

LIGHTNING STRIKES THE TEXAS SUPREME COURT

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I. INTRODUCTION

This Note concerns an issue of first impression presented to the Texas Supreme Court: whether mineral owners and their lessees can prevent surface owners and licensees from drilling through the mineral estate in order to reach minerals under an adjacent tract of land.¹ In *Lightning Oil Company v. Anadarko E&P Onshore, LLC*, Lightning attempted to enjoin Anadarko from entering into an agreement with the owners of Briscoe Ranch.² Lightning leases the minerals under Briscoe Ranch.³ Anadarko leases the minerals under an adjacent tract of land, and their lease requires them to drill offsite when “prudent and feasible.”⁴ Anadarko contracted with Briscoe Ranch to locate their drilling sites on the ranch and drill horizontally to capture their minerals on the adjacent tract of land.⁵ Lightning sued for trespass and tortious interference, arguing that Briscoe Ranch needed their permission to allow Anadarko to drill through the subsurface of the land, and that Anadarko would wrongfully capture some of the minerals under Lightning’s lease

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1. *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 43 (Tex. 2017).
 2. *Id.*
 3. *Id.*
 4. *Id.*
 5. *Id.*

during the drilling process.⁶ Lightning was denied an injunction based on the trial court's decision that Lightning failed to produce evidence that showed there was a risk of imminent, irreparable harm based on Anadarko's drilling.⁷

This Note argues that the Texas Supreme Court's decision affirming the trial court was correct, but its emphasis on the "balancing test" will lead to a multiplicity of litigation. The test used by the Texas Supreme Court weighs the interest of the individual against the interests of society and the oil and gas industry as a whole. It seems extremely rare that a situation would arise where the interests of the individual outweigh the interests of society and the oil and gas industry. Thus, it may be nearly impossible for a mineral estate owner to have any claim in equity for a trespass against someone who wrongfully captures some of their minerals during the drilling process. This balancing test has the potential to harm the individual producer because of the extreme deference to society and the oil and gas industry as a whole.

Part II of this Note will describe the general background of the law of trespass and mineral capture, and the rights of surface and subsurface owners. Part III sets out the factual and procedural history of *Lightning*. Part IV will analyze the problem that this decision has presented, and what is necessary to determine when harm constitutes a trespass.

II. BACKGROUND

A. *Rule of Capture*

A property owner's rights are often described as a bundle of sticks.⁸ One of the most important rights as a property owner is the right to exclude.⁹ A mineral lessee owns a determinable fee in the oil and gas in place in the subsurface minerals.¹⁰ When the owner of a fee simple estate severs the mineral estate by conveyance, one of the rights conveyed is the right to develop.¹¹ The right to develop includes the right to possess, use, and appropriate minerals, the exclusive right to conduct operations to mine, store, and transport the minerals, and the exclusive right to prospect for, produce, and dispose of the minerals.¹² The rule of capture allows title to be awarded

6. *Id.*

7. *Id.*

8. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

9. *See id.* ("[T]he right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'") (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

10. *Brown v. Humble Oil & Ref. Co.*, 83 S.W.2d 935, 940 (Tex. 1935).

11. *See Hysaw v. Dawkins*, 483 S.W.3d 1, 9 (Tex. 2016) ("[A] mineral estate is comprised of five severable rights: 1. the right to develop, 2. the right to lease, 3. the right to receive bonus payments, 4. the right to receive delay rentals, and 5. the right to receive royalty payments.").

12. *Stephens Cty. v. Mid-Kan. Oil & Gas Co.*, 254 S.W. 290, 293-94 (Tex. 1923).

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to whoever brings the minerals to the wellhead, even if the minerals flowed from outside the lease or property boundaries.¹³ The mineral estate is generally the dominant estate because the mineral owner has the right to use as much of the surface as is reasonably necessary to produce and remove the minerals encompassed by the lease.¹⁴ The rights of the dominant estate are well established but are not absolute.¹⁵

B. Trespass

A trespass to real property is an unauthorized entry upon the land of another, and may occur when one enters or causes something to enter another's property.¹⁶ Every unauthorized entry upon the land of another is a trespass, even if no damage is done.¹⁷ The rules for trespass are different on the surface of the Earth from those that apply two miles above or below it.¹⁸ Thus, ownership of property does not necessarily include the right to exclude every invasion or interference on the property.¹⁹

III. *LIGHTNING OIL CO. V. ANADARKO E&P ONSHORE, LLC*

A. Factual Background

Anadarko E&P Onshore entered into a lease agreement with the State of Texas for the minerals under the Chaparral Wildlife Management Area.²⁰ The lease agreement required Anadarko to drill offsite when "prudent and feasible".²¹ Anadarko planned to use an adjacent tract of land and horizontal drilling to capture the minerals under the Chaparral Wildlife Management Area.²² Briscoe Ranch is adjacent to the Chaparral Wildlife Management Area.²³ The minerals under Briscoe Ranch were severed from the surface estate many years ago.²⁴ The Hurd family owns the minerals, while Briscoe Inc. owns the surface.²⁵ In 2009, Lightning Oil Company entered into an

13. Costal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 15 (Tex. 2008).

14. Getty Oil Co. v. Jones, 470 S.W. 2d 618, 621 (Tex. 1971).

15. Humble Oil & Ref. Co. v. West, 508 S.W.2d 812, 815 (Tex. 1974).

16. Barnes v. Mathis, 353 S.W.3d 760, 764 (Tex. 2011).

17. Costal Oil & Gas Corp., 268 S.W.3d at 15.

18. *Id.* (referring to the rule that wheeling an airplane across the surface of one's property without permission is trespass but flying the plane two miles above the property is not).

19. Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 46 (Tex. 2017).

20. *Id.* at 43.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

agreement with the Hurd family to lease the minerals under Briscoe Ranch.²⁶ Lightning has three producing wells located on Briscoe Ranch.²⁷ Subsequently, Anadarko entered into an agreement with Briscoe Ranch to place a minimum of one drilling site on Briscoe Ranch with at least five wells which will start vertically and then kick off horizontally in order to capture the minerals adjacent to Briscoe Ranch.²⁸ Lightning objected to this agreement with two major arguments. First, that Briscoe Ranch does not have the right to allow Anadarko to drill through the subsurface.²⁹ Additionally, Lightning will suffer irreparable harm by Anadarko extracting a portion of the minerals under Briscoe Ranch and constructing permanent wells that will interfere with its right to produce the minerals.³⁰

B. Procedural Background

The trial court granted Anadarko's motion for summary judgment and dismissed Lightning's claims for trespass and tortious interference, also denying the requested injunction.³¹ The court of appeals affirmed the decision, relying on three legal principles.³² First, the surface overlying a mineral estate is the surface owner's property, and those property rights include the geological structures beneath the surface.³³ Second, the Fifth Circuit has concluded that the surface owner owns all non-mineral molecules of the land.³⁴ Finally, the mineral estate owner is only entitled to "a fair chance to recover the oil and gas in place or under the surface estate."³⁵ The court of appeals held that Lightning does not have a right to exclude Anadarko's operations because as the surface estate owner, Briscoe Ranch controls the earth beneath the surface estate.³⁶ The Texas Supreme Court affirmed the decision, stating that although Lightning is the dominant estate, they failed to prove that the loss of minerals that will occur due to Anadarko's drilling outweighs the interests of society and the interests of the oil and gas industry.³⁷ The Texas Supreme Court relied on long standing public policy which encourages efficient exploration and production and a maximization

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 47.

30. *Id.*

31. *Id.* at 44.

32. *Id.* at 46.

33. *Id.*; *see also* Humble Oil & Ref. Co. v. West, 508 S.W.2d 812, 815 (Tex. 1974).

34. Lightning Oil Co. 520 S.W.3d at 46; Dunn-McCampbell Royalty Interest Inc. v. Nat'l Park Serv., 630 F.3d 431, 441 (5th Cir. 2011).

35. Lightning Oil Co. 520 S.W.3d at 46 (citing Costal Oil & Gas Corp v. Garza Energy Tr., 268 S.W.3d 1, 15 (Tex. 2008)).

36. *Id.* at 44, 47.

37. *Id.* at 51.

of the recovery of minerals.³⁸ Allowing Anadarko to drill will provide the most efficient means of capturing the minerals under the Chaparral Wildlife Management Area.³⁹ Thus, the interests of society and the oil and gas industry outweigh the interests of the dominant estate, Lightning Oil Company.

IV. EFFECTS OF *LIGHTNING*

A. *Analysis of Decision*

The Texas Supreme Court has finally addressed the issue of whether a surface owner has the right to allow someone other than the mineral lessee to drill through the subsurface of the land. In deciding this issue, the Texas Supreme Court concluded that before issuing an injunction for trespass resulting from a surface owner allowing an off-lease party to drill through the subsurface, the dominant mineral lessee must show that imminent, irreparable harm will occur and that the interests of the individual outweigh the interests of society and the oil and gas industry as a whole.⁴⁰ A major issue resulting from this decision is determining whether the interest of an individual producer will *ever* outweigh the combined interests of society and the oil and gas industry.

In *Railroad Commission of Texas v. Manziel*, the Texas Supreme Court held that injecting saltwater into a well on an adjacent tract of land to capture the remaining oil in the well was not trespass when the saltwater then migrated into another well.⁴¹ Under the traditional definition of trespass, one would probably consider causing the unauthorized entry of saltwater into a producing well as trespass. However, the Texas Supreme Court held that because the railroad commission allowed the injection in order to maximize the capture of the remaining oil and gas, the interests of the individual did not outweigh the interests of society and the industry.⁴² Even though the saltwater could cause premature flooding in Manziel's well, it was permissible in order to capture the remaining oil in another well.

Similarly, In *Costal Oil & Gas Corporation v. Garza Energy Trust*, the Texas Supreme Court held that fracing, which caused minerals to flow from one tract of land to another, was not trespass because the rule of capture allows a person to obtain title to the minerals even if the minerals flowed from another tract of land.⁴³ The Texas Supreme Court emphasized the public

38. *Id.*

39. *Id.*; see Christy M. Schweikhardt, Note, *Horizontal Perspective: Texas Oil & Gas Law in Light of Horizontal Drilling Technology*, 34 S. TEX. L. REV. 329, 332 (1993).

40. *Lightning Oil Co.*, 520 S.W.3d at 49.

41. *R.R. Comm'n of Tex. v. Manziel*, 361 S.W.2d 560, 568-69 (Tex. 1962).

42. *Id.*

43. *Costal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 13 (Tex. 2008).

policy position of maximizing the capture of minerals, and relied on the rule of capture to determine who had title to the minerals.⁴⁴ This was another instance where causing the migration of minerals from one well to another did not constitute trespass because the interests of the industry in maximizing the capture of minerals outweighed Garza's interests.

A significant issue that this opinion presents is determining when extracting minerals, even unintentionally, from the mineral lessee's estate will outweigh longstanding public policy encouraging the maximization of capturing minerals. Deciding that the surface owner has the right to use the surface and all non-minerals of the subsurface without consulting the mineral estate gives the mineral owner a modified right to exclude, potentially diluting the rights of the dominant mineral estate.⁴⁵ The Texas Supreme Court relied on the authority of the railroad commission to make sure that the number of wells constructed on a property is not excessive.⁴⁶ However, Anadarko could potentially construct a well for horizontal drilling where Lightning would have constructed a well for vertical drilling, and at that point equitable remedies would no longer be available for Lightning. It seems that only an exceptional situation would allow for an injunction for trespass for an off-lease producer for drilling through the subsurface of a mineral estate.

B. *Prediction of Consequences*

The *Lightning* decision has the potential to give rise to an abundance of lawsuits. Surface owners may be more inclined to enter into agreements with adjacent mineral owners for horizontal drilling. Mineral owners and lessees looking to enjoin off-lease operators from extracting minerals will have a difficult time proving that their interests outweigh the interests of society and the industry. As a result, it is likely that lower courts will be more inclined to rule against mineral owners and lessees. While public policy supports the maximization of capture through the fewest number of wells, the courts should also seek to protect the rights of a mineral owner and lessee. The difficulty that will come with trying to obtain an injunction may force mineral estates to try and capture the minerals in a quicker, less-safe way. This Note predicts that because of the new binding precedent of *Lightning*, trial and appellate courts will overwhelmingly rule against mineral estate owners, and it will not be long before parties begin seeking monetary damages for lost minerals, as equitable remedies will no longer be available.

44. *Id.*

45. *Lightning Oil Co.*, 520 S.W.3d at 52.

46. *Id.* at 49; 16 TEX. ADMIN. CODE §§ 3.37-39 (West 2017).

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V. CONCLUSION

The Texas Supreme Court finally answered the outstanding question of who has the authority to grant an off-lease party the right to drill through the subsurface of an estate to obtain minerals under an adjacent tract of land. This decision likely came as a relief to surface owners, as they retained the property rights relating to the surface, in addition to all of the non-minerals of the subsurface. This decision is potentially a cause of major uncertainty for mineral estate owners, as they may now have to compete for surface space with off-lease producers. Additionally, mineral estates may have to deal with the consequences of off-lease producers extracting some of their minerals in the process of horizontal drilling. The Texas Supreme Court announced that while mineral estates have the right to a fair chance of capturing the minerals, the surface owner owns all non-minerals in the subsurface. Thus, when a surface owner wants to contract with an off-lease producer to drill, the surface owner may grant permission to drill through the subsurface without consulting the mineral estate. The result of *Lightning* has made it very difficult for a mineral lessee to obtain an injunction against an off-lease producer drilling through their mineral estate. While equitable remedies may be preferred, monetary damages may be all that is available to mineral lessee's post-*Lightning*.