UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2022
Fundamentals of Oil, Gas and Mineral Law

April 21, 2022

Houston, TX

Divided Surface and Mineral Estates

Survey of Split Estates, Implied Easement, Accommodation Doctrine, and Selected Emerging Issues

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DIVIDED SURFACE AND MINERAL ESTATES—SURVEY OF SPLIT ESTATES, IMPLIED EASEMENT, ACCOMMODATION DOCTRINE, AND SELECTED EMERGING ISSUES[1]

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TABLE OF CONTENTS

[1] The authors published a prior version of this article, with a multi-jurisdictional focus, in 2018 in the *Proceedings of the 64th Annual Rocky Mountain Mineral Law Institute*. *See* Kevin M. Beiter & Austin W. Brister, *Divided Surface and Mineral Estates-What's Mine Is Mine and Sometimes What's Yours Is Mine Too*, 64 Rocky Mt. Min. L. Inst. 4-1 (2018).

I. Introduction[2]

Courts have universally concluded as a core property ownership concept that when minerals are severed from the surface estate, the mineral estate includes, by necessary implication, the concomitant right to the use and occupancy of the surface to the extent reasonably necessary to access and produce the mineral estate even if the surface owner's rights are adversely affected. Consequently, the surface estate is referred to as the servient estate and the mineral estate is denominated the dominant estate.[3] Texas courts, recognizing the burden imposed upon the surface estate and the likelihood of conflicts, have evolved doctrines imposing an obligation on the part of the mineral owner to act reasonably in relation to the surface owner and liability on the mineral owner for failure to do so. Conversely, Texas courts have not imposed any obligation for the mineral owner to compensate the surface owner for damage to the surface caused by the mineral owner's reasonable and non-negligent operations on the surface estate, even if the impacts are considerable.

Obviously, reasonableness is in the eye of the beholder and entirely dependent upon the circumstances. What might be reasonable on the high plains of Texas could be entirely

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[3] In the 2016 case of *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53 (Tex. 2016), the Texas Supreme Court took pains to explain that the terms dominant and servient do not mean one estate is superior and the other lesser or inferior. Referring to one estate as dominant means only that the estate is benefited by the implied right or servitude, while referring to an estate as servient means that it is subject to the servitude and must allow the exercise of the implied right.

unreasonable next to an urban hospital or on the golf course of the Houston Country Club. Similarly, mineral operations, wherever located, that might have been perfectly reasonable in 1970 (or even more recently) could be seen as unreasonably burdensome in 2020 and beyond given advancement of technology. And in any case, some uses of surface estate might make all mineral operations unreasonable on those lands, even if those mineral operations would have been reasonable elsewhere. Given the natural tension between the owners of the surface and mineral estates, the definition of "reasonableness" has been the subject of innumerable cases. Striking a balance has also increasingly become the subject of legislation and regulation among the various producing states.

Technological and operational advances in the mineral and energy industries have redefined and sharpened the potential for conflict between mineral and surface estates. The age-old battle between surface owners and mineral owners regarding their respective rights to the use of the surface estate has expanded into the subsurface and in some cases to the overlying airspace. Evolving production practices have also underscored the nature and extent of "burdens" not foreseen in earlier times. This article provides a brief review of the evolution of legal rights associated with mineral interests severed from surface estates. In addition, it will examine how Texas courts have moved to adapt the legal frameworks to deal with potential conflicts. It will also look at some new and developing areas of conflict that are beginning to be addressed by the courts as oil and energy exploration and production practices evolve.

II. Definition of the Estates—Ownership

An understanding of the scope of surface and mineral ownership must start with the scope and extent of real property generally. From (at least) earliest English common law, the estate owned by a freeholder/landowner was defined by the "*ad coelum* doctrine."[4] Historically this meant the real property owner had rights not only to the surface of the land but also to the subsurface (theoretically to the center of the earth) and to the sky above (theoretically to the edge of the universe). The extent of the real property estate has been redefined and limited as our technological and scientific understanding has expanded and public rights have evolved so that the scope and extent of real property ownership today is more limited.[5] However, the core concept remains that the fee simple title in real estate is essentially all possessory and ownership rights associated with a piece of land.

Real estate is divisible into estates consisting of its constituent parts, and those constituent parts also consist of various

[4] *Cuius est solum, eius est usque ad coelum et ad inferos* roughly translates to: "To whom owns the soil, it is theirs including to the heavens and to hell." The exact origin of the *ad coelum* doctrine is subject to some discussion, but it was firmly established in English common law by the 15th century and notably referenced in William Blackstone's 18th century treatise Commentaries on the Laws of England. The United States Supreme Court described ownership of land at common law extending "to the periphery of the universe." *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062 (1946).

[5] As will be discussed in more detail in subsequent sections of this article, literal application of the *ad coelum* doctrine would yield implausible results in the world as we now know it and rights in adjacent airspace overlying lands have been limited and redefined by doctrines, laws and treaties relating to public and navigable airspace and space itself. For an interesting graphic depiction of the implausibility of modern application of the *ad coelom* doctrine see https://www.universetoday.com/107322/is-the-solar-system-really-a-vortex/.

associated rights. One possible division involves the severance of minerals from the remaining fee simple estate. This may be achieved by a grant in a conveyance (such as a mineral deed) or a reservation from a conveyance; by an oil, gas, and mineral lease (which in most producing jurisdictions is treated as severing and conveying a fee simple determinable estate in the minerals); or by legal regulation (such as by condemnation, statute, or ordinance).

Once the severance is effected, the separate estates, in turn, have constituent and appurtenant rights that are necessary to the use and enjoyment of the two estates. Those rights implicate activities on, above, and below the surface of the ground. In this connection, referring to one estate as "surface" and the other as "mineral" becomes confusing. When the realty is divided such that minerals are severed from the surface estate, the dividing line is not necessarily defined to be the surface of the ground, but instead is defined by the nature of the substances owned and the rights associated with mineral or surface ownership, whether relating to activities above the surface or below it.[6]

For purposes of this article, when discussing split mineral and surface estates, the term "surface estate" will refer to all rights and interests in real property other than the mineral estate.[7] The term "mineral estate" will refer to the rights and interests that pass to an owner with the grant, reservation, or other legal severance of minerals from the surface estate.

1. Surface Destruction Test

Since the surface estate consists of everything except minerals and the rights associated with the mineral estate, this obviously raises the need to define a "mineral" in connection with a severed estate. This is relatively easy to do when the parties actually state what they mean by "minerals" in the document effecting the severance—in which case that specific language will control. Judicial struggles have typically involved efforts to resolve the scope of a grant or reservation of "minerals" or "minerals of any kind or character" without further definition, or of "other minerals" in connection with a grant or reservation of "oil, gas, and other minerals."

Regarding the latter, early Texas case law applied a test called the "surface destruction test," resting the definition of minerals not on common understanding, chemical quality, or composition, but on proximity of the substance in question to the surface and the extent to which the surface would be impacted by extraction.[8] This intent-based analysis was a balancing test that required factual analyses of whether an unnamed substance was a "mineral" and of whether the extraction of those substances would result in "substantial" surface destruction.

The surface destruction test grew out of courts' efforts to determine the intent of the

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[6] Mineral severances were often historically accomplished using language of grant or reservation describing the estate as being something like "all oil, gas and other minerals in, on, under or that may be produced from" a defined tract of land. Language of this kind has led to many conflicts and has been extensively parsed by Courts trying to discern the intention of the parties and the scope of the grant of reservation usually in the context of the meaning to be ascribed to the term "other minerals."

[7] *Cf. Gulf Prod. Co. v. Cont'l Oil Co.*, 164 S.W.2d 488 (Tex. 1942), *superseded*, 163 S.W.2d 488 (Tex. 1942); *Fleming Found. v. Texaco, Inc.*, 337 S.W.2d 846 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.).

[8] *See Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971).

Title search: Divided Surface and Mineral Estates | Survey of Split Estates, Implied Easement, Accommodation Doctrine, and Selected Emerging Issues

First appeared as part of the conference materials for the
2022 Fundamentals of Oil, Gas and Mineral Law session
"Emerging and Re-Emerging Issues in the Use of Surface for Oil and Gas Operations"