SURFACE CONFLICTS:
THE ACCOMMODATION DOCTRINE AND EXCESSIVE USE

WESLEY LLOYD, *Waco/Fort Worth*
Freeman Mills PC

Co-author:
JAMIE COLE, *Lubbock*
Texas Tech School of Law

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Wesley D. Lloyd
Freeman Mills PC
115 W. 7th Street, Suite 1225
Fort Worth, TX 76102
wlloyd@freemanmillspc.com
w: 682-316-2299
m: 254-366-4926

Wes Lloyd handles litigation and appeals in disputes involving upstream oil and gas operations and midstream pipelines. He has successfully represented clients as lead counsel in numerous trials and administrative hearings, and has argued appeals at the Texas Supreme Court, the Fifth Circuit Court of Appeals and intermediate state appellate courts. Mr. Lloyd is Board Certified in Oil, Gas & Mineral Law by the Texas Board of Legal Specialization.

Mr. Lloyd also represents clients in government relations, including outreach to elected officials and agency personnel at all levels of government. For eight years he served as Governor Perry's appointee on two important statewide boards that are responsible for leasing state land for oil and gas development, and he currently serves as one of Governor Abbott's appointees to the Board of the Brazos River Authority.

Mr. Lloyd is also a certified mediator and enjoys mediating disputes within his areas of expertise.

REPRESENTATIVE EXPERIENCE

Won defense verdict and attorneys fees award for oil well operator in week-long jury trial in Harris County concerning allegations of unpaid royalties under the Texas Natural Resources Code.

Won unanimous defense verdict on liability for defendant and no damages in week-long jury trial in Scurry County.

Won favorable ruling from TCEQ after trial at SOAH over wholesale water rates charged by Texas municipality.

Acquired $1.25 Million judgment in case in Bexar County concerning breach of fiduciary duty in oilfield investment dispute.

Won summary judgment for midstream pipeline company in Navarro County lawsuit over easement rights.

Won summary judgment for engineering firm involved in building collapse in Bosque County.

Successfully represented midstream pipeline company in multiple lawsuits involving the scope of easement rights in Hays County and McLennan County.

Successfully pursued and defended multiple claims related to surface use disputes between oil companies and surface owners throughout the state.

PRACTICE AREAS

Appellate
Environmental Law
Mediation
Water Law
Oil and Gas Law

EDUCATION

Texas Tech University School of Law, Lubbock, Texas J.D. – 2005
Texas A&M University, College Station, Texas B.S. – 2001

BAR ADMISSIONS

Texas, 2005
U.S. District Court Western District of Texas, 2005
U.S. District Court Eastern District of Texas, 2005
U.S. District Court Southern District of Texas, 2006
U.S. District Court Northern District of Texas, 2006
U.S. Court of Appeals 5th Circuit

Jamie Cole
Texas Tech School of Law
jamicole@ttu.edu
jamie.texascoles@gmail.com

Jamie Cole grew up in Dallas, Texas, and is a 3L at Texas Tech School of Law. She graduated Magna Cum Laude from Oral Roberts University in 2020 and received a B.A. in International Relations. As a 2023 candidate for her JD, Jamie looks forward to pursuing a career in energy law.

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Oil & gas law has not changed near as much, or as rapidly, as oilfield technology has in the 120+ years since the first economic oilfield was discovered near Corsicana. But the law does change, and often rapidly. One area of oil and gas law that has seen nuanced development in the last half-century relates to surface conflicts between mineral owners and surface owners.

In Texas, unlike some other states, severed minerals remain the property of the owner of the severed interest in perpetuity and will never, absent acquisition in a private transaction, revert to or merge with the surface owner's title. Therefore, a purchaser of the surface of real property might not acquire any of the minerals, as is commonly the case in some parts of the state, or might only acquire a portion of the minerals. And when use of the surface is necessitated by efforts to develop and produce oil or gas, there will often be a collision of the two competing interests.

In Texas, the mineral estate is deemed to be the "dominant estate" over the surface estate. The logic behind that policy is sound: without access to the surface to develop the minerals, ownership of the mineral estate would be worthless. As the law has developed, the importance of enabling the two estates to both maximize their utility has been acknowledged and incorporated into precedents.

The seminal case that really established the parameters of the accommodation doctrine is *Getty Oil Co. v. Jones*. That case will be discussed below, followed by other cases that dealt with other surface use disputes.

1. FARMING IRRIGATED LAND

In *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971), the Supreme Court issued the seminal opinion that, combined with the subsequent opinion on rehearing, has provided the framework for the accommodation doctrine ever since. In that case, Getty Oil's new pumping units prevented Jones from using his existing pivot irrigation system.

Jones bought the 635-acre tract of property near the Texas-New Mexico border in 1955, subject to existing oil and gas leases, and did not acquire any of the mineral rights. He began farming it and drilled numerous water wells. Prior to 1963, he used hand-moved, and later power roll, irrigation equipment to irrigate the tract. In 1963 he installed a self-propelled pivot sprinkler irrigation system that covered all but the corners of the tract. The pipe that runs the length of the pivot system is seven feet off the ground.

The tract was leased for oil and gas development to three different oil companies. Getty had a lease on the Western 120 acres, while Amerada and Adobe had leases on the remaining 520 acres. When Jones installed the pivot, Getty had a producing well in the northwest corner of the tract (outside the circumference of the pivot) that utilized a pumping unit. That pump jack was well over 7 foot tall. In 1967, Getty drilled two new wells within the circumference of the pivot that would produce but not flow. So, pumping units were necessary. Gett insisted that it was legally entitled to use pump jacks that were taller than the pivot system, and that it had no obligation to excavate the pad and sink the base of the pump jack regardless of the impact on Jones.

Meanwhile, Adobe also drilled two wells within the circumference of the pivot that required pumping units. Adobe placed those pump jacks in concrete excavations that lowered the total height below that which the pivot could pass over. Amerada also drilled two wells that required pumping units, but it used shorter pumps that did not interfere with the pivot.

Jones sued Getty, and the parties proceeded to trial. Experts testified that the pumping units Getty used were more economic than its alternatives. Jones' evidence established that irrigation systems were necessary in that area due to a shortage of labor, and that was the driving factor behind his decision to install the pivot. His witnesses were cross-examined on the true necessity of the system and potential alternatives, but the witnesses all explained why the alternatives would not suffice. Jones also offered opinion testimony from a petroleum engineer about the cost of concrete cellars and the absence of safety issues.

The jury found that Getty's use of surface was not reasonably necessary, but the trial court granted judgment notwithstanding the verdict in favor of Getty.

On appeal, the Supreme Court summarized Jones' position as follows:

> His position is that under the facts and circumstances it was not reasonably necessary for Getty to install pumping units in the manner which denies him the use of his irrigation equipment.

The court summarized Getty Oil's position as:

> Getty's principal contention is that it has a right to exclusive use of the superadjacent airspace above the limited surface area occupied by the pumps and that only the lateral surface of the land should be subject to the established rule of reasonably necessary surface usage.

The Supreme Court analyzed the case by noting that the oil and gas estate is the dominant estate in the sense that use of as much of the premises as is reasonably necessary to produce and remove the minerals is held to be impliedly authorized by the lease. The court said that the rights of the mineral estate are to be exercised with “due regard” for the rights of the servient surface estate. But if there is only one means to produce the minerals, then the surface owner’s use must yield.

The court also specifically disagreed with Getty’s position on “superadjacent airspace,” and stated “[i]t has long been recognized that ownership of real property includes not only the surface but also that which lies beneath and above the surface. The use of land extends to the use of the adjacent air.” After discussing the evidence admitted at trial and admonishing the trial court for instructions that commented on the weight of the evidence, the Supreme Court stated:

> The record thus indicates that the irrigation system currently in use affords Jones the most advantageous, and perhaps the only reasonable means of developing the surface for agricultural purposes. It is also indicated that there is available to Getty the two types of pumping installations -- the beam-type pumps in cellars or the hydraulic pumps on the surface -- which are reasonable alternatives to its present use of the surface; and that Getty's use of an alternative method of producing its wells would serve the public policy of developing our mineral resources while, at the same time, permitting the utilization of the surface for productive agricultural uses. Under such circumstances the right of the surface owner to an accommodation between the two estates may be shown, dependent, of course, upon the state of the evidence and the findings of the trier of the facts.

The court remanded the case to the trial court for a new trial because the original instruction improperly (1) commented on the height of the pumps and (2) contained the wrong test for reasonable necessity.

2. WATER RESERVOIRS AND INVERSE CONDEMNATION

In *Haupt, Inc. v. Tarrant County Water Control & Improvement Dist. Number One*, 870 S.W.2d 350 (Tex. App. – Waco 1994, no writ), the owner of minerals underlying Richland Chambers reservoir brought suit against the owner of the new reservoir for inverse condemnation.

The Supreme Court held that the accommodation doctrine must be considered in determining whether inverse condemnation has occurred when a governmental entity that owns the surface restricts, impairs or impedes the mineral owner’s surface use. The court noted that under the accommodation doctrine (citing *Getty*) – if there is only one means of surface use to produce the minerals, then the mineral owner has right to pursue that use regardless of surface damage. But if there are reasonable alternative uses of surface – the mineral owner must use the alternative that allows continued use of the surface by the surface owner. The surface owner has the burden of proof to show any alternative uses of the surface, other than existing use, are impracticable under the circumstances.

The water district had the burden of introducing evidence to establish that the mineral owners had *alternative means* of access and their use of surface was not *reasonably* necessary. The water district failed to produce any evidence that these alternative methods (directional, platform, or marine drilling on lake) provided the plaintiffs *reasonable* access to the mineral estate. The court noted that just because something can be done does not mean that alternative is reasonable or economically feasible.

The mineral owner had unsuccessfully drilled a directional well after the lake was inundated, and a platform well before inundation. But no evidence was presented to indicate whether the mineral owner could reasonably access the minerals *after inundation* by a platform erected over the water. Therefore, the case was remanded for a new trial on reasonableness of the mineral owner’s alternatives.

3. LANDFILLS

In *Texas Genco, LP v. Valence Operating Co.*, 187 S.W.3d 118 (Tex. App.—Waco 2006, pet. denied), Genco (the surface owner) sued to enjoin Valence (mineral lessee and operator) from drilling a vertical (aka “straight hole”) gas well on a tract within the footprint of Genco’s ash-disposal landfill for its nearby electrical power generation plant. Coal combustion byproducts were disposed of in the landfill in predetermined areas. The plans were extensive and long-term. Genco could not stray from applicable TCEQ regulations, so its flexibility was limited.

The trial court entered a temporary injunction to prevent drilling, but the mineral owner counterclaimed for damages. After a jury trial the trial court denied Genco the permanent injunction and awarded the mineral owner $400,000 in damages.

The issue on appeal was whether the trial court should have disregarded one of the jury's answers to a question that was aimed at one element of the accommodation doctrine. The jury had been asked three questions In Question 1, the jury answered "yes" to the following question:

> Do you find by a preponderance of the evidence that Texas Genco has an existing use of the surface at the Straight Hole Location that would be precluded or substantially impaired if Valence drills Well #8 at the Straight Hole Location?

And the jury answered "yes" to Question 1(a), which asked:

> Is directional drilling from an alternate location an established industry practice that would provide a reasonable alternative to recover the gas that Valence would recover if it drilled Well #8 at the Straight Hole Location?

But it is the jury's answer to Question 1(b) that led the trial court to enter a judgment in Valence's favor:

> Do you find by a preponderance of the evidence that Valence's proposed use of the surface at the Straight Hole Location is an unreasonable use of the surface that requires Valence to directionally drill to recover its minerals from Well #8?

The jury initially checked "yes" but then scratched out that checkmark and checked "no."

The Waco court held that the jury had answered the first two questions in a way that established that Genco prevailed under the accommodation doctrine. Thus the court held that question 1(b) was unnecessary. The court reversed and rendered judgment that Valence take nothing on its counterclaim, and remanded the cause for entry of permanent injunction.

Interestingly, the court did not hold that the jury should have been asked whether Genco had any reasonable alternatives available for conducting its surface use.

4. CATTLE AND LIVESTOCK OPERATIONS

In *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244 (Tex. 2013) the Supreme Court again analyzed the accommodation doctrine and examined the *Getty* precedent. The issue in that case, which like *Haupt* and *Valence* had worked its way up to the Supreme Court via the Waco Court of Appeals, was essentially whether a plaintiff must plead and prove a third element centered on the surface owner's alternatives.

The court first noted that the lower court was incorrect when it stated that the surface owner's alternatives on other tracts were not legally relevant to the accommodation doctrine analysis and stated:

> Such a requirement would reduce the mineral owner's obligation to accommodate existing uses of the surface because of the fortuity that the surface owner had separate holdings, even though the holdings might soon be lost by the leases lapsing or being terminated. Under those circumstances the mineral owner could obtain long term benefit from use of the surface while forcing the surface owner to relocate an existing use to a place where the use might be conducted for only a short term. Accordingly, the court of appeals improperly considered the land leased by Merriman in determining whether he produced evidence that he had no reasonable alternatives to continue his cattle operation.

The court went on to note that the surface owner's actual use must be considered, and not just general or similar uses:

> Here, Merriman's use can, with fairness to both parties, be classified more narrowly than the broad "agricultural" category applied by the court of appeals. His use of the land was for a cattle operation and its essential parts. That use is what must be considered in balancing his rights with those of XTO.

The court, citing to the opinion on rehearing in *Getty*, stated that there were three elements to the claim. First, the surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued. Then, if he carries that initial burden, "he must further prove that given the particular circumstances, there are alternative reasonable, customary, and industry- accepted methods available to the lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use."

Thus, the case then turned on whether Merriman produced legally sufficient evidence that he did not have any reasonable alternatives for conducting his particular cattle operations on the tract. The court held that Merriman had not carried his burden because he had no established that

> Merriman's affidavit and deposition testimony, even assuming they were not entirely conclusory, are evidence only that XTO's well precludes or substantially impairs the use of his existing corrals and pens, creates an inconvenience to him, and will result in some amount of additional expense and reduced profitability because to continue his cattle operation he will have to build new corrals or conduct his operations in more phases. Evidence that the mineral lessee's operations result in inconvenience and some unquantified amount of additional expense to the surface owner does not rise to the level of evidence that the surface owner has no reasonable alternative method to maintain the existing use.

In addition to clarifying the elements of an accommodation doctrine claim, the *Merriman* case stands for three propositions of law in the accommodation doctrine context. First, a surface owner's alternatives are only legally relevant if they are available on the tract at issue. Second, the surface owner's specific use, and not some more general type of similar use, is the only one that he must prove he does not have reasonable alternative means to conduct. And finally, evidence of inconvenience and unquantifiable additional expense do not meet his burden to establish that he does not have reasonable alternatives for conducting that use.

5. DEER HUNTING AND MANAGEMENT

Another accommodation doctrine case that is worth discussing is *VirTex Operating Co. v. Bauerle*, 2017 Tex. App. LEXIS 10413; 2017 WL 5162546 (Tex. App—San Antonio 2017, pet. den'd). Although the opinion from the San Antonio Court of Appeals was issued back in 2017, it was long believed that the Supreme Court would ultimately weigh in and either reverse or modify the opinion. Therefore, some practitioners opted not to cover it in case law updates, or would devote minimal time to it. But in 2019, the Supreme Court denied the petition and motion for rehearing. Coverage of the impact of the case was then diminished by Covid. So, I'll include it here with some cautionary words.

In this case, Bauerle owned the surface of a large 8,000+ acre ranch in South Texas, which he leased to deer hunters. VirTex is the mineral lessee on approximately 3,000 of those acres. VirTex desired to install overhead power lines to new wells that were drilled and/or planned. The total number planned was 43 wells.

Bauerle contended that the power lines would prevent his hunters from utilizing helicopters to capture deer, count deer and assist in predator management. After VirTex voluntarily ceased installing the lines in order to try to work out an agreement, Bauerle sued and alleged violation of the accommodation doctrine. He also sought a declaratory judgment that VirTex's planned power lines would violate the accommodation doctrine.

Bauerle's evidence of alternative uses available to VirTex was primarily that sour gas from the wells could be transported to an amine sweetening plant on an adjacent ranch, sweetened, and then pipelined back onto the ranch. He also opined that VirTex could bury electric power lines or use diesel generators. Bauerle's evidence of preclusion of his existing use was testimony from his hunting lessee to the effect that he would no longer lease the property for hunting if the power lines were installed.

The jury found that the accommodation doctrine was violated. The jury also found that Bauerle had incurred reasonable and necessary attorneys fees and determined the amount. The San Antonio Court of Appeals affirmed the verdict.

But Supreme Court precedent establishes that off-lease alternatives should not be considered by the jury. It is well-established that off-lease alternatives are not to be considered in the accommodation doctrine analysis. If accommodation is not possible within the confines of the leased premises, the surface use must yield. For example, in *Sun Oil Co. v. Whitaker*, a dispute over a limited water supply between a surface owner engaged in irrigated farming and an oil company planning to engage in water flooding of the subterranean oil reservoir was resolved in favor of the mineral owner. The surface owner could not force the oil company to acquire water it needed for oil recovery operations from sources off the premises—even though the surface owner needed the same water for irrigation—because to do so "would be in derogation of the dominant estate." *Whitaker*, 483 S.W.2d at 812.

And the rule cuts both ways. *Getty* established that the surface owner's alternatives must be available on the same land. *Getty v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971, op. on rehearing) (inquiry was reasonable means of irrigating "this land."). And in *Merriman*, the Supreme Court actually reversed the lower court's holding that the surface owner's alternatives could include other leased tracts besides the property where the cattle operation was conducted. 407 S.W.3d at 250 ("the court of appeals improperly considered the land leased by Merriman in determining whether he produced evidence that he had no reasonable alternatives to continue his cattle operation.).

In *VirTex*, the San Antonio court made ample mention of the off-lease amine plant as the "next best alternative" to above-ground power lines. The opinion mentions it so often that readers are led to believe that Texas law allows consideration of off-lease options. Here are some of the statements the lower court made:

- "the Bauerles' expert, Mike Kramer, presumed VirTex could obtain an easement **over neighboring property** for a natural gas line and access to an amine plant."
- "Kramer took into account the fact that the natural gas would have to be piped from the existing wells on the Bauerles' ranch **to a neighboring ranch** that had an amine plant, where the gas could be sweetened. After the gas was sweetened, it would be **piped back to the Bauerles' ranch** to power the wells."
- "Kramer based his opinion on his forty years of experience working in the oil and gas industry and various bids he obtained, taking into account the process of sweetening the gas **at the neighboring amine plant**."
- "Phipps pointed out that **VirTex would need to obtain an easement from the neighboring property** in order to access the closest amine plant, where the natural gas could be sweetened. Phipps also testified **it was unclear whether an easement could be obtained**."

Yet, the Texas Supreme Court denied review, so the opinion stands. But beware, with respect to the accommodation doctrine *VirTex* is bad precedent and should probably just be ignored entirely until the San Antonio Court has an opportunity to write on the issue again.

6. SOLAR FARMS

In *Lyle v. Midway Solar, LLC*, 618 S.W.3d 857 (Tex. App.—El Paso, December 30, 2020), the El Paso Court of Appeals analyzed a dispute between a solar developer and the mineral owner.

Midway, the solar development company, developed a 315-acre tract in Pecos County pursuant to a 55-year solar development lease with the surface owners. Neither Midway nor the surface owners owned the underlying minerals and they did not obtain surface use agreements or waivers from all of the mineral owners.

Midway designated the perimeter of the solar project as an undevelopable area reserved for oil and gas surface operations, but without undertaking any geological investigation or soliciting any input from the mineral owners. The mineral owners had never attempted to develop the minerals in the past, and no evidence of future plans was offered.

Once construction of the project was complete, Lyle sued the surface owners and Midway for damages to the mineral estate, claiming the defendants violated the accommodation doctrine by impairing development of the mineral estate. The project ended up covering about 70 percent of the surface tract.

In the chain of title, a 1948 Deed reserved the minerals and said:

> Grantors further reserve unto themselves, their heirs and assigns, the right to such use of the surface estate in the lands above described as may be usual, necessary or convenient in the use and enjoyment of the oil, gas, and general mineral estate hereinabove reserved.

That language is broader than the implied rights that would typically flow with a bare mineral reservation. Thus, Lyle argued that the deed precludes application of the accommodation doctrine because "usual" meant vertical wells at the time of the reservation. Therefore, Lyle's position was that he had the express right to drill vertical wells by virtue of the deed. Lyle sought a mandatory permanent injunction, and damages for the lost opportunity to explore.

Two experts for Lyle opined that the solar facility "severely" impacts ability to develop minerals and were a "significant deterrent" to development. They also testified that mineral development would be economically viable, that the best area to develop was covered by the solar facility, that geography hinders a potential operator's ability to develop the minerals with horizontal wells (there were none within 20 miles), and other wells in the area were all vertical.

Defendant Midway Solar moved for partial summary judgment asserting that the accommodation doctrine did not apply because plaintiffs had not developed the mineral estate and had no plans to do so, and therefore there was nothing to accommodate. The trial court agreed and entered a take-nothing final judgment against the mineral owners.

On appeal, the El Paso Court of Appeals began its opinion by acknowledging the competing public policy issues that were in play and said:

> Texas is a leader in energy. Undeniably, Texas produces the nation's largest share of oil and gas. At the same time, its public policy favors adding renewable energy sources into the State's energy portfolio. The central issue in this case raises the potential conflict between the operation of a large-scale solar facility and the owners of the mineral interests on the land where the solar array sits.

The court held that the seed did not preclude application of the accommodation doctrine. The court noted that precedent established that "necessary" and "convenient" are too imprecise to preclude application of the accommodation doctrine. The court also found that "usual" was used generally, and was not specifically intended to contemplate certain drilling techniques. Therefore, there was "room for substantial disagreement" as to the grantor's intent, and the grantor could have said vertical wells if it has meant that (but, it seems the court was unaware that horizontal wasn't in use at the time).

But ultimately, with respect to the competing policy issues, the court determined that it was not forced to choose. The court affirmed the summary judgment in favor of Midway and held that unless and until the mineral owners attempted to develop the mineral estate, use of the surface estate was uninhibited by the accommodation doctrine. The court noted that under the current state of the evidence and the causes of action asserted, the case was premature until the mineral owner actually attempted to develop the minerals. Therefore, the trial court's judgment was reformed to be without prejudice.