# Annual Oil & Gas Case Law Update—2017

*Christopher S. Kulander*

Director & Professor, *Harry L. Reed Oil & Gas Law Institute*,
South Texas College of Law Houston
Of Counsel, Haynes and Boone, LLP
ckulander@stcl.edu

South Texas College of Law Houston
PRIVATE AND INDEPENDENT SINCE 1923.

haynesboone

# Topics for Discussion

- Drilling adjacent tracts to get to leased acreage
- What proves up common carrier status?
- Instrument interpretation—NRPI coverage
- Does RRC have primary or exclusive jurisdiction over environmental contamination claims?
- Top leases and the Rule Against Perpetuities
- Nuisance in the Barnett
- Mineral vs. royalty conundrums
- *And more!*

# *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*

**No. 15-0910 (Tex. May 19, 2017)**

- Question:
  - Can Lightning stop Anadarko from drilling horizontal wells through its mineral estate to access and produce Anadarko's adjacent minerals even if it failed to prove an imminent & irreparable injury would occur pending trial?
- Background:
  - Lightning owned ogls covering 3,251.53 acres in Dimmit County.
  - Briscoe Ranch owned the severed surface estate above, known as the Cochina East Ranch.
  - Briscoe Ranch owned the rest of the mineral interest in the Cochina East Ranch, and leased the interest to Anadarko.
  - In October 2009, Anadarko leased the adjacent Chaparral WMA. The Chaparral WMA lease requires Anadarko to utilize off-site drilling locations "when prudent and feasible."
  - Anadarko drilled horizontally from other tracts that it has leased adjacent to the Chaparral WMA—like the Cochina East Ranch.

# *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*

**No. 15-0910 (Tex. May 19, 2017)**

- Background (cont.)
  - Anadarko informed Lightning it intended to stake a well on the surface of the Ranch
  - Lightning opposed Anadarko's planned drilling operations
  - After discussions stalled, Lightning sued Anadarko seeking declaratory and injunctive relief.
- Trial court : Considered temporary restraining order enjoining Anadarko from using the surface of Ranch
- CoA(SA): Lightning did not prove:
  - that potential injuries could not be remedied by quantification and compensation, and failed to prove
  - the absence of an adequate remedy at law.

# *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*

**No. 15-0910 (Tex. May 19, 2017)**

- Lightning had claimed that Anadarko's drilling operations would harm it:
  - If Anadarko failed to properly case its wells, drilling or fracing fluid *could* seep into and damage Lightning's mineral interests;
  - Lightning would have to drill additional offset wells to prevent drainage from Anadarko's wells; *and*
  - Anadarko's wellbore would interfere with Lightning's drilling plans.

# *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*

**No. 15-0910 (Tex. May 19, 2017)**

- TxSC generally agreed with CoA's reasoning
  - found significant that Anadarko's wellbore would displace a small quantity of Lightning's minerals
- Court divided Lightning's trespass claim into two inquiries:

  (1) whether Anadarko's drilling would impermissibly interfere with Lightning's use of the surface and subsurface terrain under its lease; *and*

  (2) whether Anadarko's drilling would impermissibly interfere with the minerals themselves.

# *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*

**No. 15-0910 (Tex. May 19, 2017)**

First point—(interfere with surface and subsurface):

- TxSC: "an unauthorized interference with the *place* where the minerals are located constitutes a trespass . . . only if the interference infringes on the mineral lessee's ability to exercise its rights"
- TxSC: Lightning had not shown such interference:
  - Did not show RRC regulations didn't protect its surface rights, *and*
  - accommodation doctrine still afforded Lightning's dominant mineral estate that protection

# *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*

**No. 15-0910 (Tex. May 19, 2017)**

- Second point—(interfere with drilling plans):
- TxSC:
  - Volume of rock (minerals) lost nominal
  - off-lease drilling would prevents some waste associated with horizontal drilling and reduces the number of wells
    - Can put first take point closer to the property boundary
  - Prior to this decision, Texas case law was uneven on the issue of who exactly comprises the necessary parties to drill-through agreements.

# *Denbury Green Pipeline-Texas v. Texas Rice Land Partners, Ltd.*

**No. 15-0225 (Tex., Jan. 6, 2017)**

- Concept presented:
  - Clarifying pipeline eminent domain authority
- Background:
  - Denbury wanted pipeline and claimed common carrier status as required by RRC for eminent domain.
  - Texas Rice sues, arguing that RRC "box checking" doesn't automatically get one common carrier status
  - TxSC in 2012: Mere assertions of possibility of future public use insufficient for common carrier status

# *Denbury Green Pipeline-Texas v. Texas Rice Land Partners, Ltd.*

**No. 15-0225 (Tex., Jan. 6, 2017)**

- Beaumont Court of Appeals: Denbury required to show a (1) reasonably probable future use that (2) would serve a "substantial public interest."
- TxSC: Denbury qualified as common carrier as a matter of law—showed a reasonable probability that, after construction, it would serve the public.
  - "serve the public" means pipeline "must transport gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier"

# *Forest Oil Corporation v. El Rucio Land & Cattle Company, Inc.*

**No. 14-0979 (Tex. Apr. 28, 2017)**

- Question presented: Does the RRC have *exclusive* or *primary* jurisdiction for environmental contamination actions?
- Background: Forest leased 1.5k acres of 27k acre ranch and produced for more than 30 years, processing the production at a plant also located on the ranch.
  - 1990s: claims for underpayment of royalties, violations of implied covenant to develop, and express lease terms
  - Parties executed a "Surface Agreement" & "Settlement Agreement." The Surface Agreement provided that Forest:
    - (i) would not bring any hazardous material onto the leases;
    - (ii) would perform necessary remediation work for operational harms;
    - (iii) would comply with all germane laws and regulations; and
    - (iv) would not dispose of any hazardous materials on leases.

# *Forest Oil Corporation v. El Rucio Land & Cattle Company, Inc.*

**No. 14-0979 (Tex. Apr. 28, 2017)**

- An apparently disgruntled former employee of Forest informed McAllen in 2004 that Forest had both contaminated the leases and had donated used oilfield tubing to McAllen for construction of a rhinoceros pen.
- After handling this oilfield tubing, McAllen had to get a portion of one of legs amputated due to sarcoma.
- McAllen sued, claiming Forest had:
  - maliciously given him tubing imbibed with radioactive material;
  - caused environmental contamination; and
  - improperly disposed of hazardous items on the leased premises.
- After McAllen objected to Forest's motion to compel arbitration, the trial court denied arbitration.
- The Supreme Court eventually reversed.

# *Forest Oil Corporation v. El Rucio Land & Cattle Company, Inc.*

**No. 14-0979 (Tex. Apr. 28, 2017)**

- While the arbitration imbroglio went to the Supreme Court, McAllen invited the RRC to investigate the ranch for contamination caused by Forest.
- The RRC, in turn, invited Forest to propose and begin remediation plans under its voluntary Operator Cleanup Program.

# *Forest Oil Corporation v. El Rucio Land & Cattle Company, Inc.*

**No. 14-0979 (Tex. Apr. 28, 2017)**

- A memorable arbitration:
  - Forest & McAllen each selected one arbitrator, but the selected arbitrators could not agree upon the third.
  - Forest invited District Judge Ramos in Houston to appoint the third arbitrator
  - Judge Ramos then chose one of the candidates McAllen had proposed.
    - Interestingly, the TxSC pointed out that McAllen, two of his lawyers, and their paralegal (none of them Houston residents) had donated money to Judge Ramos' election campaign, their first such donations
    - No evidence he knew of this.

# *Forest Oil Corporation v. El Rucio Land & Cattle Company, Inc.*

**No. 14-0979 (Tex. Apr. 28, 2017)**

- After appointment, the panel split.
- The McAllen-favored arbitrators awarded McAllen $15,000,000, $500,000 in exemplary damages, $6,700,000 in attorney fees, and a $500,000 award to McAllen personally for physical injury. Also, Forest was required to:
  - Continue to remediate
  - Paid for all necessary future remediation + bond
- The arbitrator appointed by Forest wrote a 40-page dissent.

# *Forest Oil Corporation v. El Rucio Land & Cattle Company, Inc.*

**No. 14-0979 (Tex. Apr. 28, 2017)**

- Forest sought to have arbitrators' decision set aside in district court, arguing the RRC had exclusive or primary jurisdiction over dispute.
- Exclusive vs. primary jurisdiction
  - Exclusive: must exhaust remedies; must be made clear by legislature
- Ultimately, TxSC held that Forest was unable to cite any statutes that indicated the legislature's clear intent to replace a landowner's right to obtain common-law relief in court for:
  - damage caused by environmental contamination; or
  - other liabilities that may emit from the common law, such as contract disputes or for damage to property.

# *Forest Oil Corporation v. El Rucio Land & Cattle Company, Inc.*

**No. 14-0979 (Tex. Apr. 28, 2017)**

- How about ***primary*** jurisdiction?
  - a judicially-created doctrine that allocates power between courts and agencies
  - typically results in an agency being given the first opportunity to decide an issue, with a court deferring for an initial determination
- Here, Court determined that several of McAllen's claims were inherently judicial in nature, like trespass, fraud, negligence, and even assault. RRC did not preempt.
- No alleged arbitrator partiality
- Award acceptable

# *Wenske v. Ealy*

**No. 16-0353 (Tex. Jun. 23, 2017)**

- Question presented: Instrument interpretation battle!
- Background:
  - In **1988**, the Wenskes purchased land burdened by a one-fourth of royalty NPRI via a deed subject to a reservation.
  - The Wenskes sold the property in **2003**, reserving a three-eighths fee mineral estate interest. The purchasers from the Wenskes, the Ealys, received a five-eighths mineral estate interest.
  - The 1988 Deed provided "…there is expressly excepted and reserved to the grantors herein, [Vyvjala] and [Novak], their heirs and assigns . . . an undivided one-fourth (1/4) interest in and to all of the oil royalty, gas royalty, and royalty in casinghead gas, gasoline and royalty in other minerals in and under and that may be produced from the above described tract or parcel of land **for a period of twenty-five years**. . . ."

# *Wenske v. Ealy*

**No. 16-0353 (Tex. Jun. 23, 2017)**

- Purchasers from the Wenskes, the Ealys, received a 5/8 mineral estate interest in a 2003 Deed that provided for a "Reservations from Conveyance" and a "Exceptions to Conveyance and Warranty"
- So later, after leasing, question arises: does the reserved NPRI burden the entire mineral estate or just the interest of the Ealys?
- District Court: Ealys win—apportioned
- 13th Civil Court of Appeals: Affirm

# *Wenske v. Ealy*

**No. 16-0353 (Tex. Jun. 23, 2017)**

- TxSC: 5-4 decision in favor of the Ealys
- Preliminaries: instrument was unambiguous, so interpreted as a matter of law. Court then:
  - admonished using "default rules" to interpret the deed instead of seeking the parties' intent. The Court claimed it could ascertain the drafters' intent from "careful examination of the entire deed"
  - noted that "subject-to" clauses can have two uses:
    - protecting the grantor from breaching a warranty; and
    - making the grantee's interest bear the burden of an outstanding royalty—this is "fraught with ambiguity"

# *Wenske v. Ealy*

**No. 16-0353 (Tex. Jun. 23, 2017)**

## Majority (cont.)—

- Typically, the amount of royalty a mineral interest grantee receives is typically the same fraction as the amount of the fractional mineral interest received
  - But parties can K around that.
- Two facts determined their view:
  - the fact that the clauses were combined ("Exceptions to Conveyance and Warranty") when read with the reservations from conveyance clause, indicated to the majority an intent to avoid breaching the warranty only; and
  - The mineral-reservation paragraph ended with, "[i]f 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 minerals."

# *Wenske v. Ealy*

**No. 16-0353 (Tex. Jun. 23, 2017)**

- Minority—by the deed's "plain language," the interest of the Ealys was the **only one** burdened by the NPRI.
  - Noting that the deed identified the reservation as a "Reservation from *Conveyance*" and the exception as an "Exception to *Conveyance* and Warranty" (minority's emphasis), minority thought it clear that the conveyance to the Ealys was subject *exclusively* to the reservation and exceptions—including the NPRI.
- The minority included in its dissent a lengthy description of precedent it, including (1) *Duhig v. Peavy-Moore Lumber*, (2) *Benge v. Scharbauer*, (3) *Pich v. Lankford*, (4) *Bristow v. Selman*, and (5) *Bass v. Harper*.

(1) **144 S.W.2d 878 (Tex. 1940)**
(2) **Benge v. Scharbauer, 259 S.W.2d 166, 169 (Tex. 1953)]**
(3) **302 S.W.2d 645 (Tex. 1957)**
(4) **402 S.W.2d 520 (Tex.Civ.App.—Tyler 1966, writ ref'd n.r.e.)**
(5) **441 S.W.2d 825 (Tex. 1969).**

# *BP America Production Company v. Laddex, Ltd.*

**No. 15-0248 (Tex. Mar. 3, 2017)**

- Question presented: does a top lease violate the rule against perpetuities?
- Background:
  - In 1971, BP was assigned an ogl in Roberts Co.
  - One well on tract. In 2005, production dipped.
  - April 2006, lessors' attorney, believing the well had completely stopped producing, sent BP a letter stating the ogl appeared expired. No response from BP.
  - In March 2007, around 5 months after well returned to pre-slowdown levels, lessors of the BP lease made a top lease with Laddex.

# *BP America Production Company v. Laddex, Ltd.*

**No. 15-0248 (Tex. Mar. 3, 2017)**

- Laddex then filed suit against BP, claiming failure to produce in paying quantities ended the bottom lease.
- BP argued that RAP negated top lease—motion denied, the case tried to a jury. The charge to the jury posed the following questions:
- "whether the Mahler D-2 failed to produce in paying quantities '[f]rom August 1, 2005 to October 31, 2006' and whether, "under all the relevant circumstances, a reasonably prudent operator would not continue, for the purpose of making a profit and not merely for speculation, to operate the Mahler D-2 Well in the manner in which it was operated between August 1, 2005 to [sic] October 31, 2006."
- 'Yes' to both from jury. BP appeals.

# *BP America Production Company v. Laddex, Ltd.*

**No. 15-0248 (Tex. Mar. 3, 2017)**

- Top lease provision: "This lease is intended to and does include and vest in Lessee any and all remainder and reversionary interest and after-acquired title of Lessor in the Leased Premises upon expiration of any prior oil, gas or mineral lease…."
- CoA: top lease "conveyed to Laddex a vested interest in the lessors' possibility of reverter," it was not subject to the Rule.
- CoA:
- TxSC grants cert.

# *BP America Production Company v. Laddex, Ltd.*

**No. 15-0248 (Tex. Mar. 3, 2017)**

**Law Prof Time:**

"no interest is valid unless it must vest, if at all, within 21 years after the death of some life or lives in being at the time of the conveyance"

Also: if two interpretations possible, pick the one that works

Kulander RAP Test—

*—the 200-year rule*

# *BP America Production Company v. Laddex, Ltd.*

**No. 15-0248 (Tex. Mar. 3, 2017)**

- TxSC—two ways to interpret this:

  (1) through the top lease, the Lessor's vested reversionary interest in the mineral estate had been conveyed to Laddex (Laddex-top lease lives)

  (2) to the degree top lease conveyed the possibility of reverter, the vesting of this interest was delayed by the language of the lease until an uncertain future event occurred (BP-top lease void)

  – TxSC—both plausible, so use the first.

- Also, jury instruction wrong: question (1) limited the time window

# *Reed v. Maltsberger*

**No. 04-16-00231-CV (Tex. App.—San Antonio, May 23, 2017)**

- Question Presented: was a conveyed interest a mineral interest or a fixed NPRI?
- Background: 1942 Deed on land subject to an oil and gas lease —
  - "an undivided one-fourth (1/4) interest in and to all of the oil, gas, and other minerals in and under that may be produced from the following described lands," and:

# *Reed v. Maltsberger*

**No. 04-16-00231-CV (Tex. App.—San Antonio, May 23, 2017)**

- "In the event the above lease…shall for any reason become cancelled or forfeited, it is agreed that the **joinder or consent** of grantee, his heirs or assigns, shall **not be required to another or new lease** upon said property…**nor shall grantee**, his heirs or assigns, **be entitled to share in any bonus** consideration therefor or **delay rentals** thereunder, it being the purpose and intent hereof to grant and convey an undivided one-fourth (1/4) of the one-eighth (1/8) royalty (including any annual gas rentals) under said existing lease and an **equivalent royalty interest under any future mineral leases thereon by [lessor], his heirs, administrators or assigns**."

# *Reed v. Maltsberger*

**No. 04-16-00231-CV (Tex. App.—San Antonio, May 23, 2017)**

- So…what's left? Is it a stripped-down ¼ MI? A fixed 1/32 NPRI with, possibly, more rights?
  - Both are found to be possible!
- Court examines precedent…all over the map! So:
  - Notice "in and under" language
  - Conveyance noted land subject to ogl, implied possibility of future leases, consistent with conveying a mineral interest
  - "Stripping language" would be superfluous if an RI.
  - Discussion of future royalties suggests MI
- Ultimately, the court held that the 1942 Deed conveyed a 1/4 mineral interest and not a royalty interest.

# *Aruba Petroleum, Inc. v. Parr*

**No. 05-14-01285-CV (Tex. App.—Dallas, Feb. 1, 2017)**

- Question presented:
  - Did an operator create an intentional nuisance affecting neighboring surface owners with its E&P activities in the Barnett Shale?
- Background:
  - Parrs had lived on 40 acres in Wise Co. since 2007
  - Many Ps settled with Aruba, leaving the Parrs with environmental claims like nuisance
  - All dismissed/nonsuited until only private nuisance remained
  - Jury found that Aruba had **intentionally** created a private nuisance and awarded the Parrs about $3m.

# *Aruba Petroleum, Inc. v. Parr*

**No. 05-14-01285-CV (Tex. App.—Dallas, Feb. 1, 2017)**

- Jury: Aruba's operations not abnormal/out of place
- Aruba had no producing wells on the Parr's land
- CoA focused on argument that no legally sufficient evidence existed allowing the jury to establish that Aruba had any **intent** to create a private nuisance.
- Parrs argued three things showed Aruba knew:
  - Complaints by a neighbor to Aruba
  - Their own complaints to TCEQ
  - Their own calls to Aruba and contractors thereof
    - No letters or emails. Haphazard encounters with field personnel. No documented contact with particular people.

# *Aruba Petroleum, Inc. v. Parr*

**No. 05-14-01285-CV (Tex. App.—Dallas, Feb. 1, 2017)**

- CoA: a party intentionally creates a nuisance if it "actually desired or intended to create the interference"[1] or actually knew or believed "that the interference would result"[1] from its activities.
- CoA: none of the evidence presented by the Parrs showed that Aruba knew:
  - it was **interfering** with the Parrs or their property
  - or that the Parrs had **expressly** made their complaints **known** to Aruba

***Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, No. 15-0049 at *16 (Tex. Jun. 24, 2016)**

# *Ring Energy, Inc. v. Trey Resources, Inc.*

**No. 08-15-00080-CV (Tex. App.—El Paso, Jan. 18, 2017)**

- Question presented:
  - Does a court ***not*** in Travis Co. have jurisdiction to enjoin the holder of an RRC injection permit from using it?
- Background:
  - Trey applied for 9 RRC permits for injection operations in Andrews Co.
  - Ring operated 5 five wells proximal to Trey
    - No objection to RRC's permit to inject, as allowed by regs
  - In 2013, before injection occurred, Ring filed suit in Andrews Co. seeking an injunction to stop injection
    - Also sought to invalidate the permits.
  - After several temporary injunctions lapsed, Trey filed a motion to dismiss for lack of SMJ—not Travis Co.

# *Ring Energy, Inc. v. Trey Resources, Inc.*

**No. 08-15-00080-CV (Tex. App.—El Paso, Jan. 18, 2017)**

- Background (cont.)
  - Trey asserted that § 85.241 of the TX NAT. RES. CODE required that such actions must be brought in Austin (Travis Co.) where the HQ of the RRC is located.
    - "[a]ny interested person…affected by the conservation laws of this state or orders of the commission relating to oil or gas and the waste of oil or gas, and who is dissatisfied with any of these laws or orders, may file suit against the [RRC]…in Travis County to test the validity of the law or order."
  - Trial court granted Trey's motion to dismiss. Ring appealed, arguing § 85.321 TX Nat. Res. Code allowed it to seek local equitable relief for a CL action like waste before the permit was utilized.
    - party owning property "that may be damaged by another" may sue

# *Ring Energy, Inc. v. Trey Resources, Inc.*

**No. 08-15-00080-CV (Tex. App.—El Paso, Jan. 18, 2017)**

- Court admitted it seemed odd legislature would draft laws that detailed how suits would have to be brought in Travis County in one section (§ 85.241) and then would allow such suits to be tried locally in another section (§ 85.322), but…
- …Court believed that it could interpret § 85.322 no other way but to allow the injunctive relief sought by Ring to be brought in the local court, also…
- …RRC did not have exclusive or primary jurisdiction over Ring's claims, and…
- …Ring's action did not amount to a collateral attack on the RRC's permit.

# Finally—A Couple Sources

- Journal: Oil & Gas, Natural Resources, and Energy Journal ("***ONE-J***"), University of Oklahoma
- Primer: Texas Law of Oil & Gas—Joseph Shade
- Casebook/Hornbook: LOWE, ANDERSON, SMITH, PIERCE & KULANDER, CASES AND MATERIALS ON OIL & GAS LAW (6th ed. Thomson/West 2012).
  - ***AND*** 2015 Forms Manual!
- Energy News Aggregator: Real Clear Energy: http://www.realclearenergy.org/

# *Thank you!*

*Christopher S. Kulander*

Director & Professor, *Harry L. Reed Oil & Gas Law Institute*,
South Texas College of Law Houston
Of Counsel, Haynes and Boone, LLP
ckulander@stcl.edu

South Texas COLLEGE OF LAW HOUSTON
PRIVATE AND INDEPENDENT SINCE 1923.

haynesboone