A Practical Guide to Operator/ Surface-Owner Disputes and the Current State of the Accommodation Doctrine

Douglas R. Hafer
Daniel B. Mathis
Logan W. Simmons

Follow this and additional works at: https://scholarship.law.tamu.edu/txwes-lr

Recommended Citation

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas Wesleyan Law Review by an authorized editor of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.
A PRACTICAL GUIDE TO OPERATOR/SURFACE-OWNER DISPUTES AND THE CURRENT STATE OF THE ACCOMMODATION DOCTRINE

By Douglas R. Hafer, Daniel B. Mathis, & Logan W. Simmons†

I. INTRODUCTION .............................................. 48
II. A PRACTICAL GUIDE TO OPERATOR/SURFACE-OWNER DISPUTES ......................................................... 49
   A. The Mineral Owner’s Surface-Use Rights .................. 49
   B. Surface Owner Interference ................................. 51
   C. Enforcing The Mineral Owner’s Surface-Use Rights Through Injunctive Relief ................................. 53

† Douglas R. Hafer is a founding partner in the Arlington, Texas firm of Curnutt & Hafer, L.L.P. Mr. Hafer has significant trial and appellate experience. During his career, Mr. Hafer has successfully represented oil and gas operators in cases involving contract and lease disputes, failure to develop claims, seismic and geophysical testing, and class action lawsuits. Additionally, Mr. Hafer has taken and defended hundreds of depositions, and briefed and argued over one hundred motions in state and federal courts. Mr. Hafer was also selected for inclusion in 2006, 2008, and 2009 “Texas Super Lawyers,” a listing of no more than five percent (5%) of Texas lawyers for the year. Finally, Mr. Hafer is AV-rated by Martindale Hubbell, the highest skill and ethics and integrity ranking available. Mr. Hafer is a past President of the Arlington Bar Association, enjoys coaching his children’s youth basketball teams, and teaching bible study.

Daniel B. Mathis is an associate attorney with the Arlington, Texas firm of Curnutt & Hafer, L.L.P. Mr. Mathis concentrates his practice on oil and gas matters, commercial litigation, insurance disputes, and personal injury cases. His oil and gas experience includes representing clients in cases involving royalty and surface-use disputes, operator duties, drill-site accidents, pipeline and easement matters, contract and lease disputes, pooling, and title matters. Mr. Mathis also has significant appellate experience, having briefed appeals in Texas state courts, as well as both the Fifth and Eighth Circuit Courts of Appeals. Mr. Mathis was recently selected for inclusion in Texas Super Lawyers® - Rising Stars Edition 2010 in the category of Energy & Natural Resources. Mr. Mathis was also appointed to a three-year term on the Texas State Bar standing committee on Web Services, and is Vice President of the Arlington Young Lawyers Association. Mr. Mathis is an avid runner who enjoys competing in 5K and 10K races.

Logan W. Simmons is an associate attorney with the Arlington, Texas firm of Curnutt & Hafer, L.L.P. Mr. Simmons concentrates his practice in business, oil and gas, and franchise litigation. Recently, Mr. Simmons was selected for inclusion in Texas Super Lawyers® - Rising Stars Edition 2010 in the area of Business Litigation. Mr. Simmons obtained his law degree from the University of Texas School of Law, in Austin, Texas, where he was a Townes-Rice Scholar (full academic scholarship), a member of the Christian Legal Society, and an editor for the Texas Review of Law and Politics. Mr. Simmons was also recently elected to the Board of Directors for the Arlington Young Lawyers Association. Mr. Simmons resides in Arlington, Texas with his wife, Emily, who is a high school teacher. In his spare time, Mr. Simmons enjoys reading American and Russian literature and following the major sports teams of North Texas.

With special thanks to Kamryn Caldwell, Texas Wesleyan School of Law student, for her research assistance in preparing this Article.

DOI: https://doi.org/10.37419/TWLR.V17.I1.3
Published by Texas A&M Law Scholarship, 2022
D. TRO Checklist—A Few Practical Pointers that Will Help Streamline a Request for Injunctive Relief

1. Exhaust Attempts to Resolve the Matter with the Surface Owner Directly
2. Ensure Operator Compliance with All Notice Requirements
3. Gather Necessary Documents
4. Establish Key Dates and Deadlines
5. Effectuating, Serving, and Enforcing the TRO

III. THE CURRENT STATE OF THE ACCOMMODATION DOCTRINE

A. The Accommodation Doctrine: A Brief Overview

B. Common Accommodation Doctrine Issues: What is an Existing Surface Use?

C. Common Accommodation Doctrine Issues: The Existing Surface Use Must be the Only Reasonable Means of Developing the Land Available to the Surface Owner

D. Common Accommodation Doctrine Issues: When Does a Mineral Owner’s Proposed Use of the Surface Preclude or Impair the Surface Owner’s Existing Use?

E. Common Accommodation Doctrine Issues: The Mineral Owner Must Have Reasonable Alternatives Available on the Leased Premises

F. Common Accommodation Doctrine Issues: Are Damages Available Under the Accommodation Doctrine?

IV. CONCLUSION

I. INTRODUCTION

Conflicts between operators and the surface owners whose properties are subject to oil and gas leases are an inevitable part of the oil and gas business. As operators acquire and develop oil and gas interests in increasingly populated and urbanized areas, conflicts between operators and surface owners are likely to increase in frequency and scope, particularly as the public becomes increasingly educated and informed (albeit sometimes misinformed). Such conflicts can be costly to both parties, but the effects felt by the operator can be particularly acute—exploration and development plans can be delayed indefinitely and costs can skyrocket. Thus, an operator has important financial and business incentives to ensure that conflicts—if unavoidable—

1. Although the authors recognize that the terms “operator” and “mineral owner” can sometimes have different connotations, for purposes of this Article, the terms are used interchangeably.
are resolved speedily, efficiently, and legally. To accomplish this goal, it is imperative that operators understand the extent and limits of their rights and that they further know how and when to enforce such rights.

This Article provides an overview of the operator's rights and a practical guide to the procedures available to enforce them. Of particular emphasis, this Article will discuss how an operator can use injunctive relief to prevent surface-owner interference, and will specifically provide a checklist of sorts for how an operator can obtain a temporary restraining order. This Article will also address how the operator's rights can be limited by the accommodation doctrine. In this regard, this Article will examine how the accommodation doctrine is triggered, what the surface owner must prove when asserting the accommodation doctrine, and whether the accommodation doctrine provides a mechanism for the surface owner to recover damages from the operator for unreasonable surface use.

II. A PRACTICAL GUIDE TO OPERATOR/SURFACE-OWNER DISPUTES

A. The Mineral Owner's Surface-Use Rights

As a preface to our discussion of how to enforce a mineral owner's surface-use rights, it is helpful to review some of the common sources and limits of those rights. One of the most important sources for determining the scope of a mineral owner's surface-use rights is the mineral lease itself. Under typical leases, the mineral owner has the exclusive right of:

...exploring, drilling, mining and operating for, producing and owning oil, gas, sulphur and all other minerals (whether or not similar to those mentioned), together with the right to make surveys on said land, lay pipe lines, establish and utilize facilities for surface or subsurface disposal of salt water, construct roads and bridges, dig canals, build tanks, power stations, telephone lines, and other structures on said land, necessary or useful in lessee's operations in exploring, drilling for, producing, treating, storing and transporting minerals produced from the land covered hereby or any other land adjacent thereto.2

In another example from a similar lease, the mineral owner has the exclusive right of:

...investigating, exploring, prospecting, drilling, mining and operating for and producing oil, gas and all other minerals, injecting gas, waters, other fluids, and air into subsurface strata, laying pipe lines, storing oil, building tanks, power stations, telephone lines, and other structures and things thereon to produce, save, take care of, treat,

process, store and transport said minerals and other products manufactured therefrom . . . 3

As illustrated in the examples above, the lease itself often provides the mineral owner with great latitude in using the surface to develop the mineral estate. Notably, however, leases may also limit the mineral owner’s rights to the surface. For example, a lease might require the mineral owner to, among other things: (1) pay for actual damages caused to the leased premises; (2) carry out surface restoration work; (3) pay for damages to crops and livestock; (4) construct and maintain gates, fences, and cattleguards; and (5) give notice to the mineral owner for certain acts of development under the lease. 4

Apart from the lease and other contractual agreements that concern a mineral owner’s rights to the surface (e.g., easement and right-of-way agreements), Texas common law is the primary source of a mineral owner’s surface-use rights. Long ago, the Texas Supreme Court established that the mineral estate is the dominant estate, and, as such, the mineral owner has the right to use as much of the surface as is reasonably necessary and incident to the removal of the minerals. 5 This concept—the mineral owner’s right to enter and extract his minerals—is one of the most solidly established tenets of Texas property law. In short, absent a limiting provision in a lease, deed, or some other document, the mineral owner has the right to use as much of the premises, and in such a manner, as is reasonably necessary to comply with the terms of the lease and to effectuate its purpose. 6

In addition to the foregoing general surface-use rights, the common law also provides the mineral owner certain specific surface-use rights. In this regard, a mineral owner has the right to construct roads on the leased premises. 7 A mineral owner has the right to construct buildings, facilities, pipelines, and other similar structures. 8 Also, the mineral owner has the right to locate and drill well-sites. 9 Further, a


4. For a list of some of the provisions that may be found in a lease that limit a mineral owner’s surface-use rights, see Harper Estes & Douglas Prieto, Contracts as Fences, 73 Tex. B.J. 378, 384–85 (2010).


6. Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810 (Tex. 1972) (op. on reh’g).


mineral owner also has the right to use third-party agents to carry out its work under the lease (e.g., seismic companies).\textsuperscript{10}

These surface-use rights were created because "a grant or reservation of the minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved."\textsuperscript{11} Thus, the mineral owner's right to use the surface estate generally arises under Texas law once there has been a severance, but it may also be created by the terms of the lease, language in a deed, or may be obtained directly from the surface owner through an easement or other access agreement.

Despite the court's clear articulation of the mineral owner's surface-use rights, surface owners often resist an operator's attempts to enter onto their property. Such resistance can interfere with the mineral owner's exploration and production obligations under the lease, and may ultimately require court intervention to resolve.

\section*{B. Surface-Owner Interference}

One of the most common issues operators encounter while attempting to carry out their obligations under an oil and gas lease is a dispute with the surface owner whose property is subject to the oil and gas lease. To this end, many surface owners are not the mineral owners and, therefore, may not be aware that their property is subject to an oil and gas lease. As a result, the operator's request to enter onto the property may be the surface owner's first notice that the property is subject to an oil and gas lease. Thus, resolving the dispute may require merely providing the surface owner with a copy of the operator's valid oil and gas lease, along with a copy of the surface owner's deed, which often explicitly states that the surface owner acquired the property subject to a prior executed oil and gas lease. Other times, the dispute might be resolved through other negotiations, which may provide a speedier and less expensive resolution to the dispute than the final option: court intervention.

If other efforts to resolve the dispute with the surface owner have failed, court intervention will be necessary. In such cases, it is important to understand the type of interference that necessitates legal action. While it would be nearly impossible to outline every way a surface owner could interfere with the operator's ability to access property subject to one of its leases, it suffices to say that the surface owner must make some unequivocal refusal to allow the operator (or the operator's employees/contractors) to enter onto the property. For example, the following "refusals" could trigger legal action: (1) verbal

\begin{flushleft}
\textsuperscript{11} Haupt, Inc., 854 S.W.2d at 911 (internal citations and quotations omitted).
\end{flushleft}
refusal of entry onto the surface; (2) physical refusal of entry onto the surface (e.g., blocking roadways with vehicles, changing locks on gates, posting "no trespassing signs"); (3) harassing the operator's employees and/or contractors; (4) moving, disturbing, or otherwise "touching" the operator's equipment; (5) placing cattle or horses in harm's way; and (6) other threats of harm or violence toward the operator's employees and/or contractors.

The case of Davis v. Devon Energy Production Co., L.P. provides a good example of surface-owner interference requiring court intervention. There, Devon filed suit seeking a declaration that it had a superior right to use the surface and seeking a permanent injunction to enjoin the Davises from interfering with Devon's rights to the surface. The trial court entered a judgment in Devon's favor, finding, among other things, that the Davises had interfered with Devon's production of the mineral estate. On appeal, the Davises unsuccessfully argued that the evidence was factually and legally insufficient to support the trial court's finding that the Davises had interfered with Devon's rights to the surface. In affirming, the Amarillo Court of Appeals found ample evidence to support the trial court.

Among the Davises' interference, the court noted that: (1) Floyd Davis stopped one of Devon's contract crews, telling the crew that they could not work on his property; (2) Floyd Davis threatened to "whip" a Devon employee; (3) Lloyd Davis ordered a Devon employee off the property while clutching a ball-peen hammer in his hand; (4) Floyd Davis told a Devon employee that "he was willing to die for his farm," and he then asked the employee if he was "willing to die for his company"; (5) Floyd Davis cursed at Devon's contractors and employees; (6) the Davises told Devon that it could not use caliche (a type of material) for its roads; (7) Floyd Davis would not allow an employee of one of Devon's contractors to leave the property; (8) Floyd Davis testified that he would continue to instruct Devon's employees and contractors about what they could do on his land and that there would be "trouble" if caliche was used on his property; and (9) Floyd Davis testified that he would continue to plow over Devon's roads. On these facts, the Davises were found to have interfered with Devon's surface-use rights, and, consequently, were enjoined from engaging in any further similar activities.

12. Davis, 136 S.W.3d at 419.
13. Id. at 421.
14. Id. at 421, 425.
15. Id. at 425.
C. Enforcing The Mineral Owner's Surface-Use Rights Through Injunctive Relief

When a mineral owner encounters a surface owner who unequivocally interferes with the mineral owner’s surface-use rights, the mineral owner often has to seek redress from the courts. In such cases, Texas courts routinely preclude a surface owner from interfering with the mineral owner’s right to enter and extract its minerals through injunctive relief, most commonly through a temporary restraining order (“TRO”). A TRO is a judge’s order forbidding certain actions for a short period of time, usually no longer than fourteen days (although a TRO may be extended beyond fourteen days by agreement or court order).\(^{17}\) Most judges typically require a valid “emergency” as a condition for granting a TRO. For example, this might include a fast-approaching deadline by which the operator must commence operations or the lease expires. Thus, a TRO is most appropriate when there is an immediate need to stop a surface owner from interfering with the operator’s activities. At the end of the fourteen-day TRO period, a preliminary hearing may be held to determine whether a “temporary injunction” should be granted, which essentially extends the TRO until a final hearing can be held on the merits of the case.

In short, the purpose of injunctive relief is to preserve the “status quo.”\(^{18}\) Generally, the status quo is defined as “the last peaceable, noncontested status that preceded the controversy.”\(^{19}\) The question of “what is the status quo in surface disputes” is more troublesome than one would think, and is a concept often misunderstood by all parties, including counsel. A common misperception is that the applicable status quo was the moment in time right before the mineral owner made attempts to enter upon the surface estate. Others mistakenly believe that the status quo was the moment before the mineral owner made any attempt to enter upon the surface estate, but right after the surface owner was notified that the mineral owner planned to enter upon the surface estate. Still others believe that the status quo was the moment right before the surface owner refused entry and disputed the mineral owner’s right to enter the property because everything was peaceable before that time. These notions are all incorrect.

In Rendon v. Gulf Oil Corp., the Corpus Christi Court of Appeals provided an answer to “what is the status quo in surface disputes.”\(^{20}\) In Rendon, the surface owner refused Gulf Oil and its agents access to the property.

\(^{17}\) See Tex. R. Civ. P. 680.

\(^{18}\) Cannan v. Green Oaks Apartments, Ltd., 758 S.W.2d 753, 755 (Tex. 1988) (per curiam).

\(^{19}\) In re Newton, 146 S.W.3d 648, 651 (Tex. 2004).

\(^{20}\) Rendon v. Gulf Oil Corp., 414 S.W.2d 510, 513 (Tex. Civ. App.—Corpus Christi 1967, writ ref’d n.r.e.).
the surface.\textsuperscript{21} Gulf Oil obtained a temporary injunction prohibiting
the surface owner from interfering with its right to enter upon the
surface and extract its minerals.\textsuperscript{22} The surface owner counterclaimed
for actual and exemplary damages.\textsuperscript{23} In affirming the trial court’s
grant of the temporary injunction, the Corpus Christi Court of Ap-
peals held:

In this case [Gulf Oil] established that it had a right to use so much
of the premises and in such a manner as was reasonably necessary
to comply with the terms of the lease and effectuate its purpose . . .
This was the last, actual, peaceable, noncontested status which pre-
ceded the pending controversy and the status quo to be preserved.\textsuperscript{24}

Thus, under \textit{Rendon}, the status quo in surface disputes is the point in
time when the mineral owner had the right to use as much of the sur-
face and in such a manner as is reasonably necessary to comply with
the lease and effectuate its purpose. Notably, the trial court’s injunc-
tive order did not remove the surface owner from possession of the
property. Instead, the injunctive order prohibited the surface owner
from interfering with the mineral owner’s rights to the surface until
the time of trial. The \textit{Rendon} court found that:

[I]t was entirely proper that the trial court protect the evident right
to possession which is in the [mineral owner] by temporary writ of
injunction, and at the same time protect any possible right of pos-
session which the [surface owner] may have by requiring [a bond] to
be posted by the [mineral owner].\textsuperscript{25}

Accordingly, mineral owner/surface owner disputes provide a unique
conflict that may be resolved through what might ordinarily be tem-
porary relief—namely, a temporary restraining order (TRO).

D. \textit{TRO Checklist—A Few Practical Pointers that Will Help
Streamline a Request for Injunctive Relief}

Generally, injunctive relief should be a last resort to resolving sur-
face-use disputes between mineral owners and surface owners. As ex-
plained above, a TRO is a court order. Thus, obtaining a TRO
requires filing a lawsuit, which can be time-consuming and costly.
Before escalating the dispute with the surface owner to legal action,
the mineral owner should have discussed (to the extent the surface
owner is willing to do so) the underlying dispute and should fully un-
derstand the surface owner’s position.

\begin{flushleft}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.} at 511.
\textsuperscript{23} \textit{Id.} at 512.
\textsuperscript{24} \textit{Id.} at 513.
\textsuperscript{25} \textit{Id.} at 514 (quoting Garcia v. Sun Oil Co., 300 S.W.2d 724, 734–736 (Tex. Civ.
App.—Beaumont 1957, writ ref’d n.r.e.).
\end{flushleft}
1. Exhaust Attempts to Resolve the Matter with the Surface Owner Directly

As already noted, many surface owners are not the mineral owners and therefore may not know that their property is subject to an oil and gas lease. As a result, the operator’s request to enter onto the property may be the surface owner’s first notice that his/her property is subject to an oil and gas lease. Thus, resolving the dispute may require merely providing the surface owner with a copy of the operator’s valid oil and gas lease, along with a copy of the surface owner’s deed, which often explicitly states that the surface owner acquired the property subject to a prior executed oil and gas lease. Other times, merely explaining to the surface owner when and where the activities will take place may be enough to resolve the dispute. Furthermore, the mineral owner can undertake more extensive negotiations and reach compromises to achieve a speedier and less expensive resolution to the dispute than the TRO process.

Finally, if the mineral owner has exhausted all reasonable options or lacks the time to engage in such discussions, and the surface owner continues to interfere with the operator’s ability to enter onto the property, legal action may be required.

2. Ensure Operator Compliance with All Notice Requirements

Before pursuing a TRO, the mineral owner should make sure that it has complied with all notice requirements and checked all applicable limits on its surface-use rights. Under Texas statutory law, an operator must notify the surface owner of its permit to drill not later than fifteen days after its issuance.26 Additionally, notice requirements set forth in local ordinances and local government codes vary and should be checked (along with notice requirements contained in the subject lease) to ensure compliance. The mineral owner should also verify that the lease does not impose limitations on its surface-use rights (such limitations are often contained in a lease addendum). Finally, the mineral owner should check local government codes and ordinances, as well as any relevant subdivision covenants to verify that there are no additional limits placed on the mineral owner’s surface-use rights. Keeping these requirements and limitations in mind is important because the mineral owner should comply with these, and any other rules or regulations, before asking a court to enforce its rights via a TRO.

3. Gather Necessary Documents

The mineral owner’s next step in pursuing the TRO is to gather pertinent information and documents. The mineral owner should

---

keep a log of all communications with the surface owner. The mineral owner should be sure to note the dates and times of the conversations, names of all individuals present, and the substance of all discussions. Most important, the mineral owner should note what the surface owner said or did to unequivocally refuse or interfere with the mineral owner’s ability or right to access the property. Keeping records of such communications is important because, at the injunction hearing, the mineral owner needs to present evidence regarding the surface owner’s interference.

Additionally, the mineral owner must present certain documents to the court in order to obtain a TRO. In this regard, the operator’s legal right to enter onto the property and conduct exploration and/or development activities must be established in court. These rights usually, if not always, arise from the express terms of a valid, effective, and enforceable oil and gas lease. Thus, copies of the following documents are required to obtain a TRO: (1) the applicable oil and gas lease; (2) any lease extensions; and (3) any assignments of the lease to the operator. Other documents that may be required include: (1) warranty deeds (whereby the surface owner acquired the property); (2) mineral or warranty deeds (whereby the mineral owner acquired its interest in the property); (3) unit declarations/declarations of pooling; and (4) subdivision covenants.

4. Establish Key Dates and Deadlines

The next step for the mineral owner seeking injunctive relief is to establish key dates and deadlines. This is important because, in order to obtain injunctive relief, one generally must prove a threat of “irreparable harm.” For the operator, irreparable harm may come in the form of losing a lease because it failed to “commence operations” before the lease primary term expires—usually, a surface owner would be unable to compensate the operator for loss of its prospective revenues. If such a deadline is approaching and the surface owner’s interference appears to jeopardize the lease (or multiple leases if a unit is involved), dates can be very important. Among other dates, the mineral owner should establish: (1) the deadline for “commencing operations”; (2) the date the crew is expected to arrive at the well-site, including the duration of the work; and (3) other important deadlines required by the lease and local government codes and ordinances (e.g., dates relating to notice requirements).

Once the operator’s attorneys receive the required documents and information, drafting and filing a lawsuit and securing a time to meet with a judge can take anywhere from one to three business days, depending on the time of the day and the day of the week they receive a request. Indeed, judges are not generally amenable to receiving a pe-

tition for a TRO on the weekend, much less granting one. Thus, if the surface owner begins interfering with the operator’s access to the property on a Friday afternoon, the operator will likely have to wait until Monday or later to obtain a TRO.

5. Effectuating, Serving, and Enforcing the TRO

Once a court issues a TRO, the operator must then obtain a bond to effectuate the TRO. Next, the operator must serve the TRO upon each of the surface owners named in the lawsuit—usually all the property owners. For example, if the property records list both Mr. and Mrs. Smith as owners of the property, the operator should normally name both in the TRO lawsuit and serve both with a copy of the TRO once it is issued by the court. Usually, service will be accomplished by using a private process server, local sheriff, or constable. After the owners have been served with the TRO, the operator may enter upon the property without interference (at least ideally).

If, despite being served with a TRO, the surface owner continues to interfere with and/or refuse the operator’s entry onto the subject property, the operator should leave the premises immediately and make every effort to avoid breaching the peace. From a location off of the leased premises, the operator should contact the local police department (e.g., sheriff, constable, etc.) and request assistance in enforcing the TRO. Ideally, a sheriff or deputy will be available to intervene and, if necessary, escort the operator’s employees and/or contractors onto the property to avoid further incident. If law enforcement officials cannot or will not assist the operator, the operator can seek enforcement of the TRO through a contempt of court proceeding. Among the relief available through a contempt of court proceeding is jail time for the person interfering with the operator’s rights under the TRO. Usually, after the operator has obtained a TRO the surface owner relents and no longer disputes the operator’s surface-use rights. As a practical matter, the operator often has the time to complete its work during the fourteen-day period prior to the expiration of the TRO. Thus, injunctive relief can be an important tool to the operator who is at risk of missing lease and other operational deadlines due to surface-owner interference.

That being said, during the TRO process the surface owner can counterclaim for damages or injunctive relief, such as: (1) surface damages claims; (2) breach of contract claims; and (3) claims under the accommodation doctrine. One of the most seemingly misunderstood and misapplied of these involves claims relating to the accommodation doctrine.
III. The Current State of the Accommodation Doctrine

Texas law generally considers the mineral estate to be the dominant estate, but the mineral owner’s rights to enter onto the surface estate and extract its minerals are not without limits. One of the most significant limits on a mineral owner’s surface-use rights is the common law rule widely known as the “accommodation doctrine.” Operators generally encounter this doctrine during surface-owner disputes in the early stages of, or prior to commencing, drilling operations. Thus, operators must understand the accommodation doctrine and its implications when assessing the mineral owner’s surface-use rights—and when considering taking action to enforce them.

To assist the practitioner encountering this doctrine, the next section of this Article examines the elements that must be met to trigger the accommodation doctrine, as well as some of the key issues that commonly arise when the accommodation doctrine has been asserted.

A. The Accommodation Doctrine: A Brief Overview

Although the mineral estate is dominant, the rights implied in favor of the mineral estate must be exercised with “due regard” for the surface owner’s rights.28 The accommodation doctrine, also known as the “alternative means” doctrine, is based on this concept of “due regard.”29 As articulated by the Texas Supreme Court in Getty Oil Co. v. Jones, the surface owner’s rights and the mineral owner’s rights to use the surface are to be balanced as follows:

Where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under established practices in the industry there are alternatives available to the lessee whereby minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.30

The next year, in Sun Oil Co. v. Whitaker, the Texas Supreme Court clarified its enunciation in Getty, by explaining that:

Our holding in [Getty] is . . . limited to situations in which there are reasonable alternative methods that may be employed by the lessee on the leased premises to accomplish the purposes of [the] lease.31

This right of accommodation between the surface and mineral estates is dependent upon the state of the evidence and the findings of the trier of fact.32 The mineral owner need not negate the application of the accommodation doctrine; rather, the burden of proof to show

30. Id.
31. Whitaker, 483 S.W.2d at 812 (emphasis added).
32. Getty, 470 S.W.2d at 623.
that the mineral owner’s use of the surface is not reasonably necessary is upon the surface owner.\textsuperscript{33} To prove this, the surface owner may show that the mineral owner’s surface use is not reasonably necessary because the operator can employ other non-interfering and reasonable ways and means of producing the minerals, the use of which will permit the surface owner to continue the existing surface use.\textsuperscript{34}

Initially, to invoke the accommodation doctrine, the surface owner has the burden of establishing that: (1) the land is subject to an existing use and (2) the surface owner’s existing use is the only reasonable means of developing the land available to him.\textsuperscript{35} If this initial inquiry is met, the surface owner must then show: (3) the mineral owner’s proposed use of the surface precludes or impairs the existing surface use and (4) the mineral owner has reasonable alternative methods, based upon established industry practices, that will allow it to produce its minerals.\textsuperscript{36}

B. Common Accommodation Doctrine Issues: What is an Existing Surface Use?

In \textit{Getty}, the Texas Supreme Court noted that the accommodation doctrine applies only to “uses then being made by the servient surface owner.”\textsuperscript{37} That is, before the mineral owner can be held to the “due regard” standard, a court must find an \textit{existing use} by the surface owner, which will be impaired or precluded by the operations of the dominant mineral estate.\textsuperscript{38} The question then becomes: what is an \textit{existing use}? That is, at what point do a surface owner’s actions, such as planning for a prospective use, become an \textit{existing use}? Though Texas caselaw does not appear to further define the term \textit{existing use} following \textit{Getty}—at least in the context of the accommodation doctrine—the facts of the \textit{Getty} case led to the creation of the accommodation doctrine and provide valuable insight.

In \textit{Getty}, the surface owner had installed a “self-propelled sprinkler irrigation system,” which would pivot around a fixed point, and could negotiate obstacles of less than seven feet in height.\textsuperscript{39} The sprinkler system was in place and functioning approximately \textit{four years before

\textsuperscript{33} \textit{Getty}, 470 S.W.2d at 627 (op. on reh’g).
\textsuperscript{34} \textit{Id.} at 628.
\textsuperscript{35} \textit{Haupt, Inc. v. Tarrant County Water Control & Improvement Dist. No. One}, 870 S.W.2d 350, 353 (Tex. App.—Waco 1993, no writ).
\textsuperscript{36} \textit{Getty}, 470 S.W.2d at 628 (op. on reh’g); \textit{see also} Laura H. Burney, \textit{Accommodating and Condemning Surface and Mineral Estates—The Implication of Tarrant County Water Control and Improvement District Number One v. Haupt, Inc., in} \textit{STATE BAR OF TEX., PROF’L. DEV. PROGRAM, ADVANCED OIL, GAS & MINERAL LAW COURSE E, E-1} (1994); Christopher M. Alspach, \textit{Surface Use by the Mineral Owner: How Much Accommodation Is Required Under Current Oil and Gas Law?}, 55 OKLA. L. REV. 89, 94 (2002).
\textsuperscript{37} \textit{Getty}, 470 S.W.2d at 627–28 (op. on reh’g) (emphasis added).
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Getty}, 470 S.W.2d at 620.
Getty drilled its wells.\textsuperscript{40} Getty's wells had an "upstroke" of seventeen to thirty-four feet and, thus, precluded operation of the surface owner's sprinklers.\textsuperscript{41} In holding that Getty's surface use was unreasonable, the court noted that other operators had installed their drilling equipment in subsurface concrete cellars in order to avoid creating obstacles for the self-propelled sprinklers.\textsuperscript{42} In addition, Getty could have placed the wells outside the circumference of the sprinklers' path.\textsuperscript{43} Indeed, other operators had done so.\textsuperscript{44} Thus, in Getty, the surface owner had a well-established existing use, thus rendering it possible to determine alternative locations for, or accommodating methods for, operation of the mineral owner's wells.

Justice Greenhill's comments in a concurring opinion provide additional insight into the "timing" of such existing uses:

[T]he court's holding is not expressly limited to conditions in existence when Getty's pumps were installed on the irrigated area. Perhaps it would be dictum for the court to say more. But so that there might be no misunderstanding at least as far as I am concerned, I would limit this holding to the conditions at the time the pumps were installed. I would not hold that Getty, or anyone else, would have to move its pumps if they were in place before Jones purchased and installed his irrigation system. For example, if Jones decided to use a mobile irrigation system in the northwest corner where Getty had had its surface pump already operating, my opinion as to how the case should be decided would be different. I would think that the surface owner could not compel the oil and gas lessee to change its operations because the surface owner decided to change his operations. At least that would be a different ballgame. . . . So I regard the holding in this case to be a narrow one . . . .\textsuperscript{45}

Thus, Justice Greenhill's comments indicate that something more than mere planning is required, such that—using the facts in Getty for illustration—the irrigation pumps must be on the surface in order to trigger a duty of accommodation.

For additional guidance, one may look to the analysis of other jurisdictions that have followed Getty, and adopted the accommodation doctrine.\textsuperscript{46} In this regard, the analysis of a Colorado federal court in

\begin{itemize}
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id., 470 S.W.2d at 629 (Greenhill, J., concurring on reh'g) (emphasis added).
\item \textsuperscript{46} Apart from being the leading case in Texas regarding the accommodation doctrine, the Getty decision also laid the foundation for the adoption of the accommodation doctrine in other jurisdictions as well. See Diamond Shamrock Corp. v. Phillips, 511 S.W.2d 160 (Ark. 1974); Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913 (Colo. 1997) (en banc); Amoco Prod. Co. v. Carter Farms Co., 703 P.2d 894 (N.M. 1985), abrogated on other grounds by McNeill v. Burlington Res. Oil & Gas Co., 182 P.3d 121 (N.M. 2008); Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979); Flying Diamond Corp. v. Rust, 551 P.2d 509 (Utah 1976); Buffalo Mining Co. v. Martin, 267
\end{itemize}
Amoco Production Co. v. Thunderhead Investments, Inc. is informative.\(^4^7\) In Amoco, the court held it is unreasonable to require the mineral owner to accommodate "speculative future surface uses."\(^4^8\) As such, the mineral owner was not required to accommodate the planned construction of a subdivision when the surface owner acquired the property subject to a reservation of the minerals, and had two preliminary plats approved, but had not yet met all the requirements for final plat approval.\(^4^9\) Thus, the planned construction of a subdivision was not an existing use.

At this point, it should also be noted that even if the surface owner has an existing use, the accommodation doctrine may not be applicable. In Getty, the court did not hold that a mineral owner must always accommodate the surface owner's existing use. Rather, the court held that the mineral owner must accommodate the surface owner when there is only one means by which the surface owner may develop the surface, and when the mineral owner has a reasonable alternative, non-interfering use by which the minerals may be developed.\(^5^0\) Nevertheless, the court also held that even if there is only one manner by which the surface estate may be developed, if there is also only one reasonable, usual, and customary method available for the mineral owner to develop the minerals, the servient surface estate must yield nonetheless, for the mineral owner has the dominant estate.\(^5^1\) In this latter scenario, the accommodation doctrine preserves—absolute and unfettered—the right of the dominant estate to use the surface.\(^5^2\) Thus, triggering the accommodation doctrine necessarily requires an analysis into the development options of both estates—the servient surface estate and the dominant mineral estate.

C. Common Accommodation Doctrine Issues: The Existing Surface Use Must be the Only Reasonable Means of Developing the Land Available to the Surface Owner

Another issue that arises commonly is that surface owners frequently overlook the following element: the surface owner must show that any alternative uses of the surface, other than the existing use, are impracticable and unreasonable under all the circumstances.\(^5^3\) In understanding this element, one may look again to the court's analysis in Getty. There, the surface owner had developed the land for agricul-

---


48. Id. at 1173.

49. Id. at 1165.

50. Getty, 470 S.W.2d at 628 (op. on reh'g).

51. Id.

52. Haupt, Inc., 870 S.W.2d at 353.

53. Id.
tural purposes (as noted previously), and, as such, had installed a self-propelled sprinkler irrigation system.\(^5\) The court noted that the proper inquiry, under those facts, would be whether the surface owner had reasonable means for developing his land for agricultural purposes other than by use of the sprinkler system in question.\(^5\)

In Getty, the court further noted that due to a labor shortage and other possible complications that would result from an alternative irrigation mechanism, the self-propelled system was the only reasonable means by which the surface owner could develop the surface for agricultural purposes.\(^6\) Had it been possible for the land to be developed for agricultural purposes without the use of the sprinkler system in question, or through an alternative means—then, the surface owner would have had to yield, so long as the method used by the mineral owner was not otherwise unreasonable.\(^7\) Recently, courts have enunciated this element by noting that “the surface owner must also show that any alternative uses of the surface, other than the existing use, are impracticable and unreasonable under all the circumstances.”\(^8\)

**D. Common Accommodation Doctrine Issues: When Does a Mineral Owner’s Proposed use of the Surface Preclude or Impair the Surface Owner’s Existing Use?**

The Texas Supreme Court has held that the accommodation doctrine is applicable only when “there is an existing use by the surface owner which would otherwise be precluded or impaired . . .”\(^9\) That is, before the mineral owner can be held to the “due regard” standard, the surface owner must demonstrate that his existing use of the surface will be impaired or precluded by the operations of the dominant mineral estate.\(^10\) The question then becomes: when does a mineral owner’s proposed use of the surface preclude or impair the surface owner’s existing use?

The court touched on this issue in Ottis v. Haas, where the Corpus Christi Court of Appeals held that more than mere inconvenience is required to demonstrate that a surface owner’s existing use of the surface will be impaired or precluded by the operations of the mineral estate.\(^11\) The court rejected the surface owner’s request that the operator move tank batteries, at minimal cost, to a location more “conve-

---

54. Getty, 470 S.W.2d at 628 (op. on reh’g).
55. Id.
56. Getty, 470 S.W.2d at 622.
57. Getty, 470 S.W.2d at 628 (op. on reh’g).
59. Getty, 470 S.W.2d at 622 (emphasis added).
60. Id.
nient” to the surface owner. In rejecting the argument of the surface owner, the court held that “[t]here must appear to be more than a question of inconvenience to the surface owner to invoke the rule of reasonable accommodation.”

Similarly, in Davis v. Devon Energy Production Co., L.P., the Amarillo Court of Appeals held that the impairment experienced by the surface owner must be, at the very least, substantial. In Davis, Devon obtained injunctive relief preventing the surface owners from interfering with its right to construct a caliche road on the surface. Devon’s use of non-compacted dirt roads became difficult after rains. Devon proposed making the roads caliche, but the surface owners protested. In affirming the trial court, the Amarillo Court of Appeals noted that while there was some evidence that the caliche roads would cause some problems for the surface owners, the caliche roads would not destroy their ability to carry out a profitable farming operation. As such impairment had an insubstantial impact on the surface owner’s farming operations, the trial court’s grant of injunctive relief to Devon was proper.

E. Common Accommodation Doctrine Issues: The Mineral Owner Must Have Reasonable Alternatives Available on the Leased Premises

If the surface owner successfully proves an existing use is the only reasonable means to develop his land, and such use will be precluded or impaired by the mineral owner’s actions, he must then prove that the method chosen by the mineral owner to develop its minerals is unreasonable. That is, he must prove there are alternative methods used in the industry on this type of property that are available to the mineral owner, allowing it to develop the minerals without interfering with the surface estate’s existing use. Notably, the alternative method to be employed must be on the leased premises. If this is

62. Id.
63. Id. (internal quotations omitted).
65. Id. at 421.
66. Id. at 424.
67. Id. at 421.
68. Id. at 425.
69. Id.
71. Whitaker, 483 S.W.2d at 812. In Whitaker, the surface owner sued to prevent the mineral owner from using potable water from the aquifer in a secondary recovery operation. Id. at 809. While the water used by the mineral owner was the only available source of water on the land, the surface owner argued that purchasing water from other sources was a reasonable alternative available to the mineral owner. Id. at 810. Even though the mineral owner’s use of the water would reduce the surface owner’s water supply by 15-20%, the Texas Supreme Court held that Getty is limited to situa-
found to be the case, then the mineral owner must employ the non-interfering use.\textsuperscript{72} At the same time, if there is only one available means to produce the minerals, then the mineral owner has the right to pursue that use, regardless of surface damage.\textsuperscript{73} This element is necessarily a case-specific and factually-intensive inquiry.

First, in making this reasonableness assessment, the method and manner of extracting the minerals used by the dominant mineral estate are to be measured against the usual, customary, and reasonable practices in the industry under like circumstances of time, place, and servient estate uses.\textsuperscript{74} That is, what might be a reasonable use of the surface by the mineral owner on a bald prairie used only for grazing could be unreasonable within an existing residential area of the City of Houston, or on the campus of the University of Texas, or in the middle of an irrigated farm.\textsuperscript{75}

Further, in determining whether a particular manner of use is reasonable or unreasonable, the court will not ignore the condition of the surface itself and the uses then being made by the servient surface owner.\textsuperscript{76} And if the manner selected by the dominant mineral owner is the only reasonable, usual, and customary method available for developing and producing the minerals on the particular land, then the owner of the servient estate must yield.\textsuperscript{77} If, however, there are other usual, customary, and reasonable methods practiced in the industry on similar lands put to similar uses that would not interfere with the existing uses being made by the servient surface owner, it could be unreasonable for the mineral owner to employ an interfering method or manner of use.\textsuperscript{78} These are questions to be resolved by the trier of fact.\textsuperscript{79}

Finally, this assessment of whether or not the mineral owner’s use of the surface to extract the minerals is reasonable is not complete without considering the alternative surface uses otherwise available to the surface owner.\textsuperscript{80} The reasonableness of surface use by the mineral owner is to be determined by considering the circumstances of both, and the surface owner is under the burden of establishing the unrea-

\textsuperscript{72} Getty, 470 S.W.2d at 628 (op. on reh’g).
\textsuperscript{73} Haupt, Inc., 854 S.W.2d at 912.
\textsuperscript{74} Getty, 470 S.W.2d at 627 (op. on reh’g).
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 627–28.
\textsuperscript{77} Id. at 628.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
sonableness of the mineral owner’s surface use in light of these considerations.\textsuperscript{81}

F. Common Accommodation Doctrine Issues: Are Damages Available Under the Accommodation Doctrine?

A final question commonly encountered in surface-owner disputes is whether damages are recoverable by surface owners under the accommodation doctrine. As noted above, surface owners who are subject to petitions for injunctive relief—or already existing TROs or injunctions—often assert counterclaims that include, among other things, “accommodation doctrine claims.” In doing so, the accommodation doctrine is often misconstrued and misapplied to create quasi-surface-damages claims that are unsupported by Texas law. Thus, for practitioners either defending or prosecuting operator/surface-owner disputes, an understanding of such claims is both helpful and necessary.

It is important to recognize that the mineral owner, as the dominant estate, has a legal right to effectively “damage” the surface estate as is reasonably necessary to access the minerals contained therein.\textsuperscript{82} As the Texas Supreme Court stated in Moser v. United States Steel Corp., “it is reasonable to assume a grantor who expressly conveys a mineral which may or must be removed by destroying a portion of the surface estate anticipates his surface estate will be diminished when the mineral is removed.”\textsuperscript{83} The Court further noted that “[i]t is also probable the grantor has calculated the value of the diminution of his surface in the compensation received for the conveyance” of the minerals.\textsuperscript{84} Given this compensation, the Court felt justified in restricting the mineral owner’s liability to negligently inflicted damage to, or excessive use of, the surface estate where a mineral is specifically conveyed.\textsuperscript{85} Consequently, in order to recover for injury to the surface estate, the surface owner has the burden of pleading and proving: (1) either specific acts of negligence by the mineral owner that caused the alleged damage, or (2) that more land was used by the mineral owner in its operations than was reasonably necessary.\textsuperscript{86}

To synthesize the foregoing standard with the accommodation doctrine and determine if and how damages are recoverable under the

\textsuperscript{81} Id.

\textsuperscript{82} Moser v. U.S. Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984) (op. on reh’g) (citations omitted).

\textsuperscript{83} Id.

\textsuperscript{84} Id.

\textsuperscript{85} Id.

\textsuperscript{86} Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967) (affirming judgment for mineral owner because surface owner did not prove damages were unreasonable or excessive); Macha v. Crouch, 500 S.W.2d 902, 904 (Tex. Civ. App.—Corpus Christi 1973, no writ) (affirming judgment for defendant mineral owner because damages alleged were not unreasonable or unnecessary).
accommodation doctrine, we begin by referring once again to *Getty*. In the last paragraph of its original opinion, the Court stated:

We further hold, as urged by *Getty*, that in event it is ruled that *Getty* is making an unreasonable surface use, *Getty* will have the right to install non-interfering pumping units; and in such event *Getty* will not be liable in damages beyond the decrease in the value of the use of the land from the time the interfering pumps were installed to the time of their removal.87

Thus, on the unique facts in *Getty*, it appears the surface owner may have recovered damages for the discrete time period during which the operator employed the “unreasonable surface use,” but only if the surface owner could prove a decrease in the value of the use of the land.

This portion of the Court’s opinion was not, however, unanimous. In a dissenting opinion, Justice McGee noted that prior decisions allowing a surface owner to recover damages required proof of specific acts of negligence or use of more of the surface than was reasonably necessary to effectuate the purposes of the lease.88 Based on this precedent, Justice McGee maintained that there was no basis in law for allowing the surface owner to recover damages.89 Justice McGee averred that “[i]njunctions have been granted or denied under the ‘due regard’ theory, but [n]o case has been cited, nor have I been able to find one, which would allow recovery of damages on this [accommodation] theory.”90

That being said, the majority stated that damages would only be available to the surface owner if the mineral owner’s surface use was unreasonable. Thus, awarding damages on the unique facts in *Getty* was not inconsistent with the traditional common law measure of damages available to surface owners (referenced above). That is, the Court found the surface use in *Getty* to be unreasonable. But the facts in *Getty* are unique. There are few occasions in which the operator’s implementation of the “unreasonable” use will precede an accommodation doctrine claim—much less involve a set of circumstances where it is not economically impracticable to require the operator to change its mode of operation after it has been implemented, as the Court did in *Getty*.

In summary, the accommodation doctrine is a means by which, under the limited circumstances dictated by the elements outlined herein, the surface owner may obtain injunctive relief requiring the operator to employ reasonable alternative methods of extracting its minerals to accommodate the surface owner’s existing use. Usually,

88. Id. at 627 (McGee, J., dissenting).
89. Id.
90. Id.
(and notwithstanding the unique facts in Getty) if the operator has already implemented its mode of operation, the surface owner either had no existing use, or it would be economically impracticable to require the operator to employ alternative methods.

IV. Conclusion

Given the sacrosanct nature of property ownership, disputes between operators and surface owners can be particularly contentious. Thus, it is in the operator's best interest to resolve such disputes amicably, if possible. At the same time, Texas law is clear that the mineral estate is the dominant estate, and, as such, the mineral owner has the unencumbered right to free use of as much of the surface estate as is reasonably necessary to enter and extract its minerals. This is one of the most solidly established bedrock tenets of Texas property law. Consequently, when a surface owner interferes with the mineral owner's ability to carry out its obligations under a lease, Texas courts traditionally and routinely enforce the mineral owner's surface-use rights. That being said, seeking court intervention can be time-consuming and costly. With a bit of planning and preparation, however, and by following the guidelines set forth herein, the practitioner may be ready for anticipated arguments (such as the accommodation doctrine), while avoiding many of the pitfalls common in these actions.