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SURFACE USE: THE DOMINANT ESTATE, REASONABLE USE AND DUE REGARD

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SURFACE USE:
THE DOMINANT ESTATE,
REASONABLE USE, AND DUE REGARD

I. Introduction[1]

Texas courts have long held that ownership of the mineral estate includes by implication certain rights to use the surface of the property for extraction of the minerals.

> It is a well established doctrine from the earliest days of the common law, that the right to the minerals thus reserved carries with it the right to enter, dig and carry them away, and all other such incidents thereto as are necessary to be used for getting and enjoying them. The Queen and Earl of Northumberland, Plow. 310, 336; *Earl of Cardigan v. Armitage, 4 Barn. & Cress. 197.* And this is also the civil law. Rockwell's Spanish and Mexican Law, 49, 53, 83.

Cowan v. Hardeman, 26 Tex. 217, 222 (1862). This doctrine, as applied and interpreted by the courts, has resulted in a well-recognized body of law relating to the "reasonable" use of the surface and surface estate by the mineral owner.

Not surprisingly, surface owners and mineral owners often disagree about what surface use by a mineral owner is "reasonable" or "reasonably necessary." This is particularly so when the surface owner does not also own an interest in the mineral estate, and therefore has no economic incentive to encourage use of the surface for mineral development.

Disputes over "reasonable use" sometimes result in high emotions and even the threat of violence. For example, in a 2004 case, one of lessee's employees was ordered off the land while the surface owner clutched a ballpeen hammer. There was also evidence in that case that the surface owner stated that "he was willing to die for his farm," and that he then asked if the lessee's employee "was willing to die for his company." *See Davis v. Devon Energy Prod. Co., L.P.*, 136 S.W.3d 419, 425 (Tex. App.—Amarillo 2004).

The difference in opinions between surface owners and minerals owners over what uses of the surface by the mineral owner are "reasonably necessary" invariably result from the drastically different point of view from which each sees the situation.

> From the viewpoint of the surface owner when mineral operations are conducted all across his land, interfering constantly with his ranching or farming, the mineral use becomes unreasonable. But the mineral operator who employs the usual and customary methods of the industry views the matter differently; it would be unreasonable for him to give way to grazing animals by not developing the underlying minerals, i.e., by not drilling wells and building roads and power lines and flow lines and tank batteries. The viewpoint of these parties on reasonableness is quite different.

Vest v. Exxon Corp., 752 F.2d 959, 960-961 (5th Cir. 1985). The court in *Vest* went on to observe the following with regard to the historic application of Texas law to the inherent conflict between surface owner and mineral owner:

> Sadly for the surface owner, Texas law, which governs in the present case, implies that a mineral lease gives a large measure of deference to the lessee's view of reasonableness.

Id.

As the *Vest* case impliedly recognizes, the case law regarding the reasonable use of the surface by the mineral owner was developed largely in the context of conflicts between mineral development and agricultural uses. Of significance today is how the established principles governing surface use will be applied as Texas becomes more urban, and as energy prices and advancing technology encourage mineral development in areas of the State in which competing surface uses already exist or are planned. In the older cases involving damages to agricultural property, the damages at issue were often only hundreds of dollars. Will the same surface use principles applied in those cases be applied today when a dispute in a Shale play in a suburban area could put tens of millions of dollars at stake for *both* the mineral owner *and* the surface owner?

[1] Note that the authors or attorneys in their firm were counsel for parties in several of the opinions cited in this article, including *Springer Ranch, LP v. Jones*, *Texas Genco, LP v. Valence Operating Company*, *Valence Operating Company v. Texas Genco, LP, Merriman v. XTO Energy, LLC, Tarrant County Water Control & Improvement District No. 1 v. Haupt, Inc.,* and *Tarrant County Water Control & Improvement District No. 1 v. Fullwood*.

Before addressing the law governing disputes between mineral estate owners and surface estate owners over use of the surface, the definitions of and distinctions between the mineral estate and the surface estate will be examined. Recently-litigated issues in cases involving horizontal wells and the use of one tract to access the minerals beneath another tract have focused courts' attention on those definitions and distinctions.

Following the delineation of the surface-estate versus mineral-estate ownership framework, this paper examines both the history and the current state of Texas law with regard to a mineral owner's right to make reasonable use of the surface estate for mineral development. The historical examination begins with a discussion of the case-law origins of the mineral owner's implied right to use the surface and of the limiting concepts of reasonable use and due regard.

Next, the general rule that the mineral estate is dominant, applicable when one tract's mineral estate is severed and when multiple tracts' mineral estates are pooled, is briefly summarized. And other general rules emanating from the dominance of the mineral estate are enumerated.

The cases addressing surface use disputes are divided into two general categories. "Category One" cases are those focusing solely on the mineral owner's allegedly *improper use* of the surface; "Category Two" cases are those of *conflicting uses* under the accommodation doctrine.

Category One includes cases in which, regardless of the surface owner's surface use or activity, the surface owner claims that the mineral owner is acting beyond or outside of his or her authority in some manner – by using more of the surface than is reasonably necessary, for example, or by acting negligently. The primary questions in Category One cases are "how much" of the surface can be utilized by the mineral owner and in "what manner."

Category Two includes cases of conflicting and incompatible surface uses under the accommodation doctrine. These are cases where (i) the surface owner has or claims an existing use of the surface, and (ii) the surface owner's use and the mineral owner's use cannot both take place at the same time at the same spot on the ground.

As the case law demonstrates, the same general principles of law are applied to both Category One and Category Two cases. What distinguishes the two categories is not the law that is applicable, but the factual context of the disputes and the nature of the claims in the respective categories.[2]

The paper focuses not only on how the case law has been applied, but also on practical measures that mineral and surface owners can and should undertake in order to avoid surface use disputes.

II. Definitions of the Surface and Mineral Estates

Knowledge of the precise definitions of the surface and mineral estates furthers an understanding about the issues that may arise from conflicts among the owners of interests in those estates and about how the controlling principles and practicalities may resolve those issues and conflicts.

In *Springer Ranch, Ltd. v. Jones*, 421 S.W.3d 273 (Tex. App. – San Antonio 2013, no pet.), Alice Burkholder had executed a 1956 oil, gas, and other mineral lease on a tract of land containing 8,545 acres, and the lease remained in effect during the controversy that led to the suit. In her will, Alice divided the real property into three tracts, and when the dispute arose, Springer Ranch owned a tract of about 227 acres that was adjacent to Rosalie Sullivan's 369-acre tract. In 1993, Alice's heirs executed an agreement to settle a question about the ownership of royalties under the 1956 lease, and the agreement stated in relevant part that "all royalties payable under the [1956 lease] from any well or wells on said 8,545.02 acre tract, shall be paid to the owner of the surface estate on which such well or wells are situated . . . ." *Id*. at 276-77.

In 2010, the oil and gas lessee drilled a horizontal well. The surface location of the wellhead was on the Springer Ranch property, but less than one-third of the horizontal drainhole's take points were on that property and over two-thirds were on Sullivan's property. *Id*. at 277-78, 288. After Sullivan demanded a portion of the royalties and the parties were unable to reach agreement, Springer Ranch brought a declaratory judgment action. In competing summary judgment motions, Springer Ranch claimed entitlement to all of the royalties, and Sullivan argued that the royalties should be allocated based on the location of the productive portions of the well. *Id*. at 278-79. The trial court granted Sullivan's motion and denied Springer Ranch's, and the court of appeals affirmed.

The court of appeals analyzed the meaning of the pertinent words in the 1993 agreement, including

[2] Admittedly, the two categories sometimes overlap one another. Still, this factual categorization seems a logical way to divide cases in which the same principles of law are applied.

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