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Split Estate Issues (Mineral, Wind, Solar and Water)

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I. INTRODUCTION

I recall meeting with a client a few years ago at the closing of a pipeline deal. As I handed him the (substantial) damages check, he mused about how his family had almost sold their ranch in the early 2000s. "Of course, I was never for it," he told me, "good things happen when you own land."'

This was certainly true in his case, as the property now boasts dozens of producing wells and multiple large pipelines which have provided economic security for several generations of his family. His simple quote has stuck with me though, as those "good things" really are the heart of property ownership. However, they are not always the same for every landowner. For some, like my client, the "good things" come from economic exploitation of natural resources, such as oil, gas, coal, timber, water, wind, and light. For some, it is ranching or farming, often tied into generations of family heritage; for others, it is hunting or commercial development. And for some, it is simply the preservation of the land in its natural state. What counts as "good" depends upon the goals of the property owner and, so long as there is only one property owner and the estate is unsevered and unburdened, the owner is free to pursue this good to his or her heart's content.

But as we attorneys all know, an unsevered, unburdened estate owned by one individual or entity is the exception these days, not the rule. Today, the trend is toward severed estates, and often the surface owner does not own any interest in the minerals or the groundwater. The mineral estate itself may be further divided into differing ownership based on depth or substance, or burdened by non-participating royalty interests. Additionally, while not the subject of this paper, ownership in each of these estates may be fractionated into several (sometimes dozens or more) of co-tenants due to testate or intestate succession. And each of these owners will likely have vastly different ideas as to the use and development of the property.

The purpose of this paper is to address the conflicts that arise when owners of severed or split estates each attempt to pursue their own "good things" on the same piece of property. This paper will first explain the most common forms of conflict and how Texas law has addressed priority and accommodation between owners, but will deal solely with privately owned land, as the myriad issues with State land in all its forms exceeds the limited scope of this presentation.

II. The Severable and Lesser Estates

Ownership of an unsevered fee simple estate in real property theoretically encompasses the surface and extends to the highest heavens and down to the center of the Earth. *Cuius est solum, eius est usque ad coelum et ad inferos*, as is so often quoted in these types of papers. While this maxim is antiquated and hyperbolic, with some exceptions (such as regulated airspace and surface water) it holds up relatively well (in Texas at least). The Texas fee simple owner owns the surface and all subsurface substances and minerals as well as the groundwater. They are entitled to capture wind, solar, and geothermal energy. However, some of these resources can be severed from the fee estate[1]

[1] *See, e.g., Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 60 (Tex. 2016) ("Texas law has always recognized that a landowner may sever the mineral and surface estates and convey them separately.").

with such severance creating a new fee simple estate *of equal dignity* with the remaining fee.[2] At the time this paper is written, the mineral estate and the groundwater estate are the only estates capable of severance from the surface estate. It is yet to be determined whether Texas will recognize a severable "wind estate" or "solar estate."

a. The Surface Estate.

The term "surface estate" is somewhat of a misnomer, as it encompasses much more than just the "surface" of the property.[3] Severance of the mineral estate does not effect a horizontal severance of the fee as some may imagine. After severance of the mineral estate, the surface estate is comprised of the surface of the property, all so-called "surface minerals,"[4] all subsurface rock formations and porous spaces and groundwater, both fresh and saline[5]. The mineral estate owner only owns the individual molecules of oil and gas (or other mineral)—not the rock or sand formations which hold them.[6] Therefore, it is the surface owner, not the mineral owner, who must consent to salt water injection, gas storage and subsurface easements[7], though these activities may be encompassed under the mineral owner's implied easement discussed below.

In practical terms though, it is the use of the "surface" of the surface estate that is most often at issue when split estate conflicts arise. These have traditionally been agricultural and ranching uses, but now increasingly include wind and solar energy development. These uses can be surface intensive, especially in the case of solar farms as discussed *infra*, and have a high potential for interfering with concurrent mineral development.

b. The Mineral Estate

As mentioned above, a severed mineral estate is its own possessory fee simple estate of equal dignity with the surface estate, and with all the rights appurtenant to a fee simple estate. And each "mineral" can be separately severed so, in theory, an oil estate, gas estate, granite estate, uranium estate, etc. can exist concurrently in the same property. And each of these estates can be further subdivided based on depth. To further confuse the issue, Texas courts have stated that each of the

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[2] *See Gibson Drilling Co. v. B & N Petroleum, Inc.*, 703 S.W.2d 822, 826 (Tex. App.—Tyler 1986, writ ref'd n.r.e.) ("The doctrine of merger of estates has no application to a horizontal division of realty. [Severance] of the oil, gas and other minerals under a tract of land creates estates of equal dignity. There is no lesser or greater estate involved.").

[3] *See, e.g., Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814 (Tex. 2012) (explaining that groundwater is a vested real property interest owned by the surface owner); TEX. WATER CODE ANN. § 36.002 (legislating that a landowner owns the groundwater below the surface of the landowner's land as a real property).

[4] *See generally, Moser v. United States Steel Corp.,* 676 S.W.2d 99 (Tex. 1984); *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980); *Reed v. Wylie*, 554 S.W.2d 169 (Tex. 1977); *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971).

[5] *See, e.g., Fleming Found v. Texaco, Inc.*, 337 S.W.2d 846, 852 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.) (asserting rule that in Texas groundwater is owned by the surface estate); *Robinson v. Robbins Petroleum Corp., Inc.*, 501 S.W.2d 865 (Tex. 1973) (opining that saline content has no consequence on the ownership of groundwater).

[6] *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 47 (Tex. 2017) ("The surface owner retains ownership and control of the subsurface materials, while [the mineral owner] owns a property interest . . . in the oil and gas in place in the subsurface materials.").

[7] *Id. See also, Humble Oil & Refining Co v. West*, 508 S.W.2d 812 (Tex. 1974) ("[Surface ownership] include[s] the geological structures beneath the surface, together with any such structure that might be suitable for the underground storage of extraneous gas produced elsewhere.").

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