

# Surface Use Issues for Horizontal Wells

**Drew Potts**

# ***Lightning v. Anadarko***

- Dispute concerning off-site drilling location.
- Why was the drill site location an issue?
- What doctrines, laws, and precedent are involved?
- Are the rules the same in all states?

# Road Map

- Basic Property Concepts
- Historical Development of Accommodation Doctrine
  - Dominant Mineral Estate
  - Accommodation Doctrine
- Other Jurisdictions That Have Adopted the Accommodation Doctrine
  - Colorado
  - New Mexico
  - North Dakota
- Surface Damage Acts
- Off-Lease Drilling Dispute Hypotheticals

# Property Concept: Fee Owner

- Fee Simple - Owner of the property in its entirety (surface, minerals, water, gravel, dirt, grass, etc.)
- Fee owner can:
  - Sell the surface and retain the minerals
  - Sell the minerals and retain the surface
  - Sell any fractional part of the minerals or surface
  - Lease the minerals by executing an oil & gas lease
- What happens when fee owner sells less than everything?

# Property Concept: Severance

- Severance: Owner conveys less than entire "bundle of sticks".
- Vertical Severance: Split acreage
- Horizontal Severance: Split surface and minerals
- The surface estate and mineral estate constitute separate and distinct estates.
- Once a severance occurs a mineral estate is created.

# Property Concept: Easement

- An interest in land in the possession of another which:
  - Entitles the owner of the interest to a **limited use** or enjoyment of the land
  - Is not subject to the will of the possessor of the land
- Can be **Expressed** (in Deed) or **Implied** (by Necessity)
  - Servient Estate – **burdened** by the easement.
  - Dominant Estate – **benefited** by the easement.
- Courts have held mineral owner has an implied easement in the surface.

# Historical Development

- Dominant Estate Doctrine:
  - The mineral owner or his lessee may use the surface to the extent **reasonably necessary** to explore, develop, and transport minerals.
- Historically led to harsh results for surface owner.
- *Grimes v. Goodman Drilling Co.*, 216 S.W. 202 (Tex. Civ. App.-Fort Worth 1919, writ dism'd).

# Historical Development

- What is Reasonably Necessary?
  - Determined by **industry standards**.
- New Rule (absent specific contractual modification):
  - The mineral owner or his lessee may use the surface to the extent **reasonably necessary** ... but these rights must be exercised with **due regard**.



# ***Getty Oil Co. v. Jones***

**470 S.W.2d 618 (Tex. 1971)**

- Issue: Whether a **surface use** by the **lessee** was **reasonably necessary**.
- Facts: John H. Jones, the surface owner, sued for an injunction to restrain Getty Oil Company from using space for pumping units that would prevent him from using an automatic irrigation sprinkler system.
- The **surface owner** had the **burden** to show the **lessee/operator** was **unreasonable**.

# ***Getty Oil Co. v. Jones***

## **470 S.W.2d 618 (Tex. 1971)**

- Holding: "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 the minerals can be recovered, *the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.*"
- So is lack of accommodation sufficient to show unreasonable surface use?

# The Accommodation Doctrine is Born

- NO! The court says "...the rules of reasonable usage of the surface **MAY** require the adoption of an alternative..."
- In order to show lessee failed to accommodate, the surface owner must prove:
  - There is an **existing use by the surface owner** which would otherwise be **precluded or impaired** by mineral development;
  - The **surface owner** has **no other reasonable** means available 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.

# ***Tarrant County WCID v. Haupt, Inc.***

## **854 S.W.2d 909 (Tex. 1993)**

- Issue: Whether inverse condemnation claim by mineral owners could be established when the Water District inundated the surface to create a reservoir.
- Facts: Tarrant County Water Control partially inundated the surface of an eighty-acre tract and mineral owners brought an inverse condemnation action for loss of the mineral estate.
- The case had gone to the Texas Supreme Court but was **remanded to determine whether accommodation doctrine applied.**
- Neither party mentioned the accommodation doctrine in trial or appellate court.

# ***Haupt, Inc. v. Tarrant County WCID***

## **870 S.W.2d 350 (Tex.App.—Waco, 1994).**

- Issue: **Whether the evidence**, when viewed in the light of the accommodation doctrine, **was factually sufficient to support alternative access and reasonableness.**
- Under the doctrine the **Water District** had the **burden** to establish:
  - “the mineral estate had **alternative means of access** and
  - their use of the surface was **not reasonably necessary** because an **alternative means of access** was reasonable.”

# ***Haupt, Inc. v. Tarrant County WCID***

**870 S.W.2d 350 (Tex.App.—Waco, 1994).**

- The court found the minerals **could be accessed by alternative methods** of conventional or directional drilling.
- However, the court found accessing the minerals by a **vertical well** drilled from dry land **was the only reasonable means** of production.

# ***Merriman v. XTO Energy Inc.***

## **407 S.W.3d 244 (Tex. 2013)**

- Issue: Whether a mineral lessee failed to accommodate an existing use of the surface when the lessee drilled a gas well.
- Facts: Homer Merriman purchased a 40-acre tract of land in which the grantor had reserved the minerals. Grantor leased the minerals to XTO.

# ***Merriman v. XTO Energy Inc.***

**407 S.W.3d 244 (Tex. 2013)**

- XTO contacted Merriman about locating a gas well on the surface of his tract. XTO commenced operations after both parties failed to reach an agreement.
- Merriman sued to stop XTO from drilling.
- The trial court granted XTO's summary judgment, the court of appeals affirmed and the Texas Supreme Court affirmed.



# ***Merriman v. XTO Energy Inc.***

## **407 S.W.3d 244 (Tex. 2013)**

- Significance:
  - The court clarified what was necessary to prove a surface owner had no reasonable alternative method by which to continue an existing use.
  - The court stated the surface owner has the burden to prove the inconvenience of continuing the existing use by the alternative method is so great as to make the alternative unreasonable.
  - Evidence of inconvenience and unquantified amount of additional expense does not suffice.

# ***Coyote Lake Ranch, LLC v. City of Lubbock***

## **498 S.W.3d 53 (Tex. 2016)**

- Issue: Whether the **accommodation doctrine also applies** between a landowner and the owner of an **interest in the groundwater**.
- Facts: The City of Lubbock had purchased the groundwater rights of Coyote Lake Ranch in 1953. The deed had included provision regarding the City's use of the surface.
- In 2012, the City planned to drill 20 test wells and 60 new groundwater-production wells.
- The Ranch sued for a temporary injunction, pleading the City had a contractual and common law responsibility to use the amount of surface that was reasonably necessary.

# ***Coyote Lake Ranch, LLC v. City of Lubbock***

## **498 S.W.3d 53 (Tex. 2016)**

- The Ranch argued the proposed drilling would increase erosion and injure the surface unnecessarily.
- The trial court granted the injunction, the court of appeals reversed and remanded to the trial court **holding the accommodation doctrine applied but that it did not extend to groundwater owners.**
- The Texas Supreme Court affirmed the court of appeals judgment to remand but **held the accommodation doctrine did apply between a land owner and groundwater owner.**

# ***Coyote Lake Ranch, LLC v. City of Lubbock***

## **498 S.W.3d 53 (Tex. 2016)**

- Significance:
  - The court emphasized the accommodation doctrine's **broad application**.
  - Arguably, the court may have **over-applied the doctrine** by not relying on the provisions of the deed.
  - The court **clarified** the **meaning of dominant** with respect to the mineral estate.

# ***Lightning Oil Co. v. Anadarko E&P Onshore, LLC***

## **520 S.W.3d 39 (Tex. 2017)**

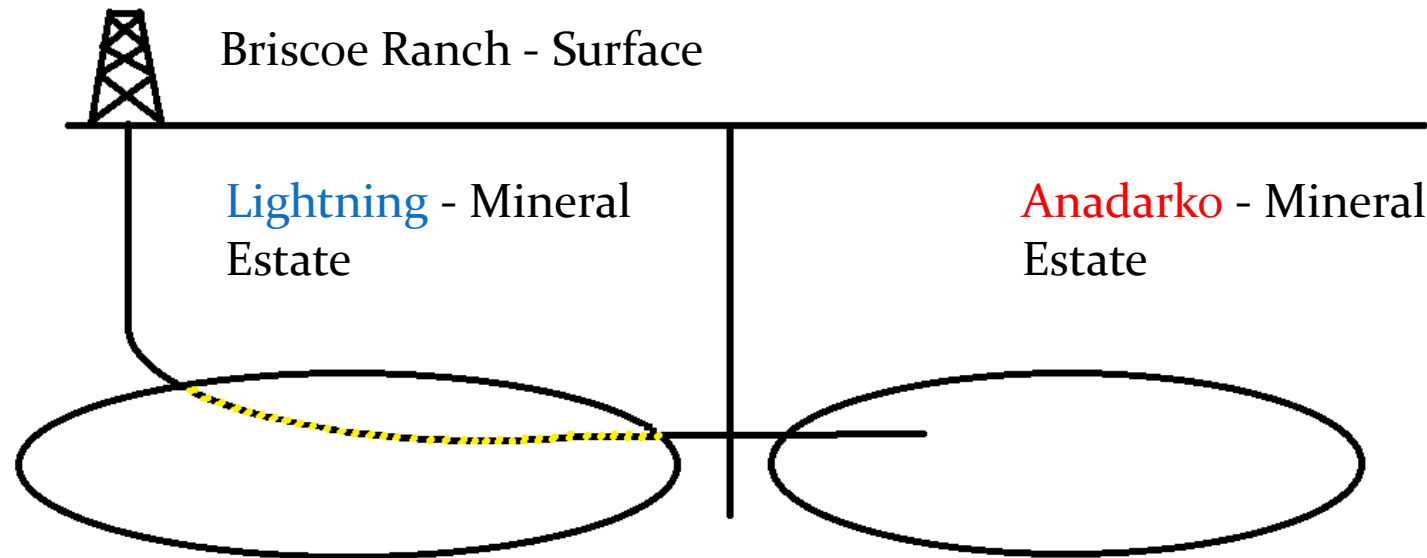
- Issue: Whether permission is necessary for an oil and gas operator to drill through a mineral estate it does not own to reach minerals under an adjacent tract of land.
- Facts: Anadarko entered into an oil and gas lease that restricted its surface use and required it to drill from off-site.
- Anadarko contracted with Briscoe Ranch, the surface estate of an adjacent tract from which Anadarko could drill.
- Lightning Oil Co. was the lessee of the minerals under Briscoe Ranch and sued to stop Anadarko from drilling.

# ***Lightning Oil Co. v. Anadarko E&P Onshore, LLC***

**520 S.W.3d 39 (Tex. 2017)**

**Anadarko** - Drillsite

Chaparral Wildlife  
Management Area - Surface



# ***Lightning Oil Co. v. Anadarko E&P Onshore, LLC***

## **520 S.W.3d 39 (Tex. 2017)**

- The trial court granted summary judgment for Anadarko; the court of appeals affirmed as did the Texas Supreme Court.
- The court stated Anadarko's activities, as the surface owner's assignee, amounted to surface use for accommodation doctrine purposes.
- It held horizontal drilling could constitute subsurface trespass if it actually interfered with the mineral estate.
- Further the court held speculation of potential interference was insufficient for injunctive relief.

# ***Texas Genco, LP v. Valence Operating Co.***

**187 S.W.3d 118 (Tex.App.—Waco, 2006)**

- Surface owner Texas Genco was the operator of a coal-fire plant. Genco designated land near its power plant for an industrial landfill.
- Valence leased minerals under landfill from mineral owner.
- A dispute arose over two wells Valence wished to drill in the landfill, which Genco had projected it would use for ash disposal within seven to ten years.



# ***Texas Genco, LP v. Valence Operating Co.***

**187 S.W.3d 118 (Tex.App.—Waco, 2006)**

- Jury Question 1:
- “Do you find by a preponderance of the evidence that Texas Genco has an existing use of the surface at the Straight Hole Location that would be precluded or substantially impaired if Valence drills Well #8 at the Straight Hole Location?”
- The Jury Answered: Yes

# ***Texas Genco, LP v. Valence Operating Co.***

## **187 S.W.3d 118 (Tex.App.—Waco, 2006)**

- Jury Question 1(a):
- “Is directional drilling from an alternative location an established industry practice that would provide a reasonable alternative to recover the gas that Valence would recover if it drilled Well #8 at the Straight Hole Location?”
- The Jury Answered: “Yes”

# ***Texas Genco, LP v. Valence Operating Co.***

**187 S.W.3d 118 (Tex.App.—Waco, 2006)**

- The court held Genco was entitled to permanent injunctions against Valence based on the accommodation doctrine.
- The jury found that:
  - (1) Genco had an existing use that would be substantially impaired by Valence's straight-hole drilling its Holmes No. 8 well, and
  - (2) directional drilling is a reasonable, industry-established, alternative method for Valence to access its gas.

# ***Texas Genco, LP v. Valence Operating Co.***

**187 S.W.3d 118 (Tex.App.—Waco, 2006)**

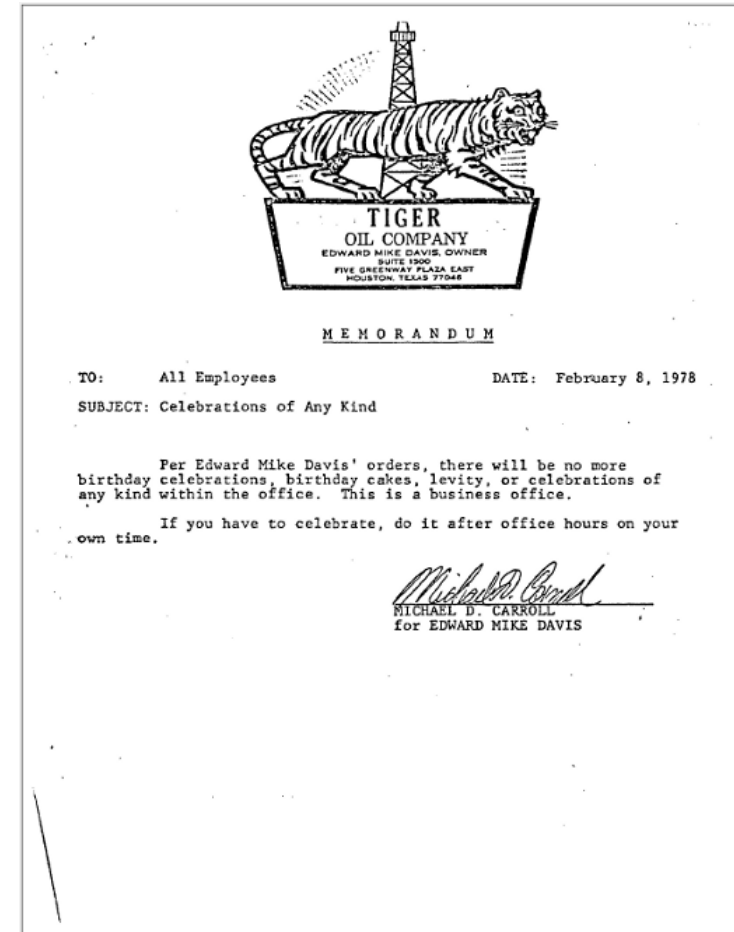
- These findings established Valence's duty to accommodate Genco's surface use.
- This suggests that “existing use” may include some types of planned surface uses.

# Other Jurisdictions that Have Adopted an Accommodation Doctrine

- To date, a variation of the accommodation doctrine has become law in other states, including:
  - North Dakota
  - New Mexico
  - Colorado

# Accommodation Doctrine in North Dakota

- North Dakota has adopted the accommodation doctrine in *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131 (N.D. 1979).
- Don't be like Mike.



# ***Hunt Oil Co. v. Kerbaugh***

## **283 N.W.2d 131 (N.D. 1979)**

- Issue: Whether lessee had an unlimited right under the mineral lease to enter upon the surface owner's property to conduct seismic operations on land.
- Holding: Surface owner had burden of proving that, under the circumstances, the use of the surface by mineral owner or lessee was not reasonably necessary.

# Accommodation Doctrine in New Mexico

- New Mexico adopted a form of the accommodation doctrine in *Amoco Prod. Co. v. Carter Farms Co.*





# ***Amoco Prod. Co. v. Carter Farms Co.***

## **103 N.M. 117 (N.M. 1985)**

- Issue: Whether mineral lessee has an implied contractual duty to completely restore the surface estate following the cessation of drilling operations.
- Holding: Lessee had the right to use so much of the premises as was **reasonably necessary** to comply with the terms of the lease and effectuate its purpose; however, the surface use must be exercised with **due regard**.
  - Surface Owner must prove that surface damages were unreasonable, excessive, or result of negligence.

# ***XTO Energy, Inc. v. Armenta***

**185 P.3d 383 (N.M. Ct. App 2008)**

- Facts: A road historically used by Lessee to access its wells was eroded due to a reservoir release mandated under the Endangered Species Act. Lessee approached surface owner to negotiate placement of a new road, but surface owner insisted Lessee repair old road, and denied Lessee access to wells.
- Holding: Because dispute arose out of an oil and gas lease, and absent an express limitation, Lessee had the right to utilize the surface property as reasonably necessary with "due regard".

# Accommodation Doctrine in Colorado

- Colorado has adopted the "Reasonable Accommodation Doctrine."
- However, in Colorado the mineral owner has the burden to prove the reasonableness of his use!



# ***Gerrity Oil & Gas Corp. v. Magness***

## **946 P.2d 913 (Colo. 1985)**

- Facts: Surface owner sued Lessee for trespass after Lessee attempted to access property to drill new wells on leased land.
- Holding: Lessee must accommodate the surface owner to the fullest extent possible consistent with their right to develop the mineral estate.
  - Lessee commits trespass when Lessee exceeds the legal authorization permitting mineral operations.

# ***Amoco Prod. Co. v. Thunderhead Inv., Inc.***

## **235 F. Supp. 2d 1163 (D. Colo. 2002)**

- Facts: Surface owner planned to develop land into a subdivision, but the land was currently vacant and only being used for hay production and grazing horses. Lessee planned to drill a well, but could not come to an agreement with surface owner as to the location.
- Holding: Lessee's proposed well did not materially interfere with the current use of the surface estate as a pasture, and the accommodation doctrine is limited to existing use by the surface owner.
- Note: The court relied on *Getty* (no speculative use of surface); however, *Texas Genco* case (Tex. App. 2006) calls this holding into question.

# Alternatives to Accommodation Doctrine

- Express provisions in the Deed or the Oil and Gas Lease.
- Surface Damage Acts

# The Surface Damage Acts

- Prior to SDA: Mineral owner had the right to “use the surface as reasonably necessary” to develop the surface. **Landowner had to show oil company had done something unreasonable.** *Difficult for average surface owner to meet.*
- Legislature now defines “reasonable use” or imposes strict liability on the operator.
- Currently found in **eleven states**—in the **west**: New Mexico, Oklahoma, Wyoming, North Dakota, Montana, South Dakota. **Not Texas!**

# The Surface Damage Acts

- Oklahoma (Surface Damages Act: §52-318.2 to .9)
  - Requires an operator to give surface owner written notice of intent to drill before drilling and enter good faith negotiations to determine surface damages.
- North Dakota (N.D. Cent. Code 38-11.1-01 to -10)
  - Imposes more responsibilities on the company by requiring that ALL damages to the surface be compensated, not just the unreasonable damages.
- Colorado (Colo. Rev. Stat. 34-60-127)
  - Operator bears the burden of establishing that any accommodations it declined to make were because of technical or economic unreasonable or unavailable.



# Limitations on Surface Use Rights

- The mineral interest owner or lessee may make only such use of the surface estate as is reasonably necessary.
- Use of the surface estate must be exclusively for obtaining minerals under the servient surface.
- Lease clauses, restrictive covenants, or other agreements may curtail the use rights of the mineral owner or mineral lessee.
- State's police power may limit the use rights of the mineral owner or lessee through state statutes, city ordinance, and governmental regulations.

# Questions or Comments?

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