PRESENTED AT

51st Annual Ernest E. Smith Oil, Gas and Mineral Law Institute

April 3, 2025 – April 4, 2025
Houston, Texas

Accommodating Concurrent Real Estate and Mineral Development in Urban Areas and Beyond: Revisiting Surface Use Agreements and Chapter 92 of the Natural Resources Code

Ross Sutherland

Author Contact Information:
Ross Sutherland
Scott, Douglass & McConnico LLP
Austin, Texas
rsutherland@scottdoug.com
512.495.6300

Accommodating Concurrent Real Estate and Mineral Development in Urban Areas and Beyond: Revisiting Surface Use Agreements and Chapter 92 of the Natural Resources Code

By: Ross Sutherland
Partner, Scott Douglass McConnico LLP[1]

I. Introduction

The interaction between surface and mineral estate development has been a long-standing issue in Texas law. The dominance of the mineral estate, a principle established by Texas common law, often creates challenges for surface development in urban, suburban, and exurban growth areas. To address these conflicts, the Texas Legislature enacted Chapter 92 of the Texas Natural Resources Code in 1983, which led to the promulgation of Statewide Rule 76. This rule provides a framework for creating "qualified subdivisions," allowing surface developers to regulate where mineral interest holders can explore and produce within designated tracts. This paper examines the statutory and regulatory framework governing Statewide Rule 76, the administrative process at the Railroad Commission of Texas ("Commission"), and case law developments affecting its application.

II. Historical Context – *Surface Estate v. Mineral Estate*

A. Common Law and the Accommodation Doctrine

The historical tension between surface and mineral estate owners in Texas is deeply rooted in property law. Texas law allows for the severance of mineral rights from surface ownership, creating two distinct estates. When a landowner conveys or reserves mineral rights, they retain or transfer five key interests: (1) the right to develop, (2) the right to lease, (3) the right to receive bonus payments, (4) the right to receive delay rentals, and (5) the right to receive royalty payments.[2]

Once severed, the mineral estate enjoys a dominant position over the surface estate. Texas law grants the mineral estate holder the right to use as much of the surface as is "reasonably necessary" for exploration and production.[3] This includes ingress and egress rights, site selection for wells and facilities, construction of roads, pits, and flow lines, and

[1] Ross Sutherland is a partner at the law firm of Scott Douglass McConnico LLP where he regularly practices in front of the Railroad Commission of Texas in addition to district courts throughout the State.
[2] *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013).
[3] *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621-22 (Tex. 1971) ("It is well settled that the oil and gas estate is the dominant estate in the sense that use of as much of the premise as is reasonably necessary to produce and remove the minerals is held to be impliedly authorized by the lease.") (citing *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967)); *Texas Genco, LP v. Valence Operating Co.*, 187 S.W.3d 118, 121–22 (Tex.App.-Waco 2006, pet. denied) (discussion of "accommodation doctrine").

even the right to use groundwater for drilling operations if no other reasonable alternative is available.[4] The surface estate, by contrast, is legally subservient, meaning it must accommodate the activities of the mineral estate so long as these activities reasonably accommodate the current use of the surface.

Despite the dominance of the mineral estate, certain legal doctrines and regulations provide limited protection to surface owners. The Accommodation Doctrine, established in *Getty Oil Co. v. Jones*, requires that mineral owners exercise their rights with "due regard" for existing surface uses.[5] If reasonable alternatives exist for mineral development that would lessen the impact on surface use, the operator may be required to adopt them.

B. Surface Estate Protections

Surface use agreements, or "SUAs," provide additional, contractual protections to landowners against the potential harms of oil and gas development. These private contracts come in many forms and can contain provisions providing recoupment from the operator based on drillsite construction, to limiting oil and gas operations based on a predetermined schedule.

Additional protections for surface owners also exist in urban, suburban, and exurban areas. Chapter 92 of the Texas Natural Resources Code, which underpins Statewide Rule 76, provides a statutory exception to the common law and allows surface owners to create qualified subdivisions that confine operations for mineral development to designated sites and easements.[6] This regulates the traditional dominance of the mineral estate by requiring operations to be confined to pre-approved areas, restricting their interference with surface development.

III. Surface Use Agreements

A surface use agreement is a voluntary agreement between the surface owner and the mineral owner/lessee that will govern relations between the two parties. Though the mineral owner is not obligated to enter into an SUA, and could instead let common law guide the relationship between the two parties, many mineral owners are willing to enter

---

[4] *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 810-11 (Tex. 1972) ("The oil and gas lessee's estate is the dominant estate and the lessee has an implied grant, absent an express provision for payment, of free use of such part and so much of the premises as is reasonably necessary to effectuate the purposes of the lease, having due regard for the rights of the owner of the surface estate.

. . . .

The implied grant of reasonable use extends to and includes the right to use water from the leased premises in such amounts as may be reasonably necessary to carry out the lessee's operations under the lease."); *Joyner v. R. H. Dearing & Sons*, 134 S.W.2d 757 (Tex. Civ. App. – El Paso 1939, writ dism'd judgmt cor.) (construction of structures and facilities); *Stephenson v. Glass*, 276 S.W. 1110, 1112 (Tex. Civ. App. – San Antonio 1925), *writ ref'd per curiam*, 279 S.W. 260 (Tex. 1926) (location of drill sites).

[5] *Getty Oil*, 479 S.W.2d at 621.

[6] Tex. Nat. Res. Code § 92.003.

Title search: Accommodating Concurrent Real Estate and Mineral Development in Urban Areas and Beyond

First appeared as part of the conference materials for the
51st Annual Ernest E. Smith Oil, Gas and Mineral Law Institute session
"Accommodating Concurrent Real Estate and Mineral Development in Urban Areas and Beyond"