NO. 05-1076

IN THE SUPREME COURT OF TEXAS

EXXON CORPORATION, *et al.*,

Petitioners,

v.

EMERALD OIL & GAS COMPANY, L.P., and
LAURIE T. MIESCH, *et al.*,

Respondents.

On Petition for Review from the
Thirteenth Court of Appeals, Corpus Christi, Texas

AMICUS CURIAE BRIEF OF
THE TEXAS ALLIANCE OF ENERGY PRODUCERS
IN SUPPORT OF THE PETITION FOR REVIEW

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IDENTITY OF PARTIES AND COUNSEL

With respect to the parties in interest, and their respective trial and appellate counsel, The Texas Alliance of Energy Producers adopts and incorporates by reference the information contained in Petitioners Exxon Corporation's and Exxon Texas, Inc.'s Petition for Review. *See* Petition for Review, pp. ii-iv.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

The Texas Alliance of Energy Producers (the "Alliance") submits this Amicus Curiae brief, pursuant to Texas Rule of Appellate Procedure 11, in support of the Petition for Review filed by Exxon Mobil Corporation and Exxon, Texas, Inc., as successor in interest to Humble Oil and Refining Company.

STATEMENT OF INTEREST OF THE TEXAS ALLIANCE OF ENERGY PRODUCERS

The Texas Alliance of Energy Producers[1] is a Texas-based trade association of independent oil and gas producers. It is one of the largest state independent oil and gas associations in the United States, with over 2,750 members distributed throughout 300 cities in 25 different states. The Alliance's principal office is in Wichita Falls, Texas, with additional offices in Abilene, Austin and Houston.

The Alliance was formed in 2000, when the North Texas Oil & Gas Association and the West Central Texas Oil & Gas Association merged. The Alliance traces its history back to the 1930s, when small groups of independent oil producers met and formally organized as the North Texas Oil and Gas Association and, separately, the West Central Texas Oil & Gas Association. Since its inception, the Alliance has represented the interests of independent producers in Texas and Washington on a variety of matters, including issues related to oil import policy, price controls, environmental issues, and

[1] The Alliance has engaged Winstead Sechrest & Minick P.C. to prepare and file this amicus curiae brief. All fees associated with the preparation and filing of this brief will be paid by the Alliance. *See* Tex. R. App. P. 11(c).

taxation and regulatory matters. It also frequently appears as amicus curiae in cases affecting its members.

The Petition for Review filed by Exxon Corporation seeks to address several fundamental errors of law that will potentially have a drastic impact on the independent oil and gas industry. The court of appeals created a new cause of action, and granted standing to assert that claim to a corporation that was not even in existence at the time of the conduct allegedly giving rise to the claim. This holding goes against long-standing Texas law that actions for damages to land are personal in nature, and do not "run with the land." Additionally, the court of appeals' opinion regarding limitations and the application of the discovery rule in oil and gas litigation extends potential liability indefinitely for operators who have long since abandoned and plugged underperforming wells.

For the reasons stated in this Amicus Curiae brief, the Alliance respectfully urges the Court to grant the Petition for Review.

STATEMENT OF THE CASE

The Alliance adopts and incorporates by reference the Statement of the Case of Petitioners, Exxon Corporation and Exxon Texas, Inc. ("Exxon"). Petition for Review, p. xi.

STATEMENT OF JURISDICTION

The Alliance adopts and incorporates by reference Exxon's Statement of Jurisdiction. Petition for Review, pp. xii-xiii.

ISSUE PRESENTED FOR REVIEW

The Alliance adopts and incorporates by reference the Issues Presented contained in Exxon's Petition for Review. Petition for Review, pp. xiv-xvi.

This Amicus Curiae brief will focus on the issues of standing and limitations raised by the court of appeals' opinion.[2] If the opinion is allowed to stand, plaintiffs will be able to bring claims for conduct that occurred years or decades before, taking advantage of a never ending right to sue that runs with the land. Litigious opportunists will be more interested in suing to recover from economically viable defendants the theoretical value of reserves than they will be in discovering and developing the actual oil reserves needed by our nation.

STATEMENT OF FACTS

The Alliance adopts and incorporates by reference the Statement of Facts recited by Exxon in its Petition for Review. Petition for Review, pp. 1-6.

SUMMARY OF ARGUMENT

The court of appeals disregarded long-standing Texas law in holding that the Respondents' claims did not accrue, and limitations did not begin to run, until the Respondents were fully aware of the full extent of their claims and alleged damages. Instead, under settled law, Respondents' claims "accrued," and limitations began to run, once Respondents were on "notice" of their claims. Since they did not file suit within

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[2] The Alliance understands that Exxon has requested that the Court consider this Petition for Review along with its Petition for Review filed in this Court in No. 05-0729, *Exxon Corporation v. Emerald Oil & Gas Company, L.P.* Rather than file separate amicus briefs in each matter, the Alliance will address in this brief the reasons why both petitions should be granted.

two years after their claims accrued, even assuming the discovery rule applies to their claims, Respondents' claims are barred by limitations.

Furthermore, the court of appeals erred in granting standing to a subsequent purchaser to recover for injuries to his land that occurred before his purchase. This decision wholly ignores the well-settled rule in Texas that the right to sue for injury to realty is a personal right, which does not run with the land.

ARGUMENT

A. The court of appeals' decision marks a significant change to Texas law regarding limitations and the "discovery rule."[3]

Generally speaking, a cause of action "accrues," and limitations begins to run, when the events giving rise to the cause of action occur, whether the party claiming to be wronged is aware of those facts or not. *See S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996). Texas courts have, however, adopted a "discovery rule" that permits the accrual of a cause of action to be deferred under certain, limited circumstances.

This Court carefully analyzed the discovery rule in *Computer Assocs. Int'l, Inc. v. Altai*, 918 S.W.2d 453 (Tex. 1994). The Court stated that the rule applies where the nature of the injury is such that the harm is "inherently undiscoverable," and the evidence of the injury is "objectively verifiable." 918 S.W.2d at 456. An injury is inherently undiscoverable if it is, by its nature, unlikely to be discovered within the prescribed limitations period. *See S.V.*, 933 S.W.2d at 7.

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[3] The court of appeals determined that the discovery rule applied to Respondents' claims. The Alliance believes this holding was in error for the reasons stated in Exxon's Petition for Review. *See* Petition for Review, p. 8. However, even assuming the rule does apply, the court of appeals nevertheless misapplied the rule in this case. Since this misapplication has the potential to affect many Alliance members, the Alliance will focus its discussion of limitations on this issue.

However, while the discovery rule provides protection for injured parties who are unaware of their claims, it also requires that they exercise diligence to investigate any potential claims when made aware of them. *See Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988). Where the rule applies, a claimant's cause of action will accrue, and limitations will begin to run, when the "claimant discovers or in the exercise of reasonable diligence should have discovered the injury and that it was likely caused by the wrongful acts of another." *Childs v. Haussecker*, 974 S.W.2d 31, 40 (Tex. 1998); *see also S.V.*, 933 S.W.2d at 4 (citing *Trinity River Auth. v. URS Consultants*, 889 S.W.2d 259, 262 (Tex. 1994)). This is true even where the injured party does not know the identity of the wrongdoer, or the full extent of the damages. *Childs*, 974 S.W.2d at 40; *S.V.*, 933 S.W.2d at 4.

It is undisputed that Respondents were aware, in June 1994, that at least some of the wells had "cut" casing, and "junk" had been found in at least one well. These conditions are the very events or acts upon which Respondents rely in asserting their claims against Exxon. While the Respondents may not have known "the full extent of their damages" at that time (i.e. how many wells were affected), it is beyond dispute that they knew at that time that at least some of the wells were affected.

Between June of 1994 and January of 1995, the Respondents continued their investigation, and by January 24, 1995 were apparently aware of "the full extent of damage to the wells…" *Exxon Corp. v. Miesch*, 2005 WL 3163157, *7 (Tex. App.—Corpus Christi 2005, pet. filed). However, Respondents did not file suit until July 15, 1996. The court of appeals determined that it was the later date, January 24, 1995, when

Respondents' claims accrued, stating "we are not willing to say that finding a few isolated problems on a small number of the wells that had been reentered to date establishes field-wide knowledge regarding systematic damage to some numerous wells as a matter of law." *Id.*. This was erroneous, and represents a significant departure from existing case law on limitations and the discovery rule.

As this Court explained in *Childs*, when the claimant discovers the injury, the cause of action accrues and limitations is triggered. *Childs*, 974 S.W.2d at 40. Accrual is not deferred until the claimant learns the "full extent of the damages," or until he has enough evidence that would establish "field-wide knowledge" of damages, and not until he learns that the damages were not "isolated." It is the discovery of the injury – not its full extent – that imposes a duty to investigate and bring suit, if appropriate, within the applicable limitations period. "[A]ccrual occurs upon notice of injury, even if the claimant does not yet know the full extent of damages or the chances of avoiding them." *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 279 (Tex. 2004).

The court of appeals' decision ignores this well-settled rule. The interrelationship between the discovery rule and the statutes of limitations represents a balance between the often-conflicting policies of preventing litigation of stale or fraudulent claims, on the one hand, and ensuring that a claimant is not precluded from asserting his claim before he even knows he has one, on the other. The Respondents were able to complete their investigation in a relatively brief period of time – approximately 6 months, according to the court of appeals' opinion – leaving them approximately eighteen months to file suit. "The discovery rule is a limited exception to strict compliance with the statute of

limitations." *Altai*, 918 S.W.2d at 457. The Respondents had ample time to investigate and file suit, but failed to do so in a timely manner.

For these reasons, the Alliance respectfully urges the Supreme Court to grant Exxon's petition for review.

B. The court of appeals' decision improperly granted standing to Emerald.

The court of appeals reversed the trial court's order granting a directed verdict on Emerald Oil & Gas Company, L.P.'s ("Emerald") causes of action for fraud, negligent misrepresentation, and tortuous interference. *Miesch*, 2005 WL 3163157 at *30. Emerald, the subsequent lessee, was formed in 1993, more than two years after Exxon had abandoned the field, and therefore had no interest in the wells at the time of the alleged injuries.

It is a "well-established" rule in Texas that "a cause of action for injury to real property is a personal right which belongs to the person who owns the property at the time of the injury . . . it is not a right that runs with the land." *Senn v. Texaco, Inc.*, 55 S.W.3d 222, 225 (Tex. App.—Eastland 2001, pet. denied). Therefore, it is the owner of the land at the time of the injury to land that has standing to bring suit. *See id.*; *see also Cook v. Exxon Corp.*, 145 S.W.3d 776, 780-82 (Tex. App.—Texarkana 2004, no pet.), *Denman v. Citgo Pipeline Co.*, 123 S.W.3d 728, 732 (Tex. App.—Texarkana 2003, no pet.), *Exxon Corp. v. Pluff*, 94 S.W.3d 22, 26-28 (Tex. App.—Tyler 2002, pet. denied), *Lay v. Aetna Ins. Co.*, 599 S.W.2d 684, 686 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

Senn v. Texaco, Inc. also dealt with the applicability of the discovery rule. The court of appeals noted, however, that the discovery rule does not apply unless "the plaintiff has standing to come into court." *Senn*, 55 S.W.3d at 226-27. Because a subsequent lessee has no standing to bring suit for injury to property that occurred prior to obtaining his interest, the discovery rule has no application. *See id.* at 226 (stating that "[t]he discovery rule cannot work to transfer the ownership of a cause of action from one person to another simply because the second person claims to have discovered the injury").

A subsequent purchaser may protect himself by negotiating for warranties as to the condition of the property or an assignment of the right to any causes of action. *See id.* Emerald, and its predecessor in interest, Pace West Promotion, Ltd., sought no such protection.

The court of appeals failed to address the standing issue in its opinion. Because Emerald had no interest in the wells at the time of the plugging, the court of appeals' application of the discovery rule is misplaced. Emerald did not have standing to bring suit. To hold so contradicts longstanding Texas law.

PRAYER

THEREFORE, Amicus Curiae The Texas Alliance of Energy Producers prays that this Court grant the Petition for Review of Exxon Mobil Corporation and Exxon, Texas, Inc. as successor in interest to Humble Oil and Refining Company.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, pursuant to Rule 9.5 of the Texas Rules of Appellate Procedure, a true and correct copy of this Amicus Curiae Brief of The Texas Alliance of Energy Producers in Support of the Petition for Review was served on the following counsel certified mail, return receipt requested, on the _____ day of February, 2006:

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