

## **Texas Surface Owners Beware!: Understanding Mineral Lessee's Rights to Use the Surface Estate**

As the oil and gas boom continues across Texas, many surface owners are surprised at the rights that mineral lessees (usually oil or gas companies) have to use the surface of the land without any input, consent, or permission of the surface owner. It is critical for all landowners, but in particular for those surface owners who do not own the mineral rights underlying their property, to understand the implied rights of mineral lessees. (For purposes of simplicity and clarity, the "mineral lessee" will be referred to as the "oil company.")

### **Mineral Estate v. Surface Estate**

Under Texas law, a mineral estate and a surface estate are two separate legal interests which may be severed. This means that one person may own the surface estate and another own the mineral estate underlying the land. This occurs most frequently when a landowner sells the surface estate to another, but reserves the mineral estate. If the mineral estate is not expressly reserved, it passes to the buyer during the sale. As between the mineral estate and surface estate, the mineral estate is the dominant estate. This means that the surface estate exists for the benefit of the mineral owner, and grants various rights to the mineral owner.

### **Mineral Lessee's Implied Right to Use the Surface Estate**

When an oil or gas company leases the mineral rights from a mineral owner, that company essentially stands in the shoes of the mineral owner. Thus, it has the right to use the surface estate. Under Texas law, this right allows that oil company to use as much of the surface estate as is "reasonably necessary" for mineral exploration and production. This right is implied in the mineral lease and requires no permission or consent from the surface owner.

What constitutes "reasonably necessary" uses? Some examples include entering the property, building roads, using caliche found on the leased property, installing pipelines to transport products from the lease, storing of equipment, and injecting saltwater in disposal wells. Further, absent contractual provisions to the contrary, an oil company can select the locations of wells and pipelines to be placed on the property without input from the surface owner.

### **Mineral Lessee's Use of Groundwater**

When the mineral estate and the surface estate are severed and belong to two different owners, who owns the groundwater? The surface owner or the mineral owner?

Many landowners are surprised to know that groundwater is considered part of the surface estate, and not part of the mineral estate. Under Texas law, unless specified otherwise, the mineral estate consists only of oil, gas, uranium, sulfur and salt. Groundwater is part of the surface estate,

even though it is located below the surface. Because of this, like the other portions of the surface estate, an oil company can use that amount of groundwater “reasonably necessary” to explore and produce minerals on the land. Generally, groundwater used for the exploration or drilling of oil does not require the oil company to obtain a permit from the local groundwater conservation district. Water used for production, such as fracking, generally does fall within groundwater conservation district jurisdiction and requires a permit.

### **Liability for Damages to the Surface Estate**

So what happens if an oil company damages the surface estate? Can the surface owner sue the oil company?

A surface owner’s rights are limited. The oil company is not liable for damages unless the surface owner can prove one of the following: (1) the oil company went beyond what was “reasonably necessary” for exploration and production; (2) the company violated the accommodation doctrine; or (3) the company caused injuries due to its negligence.

- **Reasonably Necessary**: Unreasonable or excessive use of the property will result in liability for the oil company. For example, if an oil company created a larger drill pad than necessary, it might be found to have acted unreasonably. Further, an oil company’s use of the surface of one leased property to benefit land other than the leased premises is unreasonable.
- **Accommodation Doctrine**: This doctrine requires the oil company to accommodate the surface uses of the property where reasonably possible. In order for a surface owner to claim that a lessee failed to accommodate an existing use of the surface, he must prove that: (1) The mineral owner’s actions “precludes or substantially impairs the existing use”; (2) “There is no reasonable alternative method available to the surface owner by which the existing use can be continued”; and (3) There are reasonable alternatives available to the mineral lessee that will allow the discovery of minerals while also allowing the surface owner to continue his existing uses.
- **Negligence**: Texas courts have refused to find negligence in numerous cases involving damage to the surface owner caused by an oil company. For example, courts have found that the failure to restore the surface at the end of drilling, the failure to prevent livestock from entering into the drilling area, and the draining of groundwater previously used for domestic use do not constitute negligence for which the oil company can be held liable. Negligence has been found, however, in situations where an oil company polluted groundwater, caused subsidence, and disposed of salt water in an unlined pit.

## **What Can Surface Owners Do To Protect Themselves?**

The best option for a surface owner to protect himself 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 these terms 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. It is important for a surface owner to seek to be involved in lease negotiations and to negotiate protections into a lease. 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.

For example, a mineral lease could require that a surface owner and the mineral lessee mutually agree on the location of any wells or other drilling activities. A mineral lease could also require that at the conclusion of drilling, the surface estate must be placed back into the same condition that it was prior to drilling being commenced. A third option would be to include 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. The oil company, however, is under no obligation to enter into this type of agreement.

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 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.