



Surface Use Developments in New Mexico and Texas Law

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Although most states recognize the mineral estate as the dominant estate in land use and development, states have increasingly provided greater protections to owners of a surface estate, especially where the surface estate has been severed from the mineral estate. This trend has been increasingly true for oil and gas development in the State of New Mexico and, to a lesser extent, the State of Texas. Mineral producers in those states must be aware of the constraints placed on development of minerals in conducting their surface operations.

Texas

While the Railroad Commission of Texas ("Commission") primarily regulates oil and gas operations, it has limited control over surface operations. In Texas, surface use constraints are imposed by the common law, and recourse to surface owners is obtained from the courts. However, the Texas Natural Resources Code does provide for a hearing process and administrative recourse through the Commission for surface owners, particularly those in a qualified subdivision.

Texas case law provides for use of the surface by mineral developers that is "reasonably necessary" to access their minerals, including the ability to conduct seismic testing, construct roads, and maintain pipelines and other facilities. If the use of the surface is deemed excessive, such that it damages the land or otherwise adversely affects the value of the land, then liability can be imposed. *See, e.g., Oryx Energy Co. v. Shelton*, 942 S.W.2d 637 (Tex. App. – Tyler 1996, no writ). In the absence of such damages, the mineral owner has little other obligation to compensate the owner of the surface estate for its use or restoration of the land.

Texas courts have further constrained mineral development operations by the "accommodation doctrine." The frequently cited *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971), held that where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where industry practices provide for alternatives whereby the minerals may be recovered, the rules of reasonable usage require the adoption of an alternative method of extraction by the developer. In *Getty Oil*, two pumping units were installed in a manner that interfered with the operation of the surface owner's pre-existing irrigation system. The court acknowledged the dominance of the mineral estate; however, the court pointed to other pumping units subsequently installed on the same land as evidence that alternative methods existed to produce oil and gas without interfering with the irrigation system and the surface owner's agricultural uses of the lands.

Violations of the accommodation doctrine require: 1) an existing use of the surface by the surface owner; 2) the mineral owner's operations interfere with the existing surface use; and 3) the mineral owner has reasonable alternatives to conduct its operations. Conflicts often turn on disputes over

the extent and manner of the surface owner's existing use. For example, the planned expansion of an existing land use may require a well to be directionally drilled. Similarly, disputes can arise over the extent and nature of the alleged interference with the surface use. The interference must be material; mere inconvenience to the surface owner does not usually violate the accommodation doctrine. Finally, the surface owner has the burden of proving that the mineral owner has alternative methods to extract minerals, and that the alternative methods are economical.

Texas has very limited statutory protection for the surface estate; still, some statutory limitations do exist. For example, Subchapter Q of the Texas Natural Resources Code, Section 91.753(a), provides: "Not later than the 15th business day after the date the [Commission] issues an oil or gas well operator a permit to drill a new oil or gas well or to reenter a plugged and abandoned oil or gas well, the operator shall give written notice of the issuance of the permit to the surface owner of the tract of land on which the well is located or is proposed to be located." Chapter 92 of the Texas Natural Resources Code extends additional protections for the surface owners in a "qualified subdivision" as defined in the code. Qualifying surface owners are entitled to a hearing procedure upon an application to develop minerals, which hearing is conducted by the Commission. The Commission is empowered to issue a ruling upon the adequacy of the application and limit surface use to designated operations sites. Oil and gas operations may also be subject to municipal and other local ordinances under the authority of home-rule cities.

Frequently, disputes over the use of the surface in connection with oil and gas operations can be avoided by contractual agreement between the developer and the surface owner, and the notice requirement pursuant to Section 91.753(a) is waived when such an agreement exists that meets the requirements of Section 91.753(b). Contractual modification of oil and gas leases can include additional provisions pertaining to notice upon entry, the location of drill sites, pipelines, roads and surface equipment, and damages for removal of water, timber and other violations of the agreement.

New Mexico

State regulation of oil and gas operations are governed by the New Mexico Oil Conservation Division. The NMOCD has divided the state into four districts, each of which may have varying requirements in connection with surface use. Regardless of the district in which the subject lands are located, the operator in all districts must comply with the New Mexico Surface Owners Protection Act ("Act").

First enacted in 2007, the Act at N.M. STAT. ANN. § 70-12-1, *et seq.*, applies to operators siting oil and gas locations on fee surface on or after July 1, 2007, except for certain ongoing operations. The purpose of the Act is to balance surface owners' and mineral lessees' interests with the "aim to minimize damage and loss of available surface for agriculture caused by oil and gas operations, to promote a fair negotiation process between the surface owner and the mineral lessee, and to not delay exploration and development of minerals." *Woody Inv., LLC v. Sovereign Eagle, LLC*, 362 P.3d 107, 109-110 (N.M. App. 2015). The Act imposes strict liability upon oil and gas operators for surface damage caused by oil and gas operations, including loss of agricultural production and income, lost land value, lost use of the surface owner's land, and lost value of improvements caused by oil and gas operations. N.M. STAT. ANN. § 70-12-4. Before the Act was enacted, surface owners were only able to recover for surface damages where the parties had an agreement which provided for such damages.

In addition to notice requirements imposed by New Mexico Administrative Code, Title 19, Natural Resources and Wildlife, Chapter 15, an operator must also comply with notice requirements imposed by the Act prior to drilling a well in New Mexico. N.M. STAT. ANN. § 70-12-5 requires the operator to give the surface owner at least five (5) business days' notice, by certified mail or hand delivery, prior to entering the land for activities that do not disturb the surface, and at least thirty (30) days' notice prior to entering the land to conduct "oil and gas operations" as that term is defined in the Act. The notice must meet the requirements of the Act, which include disclosure of the planned operations in sufficient detail to evaluate the effect of the operations on the property, a copy of the text of the Act, the name, address and telephone numbers of the operator, and a proposed surface use and compensation agreement addressing the placement, specifications, maintenance and design of well pads, gathering pipelines and roads to be constructed for oil and gas operations, terms of ingress and egress upon the surface of the lands for oil and gas operations, construction, maintenance and placement of all pits and equipment used or planned for oil and gas operations, use and impoundment of water on the surface, removal and restoration of plant life, surface water drainage, actions to limit and effectively control precipitation runoff and erosion, control and management of noise, weeds, dust, traffic, trespass, litter and interference with the surface owner's use, interim and final reclamation, actions to minimize surface damages to the property, operator indemnification for injury to persons caused by the operator, and an offer of compensation for damages to the surface affected by oil and gas operations.

If the proposed surface use and compensation agreement is not accepted by the surface owner within twenty (20) days, the operator may only enter upon the surface to conduct operations by posting a bond meeting the requirements of N.M. STAT. ANN. § 70-12-6. The Act also creates a cause of action for the surface owner to recover compensation for operations conducted on their land. N.M. STAT. ANN. § 70-12-7. If the surface owner brings an action and the court determines that an award of damages is proper, the court may award attorney fees, costs and treble damages. Attorneys' fees and costs may be imposed if the court finds the operator conducted operations without providing notice, without obtaining a surface use and compensation agreement or without bonding-on or otherwise acted outside the scope of the agreement. Additionally, treble damages can be imposed if the operator's conduct is found to be willful and knowing.

As in Texas, operators in New Mexico are also subject to the common law Doctrine of Accommodation. The New Mexico Supreme Court adopted a rule similar to Texas' Accommodation Doctrine, which interpreted the rule to mean that the rights held by a mineral lessee create an implied easement by necessity. The purpose of such easement is to enable activities required to effectuate the purpose of an oil and gas lease; however, the scope of the easement is only broad enough to carry out the activities reasonably necessary to produce oil and gas. *Smith & Marrs, Inc. v. Osborn*, 180 P.3d 1183, 1187 (N.M. App. 2008). The New Mexico courts do place limits on the liability of operators for reasonable use of the surface. Because the mineral lessee is entitled to use as much of the surface as is reasonably necessary to produce minerals, it is not liable for damages resulting from such reasonable use, and the owner of the mineral estate is generally not obligated to return the surface to its original condition. *McNeill v. Burlington Res. Oil & Gas Co.*, 182 P.3d 121, 129 (N.M. 2008).