The Accommodation Doctrine: What are Louisiana's Neighbors Doing and Why Should Louisiana Care?

Joshua A. Norris

Follow this and additional works at: http://digitalcommons.law.lsu.edu/mli_proceedings

Part of the Oil, Gas, and Mineral Law Commons

Repository Citation
Available at: http://digitalcommons.law.lsu.edu/mli_proceedings/vol55/iss1/9

This Paper is brought to you for free and open access by the Mineral Law Institute at LSU Law Digital Commons. It has been accepted for inclusion in Annual Institute on Mineral Law by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.
5. The Accommodation Doctrine
What are Louisiana’s Neighbors Doing and Why Should Louisiana Care?
Joshua A. Norris
Lemle & Kelleher, LLP
Houston, Texas

I. Introduction

The purpose of this paper is not to provide an exhaustive discussion of the details of any one state’s legal landscape as it relates to the sometimes heated and always changing relationship between surface estate owners and mineral owners. Rather, the purpose of this paper is to set the stage for a meaningful exchange of information, ideas, and strategy regarding what the current landscape around Louisiana’s borders looks like and why those that live, work, and, probably most importantly for our purposes, operate in the state should care about what their neighbors are doing on these issues. In sum, what, if anything, can Louisiana learn from its neighbors’ struggles with the same issues?

To serve those stated purposes, this article, after providing a brief background for context, examines how Texas, Arkansas, Mississippi, and Oklahoma have dealt with and are dealing with the accommodation of, or lack thereof, the surface estate by the mineral owners. Specifically, the article covers for each state the latest on (1) surface use disputes and (2) surface restoration issues and trends.

II. Background

Historically, the mineral estate was considered the dominant estate with the surface estate as servient. The reasons behind such a rule was that the mineral estate is rendered virtually useless without access to and the opportunity to extract minerals. Thus, without a contract in place to provide otherwise, the mineral owner had been traditionally able to use as much of the surface as was reasonably necessary to access the mineral estate in producing the minerals. The focus of this “reasonably necessary” doctrine was on whether the mineral owner’s use was reasonable or, on the other hand, excessive or negligent.¹

Such a mechanism for refereeing the relationship between the mineral and surface owners supplied plenty of opportunity for disputes, with most focusing on two related issues: (1) whether the mineral owner’s operations and use of the surface in finding and extracting the minerals were reasonable; and (2) whether the effects of the mineral owner’s operations and use of the surface had to be repaired and to what standard. Generally, the “reasonably necessary” doctrine answered those

¹ Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 136 (N.D. 1979).
questions by focusing on whether the mineral owner was reasonable in its conduct, no matter the effect on the surface owner’s use of his estate.\(^2\)

As exploration and production became more widespread and showed up closer to “civilization,” the strength of the mineral owner’s dominance began to erode. Texas was on the forefront of this debate with an appellate court’s decision in *Getty Oil Co. v. Royal*, a case that marks the shift in focus from what is “reasonably necessary” for the mineral owner to an examination that seeks to weigh the benefits and injuries to both the mineral and the surface owner.\(^3\) With the introduction of *Getty*, gone were the days, at least in Texas, of a mineral owner simply showing that it acted reasonably. Rather, under this Accommodation Doctrine (or “Due Regard” Doctrine), the mineral owner now has to tackle a court’s analysis that includes effects on both parties - mineral owner and surface owner.

At least one commentator, Professor Bruce Kramer, has perhaps more appropriately described this debate as between the “uni-dimensional” approach, with its focus solely on the reasonableness of the mineral owner’s operations, and the “multi-dimensional” approach, with its focus on balancing the “benefits and injuries to both sides to determine whether a particular use of the surface should be allowed or modified or conditioned because it conflicts with, or causes injury to, the owner of the surface estate.”\(^4\)

No matter what we call the debate, every state with operations that include the exploration and production of oil and/or gas has or is dealing with how this debate plays out, including Louisiana and its neighbors. The purpose of the following discussion is to note briefly where Louisiana’s neighboring states of Texas, Arkansas, Mississippi, and Oklahoma stand on these issues in an effort to then discuss why and what Louisiana should learn from those states’ experiences.

III. Texas

In *Getty Oil Co. v. Royal*, the mineral estate owner sued to enjoin the surface owner from building fences and gates on an oil and gas lease that were interfering with Getty Oil’s ability to operate its lease.\(^5\) The trial court instructed the jury that the surface owner had a right to erect such fences and gates if it did not unreasonably interfere with the mineral owner’s use of the roads to operate the lease.\(^6\) The jury found that the gates did not unreasonably interfere with the operations, and the

\(^2\) Id.

\(^3\) 422 S.W.2d 591 (Tex. Civ. App.—Beaumont 1967, writ ref’d n.r.e.).

\(^4\) Bruce M. Kramer, *The Legal Framework for Analyzing Multiple Surface Use Issues*, 2005 No. 1 ROCKY MTN. MIN. L. INST. PAPER.

\(^5\) 422 S.W.2d at 592.

\(^6\) Id.
appellate court, after explaining that the mineral estate is dominant, found that the jury instruction was proper where the surface owner’s use of the property was significantly affected while the mineral owner’s use was one of slight inconvenience.\(^7\) Having to get out of a vehicle to unlock gates numerous times did not surpass the surface owner’s harm caused by trespassers on the property.\(^8\)

This case set up the Supreme Court of Texas’ decision in *Getty Oil Co. v. Jones* a few years later.\(^9\) This time, however, the surface owner brought suit to enjoin the mineral estate owner from using the vertical surface space for pumping units that interfered with his use of tall irrigating towers.\(^10\) After paying lip-service to the “reasonably necessary doctrine,” the court held that the effects of the mineral owner’s uses of the property on the surface owner’s use must be taken into consideration and stated:

> 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. *Kenny v. Texas Gulf Sulphur Co.*, 351 S.W.2d 612 (Tex. Civ. App.—Waco 1961, writ ref’d). 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.\(^11\)

In *Valence Operating Co. v. Genco L.P.*, another Texas appellate court very recently emphasized the Texas law requirement to balance the interests of the mineral owner and the surface owner:\(^12\)

> The dominant mineral estate has the right to reasonable use of the surface estate to produce minerals, but this right is to be exercised with due regard for the rights of the surface estate’s owner. This concept of ‘due regard,’ known as the accommodation doctrine, was first articulated in *Getty Oil* and balances the rights of the surface owner and the mineral owner in the use of the surface.

\(^7\) *Id.*

\(^8\) *Id.*

\(^9\) 511 S.W.2d 160 (1974).

\(^10\) *Id.* at 619-20.

\(^11\) *Id.* at 622.

\(^12\) 2008 WL 553220 (Tex. Civ. App.—Waco, February 27, 2008).
The court went on to further explain that where the mineral owner has but one use to produce the minerals, he has the right to that use regardless of surface damages. But, if alternative uses of the surface exist, one of which permits the surface owner to continue to use the surface in the manner intended, then the mineral owner must use the alternative that allows such continued use.

Finally, and importantly, to enjoin the mineral owner, the surface owner has the burden to prove: (1) the particular manner of surface use being challenged is not reasonably necessary to the mineral owner’s operations, which may be proved by showing the mineral owner has other available means of production that would not interfere with the surface owner’s existing use; and (2) any other uses of the surface are impracticable and unreasonable under the circumstances.

Plaintiff Genco used coal from a nearby mine to produce electricity to run its limestone plant, which produced coal combustion products. Genco disposed of those by-products in a landfill for which Valence is the mineral estate owner. Valence’s operations included drilling two wells on the landfill’s footprint that were permitted by the Texas Railroad Commission. Those two wells prevented Genco from being able to use that part of the landfill for its operations of disposing of the coal combustion products, and Genco sued to enjoin Valence from drilling the two wells. Based on instructions consistent with the court’s explanation of the accommodation doctrine in Texas, a jury returned a verdict in favor of Genco based on a finding that Genco had no other practicable and reasonable use of the surface other than as a landfill, which the appellate court affirmed.

As Texas courts have moved away from the reasonably necessary doctrine to the due regard analysis, and thus in favor of surface owners, the same courts, on the other hand, have protected mineral owners when it comes to surface restoration disputes. First, no implied duty to restore the surface exists in Texas. Where no proof of negligence or no express provision to restore the surface exists, no liability exists. Further, where the injury to the property caused by a mineral owner’s operations

13 Id. at *4.
14 Id.
15 Id.
16 Id. at *1.
17 Id.
18 Id. at *2.
19 Id. at *1-*2.
20 Id. at *3-*8.
21 Warren Petroleum Corp. v. Monzingo, 304 S.W.2d 362 (1957).
22 Id.
exceeds the diminution in fair market value of the property, the diminution in fair market value of that property is the proper measure to be applied. In sum, Texas courts have taken on one hand, but given on the other.

IV. Arkansas

Arkansas, like Texas, is considered an accommodation doctrine state. In 1974, the Arkansas Supreme Court considered the case of Diamond Shamrock Corporation v. Phillips. There, the Arkansas Oil and Gas Commission designated 640 acres as a unit for the purpose of exploring for natural gas. The Phillips owned eighty acres within that unit, upon which they intended to build their retirement home. The Commission’s order provided that the drilling site should be located at the discretion of those who proposed to drill. Despite notices and assurances to the contrary and discussions regarding their building plans, Diamond Shamrock ultimately drilled a well on the very location of the Phillips’ proposed home site. The Arkansas Supreme Court ultimately agreed with the trial court’s finding that Diamond Shamrock acted unreasonably in its placement of the well. Acknowledging the broad rights of the mineral owner to use the surface as necessary to access the minerals thereunder, the Court tempered that rule, quoting language from the Getty case:

Another case which is very persuasive is Getty Oil Co. v. Jones. That case refers to ‘the reasonable usage of the surface. . . .’ The court said ‘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.’

In addition to the indirect adoption of the accommodation doctrine, it is also worth noting that the court here went beyond an existing use by the surface owner and recognized the accommodation of a proposed use by the surface owner. It is this type of use and possible accommodation that will be debated more heavily in the upcoming years as exploration

---

24 511 S.W.2d 160 (1974).
25 Id. at 161.
26 Id.
27 Id.
28 Id. at 161-62.
29 Id. at 163-64.
30 Id. at 163.
and production continues its encroachment on "civilization," or vice versa (depending on your perspective).

On the issue of surface restoration, Arkansas, much like Louisiana, recognizes a duty to restore the surface, holding "that the duty to restore the surface, as nearly as practicable, to the same condition as it was before drilling is implied in the lease agreement." Justifying its decision, the court explained that "[t]o hold otherwise would allow the lessee to continue to occupy the surface, without change, after the lease has ended. This would constitute an unreasonable surface use, and no rule is more firmly established in oil and gas law than the rule that the lessee is limited to a use of the surface which is reasonable." Sixteen years later, the Arkansas Supreme Court further determined that the duty of restoration runs with the lease, and the assignee of an oil and gas lease "should be held to have known that is was taking on the duty to restore any existing surface damage."

V. Mississippi

In contrast to Texas and Arkansas, Mississippi does not provide surface owners with the same protections. In granting a motion for summary judgment by an exploration company, Judge Bramlette of the Southern District of Mississippi reviewed the state's law on these issues. Quoting the Mississippi Supreme Court case of Union Producing Company v. Pittman, the court focused on rights due the owner of the mineral rights:

[I]n the absence of further rights expressly conveyed or reserved, the rights of owners of minerals are limited to so much of the surface and use thereof as is reasonably necessary to properly mine and carry away the minerals. These rights are also subject to the limitations that the mineral owner does not use the surface in such a way as unnecessarily to destroy or injure it. The right to remove minerals by the usual or customary method of mining exists, even though the surface of the ground may be wholly destroyed as a result thereof. The owner of the surface and the owner of the minerals should have due regard for each other and should exercise that degree of care and use which is a just consideration for the rights of the other. The owner of the surface of the land has the right to enjoy the land free from annoyance, except as reasonably arises from the opening, exploitation, mining, and marketing of the

32 Id.
minerals. The mineral owner on the other hand is not limited by the fact that his acts may cause inconvenience to the surface owner.\textsuperscript{34}

With the \textit{Pittman} decision as a background, the \textit{Abraham} Court limited the damages that the surface owners could recover:

\begin{quote}
[T]he [surface owners] cannot recover for loss of use or diminution of value of their land with regard to their plans to develop a subdivision. Nor may they recover damages for the location of the well, drilling pad, or pipeline, without any evidence that the location was unreasonable. They may, however, recover damages if [the exploration company] unnecessarily and unreasonably damaged the surface, or used more of the surface than was reasonably necessary to the mining operations.
\end{quote}

Accordingly, in contrast to the accommodation states, Mississippi still recognizes the dominance of the mineral estate over the surface.

In concert with its perspective on the superiority of the mineral estate, Mississippi also limits recovery for surface damages by limiting these types of damages with the prudent operator standard.\textsuperscript{35} Under this standard, “the mineral lessee will be liable to the surface owner for damages if the lessee wantonly or negligently destroys the land or uses more land than is reasonably necessary for its mineral exploration and production operations.”\textsuperscript{36}

\textbf{VI. Oklahoma}

In contrast to the states previously discussed, Oklahoma has statutes governing surface damages when there is a severed mineral estate.\textsuperscript{37} Except in specific situations, an operator is required to provide the surface owner with written notice of his intent to drill, together with a designation of the proposed location and approximate date the operator intends to commence work.\textsuperscript{38} The statute then imposes a duty on the operator to engage in good faith negotiations to reach an agreement regarding the determination of surface damages.\textsuperscript{39} If no agreement is reached, the mineral owner, prior to beginning operations, must petition the appropriate district court for the appointment of appraisers who make recommendations concerning the damages that will have to be paid. The parties then are entitled to litigate the issues through to jury trial – all prior to operations beginning on the property. In general, the surface

\textsuperscript{34} \textit{Abraham v. Sklar Exploration Co., L.L.C.}, 408 F. Supp. 2d 244, (S.D. Miss. 2005) (quoting \textit{Union Producing Company v. Pittman}, 146 So. 2d 553, 555 (1962)).


\textsuperscript{36} \textit{Id.} (citing \textit{Pittman}, 146 So. 2d at 555).

\textsuperscript{37} See \textit{OKLA. STAT. tit. 52, §§ 318.2-318.9}.

\textsuperscript{38} \textit{OKLA. STAT. tit. 52, § 318.3}.

\textsuperscript{39} \textit{Id.}
owner’s damages are limited to diminution in value (although common law torts and nuisance claims are also available with other damages theories). However, if a party pursues to jury trial and recovers less than the appraisers’ award, then all attorneys’ fees and costs must be assessed against that party.

VII. Why Should Louisiana Care?

The foregoing provides the backdrop for a discussion of what Louisiana (and other states) have to learn from their neighbors’ struggles with the same issues that work their easy through Louisiana’s courts and legislature. The oral presentation of this topic focuses on many of these common issues and how and why they should or should not be handled in the same ways by Louisiana. The following are some of those issues:

Off-Site Accommodation – is there any requirement for an operator to accommodate off-site and, if so, in what circumstances? How will Louisiana courts deal with these issues?

Off-Unit Accommodation?

Barnett Shale issues.

Should Louisiana pursue a surface damages act?