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Texas Oil and Gas: The Key That Expanded Lessees' Surface-Use to All Tracts in a Pooled Unit

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TEXAS OIL AND GAS: THE *KEY* THAT EXPANDED LESSEES' SURFACE-USE TO ALL TRACTS IN A POOLED UNIT

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ABSTRACT

The mineral estate is the dominant estate over the surface estate in Texas, and nowhere is this clearer than the production of oil and gas. An oil and gas operator can use as much of the surface as is reasonably necessary to effectuate the purpose of its oil and gas lease, subject to few limitations. Under a pooling clause and the Texas Supreme Court's ruling in Key Operating & Equipment, Inc. v. Hegar, operators can burden the surface of a tract of land for the benefit of an entire pooled oil and gas unit. Synthesizing Key with the Texas Supreme Court's rulings in Delhi Gas Pipeline Corp. v. Dixon and Wagner & Brown, Ltd. v. Sheppard allows operators to burden surface owners for the benefit of these large pooled oil and gas units—even with post-severance pooling agreements and expired oil and gas leases. Further, as property owners sever the surface estate from their mineral estate, surface owners are left without power to negotiate with oil and gas operators interested in the mineral estate only.

The Texas Railroad Commission should require all operator–lessees make a good-faith effort to enter surface-use agreements with surface owners in pooled oil and gas units. Requiring this of all operator–lessees benefits both the surface owners and the operators, even when a surface owner refuses to enter the surface-use agreement. Finally, there are other options the Texas Railroad Commission may consider to correct this issue; however, requiring operators make a good-faith attempt to acquire a surface-use agreement is the cheapest and most efficient way to address this issue without changing Texas oil and gas law jurisprudence.

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I. INTRODUCTION

In Texas, when the minerals are severed from the surface of a tract of land, whether by deed or mineral lease, a dominant estate and a servient estate is created, with the surface estate becoming servient to the dominant mineral estate.[1] This gives the holder of the mineral estate the right to use as much of the land, including the surface, as is reasonably necessary to produce the minerals.[2] Further, when a mineral owner leases the mineral estate to a third party, the dominant estate transfers to the lessee for the life of the lease.[3] This fundamental principle allows a lessee or operator to use as much of the surface that is reasonably necessary to comply with the lease and to "effectuate its purposes."[4] In other words, the lessee has an implied easement across the surface to use as much of the surface as is reasonably necessary to produce the minerals under the leased tract.[5] Yet the holder of the surface estate maintains all rights of "possession, powers of control, occupancy, use, and alienation."[6]

A lessee will often pool multiple contiguous tracts of land together to form a pooled unit for production purposes.[7] When this occurs, the pooled unit becomes one tract of land for production purposes, and production anywhere in the pooled unit counts as production everywhere within the pooled unit—this maintains all the oil and gas leases in the pooled unit as long as the well is producing.[8] If a pooled unit effectively becomes one tract of land for production purposes, and if

1. 3 JAMES N. JOHNSON, TEXAS PRACTICE GUIDE REAL ESTATE TRANSACTIONS § 17:82 (2011).

2. Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 248–49 (Tex. 2013).

3. Getty Oil Co. v. Jones, 470 S.W.2d 618, 624 (Tex. 1971).

4. *Id.* (citing Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133 (Tex. 1967); Brown v. Lundell, 344 S.W.2d 863 (Tex. 1961); Warren Petroleum Corp. v. Monzingo, 304 S.W.2d 362 (Tex. 1957); Warren Petroleum Corp. v. Martin, 271 S.W.2d 410 (Tex. 1954)).

5. *See* Texaco, Inc. v. Farris, 413 S.W.2d 147 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.).

6. JOHNSON, *supra* note 1.

7. JOSEPH SHADE & RONNIE BLACKWELL, PRIMER ON THE TEXAS LAW OF OIL & GAS 128 (5th ed. 2013).

8. Se. Pipe Line Co. v. Tichacek, 997 S.W.2d 166, 170 (Tex. 1999).

production anywhere in the unit counts as production everywhere in the unit, then the question becomes whether pooling a tract automatically gives a lessee the right to access the surface of all tracts within the pooled unit.

In *Key Operating & Equipment, Inc. v. Hegar*, the Texas Supreme Court appeared to answer in the affirmative.[9] After that decision, multiple legal commentators throughout the state generally suggested the case stood for the lessee being able to invoke the dominant estate theory on any tract within a pooled unit.[10] However, is this really what the Texas Supreme Court intended? A thorough reading of Texas case law suggests lessees have fewer restrictions than ever to access the entire surface within a pooled oil and gas unit under the dominant estate theory, the reasonable use doctrine, and the *Key* ruling. Can a pooling agreement expand the dominant estate theory of a neighboring tract within an oil and gas unit upon a surface owner who owned the surface before the neighboring mineral owner executed an oil and gas lease? What if the lease terminates but the pooling agreement is still valid?

This Note examines the effect of the Texas Supreme Court's recent decision in *Key*[11] on a surface owner's rights—or lack thereof—under a pooled unit. Further, this Note explores how powerful the Court's ruling is when synthesized with other landmark cases, in particular, *Wagner & Brown, Ltd. v. Sheppard*[12] and *Delhi Gas Pipeline Corp. v. Dixon*.[13] However, before the discussion,[14] this Note begins with an introduction—or review—of some basic oil and gas ideas and terms in Part I. Part II discusses several cases showing how much leniency courts give the dominant mineral estate and its power over the surface in an oil and gas lease, along with some of the exceptions to the domi-

9. Key Operating & Equip., Inc. v. Hegar, 435 S.W.3d 794 (Tex. 2014).

10. *See* John McFarland, *Texas Supreme Court Decides Key Operating v. Hegar*, OIL AND GAS LAWYER BLOG (June 23, 2014), http://www.oilandgaslawyerblog.com/2014/06/texas-supreme-court-decids-key.html [https://perma.cc/5XZN-9QWW] ("The legal precedent the Court followed is this: when two tracts are combined to create a pooled unit, the operator of the unit has the right to use the surface of all of the land covered by the leases included in the unit to operate wells located anywhere on the unit, regardless of the location of the well."); Butch Marseglia & Jillian Marullo, *A* Key *Decision: Supreme Court of Texas Sides with Liskow Amicus Brief on Behalf of TXOGA*, THE ENERGY LAW BLOG (June 24, 2014), http://www.theenergylawblog.com/2014/06/articles/litigation/a-key-decision-supreme-court-of-texas-sides-with-liskow-amicus-brief-on-behalf-of-txoga [https://perma.cc/8L4Z-B8KQ]; Betty Q. Richmond, Key Operating & Equipment, Inc. v. Hegar *Case Study*, OIL AND GAS LEGAL BLOG (June 30, 2014, 12:20 PM), http://www.oilandgaslegalblog.com/key-operating-equipment-inc-v-hegar-case-study [https://perma.cc/DM7D-XGCV].

11. *Key Operating*, 435 S.W.3d at 794.

12. Wagner & Brown, Ltd. v. Sheppard, 282 S.W.3d 419 (Tex. 2008).

13. Delhi Gas Pipeline Corp. v. Dixon, 737 S.W.2d 96 (Tex. App.—Eastland 1987, writ denied).

14. *See infra* Part V.

nant mineral estate.[15] Part III focuses on pooling then dives head first into *Wagner* and the Court's holding that a pooling agreement is valid after an oil and gas lease terminates.

Part IV synthesizes the material and looks at reasonable use under a pooled oil and gas unit. In particular, Part IV discusses the other two cases mentioned above, *Key* and *Delhi*. Then Part V looks at several unforeseen consequences through hypothetical examples that could potentially happen in Texas jurisprudence by synthesizing *Key*, *Wagner*, and *Delhi*. For example, what happens if the minerals are severed before the pooling agreement? Can a mineral owner expand the dominant mineral estate over the surface owner to bear the burden from all lands within a pooled unit by executing a pooling agreement "contract" with a lessee—even when the pooling agreement is subsequent to the mineral severance and the surface owner is not privy to the pooling agreement? The penultimate section, Part VI, offers a solution to the surface owner's ever-dwindling rights under an oil and gas pooled unit that benefits both the surface owner and the operator–lessee.

II. Dominant Estate

Subsequent purchasers of the surface estate "take their parcels subject to the mineral owner's preexisting rights and a mineral owner's right of surface-use is not affected by subsequent actions of the surface owner."[16] Further, "[t]his implied surface easement of reasonable usage extends to the surface of the pooled or unitized area."[17] This Part will explore reasonable surface-use freedoms granted to lessees and a few limits to reasonable use, including negligence by a lessee and the Accommodation Doctrine.

A. *Just How Dominant is that Estate?*

"[T]he owner-operator of the lease has the right to use so much of the land, both surface and subsurface, as is reasonably necessary to comply with the terms of the lease contract and to carry out the purposes and intentions of the parties."[18] Generally in Texas, if the lessee and surface owner do not sign a surface-use agreement, the lessee reimburses the surface owner only for damages from negligent or unreasonable acts.[19] In *Humble Oil*, the lessee's building and using of a road across the surface to access the pad site was not unreasonable even though the surface owner proved the value of his land diminished sig-

15. *See infra* Part II.

16. Ernest E. Smith & Jacqueline Lang Weaver, Texas Law of Oil and Gas § 2.1[B][1] at 2–16 (2d ed. 2011).

17. Prop. Owners of Leisure Land, Inc. v. Woolf & Magee, Inc., 786 S.W.2d 757, 760 (Tex. App.—Tyler 1990, no writ).

18. Brown v. Lundell, 344 S.W.2d 863, 865 (Tex. 1961).

19. *See* Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134–35 (Tex. 1967).

nificantly due to the road.[20] The Texas Supreme Court reasoned that the diminution in value did "not relate to damages from an excessive, unnecessary, or unreasonable use of the property; it relate[d] to the road itself which Humble had the right to build."[21]

Further, in Texas the lessee does not have an obligation to restore the surface of a tract unless there is a surface-use agreement.[22] In *Warren Petroleum Corp.*, the surface owner did not prove that the lessee acted negligently or used more of the surface than was reasonably necessary for the lessee's pursuit of production.[23] As a result, the lessee was not responsible for its damages to the surface even though the lessee failed to restore the surface and left slush pits unfilled, ruts from the heavy machinery, and a gravel road to the pad site.

A mineral owner has the right to use as much of a tract of land as is reasonably necessary—including the surface—but the mineral owner should exercise these rights with due regard for the rights of the surface owner.[24] A lessee's use of the surface of a tract to effectuate the lease should be reasonably necessary to operate an oil or gas well and produce the minerals.[25] If a lessee's use of the surface is unnecessary or unreasonable, then the lessee exceeds the surface rights granted to the mineral owner as holder of the dominant estate, and the lessee may be trespassing.[26]

The burden of proof to show that a lessee's use of the surface was not reasonable or necessary is on the surface owner, however, who must show that the lessee had reasonable alternative means to produce the minerals.[27] And "[w]hether the lease's grant of the dominant estate carries the right to use the particular easement is a fact question."[28] But certain actions by the lessee are privileged as a matter of law, such as where to place the pad site and when to begin operations.[29]

As a general rule under Texas law, the lessee can place a well on any portion of the surface of a unit, subject to any legal regulatory

20. *Id.* at 135.
21. *Id.*
22. Warren Petroleum Corp. v. Monzingo, 304 S.W.2d 362, 363 (Tex. 1957).
23. *Id.*
24. Trenolone v. Cook Expl. Co., 166 S.W.3d 495, 498 (Tex. App.—Texarkana 2005, no pet.).
25. Oryx Energy Co. v. Shelton, 942 S.W.2d 637, 640 (Tex. App.—Tyler 1996, no writ).
26. Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971); Haupt, Inc. v. Tarrant Cty. Water Control and Imp. Dist. No. One, 870 S.W.2d 350 (Tex. App.—Waco 1994, no writ); Johnson v. Phillips Petroleum Co., 93 S.W.2d 556 (Tex. Civ. App.—Amarillo 1936, no writ).
27. *Getty Oil*, 470 S.W.2d at 623; *Trenolone*, 166 S.W.3d at 498; Ottis v. Haas, 569 S.W.2d 508, 514 (Tex. Civ. App.—Corpus Christi 1978, writ refused n.r.e.).
28. *Trenolone*, 166 S.W.3d at 498.
29. Robinson Drilling Co. v. Moses, 256 S.W.2d 650, 651 (Tex. Civ. App.—Eastland 1953, no writ).

restrictions, restrictions contained in the oil and gas lease, and the Accommodation Doctrine.[30] A surface owner and a court of law cannot question a lessee's judgment in deciding when and where to drill a well.[31] Further, as long as the lessee's decisions are not unreasonable, the lessee can place roads and equipment necessary to produce the minerals wherever the lessee deems necessary.[32] For example, in *Ottis v. Haas*, the surface owner sought an injunction against the lessee for a tank battery the lessee placed about 400 feet from the surface owner's home.[33] The surface owner proved the tank battery could be moved with minimal cost and interference to the lessee's production; however, the court ruled the surface owner's inconvenience alone without damages was not a valid reason to even consider requiring the lessee move tools necessary for producing the minerals.[34]

Finally, courts allow small inconveniences by the lessee to the surface owner, and a surface owner cannot impede or interfere with lessee's access to the surface for oil and gas production.[35] For example, in *Davis*, to reach the well and tank batteries, the court allowed the lessee to build roads across the surface out of caliche—a cement and calcium carbonate mixture shown to hinder the surface owner's ability to farm—because the impact on the surface owner's farming was not substantial.[36] In addition to specific lease terms, two significant limitations to reasonable use are negligence by the operator–lessee and the Accommodation Doctrine.

B. *Limitations to Reasonable Use*

1. Negligence

A surface owner wishing to receive money from a lessee for surface damages must prove that the specific acts were negligent or that the lessee used more of the surface than reasonably necessary.[37] Usually, if a court finds a lessee acted negligently, the actions of the lessee are extreme. Two Texas Supreme Court cases provide helpful examples: First, in *General Crude Oil Co. v. Aiken*, the Court found negligence after the lessee "constructed its salt water disposal pit upon a location uphill from and higher in elevation than a fresh water seep spring on

30. Gulf Oil Co. v. Marathon Oil Co., 152 S.W.2d 711, 724 (Tex. 1941).

31. Grimes v. Goodman Drilling Co., 216 S.W. 202 (Tex. Civ. App.—Fort Worth 1919, writ dism'd w.o.j.) (holding that a lessee who pooled several tracts to form a unit could place a well in the front yard of one of the lessors).

32. Gulf Oil Corp. v. Walton, 317 S.W.2d 260 (Tex. Civ. App.—El Paso 1958, no writ).

33. Ottis v. Haas, 569 S.W.2d 508, 510 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

34. *Id.*

35. Davis v. Devon Energy Prod. Co., 136 S.W.3d 419, 425 (Tex. App.—Amarillo 2004, no pet.).

36. *Id.*

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

plaintiff's premises and operated it in such a manner as to pollute the underground waters that fed the spring."[38] In *Brown v. Lundell*, the Court found the lessee liable for the damages it negligently caused by disposing of salt water in a manner that failed to prevent the salt water from draining into the subsurface, which contaminated the surface owner's groundwater supply.[39]

In addition to surface damages, a negligent lessee can be liable for damages to a surface owner's livestock. In *Texaco, Inc. v. Spires*, the court ruled in favor of the surface owner after the surface owner proved that the lessee improperly built a cattle guard *and* that the surface owner told the lessee that the cattle guard was incorrectly constructed, but the lessee refused to replace it.[40] The surface owner also told the lessee to clear the dirt and grass out from under the cattle guard because the surface owner's horse preferred the long grass under the cattle guard that the lessee constructed.[41] As a result of the lessee's failure to take care of the cattle guard, the surface owner's horse broke its leg, requiring the surface owner to euthanize his horse.[42]

Notwithstanding the court's decision in *Texaco Inc.*, generally when a surface owner's livestock are injured, the surface owner's duty to prove the lessee acted unreasonably or negligently is steep. For example, in *Warren Petroleum Corp. v. Martin*, the surface owner's cows died after drinking oil that leaked from the well and pooled on top of the surface near the well. The Court did not hold the lessee liable.[43] The Court stated that the "mere fact that [the lessee] permitted oil to escape and form in small pools within five feet of the well, without any showing as to the manner in which the lease was being operated at the time, could not form the basis for . . . negligence."[44] The surface owner did not prove the lessee's equipment was not working properly or that the lessee conducted operations negligently.[45] The Court held the lessee did not have a duty to put a fence around the vicinity of the well to keep livestock out, and the lessee only owed a duty to the surface owner not to intentionally injure the surface owner's livestock.[46]

Finally, even when a surface owner can prove a lessee acted negligently in damaging the surface owner's livestock, Texas courts do not necessarily rule in favor of the surface owner. For example, in *Weaver v. Reed*, the surface owner proved the lessee negligently left an open

38. Gen. Crude Oil Co. v. Aiken, 344 S.W.2d 668, 669 (Tex. 1961).
39. Brown v. Lundell, 344 S.W.2d 863, 865 (Tex. 1961).
40. Texaco, Inc. v. Spires, 435 S.W.2d 550, 552 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.).
41. *Id.* at 551.
42. *Id.*
43. Warren Petroleum Corp. v. Martin, 271 S.W.2d 410, 412 (Tex. 1954).
44. *Id.*
45. *Id.*
46. *Id.*

bucket of poisonous pipe lubricant around the pad site where the surface owner's cattle could have consumed it.[47] The court ruled that leaving the poisonous pipe lubricant around the pad site was a reasonable use of the surface for lessee's operations, and the conduct was not negligent although some of the surface owner's cattle died from allegedly consuming the pipe lubricant from the fence or in the open bucket.[48] The court held that there was no proof that leaving the poisonous bucket out was the proximate cause of the cattle's death.[49]

The operators and lessees, however, lose their fair share of negligence lawsuits.[50] Further, there is another limitation to reasonable use when there is a pre-existing surface-use *and* the operator has reasonable alternatives. This balancing test is termed "the Accommodation Doctrine."

2. The Accommodation Doctrine

Under the Accommodation Doctrine, if the mineral owner's surface-use "will *substantially impair existing surface uses* and the mineral owner has *reasonable alternatives available*, the mineral owner may have to accommodate the surface owner if the benefit of the accommodation outweighs the burdens of the alternatives."[51]

One of the more famous illustrations of the Accommodation Doctrine is in *Getty Oil Co. v. Jones*.[52] There, the surface owner bought the surface subject to several oil and gas leases.[53] The surface owner installed an irrigation sprinkler system consisting of pipes and wheels that self-rotated around a pivot point to water his crops.[54] The irrigation pipes rotated about seven feet above the surface.[55] Subsequently, the lessee drilled two wells and installed two pumps that sat higher than seven feet and prevented the surface owner from using four of his six irrigation sprinklers.[56] The surface owner filed suit against the lessee because the lessee did not reasonably install the pumps, thereby preventing the surface owner from using the irrigation sprinkler.[57] The Court weighed the lessee's alternative method for producing the minerals—burying the pumps in cellars—against the surface owner's alternative method for irrigating the crops—hiring laborers to irrigate

47. Weaver v. Reed, 303 S.W.2d 808, 810 (Tex. Civ. App.—Eastland 1957, no writ).
48. *Id.*
49. *Id.*
50. Although the previous examples appear extreme, surface owners often win negligence law suits against operators and lessees because the venue is usually located in the surface owner's home county. SHADE & BLACKWELL, *supra* note 7, at 29.
51. *Id.* (emphasis added).
52. Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971).
53. *Id.* at 620.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 621.

the farm.[58] The Court reasoned that the surface owner's only means of producing agriculture on the property was the sprinkler system because of a labor shortage in the area,[59] and held that the lessee should accommodate the surface owner and bury the pumps, allowing maximum use of the minerals and the surface.[60]

Despite the Court's decision in *Getty*, courts usually distinguish *Getty* and rarely find for the surface owner under the Accommodation Doctrine.[61] One reason is the surface owner's burden of proof.[62] A surface owner who believes a lessee did not accommodate the current surface-use must prove: (1) the lessee's use prevents or substantially limits the current surface-use; (2) the surface owner does not have an alternative solution to the current surface-use; and (3) the lessee has reasonable alternatives to recover the minerals that allow the surface owner's continued use of the surface.[63] Some scholars even argue that the *Getty* court's discussion of "conditional submission" created a fourth element for the surface owners to prove before questioning whether the mineral owner has reasonable alternatives—that the surface owner lacks reasonable alternatives for the pre-existing surface-use.[64]

Although some state statutes,[65] the Accommodation Doctrine, and negligence claims attempt to limit operator–lessees' use of the surface, operator–lessees maintain a substantial amount of freedom to explore, drill, build roads and storage tanks, install pipelines, and use the surface owner's water to effectuate the purpose of a mineral lease—so long as it is reasonably necessary.[66] In short, Texas jurisprudence continues to favor the rights of the mineral owner over the surface owner.[67]

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58. *Id.* at 622.

59. *Id.*

60. *Id.* at 622–23.

61. Harper Estes & Douglas Prieto, *Contracts as Fences: Representing the Agricultural Producer in an Oil and Gas Environment*, 73 TEX. B.J. 378, 379 (May 2010).

62. *Id.*

63. Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 249 (Tex. 2013).

64. *See* Courtney R. Potter, Comment, *The Accommodation Doctrine Revisited: Implications in Law and in Policy*, 46 ST. MARY'S L.J. 75, 84 (2014) ("[T]he Getty opinion mentions the idea of 'conditional submission,'" meaning that a jury must find the surface owner has proved he or she lacks reasonable alternatives for the pre-existing surface use before inquiring into whether the mineral owner has reasonable alternatives. . . . [This] changes the accommodation doctrine from the traditional three-element test to a four-element test.").

65. *Id.* at 90 ("Legislation in Texas that provides protection for surface estate owners is very limited. Solutions to the lack of protection in Texas are also limited; typically, the theories of nuisance or negligence have governed the standard of liability for surface damages.").

66. SHADE & BLACKWELL, *supra* note 7, at 28–29.

67. Estes & Prieto, *supra* note 61, at 378–79, 387 ("Representation of agricultural producers against oil and gas interests utilizing the same surface is an uphill fight relying solely on the common law. They don't call it the dominant estate without a reason." *Id.* at 387.).

III. POOLING

Given that a lessee can generally use as much of the surface as is reasonably necessary, what happens when a lessee takes multiple leases and *pools* the leases together to create an oil and gas unit? The previous Parts discussed how courts treat the dominant mineral estate and a mineral owner lessee versus a surface owner. But because of pooling, a mineral owner can grant a lessee more authority to use the surface for the benefit of the mineral owner—even if the lessee is not producing the mineral reservoir directly below the surface.[68]

Pooling is "the constructive joining of at least two separately owned tracts . . . so that they are treated as one tract for oil and gas production purposes."[69] Pooling is also the bringing together of small tracts to obtain a well permit under allowable spacing rules.[70] Pooling oil and gas leases to form a unit prevents waste,[71] but the idea of pooling to conserve resources is not new.[72] As one scholar noted more than sixty years ago, "[p]ooling is important in the prevention of drilling of unnecessary and uneconomic wells, which will usually result in physical and economic waste."[73]

Further, pooling is beneficial to the lessee and the lessor, although these benefits lean towards the lessee.[74] For example, a lessee can pool multiple smaller tracts to form a tract large enough to drill one well.[75] This also allows a lessee to place a well over the most efficient area of an oil or gas reservoir.[76] Some pooling benefits—such as a lessee holding multiple leases by only drilling one well—benefit the lessee more than the lessor; however, pooling benefits lessors as well.[77] Pooling leases to form an oil and gas unit is especially beneficial to lessors with tracts too small to drill a well and produce minerals.[78] Pooling also benefits lessors because lessors collect royalties from all wells drilled within a unit, and the lessors can earn a higher

68. *See* SHADE & BLACKWELL, *supra* note 7, at 136. Texas courts recognize implied pooling under the community lease and forced pooling under the Mineral Interest Pooling Act; however, both are beyond the scope of this Note, which focuses on voluntary pooling under the oil and gas lease pooling clause or a separate pooling agreement. *See id.* at 129, 132, 136–38.

69. Brady Paul Behrens, Comment, *Rule 37 Exceptions and Small Mineral Tracts in Urban Areas: An Argument for Incorporating Compulsory Pooling into Special Field Rules in Texas*, 44 TEX. TECH L. REV. 1053, 1066 (2012).

70. Clifton A. Squibb, *The Age of Allocation: The End of Pooling as We Know It?*, 45 TEX. TECH L. REV. 929, 943 (2013).

71. SHADE & BLACKWELL, *supra* note 7, at 128.

72. *See* Howard R. Williams, *Conservation of Oil and Gas*, 65 HARV. L. REV. 1115, 1168 (1952).

73. *Id.*

74. *See* SHADE & BLACKWELL, *supra* note 7, at 136.

75. *Id.*

76. *Id.*

77. *See id.*

78. *Id.*

royalty if the lessee is able to drill several economical wells within the unit.[79]

The next Section discusses the oil and gas lease pooling clause in general. The most common type of voluntary pooling is by the pooling clause contained in the oil and gas lease.[80] However, lessors can also voluntarily pool by executing or ratifying a separate agreement, such as a "designation of pooled unit agreement" or "consent to pool agreement."[81] This Note discusses voluntary pooling under the pooling clause, which has the same effect regardless of whether a lessor pooled pursuant to an oil and gas lease pooling clause or by separate agreement.

A. *The Pooling Clause*

Almost all oil and gas leases contain a pooling clause.[82] Generally, the operator–lessee cannot pool a tract without the mineral owner lessor's express authorization contained in the pooling clause.[83] But to be valid, pooling must strictly comply with provisions in the pooling clause and the lease.[84] Without a pooling clause, the lessee cannot pool multiple tracts together, and without pooling, only the mineral owner of the minerals under the tract where a producing well is located would receive royalties.[85] But if the neighboring tracts cannot pool with the producing tract, then the mineral owners of the neighboring tracts would not receive royalties, and the producing well would drain the neighbors' minerals.[86]

Lessees must pool the tracts together "in fairness and in good faith, taking into account the interest(s) of both the lessor and the lessee."[87] Because a lessee can hold an entire tract with a lease under the pooling clause—even if only a portion of the tract is pooled[88]—courts take this "good faith" standard seriously.[89] However, the lessor has the

79. *Id.*

80. *Id.* at 137.

81. *Id.*

82. Jacqueline L. Weaver, *Voluntary Pooling and Unitization*, *in* FUNDAMENTALS OF OIL, GAS AND MINERAL LAW § 9, at 1 (2013).

83. Jones v. Killingsworth, 403 S.W.2d 325 (Tex. 1965).

84. Tittizer v. Union Gas Corp., 171 S.W.3d 857 (Tex. 2005).

85. Weaver, *supra* note 82.

86. *Id.*

87. Elliott v. Davis, 553 S.W.2d 223, 227 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.).

88. In Texas, any mineral production in a pooled unit is considered production from all tracts in the pooled unit. This allows a lessee to hold all the acreage in an oil and gas lease by pooling a small amount of the acreage. A Pugh Clause prevents this. "A Pugh Clause provides that operations or production from the pooled unit will only preserve the acreage that is within the boundaries of the pooled unit. . . . [it] severs the unpooled acreage from the pooled acreage." SHADE & BLACKWELL, *supra* note 7, at 138.

89. Weaver, *supra* note 82, at 6.

burden of proving that the lessee pooled a tract of land in bad faith.[90] Examples of bad faith by lessees include gerrymandering the boundaries of a pooled unit, pooling known bad acreage with productive acreage, and pooling just before the primary term of an oil and gas lease expires simply to hold the lease.[91]

Because a pooling clause is usually a clause contained in the oil and gas lease, if the lease terminates, one should expect the pooling clause to terminate as well. Before 2008, pooling was tied to the interest a lessee acquired in an oil and gas lease.[92] In other words, a lessee's pooled interest terminated when the oil and gas lease terminated, and the minerals ceased being subject to the pooling clause or the pooled unit.[93] However, after the Texas Supreme Court's decision in *Wagner & Brown, Ltd. v. Sheppard*, the newly-unleased-tract remains in the pooled unit.[94]

B. *Pooling Valid After Lease Terminates*

After *Wagner*, pooling continues even after a lease terminates. There, Sheppard leased her one-eighth mineral interest in a tract of land in Texas to the operator–lessee, who subsequently pooled Sheppard's lease with other leases to form a pooled gas unit.[95] The pooled unit contained just over 122 acres, and the operator drilled two producing wells on Sheppard's tract.[96] The subject lease contained a provision requiring the lessee pay royalties within 120 days of first selling the gas, but the lessee's subsequent failure to follow this provision terminated the oil and gas lease between the lessee and Sheppard.[97]

At trial, the court first decided the effect of Sheppard's lease terminating on the pooled unit.[98] Sheppard argued that when the lease terminated, it terminated Sheppard's participation in the pooled unit, and Sheppard should get one-eighth of the total production from the two wells because they were both located on her land.[99] However, the lessee argued that Sheppard's lease did not terminate Sheppard's participation in the pooled unit and that Sheppard should get one-eighth of Sheppard's acreage *proportionate* to the total acreage of the pooled

90. *Id.*

91. SHADE & BLACKWELL, *supra* note 7, at 139–40; *see, e.g.*, Amoco Prod. Co. v. Underwood, 558 S.W.2d 509 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.) (gerrymandering a unit of 688.02 acres to hold eight leases containing 2,252.03 acres was bad faith). *But see Elliott*, 553 S.W.2d at 223 (pooling shortly before lease expired did not so conclusively establish bad faith to warrant summary judgment in favor of lessors).

92. SMITH & WEAVER, *supra* note 16, at 4-123 to -124.

93. *Id.* at 4-124.

94. Wagner & Brown, Ltd. v. Sheppard, 282 S.W.3d 419 (Tex. 2008).

95. *Id.* at 421.

96. *Id.* at 421–22.

97. *Id.* at 421.

98. *Id.* at 422.

99. *Id.*

unit, or one-eighth of 51.3% of production.[100] The Supreme Court agreed with the lessee and held that "the termination of Sheppard's lease did not terminate her participation in the unit."[101]

The Court also held, however, that Sheppard was responsible for her proportionate share of production costs,[102] which is common because unleased mineral owners become working interest owners.[103] A working interest owner and the lessee must pay all production costs while the lessor's royalty is free from production costs.[104] Sheppard argued that she should not have to reimburse the production costs because Sheppard was a lessor and not a working interest holder when the operator drilled the well.[105] The Court disagreed and wrote that "Sheppard had the option to continue collecting royalties free of any drilling costs, as Wagner & Brown offered to reinstate her lease on that basis."[106] The Court continued, "[h]aving chosen instead (as was her right) to be a co-tenant with full benefits to the minerals she owned, it would be inequitable to allow her to escape the burdens that come with that choice."[107]

With its decision in *Wagner*, the Texas Supreme Court expanded an operator–lessee's pooling power—which could change lessees' approach to pooling provisions.[108] The oil and gas industry did not expect the Court to rule as it did because previous decisions allowed pooling only under an effective oil and gas lease.[109] Further, the Court's ruling in *Wagner* raised questions about the lessee's pooling power and whether the lessee could bind a previous lessor to a pooled unit; it also lowered the good-faith standard of care a lessee owes a mineral owner.[110] The Court's decision affects almost all oil and gas leases in Texas because operators need the pooling provision to meet the Texas Railroad Commission's unit spacing requirements and to produce smaller tracts of land.[111]

IV. Reasonable Use in Pooled Units

When a lessee pools several leases and its respective tracts of land to form a unit, the reasonable use of the surface of each tract of land

100. *Id.* Sheppard's acreage (62.72 acres) divided by the total acreage of the pooled unit (122.15954 acres) equals 51.3%. *Id.*
101. *Id.* at 422.
102. *Id.* at 429–30.
103. Shade & Blackwell, *supra* note 7, at 19.
104. *Id.*
105. *Wagner*, 282 S.W.3d at 429.
106. *Id.*
107. *Id.*
108. Shauna Fitzsimmons, Comment, *A Life Beyond the Lease: The Pooling Power Survives the Termination of the Oil and Gas Lease in Texas*, 43 Tex. Tech L. Rev. 719, 741 (2011).
109. *Id.*
110. *Id.*
111. *Id.*; *see* Shade & Blackwell, *supra* note 7, at 122, 128.

expands to include the entire surface in the pooled unit.[112] The lessee's access to the surface can benefit neighboring tracts as long as the leases are all in the same pooled unit.[113] For example, in *Robinson v. Robbins Petroleum Corp.*, the Court held that the surface owner had the right to be protected from the mineral owner using the surface for the benefit of tracts outside of the surface owner's tract.[114] The surface owner only owned the surface of an eighty-acre tract of land.[115] The surface owner bought the tract subject to a mineral lease and producing well.[116] The operator of the oil well started using the well on the surface owner's eighty-acre tract to produce salt water.[117] Then the operator used the salt water to produce oil from wells located in a different pooled oil and gas unit.[118] After the Court held that the water belonged to the surface estate, it looked at whether the operator could use the water from this tract to produce the minerals on separate tracts.[119] The Court discussed how a mineral owner has the right to use the surface, which includes water, to produce minerals from a tract of land.[120] The Court later said, however, that an operator was not entitled to use the surface estate for the benefit of tracts "not covered by or authorized to be pooled by the [subject lease]."[121] Finally, the Court held that the mineral owner had the right to use the water as was reasonably necessary to produce the minerals under the premises and that the surface owner had the right to not have the water used to produce oil for the benefit of tracts outside the pooled unit.[122]

Forty years later, the Court in *Key Operating & Equip., Inc. v. Hegar* distinguished from its decision in *Robinson v. Robbins Petroleum Corp.*[123] In *Key*, the Court held a lessee has the right to use the surface of a tract within the pooled unit for production of minerals

112. *See* Delhi Gas Pipeline Corp. v. Dixon, 737 S.W.2d 96, 98 (Tex. App.—Eastland 1987, writ denied).

113. *Id.*

114. Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865, 868 (Tex. 1973).

115. *Id.* at 866.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 867.

120. *Id.*

121. *Id.*

122. *Id.* at 868.

123. Key Operating & Equip., Inc. v. Hegar, 435 S.W.3d 794, 800 (Tex. 2014) ("The Hegars assert that *Robinson* prohibits a mineral lessee from using one surface to aid operations on another tract. But *Robinson* is distinguishable from the situation here. The minerals under Robinson's surface had not been, and could not be, pooled with tracts where the water was being used. . . . And Robinson himself recognized that the lack of pooling was significant, arguing in the court of appeals that he had authority to control use of the water subject to a lessee's water use to assist with production under his tract or 'underlying tracts pooled therewith.'" (citation omitted)).

anywhere within the pooled unit.[124] Key Operating was the lessee and operator of a forty-acre pooled unit.[125] After Key created the forty-acre pooled unit, the plaintiffs bought an eighty-five-acre tract of land containing ten acres within Key's forty-acre unit.[126] Key used a road on the ten-acre tract of land to access the producing well in the pooled unit, and the plaintiffs were aware of this when they bought the tract of land.[127] Roughly two years after purchasing the tract of land, the surface owners built a house on the tract and used Key's road to access the house.[128] Initially, the surface owners did not attempt to prevent Key from also using the road; however, Key drilled another well on the forty-acre unit, which caused the traffic to increase on the road.[129] The plaintiff-surface-owners filed suit against Key seeking an injunction to prevent Key from using the plaintiff's surface to produce the minerals on an adjacent tract of land also within the forty-acre unit.[130] Although the plaintiffs' ten-acre-tract was in the forty-acre pooled unit, the plaintiffs brought in a petroleum engineer who proved the producing well and mineral drainage area was not reaching the minerals below the plaintiffs' ten-acre tract.[131]

The trial court and court of appeals ruled in favor of the surface owners and held that Key did not have the right to use the plaintiffs' surface to produce minerals from another tract in the pooled unit.[132] Further, the lower courts held that Key could use the plaintiffs' surface only to produce oil below the plaintiffs' surface.[133] The Texas Supreme Court reversed the lower courts' decisions and held Key has the right to use the surface of any of the tracts within the forty-acre unit to produce the minerals.[134] The Court held that production from a tract within a pooled unit is legal production from all tracts within the pooled unit.[135] The Court concluded that once the forty-acre pooled unit was created, then the tracts within the unit were no longer separate.[136] Finally, in dicta, the Court discussed how a mineral owner has the right to ingress and egress over the surface to produce minerals; therefore, the right to ingress and egress also covered the surface of all pooled acreage within a unit.[137]

124. *Id.* at 801.
125. *Id.* at 796.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 796–97.
132. *Id.* at 797.
133. *Id.*
134. *Id.* at 798, 801.
135. *Id.* at 798.
136. *Id.* at 799.
137. *Id.* at 800.

If the Court's decision in *Key* by itself does not grant a lessee access to the surface of all tracts within a pooled unit,[138] synthesizing its ruling with a case twenty-five years prior certainly should. In *Delhi Gas Pipeline Corp. v. Dixon*, the Court held that a mineral owner could grant a pipeline easement for transporting gas from a well not located on the leased tract but within the same pooled unit.[139] The minerals were severed six years before the mineral owner signed the oil and gas lease.[140] The timing of the severance compared to the oil and gas lease is important.[141] The oil and gas lease authorized the lessee to lay a pipeline across the tract and included a pooling clause.[142] The pipeline going across the surface of the subject land only transported gas from the pooled unit.[143] The Court held the mineral owner could grant an easement across the surface of a tract for transporting gas from a well with which the tract was pooled.[144] In dicta, the Court said the lessee could not transport gas *not* from the unit's well in the pipeline without an agreement from the surface owner.[145] What happens when one synthesizes *Key* and *Delhi*? This is discussed below.

V. Potential Unforeseen Consequences

Because Texas case law is the predominant authority for oil and gas law in the country,[146] it is important to be aware of unforeseen scenarios and restrictions that may arise when one synthesizes Texas jurisprudence. This Part discusses a few of those extreme scenarios that could significantly expand a lessee's reasonable use of the surface to effectuate its oil and gas lease.

A. *Pooling Agreement Valid Post-Severance*

With its decision in *Key*, the Texas Supreme Court appeared to give operator–lessees free reasonable use of the surface of a unit for the benefit of any producing well within that unit.[147] But a close reading of *Key* reveals that the minerals were leased and pooled before the surface and minerals were severed. In other words, when the surface owners acquired the surface, they took the surface subject to the lease

138. *See supra* Section II.B (discussing limits on lease access to the surface).
139. Delhi Gas Pipeline Corp. v. Dixon, 737 S.W.2d 96, 98 (Tex. App.—Eastland 1987, writ denied).
140. *Id.* at 97.
141. *See infra* Section V.A.
142. *Delhi Gas*, 737 S.W.2d at 97.
143. *Id.*
144. *Id.* at 98.
145. *Id.*
146. *See* Ernest E. Smith, *Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right*, 64 Tex. L. Rev. 371, 375 n.13 (1985) ("Other states frequently look to Texas decisions when confronted with a new or unsettled issue of oil and gas law.").
147. *See supra* note 10 and accompanying text.

and pooling agreement. The chain of events is important. What if the pooling agreement was not already in place when the surface owners acquired the surface? Would the Court have found that a subsequent pooling agreement could burden the surface owner of a ten-acre tract of land for production anywhere within a forty-acre unit? What if we take it a step further: Subject to the Texas Railroad Commission's Field Rules, some pooling agreements can go as high as 640 acres.[148] Will Texas jurisprudence allow a 640-acre pooled unit to burden the surface of a ten-acre tract of land? When one synthesizes *Key* with *Delhi*, the answer appears to be *yes*.

When the severance occurred in *Key*, the mineral estate was subject to the prior pooling agreement. Subsequently, the operator–lessee burdened the surface estate for the benefit of the pooled unit when the operator used a road across the surface owners' tract to access a new well within the pooled unit. The surface owners sued, and the Texas Supreme Court found in favor of the operator–lessee. However—unlike *Key* where the minerals were already subject to a pooling agreement when the severance occurred—in *Delhi*, the minerals were not subject to a pooling agreement at the time of severance. In *Delhi*, the surface owner acquired the surface estate six years before the mineral owner entered an oil and gas lease containing a pooling clause.

The timing of the mineral severance compared to the pooling agreement in the chain-of-title of both *Key* and *Delhi* is the focus here. In *Key*, the surface owner acquired the surface subject to the oil and gas lease, and the Court allowed the operator to access that surface to reach other wells contained within the pooled unit. In *Delhi*, the surface owner acquired the surface *before* the mineral owner and operator entered into an oil and gas lease, and the court still allowed the operator to lay pipeline across the surface to transport minerals from other wells within the pooled unit. Synthesizing these two cases means a mineral owner of a tract can enter a contract—a pooling agreement—after the surface owner acquires the surface of the tract, and courts will still enforce the subsequent contract.[149]

If a landowner acquires the surface of a tract of land not subject to an oil and gas lease or pooling agreement, why would the new surface owner contemplate the excess burden on the tract by a subsequent lease and pooling agreement between an operator and a mineral owner? If a pooling agreement is a contract between a lessee and mineral owner, this means a court can rule that a contract between the mineral owner and lessee actually expands the dominant estate theory

148. Bruce M. Kramer, *Oil and Gas Leases and Pooling: A Look Back and a Peek Ahead*, 45 TEX. TECH L. REV. 877, 891 (2013).

149. Wagner & Brown, Ltd. v. Sheppard, 282 S.W.3d 419, 424 (Tex. 2008) ("[O]il and gas leases in general, and pooling clauses in particular, are a matter of contract.").

on a surface owner who was not privy to the pooling agreement to include all lands within a pooled unit.

With the Court's rulings in *Key* and *Delhi*, in theory, a developer could buy a large parent tract of land—600 acres for example—break it up into sixty smaller ten-acre tracts, and sell all the tracts while reserving the minerals. After selling the surface of all sixty tracts of land and reserving all the minerals thereunder, this developer could sign an oil and gas lease with a pooling agreement covering all tracts within the 600-acre parent tract. The operator–lessee could then pool the sixty ten-acre tracts with a forty-acre tract. This would allow the lessee to burden the surface estate of each ten-acre-tract for the benefit of the pooled unit anywhere within the 640-acre pooled unit, subject to the normal restrictions of negligence, reasonable use, and the Accommodation Doctrine.

To take it a step further, what if all but one ten-acre tract in the 640-acre pooled unit is landlocked? In theory, an operator could build and use a road across the non-landlocked ten-acre tract to access every well drilled in the oil and gas unit.[150] In other words, the surface owner of a ten-acre tract of land—who acquired the ten-acre tract before the mineral owner entered a pooling agreement—would now be burdened by the dominant mineral estate of that non-landlocked ten-acre tract plus the additional 630 acres contained in the pooled unit. This example is extreme, but under current Texas jurisprudence it could be a reality. The issue is not that the minerals are dominant to the surface; the issue is the dominance of these minerals can expand the burden of a surface owner exponentially pursuant to a post-severance contract—the pooling agreement. And with the *Wagner* ruling, this example could be even more extreme, which Section B discusses further.

B. *Lessee's Post-Severance Surface-use Valid After Lease Terminates*

Now take the synthesized rule discussed in Section A, and add the Court's ruling in *Wagner*. In *Wagner*, the Court held the mineral owner was still bound by the pooling clause contained in the oil and gas lease after the oil and gas lease terminated when the lessee failed to make royalty payments on time. In the most extreme example discussed above, an operator accessed every well in a 640-acre unit via the surface of the only non-landlocked tract in the unit.[151]

In this example, the surface owner acquired the surface before the mineral owner and operator entered an oil and gas lease with a pool-

150. In one extreme example, a cotton farmer in Texas had sixteen wells on his 640-acre tract of land. *See* Aman Batheja, *West Texas Oil Drilling Frustrates Some Farmers*, TEX. TRIB. (Oct. 31, 2014), http://www.texastribune.org/2014/10/31/county-resents-oil-drilling-despite-money-it-bring [https://perma.cc/YC2B-73Y8].

151. *See* discussion *supra* Section V.A.

ing clause.[152] Now assume, like in *Wagner*, that the first well produces minerals from the 640-acre unit and that the lessee fails to adhere to the terms of the lease, causing the lease holding the only tract by which the operator could access the 640-acre unit to terminate. Pursuant to *Wagner*, the pooling agreement is still valid, and the operator of the 640-acre pooled unit can still burden the surface of this ten-acre tract without a valid oil and gas lease for the benefit of the entire 640-acre pooled unit to perform any function the lessee deems reasonably necessary to "effectuate [the] purpose"[153] of a lease that no longer exists.

On one side is a surface owner of a ten-acre tract of land burdened by an operator's use of the surface to produce minerals from a 640-acre unit because of a now-terminated oil and gas lease with a pooling clause that the surface owner was not subject to when the surface was acquired. On the other side is an oil and gas operator who can reasonably burden the surface of a ten-acre tract for the benefit of 640 mineral acres, even though the oil and gas lease for the mineral estate of this ten-acre tract terminated after the operator failed to adhere to the terms of its own oil and gas lease. Although the operator has a duty to perform as a reasonable and prudent operator,[154] this duty is to the mineral owner—not the surface owner. These extreme scenarios illustrate the need for solutions to protect surface owners without restricting the dominance of the mineral estate. The next Part offers some recommendations.

VI. RECOMMENDATIONS

The struggle between operators and surface owners is not going away. At least two-thirds of the farmers in Texas do not own their minerals,[155] and that number is likely to increase as more fee owners reserve their minerals when selling the surface estate. Further, as the population grows, so does the demand for oil and gas. It is important to find a solution that benefits both the surface owner and the operator–lessee. The simplest solution does not necessarily limit operators or require any substantial change in Texas jurisprudence; instead, it focuses on giving both the operator and surface owner notice of whom each is dealing and what each can expect from the other—a surface-use agreement.

A. *Surface-use Agreements*

Some operators already voluntarily enter surface-use agreements with surface owners, but the Texas Railroad Commission could take

152. *See* discussion *supra* Section V.A.
153. *See supra* note 4 and accompanying text.
154. SHADE & BLACKWELL, *supra* note 7, at 45.
155. Batheja, *supra* note 150.

this a step further and require full disclosure to the surface owners in addition to requiring a good-faith attempt to enter a surface-use agreement with the surface owners.

A surface-use agreement is a contract between a surface owner and operator where the operator pays consideration to the surface owner in exchange for the right to use the surface in accordance with the agreement.[156] The surface-use agreement sets forth restrictions and surface provisions the operator must follow. Although this sounds like the surface owner is receiving all the benefit, surface-use agreements are beneficial to operators as well. First, this surface-use agreement gives the surface owner notice that the operator will burden the surface and sets out damage provisions the operator will pay as needed. This could avoid litigation between the operator and surface owner because the parties know what to expect, plus each side could consider adding an arbitration clause. Although the operator may win a suit in the end, if the suit from the surface owner was an injunction to prevent the operator from being on the surface, then the operator just wins the right to continue doing what it was already doing at the cost of a lot of time and money defending itself. This means litigation is expensive for the operator, win or lose. Further, the cost of litigation could be higher if the surface owner wins an injunction and the operator is required to move or stop operations.

The surface-use agreement benefits the surface owner because the surface owner can get money for damage to the surface without having to file suit. Not only does this save the surface owner the cost of litigation, it also provides the surface owner with notice and peace-of-mind knowing what to expect. Further, in Texas jurisprudence there is no duty for an operator to enter a surface-use agreement with the surface owner, so doing this shows good faith by the operator and can help ease the pain of the reality that the surface is the servient estate. And if the well is successful, the surface owner and operator could work together for several years, and a surface-use agreement is a great way to start and maintain a great relationship between the parties.

However, some surface owners may refuse to sign a surface agreement regardless of how it benefits them. If the Texas Railroad Commission requires a good-faith effort by the operator to enter a surface agreement with the surface owner, the surface owner will have notice and full disclosure that the minerals beneath the surface are leased and pooled—even if the surface owner refuses to enter the agreement.

156. *Oil & Gas Exploration and Surface Ownership*, RAILROAD COMMISSION OF TEX., http://www.rrc.state.tx.us/about-us/resource-center/faqs/oil-gas-exploration-and-surface-ownership/ [https://perma.cc/W38H-UZRV] ("[T]he surface owner may wish to contact the lessee company to attempt to negotiate an agreement restricting use of the surface or agreeing to set damages for surface use. Although there is no legal requirement to do so, a lessee may be willing to enter into a reasonable surface use/damages agreement to avoid potential disputes.").

A surface owner may not like it, but the surface owner will know what to expect. Because this requirement is only a good-faith effort by the operator, the surface owner cannot delay or prevent operations with bad-faith negotiation tactics. Further, if the surface owner is on notice about an operator's plans and the surface owner sues for negligence, the court may be more likely to find some contributory negligence by the surface owner if the surface owner had notice of the specific incident that led to the negligence claim.

In addition, simply knowing a surface owner refuses to enter a surface-use agreement is beneficial to an operator. By requiring an operator make a good-faith effort to acquire a surface-use agreement with the surface owner, the operator learns the type of surface owner with whom the operator is dealing. Most surface owners do not want to feel taken advantage of by an operator and want notice so they can know what to expect during the drilling of the oil and gas well. However, some surface owners will not enter a surface agreement—but knowing a surface owner has that attitude towards an operator can help an operator when it plans the unit or drilling schedule. An operator may perform more cautiously if the operator knows it is dealing with a surface owner who refuses to sign versus an amenable surface owner with whom the operator has a working relationship.

For example, an operator may have two choices for the access road leading to the pad site. While the operator may prefer to place the road across the surface of the unyielding surface owner, building the road across the land of the surface owner who entered the surface-use agreement could potentially save the operator time and money. By moving the road, the operator may avoid future litigation with the unyielding surface owner, and the unyielding surface owner successfully keeps the surface unencumbered by the operator's road. In the long run, the operator, the yielding surface owner, and the unyielding surface owner should be happier about the situation and have more money in their pockets than if the operator had not known the attitude of the unyielding surface owner before the operator built the access road.

The good-faith attempt by the operator could follow the same standard required in the pooling agreement.[157] Whether an operator made a good-faith effort to enter a surface-use agreement would be a question of fact.[158] Further, the operator would be required to act as a reasonable, prudent operator considering its own interests *and* the interest of the surface owner.[159] Similar to pooling clauses, the date an operator attempts to acquire the surface-use agreement, compared to the date the operator drilled the well, could also show good or bad

157. Gina S. Warren & Mark G. Walston, *Pooling Clauses and Statutes*, *in* OIL, GAS & ENERGY RESOURCES LAW 101, at 2 (2013).

158. *Id.*

159. *See id.*

faith.[160] Therefore, the good-faith standard would extend to both the surface-use agreement *and* to whether the operator contacted the surface owner in a timely manner before drilling the well.

Requiring an operator to make a good-faith effort to enter a surface agreement with a surface owner will save the operator money without a substantial amount of additional time and effort. There are other options the legislature might consider; however, additional options may limit the rights of the operator and cost the operator more than surface-use agreements.

B. *Other Options*

Requiring the operator attempt to enter a surface-use agreement with the surface owners is likely the easiest and most efficient way to attempt to remedy the tension between the two parties. However, there may still be situations where the operator has no other options other than using the surface of an unyielding and upset surface owner.[161] Additional solutions are likely too little—educating surface owners—or too extreme—changing Texas oil and gas law.

Educating surface owners and encouraging surface owners to work with mineral owners before an operator reaches out to acquire an oil and gas lease would benefit the surface owner more than the operator. A surface owner could contract with a mineral owner to require provisions in the oil and gas lease requiring the surface owner's opinion before the operator changes the surface. Further, the mineral owner could require the operator to restore completely the surface to predrilling conditions when production is finished. Education could also inform and encourage the surface owner to acquire a slight interest in the mineral estate, simply so the surface owner could take part in negotiations with the operator–lessee.

The downside to education is its cost. First, educating surface owners requires mailers or television, radio, and Internet announcements. This shotgun approach is not efficient compared to the target audience of surface owners who do not own their minerals. The Texas Railroad Commission could build an education fund into its permit costs or operators could fund this as a show of good faith. But if the education campaign is effective and a surface owner and mineral owner agree to provisions too steep for the operator, then the operator may not lease the minerals at all, which goes against Texas's public policy of encouraging oil and gas production. Not to mention mineral owners will be hesitant to make deals with surface owners in the future if it starts costing the mineral owners money. In the end, education would likely create awareness without making any substantial impact on this issue.

160. *See id.*
161. *See* discussion *supra* Sections V.A–B.

Creating regulations and laws requiring restrictions in oil and gas leases designed to protect surface owners is the most guaranteed way to address this issue. The Texas Legislature or the Texas Railroad Commission could require a provision in the oil and gas lease restricting surface-use in a pooled unit to the surface above the leased minerals and not for the benefit of the entire unit without a surface-use agreement. Additionally, the legislature could create a rule that a pooling agreement terminates with the oil and gas lease to correct the precedent from *Wagner*.[162] This would protect the surface owners from the extreme post-severance examples discussed in Part V. Once an operator knows what the pooling rules are, it can adjust its drilling plans and schedule accordingly.

However, restricting the operator's use of the pooling agreement goes against one of the main reasons for pooling—preventing waste.[163] Additionally, restricting the operator's rights under the oil and gas lease erodes the dominance of the mineral estate. Restricting pooling agreements, oil and gas leases, and the mineral estate is inapposite with public policy and over sixty-five years of Texas jurisprudence. Education programs would likely be insufficient, and statutes and regulations would likely be overkill.

VII. Conclusion

The tension between lessees and surface owners is not new. The mineral estate is the dominant estate to encourage production of oil and gas. The last decade has shown that the states that can ride the boom of oil and gas production have healthy economies because of all the jobs and money producing oil and gas brings to an economy.[164] Further, more energy is needed as the country grows. But as our country grows and requires more energy, more oil and gas companies and surface owners are crossing paths. The solution is balance—because of the recent booms in subsurface energy, more surface owners do not own their minerals now, which adds to the tension. Requiring that operators make a good-faith effort to enter surface-use agreements with surface owners should benefit both parties. The operator can set expectations with the surface owner while making a few concessions to avoid the cost of future litigation, and surface owners can feel more involved with the process while earning money for their troubles. Operators and surface owners working together is the *key* to overcoming the tension between the two parties as our country's dependency on natural resources increases.

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162. *See* discussion *supra* Section III.B.

163. *See supra* notes 70–73 and accompanying text.

164. *See Jobs, Growth & Security*, Energy Tomorrow, http://www.energytomorrow.org/jobs-growth-and-security [https://perma.cc/J4WC-PRDZ].