OIL, GAS, AND MINERAL LEASE ISSUES FROM THE SURFACE OWNER'S PERSPECTIVE

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Robert "Bob" West is a partner with the Fort Worth law firm of Whitaker Chalk Swindle & Schwartz PLLC.

West grew up in Wichita Falls, Texas, and graduated magna cum laude from Midwestern University in Wichita Falls in 1969 and with honors from The University of Texas School of Law in 1972, where he was Editor-in-Chief of the *Texas International Law Journal*.

As a practicing attorney West currently handles oil and gas leases, surface use agreements, pipeline easement agreements, and real estate and corporate transactions.

He has been a frequent speaker, panelist, or moderator at many professional education programs on topics of oil and gas law, real estate law, and professional ethics, including:

- Author/Speaker, "Ethics for Landmen," Fort Worth Association of Professional Landmen, November 14, 2013, Fort Worth, TX
- Author/Speaker, "Pipeline Easements from the Landowner's Perspective," State Bar of Texas, 24th Annual Advanced Real Estate Drafting Course, March 7-8, 2013, Houston, TX
- Author/Speaker, "Barnett Shale – Leasing & Current Issues," National Association of Lease and Title Analysts, National Conference and Educational Seminar, September 15, 2011, New Orleans, LA
- Speaker, "Barnett Shale Leasing Update," Texas Wesleyan University School of Law, Energy Symposium, April 15, 2010, Fort Worth, TX
- Speaker, "Trends in Leasing," Texas Wesleyan University School of Law, Urban Gas Drilling Symposium, April 16, 2009, Fort Worth, TX
- Author/Speaker, "Negotiating an Urban Natural Gas Lease; Pipelines; Condemnation," 18th Annual Robert C. Sneed Texas Land Title Institute, December 4, 2008, San Antonio, TX
- Author/Speaker, "Negotiating Water Provisions in Mineral Leases." Fort Worth Business Press, Barnett Shale Symposium, April 2, 2007, Fort Worth, TX
- Author/Speaker, "Urban Issues - Leasing and Drilling," 2006 Southwest Land Institute, April 6, 2006, Fort Worth, TX

While serving as Chairman of the Tarrant County Bar Association's Real Estate Section he was the organizing Moderator of that organization's first two Barnett Shale legal seminars, in 2004 and 2005, and was a speaker at the Barnett Shale Symposiums in 2006, 2007, and 2009 and at the City of Fort Worth's Barnett Shale Expo in 2008. He is Vice President of the Tarrant County Bar Association for 2014-2015, and previously served TCBA as Secretary-Treasurer in 2013-2014, and as an elected Director in 2010-2012.

He has held *Martindale-Hubbell Law Directory*'s highest rating of "AV" for over 30 years; has been named a "Texas Super Lawyer" in real estate by *Texas Monthly* magazine the past 11 years; has been named one of Tarrant County's Top Attorneys by *Fort Worth, Texas* magazine for the past 11 years; and was named as a "Power Attorney" by the *Fort Worth Business Press* in 2010.

He also is a long-time member of the American Association of Professional Landmen and the Fort Worth Association of Professional Landmen. He is an occasional guest Instructor in the Professional Land Practices training program for landmen at Texas Christian University.

His civic activities include serving as a former member and Chairman of the City of Fort Worth's Board of Adjustment – Commercial (2006–2011) and as a current member of the City of Fort Worth's Zoning Commission (2011–present). He is an elder, former trustee, and active member of Ridglea Presbyterian Church in Fort Worth.

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Prichard Bevis is a partner with the Fort Worth law firm of Whitaker Chalk Swindle & Schwartz PLLC, and he serves in the firm's real estate and oil and gas practice group.

Prichard grew up in a farming community in rural West Tennessee before moving to Memphis as a teenager. After graduating from Memphis University School, Prichard received his bachelor of business administration from the University of Mississippi in 1995 where he was a member of Sigma Alpha Epsilon. Prichard then obtained his law degree from the University of Oklahoma College of Law in 1998. Before joining Whitaker Chalk, Prichard practiced law in Dallas where he began his legal career with the appellate section of the Dallas County District Attorney's Office. After leaving the District Attorney's Office, Prichard practiced insurance defense and then commercial litigation before focusing his practice on real property, and especially oil and gas, about a decade ago.

As a practicing attorney Prichard handles all aspects of real property related transactions and litigation including purchases and sales, dedicatory instruments and other restrictions, easements and representation of homeowner's associations, municipalities and other public entities. In particular Prichard's practice is focused on upstream and midstream oil and gas development, representing not only operators and vendors but also mineral, royalty and surface owners. Prichard's oil and gas practice areas include the following: pipelines, easements and rights-of-way agreements and common carrier condemnation, executive rights disputes, title examination including drilling and division order title opinions and curative procedures, lease termination disputes, mineral leasing, organization of energy entities and partnerships, surface use agreements, mineral and royalty interest disputes, pad site transactions, surface use disputes including unreasonable surface use and environmental contamination, water sale agreements, energy financing and lending, assignments of mineral, royalty and working interests, joint exploration, development, participation and operating agreements and related disputes, pooling issues including Mineral Interest Pooling Act and bad faith pooling disputes, purchase and sale of producing and non-producing properties, drilling and vendor contracts and disputes, subsurface and seismic trespass disputes, master service agreements and related disputes, nuisance claims due to oil and gas operations, farmout agreements, mergers, acquisitions and divestitures, mineral receiverships, area of mutual interest agreements, purchase and sale agreements, partnership and joint venture transactions, government inverse condemnation claims, production sharing agreements, securities litigation, salt water disposal agreements, severance tax claims, oil field accidents including personal injury, premises liability and property damage, mineral adverse possession claims, seismic agreements and wind, solar and other renewable energy agreements.

Prichard's wife Kelly is a Financial Advisor with Wells Fargo Advisors, and Kelly and Prichard have two (2) daughters. In his free time Prichard enjoys spending time with his family, cooking, cycling the Trinity Trails and traveling. Kelly and Prichard are active members of Arlington Heights United Methodist Church.

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Lisa Leaton works as a contract attorney for the Fort Worth law firm of Whitaker Chalk Swindle & Schwartz PLLC, working primarily with the firm's Real Estate / Oil & Gas Practice Group.

Ms. Leaton grew up in the Fort Worth area and is a fifth generation Texan. She graduated *magna cum laude* from the University of Texas at Arlington 1998 and *cum laude* from Texas Tech School of Law in 2011. She also studied International Business Transactions and Comparative Law at the Pantheon-Sorbonne in Paris, France.

Licensed to practice law in Texas and North Dakota, Ms. Leaton currently handles oil and gas and real estate transaction matters, including: negotiating and drafting purchase and sale agreements, commercial leases, mineral leases, surface use and pipeline easement agreements; drafting, reviewing and revising closing and loan documents; examining title; issuing title opinions; writing title and survey objection letters; performing title curative work; conducting due diligence; representing clients in regulatory and municipal matters; representing property owners' associations.

She was the Co-Author of "Pipeline Easements from the Landowner's Perspective," State Bar of Texas, 24th Annual Advanced Real Estate Drafting Course, March 7-8, 2013, Houston, Texas.

Before attending law school, Ms. Leaton worked for six years in the land title industry.

In 2012 Ms. Leaton was named one of Tarrant County's Top Attorneys by *Fort Worth, Texas* magazine (attorneys in practice fewer than five years). She was listed as a Rising Star for 2014 in the *Texas Super Lawyers Magazine*, and recently has been selected to be an Associate member of the Eldon B. Mahon Inn of Court for a two year term beginning July 1, 2014.

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OIL, GAS, AND MINERAL LEASE ISSUES FROM THE SURFACE OWNER'S PERSPECTIVE

I. INTRODUCTION

This article and the accompanying presentation are intended primarily to offer practical assistance on the negotiation and drafting of oil, gas, and mineral lease provisions relating to use of the surface, or separate surface use agreements, from the perspective of the owner of the surface rights of the subject land.

A. Goals

My view of CLE seminars for attorneys is that the written course paper and oral presentation should do three things:

- Reinforce information you already know.
- Remind you of information you once knew, but forgot.
- Provide you a few nuggets of new ideas, information, or wisdom that will help you in your everyday law practice.

B. Perspective

The information in this article and the accompanying presentation includes citations for key legal principles involved, but the information overall is intended to be more "practical" than "scholarly" and will focus more on drafting and negotiating points than substantive legal issues.

I am primarily a real estate transaction attorney, and not an oil and gas specialist. The majority of my current practice is negotiating and closing deals for real estate, business, and oil and gas clients. I have experience earlier in my career as a first chair civil litigation attorney on business, construction, real estate, and oil and gas disputes, so I tend to negotiate and draft transaction documents from the perspective of how I perceive they likely will be viewed by judges and jurors.

My article and presentation reflect my background and experience as an attorney representing individual property owners, local real estate developers, property owners' associations, informal neighborhood groups, and a variety of private, public, and nonprofit entities.

Most of my oil and gas experience in the past fifteen years involves transactions and disputes in the Barnett Shale region of North Central Texas, but I do have some limited experience in other parts of the state.

C. Acknowledgements and Usual Disclaimers

1. I gratefully acknowledge the valuable assistance in the preparation of this course article from Prichard Bevis, a partner at my law firm who is more focused on oil and gas law than I am, and from Lisa C. Leaton, a contract attorney at my law firm who works with me on real estate and oil and gas projects.

2. The information in this article and the oral presentation is for educational purposes only and is not intended as legal advice and should not be relied upon as advice. If you or a client needs legal advice, then we would welcome the opportunity to open a project file including the signing of an appropriate legal services agreement that would please my law firm's professional liability carrier and well as our accounting department.

3. **Appendix A** to this article is a sample Surface Use Agreement provided by Mr. G. Roland Love of the Winstead PC law firm. That sample document is intended as a general guide and checklist of points to be considered in the negotiation and preparation of an actual instrument and is, of course, subject to negotiation to reach mutual agreement on the terms and customization of the language to fit a specific fact situation.

D. Overview and Current Status of Surface Issues

The recent surge in oil and gas activity in Texas now has reached almost every region of the state, creating opportunities for real estate attorneys to learn (or re-learn) and use the principles of Texas oil and gas law. The current oil and gas activity is not just in rural locations, but also includes leasing, drilling, production, and transportation in urban and suburban settings. Today's typical drilling unit in the Barnett Shale region of North Texas does not include just one surface owner or a few rural neighbors, but a wide variety of owners of commercial properties, schools, churches, golf courses and parks, pastures, apartment projects, private homes, and condominium projects. Each surface owner may or may not own mineral rights

below the surface. Whether the surface owner has any financial interest in the minerals makes a big difference in negotiation perspective. Each surface owner may (and usually does) have a different perspective on what, if any, surface use should be allowed. This may, of course, raise conflict of interest issues for an attorney representing multiple parties whose mineral interests have been pooled into the same unit or who own mineral interests in other nearby units.

This article and presentation is intended to focus just on surface use issues from the perspective of the surface owner(s) involved. There are many provisions of an oil and gas lease that do not relate to surface rights, and those provisions are not addressed in this article. If needed, one good article that does address surface use issues and other key provisions of an oil and gas lease is "Negotiating Leases and Surface Use Agreements on Behalf of Your Landowner Client," by Celia C. Flowers and Melanie S. Reyes, of East Texas Title Companies and Flowers Davis, P.L.L.C., of Tyler, which was presented at the 23rd Annual Robert C. Sneed Texas Land Title Institute, December 5-6, 2013, in San Antonio.

II. KEY PRINCIPLES OF TEXAS OIL AND GAS LAW RELATING TO SURFACE ISSUES

A. Nature of Oil, Gas, and Mineral Lease

An oil, gas, and mineral "lease" is not really a "lease" as we real estate lawyers understand a lease for occupancy of a residential, commercial, or agricultural property; instead, the oil, gas, and mineral lease actually "grants a fee simple determinable interest to the lessee, who is actually a grantee." *Natural Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 192 (Tex. 2003).

B. Mineral Estate May Be Severed

The "bundle of sticks" that represents the full ownership of land includes both surface rights and mineral rights. The mineral estate may be severed from the surface estate either by grant in a deed or a lease, or by reservation in a conveyance. *See Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 102 (Tex. 1984) (citing *Humphreys-Mexia Co. v. Gammon*, 113 Tex. 247, 254 S.W. 296 (1923)). Additionally, the five (5) interests of the mineral estate -- (1) the right to develop the minerals (also known as the right of ingress and egress), (2) the right to sign a lease (also known as the executive right), (3) the right to receive a bonus, (4) the right to receive delay rentals, and (5) the right to receive royalties -- can also be severed and held by different owners. *See French v. Chevron U.S.A. Inc.*, 896 S.W.2d 795, 797 (Tex. 1995) (citing *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986)). While the individual mineral estate interests can be severed, Texas courts have held that the right to develop the minerals and the executive rights are correlative rights that cannot be separated. *Id.* at 797 n.1 (citing *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667, 669 n.1 (Tex. 1990)). Therefore, if a mineral owner conveys the executive rights, then the right to develop passes with the executive rights by implication.

C. Mineral Estate is "Dominant"

When the mineral estate is severed from the surface estate, the mineral estate becomes the "dominant" estate. *Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971).

D. Agreements Must Be in Writing

Oil and gas interests are considered real property until removed from the ground. *Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 525 (Tex. 1982). As such, agreements relating to oil and gas interests must be in writing to be enforceable. *See* TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 1982). The instrument evidencing the agreement is legally enforceable between the parties to the agreement whether or not it is filed of record, but the instrument should be recorded to give public notice to third parties, or at least a Memorandum of Lease or a Memorandum of Agreement should be filed of record identifying the parties, the subject property (by a sufficient legal description), at least a brief summary of the key points of the agreement, and with information as to where a full copy of the agreement may be obtained by a party legally entitled to see the full agreement.

E. Mineral Owner's Right to Use the Surface

The owner of the mineral estate is entitled to exercise his or her developmental rights, i.e., the right of ingress and egress on the surface. As mentioned in paragraph II.A above, when the mineral owner

executes a "lease" the mineral owner actually conveys the minerals to the lessee, who receives a fee simple determinable estate, as well as the mineral owner's right to utilize the surface for mineral development.

The owner of the mineral estate has the right of "reasonable use" of the surface to develop the minerals, subject to terms and contractual restrictions of the lease or other agreement. The burden of proof is on a complaining surface owner to prove that the use by the mineral estate owner was not reasonable, which is a very difficult burden of proof in litigation since the lessee/operator will always have a witness or two who will testify that all of the operator's actions were reasonable.

As you probably know, there is no single form for an oil, gas, and mineral lease. It is said that "Everything in a lease agreement is negotiable except the names of the parties and the legal description of the subject property." While there is no standard "form" lease, for decades the oil and gas industry has promulgated multiple versions of the "Producers 88" lease, a lease tailored to the industry's benefit. In such a lease, the lessee is granted practically limitless authority to utilize the surface for mineral development. A common example of a Producers 88 granting clause provides:

> Lessor in consideration of _____Dollars ($_____), in hand paid, of the royalties herein provided, and of the agreements of Lessee herein contained, hereby grants, leases and lets exclusively unto Lessee for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, conducting exploration, geologic and geophysical surveys by seismograph, core test, gravity and magnetic methods, injecting gas, water and other fluids, and air into subsurface strata, laying pipe lines, building roads, tanks, power stations, telephone lines and other structures thereon and on, over and across lands owned or claimed by Lessor adjacent and contiguous thereto, to produce, save, take care of, treat, transport and own said products, and housing its employees, the following described land in _____ County, Texas, to-wit:...

As discussed below, the mineral owner may place contractual limitations on the lessee's utilization of the surface in the lease, including in some cases precluding the lessee's utilization of the surface entirely. However, even if the lease does not contain any express surface use limitations, the law does provide some protection.

F. Surface Owner Has No Right to Be Compensated for Surface Damage

In Texas the surface owner has no right, absent an express contractual provision (e.g., in the lease or in a separate surface use agreement with a lessee), to be compensated for surface damages. *See Warren Petroleum Corp. v. Monzingo*, 157 Tex. 479, 304 S.W.2d 362 (1957) (citing *Meyer v. Cox*, 252 S.W.2d 207, 208 (Tex. Civ. App.—San Antonio 1952, writ ref'd)). Because the mineral estate is the dominant estate, the oil and gas lessee has the right to use as much as the surface as is reasonably necessary to develop the minerals. *See id.* at 481 (citing *Warren Petroleum Co. v. Martin*, 153 Tex. 465, 271 S.W.2d 410 (1954)). In practice, lessees will often agree to a surface use agreement, including compensation for the surface owner, to prevent any dispute with regard to the lessee's use of the surface.

G. Reasonable Use of the Surface and Negligence

Regardless of whether the lease provides for surface protections or compensation, the lessee is not permitted to utilize more surface than is reasonably necessary to conduct its operations, and the lessee must not be negligent in its use of the surface. Reasonable use includes the right of ingress and egress upon the surface to conduct operations, the right to select the location of the operations, and the right to determine when and how the operations will be conducted. *See, e.g., Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980); *Robinson Drilling Co. v. Moses*, 256 S.W. 2d 650 (Tex. Civ. App.–Eastland 1953, no writ). Thus, even when no express contractual provision protects the surface, the surface owner may recover damages from

the mineral lessee for surface damages if the surface owner can prove either specific acts of negligence or that more land was used by the lessee than was reasonably necessary. As noted above, however, the burden of proof is on a complaining surface owner to prove that the actions by the lessee/operator were negligent or not reasonable.

H. The Accommodation Doctrine

The lessee's right to use the surface is also limited by Texas common law providing the operations must be conducted with due regard for the surface estate. *Gen. Crude Oil Co. v. Akien*, 344 S.W.2d 668, 669 (Tex. 1961). This "due regard" concept has resulted in what is commonly referred to as the "accommodation doctrine." The accommodation doctrine, as articulated by the Texas Supreme Court in *Getty Oil Co. v. Jones*, balances the surface owner's and minerals owner's/lessee's rights holding:

> [W]here 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 adoption of an alternative by the lessee. *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971)

While the accommodation doctrine does provide the surface owner some protection, the mineral estate continues to be the dominant estate. Careful review of the *Getty* opinion shows that the Texas Supreme Court did <u>not</u> find that the lessee of the oil and gas was required, at its cost, to do anything to not interfere with the surface owner's use. Instead, the court did require that the surface owner's use must be an "existing use"; a planned use is not sufficient, and thus, preparing or filing a building plan or a plat may not qualify as an "existing use" although beginning construction of a subdivision might. Additionally, as discussed more fully below in paragraph III.A, in the recent *Merriman* case, the surface owner's existing use must not only be "precluded or impaired" by the lessee's use of the surface, the surface owner must show that he has no reasonable alternative for a particular existing surface use. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013). Also, "under the established practices" in the oil and gas industry there must be "alternatives available to the lessee whereby the minerals can be recovered." *Getty* at 622. If all of the preceding requirements are met, the lessee "may" be required to adopt an alternative. *Id.* If there is no reasonable alternative and the activity is consistent with practice in the industry, the lessee is entitled to utilize the surface despite the surface owner's objection. *See Tarrant County Water Control and Improvement Dist. Number One v. Haupt, Inc*., 854 S.W.2d 909, 911-12 (Tex. 1993).

III. PROTECTION OF SURFACE RIGHTS

A. The Common Law Provides the Surface Owner Sufficient Protection, Right?

Between the lessee being required to only reasonably and not negligently use the surface and being required to accommodate the current surface use, the common law may appear to balance the equities with due consideration for the dominance of the mineral estate. Unfortunately, the application of the common law rules provides little protection to the surface estate owner in practice.

This is illustrated by the recent decision by the Texas Supreme Court in *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244 (2013). Homer Merriman owned the surface estate of a 40-acre tract of land in Limestone County on which he conducted a cattle operation. Once a year, he conducted a "roundup" to sort and work his cattle, which required that Merriman set up additional temporary corrals and catch-pens in conjunction with permanent fencing structures on the property. XTO drilled a well on Merriman's land very close to the permanent fencing and structures. Merriman filed suit seeking injunctive relief based on his assertion that XTO failed to accommodate his existing use of the surface for the annual sorting and working part of his cattle operations, and Merriman claimed that XTO's failure to accommodate exceeded its rights in the mineral estate and constituted a trespass. While evidence showed that XTO's well either precluded or substantially impaired Merriman's annual roundup and related cattle operations and

resulted in added expense and inconvenience to Merriman, there was no evidence that the cattle operation could not be conducted somewhere else on the tract. *Id*. at 252. When applying the accommodation doctrine, the surface owner's burden is to show that there is no reasonable alternative for a particular existing surface use. *Id.* at 249. This burden is "not met by evidence that the alternative method [of surface use] is merely more inconvenient or less economically beneficial than the existing method." *Id.* Rather, the inconvenience or financial burden of the alternative method must be "so great as to make the alternative method unreasonable." *Id.*

The real significance of the *Merriman* case, however, is that the court held that no bright lines can be drawn by which to categorize the "existing use" of the surface estate when applying the accommodation doctrine, so that the surface owner's burden is to show that there is no reasonable alternative for a particular existing surface use, rather than a general surface use. *Id.* at 250-51. The court of appeals had broadly categorized Merriman's use as "agricultural," thereby giving Merriman the difficult burden of showing there was no available alternative for any type of agricultural use, rather than only having to show he had no available alternative for the specific type of cattle operation that he conducted. The Texas Supreme Court held that Merriman's surface use should "be classified more narrowly" to address the specific cattle operations at issue, rather than the "broad 'agricultural' category applied by the court of appeals." *Id.* at 250.

This is important to the surface owner because the mineral owner can no longer contend that the accommodation doctrine cannot be relied upon until the surface owner can show that there is no other alternative use of the surface. Hopefully, this will limit the utility of the implied surface easement under the common law, and make a lessee more likely to negotiate an express surface use agreement.

B. So What Can a Surface Owner Do to Protect the Surface?

The surface owner's options depend upon whether the surface owner owns any portion of the minerals. When a surface estate owner also owns some mineral rights, the surface owner can either (1) include surface protections in the lease or in a separate surface use agreement or (2) require the lessee to settle the surface damages with the surface owner (which may or may not be the mineral owner) at the time operations are to begin.

If the surface owner does not own any of the minerals, then the surface owner's only options are to negotiate a surface use agreement with the lessee or file suit for negligence or unreasonable use of the surface after the damage has occurred. Because the lessee is not required to negotiate a surface use agreement and pay surface damages, a buyer of the surface should always seek some portion of the minerals from the seller, if the seller owns any portion of the minerals. Should the seller claim to not own any portion of the minerals, the prudent practice is to review title subsequent to the seller's acquisition of title to the subject property to determine whether the seller severed the minerals during its ownership period. If the seller conveyed the minerals to an affiliate or family member, it may be possible for the buyer to obtain some portion of the minerals from the "third party" as part of the purchase of the land surface from the seller.

1. Surface Use Provisions in the Lease

Leases on small urban tracts usually prohibit any surface use, since the drill site is planned for a known surface site located away from the small urban tracts.

If your client is negotiating surface use provisions, as well as damages, in the mineral lease itself, those provisions are contractual and they dictate the lessee's rights and obligations. Despite the plethora of versions of the "Producers 88," most, if not all, provide for no protection or compensation for the surface damage, or simply provide that the surface owner will be compensated only for damages to growing crops, fences, and timber. If a custom oil and gas lease is not prepared by counsel for the surface owner/lessor *(which is the more advisable course)*, a separate addendum may be prepared and attached to the pre-printed lease form containing special provisions that provide for surface protections and damages.

The following example of a surface use and damages provision in a lease appears on page 23 of the seminar article "Negotiating Leases and Surface Use Agreements on Behalf of Your Landowner Client," by

Celia C. Flowers and Melanie S. Reyes, mentioned above in paragraph I.D. of this paper:

> **Lessee's Use of Surface:**
>
> Lessee agrees to use reasonable care in its operations on the leased premises, and within a reasonable period of time after completion of any drilling operations on the leased premises, Lessee shall proceed with reasonable diligence to endeavor to restore the surface of the leased premises to as near its original condition as reasonably practicable.
>
> Lessee shall not use surface water from the leased premises without the written permission of the Lessor. In the event Lessee drills a water well on the leased premises and completes its use of same to be used for drilling, said water well will not be used for fracking of the well without the further written consent of Lessor. Upon written request by Lessor, Lessee agrees to transfer said water well to Lessor.
>
> Lessee shall not use wells on the leased premises for disposal of salt water produced without the written consent of and appropriate compensation to Lessor.
>
> No well shall be drilled nearer than three hundred (300) feet to any house, barn or physical structure now or hereafter placed on said premises without the written consent of the owner of the surface estate. Lessee shall bury its pipes and flow lines at least three feet (3') beneath the surface of the land. Lessee shall also take into consideration the surface owner's use of the surface in locating wells, pits, roads, etc. and will consult with surface owner on the location prior to commencement of drilling operations.
>
> **Surface Damages:**
>
> Lessee shall pay the Surface Owner of the property covered hereby for all reasonable damages caused by its operations hereunder, including but not limited to damages to land, pastures, crops, fences, fresh water and water wells, buildings, roads, and any other physical structures located on the herein Leased Premises.

When the surface owner also possesses all of the executive rights but only a portion of the minerals, the surface owner has a duty of utmost good faith to the non-executive mineral interest owners for whose benefit the executive rights will be exercised. *See Lesley v. Veterans Land Bd.*, 352 S.W.3d 479, 481 (Tex. 2011). This duty includes obtaining every benefit for the non-executive that the surface owner obtains for himself or herself. *Id*. Potentially, the surface owner negotiating the terms of the surface use for himself or herself at the same time as other lease terms (including bonus and royalty) are being negotiated creates a direct conflict between the rights of the surface owner exercising its executive rights and the non-executive mineral interest owners, especially if favorable surface use for the surface owner is exchanged for a lower bonus payment that would benefit the non-executive mineral interest owners.

2. Surface Use Agreements

Even when the surface owner does not own any part of the minerals, lessees will often agree to a separate surface use agreement. These agreements address the lessee's use of the surface of the property for the exploration and development of the mineral estate and limit the general rule that the mineral estate is the dominant estate. **Appendix A** to this article (furnished by Roland Love of Winstead PC) is an example of a separate surface use agreement that can provide a good starting point for preparing a customized agreement to address the specific concerns of a particular surface owner and fact situation.

Regardless of whether the protective provisions are included in the lease or in a separate surface use agreement, certain restrictions on how the surface is to be utilized for oil and gas operations should be considered along with the reasonably anticipated use of the particular property (whether residential, commercial, agricultural, or merely recreational) when addressing surface use issues, and compensation. Issues to consider and possibly address may include:

- Will the location of the operations be specified in the instrument with a sufficient legal description or will the surface owner's consent to the location be required at a later time but before operations commence?
- Will part of the surface location be temporary and the other part continue to exist throughout the term of the current lease?
- Will there be a requirement that operations be a certain distance from any structure?
- Will the operations be fenced?
- Will storage tanks be located on the property, and if so, at what times can the tanks be accessed?
- Will the lessee be allowed to utilize the surface to develop minerals not located under the surface?
- What noise restrictions will be required? (You may wish to consult city ordinances in your area near the subject property for what is possible and accepted, especially if a residence or animals may be on the property.)
- What is the surface owner reserving? (Surface and subsurface water rights; oil, gas, and other minerals; etc.)
- What roads or routes will be used in the operations?
- Will the lessee build or maintain the road?
- What happens to the road after the operations cease?
- Is there a speed limit on the property?
- Will the drilling crew be housed on the property?
- How will trash be removed, and what happens if it is not?
- How will the lessee's lavatory and toilet needs be addressed?
- Will equipment when not in use be stored on the property?
- Can the surface owner change the location of the access point to the property, and if so, is the surface owner's agreement required?
- Can the lessee place its own locks on gates?
- What happens if gates or fences are cut or damaged?
- Will the surface be used for hunting, fishing, or other recreational use, and if so, how will this be accommodated?
- Will the lessee be required to provide notice prior to entering the surface, and if so, how and how far in advance?
- What are the notice requirements in an emergency?
- Will the surface use agreement terminate upon termination of the current lease?
- How will soil erosion be addressed and compensation determined?
- How will surface and subsurface water be protected and compensation determined?
- How will animals and livestock be protected and compensation determined?
- What trees, grass, structures, etc. can be removed or relocated and what will be done once removed?
- Will lessee be required to "double ditch" its trenches or other movement of soil so that top soil is returned to the surface?
- Will the lessee be permitted to "land farm" any contaminated soil?
- Will a salt water disposal well be permitted on the property?
- Will pits, temporary or permanent, be permitted on the property?
- Will the surface use agreement permit the laying of pipelines?
- Will the lessee be permitted to drill a water well on the property?
- Will the lessee utilize existing water wells, ponds, stock tanks, streams, lakes, water pipelines, storage tanks, or other water sources existing on the property?

- How will the surface be remediated and restored when operations are completed?
- Will the lessee agree to defend and indemnify the surface owner and in what situations?
- What happens if a subcontractor of lessee files a lien?
- What are the remedies for lessee's breach and under what circumstances will the agreement terminate?
- Will the lessee accept the surface "as is" without warranty?
- Can the surface use agreement be assigned and does the lessee need the permission of the surface owner?
- Should the surface owner agree to arbitrate disputes?
- Where is the exclusive venue and what law will apply?
- Who executes the agreement for lessee and do they have the authority to bind the lessee?
- Will the surface agreement terminate at the expiration of a particular term regardless of whether the lease has terminated?
- What is the amount of compensation for agreeing to the surface use?

Some agreements are so specific that they set out schedules for the payment of certain amounts for damages for certain types of activities conducted by the lessee; however, these "liquidated damages" are problematic unless the value is adjustable for inflation at a minimum considering that production of the wells from below the surface owner's land may last many years.

3. Designation of Minerals Development Pad Sites

Normally, the mineral owner, as the dominant estate, is not burdened by surface use restrictions, such as restrictive covenants, if imposed after severance. *Property Owners of Leisure Land, Inc. v. Woolf & Magee, Inc.*, 786 S.W.2d 757, 760 (Tex. App.—Tyler 1990, no pet.). While still considering the surface owner may have duties to other mineral owners, the Natural Resources Code does provide, so that "the mineral resources of this state be fully and effectively exploited and that all land in this state be maintained and utilized to its fullest and most efficient use" and "to assure proper and orderly development of both the mineral and land resources of this state," for a developer in certain counties and in certain situations to protect the surface by designating the pad sites. *See generally* TEX. NAT. RES. CODE §92.001. The specific approval of the mineral owner is not even required. *Id.* However, in order for the developer to designate an "operation site" for the mineral owner to utilize for the exploration and production of the minerals all of the following requirements must be met.

(a) The tract must be a "qualified subdivision" which requires the tract: (i) not be more than 640 acres, (ii) be located in a county having a population in excess of 400,000, or in a county having a population in excess of 140,000 that borders a county having a population in excess of 400,000 or located on a barrier island, (iii) be subdivided by the surface owner for residential, commercial, or industrial use; and (iv) provides for an "operations site for each separate 80 acres within the 640-acre tract and provisions for road and pipeline easements to allow use of the operations site." *Id.*

(b) The mineral development "operations site" is two or more acres and located in whole or in part within the qualified subdivision. *Id.*

(c) The "operations site" is designated on the subdivision plat. *Id.*

(d) After a notice and a hearing, where the mineral owner may object, the plat is approved by the Railroad Commission of Texas pursuant to Administrative Code Title 16, Part 1 Chapter 3, Rule 3.76. *See* TEX. NAT. RES. CODE §92.003-004.

(e) The plat is filed in the county clerk's Real Property Records. *See* TEX. NAT. RES. CODE §92.003.

(f) Within three (3) years of the Railroad Commission's order, actual construction of roads and utilities within the qualified subdivision has commenced and at least one (1) lot has been sold to a third party. Administrative Code Title 16, Part 1 Chapter 3, Rule 3.76.

The statute still does not provide for the payment of surface damages. Also, "operations" as defined in Section 92.002(1) only addresses the pad site itself. Any restrictions in the dedicatory documents imposed after severance relating to the operations on the designated pad sites or utilization of the streets may be unenforceable pursuant to *Woolf* and may be a breach of the surface owner's duty pursuant to *Lesley*.

IV. CONCLUSION

Leasing practices have greatly evolved over the last decade. No longer can a landowner, executing a lease, be content to negotiate price alone and expect the lease agreement to be a standard form, protecting the landowner's many interests. Landowners must now be diligent, not only in reviewing the body of any given lease in detail to search for amended terms, but in asserting their rights by creating their own provisions in the lease or in a separate surface use agreement to protect their interests. This is true for protecting their mineral interest as well as their surface interest if they are owners (or even partial owners) of the surface estate. The time spent up front reviewing and tailoring the lease or surface use agreement will not only protect the landowners' investment, but will help prevent unnecessary litigation over misunderstood terms in the long run.

APPENDIX A – SURFACE USE AGREEMENT (SAMPLE FORM)(COURTESY OF G. ROLAND LOVE, WINSTEAD PC)

SURFACE USE AGREEMENT

State: Texas

County:

Lessor:

Lessee:

Effective Date:

On _____, 20__, Lessor, named above, executed and delivered to Lessee, named above, an Oil, Gas & Mineral Lease (the "Lease"), which is recorded in Volume __, Page ___, of the Official Public Records of _____ County, Texas, on and covering the following lands (the "Lands"):

_____ acres of land, more or less, being all of _____, Abstract No. ___, _____ County, Texas, as more particularly described in Exhibit "A" attached hereto. **[NOTE: need full legal description attached as Exhibit "A"]**

For adequate consideration, the receipt and sufficiency of which is acknowledged, Lessor and Lessee desire to enter into this Surface Use Agreement ("Agreement") setting forth certain rights and obligations with respect to Lessee's use of the surface of the Lands.

Lessor and Lessee agree on the following terms:

1. As additional consideration for the use of the Lands, Lessee agrees to assign to Lessor, within sixty (60) days from the date of first production, an overriding royalty interest (the "ORI") equal to three percent (3%) of 8/8ths of all oil, gas or other liquid or gaseous hydrocarbons produced or saved from any well bore drilled on the Lands. The ORI shall be calculated on the same basis as the royalty provided in the Lease, except as to the royalty percentage. **[Provision that might be considered by client.]**

2. Lessee agrees to pay to Lessor, as damages for the use of the Lands and access to the Lands, the amounts specified in the rate schedule attached hereto as Exhibit "B" ("Rate Schedule"), for any construction or installation listed therein, commenced after the effective date of the Lease.

3. Payment of all sums specified in the Rate Schedule under this Agreement shall be due and payable to Lessor prior to the commencement of such construction or installation operations. No separate or additional damages shall be due and payable for (i) tank batteries or other facilities or for pits, reservoirs or similar sites all located on or within a drilling pad or drill site location, or (ii) any operations conducted in the future on or within an existing drilling pad or drill site, or other location for which Lessee has previously paid damages hereunder; provided, however, Lessee shall pay the highest applicable rate for an activity on a drill pad or drill site location. For example, if a drill pad or drill site location is to be used for the storage of caliche, sand, gravel, top soil, or any other activity permitted under this Agreement, no provision in this agreement shall be deemed to exempt Lessee from paying

the applicable rate for such activity, even if damages for the drill pad or drill site location have previously been paid. **[This was language for this particular fact situation]**

4. Lessee will pay all taxes assessed against any structure, material, equipment, fixtures and facilities placed on the Lands by Lessee.

5. In no event shall Lessee construct, or cause to be constructed, any road, pipeline, tank battery site, drill site or other facility or structure on the Lands that will unduly or unreasonably interfere with Lessor's use of the surface of the Lands.

6. **[Lessor and Lessee agree that the plan attached as Exhibit "C" depicts the permissible layout of all access roads, pipelines, tank battery sites, drill sites and other facilities and structures.]** Lessor's **[additional written]** approval and consent will be required upon any new proposal by Lessee of the placement of any access roads, pipelines, tank battery sites, drill sites or other facility or structure, such approval not to be unreasonably withheld.

7. To the extent reasonably practicable, Lessee shall (i) combine facilities on the Lands in locations consistent with Lessor goals, (ii) minimize the amount of surface utilized in operations, including the size of pads, and (iii) minimize the number of compressors, and the noise generated by the compressors.

8. No permanent facilities will be permitted on the Lands other than wellheads and other production facilities which will be removed upon cessation of production. No daily residency on any drill site or other operations site is permitted, except for Lessee's drilling superintendent during drilling operations.

9. Lessee shall use the means of access onto and across the Lands as directed by Lessor, who may restrict access on existing roads used primarily by the Lessor and require Lessee to use or construct roads designated for operations purposes. Lessee's vehicles may not exceed twenty miles per hour (20 mph) on any part of the Lands.

10. **[NOTE: A good provision here might be to require Lessee to install cattleguards and gates, but need to consider relation between the surface owner and any surface tenant as well as where the drilling is planned to occur]**.

11. Lessee shall not conduct operations within three hundred feet (300') of any structure now or hereafter located on the Lands, before operations commence.

12. Lessee shall conduct its operations on the Lands in a manner which gives due regard for the then-existing surface use and shall seek all reasonable alternatives to accommodate the Lessor.

13. Prior to any new operation, Lessee shall contact the Lessor who will reasonably designate permitted means of access and location of facilities and equipment. Traffic to and from drill sites should be limited to the time period immediately before and after each crew shift except for supervisory personnel and emergencies.

14. Lessee agrees that any new flowlines from a well site shall be run to the closest existing flowlines and either tied in or run parallel with such flowlines to the nearest production facility. Lessee shall bury all pipe lines of whatever kind below ordinary plow depth and shall "double ditch" all pipelines buried, and shall refill ditches when necessary.

15. In the event there is any pipeline rupture or leaking well bore, Lessee shall notify the Lessor. In the event there are any spills or any similar event that occurs the Lands of which any governmental agency having jurisdiction requires through its rule or regulations that Lessee provide notice of the event, Lessee shall also provide the same notice to Lessor.

16. Lessee agrees to sample the groundwater and soil conditions, and provide a report of such conditions, prior to commencing any drilling activity and take such steps as may be necessary to maintain the groundwater and soil in its original condition.

[NOTE: The following language applied to a particular fact situation.] *[Lessee agrees to conduct the following tests on the Lands to maintain the existing quality of the Lands for its current use:*

(a) *Groundwater investigation and sampling from groundwater monitor wells [currently installed or to be installed by Lessee at Lessee's expense]* ***[NOTE: Consider the existing wells on the property or should Lessor require the installation of wells]*** *on the Lands, taken prior to purging the wells and again after a twenty-four hour recovery period, to measure the following: (i) depth to Light Non-Aqueous Phase Liquids (LNAPL), (ii) depth to groundwater, (iii) LNAPL thickness, and (iv) total well depth. All samples shall be sent off-site for laboratory analysis.*

(b) *Soil borings on the Lands to provide continuous samples from the surface to a depth of forty feet bgs, cased to prevent cross-examination and/or migration of any below-ground fluids between geologic horizons. Soil and gas analyses will be conducted every two-to-three feet for the detection of hydrocarbon vapors. All samples shall be sent off-site for laboratory analysis.]*

17. Lessee shall not have the right to use fresh water from said Lands without the express written consent of the Lessor. Any water well(s) drilled on the Lands shall become the property of the Lessor after Lessee ceases use thereof. To the extent water is produced, such water shall be disposed of pursuant to all applicable laws, and a record shall be maintained evidencing such disposal. Lessee shall indemnify Lessor from all liability resulting from Lessee's use and possession of the well(s). After giving notice to Lessor, any and all indemnification given by Lessee to Lessor for the water wells shall cease along with Lessee's use of such wells.

18. At the time any well, regardless of when drilled, is plugged or abandoned, the Lessee agrees to remove the caliche and other pad site materials and restore to as near its original condition as is reasonably practicable, the pad site and access roads that are not used for other producing wells, as follows:

(a) All non-natural materials shall be removed and shall be replaced with planted buffel grass, bermuda grass or other commonly available grass recommended by the USDA in accordance with the soil type at the location, such planning to be accompanied by fertilizing with 30-10-0-8 at 300# per acre for the express purpose of providing natural cover on the restored site, flowlines and access roads.

(b) Grade the sites to their original level.

(c) Remove all broken or discarded material, machinery, trash and debris.

(d) Rake and burn all removed brush.

(e) Either remove all rocks greater than four inches in diameter from the surface locations or bury such rocks or other unearthed materials with a top soil to a depth of at least four inches. The purpose of this provision is to remove rocks greater than four inches in diameter and other materials that have been uncovered or placed on the Lands which might damage Lessor's machinery or operations after the Lands are restored.

19. Upon termination of the Lease, Lessee agrees to remove all property of whatever kind stored on the Lands and return the Lands as near its original condition as possible. Any of Lessee's property left on the Lands at the expiration of one hundred eighty (180) days after the termination of the Lease shall become the property of Lessor, but this provision shall not be construed to relieve Lessee of its continuing obligations to remove the property and restore the Lands.

20. Lessee shall be responsible for all damages to the surface of Lands resulting from damage caused by operations and activities of Lessee or its employees, agents, or contractors.

21. Lessee agrees at all times to use reasonable care in its operations on the premises to prevent injury or damage to cattle, livestock, buildings or other property situated on the surface of the Lands. Lessee agrees to reimburse Lessor for damage caused by Lessee, its employees, agents, or contractors, to cattle, pastures, crops (including hay crops), buildings, livestock, fences, tanks, water, water wells, roads, and, without limitation, any and all other property situated on the Lands.

22. Lessee agrees to pay to Lessor the amount specified in the Rate Schedule as per-acre 3-D seismic for any and all seismic. The agreement to this amount by Lessor does not grant Lessee consent to conduct seismic on the Lands, inasmuch as the right to conduct seismic shall be negotiated with the mineral owner(s). This amount is merely set forth as damages for the Lessor should the mineral owner consent to seismic; provided, however, that prior to conducting seismic, Lessee shall obtain from Lessor a seismic permit, not to be unreasonably withheld, which will contain terms and provisions mutually agreed upon as to the conduct of such seismic program on the Lands. **[NOTE: Consider the details of any seismic limitations to be included.]**

23. Prior to initial entry on any part of said Lands for the purpose of conducting seismic or geophysical operations, the Lessee or anyone acting on its behalf shall contact the Lessor who will reasonably designate access.

24. Lessee shall not conduct any seismic or geophysical operations whatsoever when it is raining; thereafter, Lessee shall use reasonable efforts to conduct its operations so as to cause the least possible damage to the surface as a result of the muddy conditions.

25. Lessee shall maintain a log of all employees, contractors and other agents at the location of Lessee's operations or such other place as reasonably designated by Lessor. All employees, contractors and agents of Lessee must have a current employee identification card in their possession when on the Lands.

26. Lessee will not bring on the Lands any hazardous material. Further, Lessee agrees (1) to remove from the Lands, if, as and when required by law, any hazardous material placed or released thereon by Lessee, (2) to perform remedial work where the need therefore arises as a result of and is caused by Lessee's operations or activities on the Lands, and (3) to comply in all respects with all federal, state and local governmental laws and regulations governing operations by Lessee and remedial work on or associated with the Lands.

27. Lessee shall not store or dispose of any hazardous materials on the surface of the Lands. Nothing in this Agreement shall prohibit Lessee from storing drill pipe associated with drilling while the actual drilling or reworking of the well is taking place.

28. Lessee agrees to instruct its employees, agents, and contractors that the following is prohibited: hunting, fishing, swimming, camping, or other use of the Lands not necessary for oil and gas operations on the Lands. Lessee agrees to instruct its employees, agents, and contractors that the following may not be brought upon the Lands: dogs, cats, other animals, animal calling devises, firearms, archery equipment, traps, snares and drugs. Lessee agrees to instruct its employees, agents, and contractors that no artifacts, naturally occurring materials, antlers, bones or animals, whether dead or alive, shall be removed from the Lands.

29. Lessee agrees to prohibit all persons other than employees, agents, and contractors' employees directly engaged in oil and gas operations from the Lands, which shall include children, spouses, acquaintances of employees or other persons not directly engaged in oil and gas operations on behalf of the Lessee. This shall not exclude any person who in the Lessee's opinion has legitimate business dealings with the Lessee.

30. Any independent contractor or other person entering upon said Lands on behalf of Lessee for the purpose of performing any part of the operations of Lessee shall be deemed to be an agent of Lessee, and Lessee shall be fully responsible for the actions of any such person.

31. This Agreement is made subject to an existing verbal lease agreement to _____ ("Surface Tenant"). Notwithstanding any provisions contained herein, Lessee agrees to indemnify Lessor and hold Lessor harmless from and against any claims by the Surface Tenant for any damage caused by Lessee or its employees, agents, or contractors.

32. Notwithstanding anything to the contrary contained in this Agreement, Lessee agrees to indemnify Lessor from any and all liability arising out of the use of the Lands by Lessee or its employees, agents, or contractors.

33. This suit is entered into and performable in _____ County, Texas. Any suit arising from or relating to this Agreement shall be brought in _____ County, Texas, and shall be determined by the laws of the State of Texas.

34. This Agreement shall inure to the benefit of and be binding upon the respective heirs, devisees, personal representatives, successors and assigns of Lessor and Lessee.

35. This agreement may only be amended in a writing signed by Lessor and Lessee. Lessor and Lessee may amend this Agreement to provide for designation of pipeline easement paths and tank or equipment placements.

This Agreement is signed by Lessor and Lessee as of the date of acknowledgment of the parties signatures below, but is effective for all purposes as of the Effective Date stated above.

In the event of an inconsistency between the terms of the Lease and the terms of this Agreement, the terms of this Agreement shall prevail.

All requirements, covenants and agreements of Lessee in the Lease not specifically addressed in this Agreement shall continue to apply, notwithstanding the existence of this Agreement.

Lessor

_____

Lessee

_____

By:_____
Title:_____

STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me on this day of _____, 201_, by _____.

_____
Notary Public in and for the State of _____
Printed Name:_____
Commission Expires:_____

STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me on this day of _____, 201__, by _____.

_____
Notary Public in and for the State of _____
Printed Name:_____
Commission Expires:_____

EXHIBIT "A"

[Legal Description to be attached]

EXHIBIT "B"

Rate Schedule

Nature of Operation		Rate
Drill Site	Locations up to two acres:	$10,000.00/location
	Locations exceeding two acres:	$5,000.00/acre or part thereof
Tank battery or other facility (not to exceed one acre)		$5,000.00/site
Pits, reservoirs and similar sites	Locations up to two acres:	$5,000.00/location
	Locations exceeding two acres:	$5,000.00/acre or part thereof
Caliche, sand and gravel		$4.00/cubic yard
Top soil		$6.00/cubic yard
3-D Seismic		$20.00/net acre
Electrical line		$8.00/rod
Permanent pipeline flow line	Less than 4" in internal diameter:	$10.00/rod
	4" to 6" in internal diameter:	$20.00/rod
	More than 6" in internal diameter:	$30.00/rod

EXHIBIT "C"

[Construction Plan to be attached]