

Texas Mineral Owner's Implied Right to Use the Surface

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Portions of this blog post were excerpted from the handbook [Petroleum Production on Agricultural Lands in Texas: Managing Risks and Opportunities](#).

One of the most surprising pieces of Texas oil and gas law may be the dominant estate rule. What does this rule mean and how does it impact surface and mineral owners in the state?



TAMU Agrilife photo by Blair Fannin

Severance of the Mineral and Surface Estates

In Texas, and most other states, the ownership of the mineral estate can be separated (severed) from the surface estate. Put another way, one person may own the rights to use the surface of a piece of property while another person has the right to use the minerals underneath the property. Further complicating matters is

the fact that both the surface and mineral estates may be owned by multiple people or entities simultaneously.

Many times, the mineral and surface estates are separated when a landowner holding both the surface and minerals (that is, a unified estate) either sells the mineral estate to a party while retaining ownership of the surface estate, or sells the surface estate to one party while selling the mineral estate to another party or reserving the mineral estate himself or herself.

This separation of the surface and mineral estates would seem to create some problems. If someone else owns the surface, how will the mineral estate owner be able to extract the oil and gas he or she supposedly owns? To deal with this issue, the law regards the mineral estate as the dominant estate and the surface estate as the servient estate with regard to the extraction of minerals. This means that the mineral estate has certain rights—which are implied by law—that the surface estate must honor. Put another way, the surface estate must sometimes “serve” the mineral estate.

Mineral Estate Right to Reasonable Use of Surface

Ownership of the mineral estate carries with it an implied right to use the surface estate as is reasonably necessary to explore, develop, drill, produce, market, transport, and store the minerals from the land. What does that mean? Over time, reasonable use of the surface has been interpreted in Texas to mean the mineral estate owner (or, far more frequently, the operator to which the mineral owner has leased his or her minerals) can use the surface to:

- enter the property covered by the mineral lease,
- explore for the oil and gas by using seismic trucks or other exploration methods, construct roads, well sites, and gathering pipelines serving wells on the property at a location of the mineral owner’s choosing,
- dig pits for handling waste fluids,
- erect storage facilities,
- extract soil and clay to build up the site,
- use groundwater for production operations,
- dispose of saltwater through subsurface injection or disposal wells.

Keep in mind that this right is implied, meaning it is included in every oil and gas lease and applies on every property in Texas, unless it is expressly excluded by the parties. If the right exists, it allows the mineral estate holder to take the actions listed above without permission from or payment to the surface owner, unless such terms are negotiated between the parties.

Limitations on Rights of Mineral Estate

Texas law essentially imposes four limitations on the rights of the dominant estate holder.

First, the long-recognized limitation on these uses is that they must be “reasonable,” meaning the mineral owner and any operator of the property must not cause any unnecessary damage or make an unreasonable use of surface substances. For example, if an oil and gas company needs 1 million gallons of groundwater in order to produce oil on the property, the operator may not withdraw 2 million gallons and use the excess water for other projects. Importantly, however, the Texas Supreme Court has held that a pooled unit is treated as one for the purposes of determining reasonable use. Thus, if water was withdrawn from one pooled tract for use on another pooled tract, that would meet the requirement of reasonable use. Similarly, as was the case in the *Key Operating Equip., Inc. v. Hegar*, case before the Texas Supreme Court, a lessee may build a road across one pooled tract to access a well on another pooled tract.

Second, the mineral owner may not act in a negligent manner. Under Texas law, liability for negligence occurs when a person (here, the operator,) acts unreasonably under the circumstances and causes damage. For example, Texas courts have found negligence occurred and liability has been imposed where an operator polluted fresh groundwater with brackish water. However, in numerous instances Texas courts have found that operator actions did not constitute negligence, including failure to fence the area of operations to prevent harm to grazing livestock.

Third, Texas recognizes the accommodation doctrine, a common law legal doctrine offering protections to a surface owner’s existing surface uses if certain conditions are met. The accommodation doctrine applies when three conditions are met and proven by the landowner: (1) substantial impairment of existing surface use; (2) no

reasonable alternative method available to the surface owner that would permit the surface use to continue; and (3) reasonable alternatives are available to the mineral owner that will allow discovery of minerals and would allow the surface use to continue. For example, in the most recent Texas Supreme Court case addressing this issue with regards to oil and gas, the Court found the doctrine did not apply to a cattle rancher seeking to maintain his ability to use corrals. The rancher argued he had an existing surface use—working cattle in the corrals; that he could not work his cattle elsewhere as he had no other corrals; and that the oil and gas company could have still produced the minerals in another manner—by moving the drilling pad away from the corrals and using horizontal drilling. The Court reasoned that the rancher failed to prove the second accommodation doctrine factor because he could have built temporary pens to work cattle elsewhere on the property. As this indicates, the accommodation doctrine is not as broad as landowners might expect or desire.

Finally, a statutory provision, known as the “Common Courtesy Act,” requires that oil and gas operators inform surface owners in writing of their intent to enter the property to drill a new well or to re-enter a plugged or abandoned well at least 15 days prior to entering the property. It is unclear, however, what remedy is available to a landowner in the event the operator violates this statute, as it expressly states it does not “restrict, limit, work as a forfeiture of, or terminate any existing or future permit issued by the commission or right to develop the mineral estate in land.”

How Do Surface Owners Protect Themselves?

The best option for a surface owner to protect himself or herself is to be involved in the negotiations of the mineral lease. When the surface owner and mineral owner are the same person, it is easier to ensure that terms to protect the surface of the land are raised with the oil company. When the surface and minerals are owned by separate parties, however, these provisions may be overlooked by a mineral owner. A surface owner should seek to be involved in lease negotiations with an eye to including surface protections in the agreement. This involvement is usually sought by reaching an agreement with the mineral owner that will allow for surface owner involvement in negotiations or an agreement that the mineral owner will require certain terms be included in all mineral leases. The type of surface-

protection terms that could be negotiated, for example, include a requirement that a surface owner and the mineral lessee mutually agree on the location of any wells or other drilling activities, a clause requiring the operator to place the surface back into the same condition that it was prior to drilling being commenced once drilling is completed, or including a liquidated damage clause in the lease that would require the oil company to pay a set amount at the beginning of the lease to cover surface damages.

Another option is for a surface owner to work with the oil company leasing the minerals. Even though they are not required to do so, many oil companies will attempt to be neighborly and work with the surface owner to avoid conflicts. A surface owner may also seek an agreement as to surface-use with the oil company that leased the minerals. Although the oil and gas company is under no legal obligation to enter into a surface use agreement, they are often willing to do so in order to avoid conflicts or issues with the surface owner.

A third option may be for a surface owner to purchase all, or a portion of the undivided mineral estate underlying his land. If the surface owner becomes a mineral owner, this may allow him or her to have some input into the negotiation of mineral leases.

Finally, surface owners that reside in subdivisions or municipalities may be able to rely upon ordinances or deed restrictions issued by the subdivision or municipality to obtain some protection.

{For more information on surface owner rights, check out the handbook, "[Petroleum Production on Ag Lands in Texas](#)" and the prior [podcast episode with Parks Brown](#).}

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