

SURFACE OWNER ESTATE

GENERAL OVERVIEW

Under Texas law, landownership includes two distinct sets of rights, or “estates”: surface estates and mineral estates. Initially, these two estates were owned by the same person and they may continue to be owned together by one person. However, these estates can also be separated.

In many areas of the state, where there has been extensive oil and gas development, it is common for the mineral estate and the surface estate to be owned by different people. The division, or severance, of the mineral estate occurs when the owner sells the surface estate and retains all or part of the mineral estate; or when the owner sells all or part of the mineral estate and retains the surface estate. If an owner does not expressly retain the mineral estate when selling the surface, the mineral estate automatically is included in the sale.

Under Texas law, underground water belongs with the surface estate. In some instances, the surface estate may sell the water rights to another entity.

DOMINANCE OF MINERAL ESTATES

Regardless of whether the mineral estate and the surface estate is held by the surface owner or has been severed, Texas law holds that the MINERAL ESTATE is the dominant estate. This means that the owner of the mineral estate has the right to freely use the surface estate to the extent reasonably necessary for the exploration, development, and production of the oil and gas under the property.

The right to freely use the surface estate for the benefit of the mineral estate may be exercised by a company or an individual that has taken a mineral lease from the owner of the mineral estate. The company that takes a lease and actually manages the extraction of oil, gas, or ground water is referred to as the lessee and the mineral interest owner who granted the lease is the lessor.

Lessees have broad rights to use the surface for the purpose of exploration of oil and gas. Unfortunately, this is where conflict sometimes develops between the two severed estates. What may be in the best interest of the mineral estate may not be in the best interest of the surface estate. These kinds of conflicts have been recently experienced by a number of Montague County surface estate owners.

Lessee’s rights include the right to conduct seismic tests, drill wells at locations they select (even within 200 feet of a home or barn) and enter and exit well sites and other facilities at will. Additionally, lessees can build, maintain and use roads for access to and from well sites and facilities and build and use pipelines and gathering systems to serve wells and facilities on the property.

Except for the limited exceptions listed below, the lessee has the right to conduct the activities listed above and otherwise reasonably use the surface WITHOUT securing permission from the surface owner and WITHOUT restoring the surface or paying for the non-negligent damages it causes. However, if a lessee's use of the surface is found to be negligent, unreasonable, or excessive, the lessee may be liable to pay the surface owner for the resulting injury. Several examples of damages to the surface estate would be negative impacts caused by seismic activities, spillage (either intentional or nonintentional) of toxic fluids, injury to livestock and destruction of agricultural products.

If the operator's use of the surface estate is excessive, the surface owner can seek an injunction enjoining the operator to discontinue excessive use. In addition, the surface owner can seek damages, which vary depending on whether the injuries to the land are permanent or temporary.

Classifying damage to land as either permanent or temporary depends on the frequency of the injury. In general, if the injury has occurred several times and is likely to continue, the damage is considered permanent. If the injury occurred only once or on irregular or intermittent occasions, the damage is usually considered temporary.

If damage to the property is determined to be permanent, the surface owner may recover damages in the amount of the decrease of market value from the mineral extraction company. Such a calculation is considered to already take into account loss of use and enjoyment. Damages may also be recovered for personal injuries and damage to personal property.

If damages are determined to be temporary, damages are measured by considering recovery for loss of use and enjoyment and the cost of repair. Also, damages may be recovered for personal injuries and damage to personal property.

The statute of limitations for damages to the surface estate is two years, but when those two years begin to run depends on whether the damage to the property is considered permanent or temporary. If the damage is classified as permanent, the owner must file suit within two years from the date that the owner discovers that the operator first caused damage to the land, even if it is not until later that the extent of the damage to your land is fully ascertained. If damage is determined to be temporary, the landowner can bring a suit at any time within two years to recover damages for injuries.

EXCEPTIONS AND LIMITATIONS

The general rules regarding free use of the surface to benefit the mineral estate may be changed by specific terms of the mineral lease covering the property or the deed that severed the mineral estate from the surface estate. The rights of the lessee may also be limited by the accommodation doctrine. This legal doctrine applies in LIMITED circumstances to require the lessee to modify its operations to accommodate an existing surface use when reasonable alternatives are available.

The accommodation doctrine as stated by the Texas Supreme Court says, “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 minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.”

If the mineral estate is not under lease, the surface owner may consider contacting the owner of the mineral estate and try to establish some type of dialogue expressing concerns of protecting property by requesting certain restrictions be added to any future mineral lease. An example would be limiting drilling too close to existing structures, streams, lakes or marsh areas. Believe it or not, recently a lessee was advised by a geologist to drill within several feet of an artesian well. Fortunately, this problem was amicably resolved.

If the mineral estate is already under lease, the surface owner may wish to contact the lease company to attempt to negotiate an agreement restricting use of the surface or agreeing to set damages for surface injury. Although there is NO LEGAL REQUIREMENT to do so, a lessee may be willing to enter into a reasonable surface use/damages agreement to avoid potential disputes.

ADDITIONAL SURFACE OWNER INFORMATION

WHERE TO FIND

All laws pertaining to Natural Resources Codes in the State of Texas can be accessed on the MCPOA web site, listed under Oil and Gas or Helpful Links.

The Railroad Commission of Texas has primary regulatory jurisdiction over all of the oil and natural gas industry, pipeline transporters, natural gas and hazardous liquids pipeline operators, natural gas utilities, LP-gas operators and coal and uranium mining operations. The TRC web site can be accessed through the MCPOA links, under Oil and Gas or Helpful Links.

WHEN IS A LAW NOT A LAW?

Effective October 1, 2007, oil and gas operators are required to give the first person listed on the county appraisal roll as owner written notice within 15 business days after a drilling or similar permit has been issued by the Texas Railroad Commission. Texas Natural Resources Code 91.702

In checking with the TRC personal at the Wichita Falls office, we are told that this is a “courtesy law” only and it is not enforceable by the TRC.