

Accommodation of the Estates Doctrine

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To the surprise of many Texas landowners, the mineral estate is dominant over the surface when it comes to mineral exploration and production. Simply put, an oil company (mineral lessee) has the automatic (implied) right to use as much of the physical surface and substances belonging to the surface owner as is reasonably necessary to explore and produce the minerals. This right comes without asking permission to enter, to use the surface or the surface substances. The mineral lessee need not pay surface damages, for using the surface substances or to clean up.

The Takeaway

Surface owners without minerals face many perplexing situations when an oil company enters to explore and produce the minerals. Surface owners gain some relief and protection under the recently recognized accommodation of the estates doctrine.

To gain goodwill, some oil companies offer to pay surface damages and restore the surface.

This begs the question: What substances belong to the mineral owner, and what substances belong to the surface owner? In Texas, the answer depends on the wording of the mineral reservation. When the terms *minerals or oil, gas and other minerals* are used, oil, gas, salt, sulfur and possibly uranium belong to the mineral owner. Coal, lignite and iron ore are also included when they lie within 200 feet of the surface and can be produced without destroying (depleting) the surface.

The substances owned by the surface owner in this situation include sand, gravel, caliche, surface shale, building stone, limestone and groundwater. As mentioned earlier, the coal, lignite and iron ore also belong to the surface owner if they lie on or within 200 feet of the surface and the production destroys the surface.

The two surface substances used most often by oil companies for exploration and production include groundwater for drilling and fracking, and caliche for constructing roads and drilling pads. Statewide, it takes between ten and

40 acre-feet of groundwater to frack a horizontal well. In many cases, this represents a significant amount of free groundwater for the oil companies.

Exceptions to the Rule

Texas case law holds three exceptions. Oil companies must, by law, pay surface damages when they (1) use more surface, groundwater and/or caliche than is reasonably necessary, (2) negligently injure the surface or (3) fail to accommodate the estates. The Center's *Minerals, Surface Rights and Royalty Payments* (recenter.tamu.edu/pdf/840.pdf) discusses these rules in more detail.

The accommodation of the estates doctrine or rule is the most recently recognized exception and the least understood. Many surface owners mistakenly think this means the oil companies must accommodate all their needs as a surface owner when they enter a property to explore and produce the minerals. The rule is much more restrictive.

Also known as the “alternative means doctrine,” the rule serves to balance the rights of the surface owner and the mineral lessee’s use of the surface when unnecessary injury to the surface occurs.

The Texas Supreme Court established the doctrine in *Getty Oil v. Jones* (1970). Jones was a farmer in Gaines County who operated several pivot irrigation systems. The lateral arms cleared objects less than seven feet high. During the winter of 1967, Getty entered and drilled two oil wells within these systems and erected two pump jacks. One rose 17 feet on the upstroke and another 34 feet. These heights prevented the operation of two of Jones’ pivot irrigation systems. Jones asked Getty to install shorter pumps or to construct below-surface cellars to allow the operation of the irrigation systems.

Getty refused, relying on its implied right. Jones sued Getty for an injunction to install shorter pumps and/or below-ground cellars and for surface damages.

When the issue reached the Texas Supreme Court, it ruled in Jones’ favor. Though Getty had the right to use as much of the surface as reasonably needed, the right is not exclusive. Said the court:

. . . the implied right in favor of the mineral estate is to be exercised with due regard for the rights of the owner of the servient estate. The *due regard concept* defines more fully what is to be considered in the determination of whether a surface use by the lessee is reasonably necessary.

But under the circumstances indicated here (i.e., where there is an existing use by the surface owner, which would otherwise be precluded or impaired, and where under the established practice in the industry there are alternatives available to the lessee whereby the minerals can be recovered) the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.

Later, the high court stated that this alternative must be pursued even if it requires additional funds as long as it is an established industry practice.

The rule was further refined in *Sun Oil Co. v. Whitaker*. In this case, the surface owner protested the use of massive amounts of groundwater in a waterflood project being conducted on the property. The owners maintained that the project significantly affected water flowing to the surface, which in turn reduced the amount of groundwater available for irrigation and shortened the life of the irrigated farmland. The surface owner claimed the accommodation of the estates doctrine required the lessee to take water from sources located off the leased premises. This was a reasonable alternative, according to Whitaker.

The high court disagreed, limiting the doctrine to reasonable alternatives that exist *on the premises*, not off.

Merriman v. XTO Energy Inc., decided by the Texas Supreme Court in 2013, offers another refinement. Merriman purchased the surface to a 40-acre tract in 1996. He received no minerals. Merriman, a full-time pharmacist in Limestone County, conducted a cattle-raising operation on this and other acreage he owned in the area on weekends.

Once a year, he drove his cattle to the 40 acres, sorted them using temporary stock panels and electric fences in conjunction with permanent fencing and structures. When the sorting ended, he removed the temporary working pens and returned the area to grazing.

Merriman challenged XTO's right to place a drill site on the 40 acres citing the accommodation of the estates doctrine. The trial court held the doctrine did not apply. Merriman appealed. The appellate court affirmed the trial court, and the issue went to the Texas Supreme Court.

The high court added a wrinkle to the doctrine as pronounced in *Getty Oil v. Jones*. It ruled that the *surface owner* must prove that he or she had no reasonable alternative means of maintaining the cattle operations on the property. The surface owner must show that any alternative means he or she pursues would be impracticable and unreasonable under the circumstances. Merriman failed to meet this burden of proof.

What is interesting about this case is that the surface owners now face two burdens of proof. They must prove no reasonable alternatives exist to their *current uses*, while, at the same time, proving the lessee has reasonable alternatives to develop minerals.

In 2014, the Amarillo Court of Appeals rendered an interesting decision in *City of Lubbock v. Coyote Lake Ranch LLC*. It did not involve a dispute between the surface owner and the mineral lessee but between the groundwater owner and the surface owner.

The City of Lubbock purchased groundwater rights in Bailey County for municipal purposes. The deed gave the city the exclusive use of the surface for ingress and egress to explore and produce the groundwater, similar to rights given to an oil company to explore and produce the minerals in a lease.

In 2012 and 2013, the city proposed a plan to implement the exploration and development of the groundwater. The surface owner, Coyote Lake Ranch (CLR), sued to stop the project because a reasonable means existed to ameliorate the surface damages. The trial court agreed and issued an injunction. The city appealed.

The appellate court reversed the trial court and dissolved the injunction. The trial court applied the accommodation of the estates doctrine requiring due regard of the two interests. However, the doctrine applies only when one of the estates is dominant over the other, such as when the mineral and surface estates have been severed. A severance of the ownership of the surface from the groundwater does not create a dominant estate.

"Our research has yielded no case in which a Texas court has applied the doctrine to the groundwater context, and CLR has cited none that have." The appellate court rejected the application of the doctrine to this situation.

The case of *Valence Operating Co. v. Texas Genco LP* decided by the Waco Court of Appeals in 2008 involved a rather complex situation. Valence (the mineral lessee) wanted to drill within a disposal area being operated by Genco, a coal-burning electricity generating plant. The coal-burning process produces fly ash and bottom ash that require a class II industrial landfill permit from the Texas Commission on Environmental Quality for disposal.

In 1985, Genco acquired a permit for a 450-acre disposal site. In 1994, the site was modified to include the 91 acres where Valence intended to drill a test well. The disposal sites were recorded in the deed records. Genco sought an injunction to prevent the drilling based on the doctrine.

In the past, Genco accommodated Valence's needs for drilling by allowing it to drill on the outer fringes of the landfill. However, the landfill had literally been surrounded by drill sites. The present proposed drill site would be located within the interior of the disposal site.

The trial court granted an injunction. Valence appealed. The appellate court upheld the imposition of the injunction by quoting from *Getty Oil v. Jones*.

Where there is an existing use by the surface owner, which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the mineral lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the mineral lessee.

Basically, the reasonable alternative for Valence was to drill a directional well located 1,000 to 1,150 feet from the bottom-hole location. This is an industry-established, technically and economically feasible alternative.

Valence argued that this would require an off-premise use in violation of the rule set forth in *Whitaker* discussed earlier. The court pointed out that the admission of evidence was not challenged by Valence at trial, and consequently it could not be raised on appeal. Second, the directional drilling would occur on the lease but outside the disposal area. Consequently, it would occur at an off-site location but not off the premises.

Missed Opportunity

In 2014, the Texas Supreme Court rendered an opinion, *Key Operating & Equipment Inc. v. Hegar*, that raised concern among surface owners regarding the lessee's right to use the surface of a nondrill site tract to access a well drilled on a pool. The lessee (Key) created a 40-acre pooled unit by taking ten acres from a 191-acre tract and combining it with 30 acres from a 60-acre tract. Key built an access road across the 191 acres to reach the well drilled on the pool.

The Hegars later purchased 85 surface acres within the 191-acre tract. The 85 acres included the access road. The Hegars built a house and were content with Key's use of the road until Key drilled a second well on the 60-acre tract. Key used the road to access both wells. The truck traffic became unbearable, and the Hegars sued Key for trespass.

The Hegars proved, through expert testimony, that all the production from the pooled well came from the 30 acres taken from the 60-acre tract. As a general rule, absent the surface owner's consent, the surface of one tract cannot be used to support or benefit minerals produced from another. Key did not have the Hegars' permission.

The trial court agreed and enjoined Key from using the road across the Hegar's property. The Hegars did not rely, introduce or argue the application of the accommodation of the estates doctrine at trial. Their case was based on trespass. Key appealed.

The appellate court affirmed the trial court's injunction but relied heavily on the application of the doctrine to do so. Key appealed to the Texas Supreme Court. The high court reversed both the trial court and the appellate court and dissolved the injunction against Key's use of the road.

The court ruled that the owner of the dominant mineral estate has the right to go upon the surface of the land to produce and remove the minerals. When pooling occurs, the implied right extends to the surface of all tracts having a portion placed in the pool regardless of where the production originates. Consequently, Key had the implied right to cross any part of the 191 acres, which included the Hegars' 85 acres, to reach the well.

The high court indicated that the application of the doctrine may have altered the outcome of this case. However, because the doctrine was not introduced and argued by the Hegars during the trial, the appellate court could not apply it on appeal.

Application of Doctrine

These cases summarize the procedural and substantive rules regarding the present application of the doctrine.

- The doctrine applies only where one estate is dominant over another, such as where the surface and mineral estates have been severed.
- To prove the doctrine's application, the surface owner always bears the burden of proof.
- If the surface owner does not raise (introduce and argue) the application of the doctrine at trial, the appellate courts are precluded from applying it.
- The surface owner must have some permanent, pre-existing use of the surface that will be precluded by the mineral lessee's operations.

- The surface owner always must prove that under established industry practices a reasonable alternative exists *on the premises* whereby the surface owners' pre-existing use can be preserved and the lessee can recover the minerals even though it may increase costs.
- In addition, the surface owner must prove that he or she has no reasonable alternative means to continue the pre-existing, permanent use *on the premises* if the lessee conducts its operations.
- If the surface owner prevails, both surface damages and an injunction are possible remedies. ♣

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