St. Mary's Law Journal

Volume 13 | Number 4 Article 3

9-1-1982

Multiple Uses and Conflicting Rights Symposium - Selected Topics on Oil and Gas Law.

Guy L. Nevill

MULTIPLE USES AND CONFLICTING RIGHTS*

GUY L. NEVILL**

I. INTRODUCTION

The energy crisis has caused unprecedented drilling activity throughout the United States. According to the Denver based Petroleum Information Corporation, during the first six months of

---

* Originally published in the *Advanced Oil, Gas & Mineral Law Course Book*, STATE BAR OF TEXAS (1981). Reprinted with permission.

** Senior Staff Counsel, Dow Chemical Co., Houston, Texas. Present Past Chairman of the Oil, Gas and Mineral Law Section of the State Bar of Texas.

1981, oil and gas drilling activity in the United States increased by 21% over the same period of 1980. Texas was the leading state with 10,932 wells completed during this six-month period. On August 26, 1981, Hughes Tool Company reported to the International Association of Drilling Contractors that 4,151 rotary rigs worked during that week and that 1,422 of these rigs were in Texas. The energy crisis has likewise led to increased interest in other fossil fuels, such as coal and lignite. The Director of the Surface Mining and Reclamation Division of the Railroad Commission of Texas, J. Randel Hill, reports that twelve coal and lignite mines were operating in Texas on July 30, 1981. Texas Utilities Generating Company operates five of these lignite mines in Freestone, Panola, Hopkins and Titus Counties; Alcoa operates a lignite mine in Milam County; Texas Municipal Power Agency operates a lignite mine in Grimes County; San Miguel Electric Co-op operates a lignite mine in Atascosa County; ICI Americas operates a lignite mine in Harrison County; Farco Mining Company operates a lignite mine in Webb County; Texas Industries operates a lignite mine in Erath County; and Amistad Fuel Company operates a lignite mine in Coleman County. Thirteen lignite-fueled power units are now in opertion in Texas: two at Big Brown, three at Martin Lake, three at Monticello, four at Sandow, and one at San Miguel. An additional nineteen lignite-fueled power units are scheduled for operation by the mid 1990's.

This increased reliance on lignite and other near surface minerals, however, will not be without its costs. During 1980 alone, lignite and coal mining disturbed 2,500 acres and uranium mining 700 acres. There are an estimated ten to twenty billion tons of near-surface lignite in Texas. If fifty percent of this lignite is eventually recovered by mining at the current rate of 12,000 tons per year, some 400,000 to 800,000 acres of land will be affected.

Surface mining is a procedure whereby lignite is exposed to the sky by removing, or stripping, overburden prior to mining. In Texas, stripping of overburden is generally performed by draglines which remove up to 100 cubic yards of material per cycle. Subsequently, the coal is mined by shovels and removed from the pit by trucks. After mining, the pit is filled with waste material, or spoil, which is removed from the next cut and the land is reclaimed in accordance with the Texas Surface Coal Mining and Reclamation

Act.[1] The mining process is completely surface destructive and the time from whence stripping commences to reclamation is five to seven years.

During a typical five-year lignite permit, a mine producing 5,500,000 tons per year will pass over some 3,000 acres. Lignite is found in beds that usually dip 70 to 80 feet per mile away from their intersection with the surface, or outcrop. Mining commences along the outcrop, where it is necessary to remove about twenty feet of soil and oxidized lignite in order to reach high quality lignite. A typical mine will follow the outcrop for thousands of feet, moving back and forth as the lignite is followed downdip. For a 10,000-foot long pit, 3,000 acres will be destroyed when the mine reaches a depth of 200 feet. The surface mining techniques presently in use in Texas, moreover, require complete control of the entire surface above each mine, a minimum of 5,000 to 20,000 acres. This is in stark contrast to the drilling of oil and gas wells in the oil patch where only a few acres of land are required for each well.

Within the next thirty to forty years, approximately 400,000 to 800,000 acres of land in Texas will be surface mined solely for lignite; likewise, many thousands of additional acres will be mined for other substances. Surface mining will inevitably lead to many conflicts between the owners of oil and gas interests and the owners of near-surface mineral interests who desire to conduct surface mining operations since uranium and lignite are frequently located on structures that also contain oil and gas reservoirs. With all the drilling and surface mining activity now in progress, it seems appropriate to examine the law concerning multiple uses of the surface estate and the conflicting rights that arise out of these uses. This article addresses (1) the conflicting rights of the owners of the severed mineral and surface estates; (2) conflicts between mineral lessees and surface tenants; (3) the conflicting rights of surface owners and owners of private pipeline interests; and (4) conflicts arising between an oil and gas lessee and a lignite or uranium lessee who desires to mine its near surface minerals by reasonable, but surface destructive methods. Some statutes and regulations of administrative bodies concerning such conflicts will be mentioned, but are beyond the scope of this article. An effort will also be made

1. TEX. REV. CIV. STAT. ANN. art. 5920-11 (Vernon Supp. 1982).

to establish the trend of the Texas courts in connection with these problems, and to offer possible solutions to problems that have not yet reached the Texas appellate courts.

II. Conflicting Rights Between the Owners of Severed Mineral and Surface Estates

Conflicting rights resulting from multiple uses of a single tract of land essentially arise from the severance of either the mineral or surface estate. Severance is effected by grant[2] or reservation[3] in a deed, or by lease of either the mineral or surface estate.[4] When severance is by deed, the owner of the mineral estate and the owner of the surface estate each possess all of the usual incidents and attributes of an estate in land.[5] As the Supreme Court of Texas observed in *Acker v. Guinn*,[6] "A grant or reservation of minerals by the fee owner effects a horizontal severance and the creation of two separate and distinct estates, an estate in the surface and an estate in the minerals."[7]

Of course, a mere grant or reservation of minerals does not convey or reserve any title to the surface.[8] As a necessary appurtenance to the mineral estate, however, a grant or reservation of minerals carries with it the right to use so much of the surface as may be reasonably necessary to enjoy the estate and enforce the rights of its owner.[9] Otherwise, a grant or reservation of minerals

---

2. *See* Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 167, 254 S.W. 290, 292 (1923); Perkins v. Kent, 274 S.W.2d 892, 894 (Tex. Civ. App.—Eastland 1954, writ ref'd n.r.e.).

3. *See* Stradley v. Magnolia Petroleum Co., 155 S.W.2d 649, 651 (Tex. Civ. App.—Amarillo 1941, writ ref'd).

4. *See* Humble Oil & Ref. Co. v. L. & G. Oil Co., 259 S.W.2d 933, 938 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.); Stradley v. Magnolia Petroleum Co., 155 S.W.2d 649, 651 (Tex. Civ. App.—Amarillo 1941, writ ref'd). Severance may also occur by operation of law, as by sale under judgment or court decree. *See* Yates v. Gulf Oil Corp., 182 F.2d 286, 290 (5th Cir. 1950) (applying Texas law).

5. *See* Harris v. Currie, 142 Tex. 93, 99, 176 S.W.2d 302, 305 (1943).

6. 464 S.W.2d 348 (Tex. 1971).

7. *Id.* at 352.

8. *See* Harris v. Currie, 142 Tex. 93, 99, 176 S.W.2d 302, 305 (1943).

9. If not expressly provided, "reasonably necessary" use of the surface by the mineral owner will be implied. *See, e.g.*, Harris v. Currie, 142 Tex. 93, 99, 176 S.W.2d 302, 305 (1943); Getty Oil Co. v. Royal, 422 S.W.2d 591, 592 (Tex. Civ. App.—Beaumont 1967, writ ref'd n.r.e.); Eternal Cemetery Corp. v. Tammen, 324 S.W.2d 562, 564 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.). *But cf.* Texaco, Inc. v. Faris, 413 S.W.2d 147, 149-50 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.) (when lease expressly provides scope of surface

would be wholly worthless since the grantee could not enter the land.[10]

Although the mineral estate is dominant, and although its owner may use as much of the leased premises as is reasonably necessary to develop his estate,[11] the rights of the mineral owner must be exercised with due regard to the rights of the surface owner.[12] When a difference of opinion arises between the owners of the mineral and surface estates, the question of reasonable use of the surface is generally considered a question of fact for the jury,[13] while the proper effect to be given the grant of the oil and gas lease and the proper legal definition of "reasonably necessary" are determined by the court.[14] The surface owner, however, is not required to prove that the mineral owner's use of the surface deviates from industry custom. Rather, he need only show that the particular use made of the surface is not reasonably necessary.

Reasonable use of the surface by the mineral owner, moreover, may require the mineral owner to employ an alternate means of production when his proposed means of production will impair or preclude a prior existing use of the surface by the surface owner. In *Getty Oil Co. v. Jones*,[15] for example, the surface owner brought suit to enjoin Getty from erecting and maintaining pumping units at heights which interfered with a system of rotating irrigation pipes which he had previously installed. The trial court granted Getty's motion for judgment non obstante veredicto, but the court of civil appeals reversed.[16] Affirming the judgment of the intermediate court, the supreme court observed that

---

use court should not apply reasonably necessary standard).

10. *See, e.g.*, Harris v. Currie, 142 Tex. 93, 99, 176 S.W.2d 302, 305 (1943); Texaco, Inc. v. Faris, 413 S.W.2d 147, 149 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.); Stanolind Oil & Gas Co. v. Wimberly, 181 S.W.2d 942, 944 (Tex. Civ. App.—El Paso 1944, no writ).

11. *See* Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967).

12. *See, e.g.*, Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810 (Tex. 1972); Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971); Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967).

13. Keeton & Jones, *Tort Liability and the Oil and Gas Industry*, 38 TEXAS L. REV. 1, 4 (1956).

14. *See* Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 135 (Tex. 1967); Keeton & Jones, *Tort Liability and the Oil and Gas Industry*, 35 TEXAS L. REV. 1, 4 (1956).

15. 470 S.W.2d 618 (Tex. 1971).

16. *See* Jones v. Getty Oil Co., 458 S.W.2d 93, 97 (Tex. Civ. App.—San Antonio 1970), *aff'd*, 470 S.W.2d 618 (Tex. 1971).

> [the mineral estate] owner is entitled to make reasonable use of the surface for the production of his minerals. It is not ordinarily contemplated, however, that the utility of the surface will be destroyed or substantially impaired. The due regard concept defines, more fully what is to be considered in the determination of whether a surface use by the lessee is reasonably necessary. There may be only one manner of use of the surface whereby the minerals can be produced. The lessee has the right to pursue this use, regardless of surface damage . . . . And there may be necessitous temporary use governed by the same principle but under the circumstances indicated here; i.e., 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.[17]

On rehearing the court clarified its former opinion, stating that if the use selected by the dominant mineral lessee is the *only* reasonable, usual and customary method available for developing and producing the minerals on particular lands, the owner of the servient estate must yield.[18] If, however, there are other usual, customary and reasonable methods practiced in the industry which would not interfere with the existing use of the surface by a servient surface owner, it may be unreasonable for the mineral owner to employ an interfering method.[19] These considerations involve questions to be resolved by the trier of fact.

In *Sun Oil Company v. Whitaker*[20] the concepts of "due regard," "existing use," and "alternative means" were again before the supreme court. Sun, a prior oil and gas lessee, proposed to use fresh subterranian water in its water flood operation when the surface owner had been using the same water for irrigation prior to Sun's proposed use. Sun sought to enjoin Whitaker, the surface owner, from interfering with Sun's production of water from the common reservoir. Whitaker cross-acted, seeking an injunction prohibiting Sun from producing and using the water for its secon-

---

17. Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971) (quoting Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971)).

18. *See id.* at 628.

19. *Id.* at 628.

20. 483 S.W.2d 808 (Tex. 1972).

dary recovery operations. Whitaker further sought damages for Sun's production of water up to the time of trial. The lease agreement between Sun and its grantor provided that Sun should have free use of "*water from said land except water from [grantor's] wells for all operations*" conducted under the lease.[21] The parties, moreover, stipulated that Sun's waterflood process was a reasonable and proper operation.[22]

On motion for rehearing, the court withdrew its initial opinion and rendered judgment that Whitaker be enjoined from interfering with Sun's operations. Conceding that water is part of the surface estate unless expressly severed by conveyance or reservation,[23] the court stressed the express provision in Sun's lease allowing Sun the free use of water under the land.[24] The court thus held that Sun's implied right of reasonable use of the surface included the right to use as much water as was reasonably necessary to conduct its operations.[25]

The court's opinion in *Whitaker*, however, does not mean that the mineral owner's implied right will always include the right to the free use of the surface estate's water. The exceptional circumstances presented in the case compel this conclusion. In the first place, Sun was expressly granted the right to the free use of water. Secondly, and more important, Whitaker had stipulated that Sun's waterflood operation was a reasonable means of production. Finally, it was established at trial that efforts to use saltwater had failed and that the subterranian reservoir was the *only* available source of useable water on the Whitaker tract.[26] The court, therefore, distinguished its prior holding in *Getty Oil*, limiting that opinion to "situations in which there are reasonable alternative methods that may be employed by the lessee *on the leased prem-*

---

21. *Id.* at 810 (emphasis by the court).

22. *Id.* at 810.

23. *See id.* at 811. Unless expressly severed, freshwater is part of the surface estate. *See id.* at 811 (citing Fleming Found. v. Texaco, Inc., 337 S.W.2d 846 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.)). In Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865 (Tex. 1973), decided two years after *Whitaker*, the court held that saltwater is likewise a part of the surface estate unless expressly severed. *See id.* at 867.

24. *See* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810 (Tex. 1971).

25. *See id.* at 812.

26. Although there were other available sources of water on adjacent tracts, the court observed that to require Sun to purchase water off the leased premises "would be in derogation of [its] dominant estate." *Id.* at 812.

ises . . . ."[27]

That the rights of the mineral owner vis-a-vis the surface owner are not absolute is illustrated by the court's subsequent opinion in *Humble Oil & Refining Co. v. West*.[28] The Wests, owners of a royalty interest, sought to enjoin Humble, the owner of the mineral fee and surface estate, from injecting extraneous gas into the reservoir for storage purposes. Humble had previously produced 80% of the recoverable gas in the field, and production of the remaining 20% would have destroyed the reservoir's storage capacity. Humble, moreover, owned the reservoir structure in fee simple as an incident of its ownership of the surface estate.[29] The Wests, however, contended that Humble's storage of gas would deprive them of their absolute right to the royalty in the unproduced gas remaining in the reservoir. The court rejected this argument and reaffirmed its prior holdings requiring a reasonable accomodation of the competing rights of the surface and mineral owners.[30] Noting that the rights of the dominant mineral estate are not absolute, the court stated that the factual context presented— and not the nature of the interests—is the determinative factor in any particular case.[31]

III. Surface Owner's Conflicting Rights

It is generally accepted that the rights of a surface tenant holding under a prior lease for grazing purposes or agricultural use are superior to the rights of a subsequent oil and gas lessee, at least until the expiration of the surface lease.[32] There is little Texas authority to be found on the subject,[33] but in *Republic Natural Gas Company v. Melson*,[34] the Oklahoma Supreme Court adopted this

27. *Id.* at 812 (emphasis by the court).

28. 508 S.W.2d 812 (Tex. 1974).

29. *See id.* at 815.

30. *See id.* at 816 ("under these circumstances, the accepted principles of accomodation that have ruled the resolution of like conflicts are determinative").

31. *See id.* at 815.

32. *See* Robinson Drilling Co. v. Moses, 256 S.W.2d 650, 651 (Tex. Civ. App.—Eastland 1953, no writ). *See generally* McMahon, *Rights And Liabilities With Respect To Surface Usage By Mineral Lessees*, Sw. Legal Foundation 6th Inst. On Oil & Gas Law & Tax. 231, 236-37 (1955).

33. *See* Stanolind Oil & Gas Co. v. Wimberly, 181 S.W.2d 942, 943 (Tex. Civ. App.—El Paso 1944, no writ) (lease for "grazing purposes only").

34. 274 P.2d 543 (Okla. 1954).

view.[35] Even when the surface lease is prior, however, the surface tenant cannot exclude the mineral lessee from the leased premises altogether.[36] If the interest of the surface lessee is junior in time to the prior mineral grantee or oil and gas lessee, the mineral owner is not required to obtain permission from the surface lessee to enter the premises,[37] and may use as much of the surface as is reasonably necessary for exploration and production purposes.[38] The oil and gas lessee whose lease is junior to any surface lease, however, must first examine the terms of the surface lease to determine whether it affects his rights as the owner of the dominant mineral estate. The junior oil and gas lessee must also determine whether the prior surface lease also operates as a severance of the surface from the mineral estate. If it does, surface easements in favor of the owner of the reserved mineral estate will be implied absent an express provision to the contrary.[39]

When the surface lease grants "the surface only" there is clearly a severance of the surface from the mineral estate and the owner of the reserved mineral estate retains the usual surface easements that entitle him to recover the minerals.[40] Thus, a subsequent oil and gas lease executed by the owner of the mineral fee also conveys these same surface easements, and the oil and gas lessee can enter the premises without the consent of the surface owner.[41]

When the surface is held for a term of years under an "agricultural lease," however, the oil and gas lessee may be required to obtain the consent of the surface lessee before entering the prem-

---

35. *See id.* at 544.

36. *See* Ball v. Dillard, 602 S.W.2d 521, 523 (Tex. 1980); Stanolind Oil & Gas Co. v. Wimberly, 181 S.W.2d 942, 944 (Tex. Civ. App.—El Paso 1944, no writ).

37. *See* Gulf Oil Corp. v. Whitaker, 257 F.2d 157, 159 (5th Cir. 1958) (applying Texas law); Sinclair Prarie Oil Co. v. Perry, 191 S.W.2d 484, 486 (Tex. Civ. App.—Texarkana 1945, no writ).

38. *See* Chapapas v. Delhi-Taylor Oil Corp., 323 S.W.2d 64, 67 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.). Generally, the mineral lessee is not liable for surface damage in the absence of negligence unless the lessee's use of the surface was more than reasonably necessary. *See* Gulf Oil Corp. v. Whitaker, 257 F.2d 157, 159 (5th Cir. 1958); Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134-35 (Tex. 1967).

39. *See* 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 218.3, at 192-94.

40. *See* Phillips Petroleum Co. v. Cowden, 241 F.2d 586, 592 (5th Cir. 1957) (applying Texas law). *See generally* Davis, *Selected Problems Regarding Lessee's Rights And Obligations To The Surface Owner*, ROCKY MT. 8TH ANN. MINERAL LAW INST. 315, 321-25 (1963).

41. *See* Kemmerer v. Midland Oil & Drilling Co., 229 F. 872, 873 (8th Cir. 1915).

ises.[42] This situation is perhaps distinguishable from an express severance of the mineral estate, or a grant or lease of "the surface only."[43] The surface lessee for a term of years is entitled to enforce his covenant of peaceful and quiet enjoyment and should be entitled to damages when the covenant is breached.[44] Absent a prior severance of the mineral estate, the possessory right to the *entire* fee is in the surface tenant, and a subsequent mineral lease does not pass any possessory right in the land.[45] Logically, the oil and gas lessee should have to acquire a like lease or ratification from the tenant for years. Otherwise, the surface tenant's right to quiet enjoyment is rendered meaningless.[46]

IV. Conflicts Between Surface Owners and Owners of Private Pipeline Easements

The granting clause in the oil and gas lease usually expressly grants the right to lay pipelines. This right, however, is limited to laying pipelines that serve the leased property.[47] When the landowner grants a right of way to a gas pipeline company and the instrument is silent as to the exact location of the pipeline, the grantee may locate, construct, maintain and operate its line at any

---

42. *See* 1 H. Williams & C. Meyers, Oil And Gas Law § 218.3, at 195 (1981).

43. *See* Keeton & Jones, *Tort Liability and the Oil and Gas Industry*, 35 Texas L. Rev. 1, 5 (1959). When a prior express or clear severance occurs, however, the oil and gas lessee, although junior in time to the surface lessee, can still make reasonable use of the surface for production operations, *see* Robinson Drilling Co. v. Moses, 256 S.W.2d 650, 652 (Tex. Civ. App.—Eastland 1953, no writ), and the surface lessee may not interfere with necessary surface operations of a subsequent mineral lessee. *See* Hagar v. Martin, 277 S.W.2d 195, 198 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

44. *See* 1 H. Williams & C. Meyers, Oil And Gas Law § 218.3, at 199-200 (1981). The surface lessee, however, should not be able to "veto" oil and gas development by obtaining an injunction especially when drainage to adjacent tracts is threatened. *See id.* § 218.3, at 197.

45. R. Hemingway, The Law Of Oil And Gas § 5.5, at 193 (1971); *see* Kemmerer v. Midland Oil & Drilling Co., 229 F. 872, 877 (8th Cir. 1915) (Sanborn, J., dissenting). The determination of whether a subsequent oil and gas lessee has any possessory rights in the surface, however, may depend upon the intent of the parties and extrinsic circumstances. *See* 1 H. Williams & C. Meyers, Oil And Gas Law § 218.3, at 198 (1981).

46. *See* R. Hemingway, The Law Of Oil And Gas § 5.5, at 193 (1971); 1 H. Williams & C. Meyers, Oil And Gas Law § 218.3, at 197 (1981).

47. *See* Miller v. Crown Central Petroleum Corp., 309 S.W.2d 876, 878-79 (Tex. Civ. App.—Eastland 1958, no writ) (right extended to adjacent lands in unit when lease pooled); Comment, *Land Uses Permitted On Oil and Gas Lessee*, 37 Texas L. Rev. 889, 896 (1959).

location across the land covered by the grant.[48] Similarly, when the instrument does not specify the width of the pipeline right of way, the grant is not ambiguous and parole evidence is not admissible to establish the width of the right of way granted.[49] Every pipeline right of way, moreover, carries with it the right to do such things as are reasonably necessary for the full enjoyment of the easement, but the exercise of the right is confined to a manner that does not injuriously increase the burden on the servient surface estate.

Problems can—and do—arise when the instrument grants multiple pipeline privileges or permits the grantee to change the size and location of the easement. When the grant clearly states that the grantee has the right to construct a pipeline in excess of the one actually used, this right will continue to exist notwithstanding the exercise of a lesser privilege.[50] Conversly, when a pipeline easement is general as to its location as well as its size, the easement becomes fixed and certain after the pipeline is laid and used with acquiescence of both grantor and grantee.[51] The right to lay additional pipeline is not a mere equitable right, but grants a presently vested interest in land.[52] Consequently, it is not violative of the rule against perpetuities as an option uncertain to vest,[53] and cannot be abandoned by the "mere passage of time alone."[54] Instead, an affirmative intent to abandon is required.[55] Finally, the pipeline easement is an interest in land in the constitutional sense, and its owner is entitled to compensation for any damage thereto caused

48. *See* Lone Star Gas Co. v. Childress, 187 S.W.2d 936, 940 (Tex. Civ. App.—Waco 1945, no writ) (grantee is entitled to use as much of land as each occasion may reasonably demand).

49. Crawford v. Tennessee Gas Transmission Co., 250 S.W.2d 237, 240 (Tex. Civ. App.—Beaumont 1952, writ ref'd).

50. *See* Knox v. Pioneer Natural Gas Co., 321 S.W.2d 596, 600-01 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.).

51. Houston Pipe Line Co. v. Dwyer, 374 S.W.2d 662, 665 (Tex. 1964).

52. Strauch v. Coastal States Crude Gathering Co., 424 S.W.2d 677, 681 (Tex. Civ. App.—Corpus Christi 1968, writ dism'd); Williams v. Humble Pipe Line Co., 417 S.W.2d 453, 455 (Tex. Civ. App.—Houston 1967, no writ). The right to lay additional pipe line is an expansible easement. Strauch v. Coastal States Crude Gathering Co., 424 S.W.2d 677, 681 (Tex. Civ. App.—Corpus Christi 1968, writ dism'd).

53. Williams v. Humble Pipe Line Co., 417 S.W.2d 453, 455 (Tex. Civ. App.—Houston 1967, no writ).

54. Stauch v. Coastal States Crude Gathering Co., 424 S.W.2d 677, 681 (Tex. Civ. App.—Corpus Christi 1968, writ dism'd).

55. *Id.* at 683.

by the state.[56]

Usually a pipeline right of way requires the grantee to bury his pipeline below plow depth when his grantor requests him to do so. Since the depth at which the grantee should bury pipelines varies depending on the agricultural use being made of the surface, he must determine this depth either at the time of the execution or the time of performance. In *Mapco v. Ratliff*,[57] for example, the depth of the pipeline was continually reduced by shifting sand. The court, however, held that the owner of the easement had a continuing duty to maintain the pipeline below the depth required for deep plowing since deep plowing was practiced at the time of the grant.[58]

Texas recordation laws[59] apply to easements created by express grant, and a duly recorded pipeline easement constitutes constructive notice to tranferees of the grantor.[60] In this situation, the transferee of the servient estate is not an innocent purchaser.[61] Similarly, when two pipeline easements are created by a single grantor over the same tract of land, and the first easement is recorded prior to the second, the owner of the second pipeline easement is charged with notice of the first easement owner's right to possession of the surface as described in the instrument creating the prior right of way.[62] If the owner of the first easement requires all of the surface described in his easement and use of the entire surface is reasonably necessary for the full enjoyment of the easement, the owner of the prior easement may exclude the junior pipeline right of way owner from the same tract. The owner of the prior easement, however, is superior only to the extent exclusion is reasonably necessary for his use of the same tract. When there is a dispute between two competing pipeline easement owners in the same tract of land, it is important to examine closely the rights

---

56. *See* Magnolia Pipe Line Co. v. City of Tyler, 348 S.W.2d 537, 541 (Tex. Civ. App.—Texarkana 1961, writ ref'd).

57. 528 S.W.2d 622, 623 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.).

58. *See id.* at 624.

59. TEX. REV. CIV. STAT. ANN. arts. 6626 (Vernon Supp. 1982), 6646 (Vernon 1969).

60. *Cf.* Clements v. Taylor, 184 S.W.2d 485, 488 (Tex. Civ. App.—Eastland 1944, no writ) (recorded easement is constructive notice under article 6646).

61. *Cf.* Latimer v. Hess, 183 S.W.2d 996, 997 (Tex. Civ. App.—Texarkana 1944, writ ref'd) (easement in alley created by express grant; subsequent purchaser not innocent).

62. TEX. REV. CIV. STAT. ANN. art. 6646 (Vernon 1969). *See generally* 4 F. LANGE, LAND TITLES AND TITLE EXAMINATION § 371, at 130 (Texas Practice 1961).

granted in each instrument. Words expressing the right to use the land such as "exclusive right," "exclusive and unobstructed," and "exclusive and superior" can create an expanded use of the pipeline easement when employed properly.

V. Conflicts Between an Oil and Gas Lessee and an Iron Ore, Coal and Lignite, or Uranium Lessee: Whose Rights are Superior?

As the introduction to this article notes, there has been a tremendous increase in recovery of coal and lignite in Texas through surface mining operations. Such surface mining operations require use of 100% of the surface area during the five to seven year period when actual mining and reclamation operations are taking place. In addition, most of the same land often contains prospective sources of oil and gas. Both lessees have dominant mineral estates, meaning that these two methods of mineral development will inevitably conflict. At present, no case involving a dispute between a near surface mineral lessee and an oil and gas lessee has reached the Texas appellate courts.[63] What will happen when an oil and gas lessee moves a rig on location to drill an exploratory well to a depth of 15,000 to 20,000 feet, which may cost between one million and six million dollars depending on the depth of the formation, and he discovers a coal and lignite lessee who has completed exploratory wells cubicating the tonnage of near surface minerals?

After carefully considering the holdings in *Getty Oil Company v. Jones* and *Sun Oil Company v. Whitaker*, it is apparent that the concepts of "prior existing use" and "alternative means" were developed to settle disputes between the mineral estate and the surface estate, one estate being dominant and the other servient. The holdings in these cases restricted the rights of the *dominant* min-

63. In Roach v. Chevron U.S.A., Inc., 574 S.W.2d 200 (Tex. Civ. App.—San Antonio 1978, no writ), Chevron, a surface mining lessee, instituted suit against Roach, a oil and gas lessee, seeking declatory and injunctive relief. Chevron, whose strip mining operations for uranium were approaching a well being reworked by Roach, claimed superior right to the tract occupied by Roach as necessary for its mining operations. Chevron based ints claim on the priority in time of its lease. Roach filed a plea of privilege, which was contested by Chevron and overruled by the trial court. The trial court's action overruling the plea of privilege was affirmed on appeal. The only holding of the case is that venue was proper in the county in which the land was located. The question of superior right to the use of the surface was not reached. *See id.* at 204.

eral owner in disputes between an *oil and gas lessee* and the owner of the *servient surface estate*. The concepts developed in these cases, therefore, should not control disputes between two lessees, each of which hold a lease on a *dominant mineral estate*. The modern near surface lease form, moreover, grants the lessee an *express right* to destroy the surface of the tract of land involved. By comparison, the mineral owners in *Getty Oil Company v. Jones* and *Sun Oil Company v. Whitaker* were relying only on an *implied grant* to use as much of the surface as was reasonably necessary in producing oil. Once the question of superior right to the use of the surface is firmly established, however, there should be no hesitation on the part of our appellate courts to extend the concepts of *Getty Oil Company v. Jones* and *Sun Oil Company v. Whitaker* to encompass conflicts between oil and gas and near surface mineral lessees.

The function of the courts speaking through its judges should be to formulate a rule of law consistent with the public policy of promoting the development of all the state's natural resources, particularly those providing a source of energy which is sorely needed in both the State of Texas and nationally. When the appellate court finds itself in this position, it must formulate a rule that leaves no room for reasonable doubt as to which of these important natural resources, both being a part of the dominant mineral estate, has the superior right. In my opinion, priority in time should determine superiority of right. A rule based on priority is both workable and fair. The following sections of this article illustrate how such a rule would be applied.

A. When The Lessor of The Near Surface Mineral Lessee Acquired His Interest As Grantee of The Fee Simple Estate

When a severance of the mineral estate occurs, the owner of the determinable fee in the mineral estate also acquires a right to use so much of the surface as is reasonably necessary to produce the mineral conveyed. This right arises by express provision, as in the case of the prior near surface mineral lease, or is implied as a matter of law. When both of the dominant mineral estates are derived from a common grantor, if the prior near surface mineral lease was duly recorded, it will be found in the junior oil and gas lessee's

chain of title.[64] The junior oil and gas lessee, therefore, will be charged with notice of the prior near surface mineral lease and the lessee's express right to exclusive possession of the surface for the purpose of conducting surface destructive mining operations.[65] Conversely, the rights of a prior oil and gas lessee under the same circumstances should be essentially the same as those of the prior near surface mineral lessee. The fact that the prior oil and gas lessee will have more latitude with respect to the location of his wells and related production equipment, and the fact that the near surface mineral lessee has been granted the *express right* to conduct surface destructive mining operations, however, should be justification for the appellate courts to extend under the concept of "alternative means" in favor of the near surface mineral lessee certain circumstances.

In the event the prior near surface mineral lessee fails to record his lease prior to the execution of the junior oil and gas lease, the question is whether the oil and gas lessee has actual notice of the prior near surface mineral lease. For example, if the prior near surface mineral lessee has entered the land and commenced operations by drilling exploratory and development wells, as is customarily done, the junior oil and gas lessee is on actual notice of the prior near surface mineral lease. Similarly, a permit to conduct surface mining operation which includes the tract in question in its mine plan may be hown by the local deed records.[66]

---

64. *See* TEX. REV. CIV. STAT. ANN. arts. 6626, 6627 (Vernon Supp. 1982).

65. *See id.* art. 6646 (Vernon 1969).

66. Under the Texas Surface Coal Mining And Reclamation Act, TEX. REV. CIV. STAT. ANN. art. 5920-11 (Vernon Supp. 1982), the applicant for a surface mining permit must file a copy of its application with the clerk of the county in which the land is located. *See id.* art. 5920-11, § 17(a) (Vernon Supp. 1982). At the same time, the applicant must place an advertisement in "a local newspaper of general circulation," detailing the ownership, location, and boundaries of the affected land. *See id.* art. 5920-11, § 20(a). Similarly, under the Texas Uranium Surface Minining and Reclamation Act, TEX. NAT. RES. CODE ANN. §§ 131.001-131.270 (Vernon 1978 & Supp. 1982), the Railroad Commission is required to file a copy of the application for a surface mining permit with the clerk of the county in which the land is located. *See id.* § 131.138 (Vernon 1978).

B. When The Lessor of The Near Surface Mineral Lessee Acquired His Interest As Grantor In a Grant Of Oil, Gas And "Other Minerals" or as Grantee of "The Surface Only"

Under the rule established in *Acker v. Guinn*,[67] *Reed v. Wylie I*,[68] *and Reed v. Wylie II*,[69] when the owner of the fee simple title first severs the minerals by a grant of the "oil, gas and other minerals,"[70] he retains ownership of the balance of the tract, including near surface minerals. Assuming that he then executes a near surface mineral lease which is promptly recorded, if the grantee who acquired the oil, gas and "other minerals" subsequently executes an oil and gas lease covering his interest in the same tract, does the priority of the recording of the near surface mineral lease still determine the question of superiority with respect to the junior oil and gas lease?

The near surface minerals are definitely recognized by the Supreme Court of Texas as minerals; as such, they are part of the dominant mineral estate. For that reason, the rights that flow to the owner of the prior recorded near surface mineral lessee should be the same whether the lessor acquired his title to the near surface minerals as grantee from the owner of the fee simple estate or as a grantor in a deed conveying the "oil, gas and other minerals" to another *when the near surface mineral ores did not pass to the grantee*. Likewise, the same rights should flow under our registration statute in favor of the owner of a prior recorded near surface mineral lease when his lessor acquired the near surface minerals in a grant of the "surface only."

C. When the Lessor of the Near Surface Mineral Lessee Acquired His Interest as Grantee Specifically Named Near Surface Mineral Such as Iron Ore, Coal and Lignite or Uranium

When the lessor in a near surface mineral lease acquired iron ore, coal and lignite, or uranium in an express grant or reservation, would his near surface mineral lessee involved in a dispute with a junior oil and gas lessee hold superior right under a prior recorded

67. 464 S.W.2d 348 (Tex. 1971).
68. 554 S.W.2d 169 (Tex. 1977).
69. 597 S.W.2d 743 (Tex. 1980).
70. *See* Reed v. Wylie, 597 S.W.2d 743, 747 (1980); Reed v. Wylie, 554 S.W.2d 169, 171 (Tex. 1977); Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971).

near surface mineral lease? In my opinion, the near surface mineral lease of the named substance would be superior to the junior oil and gas lease under our registration laws. The severance of named mineral substance, however, raises a second legal question.

The attorney representing the junior oil and gas lessee, as well as the attorney representing the surface owner, would be in a position to question the right of the near surface mineral lessee to use surface destructive methods in mining unless that method was *expressly and affirmatively* set forth in the grant or reservation to his lessor. There is no Texas decision on this precise question as of this date. In *Acker v. Guinn*, however, the Supreme Court, did establish a general rule of construction to determine whether iron ore passed under a grant of oil, gas and other minerals: "The parties to a mineral lease or deed usually think of the mineral estate as including valuable substances that are removed from the ground by means of wells or mine shafts. This estate is dominant, of course, and its owner is entitled to make reasonably use of the surface for the production of his minerals. It is not ordinarily contemplated, however, that the utility of the surface . . . will be *destroyed or substantially impaired.*"[71]

The same question has been considered by the courts of a number of other jurisdictions, and various approaches and rules of construction have been used to determine the intention of the parties.[72] The holdings of these cases are not uniform, but the majority rule appears to be that the right to use so much of the land as may be necessary cannot be interpreted as the right to destroy the value of the surface of the land.[73] Thus, the cautious attorney representing the near surface mineral lessee should consider whether the Texas courts will permit his client to mine by surface destructive methods when the lessee is exercising his rights only under the implied grant to *use* as much of the surface as is reasonably necessary.[74] If you represent a near surface mineral lessee under these circumstances, you should consider advising your cli-

71. Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (emphasis added).

72. *See generally* 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 219, at 262.1-262.2 (1981).

73. *See, e.g.*, W.S. Newell, Inc. v. Randall, 373 So.2d 1068, 1070 (Ala. 1979); Southern Title Ins. Co. v. Oller, 595 S.W.2d 681, 684 (Ark. 1980); Holland v. Dolese Co., 540 P.2d 549, 551 (Okla. 1975).

74. *See* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971).

ent to obtain the consent of the surface owner prior to proceeding with mining by surface destructive methods.

D. Remedy: Injunctive Relief Or Damages?

The prior near surface mineral lessee may face difficulty in enjoining the oil and gas lessee from conducting operations on the same tract of land unless the near surface mineral lessee has obtained his permit to conduct surface mining operations from the state and filed his mine plan in the local deed records, disclosing those tracts which he desires to mine by surface mining operations.[75] This is so because the near surface mineral lessee will not be able to establish immediate irreparable injury unless his mine plan shows that he will reach the disputed tract in the near future.[76] In any event, a near surface mineral lessee's rights would be superior to the rights of the junior oil and gas lessee, and upon reaching the point in his mine plan where the junor oil and gas lease has drilled his oil well, the near surface mineral lessee would be entitled to recover damages arising out of any obstruction caused by the well's location. The attorney representing the junior oil and gas lessee should advise his client that in most cases involving coal and lignite leases such damages could easily run well over one million dollars.

VI. CONCLUSION

In the near future there will be a tremendous demand for natural resources in general. In many instances, this will undoubtedly result in numerous conflicts between the owners of various interests in both the surface and mineral estates. Such conflicts are inevitable given the multiple uses to which a single tract of land can be put. While the Texas courts have developed workable rules for

---

75. *See* TEX. REV. CIV. STAT. ANN. art. 5920-11, § 17(a) (Vernon Supp. 1982).

76. *See* Crawford Energy, Inc. v. Texas Indus., Inc., 541 S.W.2d 463, 467 (Tex. Civ. App.—Dallas 1976, no writ). In *Crawford*, Texas Industries (TXI) sought to enjoin Crawford, a junior oil and gas lessee, from drilling on the same tract of land in which TXI was quarying rock. The court of civil appeals dissolved a temporary injunction granted by the trial court, concluding that TXI had not shown "*immediate probable injuries* justifying the temporary injunction to protect its interest." *Id.* at 467 (emphasis by the court).

resolving many of these disputes, these same courts will be confronted with new problems requiring new solutions.[77]

77. As Justice Campbell observed in Dallas Power & Light Co. v. Cleghorn, 623 S.W.2d 310 (Tex. 1981), "Our jurisprudence of hard minerals has not been developed." *Id.* at 312 (Campbell, J., concurring).