

**Surface Use: The Dominant Estate,
Reasonable Use and Due Regard
March 28, 2019**

**David E. Jackson
Jackson Sjoberg & Townsend LLP
djackson@jacksonsjoberg.com**

**Original Paper dated April 18, 2018 presented at the
44th Annual Ernest E. Smith
Oil, Gas and Mineral Law Institute**

[http://www.oilgas.org/Private/Content/Documents/9/
OGML2018_04_Jackson_OG18_pap.pdf](http://www.oilgas.org/Private/Content/Documents/9/OGML2018_04_Jackson_OG18_pap.pdf)

Slide 7

Definition of Surface and Mineral Estate

- *Springer Ranch, Ltd. v. Jones*, 421 S.W.3d 273 (Tex. App.—San Antonio 2008, no pet.)
- *Lightning Oil Company v. Anadarko E & P Onshore, LLC*, 480 S.W.3d 628 (Tex. App.—San Antonio 2015), *aff'd*, 520 S.W.3d 39 (Tex. 2017)
- *XTO Energy, Inc. v. Goodwin*, No. 12-16-00068-CV, 2017 WL 4675136, 23017 Tex. App. Lexis (Tex. App. – Tyler Oct. 18, 2017, pet. denied)

Slide 14

History

- *Cowan v. Hardeman*, 26 Tex. 217, 222 (1862)
- *Grimes v. Goodman Drilling Co.*, 216 S.W. 202, 204 (Tex. Civ. App.—Fort Worth 1919, writ *dism'd*)
- *Gregg v. Caldwell-Guadalupe Pick-Up Stations*, 286 S.W. 1083 (Tex. 1926)—Laying the Groundwork for *Due Regard*
- *Gulf Production Company v. Continental Oil Company*, 144 S.W.2d 488 (Tex. 1942)—The Concepts of *Reasonable Use* and *Due Regard*

Slide 15

General Rule—Dominance of the Mineral Estate

- Mineral owner may only use so much of the surface, and in a manner, as is ***reasonably necessary*** for mineral development
- Mineral owner must make use of the surface with ***due regard*** for the rights of the surface owner
- Mineral owner must act ***without negligence*** in its use of the surface

Slide 16

**Other General Rules Flowing From
The Dominance of the Mineral Estate**

- Inconvenience to the surface owner is not controlling
- No liability for surface damages (so long as use is non-negligent, reasonably necessary and with due regard)
- No obligation to restore the surface (so long as use was non-negligent, “rightful and necessary use”)

Slide 17

**Other General Rules Flowing From
The Dominance of the Mineral Estate
(continued)**

- Surface owner may be liable for interference with a mineral owner’s reasonable use of the surface for mineral development
- A mineral cotenant may make reasonable use of the surface for mineral development
- But, a mineral owner’s use of the surface must benefit that tract

Slide 19

**Case Law on
Dominance of the Mineral Estate**

- Category One Cases—Improper or Excessive Use
- Category Two Cases—Conflicting Use and The Accommodation Doctrine

Slide 20

**Category One Cases—
Improper or Excessive Use**

- How much of the surface can be utilized by the mineral owner?
- In what manner may the surface be utilized by the mineral owner?

Slide 21

**What is Reasonably Necessary?
What is Excessive?**

- Entry upon the surface; Ingress and Egress
- Location of wells and facilities
- Construction of roads to drillsites and use of caliche for roads
- Construction of pipelines
- Housing of employees
- Disposal of salt water
- Use of fresh water
- Geophysical operations
- Release of deleterious substances

Slide 22

**What Constitutes
Negligent Use of the Surface?**

- Examples of Negligence in Use of the Surface
- Examples of Non-Negligent Uses of the Surface
- Negligence *Per Se*
- Injury to Livestock

Slide 23

What Constitutes Unreasonable or Excessive Use of the Surface?

- **Successive oil and salt water spills**—*Oryx Energy Co. v. Shelton*
- **Use of more land than reasonably necessary**—*Stradley v. Magnolia Petroleum Co.*
- **Mineral owner's excessive use of surface water**—*Gulf Oil v. Whitaker*
- **Use of surface to prevent mineral development on adjoining property**—*Atlantic Ref. Co. v. Bright & Schiff*
- **Use of more of the surface than reasonably necessary**—*Texaco v. Joffrion*

Slide 24

Recent Significant Cases On Dominance of the Mineral Estate

Key Operating and Equipment, Inc. v. Hegar, 435 S.W.3d 794 (Tex. 2014)

Coyote Lake Ranch, LLC v. City of Lubbock, 498 S.W.3d 53 (Tex. 2016)

Lightning Oil Company v. Anadarko E & P Onshore, LLC, 480 S.W.3d 628 (Tex. App.—San Antonio 2015), *aff'd*, 520 S.W.3d 39 (Tex. 2017)

Slide 26

Negligence Per Se and Texas Natural Resources Code Section 85.321

Exxon Corp. v. Emerald Oil & Gas Co., L.P., 331 S.W.3d 419 (Tex. 2010)

Discovery Operating, Inc. v. BP America Production Co., 311 S.W.3d 140 (Tex. App.—Eastland 2010, *pet. denied*)

Forest Oil Corp. v. El Rucio Land & Cattle Co., 446 S.W.3d 58 (Tex. App.—Houston [1st Dist.] 2014), *aff'd*, 518 S.W.3d 422 (Tex. 2017)

Lazy R Ranch, LP v. ExxonMobil Corp., 456 S.W.3d 332 (Tex. App.—El Paso 2015), *aff'd in part and rev'd in part*, 511 S.W. 3d 538 (Tex. 2017)

Slide 29

**Category Two Cases—
Conflicting Use and The Accommodation Doctrine**

Conflicting and incompatible surface uses where

- The surface owner has an existing use of the surface, and
- The surface owner's use and the mineral owner's use cannot both take place at the same time at the same spot on the ground

Slide 30

**Category Two Cases—
Conflicting Use and The Accommodation Doctrine**

Conflicting and incompatible surface uses

- The *Getty v. Jones* case
- The *Haupt* case
- The *Texas Genco* case
- The *Merriman* case
- The *Coyote Lake Ranch* case
- The *VirTex* case

Slide 35

Elements of the Accommodation Doctrine

- There is an **existing use** by the surface owner which would otherwise be **precluded or impaired** by mineral development
- **No other reasonable means** available to the surface owner for developing his land other than by the existing use in question
- Under **established industry practices**, the mineral owner has **alternative means** available by which to recover the minerals.

Slide 49

Railroad Commission Jurisdiction

- No authority to determine title to land or property rights
- Limited authority under Chapter 92 of the Texas Natural Resources Code and Statewide Rule 76 to create “qualified subdivisions” and then designate “operations sites.”

Slide 52

Municipal Ordinances -- Deed and Subdivisions Restrictions

Section 85.053 of the Texas Natural Resources Code

Slide 55

Practical Approaches To Avoiding Conflicts

- As Surface Owner and Lessor
- As Mineral Owner and Lessee

Slide 57

Conclusions

- Don't be confused by use of the term “Dominance”—Dominance of the Mineral Estate is limited to reasonably necessary, non-negligent use of the surface with due regard for the rights of the surface owner.
- The determination of “reasonable use” with “due regard” is fact intensive and must be determined on a case by case basis.
- In the vast majority of interactions between mineral owners and surface owners, the rules are working.