TEXAS OIL & GAS LAW – RECENT DECISIONS

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I. SCOPE OF THE ARTICLE

This article surveys selected oil and gas cases decided by Texas state and federal courts from May 1, 2013 through September 30, 2013. Immediately below are one-paragraph abstracts of the selected cases. Full case summaries follow the abstracts.

II. ABSTRACTS

1. "Calculate and pay clauses" in assignment contracts were ambiguous where they did not clearly and explicitly express intent that overriding royalty payments be suspended. The plaintiffs argued that assignment contracts in which the overriding royalty payments were to be "calculated and paid in the same manner . . . as the landowner's royalty under the Lease" allowed them to avoid paying overriding royalties until the landowner's royalties were due. The trial court granted summary judgment in favor of the plaintiffs. The Fifth Circuit reversed and remanded for interpretation of the intent of the parties, holding that the references to the landowner's royalties only rendered the calculate and pay clauses ambiguous. *Total E & P USA, Inc. v. Kerr-McGee Oil & Gas Corp.*, 719 F.3d 424 (5th Cir. 2013).

2. A plaintiff failed to state a claim for tortious interference with a prospective oil and gas contract where the contract had already been consummated and where the suit did not allege "independently tortious conduct"; but the plaintiff did state a claim for tortious interference with an existing oil and gas contract even without alleging independently tortious conduct. An oil and gas company sued after a deal failed, alleging slander of title, tortious interference with a prospective contract, tortious interference with a contract, and breach of contract. The U.S. District Court for the Western District of Texas dismissed the slander of title claim and the claim for tortious interference with a prospective contract for failure to state a claim. The court also noted that certain affirmative defenses raised by the defendant could not be used as the sole basis for dismissal of claims. *U.S. Enercorp, Ltd. v. SDC Mont. Bakken Exploration, LLC*, No. SA:12–CV–1231–DAE, 2013 WL 4400880 (W.D. Tex. Aug. 14, 2013).

3. Where a surface owner sought an injunction based on a mineral lessee's failure to accommodate his surface use, the surface owner's burden was, among other things, to show that he had no reasonable alternative method for continuing his existing use; it was not to show: (1) that he could not use other land held by short-term leases for the same use; or (2) that he had "no reasonable alternatives for *any* type of" similar use on his tract. A surface owner sought an injunction requiring a mineral lessee to move a well because the lessee failed to properly accommodate his cattle operation. The lower court granted summary judgment for the lessee because the surface owner had not shown a complete lack of *any* reasonable alternative agricultural use. The Texas Supreme Court held that the focus on *any* reasonable alternative agricultural uses was flawed. A surface owner's burden in an accommodation suit is not so high that it requires this. The Court also held that the availability of other lands under short-term lease was not a proper consideration when determining whether the surface owner had no reasonable alternatives. However, the Court affirmed summary judgment for the mineral lessee because, in this case, the surface owner did not meet his burden; instead, he showed only inconvenience and

added expense. *Merriman v. XTO Energy, Inc.*, No. 11–0494, 2013 WL 3119563 (Tex. June 21, 2013).

4. A class action order that allowed a new claim for breach of the implied covenant to market was appealable because it fundamentally changed the nature of the class. On remand from the Texas Supreme Court with direction to conduct a res judicata analysis into whether certification was appropriate, the trial court allowed a new claim to be added: breach of the implied covenant to market. The Texas Supreme Court held that the order allowing the claim was appealable because it fundamentally changed the nature of the class. Therefore, the trial court abused its discretion when it allowed the claim to be added without new certification. Also, the appeals court erred when it dismissed the interlocutory appeal for lack of jurisdiction. *Phillips Petroleum Co. v. Yarbrough*, 405 S.W.3d 70 (Tex. 2013).

5. The Fourteenth Court of Appeals refused to recognize an implied reservation of a mineral interest in a deed that did not expressly reserve or except a mineral interest. In a Receiver and Guardianship Deed, the only reference to a reservation of any mineral interest was a reference to the existence of a 1958 deed. The 1958 deed had reserved the entire mineral interest minus a 1/32 non-participating royalty interest. But without a clear intent to reserve the interest in the new deed, the Court of Appeals held that these references were not sufficient to reserve or except the mineral interest. *Meekins v. Wisnoski*, 404 S.W.3d 690 (Tex. App.—Houston [14th Dist.] 2013, no pet.)

6. A former lessee that attempted to assert a right to past bonuses could not use a breach of contract claim to recover, but it could possibly use a money had and received claim. Years after a lease conveyance, an assignee of a previous lessee won an $83 million judgment against the United States, the mineral owner. The former lessee sued to get a portion of the judgment, filing claims for breach of contract and money had and received. The trial court granted summary judgment for the defendant on both claims. The Court of Appeals affirmed summary judgment for the breach of contract claim and reversed summary judgment for the money had and received claim. The Court held that: (1) summary judgment was proper on the breach of contract claim because there could be no breach where the plaintiff made claims that, on one hand, its right to claims for the bonus payments was never conveyed, but on the other hand, the other party was in breach of the conveyance by failing to provide the bonus monies recovered; and (2) the trial court erred when it applied the economic loss rule to a money had and received claim. *Torch Energy Advisors Inc. v. Plains Exploration & Prod. Co.*, No. 01–12–00698–CV, 2013 WL 3095014 (Tex. App.—Houston [1st Dist.] June 20, 2013, no pet. h.).

7. A principal could not refuse to honor an oil and gas lease by arguing that the agent who negotiated it lacked authority where the principal allowed the agent to, among other things, frequently enter into and negotiate oil and gas leases on the principal's behalf, communicate using the principal's email system, and use an office and related facilities of the principal. Further, the principal ratified the lease when it knew of the circumstances involving the lease and waited months to repudiate it. The Court of Appeals held that there was sufficient evidence to find that an independent contractor had apparent authority, that the

principal ratified his actions, and making the conclusion of law that the principal ratified and breached the contract. *PanAmerican Operating, Inc. v. Maud Smith Estate*, No. 08–12–00036–CV, 2013 WL 3943091 (Tex. App.—El Paso July 24, 2013, pet. filed).

8. A city permit to drill an oil and gas well did not amount to a taking where the permit did not authorize the lessee to take any action not already authorized by the parties' existing property rights. In the appeal of an order granting a plea to the jurisdiction, the Court of Appeals affirmed, holding that a city permit to drill an oil and gas well did not amount to a taking because it did not require a permanent physical invasion or deprive the surface owner of all economically beneficial use of his property. The permit granted no affirmative rights, did not alter the parties' then-existing property rights, and did not shield the party drilling the well from any liability. *Walton v. City of Midland*, No. 11–11–00237–CV, 2013 WL 4654506 (Tex. App.—Eastland Aug. 20, 2013, no pet.)

III. CASE SUMMARIES

1. *Total E & P USA, Inc. v. Kerr-McGee Oil & Gas Corp.*, 719 F.3d 424 (5th Cir. 2013).

In *Total*, the Fifth Circuit Court of Appeals held that "calculate and pay clauses" in assignment contracts were ambiguous where they did not clearly and explicitly express intent that overriding royalty payments be suspended. These calculate and pay clauses did not suspend royalty payments simply because the landowner's royalty had been suspended in the original lease. Even though the assignments directed overriding royalties to be paid "in the same manner" as the landowner's royalty, the meaning of what the parties intended by this phrase was unclear. Therefore, summary judgment for non-paying lessees was not proper.

In 1998, the United States leased the mineral interests in a tract on the Outer Continental Shelf to certain oil companies. Later, those companies assigned overriding royalty interests to Kerr-McGee Oil & Gas Corp. and seven other defendants. Production commenced in 2009 and one of three lessees began to pay overriding royalties to the defendants. The other two lessees, the plaintiffs in this case, refused to pay, arguing that the presence of the calculate and pay clauses in their assignment contracts suspended their overriding royalty payments to the defendants.

The calculate and pay clauses each had some variation of the following provision: "The overriding royalty interest assigned herein shall be calculated and paid in the same manner and subject to the same terms and conditions as the landowner's royalty under the Lease." Pursuant to the Outer Continental Shelf Deep Water Royalty Relief Act (DWRRA), the original lease provided that the royalty payments to the United States were to be suspended until 87.5 million barrels were produced.

The plaintiffs argued that because the calculate and pay clauses referenced the lease in which the landowner's royalties were suspended, paying in the same manner as in that lease would mean that payments to the defendants were suspended also. The district court agreed and granted summary judgment for the plaintiffs.

The Fifth Circuit reversed the trial court's grant of summary judgment. Applying the Outer Continental Shelf Lands Act (OCSLA) and Louisiana contract law principles, the Court noted that in this case, the assignment contracts were "fairly susceptible to more than one interpretation" and therefore ambiguous. The Court concluded that the calculate and pay clauses

did "not clearly and explicitly express the intent that overriding royalty payments shall be suspended whenever the U.S. landowner royalties are suspended under the DWRRA. The Court remanded so that the clauses could be "interpreted further in search of the common intent of the parties to the assignment contracts."

2. *U.S. Enercorp, Ltd. v. SDC Mont. Bakken Exploration, LLC*, No. SA:12–CV–1231–DAE, 2013 WL 4400880 (W.D. Tex. Aug. 14, 2013).

In *Enercorp*, the U.S. District Court for the Western District of Texas held that: (1) a plaintiff failed to state a slander of title claim where the claim did not allege frustration of a "specific, pending sale"; (2) the plaintiff failed to state a claim for tortious interference with a prospective contract where the contract had already been consummated and where the plaintiff did not allege "independently tortious conduct"; (3) the plaintiff did state a claim for tortious interference with an existing oil and gas contract even without alleging independently tortious conduct; (4) the plaintiff did state a claim for breach of contract where all elements of the claim were alleged and it was unclear whether the claim would succeed or fail due to the plain language of the contract; and (5) the affirmative defenses raised by the defendants were not proper bases for dismissal, specifically the defense of release with respect to the slander of title claim and the defenses of justification and privilege with respect to the claim for tortious interference with a contract.

U.S. Enercorp, Ltd. (Enercorp), a Texas-based oil and gas exploration and production company, entered into a contract with SDC Montana Consulting, LLC and SDC Montana, LLC (collectively SDC) in 2011. Under that contract, SDC was supposed to "acquire and deliver to Enercorp oil, gas, and mineral leases." Enercorp intended to sell those leases to a third party. After the contract was consummated, Enercorp began planning and negotiating to sell the leases to Southwestern Energy Production Co. (SEPCO).

This deal eventually fell apart because, according to Enercorp, the defendants "'approached SDC Montana Consulting' and encouraged it 'not to perform under its contracts' and 'to only perform on terms that were different from and less favorable to Enercorp than the terms actually agreed to in writing.'" Further, Enercorp alleged that the defendants "induced SDC Montana Consulting to make 'fraudulent assignments of oil, gas, and mineral leases'" to create title disputes that would cause SEPCO to "back out of the deal." To avoid this result, Enercorp then entered into a Collaboration Agreement with the defendants. "The Collaboration Agreement 'gave Enercorp the exclusive authority to conduct all necessary negotiations with [SEPCO] in order to finalize and conclude the deal.'" Despite this, title defects were revealed and SEPCO did back out.

Enercorp brought suit against the defendants for (1) slander of title, (2) tortious interference with prospective business relations, (3) tortious interference with a contract, and (4) breach of contract. The defendants filed motions to dismiss all four claims. The Court dismissed the slander of title claim and the tortious interference with prospective business relations claim and allowed the other two to proceed.

The Court dismissed the slander of title claim because it did not allege frustration of a "specific, pending sale." In dismissing this claim, the Court noted that it was not doing so based on the affirmative defense of release. This defense raised by the defendants was not a proper basis for

dismissal because it required the defendant to bear the burden of proof and, here, "the release [did] not clearly and incontrovertibly cover" the claim to make the defense sufficiently clear on the face of the pleadings. The Court dismissed the claim for tortious interference with potential business relations for two reasons. First, the deal was already consummated. Second, it did not allege independently tortious conduct.

In allowing the claim of tortious interference with an existing contract to proceed, the Court rejected affirmative defenses raised by the defendants. It determined that justification and privilege were not proper bases for dismissal because they both require the defendant to bear the burden of proof. The Court also rejected another argument raised by the defendants that Enercorp had not pleaded independently tortious conduct. Whereas this was a necessary element of tortious interference with *potential* business relations, it was not a necessary element of tortious interference with an *existing* contract. Finally, the breach of contract claim was allowed to go forward because Enercorp alleged all the proper elements, thus complying with "the liberal federal pleading standards." Without "certainty" that the claim would fail due to the contract's plain language, it could not be dismissed.

3. *Merriman v. XTO Energy, Inc.*, No. 11–0494, 2013 WL 3119563 (Tex. June 21, 2013).

In *Merriman*, the Texas Supreme Court held that a surface owner seeking an injunction based on the accommodation doctrine need not show: (1) that he could not use other land held by short-term leases for the same use; or (2) that he had "no reasonable alternatives for *any* type of agricultural use on the tract he owned."

Merriman owned the surface interest in a 40-acre tract of land and XTO Energy, Inc. (XTO) had the mineral rights. Merriman conducted a cattle operation on and around the tract. He used the tract once each year, when he would conduct a "roundup" of all his cattle, a process that involved bringing all the cattle to the tract and "using temporary corrals and catch-pens in conjunction with the permanent fencing and structures."

When XTO notified Merriman of its plans to drill a gas well on the property, Merriman objected. He claimed that the proposed drilling would interfere with his cattle operation, specifically the annual "roundup." XTO began construction of the well anyway, and Merriman sought an injunction. He argued that XTO failed to accommodate his existing surface use. The trial court disagreed and granted summary judgment to XTO. The appeals court affirmed, and Merriman appealed to the Texas Supreme Court.

The Texas Supreme Court stated that to make a claim under the accommodation doctrine, "the surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued. . . . If the surface owner carries that burden, he must further prove that given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use."

Even though the Court upheld the decision that XTO was entitled to summary judgment, the Court also noted that the reasoning of the appeals court was flawed. The appeals court had focused on two issues: (1) whether Merriman had shown

"that he could not alternatively conduct his cattle operation on [other] tracts that he held by short term leases; and (2) whether he had shown "no reasonable alternatives for *any* type of agricultural use on the tract he owned."

The Court concluded that the burden applied by the appeals court was too high because it focused on the ability to use the property for any agricultural use and the ability to use other property. The Court held that Merriman "was required to produce only evidence that he had no [reasonable] alternatives for his cattle operation." Considering any agricultural use for a cattle operation was too broad. Further, considering the potential use of other lands under short-term leases would improperly alter the balance between those who possess and have the right to use the surface estate and those who own the mineral estate. Hence, the cattle operation and the property at issue had to be the use and property that was considered in balancing the surface owner's rights with those of the mineral owner.

However, the Court ultimately agreed that Merriman failed to raise a fact issue as to XTO's alleged failure to accommodate the surface use. Instead, Merriman showed only "that the mineral lessee's operations result[ed] in inconvenience and some unquantified amount of additional expense to the surface owner." That showing did "not rise to the level of evidence that the surface owner has no reasonable alternative method to maintain the existing use."

4. *Phillips Petroleum Co. v. Yarbrough*, 405 S.W.3d 70 (Tex. 2013).

In *Phillips*, the Texas Supreme Court held that: (1) it was an abuse of discretion to allow the addition of a class claim for breach of the implied duty to market without requiring an amended motion for class certification; and (2) it was error to dismiss the interlocutory appeal of that order for lack of jurisdiction.

In a class action lawsuit, Texas royalty owners alleged that Phillips Petroleum Co. (Phillips) underpaid oil and gas royalties. In 2008, the Texas Supreme Court reviewed the class certification in *Bowden v. Phillips Petrol. Co.*, affirming decertification of two subclasses and reversing decertification of one. The class that was permitted to proceed consisted of claims that Phillips breached uniform provisions in gas royalty agreements. With respect to the subclass decertification that the Court reversed, the Court remanded and "directed the trial court to conduct a res judicata analysis in determining whether certification was appropriate . . . ."

On remand, Yarbrough, the class representative, "amended her petition to allege that [Phillips] breached the implied covenant to market, which in turn contributed to their underpayment of royalties under the gas royalty agreements." The trial court permitted the amendment, denying several motions by Phillips seeking to exclude the new claim without a "new certification motion and hearing." Phillips filed a notice of interlocutory appeal of the trial court's order and a petition for writ of mandamus. The appeals court "dismissed the interlocutory appeal for lack of jurisdiction and denied the petition for writ of mandamus."

The Texas Supreme Court reversed, holding that the trial court's order was appealable. Phillips had argued that the order was appealable as an order to certify or refuse to certify a class because it changed the fundamental nature of the previously upheld class. The Court agreed, reasoning that one can breach the implied covenant regardless of whether one complies with the express terms of an

agreement, which was the subject of the earlier petitions. Thus, this order was more like one that "alters the fundamental nature" of a class than it was one "that merely alters attributes." The Court concluded that just as an order that "certifies or refuses to certify a class" is an appealable interlocutory order, the trial court's order here was appealable as the functional equivalent of a class certification order.

5. *Meekins v. Wisnoski*, 404 S.W.3d 690 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

In *Meekins*, the Court of Appeals refused to recognize an implied reservation of a mineral interest in a deed that did not expressly reserve or except any mineral interests.

In 1958, Meekins's grandmother, Kathleen Cox, deeded the surface interest in her land and a 1/32 non-participating royalty interest (NPRI) to her daughter and Meekins Sr., Meekins's parents. In this deed, Kathleen Cox expressly reserved the rest of the mineral estate. She later devised her remaining interest (the mineral interest minus the 1/32 NPRI) to her other daughter and Meekins's aunt, Eloise Cox. When Eloise died, she devised 50% of her mineral interest to Meekins and 50% to his mother, Laverne. When Laverne died in February 2003, she devised all of her property to Meekins.

A guardian was appointed for Meekins Sr. in August 2003. The guardian requested that the probate court appoint an appraiser for Meekins Sr.'s property, as it was to be sold to pay his debts. The probate court found that the property was incapable of partition and, as a result, it should be sold as a whole with the proceeds to be divided between the co-owners of the property after Lavern's will was admitted to probate.

A sale could not be had because of uncertainty regarding Lavern's unprobated will. The probate court then appointed a receiver over Lavern's estate and directed the receiver to sell the property and distribute the proceeds between Meekins Sr. and Meekins. The receiver subsequently sold the property to the Wisnoskis. The probate court approved of the receiver's actions and Meekins did not appeal.

The Wisnoskis received a Receiver and Guardianship Deed with no reservations of any mineral interest. However, they did concede that they were aware of Meekins's 50% mineral interest (minus the 1/32 NPRI) from Eloise, so they believed that they bought the entire surface estate and approximately 50% of the mineral estate. Meekins brought a trespass to try title suit against them, arguing that he owned the entire mineral estate, having gotten 50% (minus the 1/32 NPRI) from his aunt and the rest from Lavern, as well as, 50% of the surface estate from Lavern. The trial court disagreed, ruling for the Wisnoskis and entering a take nothing judgment against Meekins.

Meekins appealed, arguing that the trial court erred by not declaring him the owner of the mineral estate and 50% of the surface estate because his title had vested immediately upon Lavern's death, rather than passing to the estate to be sold. He also took issue with the take nothing judgment, arguing that the effect of a take nothing judgment in a trespass to try title suit is to vest title entirely in the defendants. But in this case, the Wisnoskis conceded that Meekins had an undisputed 50% mineral interest (minus the 1/32 NPRI).

First, the Court addressed whether the case was a trespass to try title suit or a collateral attack on the probate court's decree confirming the sale. The Court found that the probate court expressly stated that it was not determining title by approving the

sale. Therefore, Meekins was entitled to an adjudication of title, but could not attack the probate court's decree.

Second, the Court determined that the case involved a trespass to try title claim, not a declaratory judgment claim. Because his claim involved the determination of title, the suit involved a trespass to try title claim, not a declaratory judgment action.

Finally, the Court determined that the receiver sale conveyed to the Wisnoskis the interests in the property that Lavern owned and devised to Meekins. Meekins claimed that his interest in the property via Lavern's will vested upon Lavern's death. The Court found, however, that although a beneficiary under a will holds a vested interest in property upon the testator's death, the estate is still subject to administration. The administrator may dispose of it and divest the beneficiary of their interest in the property. Hence, although Meekins held a vested interest, the interest was subject to administration. The receiver, as the representative of the estate, was entitled to convey the property devised to Meekins.

Emphasizing the lack of reservation language in the Wisnoskis' deed, the Court of Appeals affirmed the trial court's declaration that the Wisnoskis own 100% of the surface estate and 50% of the mineral estate. Because the property was subject to the administration of Lavern's estate, to find that Meekins retained those interests devised by Lavern would require the Court to find that the deed included an implied reservation. A reservation by implication in favor of the grantor is not favored by courts and the Court refused to find one here because there was no clear intention to reserve or except anything from the Receivership deed.

However, the Court reversed the take nothing judgment to the extent that it vested title entirely in the Wisnoskis and deprived Meekins of the undisputed portion of his interest in the mineral estate. The Court also confirmed that an award of attorneys fees in a trespass to try title case is improper.

6. *Torch Energy Advisors Inc. v. Plains Exploration & Prod. Co.*, 2013 WL 3095014 (Tex. App.—Houston [1st Dist.] June 20, 2013, no pet. h.).

In *Torch*, The Court of Appeals held that: (1) summary judgment was proper on a breach of contract claim because there could be no breach where the plaintiff claimed that, on one hand, its claims were never properly conveyed, but on the other hand, the other party was in breach of the conveyance because the right to those claims was conveyed; and (2) the trial court erred when it applied the economic loss rule to a money had and received claim. The Court affirmed on summary judgment for the breach of contract claim and reversed on the money had and received claim.

In two contracts in 1994 and 1996, Torch Energy Advisors, Inc. (Torch) conveyed all of its interest in an oil and gas lease with the United States to Plains Exploration & Production Co. (Plains). Years later, in a dispute over offshore oil and gas leases, Plains won a judgment of over $83 million against the United States, which represented bonus payments previously made to the U.S. Torch then brought suit against Plains, "asserting a number of causes of action, including breach of contract and money had and received," and alleging that it was entitled to a portion of the judgment pursuant to the 1996 contract. Plains moved for summary judgment and the trial court granted the motion. The Court of Appeals affirmed with respect to the breach of contract claim and reversed and remanded the money had and received claim.

In affirming summary judgment on the breach of contract claim, the Court

looked to the parties' interpretation of the 1996 contract and concluded that no genuine issue of material fact existed. Under Torch's interpretation, the conveyance excluded a "remaining interest in the right to recover the bonuses from the federal government." The Court reasoned that if this interpretation were correct, "the remaining interest was excluded from the contract, meaning it was never made a part of the contract." Therefore, "there was nothing in the contract for Plains Exploration to breach when it claimed full interest in the right to recover the bonuses, even if that claim was wrong." Alternatively, if Torch's interpretation of the 1996 contract was incorrect, summary judgment still would have been proper because it would have no right to the amounts recovered, as the right to those monies would have been conveyed to Plains.

In reversing summary judgment on the money had and received claim, the Court concluded that the trial court erroneously applied the economic loss rule in this case. The Court noted that a money had and received claim is equitable, whereas the economic loss rule has only been applied to contract and defective product claims. Again assuming that Torch's interpretation of the 1996 contract was correct, "the right to recover the bonuses was a matter that was specifically excluded from the contract." Alternatively, if the other interpretation was correct, "there is no injury." The Court concluded that "[i]n either scenario, there is no economic loss to the subject of a contract because even if [Torch] has a right to recover part of the bonus, that right is not part of the contract." Thus, it was error to apply the economic loss rule to Torch's claim for money had and received. On that issue, the Court reversed and remanded to the trial court.

Finally, the Court analyzed the contractual language of the contracts to determine whether Torch could still potentially recover under its equitable money had and received claim. The Court found the contracts to be ambiguous because, among other reasons, they did not identify whether claims for bonus payments from the inception of the lease were conveyed.

7. *PanAmerican Operating, Inc. v. Maud Smith Estate*, No. 08–12–00036–CV, 2013 WL 3943091 (Tex. App.—El Paso July 24, 2013, pet. filed).

In *PanAm*, the Court of Appeals held that the evidence was sufficient for a finding that an independent contractor had the authority to enter into and negotiate oil and gas leases on behalf of a principal. The principal could not defend failure to pay bonuses based on an independent contractor's lack of authority where the independent contractor, among other things frequently negotiated oil and gas leases on the principal's behalf, communicated using the principal's email system, and used the principal's office space and facilities, and the principal never attempted to timely repudiate.

Maud Smith sued PanAmerican Operating, Inc. (PanAm) for breach of contract after PanAm failed to pay a bonus on a lease negotiated between her attorney and Robert Wormser, an independent contractor for PanAm. PamAm defended on the grounds that the contractor was not its agent, so it was not obligated to pay the bonus to Ms. Smith. After a bench trial, the trial court ruled in favor of Ms. Smith and awarded damages and attorney fees.

On appeal, PanAm argued that the court erred by: (1) finding that its independent contractor had the apparent authority to act on its behalf; (2) finding that Pan Am ratified its contractor's actions; and (3) making the conclusion of law that

PanAm ratified and breached a contract with Ms. Smith.

The Court of Appeals rejected all of these arguments, affirmed the trial court, and held that the evidence was sufficient for the trial court to make the findings of fact and conclusions of law that it did. Specifically, with respect to the lease and Mr. Wormser's authority to bind PanAm, the Court found sufficient facts to support the judgment.

Noting that only the principal's conduct is relevant in determining whether apparent authority exists, the court found sufficient evidence to establish that Wormser was the agent of PanAm. The principal's conduct is gauged by the standard of a reasonably prudent person, using diligence and discretion to ascertain the agent's authority. Here, there was no reason to believe that Wormser did not have authority to execute leases on PanAm's behalf. For example, PanAm did not dispute that Wormser had the actual authority to enter into oil and gas leases and negotiate their terms on PanAm's behalf. He had a PanAm email address, and his communications using it were monitored by the company. Further, Wormser used PanAm's offices and facilities.

The Court further found that PanAm ratified the lease. PanAm was aware of the circumstances surrounding the acquisition of the lease and chose not to repudiate for approximately three months. Indeed, the Court found that no one at PanAm ever attempted to repudiate it "until the price of oil dropped precipitously." The Court noted that this case was simply one of a "principal who employs an agent to carry out its business but, regretting the outcome of the agent's actions, opportunistically denies the agent acted with authority."

Finally, the Court found that the trial court's conclusions of law that PanAm ratified and breached the lease were proper based upon the evidence referenced above.

8. *Walton v. City of Midland*, No. 11–11–00237–CV, 2013 WL 4654506 (Tex. App.—Eastland Aug. 20, 2013, no pet.).

In *Walton*, the Court of Appeals held that a city permit to drill an oil and gas well did not amount to a taking where the permit did not authorize the lessee to take any action not already authorized by the parties' then-existing property rights.

Walton owned the surface estate of a tract of land in Midland, Texas. Endeavor owned the mineral estate as part of an oil and gas lease covering a larger piece of land that included Walton's tract. Endeavor applied to the city to get a permit to drill on Walton's tract. At first, Endeavor's application was rejected. Endeavor sued the city, the parties settled, and as part of the settlement agreement, the city granted the permit. Walton then brought an inverse condemnation suit against the city, alleging that the granting of the permit constituted a regulatory taking because it "constituted a physical invasion of his surface estate" and "a provision of the permit that required the drilling of a water well for maintaining trees constituted an invasion of his groundwater." The city challenged the trial court's subject matter jurisdiction in a plea to the jurisdiction. The Court granted the plea to the jurisdiction. Walton appealed.

The Court of Appeals affirmed the trial court, concluding that the water well requirement did not constitute a taking under the tests articulated by the U.S. Supreme Court. The permit did not require that Walton "suffer a permanent physical invasion of his property." Even if drilling the water well would cause such an invasion, the Court noted that the permit did not actually require drilling it on Walton's land. It only required that a water well be placed "no closer than 500 feet to the permitted oil and gas well," so it could not

be said to require an invasion of Walton's property.

Further, the grant to Endeavor of a permit to drill the oil and gas well did not require that Walton "suffer a permanent physical invasion." The permit "did not grant any affirmative rights to Endeavor to occupy or use Walton's property" because it did not authorize any occupation or use "that was not otherwise authorized." The Court relied on the Texas Supreme Court's 1943 holding in *Magnolia Petroleum Co. v. Railroad Commission*, "that a permit to drill an oil and gas well is 'purely a negative pronouncement' that 'grants no affirmative rights to the permittee to occupy the property.'"

Finally, the permit did not deprive Walton "of all economically beneficial use or productive use of his . . . property." Walton alleged that he was so deprived because when he bought the property "he did not anticipate that the City would permit the owner of the mineral estate to drill on his property." The Court rejected this on the basis that Walton's property "had a value of at least $3,000 per acre after Endeavor drilled the well." The Court concluded that the "City's act of granting a permit to Endeavor to drill an oil and gas well" was not a taking because it did not confer any rights to Endeavor that it did not otherwise possess.