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Inherent Surface Conflicts Between Oil and Gas and Renewable Energy Operations/Development

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INHERENT SURFACE CONFLICTS BETWEEN OIL AND GAS AND RENEWABLE ENERGY OPERATIONS/DEVELOPMENT

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I. Introduction[1]

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.[2] 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-

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[2] 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.

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 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."[3] 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.[4] However, the core concept remains that the fee simple title in

[3] *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).

[4] 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/.

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