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'From Heaven To Hell' — Mineral Rights And Ancient Deeds

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As long as the current economic conditions prevail and domestic oil production provides better opportunity for American interests, the acquisition and development of stateside mineral rights will predominate. An excellent and obvious example of this is the redoubled interest in the Permian Basin and the ramping up of activity in Midland-Odessa. As these plays continue to run, title questions will continue to emerge.

Where especially arcane conveyances to railroads are memorialized in ancient documents, the archaic language can lead to disputes, because simple phrases that seem ordinary and clear to us in modern parlance were used differently a century ago when the original transactions took place. If there are railroad tracks on your parcels, this may affect your ownership interests in a way that a typical title commitment may not catch.

Recently, in BNSF Railway Co. v. Chevron Mid-Continent L.P.,[1] decided on March 22, 2017, the El Paso court of appeals examined an ancient deed that conveyed surface rights to BNSF in 1903. Chevron subsequently acquired the mineral rights and, having drilled under the railroad tracks, struck oil.

BNSF sued for trespass to try title, arguing that the terms of the deed granted fee simple ownership of the land “from Heaven to Hell.” Chevron argued that the fee simple language was not outcome-determinative, and the language in the deed that called out the width of the parcel used the phrase “railway right of way,” typically used to describe easements. Chevron argued that the nature of a right-of-way was an easement instead.

Chevron won. The court of appeals affirmed summary judgment in favor of Chevron and against BNSF Railway. It announced its view that the placement of a statement of purpose in a granting clause should count for something but that, in this case, the granting clause could be fairly construed as conveying either the tract of land in fee simple or an easement.

The court articulated its obligation to arrive at and effectuate the grantor’s true intent. Since the granting clause was ambiguous, it examined the rest of the deed. The court pointed to the additional language granting BNSF permission to use the natural resources on the property or "appertaining thereto," arguing that permission would not have been necessary if the original conveyance included all property rights included in a traditional fee simple transaction.

In addition, it found the following factors to be persuasive: an opening recital suggesting that the landowner was bargaining for the benefits he would receive if a railroad were to pass over his land; at the time the deed was prepared, use of the term “for a right of way” suggested an easement; language describing the surveyor’s line also included “over, through, and across” language; and the habendum clause referred only to “premises,” instead of “property and premises.”

This decision did not occur in a vacuum. A previous opinion issued by the Houston Court of Appeals more than two years earlier set the stage. In Union Pacific Railroad Co. v. Ameriton Properties, Inc.,[2] the saga began in the late 1800s.

Union Pacific's predecessor, Galveston, Harrisburg and San Antonio Railway (GHSA) proceeded to condemn a right of way across a strip of land in what was then west Houston. GHSA successfully condemned the rights of two of the landowners and settled with the third property owner, Mary Lawrence, obtaining her interest by deed. The deed contained several critical elements.

First, the granting language provided that she did thereby grant, bargain, sell and release the land. Second, the land was described as "the following tract or parcel of land." Third, it was given for and in consideration of the enhanced value to be given which was contemplated to arise in her lands and other property by the location and speedy construction of the GHSA Railway.

Fourth, a more particular description of the land followed, establishing it as a strip of land fifty feet in width being the land condemned by the commission to use as a railway company right of way. Fifth, Mrs. Lawrence reserved for herself the right to all the timber on the tract, which was given for right of way together with improvements, rights, hereditaments and appurtenances forever.

Sixth and finally, Mrs. Lawrence established a condition: GHSA was required to build its railway and run its cars to the Texas & New Orleans Railroad Depot before Jan. 1, 1881. Otherwise, the deed of conveyance would be null and void.

Fast forwarding to modern times, Union Pacific removed its tracks from the property and no longer used the property for railroad purposes. Ameriton sued, claiming fee simple ownership free and clear of any claims by Union Pacific. It claimed that Union Pacific's only interest was in an abandoned right of way.

In relevant part, the Houston Court of Appeals commenced by recognizing that the term "right of way" has two significant meanings. The court referred to prior precedent in specifically stating that the phrase "right of way" can denote either a right of passage or the strip of land itself. The court suggested that using the phrase "right of way" alone is not sufficient in a deed to establish the estate conveyed.

Instead, the court of appeals restated its obligation to look to the terms of the deed and to seek to harmonize all of its terms. It also restated the general statutory rule articulated in the Texas Property Code that a conveyance is for fee simple unless the estate is limited by express language.

Looking to the six critical elements of the deed described above, the court determined that the 1879 deed conveyed an undivided fee simple interest in the property to GHSA, Union Pacific's predecessor in title. However, the court of appeals also determined that the deed to GHSA had conveyed a condition requiring it, as Union Pacific's predecessor, to build a railroad and commence to running cars on it by Jan. 1, 1881. The case was remanded for a determination of whether its predecessor had succeeded in meeting the condition of ownership.

Regarding the nature of the interest conveyed by the language of the deed, the court of appeals determined that the express language purported to sell the tract of land itself rather than rights over the land. There were no express words that clearly indicated intent to convey fee title or a lesser estate, but the purported conveyance of the tract or parcel itself and its appurtenances rather than merely a right of use was partially determinative.

In addition, the reservation of timber rights in the land would not have been necessary unless the grantor had intended to convey all other rights to the grantee. In other words, if the deed had only conveyed an easement or right of way, the reservation of the timber rights would have been unnecessary.

Finally, the court dismissed Ameriton's proposal that the language in the deed which contemplated enhancement in value to Mary's lands and other property as a result of railroad construction somehow suggested that she intended to convey only an easement. Ameriton did not provide any legal precedent to support its proposal in this regard and the mere fact that a grantor hopes to derive ancillary benefit from a conveyance is not sufficient to alter the characterization of the interest being conveyed.

What these cases show is that historical transactions involving ancient deeds for railroad right of way require closer scrutiny. And as domestic production ramps up, and whether or not BNSF Railway Co. v. Chevron Mid-Continent is appealed further, it is important to consider special circumstances that might give rise to title disputes and to evaluate them. Title examinations should catch most of these issues but certain unique transactions — like those for railroad rights of way — may bear closer examination.

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[1] BNSF Railway Co. v. Chevron Mid-Continent LP et al., __ S.W.3d __, 2017 WL 1076540 (Tex. App. – El Paso 2017, no pet. hist.).

[2] Union Pacific Railroad Co. v. Ameriton Properties Inc., 448 S.W.3d 671 (Tex. App. – Houston [1st Dist.] 2014) reh'g overruled (Dec. 9, 2014), review denied (Sept. 4, 2015).
