

Energy Exploration: Considerations in Land Use

Jamie Bryan¹

Rory Hatch²

The meek shall inherit the Earth, but not its mineral rights.—Jean Paul Getty

No freedom is secure if your property rights are not secure.—Neal Boortz

In Texas, courts have long acknowledged that “a grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved.” *Harris v. Currie*, 176 S.W.2d 302, 305 (Tex. 1944). Accordingly, the mineral estate carries with it the right to enter the surface estate in order to extract the underlying minerals. *Cowan v. Hardeman*, 26 Tex. 217, 222 (Tex.1862). That right, though dominant, is far from absolute. Instead, oil and gas producers must contend with a variety of common law surface estate protections, contractual language in various agreements between surface owners, mineral owners and/or lessees, and local authorities’ attempts to frustrate oil and gas development. The tension among the various players results in a dynamic and ever-changing legal landscape for oil and gas operations in Texas.

The Implied Easement for Reasonable Use

The mineral estate (which, for purposes of this article, include a mineral lessee) is the dominant estate and enjoys an implied easement “of free use of such part and so much of the premises as is reasonably necessary to effectuate the purposes of the lease, having due regard for the rights of the owner of the surface estate.” *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 810 (Tex. 1972). The mineral estate is not liable for damages to the surface if acting within the scope of the implied easement. *Humble Oil & Ref. Co.*

¹ Jamie Lavergne Bryan is a partner in the Fort Worth and Houston offices of K&L Gates. Jamie concentrates her practice on the oil and gas industry in both the upstream and midstream sector and complex multi-district litigation. For the past 20 years, she has focused on a broad range of energy issues including royalty disputes, lease termination issues, surface use issues, municipal ordinances, environmental claims, right to take challenges, and eminent domain.

² Rory Hatch is an associate in the Houston office of K&L Gates LLP. Rory focuses his practice on complex commercial and tort litigation, property rights, appeals, and eminent domain matters. Rory regularly advises oil and gas clients regarding lease disputes, right of way negotiations, local regulations, easements and other encumbrances, survey access, and right to take challenges. He is an author and speaker on legal issues in the energy industry and eminent domain.

v. Williams, 420 S.W.2d 133, 134 (Tex.1967). Similarly, the mineral estate has no obligation to repair or restore any part of the surface damaged by its reasonably necessary use. *Warren Petroleum Corp. v. Monzingo*, 304 S.W.2d 362, 363 (Tex. 1957). Further, the mineral estate may obtain an injunction to prevent the surface estate from interfering in the mineral estate's implied easement. See *Ball v. Dillard*, 602 S.W.2d 521, 522 (Tex. 1980).

One of the most basic rights included in the implied easement is the right to enter the surface. *Cowan*, 26 Tex. at 222. The mineral estate may access the surface through the surface owner's private roads. See *Ball*, 602 S.W.2d at 523. This right also generally includes the right to build new access roads across the surface estate. *Humble Oil & Refining Co.*, 420 S.W.2d at 135; *Gulf Oil Corp. v. Walton*, 317 S.W.2d 260, 262 (Tex. Civ. App.—El Paso 1958, no writ).

The implied easement may also include the right to use groundwater. Groundwater is part of the surface estate. *EAA v. Day*, 369 S.W.3d 814, 832 (Tex. 2012). Nevertheless, the mineral estate has the right to drill water wells and capture groundwater reasonably necessary to drill and operate oil and gas wells. *Stradley v. Magnolia Petroleum Co.*, 155 S.W.2d 649, 651–52 (Tex. Civ. App.—Amarillo 1941, writ ref'd). Using groundwater obtained on the property is reasonably necessary even if water is available from other sources off the premises. *Sun Oil Co.*, 483 S.W.2d at 812. However, groundwater recovered under the implied easement cannot be used to recover any oil and gas off premises (absent a pooling agreement). *Robinson v. Robbins Petroleum Corp., Inc.*, 501 S.W.2d 865, 867 (Tex. 1973). Further, water sourced for secondary recovery operations may be limited by the applicable Texas Railroad Commission permit. TEX. WATER CODE § 27.0511(c), (d).

The implied easement also allows for produced water, like other groundwater, to be re-injected for secondary recovery. *Robinson*, 501 S.W.2d at 867. Alternatively, the implied easement permits the mineral estate to use portions of the surface estate for disposal wells. *Brown v. Lundell*, 344 S.W.2d 863, 866–67 (Tex. 1961); *TDC Engineering, Inc. v. Dunlap*, 686 S.W.2d 346, 349 (Tex. Civ. App.—Eastland 1985, writ ref'd n.r.e.). However, the mineral estate may be liable if water escapes these wells and causes additional surface damage. *Id.*; *Gen. Crude Oil Co. v. Aiken*, 344 S.W.2d 668, 671 (Tex. 1961).

The implied easement includes the right to lay pipelines and build storage tanks, power stations, and other structures necessary “to produce, save, care for and dispose [of]” oil and gas. *Joyner v. R. H. Dearing & Sons*, 134 S.W.2d 757, 759 (Tex. Civ. App.—

El Paso 1939, error dism'd judg. cor.).³ The mineral estate may also grant reasonably necessary pipeline easements to third parties. *Delhi Gas Pipeline Corp. v. Dixon*, 737 S.W.2d 96, 99 (Tex. App.—Eastland 1987, writ denied). However, the implied easement does not include the right to transport, treat, or store substances produced off the lease. *Id.*

Finally, the implied easement includes the right to explore for minerals, which includes performing seismic tests. *Gulf Oil Corp. v. Whitaker*, 257 F.2d 157 (5th Cir. 1958).

The Mineral Estate's Surface Use Must Be Reasonably Necessary and Non-Negligent.

The mineral estate may only use the surface to the extent reasonably necessary to explore for and extract the minerals underneath. *Sun Oil Co.*, 483 S.W.2d at 810. What constitutes a reasonably necessary use depends on the circumstances of the case, including the location of the property, the surface and mineral estates' current uses and possible alternative uses, and the condition of the surface. *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 627–28 (Tex. 1971). Most importantly, courts compare the “method and manner” of the mineral estate's use of the surface against the “usual, customary and reasonable practices in the industry under like circumstances of time, place and servient estate uses.” *Id.* at 627.

Whether a use is reasonably necessary is a question of fact for the jury to decide. *Texaco Inc. v. Joffrion*, 363 S.W.2d 827, 831 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.). The surface estate has the burden to demonstrate that the mineral estate has used more land than is reasonably necessary. *Lexington Ins. Co. v. Daybreak Exp., Inc.*, 393 S.W.3d 242, 245 (Tex. 2013). If the surface estate meets this burden, its damages are generally measured by the market value of land taken in excess of what is reasonably necessary. *Cole v. Anadarko Petroleum Corp.*, 331 S.W.3d 30, 38 (Tex. App.—Eastland 2010, pet. denied).

In exercising the right to make such use of the surface as is reasonably necessary to explore and extract oil and gas, the mineral estate owes the duty to the owner of the surface estate not to negligently injure the surface estate. *Gen. Crude Oil Co.*, 344 S.W.2d at 669. Claims that the mineral estate has used the surface beyond what is reasonably necessary are often brought together with claims that the mineral estate has negligently damaged the surface. For example, in *General Crude Oil Co. v. Aiken*, the Texas

³ See also *Ottis v. Haas*, 569 S.W.2d 508, 513 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); *Atlantic Ref. Co. v. Bright & Schiff*, 321 S.W.2d 167, 168–69 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.); *Mobil Pipe Line 6 Co. v. Smith*, 860 S.W.2d 157, 159–60 (Tex. App.—El Paso 1993, dism'd w.o.j.).

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