

**J. B. Ely, Jr., Appellant v. Shawn Joyce Briley; Elizabeth R. Berg ; and Union Pacific Resources Company, Appellees**

**NO. 03-97-00211-CV**

**COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN**

**January 29, 1998, Filed**

**PRIOR HISTORY:** FROM THE DISTRICT COURT OF MILAM COUNTY, 20TH JUDICIAL DISTRICT. NO. 25,082, HONORABLE CHARLES E. LANCE, JUDGE PRESIDING.

**DISPOSITION:** Affirmed.

**COUNSEL:** FOR APPELLANT: Ms. Molly A. Hedrick, Palmos, Russ, McCullough & Russ, L.L.P., Hearne, TX.

FOR APPELLEES: Mr. Billy M. Payne - [Briley and Berg], Payne, Watson, Kling, Miller & Malechek, P.C., Bryan, TX. Mr. Shayne D. Moses - [Union Pacific], Cantey & Hanger, L.L.P., Fort Worth, TX.

**JUDGES:** Before Chief Justice Carroll, Justices Jones and Kidd.

**OPINION BY:** Jimmy Carroll

**OPINION**

In this case of first impression, we decide (1) whether a constructively severed mineral interest is subject to the doctrine of accretion, and (2) whether a deed reserving a one-half mineral interest to the grantor ceded the grantor's right to future accretion to the grantee. Because we hold that a constructively severed mineral interest is subject to the doctrine of accretion, and that the deed in question did not limit the grantor's right to future accretion, we will affirm the trial-court judgment.

**THE CONTROVERSY**

Since 1879, the tract of land in question was described with one boundary going to the Brazos River and up the river with its meanders.<sup>1</sup> In 1947, appellees Briley and Berg's predecessor-in-title deeded the land to Ely's predecessor-in-title but reserved to the grantors a one-half mineral interest in the property. The reservation read:

<sup>1</sup> A meander line is a series of course and distance calls which follow the river or other natural object or monument as closely as is practically possible for purposes of calculating the

amount of land conveyed. When a meander line is used, the natural object or monument, such as a river, the seashore, or an identifiable terrain feature, controls over the specific calls for course and distance. *Howland v. Hough*, 570 S.W.2d 876, 882 (Tex. 1978); *State v. Arnim*, 173 S.W.2d 503, 509 (Tex. Civ. App.--San Antonio 1943, writ ref'd w.o.m.). Thus, meander lines of surveys of land adjacent to or bounding upon a stream are not considered as boundaries; instead, the meander lines follow the general course of the stream, which itself is the real boundary. *Stover v. Gilbert*, 112 Tex. 429, 247 S.W. 841, 843 (Tex. 1923); see also *Selkirk Island Corp. v. Standley*, 683 S.W.2d 793, 795 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.). The parties do not ask us to decide whether the deed is one described by the river's meanders.

**MINERAL RESERVATION:** Said W.V. Joyce and Lucy Elizabeth Joyce hereby expressly reserve and retrain [sic], and the said J.A. Ely, Sr., and H.B. Ely expressly agree to such retention, an undivided one-half (1/2) interest in and to all of the oil, gas and other mineral [sic] in and under the herein described property. Said undivided one-half (1/2) mineral interest to be retained by said W.V. Joyce and Lucy Elizabeth Joyce, their heirs, successors and assigns forever, together with the right of ingress and egress for the purpose of developing and producing said one-half (1/2) mineral interest.

Since 1947, the land increased in size by approximately 266 acres due to accretion from the Brazos River. Appellee Union Pacific Resources Company ("UPRC") holds oil and gas leases covering the property in question and has drilled a producing well on it.

Ely filed suit against UPRC, alleging that he was entitled to all the mineral royalties from the accreted property. UPRC filed a third-party action against Briley and Berg, each of whom owns one-half of the undivided one-half mineral interest reserved under the 1947 deed.

Trial was to the trial court on the parties' stipulation of facts. They stipulated that Ely owns all of the surface of the accreted land and at least a one-half interest in the mineral estate thereof. They agreed that Berg and Briley retained one-half the mineral interest in the original tract;

however, they disputed whether the 1947 deed also effectively reserved a one-half interest to the minerals in the accreted lands. The trial court rendered judgment that Briley and Berg each owned a one-fourth interest in the minerals under the accreted land.

## ANALYSIS

### *Standard of Review*

The construction of an unambiguous deed is a question of law for the court, based on the parties' intent as expressed within the four corners of the instrument. *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986). We review a trial court's decision on a question of law *de novo*. *Barber v. Colorado Indep. Sch. Dist.*, 901 S.W.2d 447, 450 (Tex. 1995). We will affirm the trial-court judgment if it is proper on any basis supported by evidence. *Valencia v. Garza*, 765 S.W.2d 893, 898 (Tex. App.--San Antonio 1989, no writ).

### *Whether a mineral interest is subject to the doctrine of accretion*

Texas recognizes the doctrine of accretion, under which the owner of riparian land gains title to land that accretes to his or her property. *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 952 (Tex. 1976); *Manry v. Robison*, 122 Tex. 213, 56 S.W.2d 438, 444 (Tex. 1932). And, under Texas law, a mineral interest is a property interest. *Toledo Society for Crippled Children v. Hickok*, 152 Tex. 578, 261 S.W.2d 692, 694 (Tex. 1953); *Holloway's Unknown Heirs v. Whatley*, 133 Tex. 608, 131 S.W.2d 89, 92 (Tex. 1939). This is true whether or not the mineral estate is constructively severed from the surface estate. *Whatley*, 131 S.W.2d at 92. A mineral estate possesses "all the incidents and attributes of an estate in land." *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302, 305 (Tex. 1943). Because a constructively severed mineral estate is a property interest of equal dignity as a surface estate, it logically should also be subject to accretion.

Practical considerations also support the proposition that a constructively severed mineral estate should be subject to accretion. A deed giving rise to competing riparian claims of accretion uses the shore of the body of water as a boundary. See *Stover v. Gilbert*, 112 Tex. 429, 247 S.W. 841, 843 (Tex. 1923). Thus, the location of the mineral estate boundary as it existed at the time of the reservation will often be undeterminable. The boundary of the mineral estate, as the boundary of the surface estate, can be determined only with regard to the river's shore.

Finally, equity supports the conclusion that a mineral estate should be subject to the doctrine of accretion.

To hold that a constructively severed riparian mineral estate is not subject to the doctrine of accretion, although an unsevered riparian mineral estate is, would create a groundless distinction in the bundle of property rights accorded the two groups of property owners. We will not countenance the inequity of such a system.

For the reasons stated, we conclude that a constructively severed riparian mineral interest is subject to accretion.<sup>2</sup>

2 We note that only two other courts have addressed the issue whether a constructively severed riparian mineral interest is subject to the doctrine of accretion. In *Nilsen v. Tenneco*, 614 P.2d 36 (Okla. 1980), and *Jackson v. Burlington Northern*, 205 Mont. 200, 667 P.2d 406 (Montana 1983), the highest courts of two sister states also resolved this issue in the affirmative.

### *Whether the Deed Limited Grantor's Right to Future Accretion*

Ely argues that even if we recognize the general application of the doctrine of accretion to a constructively severed mineral estate, the doctrine does not apply in this case. Ely contends the 1947 deed limited the grantor's reservation to the boundaries as they existed in 1947 because it reserved the right to minerals "in and under the herein described property." We disagree.

We do not read the deed as implicitly conveying the grantor's right to future accretion of the retained mineral estate. We hold that the reservation of the right to minerals "in and under" the property were words of description, not of limitation. See *Burns v. Goodrich*, 392 S.W.2d 689, 692 (Tex. 1965) (clause in deed that interest conveyed was interest inherited by father from estate of his deceased parents not clause restricting granting clause but instead identifying reference).

Ely, reciting the general rule that a deed is construed as giving the broadest possible estate to the grantee, argues that the 1947 deed should have specifically reserved the right to enjoy future accretion. See, e.g., *Reeves v. Towery*, 621 S.W.2d 209, 212 (Tex. Civ. App.--Corpus Christi 1981, writ ref'd n.r.e.). We disagree.

Under Texas law, the owner of a mineral estate possesses a bundle of interests, including the right to execute oil, gas, and mineral leases, and the right to receive bonuses, rentals and royalties. *French v. Chevron USA, Inc.*, 896 S.W.2d 795, 797 (Tex. 1995); *Extraction Resources, Inc. v. Freeman*, 555 S.W.2d 156, 159 (Tex. Civ. App.--El Paso 1977, writ ref'd n.r.e.). Each is a property right which can be separately conveyed or reserved. *Concord Oil Co. v. Pennzoil Exploration & Production Co.*, 1996 Tex. LEXIS 146, 40 Tex. Sup. J. 33

(*Tex. 1996*) (pending on rehearing). But an unqualified reservation of the mineral estate reserves the entire bundle of property rights accorded a mineral estate. *French*, 896 S.W.2d at 797; see also *York v. Kenilworth Oil Co.*, 614 S.W.2d 468, 471 (Tex. Civ. App.--Waco 1981, writ ref'd n.r.e.) (reservation of mineral interest reserved "possibility of reverter"). Similarly, an unqualified reservation of a riparian mineral estate reserves the right to future accretion.

The deed clearly reserves all rights in the mineral estate. Because the right to increase by accretion is part of the bundle of riparian property rights, it follows that the grantor retained that right along with all others. We overrule Ely's first point of error.

#### *Attorney's Fees*

Ely, by point of error two, and UPRC, by cross-point, complain that the trial court abused its discretion by requiring each party to pay its own attorney's fees. Both Ely's petition and UPRC's third-party petition purported to bring suit under the Uniform Declaratory Judgments Act. See *Tex. Civ. Prac. & Rem. Code Ann. § 37.009* (West 1997). We will uphold the trial-court decision because (1) the action is properly a trespass to try title suit, not a suit for declaratory judgment, and (2) even if the action could have been brought as a suit for declaratory judgment, the record does not show an abuse of discretion.

*Texas Property Code section 22.001* provides that a "trespass to try title action is the method of determining title to lands, tenements, or other real property." *Tex. Prop. Code Ann. § 22.001* (West 1984). It is the exclusive remedy by which to resolve competing claims to property. See *Barfield v. Holland*, 844 S.W.2d 759, 771 (Tex. App.--Tyler 1992, writ denied) (trial court erred by awarding attorney's fees under declaratory judgment act

when action was trespass to try title); *Kennesaw Life & Accident Ins. Co. v. Goss*, 694 S.W.2d 115, 117-18 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.) (declaratory judgment act inappropriate vehicle to establish rights in property because trespass to try title is only remedy); see also *Yoast v. Yoast*, 649 S.W.2d 289, 292 (Tex. 1983) (court of appeals should have characterized suit disputing ownership of property as trespass to try title rather than suit for partition). We hold that attorney's fees under the declaratory judgments act are not appropriate in a suit that is in the nature of a trespass to try title.

Even if the action was properly brought as a suit for declaratory judgment, the Texas Uniform Declaratory Judgments Act allows the trial court to award reasonable and necessary attorney's fees and costs as are equitable and just. *Tex. Civ. Prac. & Rem. Code Ann. § 37.009*. The decision to grant or deny attorney's fees and costs is within the trial court's sound discretion. *Commissioners Court of Titus County v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997); *Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985). We do not reverse the trial court's denial of attorney's fees unless the complaining party shows a clear abuse of discretion. *Agan*, 940 S.W.2d at 81; *Oake*, 692 S.W.2d at 455. Neither Ely nor UPRC demonstrate how the trial court abused its discretion, nor does the record reflect an abuse of discretion. We overrule Ely's second point of error and UPRC's cross-point.

We affirm the trial-court judgment.

Jimmy Carroll, Chief Justice

Before Chief Justice Carroll, Justices Jones and Kidd

Affirmed

Filed: January 29, 1998