

# Oil & Gas Exploration and Surface Ownership

Questions and concerns frequently arise when owners of residential property in suburban and rural areas discover that oil and gas operations are being conducted in the vicinity. Although the Railroad Commission generally lacks jurisdiction over these issues, this short paper is intended to provide general answers to some of the most common questions.

## Mineral & Surface Estates

Under Texas law, land ownership includes two distinct sets of rights, or "estates," the surface estate and the mineral estate. Initially, these two estates were owned by the same person and they may continue to be owned together by one person. However, in many areas of Texas, especially those where there has been extensive historical oil and gas development, it is common for the mineral estate and surface estate to be owned by different people. The division, or "severance," of the mineral estate and surface estate occurs when an owner sells the surface and retains all or part of the minerals (or, less commonly, an owner sells the minerals and retains the surface). If an owner does not expressly retain the minerals when selling the surface, the mineral estate he owns automatically is included in the sale.

## Dominance of Mineral Estate

Regardless of whether the mineral estate and surface estate are held by one owner or have been severed, Texas law holds that the mineral estate is dominant. 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. This right to freely use the surface estate for the benefit of the mineral estate may be exercised by a company or individual that has taken a mineral lease from the actual owner of the mineral estate. The company that takes a lease and actually operates the property is frequently referred to as the "lessee" and the mineral interest owner who granted the lease is the "lessor."

Lessee's have broad rights to use the surface for the purpose of exploring for and producing oil and gas. These rights include the right to conduct seismic tests, drill wells at locations they select, to enter and exit well sites and other facilities, to build, maintain, and use roads for access to and from well sites and facilities, to build and use pipelines to serve wells and facilities on the property, to use surface and subsurface water on the leased premises for drilling and production operations,

and to drill and operate injection wells to enhance lease recovery and dispose of lease-produced water.

With the limited exceptions discussed below, the lessee has the right to conduct the activities set out above and otherwise reasonably use the surface without getting permission from the surface owner and without restoring the surface or paying for any 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 damages to the surface owner for the resulting injury.

## Exceptions and Limitations

The general rules regarding free use of the surface to benefit the mineral estate may be changed by the specific terms of the mineral lease covering the property or of the deed that severed the mineral estate from the surface estate. In addition, many cities have municipal ordinances restricting oil and gas activities on property within city jurisdiction. 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. In specific circumstances in counties in or near large metropolitan areas developers can impose restrictions on drilling and operations sites by creation of a qualified subdivision as provided by Chapter 92 of the Texas Natural Resources Code.

## Control by Surface Owner

The best method of controlling oil and gas development by a surface owner is the purchase of all or a significant portion of an undivided interest in the mineral estate. This allows the surface owner to control the timing and terms of any future leases. However, purchase of the mineral estate is not always possible or practical. In the alternative, although under no obligation to do so, a mineral interest owner may be willing to agree to include surface use and surface damages clauses in future leases.

If the mineral estate is already under lease, the surface owner may wish to contact the lessee company to attempt to negotiate an agreement restricting use of the surface or agreeing to set damages for surface use. 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.

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