

PRESENTED AT

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Oil, Gas and Mineral Law Institute

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Panel Discussion**Recent Developments Involving the Conflicting
Rights of Mineral Owners and Surface Owners****Moderator:**

Lisa Lumley, Shannon, Gracey, Ratliff & Miller, LLP - Fort Worth, TX

Panelists:

Dick Watt, Watt Thompson & Henneman LLP - Houston, TX
William G. Bredthauer, Harris, Finley & Bogle, P.C. - Fort Worth, TX

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Moderator - Lisa Lumley

Recent Developments Involving the Conflicting Rights of Mineral Owners and Surface Owners



Lisa Lumley is a partner in the Fort Worth office of Shannon, Gracey, Ratliff & Miller, LLP, one of the state's oldest and largest law firms.

She is board-certified in oil and gas law, and has a quarter-century of experience in oil and gas, real estate, and contract-related trials and arbitrations. She has successfully resolved disputes involving leasing and lease termination, land use, title, and joint operating agreements, as well as defending against personal injury and property damage claims in the energy and transportation industries.

She is frequently invited to speak and write on energy-related topics, and has been teaching trial advocacy since the late 1990's. Ms. Lumley has been elected twice to serve on the governing council of the Texas State Bar Association's Oil, Gas & Energy Resources Law Section, and the Texas State Bar appointed her to the state-wide committee charged with writing the oil-and-gas related questions that juries must use to render their verdicts in oil and gas trials. Her peers have rated her "AV Preeminent" with Martindale-Hubble.

On a more local level, she has served as the Chair of Tarrant County Bar Association's Energy Section and its Business Litigation Section. Ms. Lumley is also active in local business groups, such as the Fort Worth Wildcatters, being on the board of directors of the Fort Worth Petroleum Club, and Women Steering Business.

Ms. Lumley graduated with honors from the Ohio State University College of Law in the top 10% of her class. She was in the Order of the Coif honor society, was Managing Editor of the Ohio State Law Journal and won multiple awards for writing, legal knowledge and advocacy (including being awarded "best oral advocate" by the late Supreme Court Justice Antonin Scalia). She is licensed in Texas and Oklahoma.

When not advocating for her clients, Lisa spends time in her fully race-prepared BMW M3, competing in amateur car races sponsored by the BMW Car Club of America and the National Auto Sport Association. She also spends time working for a variety of charities, but perhaps her favorite is Doberman Rescue, inspired by the five Dobermans she has rescued and trained since 1995 because, she says, "only your lawyer should be a junk yard dog."

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Lisa Lumley Publications & Presentations:

- “The Balance of Power in Accommodation Doctrine Disputes after *Merriman v. XTO*, 40th Annual Ernest E. Smith Seminar 2014
- “Audit, Exceptions and Lien Rights for Operators and Non-Operators under JOAs,” Summer 2015
- “Continuous Development or Continuous Problems? Tricks and Traps in Continuous Development Provisions, 2014 Section Report of the Oil, Gas & Energy Resources Law Section of the State Bar of Texas
- “Losing Your Lease: Lease Termination in Texas,” 2014 NALTA 29th Annual Convention, September 24-26, 2014, Nashville, Tennessee
- “Protecting Your Secrets in the Oil Patch,” Shannon Gracey’s Legal Matters, November, 2013
- “Continuous Development or Continuous Problems? Tricks and Traps in Continuous Drilling Provisions,” National Association of Lease and Title Analysts, 29th Annual National Conference, September 18-21, 2013, Albuquerque, New Mexico
- “Getting it Right and Getting it Written,” Presented to Women’s Energy Network, March 2013, Fort Worth, Texas
- “Land Survey Issues in Litigation,” presented in November and December 2012 for a national oil and gas conference in San Antonio.
- “A Litigator’s Perspective on Letter Agreements” for the National Association of Land Title Analysts in September 2012, Dallas, Texas
- “Quiet Title” for the Dallas-Fort Worth Association of Land Title Analysts in August, 2012
- “What, Where, When Why & How of Quiet Title” for the SGRM Oil and Gas Seminar at the Ballpark, August 2012
- “The Trouble with Letter Agreements” at Halfmoon Seminar in Arlington, Texas July, 2011
- Encore presentation for XTO of “What does the dominance of your mineral estate really mean?” Shannon Gracey Oil and Gas Seminar at the Ballpark, June 2011
- “What does the dominance of your mineral estate really mean?” Shannon Gracey Oil and Gas Seminar at the Ballpark, May 2011
- Instructor, Lecturer and Demonstrator of many National Institute for Trial Advocacy Programs, Texas, Louisiana, Colorado, Arizona
- Presented on the potential ramifications of forced pooling in the urban environment, Texas Wesleyan April 2009 Symposium on Urban Drilling
- "How to Prepare for, Begin, and Complete a Deposition for Maximum Effectiveness," Phoenix, Arizona
- "Techniques for Learning Information from Potential Jurors," Baton Rouge, Louisiana
- "New Facets Of Old Alternatives For Unleased Mineral Interests," Texas Wesleyan Shale Drilling Symposium, Spring 2009
- “Effective Cross-Examinations of Fact Witnesses,” New Orleans 2009
- Presented on the technique of operators using the Mineral Interest Pooling Act to address Fort Worth leasing difficulties at the Legends Luncheon and Symposium in Fort Worth, April 2009

- "Oil and Gas Disputes: What You Don't Prepare For, Could Lead to Litigation" at the Shale Energy Breakfast Symposium, Fort Worth, October 2009
- "Oil and Gas Disputes," at Oil and Gas Seminar, Dallas, August 2009
- "Oil and Gas Litigation" at the Halfmoon Seminars' Oil and Gas Ownership, Regulation and Litigation Seminar, Arlington, Texas, July 2009 "Impact of Modern Drilling on the Ancient Conflict Between the Surface and Mineral Estates," Texas Wesleyan Energy Symposium, April 2010
- "Pooling in Texas," Halfmoon Seminars' Texas Conservation, Capture, Pooling and Unitization Seminar, Arlington, July 2010
- "Letter Agreements in the Texas Oil and Gas Industry," Advanced Oil, Gas & Energy Resources Law Course, September, 2010
- "Liability Accruing from the Survey of Mineral Interests in Texas," Texas Society of Professional Surveyors," March 2010
- "Use of Pooling Act Changes as Drilling Goes Urban," Fort Worth Business Press, June 2009
- "Oil And Gas Disputes: Better Known As, When What Can Go Wrong, Does Go Wrong," Fort Worth Business Press, July 2009
- "Oil and Gas Disputes: Stacking the deck in your favor," Fort Worth Business Press, November 2009
- "Is the mineral estate losing the upper hand in Texas?" Fort Worth Business Press, November 2009
- "New Facets of Old Alternatives for Unleased Mineral Interests," Texas Wesleyan Bar Journal, Fall 2010
- "Texas Supreme Court adds Bullets to Russian Roulette of Buying/Selling Mineral Rights," Powell Barnett Shale Newsletter, April 2010
- "Don't be Shut-Out by Your Shut-In Clause," Fort Worth Business Press Energy Report, Summer 2010
- "One for All and All for All? Pooling and Other Groupings of Mineral Interests in Texas," July 2010
- "The Trouble With Letter Agreements: A Litigator's Perspective," Advanced Oil, Gas & Energy Resources Law Course, September, 2010
- "Pooling & Spacing Issues That Could Land You in the Courthouse," September, 2011
- "Case Law Update," Shannon Gracey Oil & Gas Seminar 2010, September 201
- "Should Unpublished Works Be Unfair Game?," 51 OHIO ST. L.J. 5, 1990
- A House, A Nation, and a Theory of Government Divided: The Lincoln-Douglas Debates, published in READING LEGAL CLASSICS, 1990

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Practice Areas

General civil litigation, arbitration and mediation including international and domestic disputes in contract and tort relating to oil and gas, eminent domain and real property law

DICK WATT PARTNER

Dick Watt is a founding partner of WTH. He has practiced law in Texas since his admission to the Texas bar in 1972, after completion of both his undergraduate and legal education at The University of Texas at Austin. Mr. Watt's practice emphasizes general civil litigation, oil and gas law, and oil and gas litigation, including extensive trial and appellate work. In oil and gas matters, he has represented clients in all phases of the upstream and mid-stream exploration, development, and production sector, and besides representing parties in these areas, has also served as both an arbitrator and a mediator in numerous energy-related matters. Prior to being a co-founder of WTH in 2001, Mr. Watt was a founding partner of the Houston firm of Watt, White & Craig, and maintained a solo practice in Houston from 1991 until the formation of WTH in 2001. He is also active in ranching and oil and gas activities.

EDUCATIONAL BACKGROUND

- The University of Texas School of Law, Austin, Texas, 1972 J.D.
- The University of Texas at Austin, Texas, 1969 B.A.

PROFESSIONAL HONORS & ACTIVITIES

- Recipient of the 2014 Ernest E. Smith Lifetime Achievement Award by the Texas Journal of Oil, Gas and Energy Law of the University of Texas School of Law
- "Texas Super Lawyer," Energy & Natural Resources Law and Business Litigation Law, 2004-2015 as recognized by Thomson Reuters and published in Texas Monthly
- Selected as one of five finalists for the 2012 Texas Lawyer Go-To Guide in Energy Law
- Former Co-Chair, Texas Oil, Gas & Energy Resources Law Section Pattern Jury Charge Project, and currently member of State Bar of Texas Oil & Gas Pattern Jury Charge Committee
- 2011 Chambers USA America's Leading Lawyer for Business, focusing on both general civil litigation and oil & gas litigation
- The Best Lawyers in America, selected by peers as one of Texas Best Lawyers in Natural Resources Law and Oil & Gas Law, as published by U.S. News and World Report, 2010-2015
- The Best Lawyers in America, voted "Houston Natural Resources Lawyer of the Year," as published by U.S. News and World Report, 2010
- Chair of the State Bar of Texas Oil, Gas and Energy Resources Law Section for 2007-2008
- Martindale-Hubbell AV Preeminent Rating - The Highest Possible Rating from Martindale-Hubbell 1983-2015

REPRESENTATIVE EXPERIENCE

- Defense of independent oil company against fraud and theft of trade secret claims
- Representation of major oil company with regard to OCSLA lease interpretation
- Representation of royalty owners in class action regarding crude oil pricing
- Representation of royalty owners in class action regarding royalties on natural gas
- Representation of pipeline company in acquisition of easements and condemnation claims
- Representation of landowners against pipeline companies in eminent domain proceedings
- Defense of independent producer against class action claims asserted by property owners for damages to homes resulting from acquisition of seismic data
- Representation of party in arbitration over pipeline construction contract in the Arabian Sea
- Representation of producers in take-or-pay litigation against pipeline companies
- Disputes over contracts and production sharing agreements in the Gulf of Guinea offshore West Africa
- Served as arbitrator in dispute between oil companies concerning exploration agreement
- Representation of royalty owners in development claim against lessee operator
- Defense of oil and gas company against royalty owner development claims
- Defense of oil and gas company against royalty owner drainage claims
- Representation of working interest owners in dispute over terms of acquisition agreement
- Defense of independent oil company over royalty owner fraud claims
- Arbitration in dispute between parties over construction of operating agreement
- Defense of oil company against royalty owner concerning lease terms
- Representation of bank trust company in dispute with trust beneficiaries over oil and gas royalty claims
- Representation of mineral owners under Padre Island National Seashore against National Park Service in multiple matters
- Representation of parties in probate proceedings involving duties of trustee and executor
- Arbitration of dispute between partners of a large law firm regarding provisions of the Partnership Agreement
- Representation of parties in will contest involving significant oil and gas assets
- Representation of drilling contractor against manufacturer of weight indicator on drilling rig

SELECTED SPEECHES & ARTICLES

- Author/Speaker: *Flashpoints in Joint Operating Agreements* for the Institute for Energy Law, The Center for American and International Law, 9th Annual Energy Litigation Conference, October 12, 2010
- Co-Author: *The Legal Principles Affecting Contractual Liabilities When Oil & Gas Properties Are Assigned*. 20th Annual Energy Law Institute, South Texas College of Law, November 8, 2007
- Author/Speaker: *Beyond the Standard Lease Form Selected Oil & Gas Lease Issues* for the Rocky Mountain Mineral Law Foundation, November 4-5, 2004
- Co-Author/Speaker: *Royalty Litigation in 2004 An Update and a Look Ahead* for the University of Texas School of Law Civil Litigation Conference, October 28-29, 2004
- Co-Author: *A Litigation Perspective: Selected Thoughts on the Express Negligence Doctrine, Exculpatory Clauses, and Indemnity in Joint Operating Agreements*. State Bar of Texas Oil, Gas and Energy Resources Law Section Report. Volume 26, Number 1. September 2001

- Author/ Speaker: *Application of Discovery Rule In Oil and Gas Litigation: 1995 Update — The Plaintiffs' Perspective* for State Bar of Texas, Advanced Oil, Gas and Mineral Law Course, September 21, 1995
- Co-Author/ Speaker: *Drainage From A to Z* for State Bar of Texas, 12th Annual Advanced Oil, Gas and Mineral Law Institute, October 6-7, 1994
- Author/ Speaker: *Judicial Process for Evaluating Producing and Non-Producing Oil and Gas Properties* for the Austin Geological Society and Travis County Bar Association and endorsed by the State Bar of Texas, Environmental Law Section, October 8, 1994
- Author/ Speaker: *Marketing and Implied Covenant Litigation* for the State Bar of Texas, 11th Annual Advanced Oil, Gas and Mineral Law Course, October 14, 1993
- Author/ Speaker: *Application of Discovery Rule in Oil and Gas Litigation* for the South Texas College of Law, 6th Annual Advanced Oil & Gas Institute, July 22, 1993
- Co-Author/ Speaker: *To Share or Not To Share - Royalty Obligations Arising Out of Take-or-Pay or Similar Gas Contract Litigation* for the Southwestern Legal Foundation 42nd Annual Institute on Oil and Gas Law and Taxation, February 21, 1991
- Author/ Speaker: *Sun v. Jackson: An Analysis of a Lessee's Obligations In Texas Under the Implied Covenant of Reasonable Development in 1990* for Houston Bar Association, Oil, Gas and Mineral Law Section, April 24, 1990

PROFESSIONAL ASSOCIATIONS & MEMBERSHIPS

- U.S. District Court Southern District of Texas
- U.S. District Court Eastern District of Texas
- U.S. District Court Western District of Texas
- U.S. District Court Northern District of Texas
- U.S. Court of Appeals 5th Circuit
- American Bar Association
- Texas Bar Association
- Houston Bar Association

WILLIAM G. BREDTHAUER

Practice Area: Oil, Gas and Mineral Law

Bill's main area of expertise is oil and gas law including title examination, purchase and sale of producing properties and representation of both operators and land owners in oil and gas leasing and other transactions and has practiced oil and gas law since 1979.

- Member, Oil, Gas and Mineral Law section, State Bar of Texas
- Member, Oil, Gas and Mineral Law Advisory Commission, State Bar of Texas; This commission is responsible for reviewing applications for specialization in oil, gas and mineral law.
- Member, Oil, Gas and Mineral Law Exam Commission, State Bar of Texas; This commission is responsible for preparing and grading the exams for specialization in oil, gas and mineral law.
- AV rated by Martindale-Hubbell
- Graduate, Southern Methodist University (JD, 1979)
- Graduate, Texas Christian University (BBA, 1976)
- Board Certified in Oil, Gas and Mineral Law, Texas Board of Legal Specialization (since 1986)
- Council Member, Oil, Gas and Mineral Law Section, State Bar of Texas
- Course Director, 26th Annual Ernest E. Smith Oil, Gas and Mineral Law Institute
- Fellow, Texas Bar Foundation

Publications

- *Dealing with Financially Troubled Parties in Oil and Gas Transactions* – State Bar of Texas, Advanced Oil, Gas and Mineral Law Course (September 1997)
- *Fort Worth Rocks* – The University of Texas School of Law, 31st Annual Ernest E. Smith Oil, Gas & Mineral Lease Institute (April 2005)
- *Barnett Shale Leasing Decisions Hinge on Many Factors* – Barnett Shale Breakfast Symposium (November 2006)
- *Ownership and Leasing of Minerals under Highways and Right-of-Ways* – Texas Wesleyan University School of Law, Urban Gas Drilling Symposium (April 2009)
- *Barnett Shale Update* – Dallas Bar Association, Energy Law Section, Review of Oil & Gas Law XXIV (August 2009)

Recent Developments Involving the Conflicting Rights of Mineral Owners and Surface Owners

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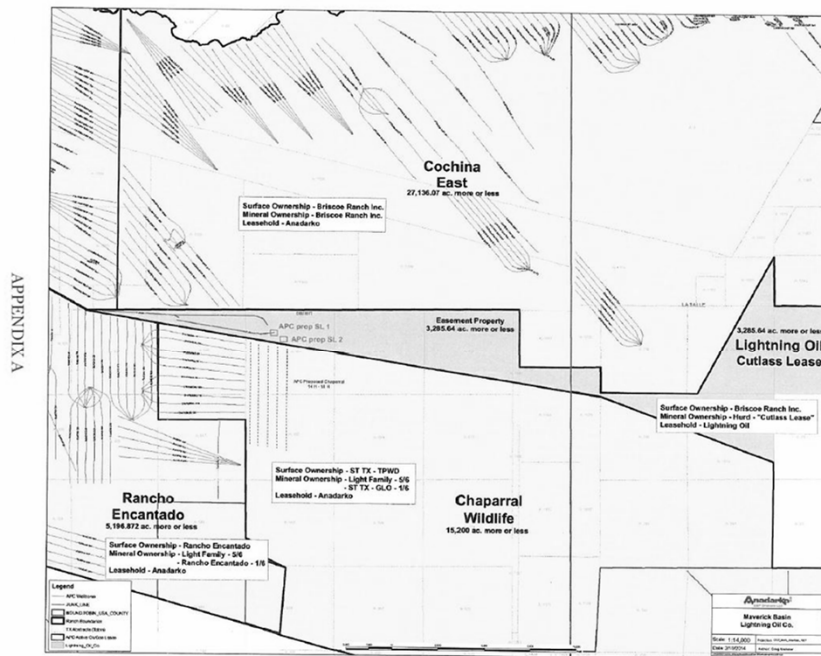
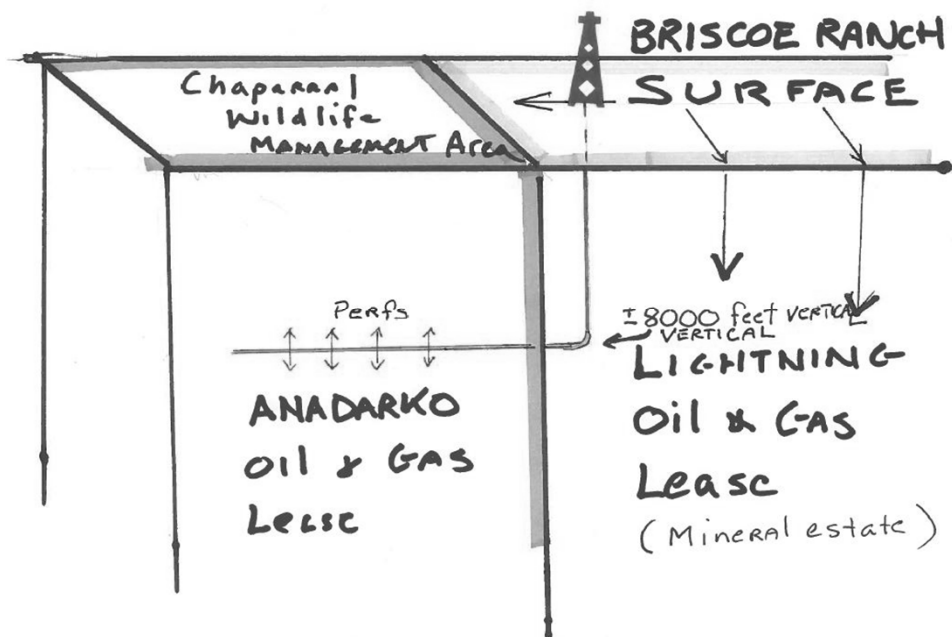


1

Summary of *Lightning Oil Co. v. Anadarko E&P Onshore LLC*, No. 04-14-00903-CV, 2015 WL 5964939 (Tex. App.—San Antonio, October 14, 2015, pet. filed)

- An owner conveyed the surface estate of land to Briscoe Ranches, Inc. ("Briscoe Ranch"), and reserved "all oil, gas and all minerals" as well as "the sole and exclusive right" to lease the tract for oil and gas. In 2009, the successor to this mineral interest signed an oil and gas lease in favor of Lightning Oil Co. (the "Cutlass Lease").
- Anadarko owns an oil and gas lease covering acreage south of the Cutlass Lease, called the Chaparral Wildlife Management Area (the "Chaparral Lease"), that requires Anadarko to
 - (i) obtain authorization from the Texas Parks and Wildlife Department for drill-site locations, and (ii) directs Anadarko to use offsite locations "when prudent and feasible."
- Consequently, Anadarko entered into a "Surface Use and Subsurface Easement Agreement" with the owner of the surface of the Cutlass Lease, Briscoe Ranch, that allowed Anadarko to use the surface and "directionally and/or horizontally drill" wells through the Cutlass Lease to produce from "take points" on the adjacent Chaparral Lease.
- Several potentially productive formations underlie the Cutlass Lease.
- Anadarko staked its proposed drill-site location on the surface of the Cutlass Lease and notified Lightning Oil of the proposed site. Upon learning of the proposed site, Lightning Oil obtained a permit to use the same site as its own drilling location, after which Anadarko proposed a second site from which to drill.
- Lightning Oil sued Anadarko and both parties moved for partial summary judgment seeking declarations
 - (1) whether Anadarko's drilling would constitute a subsurface trespass of Lightning Oil's mineral estate, and
 - (2) whether the Briscoe Ranch could authorize Anadarko's subsurface activities without Lightning Oil's consent.
- The trial court ruled in favor of Anadarko, and the court of appeals affirmed, holding that a surface owner controls the earth surrounding the subsurface "minerals," and thus there was no trespass, and the Briscoe Ranch was authorized to grant Anadarko permission to drill through the Cutlass Lease.

2



The Origin and Rationale of the “Ownership in Place” Doctrine

- (a) At the dawn of the petroleum age, courts sought to deal with the legal concepts of this new industry by analogy to things with which they were familiar, such as wild animals and hard rock mining. In Texas, *Texas Co. v. Daugherty* explained mineral ownership as follows:

With the land itself capable of absolute ownership, everything within it in the nature of a mineral is likewise capable of ownership, so long as it constitutes a part of it. If these minerals are a part of the realty while in place, as undoubtedly they are, upon what principle can the ownership of the property interest, which they constitute while they are beneath or within the land, be other than the ownership of an interest in the realty? . . . A purchaser of [oil and gas] within the ground assumes the hazard of their absence through the possibility of their escape from beneath the particular tract of land, and, of course, if they are not discovered, the conveyance is of no effect, just as the purchaser of solid mineral within the ground incurs the risk of its absence, and therefore a futile venture. But let it be supposed that they have not escaped, and are in repose within the strata beneath the particular tract and capable of possession by appropriation from it. There they clearly constitute a part of the realty. (emphasis added) *Texas Co. v. Daugherty*, 176 S.W. 717, 719-20 (Tex. 1915).

- (b) While this doctrine is firmly established in Texas and most other oil and gas jurisdictions, in reality, it seems to many to be a legal fiction, as illustrated by the following from *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 15 (Tex. 2008):

“While a mineral rights owner has a real interest in oil and gas in place, . . . The minerals owner is entitled, not to the molecules actually residing below the surface, but to ‘a fair chance to recover the oil and gas in or under his land or their equivalents in kind.’”

- (c) Far too lengthy to be discussed here, the ownership in place doctrine works in conjunction with two other real property principles, the correlative rights doctrine and the common law Rule of Capture. Also, issues involving “surface minerals,” e.g. *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99 (Tex. 1984), are not discussed here.
- (d) For a more general discussion of “ownership in place,” see generally, Smith & Weaver, 1 Texas Law of Oil and Gas, 2d ed. Issue 0 (1998), § 1.2(A) (Butterworth 1998); A.W. Walker, Jr., *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas: Part 1*, 7 TEX. L. REV. 1 (1928).

5

General Criticism of the “Ownership in Place” Doctrine in the *Lightning* Opinion

- a. The original utility of the “ownership in place” doctrine is its certainty and simplicity: after severance, one party owns the minerals in the ground; and the other owner owns the rest of the land – not only the surface, but all of the rest, down to the core of the earth – except, of course, the “minerals.”

This works well enough so long as it remains certain and simple, like “Mc Tarzan, You Jane.”

A primary problem with the *Lightning* opinion (and some of the cases on which it relies), is that it complicates this simple real property concept in ways destined to eliminate the primary virtue of the “ownership in place” doctrine – its certainty and simplicity. This complexity arises when courts attempt to apply modern understanding of chemistry and geology to this original concept, e.g., electron microscopes show the actual composition of the subsurface, for example, particles of limestone to which hydrocarbon molecules are attached, surrounded by saltwater, which is a part of the surface estate.

- b. In addition, in doing so, *Lightning* uses quaint, archaic language such as “subterranean structures” that “harbor oil and gas,” etc. that ignore and confuses modern geological knowledge. For example, “traversing the subsurface strata in which *Lightning*’s oil and gas hydrocarbon molecules may lie.”; “Matrix of the underlying earth;” and the mineral reservation did not “expressly include any right to control ‘subterranean structures.’”

- c. This type of problem – emanating from a more “granular” approach – already exists in issues involving gas storage in depleted gas reservoirs. As to who owns unoccupied “pore space,” that inquiry may venture into quantum physics, e.g. what occupies an empty space, a realm in which Texas oil & gas law might be well advised to steer clear of. See generally, Owen L. Anderson, *Lord Coke, the Restatement and Modern Subsurface Trespass Law*, 6 TEX. J. OIL, GAS & ENERGY LAW 203 (2011).

- d. *Lightning* seems to increase the trespass burden of proof, i.e. it required *Lightning Oil* (when it sought to enjoin *Anadarko*) to prove not only its mineral ownership, and that it had not consented to *Anadarko*’s use, normally all that is required in a trespass case where entry is undisputed, but to also prove that “imminent and irreparable harm” would result from the drilling.

6

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