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# The Dominant and Servient Estates in Oil and Gas Operations: The Accommodation Doctrine and Its Limits

Oftentimes tension arises between landowners desiring to protect the surface of their properties and mineral owners wanting to drill wells or conduct other surface operations to produce minerals underlying those properties. This tension is magnified in jurisdictions like Texas, where the surface and the mineral estates can be, and often are, severed from each other and owned by different parties. Disputes about these divergent property interests will likely become more frequent as drilling continues to expand into new shale plays across the United States and in more urban areas.

A review of Texas law on this issue is instructive because, “[g]iven Texas’ unrivaled leadership in shaping the nation’s dynamic energy sector, [o]ther states frequently look to Texas decisions when confronted with a new or unsettled issue of oil and gas law.”<sup>1</sup> *Getty Oil Co. v. Jones*<sup>2</sup> is the seminal Texas case on the tension between the surface and mineral

estates. In *Getty*, the Texas Supreme Court observed that “the oil and gas estate is the dominant estate in the sense that use of as much of the premises as is reasonably necessary to produce and remove the minerals is held to be impliedly authorized by the lease.”<sup>3</sup> This rule generally makes sense because “a grant or reservation of minerals would be worthless if the grantee and reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved.”<sup>4</sup>

Although mineral owners possess the dominant estate, Texas law provides that they must conduct their operations with “due regard” for the surface owner’s rights.<sup>5</sup> Based on this “due regard” concept, the *Getty* court articulated what is known as the “accommodation doctrine” in an effort to reconcile this tension between the two estates. The accommodation doctrine holds that “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 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.”<sup>6</sup> The surface owner seeking to invoke the accommodation doctrine has the burden of establishing that the lessee’s surface use is not reasonably necessary, considering “usual, customary and reasonable practices in the industry under like circumstances of time, place and servient estate uses.”<sup>7</sup> The unreasonableness of a mineral owner’s surface use may be established by showing the availability of other non-interfering and reasonable means to produce the minerals that will permit the existing use of the surface to continue.<sup>8</sup>

The Texas Supreme Court recently revisited the accommodation doctrine in *Merriman v. XTO Energy, Inc.*<sup>9</sup> In *Merriman*, the landowner brought suit to enjoin XTO from drilling a well that he alleged failed to accommodate his existing cattle operation.<sup>10</sup> In affirming a summary judgment for XTO, the court of appeals found the landowner failed to prove that: (1) he did not have any reasonable alternative “agricultural” uses for the subject tract; and (2) relocating his cattle operation to other tracts held under short-term leases was not a reasonable

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alternative.<sup>11</sup> While the Texas Supreme Court upheld the summary judgment, it clarified the court appeals' opinion in two respects. First, it found that the "existing use" in question was the cattle operation and not a broader "agricultural use" as worded by the court of appeals.<sup>12</sup> Second, the court disregarded the other tracts under short-term leases to the landowner and focused on whether the landowner was precluded from conducting his cattle operations on the subject tract.<sup>13</sup> Ultimately, the court affirmed the summary judgment, holding that "[e]vidence that the mineral lessee's operations result in inconvenience and some unquantified amount of additional expense to the surface owner does not rise to the level of evidence that the surface owner has no reasonable alternative method to maintain the existing use."<sup>14</sup>

In sum, Texas law holds that the mineral estate is dominant and will not be infringed upon lightly. While the rights of the surface and mineral estates are to be balanced, the surface owner carries a heavy burden under the accommodation doctrine and is unlikely to force the mineral owner to yield to an existing use of the surface unless there are less intrusive, industry-recognized alternatives available to the mineral owner on the leased premises. Other states have weighed in on the

accommodation doctrine. For example, North Dakota and Utah have adopted the doctrine as set forth in *Getty*.<sup>15</sup> In Colorado, the doctrine is codified and provides that "[a]n operator shall conduct oil and gas operations in a manner that accommodates the surface owner by minimizing intrusion upon and damage to the surface of the land."<sup>16</sup> "Minimizing intrusion upon and damage to the surface" is defined to mean "selecting alternative locations for wells, roads, pipelines, or production facilities, or employing alternative means of operation, that prevent, reduce, or mitigate the impacts of the oil and gas operations on the surface, where such alternatives are technologically sound, economically practicable, and reasonably available to the operator."<sup>17</sup> It is unknown how other jurisdictions will choose to "balance" these competing surface and mineral interests. However, more and more of them will likely be called upon to do so as drilling continues to intensify in other parts of the United States and especially near urban centers.

### Practice Pointer:

Disputes about permissible surface uses and application of the accommodation doctrine can be minimized, if not avoided, by clearly establishing the mineral owner's surface rights in the governing

lease or mineral conveyance. By way of example, practitioners representing both landowners and producers should consider including provisions specifying the types of permitted or prohibited surface uses by the mineral owner; identifying permissible locations for well sites, roads, pipelines or other facilities (either by legal description or by attaching a plat); and/or delineating any existing or anticipated surface uses the landowner will be allowed to engage in without interference by the mineral owner. **P**

- 1 *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.2d 1, 42 (Tex. 2008) (Willett, J., concurring) (quoting Ernest E. Smith, Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right, 64 TEX. L. REV. 371, 375 n.13 (1985)).
- 2 470 S.W.2d 618 (Tex. 1971).
- 3 *Id.* at 622.
- 4 *Harris v. Currie*, 176 S.W.2d 302, 305 (Tex. 1943).
- 5 *Getty*, 470 S.W.2d at 621.
- 6 *Id.* at 622.
- 7 *Id.* at 627.
- 8 *Getty*, 470 S.W.2d at 622; *Trenolone v. Cook Exploration Co.*, 166 S.W.3d 495, 498 (Tex. App. – Texarkana 2005, no pet.).
- 9 407 S.W.3d 244 (Tex. 2013).
- 10 *Id.* at 247.
- 11 *Id.*
- 12 *Id.*
- 13 *Id.* at 250-51.
- 14 *Id.*
- 15 *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 136 (N.D. 1979); *Flying Diamond Corp. v. Rust*, 551 P.2d 509, 511 (Utah 1976).
- 16 C.R.S. § 34-60-127(1)(a).
- 17 C.R.S. § 34-60-127(1)(b).