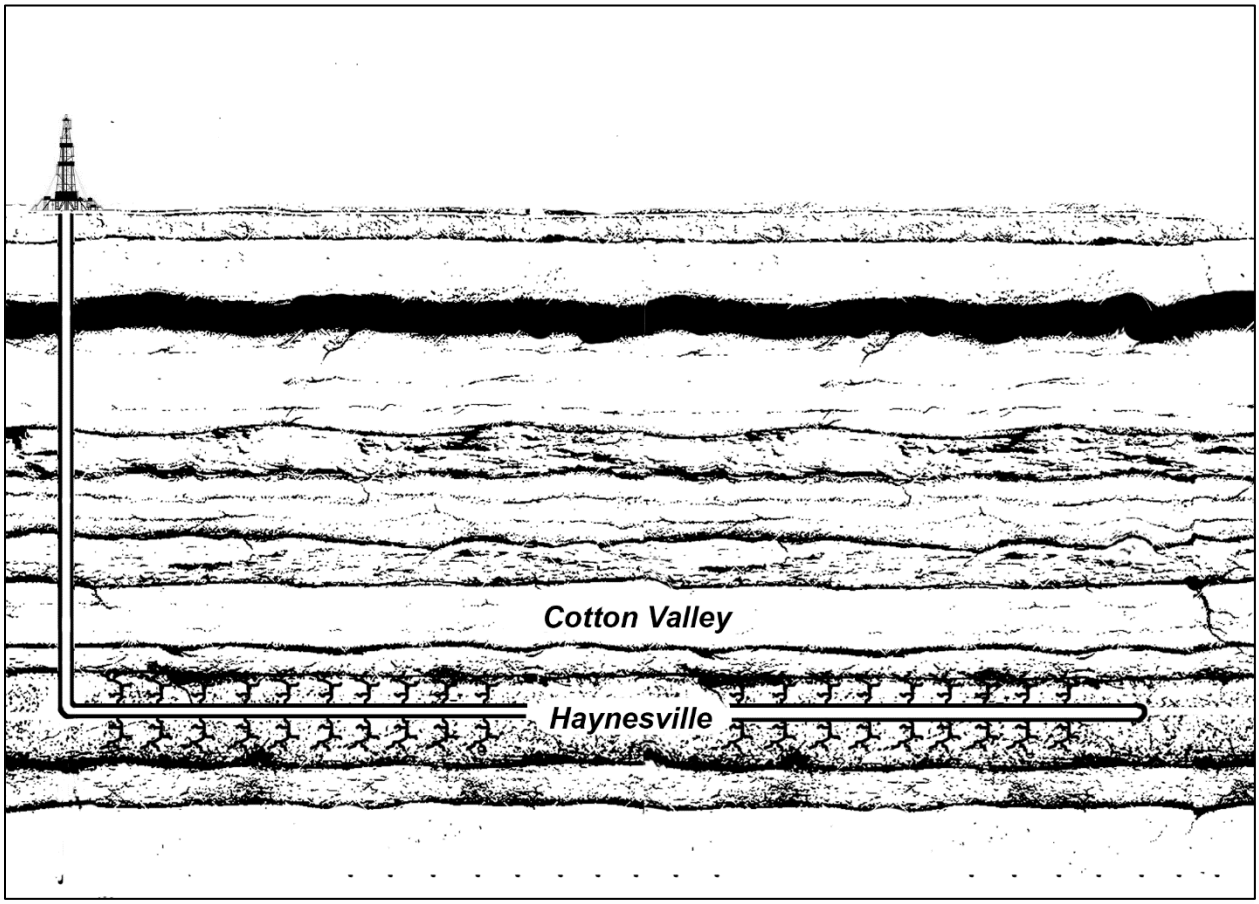

Figure 3 – Drilling Through Shallow Formation

How does Lightning *affect the rights of the parties?*

Again, whether a trespass action will be supported when a wellbore extracts trace amounts of minerals embedded in the rock and soil drilled out of the ground depends on whether the interests of society and the industry as a

whole outweigh that of the individual operator.[137] As noted by the *Lightning* court, it has been the longstanding policy of the State of Texas to encourage maximum recovery of minerals and to prevent waste.[138] To maximize recovery in areas with multiple producing formations, drilling through the shallow formations to reach the deeper formations is required and will result in some amount of trace minerals from the shallow formation being removed in the process. Again, balancing the need of the industry to explore multiple formations against the shallow lessee's rights likely weighs in favor of the producer seeking to explore deeper formations.

Scenario: You have leased up several tracts in an area and plan to drill a lateral across them, but one stubborn mineral owner with a tract in the middle of your planned lateral has refused to lease. After exhausting all your options, you have decided that the best way to make the most of your investment is to drill through that unleased tract and avoid perforating the unleased tract so as not to commit bad-faith trespass. You have obtained a subsurface easement from the surface owner of the unleased tract, but obviously the mineral owner will not grant a similar easement.

How does Lightning *affect the rights of the parties?*

Although the surface owner owns all of the non-hydrocarbon particles below his land, prior to *Lightning* it was arguable that drilling through potentially productive intervals to reach an adjacent tract would interfere with a mineral owner's "fair chance to recover" his hydrocarbons.[139] Now, the Supreme Court has confirmed that the surface owner's permission to cross the tract is sufficient so long as i) such action does not interfere with the reasonable exercise of the mineral owner's own rights, and ii) the interests of society and the industry as a whole outweigh that of the mineral owner insofar as it relates to the amount of minerals inevitably extracted via the drilling process.[140]

The operator should still be cautious and avoid perforating the unleased tract, because such an action would most likely be a trespass which could

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[137] *Id*.
[138] *See* Tex. Const. art. XVI, § 59(a), *supra*; *see also Key Operating*, 435 S.W.3d at 798.
[139] *See Dunn-McCampbell Royalty Interest*, 630 F.3d at 441-42.
[140] 2017 WL 2200343, at *7-8

lead to injunctive relief.[141] In fact, unless a Rule 37 exception is sought and granted, the operator must not perf within 437 feet[142] of the unleased tract or the well must be plugged and abandoned.[143]

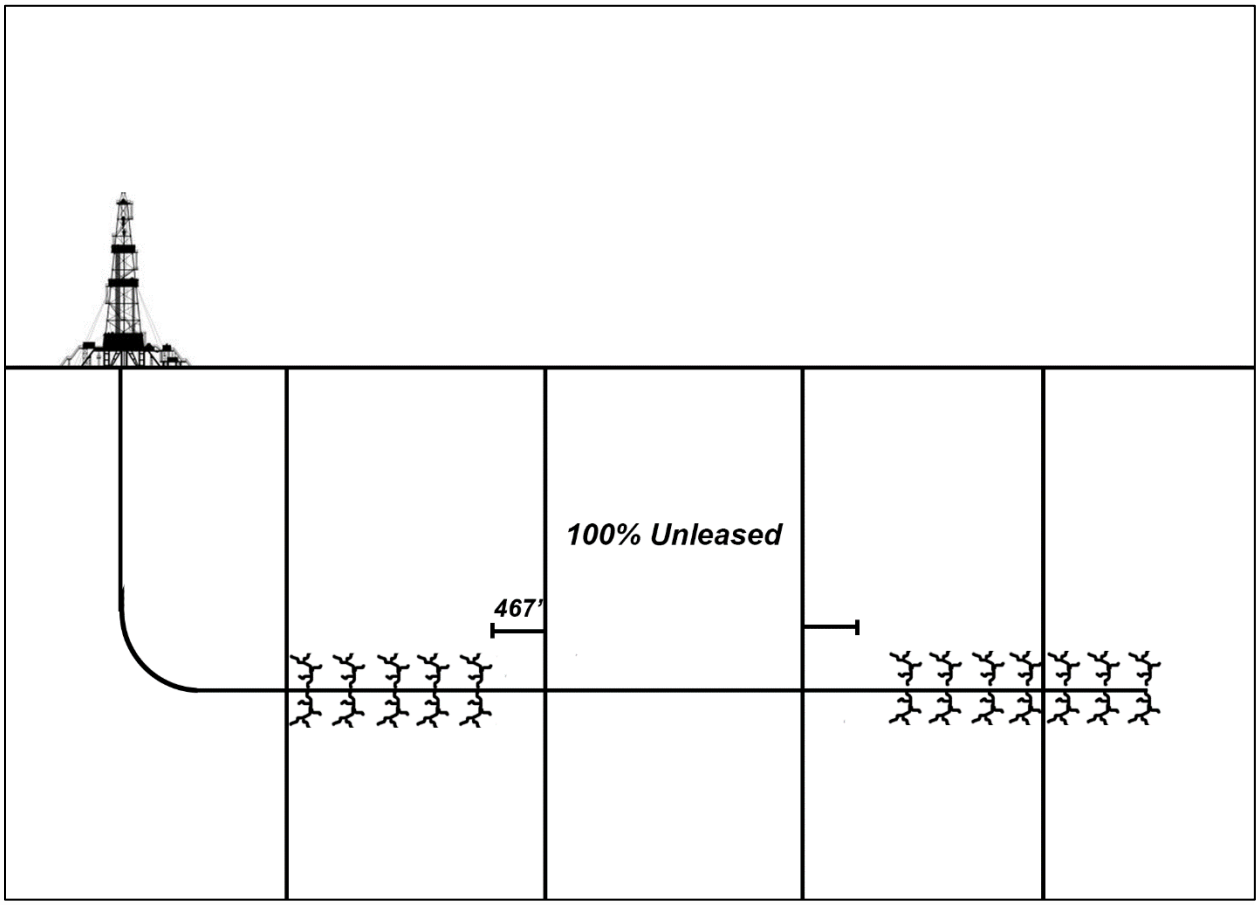

Figure 4 – "No Perf Zone"

Scenario: Same as above, but you decide to perforate the unleased tract. What's the worst that could happen?

How does Lightning *affect the rights of the parties?*

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[141] *See Hastings*, 234 S.W.2d at 398.

[142] Or other distances depending on the applicable field rules.

[143] "No well drilled in violation of this section without special permit obtained, issued, or granted in the manner prescribed in said section, and no well drilled under such special permit or on the commission's own order which does not conform in all respects to the terms of such permit shall be permitted to produce either oil, gas, or geothermal resources and any such well so drilled in violation of said section or on the commission's own order shall be plugged. 16 Tex. Admin. Code § 3.37(e) (2011) (Tex. R.R. Comm'n, Statewide Spacing Rule).

Lightning cannot be understood as giving *carte blanche* authority to operators who drill and extract whatever they wish with "permission" from the surface owner. Producing from an unleased tract absolutely interferes with the unleased owner's fair chance to recover his minerals, which would entitle the unleased owner to injunctive relief and a claim for trespass.[144]

Five Wells or 65? What Crosses the Threshold into "Interference With the Mineral Owner's Fair Chance of Recovery"?

Lightning leaves open the door for an injunction where the mineral owner or his lessee can show "that absent such relief, [they] will suffer imminent, irreparable harm."[145] As discussed above, many actions likely don't rise to that level of harm. But at some point, the cumulative effect of so many minor incursions might rise to the level of interfering with the mineral owner's "reasonable exercise of his own rights."[146]

Scenario: You are the mineral owner as lessee. The off-lease operator continues to use your surface to drill horizontal wells into an adjacent tract. With each well, it becomes more difficult for you to access your minerals. Eventually, it might be impossible for you to access your minerals because the off-lease operator has filled your sub-surface with wellbores that are producing from an adjacent tract.

How does Lightning *affect the rights of the parties?*

Notably, *Lightning* does not define the "threshold" at which cumulative acts become "interference with the fair chance of recovery." In fact, although it was brought to the court's attention that Anadarko's internal records indicated that it planned to drill 65 wells total (five per pad side across multiple potential padsites), the court failed to consider whether such extensive plans would irreparably interfere with Lightning's own drilling plans.[147] It seems reasonable that there is a threshold at which "interference with the fair chance of recovery" could lead to injunctive relief or, potentially,

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[144] *See, e.g.*, *Hastings*, 234 S.W.2d at 398.
[145] 2017 WL 2200343, at *7.
[146] *See* 2017 WL 2200343, at *7; *see also* Bright *& Schiff*, 321 S.W.2d 167 at 169.
[147] Petitioner's Reply to Respondent's Brief On the Merits at 3, 2017 WL 2200343, 2016 WL 7409746, at *3.

damages. However, that will inevitably be a fact-based determination to be made on the merits of each case.

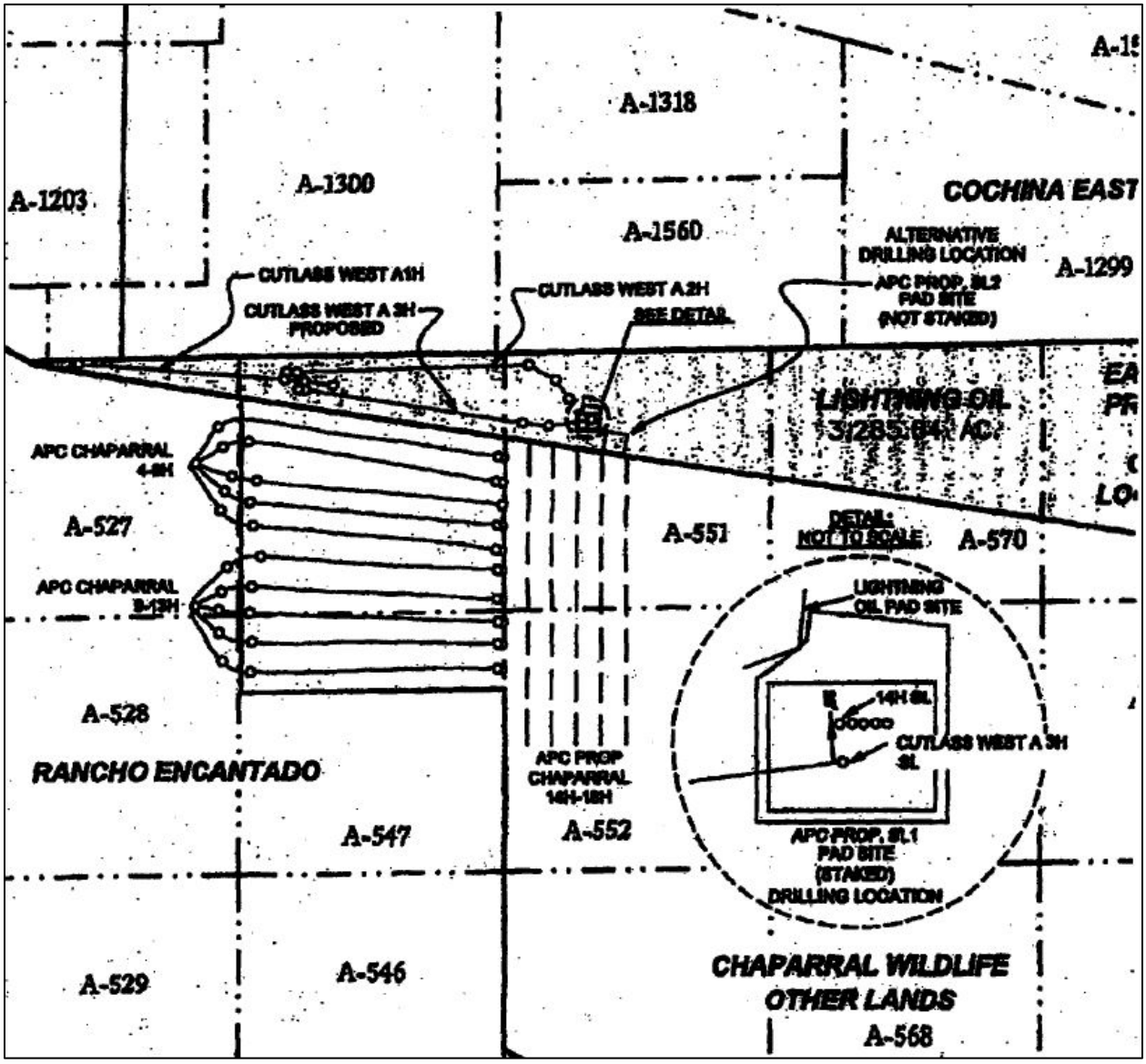

Figure 5 – 5 Wells or 65 Wells?

What are the Unanswered Questions?

Under what facts would the mineral estate owner prevail?

As with many decisions by the high court, this one is not absolute. The court left open the possibility that a mineral owner could prevent pass-through drilling if it could show that such activity would either (i) unreasonably

interfere with the mineral estate owner's development of the estate or (ii) remove or destroy a "sizeable" quantum of minerals.

What about subsurface seismic surveys?

The court of appeal in *Lightning* addressed the possibility of a trespass from subsurface seismographic surveys. Those operations could be a trespass, except that there was no evidence that Anadarko conducted a seismographic survey of Lightning's mineral estate.[148]

Has the accommodation doctrine been affected?

Lightning argued in its briefing, to no avail, that by denying its claims the court would be expanding the accommodation doctrine. Despite the court's rejection of such an effect, *Lightning* could be read as expanding the scope of an "existing use" under the accommodation doctrine to include oil and gas operations for adjacent tracts. In any event, the decision emphasizes the 'balancing' approach employed by Texas courts.[149]

Conclusion

Lightning answers one question that has perplexed oil and gas practitioners and their clients for years. At the same time, it raises new questions that, in the fullness of time, will prompt just as many restless nights. Such is the ever-

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[148] *Lightning Oil Co. v Anadarko E&P Onshore LLC*, 480 SW 3d 628, 634 (Tex. App.—San Antonio 2015), *aff'd* 2017 WL 2200343.

[149] "The accommodation doctrine has long 'provided a sound and workable basis for resolving conflicts' between owners of mineral and surface estates that allows the mineral owner to use as much of the surface—and subsurface—as is reasonably necessary to recover its minerals. *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 63 (Tex. 2016); *see* [*Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013)]. Lightning has advanced no reason that convinces us the doctrine will not be flexible enough to do so in the future. See, e.g., *Coyote Lake*, 498 S.W.3d at 55 (applying the accommodation doctrine, outside of the typical oil and gas application, to a dispute between a surface owner and owner of a severed groundwater estate)." 2017 WL 2200343 at *7.

"Lightning's argument is essentially that it should have the right to prevent any surface or subsurface use that might later interfere with its plans. Such a decision would render the mineral estate absolutely dominant and significantly alter the balance achieved through the flexible nature of the accommodation doctrine." *Id.* at *9.

evolving nature of the law that constantly calls into question our “well fenced out real estate of mind.”[150]

[150] Empson, *supra*.