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Adverse Possession of Working Interest by a Non-Operator

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I. INTRODUCTION

Texas courts have been applying adverse possession statutes to severed mineral estates for at least a century. *See Nat. Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 193 n.13 (Tex. 2003) (collecting cases). But adverse possession developed through centuries of common law, and the State eventually codified the law with fee simple interests in mind. As a result, property owners (and potential adverse possessors) have run into a slew of issues unique to oil and gas law when applying adverse possession principles to mineral interests.

In the last twenty years, the Texas Supreme Court has waded into this confusion to provide guidance on how adverse possession operates in two mineral interest contexts: In *Natural Gas Pipeline Co. of America v. Pool*, 124 S.W.3d 188 (Tex. 2003), the Court confirmed that mineral interests are subject to adverse possession and applied the concept to an operator claiming adverse possession against a lessor through the operator's continued operation of the property after termination of the lease, and in *BP America Production Co. v. Marshall*, 342 S.W.3d 59 (Tex. 2011), the Court applied the requirements for adverse possession to property where the operator claimed adverse possession against a cotenant as a result of its continued operation of the property after termination of the lease.

But while *Pool* and *Marshall* have answered some questions and provided a basic framework for analyzing claims of adverse possession of mineral interests, the ill fit of applying a concept developed for fee property to mineral interests means that even minor deviations from the *Pool* and *Marshall* fact patterns results in substantial uncertainty.

Recently, the Seventh Court of Appeals in *PBEX II, LLC v. Dorchester Minerals, L.P.*, 670 S.W.3d 374 (Tex. App.—Amarillo 2023, pet. filed) addressed one of these uncertain deviations: what are the requirements for adversely possessing nonoperating working interest? The issue reveals the tension between fee-property adverse possession doctrine and the framework set out in *Pool* and *Marshall* as the Court of Appeals' decision moved further from traditional doctrine in an apparent attempt to harmonize with and follow *Pool* and *Marshall*.

To understand the *PBEX* decision and the question of adverse possession of non-operator working interest requires first understanding traditional principles of adverse possession, *Pool*, and *Marshall*. This paper will look at each before turning to the Court of Appeals' decision in *PBEX* and potential next steps.

II. ADVERSE POSSESSION IN TEXAS

"The purpose of Texas's adverse possession statutes is to promote stability and marketability of title and to encourage the cultivation and development of property." *Id.* at 380.

The Texas legislature has defined adverse possession as "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." Tex. Civ. Prac. & Rem. Code § 16.021(1).

> It is well settled, that, where a party relies upon naked possession alone as the foundation for his adverse claim, it must be such an actual occupancy as the law recognizes as sufficient, if persisted in for a long enough period of time, to cut off the true owner's right of recovery.
>
> It has been said that such possession must not only be actual, but also visible, continuous, notorious, distinct, hostile (i.e., adverse), and of such a character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant.

Satterwhite v. Rosser, 61 Tex. 166, 171 (1884). In other words, "[a]dverse possession requires proof of actual possession of the disputed real property that is open and notorious, peaceable, under a claim of right, adverse or hostile to the claim of the owner, and consistent and continuous for the duration of the statutory

period." *Estrada v. Cheshire*, 470 S.W.3d 109, 123 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). "[T]he question of adverse possession normally is a question of fact, so only in rare instances is a court justified in holding that adverse possession has been established as a matter of law." *Bywaters v. Gannon*, 686 S.W.2d 593, 595 (Tex. 1985).

A. Actual & Exclusive Possession

As indicated by the name, adverse possession requires actual possession. Tex. Civ. Prac. & Rem. Code § 16.021(1); *see also Vaughan v. Anderson*, 495 S.W.2d 327, 332 (Tex. App.—Texarkana 1973, writ ref'd n.r.e.) (noting that maintaining a fence around land is not sufficient to constitute adverse possession without "actual occupancy or open use"). Adverse possession "requires visible appropriation; mistaken beliefs about ownership do not transfer title until someone acts on them." *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 69 (Tex. 2011).

This "actual possession" must be "of such character as of itself to give notice of an exclusive, adverse possession." *Orsborn v. Deep Rock Oil Corp.*, 267 S.W.2d 781, 786 (Tex. 1954). For example, in the classic adverse possession situation of cattle grazing, "[t]he case law distinguishes 'casual fences' from those that 'designedly enclose an area," and "[t]he law is well settled that the mere grazing of land incidentally enclosed by a fence created by others cannot support a claim of adverse possession." *Harlow v. Giles*, 132 S.W.3d 641, 647 (Tex. App.—Eastland 2004, pet. denied). Instead, an adverse possessor claiming possession through grazing must "designedly enclosed" the property to the exclusion of others. *McDonnold v. Weinacht*, 465 S.W.2d 136, 142 (Tex. 1971). "Exclusive possession of the land is required to support an adverse possession claim; the adverse possession claimant must wholly exclude the owner from the property." *Harlow*, 132 S.W.3d at 646–47.

B. Open & Notorious

For title to pass through adverse possession, the property owner must have notice of the adverse possession. This notice can be either actual, through the adverse possessor telling the property owner of the possession, or constructive, through possession in such an open and notorious manner that knowledge is imputed to the owner. *Orsborn*, 267 S.W.2d at 787.

Open and notorious possession is most often shown through exclusion of the property owner. For example, Texas courts have found that planting a hedge as a barrier to exclude an adjoining property owner from the disputed property was sufficiently open and notorious to give notice of the claimant's adverse possession, *Julien v. Baker*, 758 S.W.2d 873 (Tex. App.—Houston [14th Dist.] 1988, writ denied), but mowing the grass or maintaining a preexisting hedge is not sufficiently open and notorious to constitute notice, *see, e.g.*, *Bywaters*, 686 S.W.2d 593; *Miller v. Fitzpatrick*, 418 S.W.2d 884 (Tex. App.—Corpus Christi, 1967, writ refused n.r.e.).

C. Peaceable & Continuous

Adverse possession must be peaceable. "'Peaceable possession' means possession of real property that is continuous and is not interrupted by an adverse suit to recover the property." Tex. Civ. Prac. & Rem. Code § 16.021(3). The length of time that the possession must continue is dictated by the specific statute under which the adverse possessor claims title. Texas has various adverse possession statutes of differing lengths of time, ranging from three to twenty-five years. *See* Tex. Civ. Prac. & Rem. §§ 16.024–.028.

What is required to "continuously" possess the property for the required statutory period will "var[y] with the nature of the land and its adaptability to a particular use." *Vaughn*, 495 S.W.2d at 332. But "[e]ven regular and consistent use every year for the statutory period in a manner peculiarly adapted to the nature of the land, is not sufficient if there are substantial periods of time when the land is not in actual use." *Id.* If there is a break in continuity of possession, the adverse possessor must show that any break continued only for a "reasonable period." *Hardy v. Bumpstead*, 41 S.W.2d 226 (Tex. Comm'n App. 1931) (citing *Dunn v. Taylor*, 113 S.W. 265 (Tex. 1908)).

Although possession must be continuous for the statutory time period, possession does not need to continue in the same person. "Where there is privity of estate between a predecessor and plaintiffs who

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