2016-17 OIL & GAS CASE LAW UPDATE

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CASES

***Lightning Oil Co. v. Anadarko E&P Onshore LLC*, No. 15-0910 (Tex. May 19, 2017)**

On May 19, 2017, the Texas Supreme Court affirmed the San Antonio Court of Appeals and held that an oil and gas operator could drill through the mineral estate underlying an adjacent tract of land without the adjacent mineral lessee's permission. After balancing the interests of the oil and gas industry as a whole and evidence showing only a small loss of minerals caused by off-site drilling, the Texas Supreme Court rejected the adjacent lessee's claims for trespass and injunctive relief. Consequently, this holding permits an operator to locate its drill sites on the surface above an adjacent lease as long as the surface owner grants permission and the interference with the adjacent mineral estate is no more burdensome than was shown in this opinion.

Anadarko leased the minerals under the Chaparral Wildlife Management Area ("***WMA***"), a tract controlled by the Texas Parks and Wildlife Department. The state lease required Anadarko to locate its drill sites on other tracts whenever possible. Anadarko contracted with adjacent surface owner Briscoe Ranch, Inc. (the "***Ranch***") for the right to place wells on the Ranch's surface. Under that agreement, Anadarko could also drill through the mineral estate beneath the Ranch so that Anadarko's horizontal wells could then reach the minerals underlying the adjacent Chaparral WMA. Lightning Oil Co. ("***Lightning***"), lessee of the minerals underlying the Ranch, was not a party to the Anadarko-Briscoe Ranch agreement and objected to Anadarko's plans to drill through Lightning's mineral estate.

Lightning brought suit against Anadarko for underground trespass and tortious inference with its mineral lease, seeking a temporary restraining order and an injunction against drilling on the Ranch's surface. The trial court granted partial summary judgment in favor of Anadarko, and the San Antonio Court of Appeals affirmed. Noting that "the mineral estate owner does not control the subsurface mass," the court of appeals reasoned that the surface owner could grant a third party permission to locate a well on its tract for the purpose of producing on the adjacent mineral estate.[2] Lightning appealed this decision to the Supreme Court of Texas.

Although the Supreme Court generally agreed with the court of appeals' reasoning, it

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[2] *See* Lightning Oil Co. v. Anadarko E&P Onshore LCC, 480 S.W.3d 628 (Tex. App.—San Antonio 2015).

found significant that Anadarko's wellbore would displace a small quantity of Lightning's recoverable minerals, namely the volume of minerals contained in the wellbore cuttings. To assess the implications of this fact—which was not addressed in the cases cited by the court of appeals—the Court reviewed the attributes of mineral ownership (the "bundle of rights"), focusing on a mineral lessee's right to develop. The Court then 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.

To guide the first inquiry, the Court set out the following rule: "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" (emphasis by Court). Within this context, Lightning argued that Anadarko's drill sites would interfere with its right to develop by limiting Lightning's access to the surface and subsurface of its leased tract. Noting that Lightning's speculation that this would occur was not enough, the Court found that Lightning had not demonstrated an unauthorized interference for two reasons. First, Lightning had presented no evidence that the Texas Railroad Commission's (the "***RRC***") drilling regulations were insufficient to protect its rights to use the surface. Second, because Anadarko's rights under the contract were not any greater than those of the surface owner, the accommodation doctrine still afforded Lightning's dominant mineral estate the same protections.

In conducting the second inquiry, the Court weighed the interests of society and the oil and gas industry against Lightning's individual interest in its leased minerals. Even though it acknowledged that Anadarko's drilling would inevitably destroy some of Lightning's leased minerals, the Court recognized that the loss would be relatively small. In fact, the drilling process would only extract "fifteen cubic yards of dirt and rock for each thousand linear feet drilled with an eight-inch wellbore," and Lightning only had a right to the even smaller quantity of minerals contained within that volume of drilled-out subsurface.

Additionally, the off-lease drilling strategy would likely avoid some of the waste associated with horizontal drilling and reduce the number of wells required to extract the minerals underlying the Chaparral WMA. Drilling from an adjacent tract, instead of the leased tract, would help eliminate the unproduced volumes of reservoir left behind below the kick off point, before the wellbore reaches its horizontal plane. Starting drilling operations on an adjacent tract would instead allow the wellbore to enter the formation completely horizontally. Thus, given the "longstanding policy of this state to encourage maximum recovery of minerals and to minimize waste," the industry and societal interests in recovering oil and gas outweighed Lightning's individual right to extract all of its leased minerals. In conclusion, the Court rejected Lightning's underground trespass claim and related request for injunctive relief.

The Court then dispatched Lightning's remaining arguments. First, Lightning had argued that finding in favor of Anadarko would legitimize other types of underground trespass that the Court had impliedly recognized, such as trespass resulting from the migration of wastewater injected into a well. In response, the Court clarified that it had not impliedly recognized such a cause of action, as it had never addressed the issue on the merits. The Court then rejected Lightning's argument that its decision would impair the dominance of Lightning's mineral estate. The Court refused to expand the accommodation doctrine to grant Lightning "the right to prevent any surface or subsurface use that might later interfere with its plans." Addressing Lightning's related contention that this decision would make the accommodation doctrine

applicable to adjacent mineral owners, the Court reiterated that any rights Anadarko had under the contract were as a surface owner's assignee, not an adjacent mineral lessee.

Turning finally to the tortious inference claim, the Court agreed with the lower court that Anadarko could raise a valid justification defense because it had received a contractual right to drill on the surface of the Briscoe Ranch. Thus, Anadarko was entitled to summary judgment on Lightning's claims for underground trespass and tortious inference with contract. Accordingly, the Texas Supreme Court affirmed the decision of the San Antonio Court of Appeals that summary judgment was appropriate.

Prior to this decision, Texas case law was uneven on the issue of who exactly comprises the necessary parties to drill-through agreements. For example, in *Humble Oil and Refining Company v. L & G Oil Company* seemed to established that a leasehold owner only needed permission from the surface owner to drill from a tract in which it had no leasehold interest to penetrate a tract in which it held a lease, although the case focused on the ability of state authorities to grant permits for such wells.[3] Conversely, *Chevron Oil Company v. Howell* granted an injunction against Chevron from drilling a directional well from a surface tract on which it did not own the lease.[4] The *Chevron* court quoted favorably a witness in the case that stated "anytime you drill into something there is bound to be some damage."[5]

***Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.*, No. 15-0225 (Tex. Jan. 6, 2017)**

On January 6, 2017, the Supreme Court of Texas reversed the judgment of the Beaumont Court of Appeals (Ninth District) and reinstated the judgment of the trial court. The Court held that because the summary judgment evidence produced by Denbury Green Pipeline-Texas, LLC ("***Denbury Green***") established conclusively "a reasonable probability that, at some point after construction, the carbon dioxide pipeline known as "the Green Line" would serve the public, as it does currently," Denbury Green was a common carrier.

Denbury Green built a pipeline (the "***Green Line***"), which became part of a network of pipelines formed in part for the transportation of carbon dioxide ("***CO_2***") from Jackson, Mississippi. The route followed by the Green Line ran through eastern Texas and, prior to construction, Denbury Green had tried to get the permission of landowners across the proposed pipeline route, one of whom was Texas Rice Land Partners, Ltd. ("***Texas Rice***"), to perform surveys of their property. In 2007, Denbury Green was denied access to Texas Rice's land after attempting to survey two of its Jefferson County tracts. The following year Denbury Green sought common-carrier status and, to that end, filed a T-4 permit application with the RRC.[6] After receiving the permit, Denbury Green sued to obtain an injunction against Texas Rice to stop Texas Rice's prevention of its entry onto the Texas Rice tracts in Jefferson County for the purpose of completing the pipeline survey. Then, while the suit remained unresolved, Denbury Green took possession of the property pursuant to the Texas Property Code[7] and proceeded to

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3 259 S.W.2d 933 (Tex. Civ. App. – Austin 1953, writ ref'd n.r.e.). A similar decision was reached in Atlantic Refining Company v. Bright & Schiff (321 S.W.2d 167 (1959)) two years later.

4 407 S.W.2d 525 (Tex. Civ. App. 1966, writ ref'd n.r.e.).

5 *Id.* at 528.

6 *See* TEX. NAT. RES. CODE § 111.019(a) ("Common carriers have the right and power of eminent domain.").

7 Specifically, TEX. PROP. CODE § 21.021(a).

survey for and build the Green Line.

The trial court found Denbury Green to be a common carrier with the power of eminent domain in accordance with the Natural Resources Code, and this judgment was affirmed on appeal.[8] In Texas Rice's first appeal to the Supreme Court of Texas,[9] however, the Court reversed and remanded the case to the trial court. (This appeal hereafter, "*Texas Rice I*".) According to the Court this time, reversal and remand were intended to allow for proceedings in line with the common-carrier test established by the Court therein, which would provide an opportunity for Denbury Green "to produce 'reasonable proof of a future customer, thus demonstrating that [the Green Line] will indeed 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.'"[10] The Court observed that on remand, Denbury Green produced evidence including transportation agreements with Air Products and Chemicals, Inc., and Airgas Carbonic, Inc., both unaffiliated entities. The Court also noted the inclusion in the evidence of another transportation agreement, this one between Denbury Onshore and Denbury Green. The court of appeals' review of the evidence produced on remand led it to the conclusion "that 'reasonable minds could differ regarding whether, at the time Denbury Green intended to build the Green Line, a reasonable probability existed that the Green Line would serve the public,'" and it reversed the trial court's grant of summary judgment for Denbury Green as the case wound through the court system for a second time.[11]

The Court then turned to its first decision in *Texas Rice I* where, in order to conform with the Texas Constitution, it had held "that "[t]o qualify as a common carrier with the power of eminent domain, the pipeline must serve the public; it cannot be built only for the builder's exclusive use."[12] The Court noted it had then specifically found:

> "for a person intending to build a CO_2 pipeline to qualify as a common carrier under Section 111.002(6) [of the Natural Resources Code], a reasonable probability must exist 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."[13]

According to the Court, a reasonable probability under the test "is one that is more likely than not."[14] The Court further observed that when a challenge to common-carrier status is brought by a landowner, "the burden falls upon the pipeline company to establish its common-carrier bona fides if it wishes to exercise the power of eminent domain."[15] The Court noted it held "Denbury Green was 'not entitled to common-carrier status simply because it obtained a common-carrier permit, filed a tariff, and agreed to make the pipeline available to any third party wishing to transport its gas in the pipeline and willing to pay the tariff.'"[16] The Court observed

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8 Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 296 S.W.3d 877, 881 (Tex. App.—Beaumont 2009), *rev'd*, 363 S.W.3d 192 (Tex. 2012).

9 *Texas Rice I*, 363 S.W.3d 192.

10 *Id.* at 204.

11 457 S.W.3d 115, 121-22 (Tex. App.—Beaumont 2015, pet. granted).

12 363 S.W.3d at 200.

13 *Id*. at 202 (footnotes omitted).

14 *Id*. at 202 n. 29.

15 *Id*. at 202.

16 *Id.*

that, while the *Texas Rice I* affidavit testimony supported the existence of negotiations between Denbury Green and parties seeking to use the Green Line to transport CO_2, it failed to show whether the gas would be used for other parties' benefit or entirely by Denbury Green.[17] According to the Court, evidence in the record did not identify any possible customers; rather, the evidence merely attested to a likelihood of future customers making use of the Green Line.[18] The Court also noted there had been evidence of an intention by Denbury Green to operate the Green Line wholly for purposes of its own,[19] and Denbury Green's website included statements suggesting the pipeline would be used for its tertiary recovery operations.[20] The Court observed the evidence in *Texas Rice I* failed to show there was a reasonable probability the pipeline would serve the public "at some point after construction,"[21] and led it to hold then that Denbury Green's contentions were not enough to find it was a common carrier.[22] The Court noted it had ultimately remanded the case for further proceedings in the trial court, having concluded that when the common-carrier status of a pipeline "has been challenged, "the company must present reasonable proof of a future customer, thus demonstrating that the pipeline will indeed 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.'"[23]

The Court then turned to the dispute among the parties in this appeal: whether the new evidence, provided by Denbury Green on remand, entitled it to summary judgment as to whether it was a common carrier. Here, the Court found its task was to apply the *Texas Rice I* test to the facts of the new case. Therefore, observed the Court, it would consider whether, as a matter of law, Denbury Green established a reasonable probability the Green Line, after construction, "would 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." The Court held Denbury Green was a common carrier in accordance with the Natural Resources Code, Chapter 111, as it had satisfied the *Texas Rice I* test.

The Court then applied the *Texas Rice I* test to the facts before it. The Court found that the court of appeals, in holding "central to our inquiry is Denbury Green's intent at the time of its plan to construct the Green Line[,]" had wrongly interpreted the *Texas Rice I* test's introductory phrase "for a person intending to build[.]" The Court observed it was improper to focus on intent, as "person intending to build" did not describe the intent required of a party when the pipeline was being considered. According to the Court, this phrase merely showed who had to prove common-carrier status—the pipeline company. The Court observed the court of appeals' focus on intent led it to discount relevant evidence Denbury Green had submitted regarding a contract entered into by Airgas Carbonic for transportation of its CO_2 over the Green Line, which the court of appeals noted had been entered into following construction of the pipeline.[24] The Court also noted "the court of appeals rejected relevant evidence that the Green Line's future

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17 *Id*. at 203.

18 *Id*.

19 *Id*.

20 *Id*. at 203-04.

21 *Cf. State v. K.E.W.*, 315 S.W.3d 16, 23 (Tex. 2010) (recognizing that "probability" is synonymous with "likelihood").

22 *Texas Rice I*, 363 S.W.3d at 202 (quoting Houston Auth. of City of Dallas v. Higginbotham, 143 S.W.2d 79, 84 (Tex. 1940)).

23 *Id*. at 204 (quoting TEX. NAT. RES. CODE §§ 111.002(a), .003(a) (alteration in original)).

24 457 S.W.3d at 120.

public use could be supported by its proximity to other CO_2 shippers once construction was completed."[25] According to the Court, the court of appeals had shifted the analysis to focus on intent and, consequently, had disregarded relevant evidence supporting the common-carrier status of Denbury Green.

The Court then addressed its own review of the evidence in *Texas Rice I*, noting it had been limited to assertions by Denbury Green regarding its intention to have the public use the Green Line. The Court noted it was the lack of evidence demonstrating "a reasonable probability of the Green Line's future public use" that led it to determine Denbury Green was not entitled to summary judgment.[26] The Court observed that, by itself, such evidence of intent failed to meet the reasonable probability standard from *Texas Rice I*.[27] There was also affidavit testimony in support of Denbury Green's contention that there were other parties with which it was negotiating for the transportation of CO_2 over the Green Line, but the Court found this testimony suggested Denbury Green would only transport gas for tertiary recovery operations of its own and, therefore, without evidence to the contrary, this did not establish public use.[28] According to the Court, "[t]he testimony 'did not identify any possible customers and [Denbury Green] was unaware of any other entity unaffiliated with Denbury Green that owned CO2 near the pipeline route in Louisiana and Mississippi.'"[29] As to the claims of Denbury Green on its website, the Court had concluded:

> "Denbury Green's representations suggesting that it (1) owns most or all of the naturally occurring CO_2 in the region, (2) intends to purchase all the man-made CO_2 that might be produced under current and future agreements, (3) see its access to CO_2 as giving it a significant advantage over its competitors, and (4) intends to fully utilize the pipeline for its own purposes, *are all inconsistent with public use of the pipeline.*"[30]

The Court had thus held Denbury Green had not established "a reasonable probability that, 'at some point after construction,' the Green Line would serve the public."[31]

Next, the Court turned to the appropriate *Texas Rice I* test, observing it balanced landowner property rights with the public policy interest of the state in development of pipelines, even as it preserved respect for constitutional limitations on the oil and gas industry.[32] The Court noted that before *Texas Rice I*, obtaining common-carrier status required pipeline owners "to do little more than "check[] a certain box on a one-page government form[.]"[33] According to the Court, the Texas Constitution demands considerably more,[34] requiring some objective evidence that the public will probably be served by a pipeline in order for its owner to obtain the right to condemn private property under eminent domain authority.[35] The Court observed that when contracts with unaffiliated entities demonstrate the transportation of gas, not owned by the

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25 *Id*.
26 *Texas Rice I*, 363 S.W.3d at 204.
27 *See id*. at 203-04.
28 *Id*. at 203.
29 *Id*.
30 *Id*. at 204 (emphasis added).
31 *Id*.
32 *See id*. at 197, 204.
33 *Id*. at 199.
34 *Id*.
35 *Id*. at 202.

pipeline, is benefitting an unaffiliated entity, such contracts "can be relevant to showing reasonable probability of future public use."

The Court then noted Texas Rice wanted the Court to hold that the Airgas Carbonic contract, made after contemplation of the Green Line and the *Texas Rice I* holding, was irrelevant and, if anything, merely raised an issue of fact regarding Denbury Green's intent to offer use of the pipeline to the public. However, the Court found the reading misunderstood the test from *Texas Rice I*.

The Court found that, in the absence of additional relevant evidence, post-construction contracts typically established only pre-construction possibilities regarding future public use. However, the Court determined these contracts could be relevant to demonstrating "a reasonable probability that, 'at some point after construction,'" the public would be served by a pipeline. According to the Court, post-construction contracts, in combination with additional evidence, have the potential to lead to a determination by a reasonable observer that, due to a pipeline's proximity to possible customers and given the regulatory environment, when a challenge was made to common-carrier status 'it was "more likely than not'" that someday the public would be served by a pipeline. The Court ultimately found Denbury Green had established a reasonable probability existed "that, at some point after construction, the Green Line would serve the public." The Court further found the evidence of Denbury Green's 2013 CO_2 transportation contract, in combination with the Green Line's proximity to possible customers like Air Products and Airgas Carbonic, meant a reasonable fact-finder could no longer find genuine fact issues "as to whether the Green Line would, *at some point after construction*, do what it now most certainly does: transport CO_2 owned by a customer who retains ownership of the gas." According to the Court, the contract with Airgas Carbonic showed present public use of the Green Line. Of great significance to the Court was the support, provided by the transportation agreement with Air Products, for Denbury Green's assertion that the design of the pipeline's route was intended to enable third parties to transfer their own gas. The Court ultimately determined the evidence before it established conclusively "that it was 'more likely than not' that, 'at some point after construction,' the Green Line would serve the public."

The Court next addressed the court of appeals erroneous requirement "that the reasonably probable future use of the pipeline serve a 'substantial public interest.'"[36] According to the Court, the court of appeals disregarded a claim by Denbury Green that owners of small interests in the Jackson Dome and West Hastings fields were benefitted by the transfer of CO_2 from those units via the Green Line despite Denbury Onshore's ownership of controlling interests in those units, which led the court of appeals to conclude a fact issue as to the substantiality of this use had been raised.[37] The Court also noted the court of appeals found the agreement with Air Products was not substantial enough to withstand summary judgment.[38] The Court found, by levying this added requirement, the court of appeals had wrongly relied on the Court's *Coastal States Gas Producing Co. v. Pate* decision.[39] Turning to the *Pate* case, which involved "eminent domain authority to drill a directional well," the Court observed it had held the benefit to the state, the dedication to the Permanent School Fund of a fraction of gross production revenue,

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36 457 S.W.3d at 121.

37 *Id.*

38 *Id.*

39 *Id.* (citing 309 S.W.2d 828, 833 (Tex. 1958)).

"was a 'direct, tangible and substantial interest' in the taking."[40] According to the Court, it had not held an interest had to "be direct, tangible, or substantial," but instead that the *Pate* facts provided support "that the public's interest would be served."[41] The Court observed that "[t]o the extent that the degree of service to the public was woven into our test in *Texas Rice I*, we held that for the pipeline to serve the public it 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.'"[42] The Court held evidence that establishes "a reasonable probability that the pipeline will, at some point after construction, serve even one customer unaffiliated with the pipeline owner is substantial enough to satisfy public use under the *Texas Rice I* test."

In conclusion, the Court then held the evidence Denbury Green produced on remand established a reasonable probability as a matter of law "that, at some point after construction, the Green Line would serve the public by transporting CO_2 for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier." The Court reversed the judgment of the court of appeals and reinstated the judgment of the trial court.

***Forest Oil Corporation v. El Rucio Land and Cattle Company, Inc.*, No. 14-0979 (Tex. Apr. 28, 2017)**

On Apr. 28, 2017, the Texas Supreme Court considered the question of whether the RRC has exclusive or primary jurisdiction over actions for environmental contamination, which would possibly abrogate suits for monetary damages or another relief in civil court. In affirming the Houston [1st] Court of Appeals, the Court decided that the RRC did not have exclusive or primary jurisdiction. In addition, the Court considered whether the award given to the respondent in arbitration before litigation occurred should have been nullified due to alleged impartiality of the part of one the arbitrators or if the arbitrators had surpassed their powers, or both.

James A. McAllen ("***McAllen***"), respondent, owned a ranch in South Texas. Forest Oil Corporation ("***Forest***") had leased 1,500 acres of the 27,000 acre ranch and produced oil from the ranch for more than 30 years, processing the production at a plant also located on the ranch. After litigation in the 1990s involving claims for the underpayment of royalties and alleged violations of the implied covenant to develop the lease and express lease terms, the parties executed a "Surface Agreement" and a "Settlement Agreement." Among other things, the Surface Agreement provided that Forest: (i) would not bring any hazardous material onto the leases; (ii) would perform necessary remediation work on the leases for harm caused by operations; (iii) would comply with all germane laws and regulations; and (iv) would not dispose of any hazardous materials on the surface of the leases.

An apparently disgruntled former employee of Forest informed McAllen in 2004 that Forest had both contaminated the leased premises and had donated used oilfield tubing to McAllen for a project involving construction of a rhinoceros pen. After handling the used oilfield tubing, McAllen had to get a portion of one of his legs amputated due to sarcoma, a form of tissue cancer. McAllen then sued, claiming Forest had maliciously gave him tubing imbibed with radioactive material as well as alleging environmental contamination and improper disposal of

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40 *Id.* at 833.

41 *Id.*

42 363 S.W.3d at 202 (emphasis added) (footnote omitted).

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.[43]

While the arbitration imbroglio bubbled up towards 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.[44]

Meanwhile, arbitration began with the attempted selection of three (hopefully) neutral arbitrators. Forest and McAllen each selected one arbitrator, but the two selected arbitrators could not agree upon the third. Forest invited District Judge Ramos in Houston to appoint the third arbitrator. Judge Ramos chose one of the candidates McAllen had proposed.[45] After appointment, the panel split. The two McAllen-favored arbitrators awarded McAllen $15,000,000, $500,000 in exemplary damages, and $6,700,000 in attorney fees as well as a $500,000 award to McAllen personally for physical injury. Furthermore, the majority of the troika decided that:

> a. [Forest] has a continuing obligation and duty under the Surface Agreement to locate, remediate, and dispose of all hazardous and non-hazardous materials from the [Ranch] related to [Forest's] operations;
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> b. [Forest] is required to perform remedial work where the need therefore arises, which shall include the removal of any and all hazardous and non-hazardous materials when those materials are no longer necessary in the conduct of [Forest's] operations on the lease;
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> c. [Forest] is solely responsible for reimbursing [McAllen] for any future costs and expenses incurred by [McAllen] in conducting investigations which result in the identification of additional locations requiring remediation of hazardous and non-hazardous materials on the [Ranch] resulting from [Forest's] operations; and
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> d. [Forest] is solely responsible for all future remediation costs and activities related to pollutants, contaminants, and hazardous and non-hazardous materials that are known to be present and/or discovered under those lands covered by the Surface Agreement.

To help insure that Forest would perform these commands, the split panel demanded that Forest post a $10 million dollar bond. The arbitrator appointed by Forest wrote a 40-page dissent.

Not surprisingly, Forest sought to have the arbitrators' decision set aside in district court. Forest first argued that the RRC had exclusive or primary jurisdiction over the dispute. A finding that exclusive jurisdiction lay with the RRC would eliminate the arbitrator award because the troika would have lacked subject-matter jurisdiction to make its ruling and the trial court would have lacked jurisdiction to order its enforcement. Forest also presented evidence that it had not been informed of a possible conflict of interest regarding one of the arbitrators that required vacating the award. Finally, Forest argued more generally that the damages were "in manifest

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43 Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 62 (Tex. 2008).

44 The Court noted that, as of Apr. 28, 2017, the RRC had approved portions of Forest's remediation proposals but had not yet approved its final remediation plans.

45 Interestingly, the Court points 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.

disregard of Texas law, and that the parties had agreed to expanded judicial review of the arbitration award." The trial court held for McAllen with the exception of the bond requirement, and the Houston [1st] Court of Appeals affirmed.[46]

The Court first turned to the matter of whether the RRC has primary or exclusive jurisdiction over issues of environmental contamination. If the agency has exclusive jurisdiction, a party must exhaust all agency remedies in order to advance to court. After noting that, "an agency has exclusive jurisdiction when the Legislature gives the agency alone the authority to make the initial determination in the dispute,"[47] the Court stated that in order to abrogate the common-law right to seek a judicial remedy and to replace it with (an initial) agency primacy, the legislature must make its intent clear to do so. The Court also noted that tribunals are not to interpret a law creating an agency-driven remedy to deprive a party of common-law remedies unless the statute clearly reflects the legislature's intent to preempt the common-law remedy with the statutory or regulatory one.

In seeking to prove such intent, Forest cited the Texas Water Code,[48] which provided that the RRC is "solely responsible for the control and disposition of waste and the abatement and prevention of pollution of surface and subsurface water" by activities arising from exploration and production activities. The Court countered, however, that the legislative record showed that the "solely responsible" language was added to settle an inter-agency dispute between the RRC and the predecessor to the Texas Commission on Environmental Quality (the "***TCEQ***").

Forest also cited the Texas Health and Safety Code,[49] which provides the RRC with the "sole authority to regulate…the disposal of oil and gas [radioactive] waste." Again, the Court noted in response that this citation was part of a subchapter requiring the RRC, the TCEQ, and other agencies to define their roles among themselves under the Texas Radiation Control Act,[50] not to abrogate the right of common-law actions.

Continuing in its attempts to find clear legislative intent to show exclusive jurisdiction, Forest argued that § 85.321 of the Texas Natural Resource Code, which provides that a property owner's remedy for harm arising from a violation of Chapter 85 or "another law of this state prohibiting waste or a valid rule or order of the [RRC] may sue for and recover damages and have any other relief to which he may be entitled at law or in equity,"[51] necessarily precluded any common-law action stemming from the same violations. The Court, however, saw no language that clearly abrogated a common-law action in the regulatory language cited by Forest.

Unrelated to actual statute language, Forest more broadly argued that the ability to seek statutory remedies through an agency ***and*** common-law remedies through a court could lead to the unfair result of a defendant paying twice for the same injury. Such a result may arise, it noted for example, if monetary damages from a suit are not be used to remedy actual environmental harm and the appropriate agency, perhaps the RRC in the event of harm arising from oil and gas exploration, might still have a responsibility to order site remediation. In response, the Court noted that the operator could seek an RRC cleanup order and fulfill its requirements, thus

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46 446 S.W.3d 58, 87 (Tex. App.—Houston [1st Dist.] 2014).

47 *Forest Oil Corporation* at *5, *citing* Cash Am. Int'l Inc. v. Bennett, 35 S.W.3d 12, 15 (Tex. 2000).

48 TEX. WATER CODE § 26.131(a)(1).

49 TEX. HEALTH & SAFETY CODE § 401.415(a).

50 *Id.* § 401.0005.

51 TEX. NAT. RES. CODE § 85.321.

providing evidence in the concurrent lawsuit of lessened or remedied environmental harm and reduced or no monetary damages.

Ultimately, the Court 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 to its property by environmental contamination, or other liabilities that may emit from the common law, such as contract disputes or for damage to property.

The Court then turned to the question of whether the RRC had *primary* jurisdiction over claims for environmental damage arising from oil and gas operations. The Court first noted that primary jurisdiction, a judicially-created doctrine that allocates power between courts and agencies when both have authority to settle a dispute, typically results in an agency being given the first opportunity to decide an issue, with a court deferring to the agency for an initial determination. This doctrine relies on the notions that agencies are typically staffed with trained specialists in the field at issue, unlike courts and juries, and that such agencies would provide more consistent interpretations of specialized regulations and statutes than courts or juries.

Applying the doctrine to the facts before it, the Court determined that several of McAllen's claims were inherently judicial in nature, like trespass, fraud, negligence, and even assault. It noted that the RRC's jurisdiction was not so broad as to oust a court's jurisdiction. Turning to the requirements placed on Forest by the Surface Agreement, the Court answered Forest's claim that only the RRC could determine what hazardous materials had to be removed by law when it opined that, while the RRC could inform the extent of legally required remediation, the RRC could not supplant Forest's common-law duties. In addition, the Court noted that the Surface Agreement expressly disallowed placing hazardous materials on the leases and that violation of those terms did not entail primary RRC jurisdiction as such violations were purely contractual and beyond the standards of regulatory compliance.

Turning finally to Forest's claim of alleged arbitrator partiality, the Court first established that arbitration awards must be set aside when "the rights or a party were prejudiced by…evident partiality by an arbitrator appointed as a neutral arbitrator."[52] Quoting itself further, "evident partiality" is arises by the nondisclosure of "facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality,"[53] but not does require the disclosure of "trivial" facts.[54] Agreeing with the trial court, the Supreme Court held that Arbitrator Ramos should not have been disqualified for failing to disclose what the trial court referred to as a "trivial, non-prejudicial, not consummated invitation to act as mediator" in another matter.

Regarding the scope of the arbitration troika's awards, Forest argued that the panel had exceeded its authority both under the terms of the Settlement Agreement and by requiring damages that were not allowed under Texas law. Here, the Supreme Court turned to the terms of the Settlement and Surface agreements, noting that the Settlement Agreement allowed arbitrators "to award punitive damages where allowed by Texas substantive law" and that all "disputes relating to his [sic] Agreement or disputes over the scope of this arbitration clause will be resolved by arbitration." The Court held that, under these provisions, the panel had very broad authority, including determining what damages Texas law allows, as well as the amounts to be awarded as damages. The Court observed that the panel had defined the remediation

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52 TEX. CIV. PRAC. & REM. CODE § 171.088(a)(2)(A).

53 Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC, 437 S.W.3d 518, 524 (Tex. 2014).

54 Burlington N. R.R. Co. TUCO Inc., 960 S.W.2d 629, 636-637 (Tex. 1997).

requirements and costs—both within the boundaries of the agreements.

Forest finally argued that, since the parties had authorized the troika to "award punitive damages where allowed by Texas substantive law," the parties had allowed for judicial review of any exemplary damages. The Court noted that, while the Texas Arbitration Act limits judicial review of awards made by arbitration, parties can—by "clear agreement"—allow for judicial review. In the present case, however, the Court contrasted the Settlement Agreement's terms concerning discovery protocols—which "apply the Texas Rules of Civil Procedure" and allow for parties to apply for relief in district court—with exemplary damages, where no provision is made for judicial review. Finding no clear agreement by the parties in the Settlement and Surface agreements to allow judicial review of exemplary damages, the Court declined to exercise judicial review of the punitive damages.

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

On June 23, 2017, a sharply divided Supreme Court of Texas considered how to interpret reservation and exception language within a mineral conveyance, deciding whether the language of the instrument passed the entire burden of a prior outstanding non-participating royalty interest ("***NPRI***") to the grantee of the minerals or whether the NPRI proportionately burdened the grantor's reserved mineral interest as well. The majority affirmed the decision of court of appeals, but for different reasons, that the NPRI burden should be proportionately spread. The four-justice dissent maintained that the language of the mineral deed clearly required only the grantee to bear the NPRI burden.

In 1988, the Wenskes purchased land burdened by a 1/4th of royalty NPRI via a deed subject to a reservation (the "***1988 Deed***"). Specifically, each of the two grantors in the 1988 Deed reserved a 1/8th NPRI, resulting in a total reservation of 1/4th of the royalty estate.[55] The Wenskes sold the property in 2003, reserving a 3/8th fee mineral estate interest (the "***2003 Deed***"). The purchasers from the Wenskes, the Ealys, received a 5/8th mineral estate interest. Specifically, the reservation in the 2003 Deed provided the following "Reservations from Conveyance":

> For [appellants and appellants'] heirs, successors, and assigns forever, a reservation of an undivided 3/8ths 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.

Following that reservation, the 2003 Deed thereafter contained the following "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 [Vyvjala], et al for a term of twenty-five (25) years in an instrument recorded in Volume 400, Page 590 of the Deed Records of Lavaca County, Texas, together with all rights, express or

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55 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. . . ."

> implied, in and to the property described herein arising out of or connected with said reserved interest and reservation reference to which instrument is here and now made for all purposes
>
> ….
>
> Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Property to Grantee . . . except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.

In 2011, the Wenskes and Ealys leased their respective mineral estates. The Wenskes filed a declaratory judgment petition in 2013, arguing their 3/8th interest had been taken free and clear of the NPRI. According to the Wenskes, the NPRI should have been deducted exclusively from the 5/8th interest owned by the Ealys. The Ealys' counter summary judgment motion was granted by the trial court, which concluded both parties' mineral estates would share the 1/4 NPRI burden proportionately.

On appeal, the Wenskes argued the 2003 Deed conveyed the NPRI burden to the Ealys alone. Thus, the Wenskes' reserved mineral interest was unburdened by the NPRI. The Wenskes pointed to the following provision in the 2003 Deed for support:

> "Grantor, for the Consideration and *subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty*, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. [(Emphasis added)]."

The Ealys countered the NPRI burdened the entire mineral estate and that the resultant mineral estates were proportionally burdened. The Corpus Christi Court of Appeals (Thirteenth District), following a *de novo* review, overruled the Wenskes' sole issue and affirmed the trial court's decision that the Ealys were entitled to summary judgment. The court concluded that a reservation of a 1/4 of royalty NPRI burdened subsequent owners of both mineral estate interests. The Wenskes had argued the use of the phrase "subject to" in the 2003 Deed was an unqualified limitation on the conveyance, making the Ealys entirely responsible for the NPRI.[56] The court of appeals distinguished *Bass*, however, noting it "sa[id] nothing about how to apportion a separate royalty estate that corresponds with the minerals."[57] The court of appeals found the 2003 Deed did not supply guidance as to this apportionment and, therefore, "the default rule should apply: 'Ordinarily the royalty interest…would be carved proportionately from the two mineral ownerships….'"[58]

The court of appeals noted the exception in the 2003 Deed provided the NPRI owners "own an undivided one-fourth (1/4) *interest in all of the oil, gas, and other minerals in and*

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56 Bass v. Harper, 441 S.W.2d 825 (Tex. 1969).

57 *See id.*

58 Pich v. Lankford, 302 S.W.2d 645, 650 (1957).

under the land for a term of twenty-five (25) years." (emphasis added) It then also noticed the 1988 Deed stated the NPRI owners owned a 1/4th interest in the royalties produced from the land, while the 2003 Deed made no mention of royalties. The court stated it disagreed with the Wenskes "that they could be unburdened by the NPRI simply by stating in the 2003 Deed that they conveyed the property to the Ealys 'subject to' the exception without even mentioning anything about royalties or that the portions of the royalty estate owned by [the NPRI owners] would be paid entirely by the Ealys."

The Wenskes appealed to the Texas Supreme Court. The five justices composing the majority affirmed the lower courts. In doing so, the Court provided perhaps its strongest message yet reaffirming what it called "the paramount importance of ascertaining and effectuating the parties' intent." The Court held that, in such interpretive cases, it must "determine that intent by conducting a careful and detailed examination of a deed in its entirety, rather than applying some default rule that appears nowhere in the deed's text."

Like the lower courts, the Supreme Court agreed with both parties that the instrument was unambiguous, allowing them to interpret its meaning as a matter of law. As they had before the Corpus Christi court, the Wenskes again relied on the Court's treatment of a similar "subject-to" clause in *Bass v. Harper*,[59] wherein the Court had considered the effect of a prior reservation of 6/14 of the 1/8th lessor's royalty under an existing lease on a subsequent conveyance of a 1/2 interest in the minerals to a later grantee. As in the present case, a dispute on the payment of royalty later arose with the grantor in that case claiming that the grantee should bear all of the outstanding 6/14 royalty interest (1/2 of 1/8 less 6/14 of 1/8 or 1/14) while the grantee believed the 6/14 of 1/8 royalty burden should be proportionately apportioned between the grantor and grantee. In *Bass*, the Court agreed with the grantor, reasoning that the exception of the 6/14ths lessor's royalty was "tied specifically to the grant"[60] and so operated to limit the mineral grant in addition to protecting the grantor against warranty claims.

In response here, the Court noted that *Bass* was decided "under the specific wording of the instrument"[61] and its effects should be limited to similarly worded instruments. Specifically, the Court noted that the *Bass* instrument's "subject-to" clause was located in the granting clause and not the warranty clause. More broadly, the Court also noted that, since *Bass*, interpretive jurisprudence in Texas has moved towards focusing on the intent of the parties and harmonizing all parts of a disputed instrument when interpreting its parts.

After discounting *Bass*, the Court admonished the court of appeals for turning to a "default rule" 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" before it focused almost exclusively on the "subject-to" clause and its location within the deed. The Court 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. The first use is commonplace and relatively straightforward, but the Court, citing Professor Ernest Smith, observed that relying on a "subject-to" clause to perform some other function can be fraught with ambiguity requiring litigation to unravel.

Turning to the instrument itself, and "[g]iving the deed's words their plain meaning,

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59 Bass v. Harper, 441 S.W.2d 825 (Tex. 1969).

60 *Id*. at 827.

61 *Id*. at 828.

reading it in its entirety, and harmonizing all of its parts, [the Court could not] construe [the deed] to say the parties intended the Ealys' interest to be the *sole* interest subject to the NPRI." (emphasis by Court) The Court's majority agreed with the dissent that the amount of royalty a mineral interest grantee receives is typically the same fraction as the amount of the fractional mineral interest received in the deed[62] and that, under the same reasoning, a freestanding royalty that encumbered the entire mineral interest before a partial conveyance of that mineral interest would generally burden a proportion share of each of the split mineral interests after the partial conveyance. The Court observed, however, that parties could contract for whatever division of burden by a freestanding royalty they desire and that their intent, as expressed in a deed, controls. Here, the Court's majority found no intent in the deed indicating that the drafters wanted to deviate from the general rule.

Further, the Court's majority noted that in the disputed deed, the exceptions to the conveyance and the exceptions to the warranty were combined into one clause. The fact that the clauses were combined, when read with the reservations from conveyance clause, indicated to the majority an intent to avoid breaching the warranty only, and not an intent to reserve to the Wenskes a full, unencumbered 3/8 interest. In addition, the majority noted that 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."

The dissent, composed of four justices, believed that, by the deed's plain language, the interest of the Ealys was the only one burdened by the NPRI. The minority noticed that the 2003 Deed described one "Reservation from Conveyance"—a reservation by the grantors of "an undivided 3/8th of all oil, gas, and other minerals in and under and that may be produced" from the captioned land—and multiple "Exceptions to Conveyance and Warranty," including the NPRI. Further, in the minority's eyes, the granting clause unambiguously identified what the "subject-to" clause modified. 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), the minority thought it clear that the conveyance to the Ealys was subject *exclusively* to the reservation and exceptions—including the NPRI. The minority believed that the "subject-to" clause did not just act to prevent a warranty breach and that the deed described precisely one interest that was subject to the NPRI—the mineral interest of the Ealys.

The minority then examined whether principles that govern the inherent nature of interests being conveyed and reserved in an instrument altered the deed's express language and determined it did not. The minority included in its dissent a very lengthy description and analysis of precedent it claimed supported its position and that, it claimed, was ignored by the majority, including *Duhig v. Peavy-Moore Lumber*,[63] *Benge v. Scharbauer*,[64] *Pich v. Lankford*,[65] *Bristow v. Selman*,[66] and *Bass v. Harper*.[67]

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62 Woods v. Sims. 273 S.W.2d 617, 621 (Tex. 1954); Benge v. Scharbauer, 259 S.W.2d 166, 169 (Tex. 1953).
63 144 S.W.2d 878 (Tex. 1940).
64 Benge v. Scharbauer, 259 S.W.2d 166, 169 (Tex. 1953).
65 302 S.W.2d 645 (Tex. 1957)
66 402 S.W.2d 520 (Tex.Civ.App.—Tyler 1966, writ ref'd n.r.e.)
67 441 S.W.2d 825 (Tex. 1969).

***BP America Production Company v. Laddex, Ltd*., No. 15-0248 (Tex. Mar. 3, 2017)**

On March 3, 2017, the Supreme Court of Texas affirmed the holding of the Amarillo Court of Appeals (Seventh District) and held that (1) a top lease entered into by Laddex, Ltd. (the "***Laddex lease***") did not violate the rule against perpetuities (the "***Rule***") and, therefore, Laddex had standing to file its lawsuit, and (2) the court of appeals correctly remanded the case for a new trial because the trial court erroneously charged the jury on the question of cessation of production in paying quantities.

In 1971, BP acquired an oil and gas lease (the "***BP lease***") by assignment. The lease, covering property in Roberts County, Texas, had a 5-year primary term and was to continue "as long thereafter as oil or gas is produced from said land hereunder." The BP lease had a single producing well (the "***Mahler D-2***"), during the relevant period of time, and, in August 2005, it began experiencing significantly slowed production. In November 2006, the Mahler D-2 returned to producing quantities similar to those prior to the slowdown. In April 2006, during the slowed production period, the lessors' attorney, believing the well had completely stopped producing, sent BP a letter stating the BP lease appeared to have terminated due to "failure to produce in paying quantities and cessation of production." The letter included a request for BP to contact the lessors' attorney to speak about the issue, but there was no response from BP.

In March 2007, around five months after the well returned to pre-slowdown levels of production, the lessors of the BP lease made a top lease with Laddex. The Laddex lease covered the same property as the BP lease, and provided in part:

> "It is agreed that this is a top lease and, subject to the other provisions herein contained, the primary term of this lease shall commence [(a)] upon the date that written releases are filed in the official public records of the county in which the land is located by all owners of record of the prior terminated lease, releasing the last recorded prior now-terminated lease (the "base lease"); or (b) upon the date upon which a judgment of a court of competent jurisdiction terminating the base lease and all interests under the base lease becomes final and nonappealable. 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…"

Laddex filed a suit against BP one month after execution of the Laddex lease, claiming the failure to produce in paying quantities terminated the BP lease. BP sought dismissal of the suit based on lack of subject-matter jurisdiction, contending Laddex did not have standing to submit its claims. According to BP, the source of Laddex's standing, the Laddex lease, was void because it was in violation of the Rule. Following the denial of BP's motion, the case was 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."

The jury gave yes answers to both questions, and further found the April 2006 letter from the

lessor's attorney "did not "repudiate BP's title to the [BP] lease." In delivering judgment on the verdict, the trial court decreed the BP lease had "lapsed and terminated for failing to produce in paying quantities" and granted possession of the relevant mineral estate to Laddex.

BP then appealed. As to the issue of standing, the court of appeals held that because the Laddex lease "conveyed to Laddex a vested interest in the lessors' possibility of reverter," it was not subject to the Rule.[68] On the jury charge issue, court of appeals held "the trial court erred in limiting the jury's paying-production inquiry to the specific fifteen-month period in which production slowed,"[69] and concluded the charge had "limited the jury's consideration to a period of time that was not reasonable."[70] The court of appeals also rejected the challenge by BP to the legal sufficiency of evidence supporting the verdict, and held the record showed "sufficient evidence to have allowed a reasonable jury to differ as to whether the lease produced in paying quantities when a reasonable period of time is considered."[71]

The Court began by addressing the rule against perpetuities issue. Here, BP challenged "Laddex's standing to seek termination of the BP lease" and argued the top lease which this standing depended upon was void as a perpetuity. The Court noted the Texas Constitutional prohibition on perpetuities[72] is manifested in the Rule which states, "no interest is valid unless it must vest, if at all, within twenty-one years after the death of some life or lives in being at the time of the conveyance."[73] The Court observed application of the Rule required them to "look at the conveyance instrument as of the date it is executed, and it is void if by any possible contingency the grant or devise could violate the Rule."[74] The Court acknowledged "that where an instrument is equally open to two constructions, the one will be accepted which renders it valid rather than void, it being assumed that a grantor would intend to create a legal instrument rather than one which is illegal."[75] The Court noted the Rule has no application to present or future interests vesting at their creation.[76] Therefore, observed the Court, to determine whether the Rule applied, they had to analyze the nature of the interest the Laddex lease conveyed. The Court noted, "In Texas, a typical oil and gas lease actually conveys the mineral estate (less those portions expressly reserved, such as royalty) as a determinable fee."[77] It further noted, "[a] possibility of reverter is the interest left in a grantor after the grant of a fee simple determinable."[78] Finally, the Court observed a possibility of reverter is presently vested at execution of the lease, although it is not presently possessory.[79]

The Court turned to the BP lease, and observed it conveyed the mineral estate of the lessors, as a determinable fee, to BP's predecessor "subject to a vested possibility of reverter in

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68 458 S.W.3d 686-87 (Tex. App.—Amarillo 2015).

69 *Id*. at 688.

70 *Id*.

71 *Id*. at 689.

72 TEX. CONST. art. I, § 26.

73 Peveto v. Starkey, 645 S.W.2d 770, 772 (Tex. 1982).

74 *Id*.

75 Kelly v. Womack, 268 S.W.2d 903, 906 (Tex. 1954).

76 *See Id*. at 905-06 ("The requirement of the rule in this respect is complied with when a future estate or interest becomes vested in interest regardless of when it becomes vested in possession.")

77 Luckel v. White, 819 S.W.2d 459, 464 (Tex. 1991).

78 Jupiter Oil Co. v. Snow, 819 S.W.2d 466, 468 (Tex. 1991); *Luckel*, 819 S.W.2d at 464 (explaining that the possibility of reverter is "the grantor's right to fee ownership in the real property reverting to him if the condition terminating the determinable fee occurs").

79 *See Snow*, 819 S.W.2d at 468.

the lessors." Noting they had acknowledged a lessor's ability to sell or assign, in whole or in part, a possibility of reverter, the Court turned to Laddex's contention that, through the Laddex top lease, the Lessor's vested reversionary interest in the mineral estate had been conveyed to Laddex.[80] In responding to Laddex, BP argued that, to the degree Laddex's lease conveyed the possibility of reverter of the lessors, the vesting of this interest was delayed by the language of the lease until an uncertain future event occurred, this event being the expiration of the lease held by BP. According to the Court, this argument amounted to a claim the Rule was violated by the top lease and therefore was void. The Court observed that, generally, the conveyance of a top-lease that is contingent on a determinable-fee bottom lease expiring, without more, would violate the Rule. Noting this did not necessarily mean the Laddex lease violated the Rule, the Court turned its attention to the Laddex lease provisions. The Court noted the Laddex lease's primary term began the date that either the BP lease (i) was released, or (ii) was terminated by a final and nonappealable judgment. Therefore, observed the Court, until the BP lease was adjudged terminated or released, Laddex had no right to possess the mineral estate. The Court then turned to the Laddex lease provision forming the root of the dispute between the parties:

> "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…."

While Laddex claimed the lease presently conveyed the possibility of reverter of the lessors, BP argued the language expressly delayed the reversionary interest from vesting until the BP lease expired, to the extent vesting of the interest could occur outside the period of the Rule. The Court concluded, "a plausible interpretation of this language is that the Laddex lease is a present "partial alienation" of the lessors' possibility of reverter under the BP lease," insofar as Laddex's acquisition "is capable of ripening into a fee simple determinable interest upon expiration of the [BP] lease."[81] The other plausible interpretation, which BP subscribed to, was "that the vesting of Laddex's interest is contingent on the BP lease's expiration." The Court then noted, "where an instrument is equally open to two constructions, the one will be accepted which renders it valid rather than void, it being assumed that a grantor would intend to create a legal instrument rather than one which is illegal."[82] The Court then held the Laddex lease was "a present conveyance of a vested interest" that did not contravene the Rule. According to the Court, if viewed in accordance with BP's interpretation, the provision in dispute would serve only to guarantee violation of the Rule by the lease. The Court concluded that interpreting the vesting language as an effort to avoid a violation of the Rule was the correct approach, and held Laddex had standing to bring this lawsuit under its lease.

The Court then turned to the remaining disputes of the parties, which involved the finding by the jury "that the Mahler D-2 well failed to produce in paying quantities," as well as the court of appeals' remand of the case for a new trial. The Court began with a reiteration of the framework under which it evaluated claims for termination of production in paying quantities.

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80 *See* Michael L. Brown, *Effect of Top Leases: Obstruction of Title and Related Considerations*, 30 BAYLOR L. Rev. 213, 239 (1978) (noting that a top lease "may be classified as a partial alienation of a possibility of reverter," in that "a lessee under a top lease acquires the lessor's possibility of reverter to the extent that what he has acquired is capable of ripening into a fee simple determinable interest upon expiration of the bottom lease" (emphasis omitted)).

81 Brown, 30 BAYLOR L. REV. at 239.

82 *Kelly*, 268 S.W.2d at 906.

The Court observed that the BP lease, having entered its secondary term, would continue so long as oil or gas was "produced," which meant "produced in paying quantities."[83] The Court further observed that whether a well is generating production in paying quantities is a fact question for the jury, and the lessor has the burden of proving an absence of such production for the purpose of terminating a lease.[84] The Court then turned to *Clifton v. Koontz*, where they had set forth an analysis for answering this question,

> "holding that whether a well is producing paying quantities depends on (1) whether the well "pays a profit, even small, over operating expenses,"[85] and (2) if not, whether, "under all the relevant circumstances a reasonably prudent operator would, for the purpose of making a profit and not merely for speculation," continue to operate the well as it had been operated."[86]

The Court also noted *Clifton* had emphasized "there can be no limit as to time, whether it be days, weeks, or months, to be taken into consideration in determining the question of whether paying production from the lease has ceased."[87]

The Court then reviewed the questions and instructions in the jury charge. Question 1 asked in part, "From August 1, 2005 to October 31, 2006, did the Mahler D-2 Well fail to produce in paying quantities?" Noting the jury answered this question "Yes," the Court reviewed Question 2, which was based on a "yes" answer to Question 1, and asked in part if, "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?" The jury answered this question "Yes" as well.

The Court noted the court of appeals held Question 1 to be erroneous because it restricted the jury's deliberation to the fifteen months during which production had slowed, thus preventing the jury from taking into consideration the restoration of the Mahler D-2's profitability following that time period.[88] The Court observed the court of appeals had remanded the case for a new trial when it concluded evidence on the record "would 'have allowed a reasonable jury to differ as to whether the lease produced in paying quantities when a reasonable period of time is considered,'" but noted the court of appeals specifically declined to make a determination as to "what would be an appropriate period of time in this case."[89]

Turning to the parties' arguments, the Court first took note of BP's contention that the evidence conclusively established the profitability of the lease over a reasonable time period and, therefore, a finding in its favor instead of remand was justified. BP took the position that a reasonable period of time here would, at the least, be the 27 months before Laddex filed its April 2007 suit. Laddex responded by arguing the jury's finding, that throughout the fifteen-month slowdown the well was operated at a loss, was supported by the evidence, and further contended "that the trial court 'acted properly in stating the period over which Laddex alleged there was a

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83 *Garcia v. King*, 164 S.W.2d 509, 511 (Tex. 1942).
84 *See* Skelly Oil Co. v. Archer, 356 S.W.2d 774, 782-83 (Tex. 1961).
85 *Id*. at 691 (citation omitted)
86 *Id*.; *see also Skelly Oil*, 356 S.W.2d at 783.
87 325 S.W.2d at 690.
88 458 S.W.3d at 689.
89 *Id*. at 688 n.3 & 689.

lack of paying production and instructing the jury that the measuring period must be reasonable.'" According to the Court, Laddex essentially argued the proper period for analysis was "that in which there is evidence of nonpaying production," and it was for the jury to determine whether, under the circumstances, this period was reasonable.

According to the Court, both parties' positions were in conflict with *Clifton*. In *Clifton*, the primary term of a lease terminated in 1950 and, on September 12, 1956, the operator began reworking operations.[90] The trial court in *Clifton* determined the well on the lease "had at all material times produced gas in paying quantities," and the issue considered was whether there existed any record evidence that would sustain this finding.[91] The lease had a clause barring termination due to cessation of production as long as reworking operations began "within sixty days of such cessation," leading the *Clifton* Court to consider "whether there was evidence of paying production through July 12, 1956."[92] The Court "considered record evidence of monthly and aggregate profits and losses throughout 1954, 1955, and the first six months of 1956[,]" and held there was such evidence.[93] In rejecting one of the lessors' contentions regarding the relevance of the clause, the Court observed:

> "There can be no arbitrary period for determining the question of whether or not a lease has terminated for the additional reason that there are various causes for slowing up of production, or a temporary cessation of production, which the courts have held to be justifiable. We again emphasize that *there can be no limit as to time*, whether it be days, weeks, or months, to be taken into consideration in determining the question of whether paying production from the lease has ceased."[94]

Though the sixty-day clause of the BP lease was not at issue in this case, the Court found its analysis here was governed by *Clifton* "because it more broadly addressed "the question of over what period of time paying quantities should be determined.""[95] The Court again pointed out, in answering this question, "there can be no limit as to time…to be taken into consideration [.]"[96] The Court noted that here, the trial court properly permitted the parties to offer evidence of the well's profitability prior to, during, and following the slowed production. However, the trial court had "ultimately asked the jury to evaluate production in paying quantities only as to the specific period in which production slowed." The Court found itself in agreement with the court of appeals that, under *Clifton*, this was error.

After reviewing BP's arguments about how paying production should have been evaluated by the jury, the Court found it agreed with BP that an evaluation of the question with regard to any specific period of time violated *Clifton*. According to the Court, narrowing the paying production question to any specific period of time was 'necessarily "arbitrary."'[97] The

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90 *Clifton*, 325 S.W.2d at 688.

91 *Id*.

92 *Id*. at 689.

93 *Id*.

94 *Id*. at 690. (emphasis added) (internal citations omitted).

95 *Id*.

96 *Id*.

97 *Id*.; *see* 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL & GAS § 4.4[A][2][b], at 4-40 (Nov. 2009) ("Unless the lease defines the period for which production in paying quantities is measured, a well's profitability is not determined by looking at any specific accounting period.").

Court further noted the jury's verdict, which benefits from considerable deference on appeal, could be influenced significantly by the chosen period. The Court took note of Laddex's insistence that the jury's verdict be upheld because the jury determined the fifteen-month time frame was a reasonable period of time to evaluate paying production over. After noting this argument was based on the accompanying instruction to Question 1, the Court found it disagreed. The Court observed, "the submission served to 'focus the jury' on the period of slowed production and then 'imply that that is a reasonable time period.'" According to the Court, even if the jury had been given a more direct instruction that the selected period of time was required to be reasonable, "the question would still improperly direct the jury toward a specific period instead of allowing it to evaluate cessation of paying production with 'no limit as to time….to be taken into consideration.'"[98] The Court observed that while it was permissible for the parties to use evidence and argument to focus the jury, "the *charge* may not ask or instruct the jury about a specific period without unduly influencing the jury and violating *Clifton*." The Court concluded the charge failed to allow the jury it fulfill its duties and, since "a reasonable jury could have differed as to whether the well ceased to produce in paying quantities under the *Clifton* standard," it was appropriate to remand the case for a new trial.

***Reed v. Maltsberger*, No. 04-16-00231-CV (Tex. App—San Antonio, May 3, 2017)**

On May 3, 2017, the San Antonio Court of Appeals (Fourth District) reversed the judgment of the trial court regarding the interpretation of a mineral conveyance from 1942 (the "***1942 Deed***"). The court held that the 1942 Deed conveyed a 1/4 mineral interest to the grantees/appellants.

The appellants (collectively, the "***Reed Plaintiffs***"), successors of the original grantees, argued that a 1/4 mineral interest was conveyed to them in the 1942 Deed. The appellees argued that the 1942 Deed conveyed only a fixed non-participating royalty interest. At the time of the 1942 conveyance, the captioned land was already subject to an oil and gas lease that provided for a 1/8 lessor's royalty under that existing lease. The court affirmed that, although the 1942 Deed conveyed:

> "…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,"

The language in the 1942 Deed also stripped the grantees (W.B. Dossett and E.M. Benz) of certain fee mineral rights:

> "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."

The dispute over whether the conveyance amounted to a fixed royalty or a mineral

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98 *Clifton*, 325 S.W.2d at 690.

interest lay at the heart of the case. Under the terms of the lease covering the captioned land at the time of the dispute (the "***Hanks Lease***"), the lessee, Rosetta Resources Operating, was paying a fixed 1/32 royalty to the Reed Plaintiffs. However, because the Reed Plaintiffs believed that they owned a 1/4 mineral interest in fee, they argued that they were owed 1/4 of the 22.5% royalty (the agreed royalty in the Hanks Lease) instead of the fixed 1/32 royalty that Rosetta had been paying.

Both parties moved for summary judgment with the district court. The trial court determined that the Reed Plaintiffs owned only a fixed 1/32 nonparticipating royalty interest. The Reed Plaintiffs appealed.

Reviewing the trial court's grant of summary judgment *de novo*, the court of appeals considered the nature of the conveyance, noting that the primary objective in interpreting mineral grants is to determine intent from the four corners of the instrument and not the subjective intent that would benefit each party. The court used a "holistic" approach in order to discern the intent of the parties from the 1942 Deed as a whole as to whether a mineral interest or a royalty interest had been conveyed. The court first delineated the five components of a mineral interest in Texas: (1) the right to develop, (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, and (5) the right to receive royalty payments. The court clarified however that not all of the elements of a mineral interest must be conveyed; a grantor may reserve specific interests in the conveyance.

In contrast, the court noted that a royalty interest comes from the grantor's mineral interest, is non-possessory, and could be separated. A royalty interest has two distinct characteristics: (1) it is non-possessory, and (2) it is free of production and operating expenses.

The court further noted that, just as it is possible to strip certain rights from a mineral fee interest, it is also possible to strip or add certain rights to a royalty interest. Hybrid fee and royalty interests occur frequently despite the problems created. Distinct conveyance or reservation language may help indicate which type of interest is being conveyed or reserved. Traditional mineral fee language refers to the "oil, gas, and other minerals 'in and under' the described land." On the other hand, simply using the word "royalty" typically creates a royalty.

The court then compared and contrasted several cases[99] to determine whether a conveyed mineral interest that strips the grantee of several mineral interest rights remains a mineral fee interest or converts it into a royalty interest. Ultimately, the court noted that each case varied in analysis and conclusion, and determined that no fixed rule existed, concluding that the court must take the language of the instrument as a whole in order to glean and interpret the intent of the drafters.

The court then applied rules of construction to the 1942 Deed. First, the court noted that the traditional mineral fee conveyance language of "in and under" was used in the 1942 Deed. Second, the court noticed that at the time the 1942 Deed was conveyed, the land was already subject to an existing oil and gas lease. This implied the possibility of future leases (which was believed consistent with conveying a mineral interest). Third, the court noted that the 1942 Deed

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[99] Watkins v. Slaughter, 189 S.W.2d 699 (Tex. 1945); Altman v. Blake, 712 S.W.2d 117 (Tex. 1986); French v. Chevron USA, 896 S.W.2d 795 (Tex. 1995); Temple-Inland Forest v. Henderson Family Partnership, 958 S.W.2d 183 (Tex. 1997); Garza v. Prolithic Energy Co., L.P., 195 S.W.3d 137 (Tex. App.—San Antonio 2006, pet. denied); and Hamilton v. Morris Resources, 225 S.W.3d 336 (Tex. App.—San Antonio 2007, pet. denied).

stripped the grantees of certain rights and opined, "if the grantor had intended to convey only a royalty interest, this language stripping the grantee of rights would be redundant because a royalty interest owner has no such rights."

Finally, the court considered the provision in the 1942 Deed regarding future royalties. The lease stated that the grantees were entitled to an "equivalent royalty interest under any future mineral leases." The court decided that this provision made it clear that under future leases, which could provide for an amount differing from a 1/8 royalty (the amount in the original lease), the grantees will be entitled to "an equivalent royalty interest" – that is, 1/4 of any future royalty negotiated.

Ultimately, the court held that the 1942 Deed conveyed a 1/4 mineral interest and not a royalty interest. Therefore, the court reversed the judgment of the trial court.

***Aruba Petroleum, Inc. v. Parr*, No. 05-14-01285-CV (Tex. App.—Dallas, Feb. 1, 2017)**

On Feb. 1, 2017, the Dallas Court of Appeals considered whether an operator had created an intentional nuisance that affected neighboring surface owners when it conducted exploration and production activities in the Barnett Shale. Three members of the Parr family—Robert, Lisa, and Lisa's daughter E.D. (collectively, the "***Parrs***")—sued several oil and gas companies including Aruba Petroleum, Inc. ("***Aruba***"), alleging that "environmental contamination and polluting events" had occurred on the captioned land. The court of appeals concluded that no legally sufficient evidence of intent to cause a nuisance had been presented by the Parrs and reversed the district court.

The Parrs owned forty acres of land in Wise County, Texas. Since approximately 2000, the region has seen extensive oil and gas-related activity related to development of the Barnett Shale. All three Parrs lived on the property after 2007, with one family member present on the captioned land since 2002. After litigation began, several other defendants either settled with the Parrs or were released from liability in the case by summary judgment or claim severance through the trial court, eventually leaving Aruba as the sole defendant. The Parrs alleged a variety of environmental claims, including nuisance, stemming from Aruba's activities. All claims except for private nuisance were eventually dismissed, nonsuited, or abandoned prior to trial. As for negligent private nuisance, the trial court granted a directed verdict to Aruba. The jury, however, found that Aruba had intentionally created a private nuisance and awarded the Parrs $2.65 million in damages for "past and future physical pain and suffering and mental anguish" and $0.275 million for loss of market value of the captioned land.

Aruba appealed, marshalling six issues. Among them, the court of appeals focused on Aruba's argument that no legally sufficient evidence existed allowing the jury to establish that Aruba had any intent to create a private nuisance targeting the Parrs or their land. The court acknowledged that it must sustain a no-evidence challenge if the evidence presented by the Parrs illustrated a complete absence of any proof of a vital fact, including evidence it could not consider due to the rules of law or evidence.[100] In addition, the court noted it must sustain a no-evidence challenge if the evidence offered of a vital element is no more than a "mere scintilla" or

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100 Serv. Corp. Int'l v. Guerra, 348 S.W.3d 221, 228 (Tex. 2011).

the evidence shows the opposite of the vital fact.[101]

In establishing the applicable law, the court first turned to the definition of intentional nuisance in Texas, quoting recent case law that "[A] defendant may be held liable for intentionally causing a nuisance based on proof that he intentionally created or maintained a condition that substantially interferes with the claimant's use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it."[102] Aruba argued that no evidence existed that it knew it was harming the Parrs or their properties or that harm was substantially sure to occur due to its conduct. Furthermore, Aruba noted that the jury had found that its activities were not abnormal or unusual for the area and were no different than any of the other operators nearby. Therefore, Aruba could have had no notice that its particular activities were uniquely affecting the Parrs or their property, or both.

In response, the Parrs argued that evidence existed that Aruba did know that its activities were harmful to the Parrs and their property and was significantly interfering with their use and enjoyment of the property. In support of this assertion, they offered three categories of evidence showing's Aruba knowledge of the harm it caused the appellees: (1) complaints made by a neighbor; (2) their own complaints to the Texas Commission on Environmental Quality (the "***TCEQ***"); and (3) their own complaints directly to Aruba and contractors hired by Aruba.

In support of the first category of evidence showing Aruba's knowledge of the specific harm to the Parrs, the Parrs offered evidence from trial that Lisa Parr had testified that a neighbor had complained to Aruba through various outlets multiple times. This meant, the Parrs believed, that Aruba had knowledge it was harming the neighboring landowners—including the Parrs—and that that sufficed to satisfy the knowledge requirement of harm and thus established intent. Aruba countered that none of this evidence showed that the complaints included specifics about the Parrs or their property. Aruba could not have known about alleged nuisance activities directed at the Parrs and, therefore, the evidence was not germane to a claim of intentional negligence.

In support of the second category of evidence, the Parrs argued that they had offered evidence at trial of complaints they made to the TCEQ about Aruba's activities. In response, Aruba pointed out that no evidence existed that the Parrs had identified themselves or their property to the TCEQ or that Aruba knew about the complaints the Parrs had made to the TCEQ. The court noted, however, that the Parrs had offered no evidence that Aruba knew the Parrs were making complaints to the TCEQ about their activities on the captioned land.

In support of the third category of evidence, the Parrs offered evidence that they had alerted Aruba directly of the harm caused by Aruba's operations. Here, the case provides a lengthy recap of the testimony at trial of Lisa and Robert regarding various haphazard encounters Lisa had with Aruba field personnel and contractors on or near the captioned property, and phone calls made by Lisa to various people at Aruba, with each person reached vaguely remembered only on a first name basis. The court noted that Lisa Parr had testified under cross examination that the Parrs had not contacted Aruba via letter or email. In response, Aruba argued that the Parr's evidence of anonymous complaints to people near the wellsite—some of them contractors—or on the telephone did not suffice to prove it had knowledge and intent on its part to create a nuisance.

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101 *Id.*

102 Crosstex N. Tex. Pipeline, L.P. v. Gardiner, No. 15-0049, 505 S.W.3d 580 (Tex. Jun. 24, 2016).

The court noted that Aruba had no producing wells on the Parr's property and that the jury had, when asked if Aruba's operations were abnormal and out of place such as to constitute a private nuisance, answered "No." The Parrs, while conceding that intentional nuisance "requires evidence of more than an 'awareness of the mere possibility of damage,'"[103] presented evidence they claimed showed Aruba was aware that its operations generally resulted in smells, noise, light, and vibrations. They cited testimony of an Aruba officer that locals neighboring operations would "probably" find the activities a nuisance and that Aruba had "probably" had complaints about approximately twenty wells near the Parrs and their property.

Ultimately, however, the court stressed that the question before it was not whether Aruba had created a nuisance or acted negligently, but rather whether it had created an *intentional* nuisance as to the Parrs. Returning to *Crosstex* for the legal standard of intentional nuisance, the court noted that a party intentionally creates a nuisance if it "actually desired or intended to create the interference" or actually knew or believed "that the interference would result" from its activities.[104] The court noted that evidence showing Aruba had "intentionally engaged in the conduct that caused the interference"[105] was not enough to show an intentional nuisance. Instead, Aruba must have "intentionally caused the interference that constitutes the nuisance [.]"[106] In other words, Aruba must have specifically known that the Parrs' use and enjoyment of their land was being interfered with by its operation. Here, the court held that 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.

Ring Energy, Inc. v. Trey Resources, Inc. **No. 08-15-00080-CV (Tex. App.—El Paso, Jan. 18, 2017)**

On Jan. 18, 2017, the El Paso Court of Appeals decided a question of first impression concerning whether a district court ***not*** located in Travis County, Texas had jurisdiction to enjoin the holder of a permit issued by the RRC allowing for the use of injection wells used for disposal wastes associated with oil and gas operations. After considering questions of statutory interpretation, legislative intent, and the nature of the common-law claim (waste), the court of appeals reversed and held that a local court retained subject matter jurisdiction to deliver injunctive relief to the producer/appellant for a probable, imminent, and irreparable injury. In addition, the court held that the RRC did not retain exclusive or primary jurisdiction over actions for common-law claims and that such actions did not constitute a collateral attack on the permit.

On Sep. 6, 2012, Trey Resources, Inc. ("***Trey***") applied for nine permits from the RRC to conduct injections operations into certain wells in Andrews County, Texas. At the time, Stanford Energy operated five producing wells proximal to the proposed operations. These five wells were later assigned to Ring Energy, Inc. ("***Ring***"). Ring did not file a protest of the proposals for a permit, as allowed by RRC regulations, and the RRC granted the permits on Jan. 17, 2013.[107] On

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103 City of San Antonio v. Pollock, 284 S.W.3d 809, 821 (Tex. 2009).

104 *Crosstex*, 2016 WL 3483165, at *16.

105 *Id.*

106 *Id.*

107 Although the court did not consider the question in the present case, a dispute existed about whether Trey had provided the required notice of the proposed operations—delivering a copy of the injection proposal to any owners and/or operators of wells located within a half mile of the proposed operations and publication in the local newspaper of record.

Sep. 23, 2013, before any injection operations had occurred, Ring sued Trey in state district court in Andrews County, seeking a declaration that the RRC permits were void and that injunction operations would limit recovery by Ring of its mineral interest and thus constituted waste. In its suit, Ring sought both damages and equitable relief in the forms of temporary and permanent injunctions.

After several temporary injunctions had lapsed, Trey filed in Andrews County a motion to dismiss for lack of subject matter jurisdiction, arguing that Ring had both failed to exhaust its administrative remedies before the RRC and had failed to file suit in the proper venue—Travis County, Texas. Ring responded, conceding its claim that the permits should be invalidated out of hand, but that its claims for damages and injunctive relief under § 85.321 of the Texas Natural Resources Code were rightly placed before the trial court located where the captioned land and alleged harm might take place. The trial court granted Trey's motion to dismiss and Ring appealed.

Ring contended in its appeal that the trial court had mistakenly dismissed the suit for lack of subject matter jurisdiction. In its response, Trey argued that Ring could seek injunctive relief before possibly damaging activities occurred only in Travis County where, by statute, orders by the RRC authorizing injection of oil and gas waste are exclusively considered. Any other such action outside Travis County, Trey contended, would be a collateral attack on a valid RRC permit. Ring answered that § 85.321 allows for equitable relief to prevent waste.

The court first considered whether equitable relief was available at the trial court proximal to the affected properties. Trey asserted that § 85.241 of the Texas Natural Resources Code[108] required that such actions must be brought in Austin (Travis County) where the headquarters of the RRC are located. After noting Trey's argument, the court noticed that, after an RRC permit has been put to actual use, all courts in Texas with subject matter jurisdiction can hear cases addressing the consequences of use of the permit and highlighted case law that compared the permit to a driver's license which permits driving but not immunity to damages resulting from same.[109]

The court then considered § 85.321, which Ring argued expressly authorized it to seek local equitable (injunctive) relief for a common law action like waste before the permit was utilized. Ring focused on the opening phrase of the section, which states that a party owning property "that may be damaged by another" may sue, and argued that this implied injunctive relief could be sought before the possibility of damaging activities even began. The court was unconvinced, answering that the meaning of the word "may" depended on the surrounding language in the law and could have instead been used to express the probability of damages happening, not that injunctive relief could be sought before the possibly damaging activities occurred.

Trey countered Ring with the argument that § 85.321 only allowed for local judicial review of actions brought *after* injection operations had commenced and any alleged damages had arisen. If Ring wanted injunctive relief *before* injection operations had begun, Trey also

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[108] Specifically, § 85.241 provides that "[a]ny interested person who is 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."

[109] Berkley v. R.R. Commn. of Texas, 282 S.W.3d 240, 243 (Tex.App.—Amarillo 2009, no pet.).

argued, it would have to bring such action in Travis County. The court was again unconvinced with the presented definition, however, answering that the case law cited by Trey covering this section—wherein no party had sought injunctive relief—did not mean that injunctive relief was not available. The words of the statute, the court stressed, primarily drove any interpretive decision.

With the interpretive schemes proffered by both sides thus discounted, the court then dove into an analysis of the entire act. Ultimately, the court focused on § 85.322 of the Natural Resource Code, which provides that:

> None of the provisions of this chapter that were formerly a part of Chapter 26, Acts of the 42nd Legislature, 1st Called Session, 1931, an amended, *no suit by or against the [RRC]*, and no penalties imposed on or claimed against any party violating a law, rule, or order of the [RRC] *shall impair or abridge or delay a cause of action for damages or other relief* that an owner of land or producer of oil or gas…may have or asset against any party violating any rule or order of the commission or any judgment under this chapter.[110]

While the court admitted it seemed odd that the 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 of the act (§ 85.322), the 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.

The court also held that the RRC did not have exclusive or primary jurisdiction over Ring's claims. Citing *In re Discovery Operating, Inc.*[111] for the proposition that the RRC does not have exclusive jurisdiction over injection wells used for secondary recovery operations, the court also agreed with the Eastland Court of Appeals that the language of §§ 85.321-2 clearly allowed district courts to hear claims for common law claims like waste and negligence.

As for the allocation of primary jurisdiction between courts and agencies, the court first noted that trial courts should abate its own actions to allow initial agency primacy if the agency is properly staffed with experts and "great benefit is derived from an agency's uniformly interpreting its laws, rules, and regulations, whereas courts and juries may reach different results under similar fact situations."[112] Then, the court noticed that Trey had not sought abatement, but rather outright dismissal of Ring's claims. It also noticed that the Legislature had not clearly and expressly granted the RRC exclusive or primary jurisdiction over the type of claims Ring brought. And, again, the court agreed with the determination of the Eastland Court of Appeals in *In re Discovery* that claims such as negligence and waste were "inherently judicial" and thus did not warrant giving the RRC primary jurisdiction. In ruling against Trey, the court acknowledged that injunctive relief of the kind Ring sought could negate use of an RRC permit, but pointed out that injunctions required the complaining party name a cause of action and probable right to

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110 § 85.322 TEX. NAT. RES. CODE (emphasis by court).

111 216 S.W.3d 898 (Tex.App.—Eastland 2007, orig. proceedings).

112 Subaru of Am. v. David McDavid Nissan, 84 S.W.3d 212, 221, citing Gregg v. Delhi-Taylor Oil Corp., 344 S.W.2d 411, 413 (Tex. 1961).

relief, along with a "probable, imminent, and irreparable injury"[113] as well as the posting of a substantial bond.

Turning at last to Trey's argument that the injunction sought by Ring amounted to a collateral attack on the RRC's permit, the courted noted that Trey had cited a handful of cases in support of the general proposition that an order of the RRC cannot be collaterally attacked, particularly outside of Travis County. The court dismissed consideration of any of the cases, noting that they either did not concern a claim brought under § 85.321 or simply did not support Trey's claims. In addition, the court held that none of the cases undermined the possibility of bringing an equitable claim as expressly allowed by §§ 85.321-2.

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[113] The court noted that the injunctive relief sought by Ring was brought under §§ 65.011-2, TEX.CIV.PRAC.& REM.CODE. Interestingly, § 65.012 allows for relief that prohibits "subsurface drilling or mining operations" when an injury is threatened that cannot be remedied with damages for the resultant injuries.