



Contracts as Fences

Representing the Agricultural Producer in an Oil and Gas Environment

BY HARPER ESTES AND DOUGLAS PRIETO

Agriculture and energy are prominent sectors in the Texas economy. However, these industries are often in conflict because both require surface access for production. As a result, the lawyer representing an agricultural producer should have a fundamental understanding of the law that controls when the two industries collide. There are no fences that physically separate the two estates. Nevertheless, carefully crafted agreements can benefit parties on both sides of the issue.

Lawyers representing agricultural producers can be confronted with a multitude of scenarios with differing remedies available in each. The most difficult of these scenarios is the agricultural producer who owns no mineral or executive rights, but conducts farming activities subject to active mineral development or production. Typical disputes in this scenario can relate to surface access and what constitutes reasonable use of the surface by the oil and gas operator.

An agricultural producer who is fortunate enough to own minerals under its agricultural operation is often faced with a different set of issues, including lease negotiation, pooling, and, for some, what duties are owed to others for whom they have the power to lease (i.e., the duty an executive rights owner owes to the non-executive).





Operating the Surface with No Minerals

The general rule has been long and often stated that the owner of the mineral lease has the right to use so much of the surface as is reasonably necessary to comply with the terms of the lease and effectuate its purposes.¹ Texas law recognizes the oil and gas estate as dominant and also generally recognizes that the mineral lessee may select any portion of the surface estate covered by the lease for placement of its well.²

The rights of the mineral lessee to use the surface estate are not absolute and must be exercised with due regard to the rights of the surface owners.³ Such limitations on the rights of the mineral lessee to use the surface operates as limits only on the manner in which mineral operations are done and do not limit the rights of the mineral lessee to extract minerals in accordance with the lease.⁴ The rights of the mineral lessee are, of course, subject to limitation in the instrument granting the lease and extend only to the leased property.⁵

Thus, under the general rule, liability on the part of a mineral lessee to a surface owner must be predicated on a display of use of more of the surface than is reasonably necessary or negligence.⁶

In 1971, the Texas Supreme Court issued its opinion in *Getty Oil Co. v. Jones*.⁷ The Court, for the first time, recognized that there may be situations where there is an existing use by

the surface owner, which could otherwise be precluded or impaired, and where, under the established practice in the industry, there are alternatives available where the minerals can be recovered. The Court held, where these circumstances exist, the usual rules of reasonable usage may require the mineral lessee to adopt such alternatives.

The *Getty* case was hailed by many as an expansion of surface rights, or at least a diminution of the expansive rights of the mineral lessee with regard to the surface.⁸ The doctrine announced, however, has not made a large difference in the ordinary surface use case and the decision of *Getty* has often been limited or distinguished.⁹ Further, for the doctrine to be invoked, the surface owner faces a substantial burden of proof.

For the *Getty* decision and its announced doctrine, commonly called the accommodation doctrine, to have application, the landowner must be able to prove the following three elements:

1. The mineral lessee has non-interfering and reasonable ways and means of producing the minerals available to him;
2. The use of such ways and means will obviate the abandonment by the surface owners of their existing use of the surface; and,
3. The alternatives available to the surface owners would be impractical and unreasonable under all the conditions.¹⁰



You already have a complete digital dictation system in your pocket.

SpeakWrite is now available on iPhone and Blackberry

- Turn your phone into a digital office with our US based transcriptionists
- You can record dictation of any length from anywhere with full editing capabilities
- You can record telephone calls, meetings or interviews for transcription
- Or take photos and integrate those into your dictation
- And with our 24/7 transcription staff, your completed work is delivered to your email and your mobile device in about 3 hours
- The App is free; you simply pay for the work transcribed and nothing else

(800) 828-3889

www.speakwrite.com/TXBJ

SPEAKWRITE
Voice-To-Document Service



Further, and perhaps more important on a practical level, the court made it clear that the *initial* inquiry is whether the surface owner has a reasonable means of developing the surface and, if so, the surface owner must yield to the use of the surface adopted by the mineral lessee.¹¹

The accommodation doctrine is alive and well,¹² however, it does not have application in every case and the surface owner must accommodate first if such accommodation is practical or reasonable.

Some may argue that surface owners have gained some traction recently in *Valence Operating Co. v. Texas Genco, L.P.*¹³ In that case, the Court reaffirmed that the mineral estate is the dominant estate, and if there is but one way to produce the minerals, the mineral owner has the right to pursue his use.¹⁴ But the Court emphasized that if there is another way to produce the minerals, one that permits the surface owner to continue his use (especially when there is only one reasonable manner in which the surface may be used), and one that precludes the surface use, the mineral owner *must* use the alternative that permits continued surface use.¹⁵ In order to invoke this doctrine, the surface use must be in existence at the time of the proposed operation. This case does not overturn the ruling set forth in *Getty*, but further defines the relationship between surface and mineral owner.

Each case will be decided on a fact-specific basis and, as the Supreme Court made clear in *Haupt*, whether or not the accommodation doctrine applies will depend on the state of the evidence and findings by the trier of fact.¹⁶ New technology and development in areas with pre-existing surface uses will inevitably lead to arguments that the doctrine should apply in certain cases.

Lease Negotiation If the Client Has Minerals

Despite the dominance of the mineral estate, a lawyer representing an agricultural producer who owns all or a portion of the mineral estate underlying the property it cultivates can protect its surface interest while providing for development of its mineral rights through lease negotiations.

The level of protection a lawyer can provide is often limited by certain factors, including the size of the mineral interest owned by the client, the geographic location of the property, the geologic location of the property, the specific company seeking to lease the property, and, of course, prevailing economic conditions.

The most important provisions that should be included in an oil and gas lease executed by an agricultural producer are the surface protections and environmental considerations; however, other areas merit discussion as well. The following provisions represent some of the more important issues upon which an attorney representing an agricultural producer should focus.

Lease Coverage

An oil and gas lease should be specifically limited to oil and gas. The current rules defining “minerals” in Texas were origi-

nally set forth in *Moser v. U.S. Steel Corp.*,¹⁷ and are somewhat confusing to apply. In addition, the question of what is a “mineral” under the ordinary and natural meaning test set forth in *Moser* is somewhat open to argument and debates in court among the experts.¹⁸ Therefore, in order to avoid any misapplication that could result in detriment to your client, language expressly excluding gravel, uranium, fissionable materials, coal, lignite, or any hard minerals or substances of any type that may be produced separately and apart from, or independently of, oil, gas, or other liquid and gaseous hydrocarbons should be included in the lease or addendum thereto. This precautionary measure will help to avoid any misapplication of the *Moser* rule.

Bonus and Royalty Rate

Diligent inquiry as to prevailing market rates regarding bonus and royalty is essential. These rates can differ greatly depending on geographic and geologic location and prevailing economic conditions. In addition, the ability to negotiate these terms can be affected by a myriad of issues specific to a certain trend. Therefore, strong knowledge of prevailing market rates may be able to create significant leverage in negotiations with an oil and gas company.

Term

The landowner generally wishes to limit term as much as is reasonably possible. Three-year terms are very common. Absent some specific interest benefitting the client, any term beyond three years is often inadvisable due to rapidly changing market conditions in the oil and gas industry. In addition, the inclusion of an option to extend an oil and gas lease for a specified period of time beyond its primary term for additional consideration is becoming much more common. Consideration for an option to extend an oil and gas lease is a negotiated item; however, it should be equal to or greater than the initial bonus consideration paid for the lease in order to account for market risk. The most common term of an option to extend is two years. Any term extending an oil and gas lease beyond two years is likely inadvisable, absent a special circumstance.

Shut-in Royalty

Additional language should be considered in a lease addendum to limit the length of time a lease can be kept alive pursuant to the shut-in royalty clause present in virtually every printed lease form currently in use. An example of the language to be included:

This lease cannot be continued in force solely by the shut-in royalty payments provided for in the shut-in royalty provision of the printed form of this lease for a period of more than two (2) years beyond the expiration date of the primary term hereof, or from time to time not to exceed two (2) years in aggregate, and this provision shall constitute an express limitation on the provisions for the payment of shut-in royalty under the printed form. Lessee shall pay Lessor as shut-in royalty the sum of (\$X.XX) per acre then covered by this lease.



This language is common. However, appropriate modifications should be made where specific circumstances require.

Post-production Deductions

The ability to limit or eliminate the post-production deductions chargeable against a lessor's share of production is another negotiable item that should not be overlooked. This results in more royalty revenue for the client.

Pooling Clause

A pooling clause allows the oil and gas producer to combine lands from two or more leases into a unit for the production of oil and gas. Typically, a pooling clause allows for 80 acres to be combined for the production of oil and 640 acres for the production of gas, absent some special field rules imposed by the Texas Railroad Commission (RRC). The purpose of pooling is to encourage the orderly development of oil and gas and to encourage the conservation of natural resources. Pooling can be a double-edged sword. On one hand, a lessor may be able to benefit from production from lands he or she does not own through a pooled unit. On the other hand, that lessor's interest in producing wells located on the leased premises is diluted by other interests in the pool. In order to reduce dilution, it is common to see provisions that require the lessee to pool all of the lands subject to a lease — or pooling is not allowed. This provision, of course, is only effective for smaller tracts. In addition, provisions requiring that the "leased premises must comprise at least 50 percent of the gross acreage in the unit" are also common. For larger tracts, it is common to see pooling authority withheld until all the lands subject to a lease are included in proration units, and only at that time may the additional acreage not included in a proration unit be pooled with tracts under other leases. In the horizontal context, pooling should be tied to the lateral length of the wellbore. If horizontal drilling is anticipated, it is typical to see provisions that require pooling based upon the minimum acreage provided for under RRC rules plus Rule 86 allowances (for the lateral portion of the wellbore).

The pooling clause contained in a lease should be carefully drafted, particularly in light of the recently decided Texas Supreme Court case, *Wagner & Brown, Ltd. v. Sheppard*.¹⁹ In that case, the Court ruled that the pooling clause contained in the lease executed by Sheppard, as lessor, granted the lessee the right to pool the reversionary interest of Jane Turner Sheppard, so that her mineral interest remained committed to the pooled unit after the lease terminated due to improper royalty payment. Sheppard owned an undivided one-eighth interest in land and mineral rights on a 62-acre tract of land in Upshur County. In 1994, she signed an oil and gas lease with C.W. Resources, Inc., which contained a pooling clause that provided, in relevant part, as follows:

Lessee shall have the right but not the obligation to pool all or any part of the *leased premises or interest therein* with any other lands or interests. ...²⁰

It is important to note Paragraph 1 of the Sheppard Lease provides that "Lessor hereby grants, leases and lets exclusively to Lessee the following described land, hereinafter called leased premises." "Land" is therefore interchangeable with the term "leased premises" as used in the lease. Therefore, the pooling provision above effectively authorizes the lessee to pool "all or any part of the land or interests therein with any other lands or interest."

In the opinion, the Court addressed the issues on the narrow ground of contract interpretation, rather than broad principles, noting that the pooling clause did not address what happens to the unit when a single lease terminates, and that the pooling provision pooled both the lands and interests therein.²¹ The Court first examined the language contained in the pooling provision of the oil and gas lease and found that the language failed to specify what happens to the unit when one lease terminates. As a result, the Court interpreted the language found in the pooling provision, rather than applying a plain meaning test.²² Further, the Court examined the express authority granted to the lessee in the pooling clause and construed the language to enable the lessee to pool all of the lessor's interest in the lands, including the reversionary interest.²³

As a result of the Court's focus on the specific language of the pooling provision, it is particularly important to ensure that the pooling clause limits the interests pooled to those interests contained in the fee simple determinable conveyance. The attorney representing a lessor should consider specific language expressly excluding the lessor's reversionary interest from being pooled. Further, language should be included to expressly remove the lessor's interest from the pooled unit upon termination of the lease if one wishes to avoid application of the *Sheppard* ruling. The case has drawn a good deal of attention and numerous parties filed amicus briefs. However, the outcome of the case does heighten the importance of the language chosen in the pooling clause of a lease.

Retained Acreage and Continuous Development

A "Freestone Rider," "Pugh" clause, or "Retained Acreage" provision can be negotiated and included in a lease if possible. This provision limits the amount of acreage, and the depths below producing wells that can be retained following the expiration of the primary term of an oil and gas lease. Continuous Development provisions extend the primary term of an oil and gas lease so long as there is no cessation of more than (XX) days between the completion of one well and the commencement of another. A Continuous Development provision is very advantageous to a lessor because it helps to ensure that the lessee is fully developing the mineral estate of the lessor, which means more revenue for the client.

Surface Operations, Surface Damages, And Environmental Considerations

As noted, this is the most important area of focus for an attorney representing an agricultural producer. Although Texas



cases have granted damages for negligence²⁴ and excessive use of the land,²⁵ they have not required the lessee to pay for injury or damage to the surface that results from the lessee's necessary operations.²⁶ Additionally, the courts have not required lessees to restore the surface of land to its original condition.²⁷ The accommodation doctrine requires a lessee to accommodate existing surface uses wherever reasonably possible;²⁸ however, it does not prevent a lessee from fully developing the mineral estate in a manner that interferes with surface uses.²⁹

Many printed lease forms do not provide for surface protections and those that do fail to adequately protect a lessor's surface interest, especially when the majority of that lessor's income is derived from surface operations. Those provisions are typically limited to prohibitions of surface water use and limitations regarding depth of pipelines or prescribing minimum distances in which a well can be placed in relation to existing structures or residences. Protections related to "growing crops" are often seen in printed lease forms, but do not include unimproved rangeland.³⁰

Therefore, additional addendum provisions regarding surface operations, damages, and environmental considerations should be considered in every lease. Among other provisions, surface operations provisions to consider in negotiation would require the lessee to:

1. Agree to conduct its operations upon the leased premises as a reasonable and prudent operator, or provide for a higher standard of care, if possible;
2. Fill and level all pits and/or excavations made by the lessee in connection with operations conducted on the leased premises after termination of use thereof, and to construct and maintain fences surrounding such pits and/or excavations to turn livestock until such time as said pits and/or excavations are leveled;
3. Pay for all actual damage done or caused by the lessee to the leased premises, and any buildings, fences, road, culverts, merchantable timber, growing crops, or any other improvements on said land, or to livestock on said land;
4. Agree that if any salt water or other deleterious substances shall come from or in any manner be extracted or produced from any well as the result of any drilling operations, the lessee will confine those substances in lined and water-tight pits or excavations adjacent to the drilling site;
5. Construct and maintain gates and/or cattle guards whenever the lessee enters said premises, so constructed as to turn livestock from the drilling site;
6. To first consult with the lessor regarding the operations that the lessee proposes to conduct;
7. Enter into a separate development plan with the lessor (or consult and agree with the lessor) as to the point of ingress and egress that shall be used by the lessee and the location of drill sites, roads, tanks, utility or telephone lines, and other items the lessee proposes to construct, prior to any work being commenced upon the leased premises;

8. Use existing roads in its operations on the leased premises to the extent possible and bury all pipelines below plow depth (if not specifically stated in the printed lease form);
9. Keep the premises free of all rubbish, cans, bottles, paper cups, or garbage attributable to lessee's operations. Upon completion of those operations, take such steps as reasonably necessary to reduce the size of the drilling pad and restore the surface of the land to as near its original condition and contours as practicable. If the lessee should fail to keep the premises free of all rubbish, cans, bottles, paper cups, or garbage attributable to the lessee's operations, then the lessor shall have the right to have such items collected and removed from the premises and charge the lessee the reasonable costs for such collection and removal; and
10. Abstain from hunting, fishing, or using firearms upon the leased premises.

Surface damage provisions should be clear and attempt to specify actual damages wherever possible so as to avoid issues of interpretation and measurement of damages.³¹ An attorney should consider provisions that require lessee to pay lessor specific surface damages for all roads, locations, pipelines, and electric lines at a rate equal to at least the fair market value of the land used, and additionally stipulate that the parties to the lease agree that the fair market value of the land shall be not less than a certain amount per acre. Moreover, those provisions should require that in the event of damage to livestock, water wells, fences, roads, personal property, buildings, or other improvements resulting from lessee's operations under the lease, lessee would be required to pay the actual amount of said damage or loss.

Environmental protections are increasingly important and should be drafted into an oil and gas lease whenever possible. An example of provisions that may be beneficial to a lessor include requiring the lessee to:

1. Be responsible for complying with all local, state, and federal laws and regulations regarding the storage, use, and disposal of any hazardous or toxic materials on the leased premises;
2. Promptly report the occurrence of any toxic or hazardous material owned or used by the lessee or the lessee's employees, representatives, agents, invitees, guests, or contractors that spills, leaks, or overflows on or from the leased premises, or while being transported to or from the leased premises, to the authorities or governmental agency specified by regulation or law and to promptly report the incident to the lessor;
3. Be solely responsible for all costs involved in the cleanup, removal, and disposition of the contaminated material from the leased premises or any other property that the spill, leak, or overflow contaminates that have been introduced as a result of the lessee's operations, in accor-



- dance with the procedures prescribed by the applicable laws or regulations;
4. Notify the lessor of any order, request, notification, or other written or oral communication from any agency relating to the potential violation of any environmental regulation or law relating to the leased premises;
 5. Agree not to use or store hazardous material on the leased premises in quantities exceeding that normally stored or used for operating and maintaining the wells and facilities on the lease and include restrictions upon the length of storage of those materials upon the leased premises;
 6. Agree that prior to the plugging and abandonment of any well on any portion or portions of the leased premises at any time to notify the lessor of such abandonment and within 60 days of such abandonment to furnish lessor copies of Texas Railroad Commission Form P-3, Plugging Report; and
 7. Indemnify the lessor for any costs, damages, lawsuits, or other expenses incurred by lessee upon or arising out of its operations on the leased premises.

Assignment Restrictions

The last and final recommendation is to consider a restriction on the assignability of a lease in order to ensure that the lessee has complete control over who is conducting operations on its property. A typical provision requires that the lessee obtain the prior written consent of lessor prior to assignment, and in the event that consent is not obtained, the assignment is void *ab initio*. This provision allows a lessee to research an operator's background and record regarding surface incidents before consenting to an assignment of the oil and gas lease covering the lessee's property to a particular operator.

As noted, the issues addressed above only scratch the surface of possibilities to consider. The attorney should carefully consult with the client and fully understand their operations so that the attorney can ensure the client receives adequate protections when they execute an oil and gas lease.

Leasing For Others — Executive Rights

Texas law has been somewhat confusing as to what duty is applicable when an individual or entity holds the rights to execute an oil and gas lease on behalf of another non-executive mineral owner or non-participating royalty owner, when that duty arises, and when liability is to be incurred for a breach of that duty. Although the standard is typically characterized in terms of a single standard applicable to the exercise of the executive right, in practice the standard varies with the nature and purpose of each transaction. As a result, it is difficult to define a clear duty to which we may hold the executive right holder accountable. Despite this fact, the non-executive is certainly entitled, at a minimum, to an expectation that the executive will act in good faith in the exercise of the power. The resulting duty imposed by the courts is premised upon this expectation of good faith.

The bundle of rights comprising a mineral estate consists of five particular attributes: (1) the right to explore and develop (the right of ingress and egress); (2) the right to lease (the executive right); (3) the right to receive bonus payments; (4) the right to receive delay rentals; and (5) the right to receive royalty payments.³² When an undivided mineral interest is conveyed, reserved, or excepted, it is presumed that all attributes remain with the mineral interest unless a contrary intent is expressed.³³ Absent an express reservation of a particular right in the conveyance, the law presumes that each of the rights transfers to the mineral grantee.³⁴

It has long been recognized that the rights can become unbundled and conveyed, or reserved, separately.³⁵ Prior to *Day & Co. v. Texland Petroleum, Inc.*, the executive right was treated differently from the other attributes. In *Pan American Petroleum Corporation v. Cain*,³⁶ the Court held that a severed executive right was not an interest in land, but a right based in contract and subject to principles of contract and agency law, comparing it to a power of appointment that terminated upon the death of the principal. The Day Court overruled *Pan American Petroleum Corporation v. Cain*, and held that "... the executive right is an interest in property, an incident and part of the mineral estate like the other attributes such as bonus, royalty and delay rentals."³⁷



**Your clients will think
she works in your office.**

Ruby is the live remote receptionist who's never late, sick, at lunch, or on vacation. See how Ruby can help your business and your bottom line with a FREE trial.

GIVE US A CALL!

866-611-RUBY

(or visit callruby.com)

Ask about our FREE 14-day trial!

RUBY
receptionists



The duty an executive owes to the non-executive has been pronounced many different ways in many different courts in Texas. In fact, many legal publications have been dedicated to this single subject. The most notable case is *Manges v. Guerra*.³⁸ Until the decision in *Manges*, an executive was required to act on behalf of the non-executive with utmost good faith, which was considered to be more than ordinary good faith and a step below a true fiduciary duty. In *Manges*, the trial court submitted the following instruction defining the executive's duties to the non-executive:

[T]he possessor of an "Executive Right" as herein defined owes to the co-mineral owners the same degree of diligence and discretion in exercising the rights and powers granted under such Executive Rights as would be expected of the average land owner who because of self-interest is normally willing to take affirmative steps to seek or cooperate with prospective lessees ... that in the exercise of the executive rights, the holder thereof is required to use the utmost good faith and fair dealing as to the interest of the non-executive mineral interest owners. You are further instructed that the holder of the executive rights has a duty to prevent drainage of oil or gas from any lands covered by the executive rights. In any lease executed by the holder of the executive rights, the holder thereof is required to obtain all benefits that could be reasonably obtained from a disinterested third party.³⁹

Despite the dominance of the mineral estate, a lawyer representing an agricultural producer who owns all or a portion of the mineral estate underlying the property it cultivates can protect its surface interest while providing for development of its mineral rights through lease negotiations.

Although neither party objected to the instruction, the Court addressed the duty of an executive, as follows:

The duty of utmost good faith owed by an executive has been settled since *Schlittler v. Smith*, 128 Tex. 628, 101 S.W. 2d 543, 545 (1937) [citations omitted] The fiduciary duty arises from the relationship of the parties and not from the contract. ... That duty requires the holder of the executive right, *Manges* in this case, to acquire for the non-executive every benefit that he exacts for himself.⁴⁰

The imposition of the fiduciary duty standard was not required under the facts in *Manges*, as egregious as those facts were, and by equating the standard of utmost fair dealing with fiduciary duty, the Supreme Court created confusion that has plagued lower courts.

Subsequent cases have struggled in both their interpretation and application of *Manges*. Perhaps the best explanation of the duty owed by the holder of the executive rights is the following excerpt from *Pickens v. Hope*:⁴¹

The executive, in leasing the land, must act with reasonable regard for the interests of the nonparticipating royalty owner

as a reasonably prudent landowner who owned all of the mineral estate would have acted under the same or similar circumstances. Matters of cash bonus, primary term, delay rentals and special provisions are matters of trading, and as long as the executive acts in good faith and with reasonable regard for the interests of the non-participating royalty owner, his judgment in leasing or refusing to lease is not subject to question, and his refusal to lease, absent arbitrariness, connivance or deliberate action calculated to deprive the non-executive of his royalty interest, will not constitute a breach of duty owed the owner of the non-participating royalty.

One issue that was left unresolved, and which is of current interest, is whether there is a duty to lease. What happens when the owner of the executive rights also owns the surface, and it is more beneficial to preserve the surface than to lease? Or when the owner of the executive rights would prefer to gamble on the results of an offset well or preserve the potential revenue to be earned from production for another generation? Can the non-executive require the executive to lease?

The Supreme Court re-visited *Manges* in *In re Bass*,⁴² but rather than shed light on how these issues should be resolved, the Court added more confusion. The McGills owned a non-participating royalty interest in Bass's mineral estate and based upon that relationship, the Court properly concluded that Bass owed the McGills a duty to acquire every benefit

for them that Bass would acquire for himself.⁴³ However, in this case, Bass had not executed a lease covering the McGills non-participating interest. The Court reasoned that since Bass had not leased and, therefore, had not acquired any benefits for himself, there was no evidence of self-dealing; and in the absence of self-dealing, no duty had been breached.⁴⁴ Although the Court was presented with the opportunity, it did not address whether the non-executive could require the executive to lease.

This elusive question was recently answered in *Veterans Land Board v. Lesley*.⁴⁵ In this case, the owners of non-executive mineral interests in a subdivision brought an action against the property developer, the property owner's association, individual lot owners in that subdivision, and the Veterans Land Board of the State of Texas, alleging that as owners of executive rights, they owed a duty of utmost good faith to them, that such duty was fiduciary in nature and included the duty to lease all of the minerals for exploration and development of oil and gas, and that they either breached the duty to lease the minerals rights or aided and abetted a breach of that duty through creating and recording restrictive covenants prohibiting mineral development within the subdivision.⁴⁶



The Court of Appeals overturned the decision of the trial court, and held, among other things, that the owners of executive rights to a mineral estate do not have a duty to lease the minerals, and that in creating and recording declarations of covenants and plats for the subdivision, the developer and individual lot owners did not breach any fiduciary duties owed to the non-executives.⁴⁷ The Court, following the rationale of *In Re Bass*, stated that the executive rights holders “did not exercise the executive rights by creating and recording declarations of covenants and plats for the subdivision.”⁴⁸

Rather, the declarations, which included the restriction against mineral development, showed that the executive would not be exercising those rights.⁴⁹ The Court said that the appellees (the non-executives) knew that a residential developer would not want drilling or other similar activities to take place on the surface of the subdivision.⁵⁰ With that knowledge, the appellees sold the property to the developer and willingly conveyed their executive rights, creating a non-executive mineral interest.⁵¹ The developer created the declarations, covenants, conditions, and restrictions for the purpose of maintaining the integrity of the subdivision.⁵² Based on the nature of those arm’s length transactions and the absence of self-dealing in them, the Court stated that “even if the declarations or the agreement to comply with them could be construed as an exercise of the executive rights, the owners of the executive rights did not breach a fiduciary duty to the non-executives.”⁵³

Rehearing of this case was overruled on March 15, 2008. Accordingly, under Texas law the executive has no duty to lease.

Conclusion

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. However, the lawyer who has an opportunity to contractually protect the agricultural producer through lease negotiations or surface use agreements can make a real difference in leveling the field.

Notes

1. *Warren Petroleum Co. v. Martin*, 153 Tex. 465, 271 S.W.2d 410 (1954); *Warren Petroleum Corp. v. Monzingo*, 304 S.W.2d 362 (Tex. 1957).
2. *Ottis v. Haas*, 569 S.W.2d 508 (Tex. Civ. App. — Corpus Christi 1978, writ ref’d n.r.e.).
3. *Winslow v. Duvall County Ranch Co.*, 519 S.W.2d 217 (Tex. Civ. App. — Beaumont 1975, writ ref’d n.r.e.).
4. *Vest v. Exxon Corp.*, 752 F.2d 959 (5th Cir. 1985).
5. *Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865 (Tex. 1973).
6. Douglas Hale Gross, Annotation, *What Constitutes Reasonably Necessary Use of Surface of the Leasehold by a Mineral Owner, Lessee, or Driller under an Oil and Gas Lease or Drilling Contract*, 53 A.L.R. 3d 16,34 (1973).
7. *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971).
8. 29 Baylor L. Rev. 907, 925 (“... what could develop into a large exception to the dominant estate theory — the doctrine of alternative means.”); 50 Tex. L. Rev. 806 (“... the Texas Supreme Court sharply cut back the right of mineral lessees to appropriate surface estates for their mineral operations.”)
9. *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972).
10. *Getty Oil Co. v. Jones*, at 623.
11. *Getty Oil Co. v. Jones*, at 628.
12. *Tarrant County Water Control v. Haupt*, 854 S.W.2d 909 (Tex. 1993); on remand 870 S.W.2d 350.
13. 255 S.W.3d 210 (Tex. App. — Waco, 2008, no pet).
14. *Id.* at 216.
15. *Id.* (Emphasis by the court).
16. 854 S.W.2d 909 at 911.
17. 676 S.W.2d 99 (Tex. 1984).
18. See John S. Lowe, *What Substances Are Minerals?*, 30 Rocky Mtn. Min. L. Inst. 2–1 (1984).
19. No. 06-0845, 2008 WL 4958501 (Tex. Nov. 21, 2008) (Motion for Rehearing pending).
20. *Id.* at *2 (emphasis added).
21. *Wagner & Brown, Ltd.*, 2008 WL 4958501 at *2.
22. *Id.* at *5.
23. *Id.* at *7.
24. *Brown v. Lundell*, 344 S.W.2d 863, 162 (Tex. 1961)
25. *Texaco, Inc. v. Faris*, 413 S.W.2d 147, 149 (Tex. Civ. App. — El Paso 1967, writ ref’d n.r.e.).
26. *Warren Petroleum Corp. v. Martin*, 271 S.W.2d 410 (Tex. 1954).
27. *Warren Petroleum Corp. v. Monzingo*, 304 S.W.2d 362 (Tex. 1957).
28. *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971).
29. *Vest v. Exxon Corp.*, 752 F.2d 959 (5th Cir. 1985).
30. *Melder v. Phillips Pipe Line Co.*, 539 S.W.2d 208 (Tex. Civ. App. — Austin 1976, writ ref’d n.r.e.).
31. See *P.G. Lake, Inc. v. Sheffield*, 438 S.W.2d 952 (Tex. Civ. App. — Tyler 1969, writ ref’d n.r.e.).
32. *French v. Chevron U.S.A., Inc.*, 896 S.W.2d 795, 797 (Tex. 1995).
33. *Id.* at 797.
34. *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667, 669–70 (Tex. 1990).
35. See *Schlittler v. Smith*, 101 S.W.2d 543 (Tex. Comm’n App. 1937); *French*, 896 S.W.2d at 797.
36. 355 S.W. 2d 506 (Tex. 1962).
37. *Day*, 786 S.W.2d at 659.
38. 673 S.W.2d 180 (Tex. 1984).
39. *Id.*
40. *Id.* at 183.
41. 764 S.W.2d 256, 268–69 (Tex. App. — San Antonio 1988, writ denied).
42. 113 S.W.3d 735 (Tex. 2003).
43. *Id.* at 744–45.
44. *Id.*
45. 281 S.W. 3d 602 (Tex. App. — Eastland, Jan. 22, 2009).
46. *Id.* at 610.
47. *Id.* at 619.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 620.
52. *Id.*
53. *Id.*

HARPER ESTES

is a shareholder in Lynch, Chappell & Alsop, P.C. in Midland, where he focuses on trial and appellate law. He is a past president of the State Bar of Texas.

DOUGLAS PRIETO

is an associate with Lynch, Chappell & Alsop, P.C. in Midland, where he practices in the areas of business law and oil and gas law.