

University of Arkansas, Fayetteville  
**ScholarWorks@UARK**

---

Annual of the Arkansas Natural Resources Law  
Institute

School of Law

---

2-2008

# Pending Oil And Gas Litigation: What's Happening And What's Coming

David F. Butler

Follow this and additional works at: <http://scholarworks.uark.edu/anrlaw>

 Part of the [Natural Resources Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

---

## Recommended Citation

Butler, David F, "Pending Oil And Gas Litigation: What's Happening And What's Coming" (2008). *Annual of the Arkansas Natural Resources Law Institute*. 67.

<http://scholarworks.uark.edu/anrlaw/67>

This Article is brought to you for free and open access by the School of Law at ScholarWorks@UARK. It has been accepted for inclusion in Annual of the Arkansas Natural Resources Law Institute by an authorized administrator of ScholarWorks@UARK. For more information, please contact [scholar@uark.edu](mailto:scholar@uark.edu), [ccmiddle@uark.edu](mailto:ccmiddle@uark.edu).

# PENDING OIL AND GAS LITIGATION WHAT'S HAPPENING AND WHAT'S COMING

**BY: DAVID F. BUTLER**

## *Introduction*

Due to the price of oil and gas, the thousands of new mineral owners who are now interested in the laws pertaining to oil and gas, the government's eagerness to get its share of the revenue, and new attorneys who have taken a new look at old law, there is a lot going on in the oil and gas industry. My discussion will concern cases or issues that are pending, and litigation the oil and gas industry will face in the next few years.

## *The Strohacker Doctrine*

Bob Honea, an attorney in Fort Smith, has been kind enough to provide me with the pleadings in one case that he has tried, and in two other cases that are pending. These cases concern the *Strohacker* doctrine. Tom Daily will discuss case that was decided in 2007 by Judge Eisele in federal court, and I'll address the issues in the other two pending cases.

In 1975, at the Arkansas Natural Resources Oil and Gas Institute, another distinguished attorney from Fort Smith, Gerald Delung, presented the *Strohacker Doctrine* in great detail. Mr. Delung called it an "Arkansas Rule of Property." He said so because this rule does not exist in other oil and gas states, nor does it create the confusion it has created in Arkansas, particularly in light of the voluminous number of reservations that took place in the Fayetteville Shale area in the late 1800's and early 1900's that now puts landmen and title attorneys in a predicament.

## ***MISSOURI PACIFIC RAILROAD COMPANY V. STROHACKER***

The *Strohacker* case is properly styled, *Missouri Pacific Railroad Company v. Strohacker*, 202 Ark. 645, 152 S.W. 2d 587 (1941). The *Strohacker Doctrine* necessitates that a factual determination be made as to the true intent of the parties at the time of the original reservation, and the Arkansas Supreme Court has stated it is appropriate to rely upon the contemporary facts and circumstances surrounding the execution of the instrument in question, and has determined it is proper to ascertain the intent of the parties so as to be consistent with and limited to those minerals commonly known and recognized by legal or commercial usage.

For those for you who have not encountered *Strohacker*, the reservation is as follows:

“...reserving, however, all coal and mineral deposits”

### ***PENDING STROHACKER CASES***

Tom Daily has already discussed with you the Faulkner County case heard by Judge Eisele in federal court last year. Two other cases are pending, both in White County. One case involves Hallwood/Anadarko as entities that succeeded to the interest of the railroad. The other case involves Upland Industrial Development Company. In both cases, landowners who acquired their interests in the 60's, 70's or later have now challenged the interests that are claimed by the railroad or its successor. One case involves a reservation made in the mid 1920's, and the other case involves a reservation made in the mid 1930's. Two issues are of interest in this litigation:

#### **1. Federal Court Jurisdiction**

One of the cases concerns with the issue of whether or not the damages requested are sufficient for the minimum jurisdiction of \$75,000.00 in controversy.

To acquire federal court jurisdiction, you need diversity jurisdiction, and a minimum of \$75,000.00 in damages claimed. There is trial strategy ongoing by the lawyers on both sides in regard to which court (state or federal) will hear the case. Since Judge Eisele made his ruling, naturally a party representing a railroad or its successor would want to be in federal court. Federal judges are appointed by the President, and serve for life. Circuit Court judges are elected every few years, and they are very much concerned about their constituency. Since a precedent has been set in federal court, I would want to be in Circuit Court, and perhaps I would want a jury trial in White County if I represented the landowner.

## **2. “Commonly Known” or “Commercially Viable Minerals”**

Under the rule of *Strohacker*, a generic reservation of mineral rights and an instrument conveying real property of the sort described above has been construed to include only those minerals commonly known or recognized by legal and commercial usage. What does this mean for the landmen and attorneys who have to deal with these issues?

*Strohacker* necessitates a fact finding mission determining whether or not oil and gas was “commonly known” in the community. In one of the cases, it is argued that at the time the reservation was made, the mineral must be “commercially viable at that time in that county.” The argument is that at that time there was no CNN or C-Span, and newspapers did not exist at that time in certain areas. White County has a large geographic area, and maybe one hand didn’t know what the other was doing. The argument is that in one part of the county, the public’s knowledge may be different than that of another part of the county and it’s a face question as to what is “commonly known.”

By this time next year, we will know a lot more. Here's what we do know so far:

1. In 1892 and 1893, oil and gas was not commonly thought to a mineral in Miller County, Arkansas. (*Strohacker* case)
2. In 1937, a conveyance reserving "mineral rights" was effective to withhold oil and gas and other minerals from the conveyance. *Shepard v. Zeppa, Trustee 199 Ark.1, 133 S.W.2d 86 (1939)*.
3. In 1938, according to the recent federal court ruling from Faulkner County, oil and gas was a mineral commonly known or recognized by legal and commercial usage within the meaning of *Strohacker*. This reservation contained the following language:

"reserving to Mopac all the minerals, upon in and under said land"

That's what we know for now. We'll update you next year.

### ***SUBORDINATION AGREEMENTS***

One issue that is pending and will be a problem, particularly for landmen, concerns the following provision in an oil and gas title opinion:

"The interest of Farmer Brown is subject to an outstanding mortgage in favor of ABC Bank. This mortgage was in effect prior to execution of Farmer Brown's oil and gas lease. You should secure a subordination agreement from the bank."

What's the big deal? There is no question the mortgagee's rights are superior to that of the leasehold owner under this scenario. What happens to your lease if the bank refuses to execute a subordination agreement? Normally, nothing happens, the well is drilled, and life is good. Life is good until Farmer Brown defaults on the terms and conditions of the mortgage agreement. Then what? The easy answer is to simply not pay to Lessor the bonus money until the bank comes on board. In other words, tell Farmer Brown that he has to get the bank to sign a

subordination agreement or another document that will accomplish the same goal prior to paying the bonus.

What happens if Farmer Brown is given the opportunity to lease from a competitor, and your company refuses to pay the bonus money in the absence of a subordination agreement? What happens if Farmer Brown defaults, you are 30 days from spudding the well, or if the well has been drilled and waiting on a pipeline, or what if the well is producing? If Farmer Brown defaults, your remedy is to form a real estate company, and go to the sale at the Courthouse steps to make sure that the bank does not become an unleased mineral owner, or else the bank is now your partner if it is the high bidder at the public sale.

You will have no choice but to make sure your interest is protected at the sale. I suggest that you intervene in the foreclosure case, and see if you can get the parties to agree to a subordination agreement. The mortgagee will not own the mineral interests unless it is the high bidder. The bank simply owns a mortgage on the lands, and the lands will be owned by the party purchasing the lands at the foreclosure sale.

### ***CHESAPEAKE TRIES TO INTEGRATE THE BANK***

Chesapeake successfully integrated a few mortgagees through the integration process, and actually paid the bank additional bonus money to insure that this interest was under the terms and conditions of a lease. The problem comes with the definition of “owner.”

### ***WHAT THE HECK IS AN “OWNER”***

Under A.C.A. §15-72-102 (7) “owner” is defined as follows:

“Owner means the person who has the right to drill into and to produce from any pool, and to appropriate the production either for himself, or for himself and another, or others”

In two administrative hearings, the Arkansas Oil and Gas Commission (AOGC) made a ruling that under the definition of the word “owner” as written above, the non-subordinating bank, (also known as a shifting executory interest) is not included within the word “owner.” The AOGC was concerned it did not have the statutory authority to integrate this type of interest. Chesapeake argued the following:

1. Historically, the AOGC has integrated dower and curtesy interests.
2. Historically, the AOGC has integrated term mineral interests (grantor reserves minerals for a term of years)
3. The contingent interest of the lending agency, even if it may not vest, is a type of interest contemplated under the definition of “owner.”

#### **Dower and Curtesy Interests and Term Mineral Interests**

In regard to dower and curtesy interests, dower and curtesy interests are not interests that presently exist in that these interests do not actually vest until a spouse dies. In other words, you have an inchoate interest. In regard to a term mineral interest, it is an interest that will vest at some point in time, but a person or entity owning a term mineral interest would not have the *present* right to drill.

#### **AOGC ORDERS**

An Arkansas Oil and Gas Commission order includes the following language:

“This order is binding on heirs, successors and assigns.”

I found no statutory authority which enables the AOGC to make the order binding on parties who were not subject to the order. The argument from the AOGC is that dower or curtesy interests or term mineral interests would be “heirs, successors or assigns.”

## ***APPEAL***

Under the Arkansas Administrative Procedures Act, an appeal from an order issued by the AOGC can be appealed to the Circuit Court in the County in which the real property is located, or the appeal can be filed in Pulaski County. One appeal has a White county case and the other from Faulkner County. Chesapeake elected to file one action in Pulaski County, and consolidated the two cases without objection from the AOGC. A motion for judgment on the pleadings was filed by the AOGC. Chesapeake has asked that the matter be set for a hearing. The case is pending.

### **AOGC HAS NO DOG IN THIS FIGHT**

This is a case where the litigants are really not at odds with each other. The AOGC really does not have a dog in this fight, and it would certainly not bother the AOGC if the Circuit Court were to rule the word “owner” includes this type of interest. In the event the Circuit Court finds the word “owner” means that it is a “present owner” as opposed to a contingent owner, then the remedy would be to address this issue at the legislative level. Chesapeake filed this action in part to be able to make the argument that it had exhausted all legal remedies prior to approaching the legislature for relief. In the event the Circuit Court denies the relief requested by Chesapeake, then the word “owner” needs to be redefined or expanded based upon recent hearings at the Arkansas Oil and Gas Commission in January, 2008.

### ***DOES “OWNER” REALLY MEAN “RECORD TITLE OWNER”***

Chesapeake was once again involved with the issue of the definition of “owner.” Storm Cat had filed an integration application. The issue presented in the Storm Cat case concerned a determination of whether or not, for purposes of an



integration proceeding, a party to an integration is an owner if the documentation making the person an “owner” is not recorded in the Circuit Clerk’s records. Several questions came up at this particular integration proceeding. These issues concerned who should be named the operator.

### ***OPERATOR CHALLENGE HELPS FORM THE DEFINITION OF “OWNER”***

In the first instance, the argument was made that on the date an integration application was filed, record title indicated the non-applicant did not own a working interest that would have justified an operator challenge. The next question to present itself was at what point in time, for the purpose of an integration proceeding, a non-applicant can make a claim it has an interest even though it may not be recorded. Another question concerns whether or not actual notice of an unrecorded interest is enough to justify being named the operator. At an AOGC hearing, as a general rule, “He who has the largest working interest, or the support of the greatest percentage of working interests gets named “operator.”

#### **1. Record Title Owner**

Chesapeake argued that for the purposes of integration, the AOGC had not historically used the standard that the word “owner” meant record title owner. For example, in this industry, exploration agreements, seismic exploration agreements, farmout and various other agreements are entered into between companies that are not recorded. A typical farmout agreement provides that company will sign a letter agreement wherein the company is given the right to drill a well on lands, and if the entity secures oil and gas production, then an assignment of record will be made. A general rule, if you were to examine title, record title would be in the entity who farmed the interest out, and not the farmouttee.

If the AOGC Commission had ruled the word “owner” means record title owner, then it would be necessary for all agreements to be recorded. In regard to the question that the assignment had not been recorded as of the date the application was filed, and the argument that the assignment was not recorded until the day of the integration hearing, the AOGC ruled that this assignment was effective, and named Chesapeake the operator even though the assignment was not of record prior the application being filed, and was not actually filed of record until the day of the hearing. To avoid this peril, I suggest you record some document signed by the record title owner which makes reference to your agreement.

## **2. Option to Lease & Lack of Consideration**

The second issue that concerns the definition of “owner” is much more complex. Chesapeake had secured an option to lease from a mineral owner. One of the terms and conditions of the lease option provided that lease would not be recorded. At the integration hearing, the only document filed of record was an “option to lease.” The Applicant, One Tech (now Petrohawk), did not inquire of Chesapeake whether or not the option to lease had been exercised, and sent an integration application to the Commission claiming that this entity was unleased because there was nothing of record except the “option to lease.”

Chesapeake contended the option to lease had been exercised. In fact, testimony was received that a lease covering the lands had been executed, but it had not been recorded based upon the agreement between the parties that the lease not be recorded. Chesapeake testified it intended to file a memorandum of lease in the future. Another argument was made that even if the option had been exercised, full consideration had not been paid for the lease. There was no dispute that

Chesapeake had paid a considerable amount of money for the option, and once the option to lease had been exercised, Chesapeake was required to pay the bonus monies after completing due diligence. Once Chesapeake exercised its option to lease, there was a binding contract which required paying an agreed upon bonus times the number of mineral acres that were owned by the mineral owner.

This issue concerns whether or not the word “owner” is defined as including an entity when there has been no recorded lease, and full consideration had not been paid because the consideration was to be paid after the completion of due diligence. There was a split decision by the AOGC. In fact, the decision was split 4-4 (one commissioner was absent.) The AOGC compromised and ruled “we don’t know the answer to this” and the parties were ordered to secure a title opinion to prove title.

### ***OPERATOR***

Under A.C.A. § 15-72-201, the word “operator” is defined as follows:

“ the person who has the right to enter upon the lands of another for the purposes of exploring, drilling, and developing for the production of brine, oil, gas, and all other petroleum hydrocarbons.”

In a typical real estate action, for example, if a party wanted to sue an entity in a real property lawsuit, it would be necessary to sue the person who had record title. Two of the commissioners are lawyers, and they have some issues concerning “record title” or “failure to pay consideration.” Several questions came up in this regard.

#### **1. Not of Record**

If, in fact, Storm Cat had been deemed the Operator, and their claim was accurate that since the assignment was not of record, and they, therefore, had the largest working interest, could Chesapeake have simply waited behind the eight

ball and done nothing? If the Applicant had knowledge that a lease has been executed, but the lease was not of record, even though they had been notified that a lease had been secured, would they be required to pay additional bonus monies to a Lessor when they had notice this entity had leased to another company. Could Storm Cat have then still drilled the well and taken all the risks, and then Chesapeake come back into the unit as a tenant in common?

## **2. Consideration**

In regard to the One Tech scenario, there was a contention the consideration for the lease had not been paid. Again, assuming there was actual notice given to the applicant integrating the unit, would Applicant have to pay additional bonus monies to this entity? Does the language “this order shall be binding on heirs, successors or assigns” save Applicant from a dilemma wherein they are merely a tenant in common with an entity when they had actual notice they had leased the interest to another party? I am unaware of any cases wherein this dilemma has been adjudicated. What if a party leases their interests to another party between the date of the integration and the date the integration order is sent out? If it’s a working interest owner, are they automatically deemed non-consent if they do not make an election since Applicant did not notice them? Can they be considered a “carried interest?”

### ***ADVERSE POSSESSION OF ROYALTY: WILL THAT DOG HUNT?***

There are a couple of adverse possession cases, one pending and one brewing down in south Arkansas. These two cases have different facts, but the interesting issue concerns whether or not you can adversely possess royalty in some circumstances. In the first case, a warranty deed conveys property with no

reservation of minerals. Grantor sells land to a timber company with the following language included:

“Grantee acknowledges that this conveyance is subject to existing oil and gas leases and all mineral reservations existing as of the date of this transaction.”

On the date of the transaction, the apparent intent of the parties was for the Grantor to reserve the minerals, and for the timber company to purchase the surface only. In this situation, there were three existing stripper oil wells located on the lands on the date the warranty deed was executed. Some royalty was being paid on the date of the execution of the warranty deed, but not much.

Since minimum royalty was being paid, it is believed Grantee was unaware it actually owned the minerals, and Grantee did nothing to transfer by division order the interests from Grantor to Grantee in regard to the three producing wells. The wells produced for in excess of seven years with Grantor receiving the royalty from the three producing wells. Approximately 8 ½ years after the warranty deed was recorded, a landman putting together a prospect notified Grantee that it owned the minerals, and Grantee initially denied that it owned the minerals. The landman convinced Grantee that it indeed did own the minerals. Grantee then signed a new lease covering all the acreage. Grantee then contacted the purchaser, and got the royalty transferred from Grantor to Grantee in the division order department.

### **1. Severed Mineral Interests**

It is theoretically possible to adversely possess minerals, if, for a statutory period of 7 years, a party has possessed the mineral. The Arkansas Supreme Court has consistently held that when title to the surface estate of land has been severed from title to the underlying mineral estate, title to the minerals cannot be acquired by adverse possession of the surface alone. Actual production of

minerals is required. In *Claybrooke v. Barnes*, 180 Ark. 678, 22 S.W. 2d 390

(1929) for example, the Arkansas Supreme Court held as follows:

“When there has been a severance of the legal interest in the minerals from the ownership of the land, it has been held as to solid minerals, and the same rule has been applied to oil and gas, that adverse possession of the land is not adverse possession of the mineral estate and does not defeat the separate interest in it.... So, it may be taken as settled that the two estates, when once separated, remain independent, and title to the mineral rights can never be acquired by merely holding and claiming the land, even though title be asserted in the minerals all the time.”

The rationale for this is that “the statute of limitations does not run against these rights [to severed mineral interests,] unless there is an actual adverse holding, which constitutes an invasion of these particular rights. Adverse possession, whether of the surface or severed minerals, must be open and notorious (meaning highly visible) and inconsistent with rights of the true owner. The only way to make a visible claim to the minerals is to sink a mine shaft or drill a well and then to use that shaft or well to actually remove the mineral.

## **2. Production from a Unit Well Not on the Tract**

The second case involves a term royalty interest wherein the purchaser continued to pay royalty after the term had expired, again, far in excess of 7 years. In addition to the requirement that an adverse possessor must actually extract the minerals, there is an unresolved question in Arkansas as to whether production from a unit well that is not situated on the tract in issue is sufficient to constitute adverse possession. Such production has been held to be insufficient in Oklahoma, but there is some indication that the Arkansas Supreme Court would not adopt such an approach. In *Post v. Tenneco Oil Co.*, 278 Ark 527, 648 S.W. 2d 42 (1983), the Arkansas Supreme Court held that a lessor’s entitlement to “free gas” from wells located on the leased premises included the off-premises unit wells. In *Post*, the

court noted that the unit wells produced gas from under the leased premises and that royalties were paid on a unit basis. In *Brizzolara v. Powell*, 214 Ark. 870, 218 S.W. 2d 728 (1949), the Arkansas Supreme Court held that adjoining production under a voluntary pooling agreement did not constitute adverse possession of gas, but the court offered the following dicita:

“It is possible that the rule might be different if the neighboring well had been drilled in accordance with a finding in the Oil and Gas Commission that such a well would drain surrounding property, necessitating the formation of a drilling unit” but that situation has not presented itself as of this date.

### **3. Erroneous Payments- Adverse Possession**

In *Warmack v. Henry H. Cross Co.*, 237 Ark. 869, 377 S.W. 2d 47 (1964), the Arkansas Supreme Court essentially said that an erroneous payment of royalty did not translate into adverse possession based upon the fact the wrong party was paid in excess of 7 years. Language from *Warmack* of significance is as follows:

“Appellant’s argument would seem to boil down to the fact that because Appellant has been overpaid for the last 25 years, he should continue to be overpaid”

In *Palmer v. Lide*, 567 S.W. 2d 295 (1978), the Arkansas Supreme Court once again looked at *Warmack* and said:

“In a case so similar as to be controlling we held that there was no adverse possession or acquiescence where the real title holders did not know that the company owning the oil runs was overpaying one royalty owner on the mistaken premises that his interest was twice as large as it actually was. That the appellant erroneously received and kept overpayments for several years does not give her any equitable ground for contending that the same error should continue in the future.”

The two pending cases are distinguishable from *Warmack* and *Palmer* in that both of these cases involve the grantee receiving a portion of the royalty payments, but, arguably not the full amount. It was argued the error on the part of the purchaser or the division order department would not translate into adverse

possession. In the two pending cases, the grantee received “no” royalty payments for in excess of 7 years.

We’ll let you know next year what happened.

### ***LITTLE RED RIVER- WHO OWNS THE MINERALS UNDER THE RIVER?***

In the Fayetteville Shale play, the owner of minerals under the Little Red River and adjoining the river is at issue. Landowners have been taking the position they own the minerals, and up until a few weeks ago, the State of Arkansas agreed with them.

Attorney General Opinion No. 1998-312 says:

"The State of Arkansas, of course, owns title to the beds of all navigable waterways within the state. See *Hayes v. State*, 254 Ark. 680, 496 S.W.2d 372 (1973); *Clarke v. Montgomery County*, 268 Ark. 942, 597 S.W.2d 96 (Ark. App. 1980); *McGahhey v. McCollum*, 207 Ark. 180, 179 S.W. 2d 661 (1944); *Barboro v. Boyle*, 119 Ark. 149, 167 S.W. 854 (1914). It has been stated that:

When the Original Colonies ratified the Constitution, they succeeded to the Crown's title and interest in the beds of navigable waters within their respective borders. See *Utah Division of State Lands v. United States*, 482 U.S. 193, 195-96, 107 S.Ct. 2318, 2320-21, 96 L.Ed.2d 162 (1987); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 317-318, 94 S.Ct. 517, 521-522, 38 L.Ed.2d 526 (1973), overruled on other grounds, *Oregon ex. rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 636, 97 S.Ct. 582, 50 L.Ed. 2d 550 (1977). Under the equal footing doctrine, new states were admitted with "the same rights, coverignty and jurisdiction... as the original States possess within their respective borders,' *Bonelli*, 414 U. S. at 318, 94 S.Ct. At 522. Accordingly, title to lands beneath navigable waters passed from the federal government to the states upon their admission to the Union.

*101 Ranch v. U.S.* 905 F.2d 180,182 (8<sup>th</sup> Cir. 1990).

This is true assuming there had been no valid federal grant of particular land to an individual prior to the state’s admission to the Union. *Utah Division of State Lands v. United States*, supra.

### **IS THE LITTLE RED “NAVIGABLE”**

As regards lands still underwater, or below the ordinary high water mark, common



law principles must be applied. It is held in Arkansas, in contrast to the majority of states, that because the state's title to the land under water rests on navigability, when the navigation ceases the title terminates, and riparian rights attach. See *Parker, Commissioner of Revenue v. Moore*, 222 Ark. 811, 262 S.W.2d 891 (1953), relying on *Harrison v. Fite*, 148 F. 781 (8<sup>th</sup> Cir. 1906). See also *United States v. Keenan*, supra; *Gill v. Porter*, supra; *Porter v. Arkansas Western Gas Co.*, supra and *Five Lakes Outing Club v. Horseshoe Lake Protective Association*, 226 Ark. 136, 288 S.W.2d 942 (1956). Compare 65 C.J.S. Navigable Waters 97. A determination, therefore, of the title to the lands still under water will require a finding as to the water's navigability. This is an inherently factual question. If no longer "navigable" Arkansas common law provides that riparian ownership attaches at the time the waters became nonnavigable. See *Keenan*, supra, and *Gill v. Porter*, supra.

In *AR. River Rights Comm. v. Echubby Lake Hunting Club*, 83 Ark. App. 276, 126

S.W.3d 738 (2003) the Court of Appeals wrote;

Determining the navigability of a stream is essentially a matter of deciding if it is public or private property. *State v. McIlroy*, 268 Ark. 227, 595 S.W.2d 659 (1980), cert. denied. 449 U.S. 843 (1980). If a body of water is navigable, it is considered to be held by the State in trust for the public. See *Hayes v. State*, 254 Ark. 680, 496 S.W.2d 372 (1973); 9 *Powell on Real Property* 62.11 (2)(a) (2003). Navigability is a question of fact. *Goforth v. Wilson*, 208 Ark. 35, 184 S. W. 2d 814 (1945).

\*\*

## DEFINITION OF "NAVIGABILITY"

Arkansas law has defined navigability as follows:

The true criterion is the dictate of sound business common sense, and depends on the usefulness of the stream to the population of its banks, as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise. If, in its natural state, without artificial improvements, it may be prudently relied upon and used for that purpose at some seasons of the year, recurring with tolerable regularity, then in the American sense, it was navigable ...

*Milroy*, 268 Ark. at 234-35, 595 S.W.2d at 663 (quoting *Lutesville Sand & Gravel Co. v. McLaughlin*, 181 Ark. 574, 26 S.W.2d 892 (1930)). In 1980, this definition was expanded by the Arkansas Supreme Court to include consideration of the water's recreational use as well as its commercial use in determining navigability. *McIlroy*, supra. In *McIlroy*, the court was asked to determine whether a stream that had considerable recreational value for boating and fishing was navigable, even though it lacked the commercial adaptability that was the hallmark of traditional navigability.

## MULBERRY RIVER CASE

One of the major river cases involves the Mulberry River. The Mulberry River, in *McIlroy*, was described in the opinion as an intermediate stream at least 100 feet wide at some points, that for fifty to fifty-five miles of its length could be and often was floated by canoes or flat-bottomed boats. The Mulberry was designated by the state Department of Parks and Tourism as Arkansas's finest white water float stream. In 1838, it was "meandered" by surveyors, which is prima facie evidence of navigability. Based on these facts, the Arkansas Supreme Court held that "there is no about that the segment of the Mulberry River that is involved in this lawsuit can be used for a substantial portion of the year for recreational purposes. Consequently, we hold that it is navigable .. ." *McIlroy*, 268 Ark. at 237,595 S.W.2d at 665.

### IS A RIVER'S PRESENT-DAY NAVIGABILITY RELEVANT?

In *McIlroy*, one party Appellee contended that the areas' present-day navigability is not relevant; rather, navigability must solely be determined as of the date of Arkansas's statehood because each state, upon entry into the union, took title to the navigable waters within its borders. See generally *Utah v. United States*, 403 U.S. 9 (1971); *Anderson v. Reams*, 204 Ark. 216, 161 S.W. 2d 957 (1942). The Arkansas Supreme Court disagreed that the concept of navigability for the purpose of determining the public's right to use water was that static. Although navigability to fix ownership of a river bed or riparian rights is determined as of the date of the state's entry into the union, navigability for other purposes may arise later. See, e.g., *United States v. Appalachian Power Co.*, 311 U.S. 377, 408 (1940); *Hitchings v. Del Rio Woods Recreation & Park Dist.*, 55 Cal. App. 3d 560,568, 127 Cal. Rptr. 830, 835 (1976) ("navigability for purposes of a public navigational easement need not be evaluated as of the date of statehood; it may later arise"); *Bohn v. Albertson*, 107 Cal. App.2d 738, 743, 238 P.2d 128, 132 (1951) (if the evidence showed the creation of a new channel of the river, the fact that there was no such channel (at statehood) would not prevent the assertion by proper public authority of the right to use that channel for navigation and fishing"); 65 C.J. S. Navigable Waters 12 at 68 (2000). This point can be illustrated by the fact that, in the following cases, the Arkansas Supreme Court did not address navigability for the purpose of public usage in terms of whether the water was navigable at the time of statehood but whether the water was currently navigable. See *State v. McIlroy*, supra; *Hayes v. State*, supra; *Five Lakes Outing Club, Inc. v. Horseshoe Lake Protective Ass'n*, 226 Ark. 13 6, 288 S. W.2d 942 (1956); *McGahhey v. McCollum*, 207 Ark. 180, 179 S. W.2d 661 (1944). One case phrased the question of navigability as "whether the lake is susceptible of public servitude as a means of transportation at either now or within the foreseeable future ... " *Parker v. Moore*, 222 Ark. 811, 814, 262 S.W. 2d 891, 893 (1953). An argument is that an area's navigability, in the sense that the public use it, is conclusively established by that area's status in 1836.

The question, therefore, is the Little Red River navigable? If so, was it navigable in

1836 (at Statehood)? If it is, and was, navigable then the State of Arkansas owns the bed up to the normal high water mark.

It appears that if the Little Red River was "navigable" at statehood then the minerals lying in, under and upon the river bed are owned by the State of Arkansas. On the other hand, if the river was not navigable at the date of statehood (1836), then all the state (and the public) has is a right to the use the river surface, but the adjoining owners of the river may own the minerals under the river bed. In any event, this seems like the proper case for suspending the payment of royalties and, perhaps, for filing a declaratory judgment action asking the court to declare who owns the mineral, i.e the State of Arkansas or the adjoining owners. The last I heard is that the State of Arkansas is now claiming the minerals.

### **CONCLUSION**

A big dose of Strohacker, probably some litigation involving forfeited mineral interests, a little dab of adverse possession, issues surrounding ownership of minerals under a world renowned trout fishing river, and a little controversy involving administrative hearings are a happening right now. We'll keep you posted.