SCOTX Asked to Settle Retained Acreage Disputes

By Janet Elliott

(AUSTIN) – (Feb. 12) – Horizontal drilling in shale plays can be an expensive proposition, often requiring miles-long wellbores crossing multiple tracts of land. Disputes over who owns what tract have become increasingly common and increasingly complicated, with nine of the state's intermediate courts of appeals reaching conflicting decisions in the last four years in cases involving how much acreage is protected around a well.

Now the Texas Supreme Court is tasked with clarifying the law in cases where a driller's state regulatory filings conflict with the lease's "retained acreage clause." The court heard arguments earlier this month in a pair of cases being closely watched by the industry.

The first case, Endeavor Energy Resources and Endeavor Petroleum v. Discovery Operating and Patriot Royalty and Land, involves competing claims of ownership in two disputed quarter-sections of land in Martin County. The land is in the Spraberry Trend Area Field, once known as the world's largest uneconomic field but now the source of increased oil production due to improved fracturing methods.

Endeavor took four leases in the Spraberry in 2004 and 2007 and drilled four successful wells, one in each of four 160-acre tracts. Endeavor admits to a clerical error when it filed plats at the Texas Railroad Commission in 2007 designating 80 acres of protected land around each well, although the commission's rules allowed 160 acres for each proration unit.

After reviewing the plats and Endeavor leases that were on file with the county clerk, Patriot believed the Endeavor leases had automatically terminated on the disputed acreage. Patriot paid the landowners a bonus and higher royalties for new leases. Patriot then assigned the leases to Discovery, which drilled four producing wells.

Discovery and Patriot sued Endeavor for title to the disputed land, and Endeavor filed counterclaims. The trial court granted summary judgment for Discovery and Patriot, finding that Endeavor's leases had terminated. The Eastland Court of Appeals affirmed the trial court ruling in 2014.


David Gunn

Scott Brister and ***David Gunn*** presented arguments for Endeavor to the Supreme Court. Brister, a former Supreme Court justice now a partner at Andrews Kurth Kenyon, said Discovery made a mistake when it drilled wells on land under lease by Endeavor. He said the court of appeals decision wrongly "turns proration records into title records."

Gunn urged the court to promote property rights by holding that retained-acreage clauses in oil-and-gas leases allow the leaseholder to retain the maximum acreage. Such a rule would be "stable, solve a lot of problems, and you won't have to send these cases to juries."

Justice Jeff Boyd asked whether there is a policy consideration to "protect the person that's actually going to use it" and develop a property's mineral resources.

"When developing large tracts you've got to start somewhere. We can't do it all at once," said Gunn, a partner at Beck Redden.


John "Jad" Davis

John "Jad" Davis, who represented Discovery and Patriot, said his clients spent millions of dollars drilling four wells on land that was open according to Railroad Commission records.

"If you don't file a plat, the lease terminates," said Davis of Davis, Gerald & Cremer.

He noted that the Railroad Commission filed an amicus letter explaining its long-standing practice of accepting proration acreage assigned by the operator in its regulatory filings. The commission said that any interpretation that is inconsistent with that practice "could have adverse consequences for oil and gas operators, mineral interest owners, royalty owners, and state and local governments who collect taxes on oil and gas production."

In a response brief to the commission's letter, Endeavor said the case does not challenge any regulatory rule.

"It requires interpretation of private contracts that tie retained acreage to the maximum size allowed by RRC proration rules without limiting them to the size shown by RRC plats," said Brister.

Several independent producers and royalty owners sided with Discovery in amicus filings.

Another brief, filed by Browning Oil Co., took no position on the case outcome but urges the Supreme Court to provide clear guidance by holding that retained-acreage clauses allow the lessee or grantee to retain the maximum estate consistent with the terms of the lease.

In the second case, the Amarillo Court of Appeals reached the opposite conclusion, deciding that the contract's retained-acreage clause determined the size of the proration units. The decision was issued in 2015, about 10 months after the Endeavor decision.

The Wheeler County case began when XOG Operating and Geronimo Holding sued Chesapeake Exploration, alleging Chesapeake lost rights to half of 1,600 acres it claimed under the lease through its regulatory filings. The trial court sided with Chesapeake based on the lease. The Amarillo Court of Appeals, in a 2-1 decision, agreed. The dissenting justice relied on the Eastland Court of Appeals ruling in the Endeavor case.

In an unusual twist, Chesapeake was represented by Ryan Clinton, also a partner in Davis, Gerald & Cremer, placing the Midland firm on opposite sides of the high-profile legal issue.

Watch the arguments in Endeavor v. Discovery ***here***.

Watch the arguments in XOG v. Chesapeake ***here.***