



Traversing Is Not Necessarily Trespassing: A Texas Appellate Court Weighs-In On Permissible Uses Of The Subsurface Strata

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What right does a competitor have to place wellpads above your mineral estate and to directionally drill through your mineral estate in order to access its neighboring leased minerals? A Texas appellate court recently found that if the surface estate owner agrees, a competitor may have extensive rights to conduct these types of activities above and through your mineral estate.

On August 19, 2015, the Fourth District Court of Appeals of Texas issued an important decision upholding the District Court's grant of summary judgment in favor of Anadarko E&P Onshore LLC's ("Anadarko") right to directionally drill through Lightning Oil Co.'s ("Lightning") mineral estate from the surface overlying that estate. In granting Anadarko's motion for summary judgment, the court held that while the mineral estate owner is entitled to a fair chance to recover the oil and gas in or under the surface estate, absent the express grant of a right to control the subterranean structures in which the oil and gas molecules are held, the mineral estate lessee does not control the subsurface. Thus, the court held that Anadarko was not trespassing on Lightning's mineral estate, and that Anadarko had sufficient justification to withstand a claim of tortious interference. *See Lightning Oil Co. v. Anadarko E&P Onshore LLC*, No. 04-14-00903-CV (Tex. App. August 19, 2015).

This dispute originated in 2009 when Anadarko obtained an oil and gas lease to develop the mineral estate underlying the Chaparral Wildlife Management Area (the "Chaparral Lease"). Under the terms of the Chaparral Lease, Anadarko was obligated to utilize off-site drilling locations "when prudent and feasible". Consequently, Anadarko entered into a Surface Use and Subsurface Easement Agreement with Briscoe Ranch, Inc., the surface owner of the neighboring Cochina East Ranch that also overlies the mineral estate subject to a lease held by Lightning (the "Cutlass Lease"). The Cutlass Lease granted Lightning the right of "exploring for, developing, operating, producing, owning, marketing, treating and transporting oil and gas from the Leased Premises", but neither the original mineral reservation nor the lease itself included any express rights to subterranean structures. After Anadarko staked a proposed wellpad location on the Cochina East Ranch, Lightning sued Anadarko asserting claims of trespass and tortious interference with the Cutlass Lease, and sought injunctive relief. Lightning argued that as lessee of the mineral estate, it has the right to exclude others from drilling within the subsurface boundaries of its leased lands. Anadarko countered that it needed to only obtain permission from

Briscoe Ranch, Inc., the owner of the surface estate overlying Lightning's mineral estate, to place the well pads and commence drilling.

The trial court initially heard evidence in support of Lightning's request for a temporary injunction, but denied that request finding that Lightning failed to prove it would suffer a probable, imminent, and irreparable injury from Anadarko's drilling activity. The denial of the temporary injunction was upheld on appeal on October 29, 2014. *See Lightning Oil Co. v. Anadarko E&P Onshore LLC*, No. 04-14-00152-CV (Tex. App. October 29, 2014).

Lightning's case then advanced at the trial court, and both parties filed motions for summary judgment. The trial court ultimately granted Anadarko's summary judgment motion and Lightning appealed. The Texas Court of Appeals first considered Lightning's claim that Anadarko's actions constituted unauthorized entry upon its property thereby satisfying the legal standard for trespass. The court reviewed long-standing Texas precedent and rejected Lightning's argument that ownership of the minerals *in* the ground also confers ownership rights regarding the minerals *and* the ground. Absent an express provision in an oil and gas lease granting the mineral lessee rights to control subterranean structures, the court found that the surface owner retains control of the earth below the surface estate. Because Anadarko had the permission of the owner of the Cochina East Ranch to place well pads on the surface and to directionally drill through Lightning's minerals and into the minerals subject to the Chaparral Lease, Lightning had no legal right under Texas law to exclude Anadarko from conducting those drilling activities. Without the legal right to exclude Anadarko from the subsurface, Lightning's case lacked an essential element of a claim of trespass, and the court upheld the trial court's grant of Anadarko's motion for summary judgment on this issue.

The appellate court also upheld the grant of Anadarko's summary judgment motion on Lightning's claim that Anadarko's actions constituted tortious interference with the Cutlass Lease. There are four elements to a successful claim of tortious interference under Texas law: (1) that a contract subject to interference exists; (2) that the alleged act of interference was willful and intentional; (3) that the willful and intentional act proximately caused damage; and (4) that actual damage or loss occurred. Anadarko argued that Lightning failed to carry its burden of proof that its actions proximately caused actual damage. Anadarko also argued the applicability of the "justification" affirmative defense to tortious interference. To establish the justification affirmative defense, a party need only show that its actions were based on the exercise of either its own legal rights, or a good-faith claim to a colorable legal right. The court agreed with Anadarko and found that in the Surface Use and Subsurface Easement Agreement Briscoe Ranch Inc. granted Anadarko permission to place wellpads on the surface overlying the Cutlass Lease mineral estate and to directionally drill through the earth within the boundaries of the Cutlass Lease to reach Anadarko's leased minerals. Thus, by acting within its own legal rights expressly set forth in the Surface Use and Subsurface Easement Agreement, the court found that Anadarko established the justification affirmative defense as a matter of law.

This case offers a cautionary tale regarding the breadth of surface estate rights in and to the subsurface strata despite the severance of the mineral estate. Clearly, the case's conclusions warrant careful review and drafting of oil and gas leases to determine whether the rights to control subsurface activities proximate to the leased estate (and to exclude others) has been

granted to the mineral lessees. But the court was also careful to recognize limits to a surface owner's (or its grantee) rights to impact the subsurface strata containing the mineral estate. In upholding summary judgment on the trespass claim, the court noted—and Anadarko agreed—that Lightning could have a cause of action for trespass if Anadarko had bottomed or opened a well within the boundaries of the Cutlass Lease. The court also recognized Texas precedent holding that a seismographic survey of the Cutlass Lease, without Lightning's permission, could constitute trespass under Texas law. But in this case, Lightning presented no evidence showing that Anadarko conducted a seismographic survey of the Cutlass Lease minerals, or that Anadarko's wellbores would bottom or open within the Cutlass Lease boundary.

As the dispute presented in this case revealed, it is not difficult to identify possible scenarios under which simply drilling through a mineral estate can cause damages and losses to the estate even if there are no seismographic surveys or bottom holes located within the boundaries of such mineral estate. In the temporary injunction portion of the proceeding before the trial court, Lightning put on evidence suggesting that Lightning and its mineral estate *could* suffer harm if, for example, Anadarko were to use inadequate casing during drilling, in the event of a casing failure during fracking operations, or by triggering offset well drilling obligations under the Cutlass Lease to protect against drainage. While the trial court recognized all of these events represent the *potential* for injury to Lightning and its mineral estate *in the future*, those losses could be quantified and compensated if they were to occur. Further, the evidence demonstrated that the offset obligation could arise regardless of whether the wellpad and the wellbore are located on (and originate from) or off of the relevant surface estate.

Under the facts of this case, there was insufficient evidence of probable, imminent and irreparable harm, no factual evidence of trespass to Lightning's mineral estate and sufficient justification to potentially interfere with the Cutlass Lease. But a very different result is possible if a Texas court was presented with lease terms granting the mineral lessee more extensive subsurface rights, or if there were evidence of actual damages incurred by the mineral lessee during the other party's drilling or completion operations through its mineral estate.

For additional information regarding this case, please contact [Jeff Becker](#).