

# **Case Law Update**

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**We have endeavored to make this draft current as of April 9**

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## TRESPASS: SURFACE OWNERSHIP AND USE V. MINERAL OWNERSHIP AND USE

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

**Topics:** Surface Interest v. Mineral Interest

**Facts:** Lightning leased the Hurd family's severed mineral interests (the Cutlass lease) (comprising about 3,251.53 acres, 2014 WL 5463956) underlying the much larger Briscoe Ranch in 2009 and operates three wells on the property. Adjacent to the Cutlass lease area of the Briscoe Ranch is the Chaparral Wildlife Management Area ("CWMA"), which is owned by the State of Texas and managed by the Texas Parks and Wildlife Department. Anadarko leased the mineral rights to the CWMA (the CWMA lease), but the lease requires Anadarko to drill offsite "when prudent and feasible." Under a Surface Use and Subsurface Easement Agreement, Anadarko obtained permission from the Briscoe Ranch surface owners to designate a drill site on which Anadarko would commence five horizontal wells on the surface of the Cutlass lease area. The wells would start vertical, kick off, and then run horizontally into the CWMA subsurface.

Lightning objected to Anadarko's proposed well site, saying that it would object to any well proposal that started on the Briscoe Ranch property. Lightning sued for trespass and tortious interference with its Cutlass lease, seeking a temporary injunction against Anadarko drilling wells on Briscoe Ranch.

**Procedural History:** Both parties filed for summary judgment. Without stating its reasons, the trial court granted partial summary judgment for Anadarko and denied Lightning's motions but left both orders open for appeal. The San Antonio Court of Appeals affirmed. Lightning appealed.

**Result:** The Texas Supreme Court affirmed the San Antonio Court of Appeals.

**Holdings:** Lightning, as the mineral lessee, does not have the right to exclude Anadarko from drilling into the subsurface on the Briscoe Ranch property covered by the Cutlass lease. Anadarko needed only the surface owner's permission.

**Rationale:** The Court of Appeals had reasoned that (1) the surface owner owns the geological structures beneath the surface; (2) that the surface owner owns the non-mineral molecules, i.e., the mass that underlies the surface; and (3) that mineral owner is only entitled to a fair chance to recover oil and gas in place. Thus, the Court of Appeals concluded that Lightning has no right to exclude Anadarko's operations because Lightning "does not own or exclusively control the earth surrounding any hydrocarbon molecules that may lie within the boundaries of the Cutlass Lease."

The Supreme Court stated: "We generally agree with the Court of Appeals' position regarding subsurface control."

The Supreme Court had the most difficulty with Lightning's argument that the Anadarko well bores would displace some of Lightning's oil and gas in place and even extract some of Lightning's oil and gas. The court noted that while a mineral lessee has "the rights to explore, obtain, produce, and possess the minerals subject to the lease; they do not include the right to possess the specific

place or space where the minerals are located.” The court called some of Lightning’s concerns about drainage and interference “speculation,” concluding that “speculation is not enough” to secure relief. The court was satisfied that Lightning’s rights would be protected by the Railroad Commission in its well permitting and other processes and by the accommodation doctrine.

Specifically, as to the extraction of some of Lightning’s minerals, the court said that the interests of Lightning must be balanced with the larger societal interest of recovering hydrocarbons resources more generally and the need to allow efficient and effective horizontal drilling to prevent the underground waste of oil and gas. “Balanced against the small loss of minerals a lessee such as Lightning will suffer...is the longstanding policy of this state to encourage maximum recovery of minerals and to minimize waste.... [W]e conclude that the loss of minerals Lightning will suffer by a well being drilled through its mineral estate is not a sufficient injury to support a claim for trespass.” Notably, the court rejected Lightning’s arguments that the court had already implicitly recognized that a trespass action would lie in its *FPL Farming* opinions.

The Texas Supreme Court stated that the mineral owner’s right to develop does not include a right to possess a specific place or space where the minerals may be. The Court concluded that Lightning’s argument “would render the mineral estate absolutely dominant and significantly alter the balance achieved through the flexible nature of the accommodation doctrine... [and] would alter oil and gas law in ... a drastic manner.” The dominant estate doctrine—tempered by the accommodation doctrine—keeps this balance in place. Expanding the dominant estate doctrine to include an implied possessory or exclusionary right would upset this balance.

The court rejected Lightning’s argument that its dominant mineral interest would be diluted because it would have to allow the use of its mineral estate to benefit adjacent lands, which would expand the accommodation doctrine. The court reasoned that Anadarko was an assignee of the surface owner and that Anadarko is the surface user for purposes of the accommodation doctrine. Lightning retains its dominant right to use the surface as is “reasonably necessary to develop and recover its minerals,” subject to the accommodation doctrine.

The court rejected Lightning’s argument that the initial severance instrument gave the Hurds the “the sole and exclusive right to lease said property for oil, gas and mineral purposes,” concluding that this language merely addressed the right to execute oil and gas leases.

Notably, the court said that it was irrelevant whether the Anadarko had other possible well locations as its decision was not based on necessity but on the respective rights of the surface estate and the mineral estate. The court also said that the number of pass-through wells that might be drilled is also irrelevant.

Without having the right to exclude Anadarko, Lightning could not maintain a trespass action.

Finally, the court rejected Lightning’s tortious interference argument, concluding that Anadarko’s justification defense was valid as a matter of law because the Anadarko was exercising its own valid contractual rights.

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