

PRESENTED AT
44TH ANNUAL ERNEST E. SMITH
OIL, GAS AND MINERAL LAW INSTITUTE
April 20, 2018
Houston, Texas

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

David E. Jackson
Marc O. Knisely

Authors' Contact Information:

David E. Jackson
djackson@jacksonsjoberg.com
512.225.5560

Marc O. Knisely
mknisely@jacksonsjoberg.com
512.225.5602

Jackson Sjoberg & Townsend, LLP
711 West 7th Street
Austin, Texas 78701

TABLE OF CONTENTS

I.	Introduction	1
II.	Definitions of the Surface and Mineral Estates	2
III.	History of the Implied Surface-Use Right and Its Limitations	5
1.	The <i>Grimes v. Goodman</i> case	6
2.	The <i>Gregg</i> case—Laying the Groundwork for <i>Due Regard</i>	7
3.	Late 1920s to Early 1940s—The Terms <i>Reasonable Use</i> and <i>Due Regard</i> Become Established	7
IV.	The General Rule—Dominance of the Mineral Estate: Applicable When One Tract’s Mineral Estate Is Severed And When Multiple Tracts’ Mineral Estates Are Pooled.....	8
V.	Other General Rules Flowing from the Dominance of the Mineral Estate	10
A.	Inconvenience to the Surface Owner is not Controlling	10
B.	Surface Damages	10
C.	Restoration of the Surface	10
D.	Surface Owner’s Liability for Interference	11
E.	Use of the Surface by a Co-Tenant Mineral Owner	11
F.	A Mineral Owner’s Use of the Surface Must Benefit that Tract	11
VI.	Case Law on Dominance of the Mineral Estate	12
A.	Category One Cases: Claims of Excessive or Improper Use	12
1.	What is Reasonably Necessary? What is Excessive?.....	12
a.	Entry Upon the Surface; Ingress and Egress	12
b.	Location of Wells and Facilities	12
c.	Construction of Roads to Drillsites and Use of Caliche in Road Construction	13
d.	Construction of Pipelines	13
e.	Housing of Employees.....	13
f.	Disposal of Salt Water	13
g.	Use of Fresh Water	13
h.	Geophysical Operations	14
i.	Release of Deleterious Substances	14
2.	What Constitutes Negligent Use of the Surface?	14
a.	Cases Finding Negligence in Use of the Surface	14
b.	Cases Finding Non-Negligent Uses of the Surface	14
c.	Negligence Per Se and Texas Natural Resources Code Section 85.321	15
d.	Injury to Livestock	16
3.	Who Controls Use of the Surface and Subsurface for Off-Site Production?	16
4.	Unreasonable or Excessive Use of the Surface	16
5.	The <i>Moser</i> Rule—Destruction of the Surface by an Owner of “Other Minerals”	17
B.	Category Two Cases: Conflicting Use—The Accommodation Doctrine.....	18
1.	The <i>Getty v. Jones</i> case	18
2.	The <i>Haupt</i> case	19
3.	The <i>Texas Genco</i> case	21
4.	The <i>Merriman</i> case	23
5.	The <i>Coyote Lake Ranch</i> case	25
6.	The <i>VirTex</i> case	27
7.	The <i>Lesley</i> and <i>Lightning Oil</i> cases	28
8.	Other Accommodation Doctrine cases	29
VII.	The Railroad Commission’s Limited Jurisdiction over Surface Use	30
A.	Railroad Commission Jurisdiction	30
B.	Chapter 92 of the Texas Natural Resources Code, and Railroad Commission Statewide Rule 76	30
C.	Sand Mining	31

VIII. Municipal Ordinances	33
IX. Deed and Subdivision Restrictions	33
X. Injunction—Often a Dispute’s Inception	34
XI. A Practical Approach to Avoiding Conflicts	37
A. As Surface Owner	37
B. As Mineral Owner or Lessee	38
XII. Conclusion	38

TABLE OF CASES

<i>8100 North Freeway Ltd. v. City of Houston</i> , 329 S.W.3d 858 (Tex. App. – Houston [14 th Dist.] 2010, no pet.)	35
<i>Acker v. Guinn</i> , 464 S.W.2d 348 (Tex. 1971).....	17
<i>Amarillo Oil Co. v. Energy Agri-Products, Inc.</i> , 794 S.W.2d 20 (Tex. 1990),.....	30
<i>Amerada-Hess Corp. v. Iparrea</i> , 495 S.W.2d 60 (Tex. Civ. App.—El Paso 1973, writ ref’d n.r.e.)	14,16
<i>Amoco Prod. Co. v. Thunderhead Investments, Inc.</i> , 235 F. Supp. 2d 1163 (D.C. Colo. 2002).....	30
<i>Atlantic Ref. Co. v. Bright & Schiff</i> , 321 S.W.2d 167 (Tex. Civ. App.—San Antonio 1959, writ ref’d n.r.e.)	16
<i>B. L. McFarland Drilling Contractor v. Connell</i> , 344 S.W.2d 493 (Tex. Civ. App.—El Paso 1961), <i>case</i> <i>dism’d as moot, sub. nom., Connell v. B.L. McFarland Drilling Co.</i> , 347 S.W.2d 565 (Tex. 1961)	13
<i>Ball v. Dillard</i> , 602 S.W.2d 521 (Tex. 1980).....	11,12,37
<i>BCCA Appeal Group, Inc. v. City of Houston</i> , 496 S.W.3d 1, (Tex. 2016)	33
<i>Bowden v. Phillips Petroleum Co.</i> , 247 S.W.3d 690 (Tex. 2008)	26
<i>Brown v. Lundell</i> , 344 S.W.2d 863 (Tex. 1961)	9,13,14
<i>Burkett v. Lake Country Property Owners Assoc.</i> , No. 02-13-00090-CV, 2014 Tex. App. LEXIS 4240, 2014 WL 1510137 (Tex. App. – Fort Worth April 17, 2014, no pet.).....	34
<i>Butnaru v. Ford Motor Co.</i> , 84 S.W.3d 198, 204 (Tex. 2002)	35
<i>Byrom v. Pendley</i> , 717 S.W.2d 602 (Tex. 1986)	11
<i>Cage Brothers v. Whiteman</i> , 163 S.W.2d 638 (Tex. 1942)	33
<i>Carter v. Simmons</i> , 178 S.W. 743 (Tex. Civ. App.—Waco 1944, no writ).....	15
<i>City of Dallas v. Trinity East Energy, LLC</i> , No. 05-16-00349-CV, 2017 Tex. App. LEXIS 1070, 2017 WL 491259 (Tex. App. – Dallas Feb. 7, 2017, pet. filed)	33
<i>City of Houston v. Maguire Oil Co.</i> , 342 S.W.3d 726 (Tex. App. – Houston [14 th Dist.] 2011, pet. denied)	33
<i>City of Houston v. Trail Enterprises, Inc.</i> , 377 S.W.3d 873 (Tex. App. – Houston [14 th Dist.] 2012, pet. denied)	33
<i>Clint Independent School Dist. v. Marquez</i> , 487 S.W.3d 538 (Tex. 2016)	35
<i>Cole v. Anadarko Petroleum Corp.</i> , 331 S.W.3d 30 (Tex. App. – Eastland 2010, pet. denied)	11
<i>Cowan v. Hardeman</i> , 26 Tex. 217 (1862)	1,5
<i>Cox v. Davidson</i> , 397 S.W.2d 200 (Tex. 1965)	11

<i>Coyote Lake Ranch, LLC v. City of Lubbock</i> , 498 S.W.3d 53 (Tex. 2016)	5,9,25,26,27,32,35
<i>Cozart v. Crenshaw</i> , 299 S.W. 499 (Tex. Civ. App. 1927, no writ)	7,8
<i>Currey v. Ingram</i> , 397 S.W.2d 484 (Tex. Civ. App.—Eastland 1965, writ ref’d n.r.e.).....	14
<i>Davis v. Devon Energy Prod. Co.</i> , 136 S.W.3d 419 (Tex. Civ. App.—Amarillo 2004, no writ).....	11,12,29
<i>Delhi Gas Pipeline v. Dixon</i> , 737 S.W.2d 96 (Tex. Civ. App.—Eastland 1987, writ denied)	13
<i>DeNoie v. The Board of Regents of the University of Texas System</i> , 609 S.W.2d 601 (Tex. Civ. App. – Austin 1980, no writ)	35
<i>Discovery Operating, Inc. v. BP America Production Co.</i> , 311 S.W.3d 140 (Tex. App. – Eastland 2010, pet. denied)	15
<i>Double M Petroproperties v. Frisby</i> , 957 S.W.2d 594 (Tex. App. – Eastland 1997, no pet.)	35
<i>Egan v. Woodell</i> , 720 S.W.2d 169 (Tex. App. – San Antonio 1986, writ ref’d n.r.e.)	37
<i>Ellis Drilling Corp. v. McGuire</i> , 321 S.W.2d 911 (Tex. Civ. App.—Eastland 1959, writ ref’d n.r.e.)	14
<i>Entex v. Gonzalez</i> , 94 S.W.3d 1 (Tex. App. – Houston [14th Dist.] 2002, pet. denied)	15
<i>Exxon Corp. v. Atlantic Richfield Co.</i> , 678 S.W.2d 944 (Tex. 1984)	26
<i>Exxon Corp. v. Emerald Oil & Gas Co., L.P.</i> , 331 S.W.3d 419 (Tex. 2010)	15
<i>Fasken v. Darby</i> , 901 S.W.2d 591 (Tex. App. – El Paso 1995, no pet.)	37
<i>Fleming Foundation v. Texaco</i> , 337 S.W.2d 846 (Tex. Civ. App. – Amarillo 1960, writ ref’d n.r.e.)	4
<i>Forest Oil Corp. v. El Rucio Land & Cattle Co.</i> , 446 S.W.3d 58 (Tex. App. – Houston [1st Dist.] 2014), <i>aff’d</i> , 518 S.W.3d 422 (Tex. 2017)	10,11,15,30
<i>Forest Oil Corp. v. McAllen</i> , 268 S.W.3d 51 (Tex. 2008)	30
<i>Francis v. Coastal Oil & Gas Corp.</i> , 130 S.W.3d 76 (Tex. App. – Houston [1st Dist.] 2003, no pet.)	15
<i>Freeman v. Samedan Oil Corp.</i> , 78 S.W.3d 1 (Tex. App. – Tyler 2001, pet. granted, judgm’t vacated w.r.m.)	11
<i>Freeport Sulphur Co. v. American Sulphur Royalty Co.</i> , 6 S.W.2d 1039 (Tex. 1928)	26
<i>FPL Farming Ltd. v. Environmental Processing Systems, L.C.</i> , 351 S.W.3d 306 (Tex. 2011)	4
<i>General Crude Oil Co. v. Aiken</i> , 344 S.W.2d 668 (Tex. 1961)	9,14,16
<i>Getty Oil Co. v. Jones</i> , 470 S.W.2d 618 (Tex. 1971).....	10,18,19,35
<i>Getty Oil Co. v. Royal</i> , 422 S.W.2d 591 (Tex. Civ. App.—Beaumont 1958, writ ref’d n.r.e.)	12
<i>Gregg v. Caldwell-Guadalupe Pick-Up Stations</i> , 286 S.W. 1083 (Tex. 1926)	7
<i>Grimes v. Goodman Drilling Co.</i> , 216 S.W. 202 (Tex. Civ. App.—Fort Worth 1919, writ dism’d)	6,7

<i>Grubstake Inv. Ass’n v. Coyle</i> , 269 S.W. 854 (Tex. Civ. App. – San Antonio 1925, writ dismiss’d w.o.j.)	16
<i>Gulf Oil v. Whitaker</i> , 257 F.2d 157 (5th Cir. 1958)	16
<i>Gulf Oil Corp. v. Alexander</i> , 291 S.W.2d 792 (Tex. Civ. App.—Amarillo 1956), writ ref’d n.r.e. per curiam, 295 S.W.2d 901 (Tex. 1956)	15
<i>Gulf Oil Corp. v. Walton</i> , 317 S.W.2d 260 (Tex. Civ. App.—El Paso 1958, no writ)	12,13
<i>Gulf Production Company v. Continental Oil Company</i> , 144 S.W.2d 488 (Tex. 1942).	4,8
<i>Harris v. Currie</i> , 176 S.W.2d 302 (Tex. 1943)	5,6
<i>Haupt, Inc. v. Tarrant County Water Control & Improvement Dist. Number One</i> , 870 S.W.2d 350 (Tex. App. – Waco 1994, no writ)	20,21
<i>Heinatz v. Allen</i> , 217 S.W.2d 994 (Tex. 1949)	31,32
<i>Helton v. City of Burkburnett</i> , 619 S.W.2d 23 (Tex. App. – Fort Worth 1981, writ ref’d n.r.e.)	33
<i>Hicks v. Humble Oil & Refining Co.</i> , 970 S.W.2d 90 (Tex. App. – Houston [14th Dist.] 1998, pet. denied)	15
<i>Humble Oil & Refining Co. v. L. & G. Oil Co.</i> , 259 S.W.2d 933 (Tex. Civ. App. – Austin 1953, writ ref’d n.r.e.)	16
<i>Humble Oil & Refining Co. v. West</i> , 508 S.W.2d 812 (Tex. 1974)	3,5,29
<i>Humble Oil & Refining Co. v. Williams</i> , 420 S.W.2d 133 (Tex. 1957)	9,10,13
<i>In re McDonald</i> , No. 14-13-00127-CV, 2013 Tex. App. LEXIS 4052, 2013 WL 1279454 (Tex. App. – Houston [14th Dist.] March 28, 2013, orig. proceeding)	31
<i>Jones v. Killingsworth</i> , 403 S.W.2d 325 (Tex. 1965)	30
<i>Jones v. Nafco Oil & Gas, Inc.</i> , 380 S.W.2d 570 (Tex. 1964)	14
<i>Joyner v. R. H. Dearing & Sons</i> , 134 S.W.2d 757 (Tex. Civ. App.—El Paso 1939, error dismiss’d judg. cor.)	8,13
<i>Key Operating and Equipment, Inc. v. Hegar</i> , 435 S.W.3d 794 (Tex. 2014)	9,11,12,29
<i>Klepak v. Humble Oil and Refining Co.</i> , 177 S.W.2d 215 (Tex. Civ. App.—Galveston 1944, writ ref’d w.o.m.)	33
<i>Landreth v. Melendez</i> , 948 S.W.2d 76 (Tex. App.—Amarillo 1997)	29,30
<i>Lazy M Ranch v. TXI Operations, LP</i> , 978 S.W.2d 678 (Tex. App. – Austin 1998, pet. denied)	33
<i>Lazy R Ranch, LP v. ExxonMobil Corp.</i> , 456 S.W.3d 332 (Tex. App. – El Paso 2015), <i>aff’d in part and</i> <i>rev’d in part</i> , 511 S.W.3d 538 (Tex. 2017)	15
<i>Lesley v. Veterans Land Board</i> , 352 S.W.3d 479 (Tex. 2009)	28,29,34
<i>Lightning Oil Company v. Anadarko E & P Onshore, LLC</i> , 480 S.W.3d 628 (Tex. App. – San Antonio 2015), <i>aff’d</i> , 520 S.W.3d 39 (Tex. 2017)	4,5,9,16,28,29,35

<i>Magnolia Petroleum Co. v. Railroad Comm'n</i> , 170 S.W.2d 189 (1943)	30
<i>Mahler v. City of Seabrook</i> , 538 S.W.2d 870 (Tex. Civ. App. – Houston 1976, no writ)	31
<i>Marriott v. City of Dallas</i> , 644 S.W.2d 469 (Tex. 1983)	31
<i>Merriman v. XTO Energy, Inc.</i> , 407 S.W.3d 244 (Tex. 2013)	10,24,25,26
<i>Merriman v. XTO Energy, Inc.</i> , No. 10-09-00276-CV, 2011 Tex. App. LEXIS 3601, 2011 WL 1901987 (Tex. App. – Waco May 11, 2011), <i>aff'd</i> , 407 S.W.3d 244 (Tex. 2013)	23,35
<i>Miller v. Crown Central Petroleum Corp.</i> , 309 S.W.2d 876 (Tex. Civ. App.—Eastland 1958, writ dism'd by agr.).....	13
<i>Mobil Pipe Line Co. v. Smith</i> , 860 S.W.2d 157 (Tex. App. – El Paso 1993, writ dism'd w.o.j.)	37
<i>Monfort v. Trek Resources, Inc.</i> , 198 S.W.3d 344 (Tex. App.—Eastland 2006, no pet.)	30
<i>Moser v. United States Steel Corp.</i> , 676 S.W.2d 99 (Tex. 1984).....	4,17,18
<i>Murphee v. Phillips Petroleum Co.</i> , 492 S.W.2d 667 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.)	15
<i>Nale v. Carroll</i> , 289 S.W.2d 743 (Tex. 1956).....	30
<i>North Shore Energy, LLC v. Harkins</i> , 501 S.W.3d 598 (Tex. 2016)	14
<i>Oryx Energy Co. v. Shelton</i> , 942 S.W.2d 637 (Tex. App.—Tyler 1996, no writ)	14,16
<i>Ottis v. Haas</i> , 569 S.W.2d 508 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).....	10,11
<i>Parker v. Texas Co.</i> , 326 S.W.2d 579 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.)	11,12
<i>Peterson v. Grayce Oil Company</i> , 37 S.W.2d 367 (Tex. Civ. App.—Fort Worth 1931), <i>aff'd</i> , 98 S.W.2d 781 (Tex. 1936)	14
<i>Petty v. Winn Exploration Co., Inc.</i> , 816 S.W.2d 432 (Tex. App. – San Antonio 1991, writ denied)	37
<i>Pharaoh Oil & Gas, Inc. v. Ranchero Esperanza, Ltd.</i> , 343 S.W.3d 875 (Tex. App. – El Paso 2011, no pet.)	36
<i>Phillips Petroleum Co. v. Cargill</i> , 340 S.W.2d 877 (Tex. Civ. App.—Amarillo 1960, no writ).....	12
<i>Pritzer & West v. Williamson</i> , 159 S.W.2d 181 (Tex. Civ. App. – Fort Worth 1942, writ dism'd w.o.j.)	8
<i>Property Owners of Leisure Land Inc. v. Woolf & Maggee, Inc.</i> , 786 S.W.2d 757 (Tex. App.—Tyler 1990, no writ)	34
<i>Psencik v. Wessels</i> , 205 S.W.2d 658 (Tex. Civ. App. – Austin 1947, writ ref'd)	32
<i>Railroad Comm'n v. City of Austin</i> , 524 S.W.2d 262 (Tex. 1975).....	30
<i>Reading & Bates Offshore Drilling Co. v. Jergensen</i> , 453 S.W.2d 853 (Tex. Civ. App.—Eastland 1970, writ ref'd n.r.e.)	13
<i>Reed v. Wylie</i> , 554 S.W.2d 169 (Tex. 1977)	4,17

<i>Reed v. Wylie</i> , 597 S.W.2d 743 (Tex. 1980)	4,17
<i>Richter v. Hickman</i> , 243 S.W.2d 466 (Tex. Civ. App. – Galveston 1951, no writ)	37
<i>Robinson v. Robbins Petroleum Corp.</i> , 501 S.W.2d 861 (Tex. 1973)	11,14
<i>Rosenthal v. Railroad Commission of Texas</i> , No. 03-09-0015-CV, 2009 Tex. App. LEXIS 6522, 2009 WL 2567941 (Tex. App. – Austin 2009, pet. denied)	4,30
<i>Ryan Consol. Petroleum Corp. v. Pickens</i> , 285 S.W.2d 201 (Tex. 1955), <i>cert. denied</i> , 351 U.S. 933 (1956)	30
<i>San Jacinto Sand Company v. Southwestern Bell Telephone Company</i> , 426 S.W.2d 338 (Tex. Civ. App. – Houston [14th Dist.] 1968, writ ref’d n.r.e.)	32
<i>Shelby Operating Co. v. City of Waskom</i> , 964 S.W.2d 75 (Tex. App. – Texarkana 1998, no pet.)	33
<i>Shell Petroleum Corporation v. Liberty Gravel and Sand Company</i> , 128 S.W.2d 471 (Tex. Civ. App. – Beaumont 1939, no writ)	32,33
<i>Ski Masters of Texas, LLC v. Heinemeyer</i> , 269 S.W.3d 662 (Tex. App. – San Antonio 2008, no pet.)	34
<i>Smith v. Merritt</i> , 940 S.W.2d 602 (Tex. 1997)	15
<i>Springer Ranch, Ltd. v. Jones</i> , 421 S.W.3d 273 (Tex. App. – San Antonio 2013, no pet.)	2,3,4,5
<i>Stanolind Oil & Gas v. Wimberly</i> , 181 S.W.2d 942 (Tex. Civ. App. – El Paso 1944, no writ).....	12,36
<i>Stradley v. Magnolia Petroleum Co.</i> , 155 S.W.2d 649 (Tex. Civ. App.—Amarillo 1941, writ ref’d).....	13
<i>Sun Oil Co. v. Whitaker</i> , 483 S.W.2d 808 (Tex. 1972).....	9,10,13
<i>SWEPI, LP v. Camden Resources, Inc.</i> , 139 S.W.3d 332 (Tex. App.—San Antonio 2004, pet. denied).....	30
<i>SWEPI LP v. Railroad Comm’n of Texas</i> , 314 S.W.3d 253 (Tex. App. – Austin 2010, pet. denied)	30,31
<i>Tarrant County Water Control & Improvement Dist. Number One v. Haupt, Inc.</i> , 854 S.W.2d 909 (Tex. 1993)	6,19,20
<i>TDC Engineering, Inc. v. Dunlap</i> , 686 S.W.2d 346 (Tex. Civ. App.—El Paso 1959, writ ref’d n.r.e.)	11,13
<i>Texaco, Inc. v. Faris</i> , 413 S.W.2d 147 (Tex. Civ. App. – El Paso 1967, writ ref’d n.r.e.)	26
<i>Texaco, Inc. v. Parker</i> , 373 S.W.2d 870 (Tex. Civ. App.—El Paso 1963, writ ref’d n.r.e.)	12
<i>Texaco v. Joffrion</i> , 363 S.W.2d 827 (Tex. Civ. App.—Texarkana 1962, writ ref’d n.r.e.)	14,17
<i>Texaco v. Spires</i> , 435 S.W.2d 550 (Tex. Civ. App.—Eastland 1968, writ ref’d n.r.e.)	14
<i>Texas A & M University v. Carapia</i> , 494 S.W.3d 201 (Tex. App. – Waco 2015, pet. denied)	37
<i>Texas Genco, LP v. Valence Operating Co.</i> , 187 S.W.3d 118 (Tex. App.—Waco 2006, pet. denied)	21,22,35
<i>Texas Power & Light Co. v. Cole</i> , 313 S.W.2d 524 (Tex. 1958)	33

<i>The State of Texas v. Cemex Construction Materials South, L.L.C.</i> , 350 S.W.3d 396 (Tex. App. – El Paso 2011, pet. granted, judgment vacated w.r.m.)	32
<i>Transport Co. of Texas v. Robertson Transports Inc.</i> , 261 S.W.2d 549 (Tex. 1953)	35
<i>Trenolone v. Cook Exploration Co.</i> , 166 S.W.3d 495 (Tex. Civ. App.—Texarkana 2005)	13
<i>Trinity Materials, Inc. v. Sansom</i> , No. 03-11-00483-CV, 2014 Tex. App. LEXIS 13884, 2014 WL 74647464023 (Tex. App. – Austin Dec. 31, 2014, pet. denied)	31
<i>Unger v. State</i> , 629 S.W.2d 811 (Tex. App. – Fort Worth 1982, pet. ref’d)	33
<i>Universal Health Services, Inc. v. Renaissance Women’s Group, P.A.</i> , 121 S.W.3d 742 (Tex. 2003)	26
<i>Valence Operating Co. v. Texas Genco, LP</i> , 255 S.W.3d 210 (Tex. App. – Waco 2008, no pet.)	22,23
<i>Vest v. Exxon Corp.</i> , 752 F.2d 959 (5th Cir. 1985)	1,38
<i>Veterans Land Board v. Lesley</i> , 281 S.W.3d 602 (Tex. App. – Eastland 2009), <i>aff’d in part and rev’d in part</i> , 352 S.W.3d 479 (Tex. 2011)	34
<i>VirTex Operating Co. v. Bauerle</i> , No. 04-16-00549-CV, 2017 Tex. App. LEXIS 10413, 2017 WL 5162546 (Tex. App. – San Antonio Nov. 8, 2017, pet. filed)	27,28
<i>Wagner & Brown, Ltd. v. Sheppard</i> , 282 S.W.3d 419 (Tex. 2008)	11
<i>Warren Petroleum Corp. v. Martin</i> , 271 S.W.2d 410 (Tex. 1954)	10,14,16
<i>Weaver v. Reed</i> , 303 S.W.2d 808 (Tex. Civ. App.—Eastland 1957, no writ)	14
<i>Wilson v. Texas Co.</i> , 237 S.W. 649 (Tex. Civ. App.—Fort Worth 1951, writ ref’d n.r.e.)	14
<i>Yates v. Gulf Oil Corp.</i> , 182 F.2d 286 (5th Cir. 1950)	14

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

I. Introduction¹

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.*,

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*.

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?

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.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Surface Use: The Dominant Estate, Reasonable Use, and Due Regard

Also available as part of the eCourse

[Surface Use: The Dominant Estate, Reasonable Use, and Due Regard](#)

First appeared as part of the conference materials for the
44th Annual Ernest E. Smith Oil, Gas and Mineral Law Institute session
"Surface Use: The Dominant Estate, Reasonable Use, and Due Regard"