LANDOWNER REPRESENTATION ISSUES

KEITH FRANKLIN, *Laredo*
Martinez Franklin & Morales

ROBERT WOODS, *Houston*
Yetter Coleman

State Bar of Texas
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CHAPTER 2

KEITH W. FRANKLIN

Practice Areas

- Oil and Gas
- Civil Litigation
- Title Disputes
- Real Estate
- Eminent Domain/Condemnation
- Probate
- Estate Planning
- Tax-Exempt/Nonprofit Organizations

Background

Keith was born in Laredo, grew up in Cotulla, and has practiced as an attorney for over nine years in courts throughout south and central Texas. He assists clients in both litigation and transactions in a variety of areas, including oil and gas, title disputes, real estate, and condemnation, with a particular focus on land and mineral owner representation. Keith also handles other areas of civil litigation, probate, estate planning, and issues involving nonprofit organizations. Before co-founding Martinez, Franklin & Morales, PLLC, Keith practiced with Person, Whitworth, Borchers & Morales, LLP (2013-2019).

Education

Thurgood Marshall School of Law, Texas Southern University – J.D., magna cum laude, 2013

- Thurgood Marshall Law Review – Executive Editor

Texas A&M University – B.S. Agribusiness, 2009

- Minor: Anthropology

Bar Admission

State Bar of Texas, 2013

Community Involvement

Laredo Area Community Foundation, Director/Past President

Dr. Lanse T. Fox Memorial Organization, President

Professional Associations & Memberships

Texas Bar Oil, Gas, and Energy Resources Law Section, Member

Laredo-Webb County Bar Association, Member

Publications & Speaking Engagements

Dos and Don'ts for Negotiating an Oil and Gas Lease; Texas Land & Mineral Owner Association Annual Meeting; San Antonio, Texas; October 11, 2018.

Ricardo E. Morales and Keith W. Franklin; *The Commingling Doctrine & Horizontal Wells: Whose Burden is it Anyway?*; State Bar of Texas 36th Annual Advanced Oil, Gas and Energy Resources Law Course; Houston, Texas; September 20-21, 2018.

Commingling: The Concept and the Controversy; Profitable Mineral Management Breakfast Series; San Antonio, Texas; Feb. 20, 2018.

Title Issues Inside your Fence Line? How Texas adverse possession law can be used to clear up ownership questions on land and minerals; Profitable Mineral Management Breakfast Series; San Antonio, Texas; June 7, 2016.

Baldemar Garcia, Jr., Ricardo E. Morales, & Keith W. Franklin; *Trespass, Subsurface Trespass and the Texas Supreme Court*; State Bar of Texas 33rd Annual Advanced Oil, Gas and Energy Resources Law Course; Houston, Texas; Oct. 1–2, 2015.

YetterColeman LLP
TRIALS | APPEALS

Partner
713.632.8074
rwoods@yettercoleman.com

University of Chicago Law School
J.D., 2014
with honors

University of Texas
B.A., 2011
with Highest Honors
Phi Beta Kappa
Eva S. Woods Unrestricted
Presidential Scholarship

Admitted to Practice
Texas, 2014
U.S. District Court,
Southern District of Texas, 2015

ROBERT D. WOODS

Robert is an accomplished litigator who specializes in high-stakes disputes in the oil and gas industry. With a deep understanding of the industry and extensive experience in complex litigation, he handles royalty, lease termination, subsurface trespass, JOA, processing/gathering agreements, environmental contamination, surface use, and similar cases across the country.

Robert has presented opening statements as well as presented and cross-examined witnesses in significant trials and arbitrations. He also combines his trial experience with strategic counsel to help clients find solutions outside the courtroom or avoid disputes before they arise.

Recognized as “Up and Coming” in nationwide oil and gas litigation by *Chambers USA* and a “Texas Rising Star” by Thomson Reuters’ *Super Lawyers*, Robert is also named “One to Watch” in Commercial Litigation and Oil & Gas Law by *Best Lawyers in America*. He is a sought-after speaker and author on legal issues affecting the oil and gas business, regularly publishing and presenting on emerging issues in the industry.

Robert is a member of the prestigious Institute for Energy Law’s 2nd Leadership Class for 2019-2020, one of only 40 professionals selected from around the country.

Representative Experience

- ***Columbia v. SWN*** (Marshall County, W. Vir.) Secured favorable settlement for operator against claims of underpayment of an overriding royalty, after prevailing on key legal issues at the outset of the case.
- ***Rounds v. Unbridled Resources*** (W.D. Okla.) Secured favorable settlement for operator in a putative class action alleging failure to pay royalty on fuel gas, as well as underpayment of interest under a royalty statute, after filing motion to exclude the plaintiff’s expert witness.
- ***Rhea v. Apache*** (E.D. Okla.) Secured favorable settlement for operator in an already-certified class action alleging underpayment of royalty for breach of the implied covenant to market and alleged failure to pay royalty on fuel gas, after prevailing on key legal issues at summary judgment.
- ***ETC Texas Pipeline v. Colgate Energy*** (Harris County, Texas) Secured favorable settlement for midstream client in action for breach of a midstream dedication, after the producer’s motion for summary judgment was denied.

- ***Tapstone Energy v. Enable*** (Oklahoma County, Okla.) Secured favorable settlement for midstream client against claims for breach of a gathering and processing agreement.
- ***Titus Oil & Gas v. Novo Oil & Gas*** (Eddy County, N.M.) Secured favorable settlement for client against claims for alleged forfeiture of interest under joint operating agreement.
- ***Sierra Frac Sand v. CDE Global*** (E.D. Tex.) Secured dismissal for forum non conveniens of a multi-million fraud and breach of contract lawsuit arising out of the sale of sand processing equipment.
- ***Briggs v. Southwestern Energy*** (Penn. Supreme Court) Assisted client in coordinating briefing in landmark appeal of subsurface trespass issues in the Marcellus Shale, including amici.
- ***Chieftain Royalty v. Newfield*** (E.D. Okla.) Secured favorable settlement for operator against a putative class action alleging underpayment of interest under a royalty statute.
- ***Apollo v. Apache*** (Midland County, Texas) Secured no evidence summary judgment on the eve of trial for operator against alleged multi-hundred million dollar claims under purchase and sale agreements and joint operating agreements related to carried interests and alleged failure to preserve leasehold.
- ***Confidential Client.*** Secured a favorable settlement for an overriding royalty interest owner related to the deduction of post-production costs in Oklahoma.
- ***Confidential Client.*** Secured favorable settlement in multi-million-dollar trespass to try title dispute in South Texas regarding retained acreage after summary judgment briefing.
- ***Smith v. SWN*** (E.D. Arkansas) Part of a team that secured a full defense jury verdict in a two-week $300 million trial of a royalty underpayment class action related to an affiliate midstream contract.
- ***Eagle Ford Royalty Cases***. Representation and settlement of over a dozen royalty claims at all stages of litigation in various South Texas jurisdictions.
- Numerous advisory matters relating to joint operating agreements, subsurface trespass, gas gathering/processing contracts, and royalty payment issues in multiple jurisdictions.

Professional Honors and Affiliations

- "Up & Coming" in Nationwide Oil & Gas Litigation, *Chambers USA: America's Leading Business Lawyers*, 2022
- "Ones to Watch" in Commercial Litigation and Oil and Gas Law, *Best Lawyers in America*, 2021-2022
- "Associate to Watch," in Texas Energy & Natural Resource Litigation, *Chambers USA: America's Leading Business Lawyers*, 2020
- "Texas Rising Star," in Energy & Natural Resources by Thomson Reuters' *Super Lawyers*, 2019-2023
- Houston Young Lawyers' Association (Board of Directors, 2018-2019; Leadership Academy Co-Chair, 2017–2019)
- Institute for Energy Law (Advisory Board; Young Professionals Leadership Council, 2019-2021)
- Member: Institute for Energy Law 2nd Leadership Class, 2019-2020
- Member: Rocky Mountain Mineral Law Foundation
- Member: Oil, Gas & Mineral Law Section, Houston Bar Association

Presentations and Publications

- "Perspectives from Both Sides of Royalty Litigation – Operator and Landowner," 21st Annual Energy Litigation Conference, November 9, 2022 (co-presenter)
- "Bluestone: Texas Supreme Court Adds to Law on Postproduction Costs and Analyzes Issue of First Impression on Free Use Clause," *The Energy Dispatch*, Institute for Energy Law, June 2021
- "Royalty Litigation Update," Houston Bar Association Oil, Gas & Mineral Law Section CLE, May 27, 2021 (co-presenter)
- "Be Careful What You Bargain For: A Litigator's Perspective on Negotiating and Interpreting Oil and Gas Contracts in Texas," TJOGEL Symposium, February 2021 (co-presenter)
- "Trends in Royalty Litigation in Texas, the Fifth Circuit, and Beyond," 2019 TJOGEL Symposium (presenter)
- "Royalty Litigation and Class Actions in Texas and the Fifth Circuit," *The Advocate*, Winter 2018 (co-author)
- "The Royalty Class Action Trial – Lessons Learned," Institute for Energy Law 17th Annual Energy Litigation Conference, November 2018 (co-presenter)

- “Recent Developments Regarding the Discovery Rule and Fraudulent Concealment Doctrine,” Page Keeton Civil Litigation Conference, October 2016 (author and presenter)
- Young Energy Professionals General Counsel Forum, Institute for Energy Law, 2015-2017 (co-chair)
- “An Uncertain Fate for Oil and Gas Midstream Agreements,” *Law360*, February 2016
- “Are Modern ‘Compensatory’ Royalty Clauses Unenforceable Penalty Clauses? Five Factors to Guide the Analysis,” *Section Report of the Oil, Gas & Energy Resources Law Section,* State Bar of Texas, Spring 2016

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LANDOWNER REPRESENTATION ISSUES

I. SCOPE OF ARTICLE

Whether they own minerals or not, no landowner loves their oil and gas operator. Cashing checks certainly helps in this regard but rarely changes the prevailing sentiment. For operators, landowners are a necessary means to an end. They hold the keys to nearly everything operators need to do business. So much so, that operators will devote entire divisions of their operation to landowner relations and even contract independent landmen to aid in the effort. It's a complicated relationship—often lucrative—and sometimes tenuous.

Out of this complicated relationship, however, landowner attorneys were born, who work with their attorney counterparts on the operator side to reach our common goal: getting the best deal for our respective clients. Sometimes the deal is made at the negotiating table, and sometimes it is won in the courtroom. Either way, it has kept Texas oil and gas lawyers busy for over 100 years. This article will explore several common landowner issues, as reviewed by the Texas Supreme Court, from the perspective of both the landowner and the operator to help practitioners with clients on either side of the fence.

In the first section, the article will take a look at the extent to which surface owners with the executive right to execute an oil and gas lease have the authority to dictate oil and gas activity on their surface, and further, how the accommodation doctrine is designed to protect non-executive surface owners subject to an oil and gas lease. The second section will look at the circumstances where an oil and gas lease does not dictate surface activity and, instead, must be within the scope of easement rights to use the surface. The second section will also look at how pooling can pull surface rights back from the requirement of an easement grant to within the implied rights to use the surface by virtue of pooled oil and gas leases. The third section will discuss other, court-created means by which oil and gas operators have obtained surface rights to operate without the aid of an oil and gas lease or an express easement grant. Finally, the fourth section will discuss the elements of trespass claims where oil and gas operators were presumed to have acted outside of their authority over the surface estate, as well as what is ultimately required to recover damages for trespass.

II. SURFACE RIGHTS SUBJECT TO AN OIL AND GAS LEASE

"There are five essential attributes of a severed mineral estate: (1) the right to 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, (5) the right to receive royalty payments." *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986) (citing R. Hemmingway, *Law of Oil and Gas* §§ 2.1-2.5 (1971) (emphasis added)). When the owner of a surface estate also owns executive rights to lease the minerals on the land, they are in a unique position when it comes to negotiating an oil and gas lease. They have the ability to dictate what an operator can and cannot do on or under the surface as part of its exploration and development of the mineral estate. One of the goals of every surface owner in an oil and gas lease negotiation is the inclusion of strong surface use protections in the lease. Doing so ensures that the surface owner's existing use of the land encounters the least amount of detrimental impact, while also protecting the value of the surface estate as an asset. With the advances in horizontal drilling technology, many oil and gas leases today, especially on small tracts of minerals, or those located in residential areas, are even drafted as non-surface use leases. Such leases prohibit the use of the surface altogether, except for the horizontal drilling and development of the subsurface from a location off-lease.

A. Tex. Outfitters, Ltd., LLC v. Nicholson and the Executive Surface Owner

Sometimes, however, an executive surface owner can go a little too far in their effort to protect the surface from the potential harms of oil and gas development. In *Tex. Outfitters, Ltd., LLC v. Nicholson*, the Texas Supreme Court reviewed a decision involving a 1,082-acre tract of land in Frio County. 572 S.W.3d 647, 649 (Tex. 2019). The surface owner, Texas Outfitters, purchased the surface from the Carter family, who also owned an undivided 50% mineral interest in the land. *Id.* When Texas Outfitters bought the surface from the Carters, it also acquired a small undivided mineral interest and the executive rights on the entire 50% mineral interest, of which the Carters kept nearly 46% as a non-executive mineral interest. *Id.* Texas Outfitters intended to use the surface of the land for a hunting operation. *Id.* Sometime after the sale, Texas Outfitters turned down an oil and gas lease offer for a $1,750 per acre bonus and a 25% royalty, despite the Carters' desire for Texas Outfitters to accept the offer. *Id.* at 649-50. The same lessee had already leased the other undivided 50% mineral interest in the tract. *Id.* at 649.

In Texas, "[t]he holder of the executive right to lease a mineral estate owes non-participating mineral- and royalty-interest owners a duty of utmost good faith and fair dealing." *Id.* A few years prior to *Tex. Outfitters*, the Texas Supreme Court in *KCM Fin. LLC v. Bradshaw*, had already established that, while the scope of the executive duty was "imprecise," at a minimum, the executive in its discharge of the duty "is prohibited from engaging in acts of self-dealing that unfairly diminish the value of the non-executive interest." 457 S.W.3d 70, 74 (Tex. 2015).

In a suit against Texas Outfitters, the Carters claimed that Texas Outfitters breached its executive duty of utmost good faith and fair dealing. *Tex. Outfitters*, 572 S.W.3d at 650. The Carters presented evidence that Texas Outfitters engaged in self-dealing when it declined the lease offer because of the effect that oil and gas development would have on its hunting operation. *See id.* The Texas Supreme Court emphasized the "fact-dependent nature of executive duty inquiries" and held that here, the Carters' burden was met to show that Texas Outfitters engaged in acts of self-dealing that unfairly diminished the value of the Carters' non-executive interest." *Id.* at 657.

One of the primary reasons cited by the Court in its holding was evidence presented by the Carters that a subsequent lease offer by a different operator for a higher bonus was made after the initial offer, which the operator subsequently withdrew when it learned that 50% of the mineral interests were already leased. *Id.* Because Texas Outfitters knew of the lease on the other 50% mineral interest at the time it declined the initial offer by the same operator, it had "'unfavorably affected' the pool of potential lessees." *Id.* (quoting trial court finding). In doing so, the Court found that "Texas Outfitters chose to reap the benefits of an unburdened surface estate to the Carters' detriment." *Id.* The Court admitted that the evaluation of the competing interests between an executive surface owner and a non-executive is "difficult to determine when such an executive crosses the line from lawfully promoting his own surface interest to unlawfully doing so at the expense of the non-executive, thereby engaging in self-dealing that unfairly diminishes the value of that interest." *Id.* at 656. However, the Court stated further that, to an extent, it had previously addressed those competing interests in its *Lesley v. Veterans Land Bd.* decision. 352 S.W.3d 479 (Tex. 2011). The Court in *Lesley* held that "the common law provides appropriate protection to the surface owner through the **accommodation doctrine**." *Id.* at 491 (emphasis added). Therefore, an executive surface owner who attempts to go beyond the protections of the accommodation doctrine and take additional measures for the benefit of the surface to the detriment of the mineral estate "is at particular risk of violating his executive duty." *Tex. Outfitters*, 572 S.W.3d at 656.

B. *Merriman v. XTO Energy, Inc.* and the Accommodation Doctrine

Clearly, the Texas Supreme Court holds the accommodation doctrine, and the protections it affords surface owners, in high regard. Failing to give it proper respect as an executive surface owner in an oil and gas lease negotiation can land you in hot water with a non-executive interest owner. How truly helpful is the accommodation doctrine though? And how hard is it for a surface owner to prove a claim under it?

The accommodation doctrine was born out of the common law right of the severed mineral estate to use the surface for mineral development. *Tarrant County Water Control & Improvement Dist. Number One v. Haupt, Inc.*, 854 S.W.2d 909, 911 (Tex. 1993). "It is a well-established doctrine from the earliest days of the common law that the right to the minerals carries with it the right to enter and extract them, and all other such incidents thereto as are necessary to be used for getting and enjoying them." *Id.* (citing *Cowan v. Hardeman*, 26 Tex. 217, 222 (1862)). "The incidental rights include the right to use as much of the surface as is reasonably necessary to extract and produce the minerals." *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013). A severed mineral estate would be "wholly worthless" if not for this right. *Harris v. Currie*, 176 S.W.2d 302, 305 (Tex. 1944). However, the exercise of its dominant right over the surface by the owner of the mineral estate must be "with *due regard* for the rights of the surface owner." *Haupt*, 854 S.W.2d at 911 (citing *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971); *General Crude Oil Co. v. Aiken*, 344 S.W.2d 668, 669 (Tex. 1961); *Gulf Production Co. v. Continental Oil Co.*, 132 S.W.2d 553, 563 (Tex. 1939)). "The accommodation doctrine is based on this concept of 'due regard.'" *Getty Oil*, 470 S.W.2d at 622.

If there is no other way but one to use the surface for mineral development, the lessee is permitted to use the only effective method "regardless of whether it precludes or substantially impairs an existing use of the servient surface estate." *Merriman*, 407 S.W.3d at 249 (citing *Haupt*, 854 S.W.2d at 911; *Getty Oil*, 470 S.W.2d at 622). However, as is more often the case,

> [i]f the mineral owner has reasonable alternative uses of the surface, one of which permits the surface owner to continue to use the surface in the manner intended . . . and one of which would preclude that use by the surface owner, the mineral owner *must* use the alternative that allows continued use of the surface by the surface owner.

Id. (quoting *Haupt*, 854 S.W.2d at 911-12).

The Texas Supreme Court dealt with this analysis in *Merriman v. XTO Energy, Inc.*, which involved a 40-acre tract of land in Limestone County. *Id.* at 247. Merriman was a non-executive owner of the surface of the 40 acres, and XTO held the oil and gas lease on the severed mineral estate. *Id.* Merriman lived on the property and had a barn, pens, and fencing there as part of a cattle ranching operation. *Id.* In addition to the 40 acres, Merriman had other acreage leased for grazing, but he would conduct an annual roundup on all of his leased acreage to bring the cattle to the 40-acre tract to sort and work them. *Id.* When XTO approached Merriman about a surface location for a gas well on the 40 acres, Merriman opposed it, citing interference with his existing cattle operation. *Id.* XTO, acting under its dominant right to use the surface to develop the mineral estate, constructed a pad site and drilled the well on the 40 acres anyway. *Id.* In response, Merriman filed a claim under the accommodation doctrine against XTO, which sought an injunction for XTO's failure to accommodate his existing use of the surface, and further, that "XTO's acts exceeded its rights in the mineral estate and constituted a trespass." *Id.*

> To obtain relief on a claim that the mineral lessee has failed to accommodate an existing use of the surface, 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. *See Getty Oil*, 470 S.W.2d at 628 (op. on reh'g); *see also Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133, 135 (Tex. 1967); *Davis v. Devon Energy Prod. Co., L.P.*, 136 S.W.3d 419, 424 (Tex. App.—Amarillo 2004, no pet.). If the surface owner carries that 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. *Haupt*, 854 S.W.2d at 911-12.

Id. at 249.

"[A] surface owner's burden to prove that his existing use cannot be maintained by some reasonable alternative method is not met by evidence that the alternative method is merely more inconvenient or less economically beneficial than the existing method." *Id.* (citing *Getty Oil*, 470 S.W.2d at 628; *Williams*, 420 S.W.2d at 135). "Rather, the surface owner has the burden to prove that the inconvenience or financial burden of continuing the existing use by the alternative method is so great as to make the alternative method unreasonable." *Id.* (citing *Getty Oil*, 470 S.W.2d at 628).

The trial court granted summary judgment in favor of XTO, which was affirmed on appeal. *Id.* at 250. In doing so, the appellate court considered the leased acreage held by Merriman and found that his failure to provide evidence as to why he could not move his cattle operation there, as an alternative to his existing use, meant that he failed to carry his burden of proof under the accommodation doctrine. *Id.* The appellate court also found that Merriman had reasonable alternative means of developing his land for general "agricultural purposes" and did not limit their accommodation doctrine analysis to the specific cattle operation that Merriman conducted on the 40 acres. *Id.* While the Texas Supreme Court affirmed the appellate court's decision, it disagreed with the court's reasoning. *Id.*

The Court reiterated that "[t]he accommodation doctrine focuses on balancing the respective rights of the parties." *Id.* (citing *Haupt*, 854 S.W.2d at 911). Likewise, forcing Merriman to produce evidence that using additional land where he held short term leases as an alternative to using the 40 acres "would too greatly alter the balance between those who possess and have established a use of the surface estate and those who possess the mineral estate." *Id.* The resulting imbalance could be one where a mineral owner would receive a long-term benefit of surface use while the surface owner is forced to relocate elsewhere for only a short term. *Id.* Additionally, the Court stated that it would still be fair to both parties if Merriman were only required to produce evidence that there was no reasonable alternative to operating his cattle business on the property—not whether there were alternatives to the broad category of his general agricultural use. *Id.* at 250-51.

However, despite the Court's disagreement with the appellate court's analysis, it still reached the same conclusion that Merriman failed to carry his burden of proof under the accommodation doctrine. *Id.* at 252. The Court's analysis turned on the fact that the evidence presented by Merriman showed XTO's well location made Merriman's cattle operation "practically impossible to accomplish using the **existing corrals and pens**." *Id.* at 251 (emphasis added). Merriman provided no evidence as to whether his pens and corrals could be moved or reconstructed in another place on the 40 acres, and if so, how much doing so would cost. *Id.* Likewise, the evidence Merriman did provide as to the corrals and pens in their existing position only constituted evidence of mere inconvenience, substantial impairment, additional expense, and reduced profitability, none of which are sufficient to meet the standard of proof under the accommodation doctrine that he had no reasonable alternative to his existing use. *Id.* at 251-52.

C. Surface Use Agreements

We know that the Texas Supreme Court highly favors the accommodation doctrine, to the point of discouraging executive surface owners from reaching beyond the protections of the doctrine and over-exercising their ability to protect the surface in an oil and gas lease negotiation. However, the Court has still placed a very high burden of proof on accommodation doctrine claims. So, what can a landowner attorney do for a surface owner client instead? Enter into a surface use agreement with the operator holding the oil and gas lease.

"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." Stephen L. Parker, *Note: Texas Oil and Gas: The Key that Expanded Lessees' Surface-Use to All Tracts in a Pooled Unit*, 3 TEX. WESLEYAN L. REV. 721, 740 (2016). Just like the surface provisions of an oil and gas lease, the range of applications for a surface use agreement to oil and gas development on the surface is nearly endless. Locations, limitations, and consideration for lease roads, flowlines, pad sites, and more can all be governed by the terms of a surface use agreement. Surface use agreements can even be so detailed as to set speed limits on lease roads, restrict operations during hunting season, and dictate what types of grass seed must be replanted after reclaiming an oilfield location. Liability protections can also be included in a surface use agreement, i.e., indemnity and insurance clauses, environmental protections in the event of a spill or other catastrophe, liquidated damages for breach of the agreement, etc. The range of options for inclusion in a surface use agreement will often depend on the amount of acreage it is intended to cover and the potential upside for profitable mineral development. In other words, a surface use agreement for one well site on 40 acres like in *Merriman* is going to look a whole lot different from a surface use agreement on 4,000 acres where the operator plans to drill multiple wells.

The benefits of a surface use agreement are not one-sided, however. While a surface use agreement does afford surface use protections for a surface owner who otherwise may only rely on the accommodation doctrine to help them, operators too can benefit from entering into a surface use agreement. In exchange for some measure of consideration, usually representing a pre-determined amount of surface damages owed for the surface owner's potential accommodation doctrine claim, an operator effectively receives a waiver of all claims under the accommodation doctrine from the surface owner. Instead, all parties to a surface use agreement gain the benefit of contractual expectations of one another and can sue for breach of contract in the event one of the parties fails to meet those expectations, for which the recovery of attorney's fees is an available remedy. *See* TEX. CIV. PRAC. & REM. CODE § 38.001(b)(8) ("A person may recover reasonable attorney's fees from an individual or organization . . . , in addition to the amount of a valid claim and costs, if the claim is for: . . . an oral or written contract.").

III. SURFACE RIGHTS BY EXPRESS GRANT

Very often in Texas oil and gas development, operators require the use of surface interests where they do not possess an oil and gas lease. Other times, operators require the use of surface interests where they do hold an oil and gas lease, but the planned use of the surface is intended for off-lease benefit. Either way, if an operator does not possess the benefit of the implied right to use the surface for its intended use by virtue of an oil and gas lease from the mineral owner, it must obtain an easement or license to operate on the surface for that purpose from the surface owner. These types of grants to operators by surface owners are commonly made for: gathering lines/gathering facilities, frac ponds, water wells, disposal wells, roads, and more.

A. Southwestern Elec. Power Co. v. Lynch and the Scope of Easements

A common issue faced by landowners is the question of scope of an easement that burdens the surface estate and to what extent is an operator allowed to exercise its rights to the surface pursuant thereto. *E.g.*, *Cook v. Cimarex Energy Co.*, No. 07-19-00099-CV, 2021 Tex. App. LEXIS 2474 (Tex. App.—Amarillo Mar. 31, 2021, no pet.) (analyzing whether road easement to drill one well extends to the drilling of additional wells). The issue often arises in situations where an owner of an older easement attempts to exercise rights thereunder in the context of a modern application. *E.g.*, *Texan Land & Cattle II, Ltd. v. ExxonMobil Pipeline Co.*, 579 S.W.3d 540 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (analyzing language of 1919 easement for transportation of "oil or gas" applied to transportation of refined products derived from crude petroleum). The Texas Supreme Court recently went through an exhaustive scope of easement review in the context of an electrical easement but separately analyzed two oil and gas pipeline cases to arrive at its holding.

In *Southwestern Elec. Power Co. v. Lynch*, Southwestern Electric Power Company ("SWEPCO") acquired several electrical transmission line easements that dated back to 1949. 595 S.W.3d 678, 681 (Tex. 2020). The original terms of the easement allowed for its holder "to erect towers, poles and anchors along" the easement right-of-way. *Id.* Beginning in 2014, SWEPCO began a project to replace the transmission line's wooden poles with new steel poles. *Id.* As part of the project, SWEPCO attempted to supplement the terms of the original easements in a proposed agreement with all of the landowners along the line. *Id.* One of the terms that SWEPCO sought to include was the new width to which they intended to expand the line, being 100 feet. *Id.* The original easement did not contain a width restriction among its terms, but the width on the ground of the original transmission line was 30 feet. *See id.*

Some of the landowners subject to the easement agreed to the updated terms and some did not, but SWEPCO began its modernization project anyway, which included the expansion of the width of the line. *Id.* Three landowners along the line (collectively, the "Landowners") sued SWEPCO seeking a declaratory judgment that since the line had only ever been 30-feet wide, the width should be fixed at 30 feet, and should not be able to be widened to more than three times its historical size. *Id.* The Landowners sought to use SWEPCO's proposal to amend the original easement to include the width restriction at 100 feet as evidence that SWEPCO had acknowledged the prior restriction to a 30-foot width. *Id.*

At a bench trial, the trial court allowed the Landowners to bring in the extrinsic evidence of SWEPCO's prior use of the easement as proof that the easement should remain at a maximum 30-foot width. *Id.* at 682. SWEPCO argued that by the easement lacking a width restriction, it constituted a general easement, giving SWEPCO the right to use the Landowners' property "as much as is reasonably necessary for the purposes specified in the easements." *Id.* The trial court ruled in favor of the Landowners, which was affirmed on appeal. *Id.*

Upon review by the Texas Supreme Court, the Court first applied the rules of contract construction, which is proper when interpreting the terms of an easement. *Id.* at 686.

> When construing the terms of an easement, courts deploy the rules of contract interpretation and look to the easement's express terms to determine its scope. *DeWitt Cty. Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999) (citations omitted) ("The rules of contract construction and interpretation apply to easement agreements. When a court concludes that contract language can be given a certain or definite meaning, then the language is not ambiguous, and the court is obligated to interpret the contract as a matter of law."). As in contract interpretation cases, courts look to all of the language in the easement and harmonize its terms to give effect to all of the provisions. *See id.* at 101 (looking to multiple portions of an easement to give effect to the agreement's intent). If the easement's terms can be given a definite or certain meaning, "then the language is not ambiguous, and the court is obligated to interpret the contract as a matter of law." *Id.* at 100. Importantly, a dispute over the meaning of the easement's terms is not enough to render an easement ambiguous. *Id.* (citing *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex.1994)). An easement is ambiguous only if it is susceptible to two different, reasonable meanings. *Id.*

Id.

SWEPCO's position was that the easement was unambiguous, and the original parties to it intentionally omitted any specific width limitation in the grant of rights therein. *Id.* at 687. Therefore, SWEPCO argued, the trial court erred in allowing the consideration of extrinsic evidence, being SWEPCO's historical use of the easement. *Id.* The appellate court looked to *Houston Pipe Line Co. v. Dwyer* in coming to its decision on the issue. *Id.* (citing 374 S.W.2d 662 (Tex. 1994)). *Dwyer* dealt with an easement grant for the limited purpose of "laying, constructing, maintaining, operating and repairing a pipeline." *Dwyer*, 374 S.W.2d at 665. The *Dwyer* easement did not set a width restriction on the diameter of the pipe to be used in the right-of-way. *Id.* at 663. The pipeline company, however, sought to replace the existing 18-inch pipe with 30-inch pipe in the easement. *Id.* The *Dwyer* Court found that "the parties who negotiated the easement for $32.00 could not have intended to create an easement that 'might be enlarged over and over again as often as an increase in demands for gas might make it necessary.'" *Lynch*, 595 S.W.3d at 687 (quoting *id.* at 666). Thus, the Court held that upon the pipeline company's construction of the line with 18-inch pipe, "its rights became fixed and certain, and the defendant was not permitted to install a [30]-inch pipe pursuant to the existing easement." *Id.* (quoting *Dwyer*, 374 S.W.2d at 666). Likewise, the appellate court in *Lynch* relied on the holding in *Dwyer* to justify the consideration of extrinsic evidence, being the historic use of the transmission line at a 30-foot width, to make the width restriction "fixed and certain" at 30 feet. *See id.*

The appellate court in *Lynch* believed the facts there to be aligned with *Dwyer* and distinguishable from those in the *Knox v. Pioneer Natural Gas Co.* case from the El Paso Court of Appeals. 321 S.W.2d 596 (Tex. App.—El Paso 1959, writ ref'd n.r.e.). The easement in *Knox* granted an easement "of sufficient width to permit the grantee to lay, maintain, operate and remove a pipe line for the transportation of gas . . . ." *Id.* at 598. Just as in *Dwyer*, the easement in *Knox* did not set any diameter restriction on the pipe to be used in the right-of-way, and the pipeline company also sought to replace the existing pipe with that of a wider diameter. *Id.* at 599. Unlike the easement in *Dwyer*, however, the granting language was found to be "forward-looking" and contemplative of rights beyond those actually used. *Id.* at 601. "[I]f the language of the grant clearly gives the grantee a right in excess of the one actually used, such right would still exist notwithstanding the exercise of a lesser privilege." *Id.* at 600.

The Texas Supreme Court disagreed with the lower court that the easement in *Lynch* was not forward-looking or a grant of additional rights other than those actually in use. In fact, the Court found that the easement in *Lynch* was even more contemplative of additional rights than the easement in *Knox*. The easement in *Lynch* granted to SWEPCO the right to install a transmission line with "variable numbers of wires, and all necessary or desirable appurtenances (including towers or poles made of wood, metal or other materials . . .)" and granted the future authority of "reconstruction" of the line. *Lynch*, 595 S.W.3d at 688-689. Additionally, prior Texas Supreme Court precedent has recognized the existence of general easements and nothing about them is inherently ambiguous that would require the use of extrinsic evidence to resolve the ambiguity. *Id.* at 689 (citing *Coleman v. Forister*, 514 S.W.2d 899, 903 (Tex. 1974) ("A grant or reservation of an easement in general terms implies a grant of unlimited reasonable use such as is reasonably necessary and convenient and as little burdensome as possible to the servient owner.")). The Court concluded, therefore, that SWEPCO held a general easement that did not fix any width on the transmission line, reversing the lower court and rendering judgment in favor of SWEPCO. *Id.* at 691.

B. *Key Operating & Equip., Inc. v. Hegar* and the Effect of Pooling on the Rights of Surface Owners

We have now reviewed the general principle that if there is no implied easement to use the surface by virtue of an oil and gas lease, an operator instead needs to obtain an express grant of an easement to use the surface where it intends to operate. Further, the parties have the ability to set the scope and purpose of an easement granted on the surface for oil and gas use. However, what effect can the pooling of oil and gas leases covering separate mineral estates have on the surface of each leased tract? Does the operator of pooled oil and gas leases still need an easement from the surface owner of one tract to use it to aid in achieving production from the other tract? Or does the pooling of the leases also extend the implied easement to use the surface of each tract such that an easement grant would be unnecessary?

In *Key Operating and Equipment, Inc. v. Hegar*, the Texas Supreme Court examined this issue. 435 S.W.3d 794. Key Operating and Equipment, Inc. ("Key"), acquired oil and gas leases on two separate mineral tracts, the Hegar Tract and the Richardson Tract. *Id.* at 796. Both leases granted pooling authority to Key, which Key exercised to pool the minerals in both tracts into a single pooled unit. *Id.* The Hegars purchased the Hegar Tract subject to Key's oil and gas lease. *Id.* The Hegars used a former oil and gas lease road on the Hegar Tract to access their home on the property. *Id.* After drilling a well on the Richardson Tract, Key began to use the road on the Hegar Tract to access its well on the Richardson Tract. *Id.*

The Hegars sued Key, seeking a declaratory judgment that it had no right to use the Hegar Tract to aid in producing minerals from the Richardson Tract. *Id.* The trial court ruled in favor of the Hegars, finding that "Key's use of the surface of the Hegar Tract to access the Richardson Tract constituted a trespass." *Id.* at 797. Critical to the trial court's decision was the fact that the well on the Richardson Tract was not achieving any production from the Hegar Tract. *Id.* The appellate court affirmed the trial court decision. *Id.* The Texas Supreme Court did not, agreeing instead with Key that "because [] production from a tract pooled with others is legally treated as production from each tract within the unit, it has the right to use the surface of any of the units' pooled tracts in its production activities." *Id.* at 798.

> Mineral lessees of multiple tracts may pool some or all of the tracts by combining them into a single unit, provided pooling is authorized by the leases. *Se. Pipe Line Co. v. Tichacek*, 997 S.W.2d 166, 170 (Tex. 1999). The policy of Texas is to encourage the recovery of minerals, and the Legislature has made waste in the production of oil and gas unlawful. *See R.R. Comm'n of Tex. v. Manziel*, 361 S.W.2d 560, 569-70 (Tex. 1962); *see also* TEX. NAT. RES. CODE § 85.045. Pooling is one method to prevent waste. *See* TEX. NAT. RES. CODE § 102.011 (providing that the Railroad Commission may establish a pooled unit in certain circumstances to prevent waste).

Id.

"The primary legal consequence of pooling is that 'production and operations anywhere on the pooled unit are treated as if they have taken place on each tract within the unit.'" *Id.* (quoting *Tichacek*, 997 S.W.2d at 170). The Texas Supreme Court held that once the Richardson and Hegar Tracts were pooled, they "no longer maintained separate identities insofar as where production from the pooled interests was located." *Id.* at 799. Production from the Richardson Tract is also production from the Hegar Tract, and the Hegars certainly make no contention that Key is not authorized to use the road for oil and gas activity on the Hegar Tract. *See id.* Accordingly, because production is pooled between the tracts, so are the implied rights to use the surface for achieving production. *Id.* (citing *Prop. Owners of Leisure Land v. Woolf & Magee, Inc.*, 786 S.W.2d 757, 760 (Tex. App.—Tyler 1990, no writ)).

The appellate court in *Hegar* attempted to liken their holding to the *Robinson v. Robbins Petroleum Corp.* case and find that the evidence produced by the Hegars to show that the well on the Richardson Tract did not produce any minerals from the Hegar Tract meant that the surface rights on the Hegar Tract could not be extended to benefit the Richardson Tract. 501 S.W.2d 865 (Tex. 1973). In *Robinson*, the surface was subject to an oil and gas lease covering multiple tracts that was entered into at a time when all of the tracts were owned together by the same owner. *Id.* at 866. The operator, Robbins Petroleum, began to produce water from the surface estate of the tract owned by Robinson pursuant to its oil and gas lease. *Id.* Robbins then used the water from Robinson's surface as part of efforts to achieve mineral production on other tracts covered by the lease. *Id.* When Robbins' conduct came under the scrutiny of the Texas Supreme Court, the Court held that such conduct was impermissible. *Id.* at 868 ("Robinson, as owner of the surface, is entitled to protection from uses thereof, without his consent, for the benefit of owners outside of and beyond premises and terms of the [] lease.").

However, the Texas Supreme Court found *Robinson* to be distinguishable from *Hegar* because the lease in *Robinson* did not grant pooling authority, and therefore, the mineral estate of the surface owned by Robinson was not pooled with the other tracts where the produced water was being used. *Hegar*, 435 S.W.3d at 800 (citing *id.* at 867). The Hegars took title to their surface subject to the lease held by Key, which granted pooling authority, and meant that the surface was at the risk of use for any reasonable purpose to benefit mineral production anywhere on pooled lands. *See id.* So, while the surface owner in *Robinson* would have needed to give the operator an express easement grant to use water from their surface on another tract, the surface owner in *Hegar* had no such right when it came to the road on his property to the off-lease pooled tract.

IV. ALTERNATIVE WAYS SURFACE RIGHTS ARE OBTAINED WITHOUT A LEASE OR AN EASEMENT GRANT

So far, we have reviewed situations where operators, in arms-length negotiations with landowners, have acquired rights to use the surface for mineral development, by oil and gas lease or other grant (i.e., express easement). Even in *Hegar*, where the rights to the surface came from elsewhere via the pooling authority in an oil and gas lease, that authority still came from an express grant of those rights. However, what about situations where equitably, despite the absence of any express grant of surface rights to an operator for oil and gas use, Texas law provides for the operator to have those rights anyway? The following will discuss two common law principles of surface rights acquisition, historically relied upon for the benefit of landowners, that have been extended to oil and gas operators.

A. *Johnson v. Dale* and Establishing Common Law Easements in Favor of an Operator

Johnson v. Dale is a case out of the Waco Court of Appeals that also involved a landowner and operator dispute over a road. 835 S.W.2d 126 (Tex. App.—Waco 1992, no writ). Texas Royalty owned an oil and gas lease on Dale's property, which adjoins property owned by Johnson. *Id.* at 217. To access wells on Dale's property from the nearest public road, Texas Royalty used a road on Johnson's property. *Id.* Johnson denied Dale and Texas Royalty's right to use the road, after which a suit for declaratory judgment followed. *See id.*

The trial court found that Texas Royalty, through its lessor, Dale, had the right to use the road on Johnson's property to access Dale's property by prescriptive easement. "A person acquires a prescriptive easement by the open, notorious, continuous, exclusive, and adverse use of someone else's land for ten years." *Id.* at 218 (citing *Brooks v. Jones*, 578 S.W.2d 669, 673 (Tex. 1979)). Texas Royalty presented evidence dating back several decades showing the use of the road on the Johnson property to access Dale's property with no permission from Johnson or any of his predecessors. *Id.*

Johnson argued that Texas Royalty's use was not adverse because it failed to produce evidence that the use of the road was exclusive and not shared with Johnson or his predecessors. *Id.* at 219. "The evidence established a long-standing, open, unmolested, and continuous use of the roadway far in excess of the ten years necessary to acquire a prescriptive easement. This raised a rebuttable presumption that the use was non-permissive, under a claim of right, and thus adverse." *Id.* (citing *Schultz v. Shatto*, 237 S.W.2d 609, 613 (Tex. 1951)). After the burden shifted to Johnson to rebut the presumption, Johnson failed to present any evidence showing Texas Royalty's use was not exclusive or that its use was indeed concurrent with others. *Id.* This evidentiary concept is akin to the burden-shifting requirement of constructive ouster in cases of adverse possession against a cotenant owner of land, which the San Antonio Court of Appeals recently clarified in its *Hardaway v. Nixon* decision. 544 S.W.3d 402, 409 (Tex. App.—San Antonio 2017, pet. denied) ("Texas law requires a summary judgment movant to do more than assert and prove "long-continued possession under a claim of ownership" and "nonassertion of a claim by the titleholder" to prove constructive ousters as a matter of law. Proof of long-continued possession under a claim of ownership and absence of a titleholder claim merely raise an inference or presumption of ouster.”). Because Johnson failed to rebut the presumption related to Dale’s use of the road, the appellate court affirmed that Texas Royalty had established a prescriptive easement over Johnson’s property to access the wells on Dale’s property. *Id.*

The *Johnson* court found further that Texas Royalty had also established an implied easement by prior use to access the road over Johnson’s property. *Johnson*, 835 S.W.2d at 219. “An implied easement attaches to the dominant estate (Dale’s land) when it is severed from the servient estate (now Johnson’s land) if use of the servient estate is apparent and necessary to the use of the dominant estate.” *Id.* (citing *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1963)).

> Use of the servient estate by the dominant estate must be (1) apparent and existing at the time of severance of the two estates, (2) continuous enough that the parties must have intended its use to pass with the dominant estate; and (3) reasonably necessary to the comfortable enjoyment of the dominant estate.

Id. (citing *Drye*, 364 S.W.2d at 207-08).

Evidence presented by Texas Royalty showed that the dominant and servient estates were both owned by the same party prior to being severed, and further, that all other elements had been satisfied to establish an implied easement by prior use, including the element of necessity. *Id.* Recently, however, in *Hamrick v. Ward*, the Texas Supreme Court clarified once and for all that “one claiming an implied easement for **roadway access** to a landlocked, previously unified parcel must pursue a necessity easement rather than a prior use easement.” 446 S.W.3d 377, 385 (Tex. 2014) (emphasis added). Interestingly, therefore, the remedy afforded Texas Royalty in 1992 for the implied roadway easement by prior use would not be available today.

Nevertheless, Texas Royalty also pled and proved an easement by necessity to use the road on Johnson’s property to access its wells on Dale’s property. *Johnson*, 835 S.W.2d at 220. “An essential element of an easement by necessity is that use of the servient estate by the dominant estate must be necessary at the time the two estates are severed.” *Id.* (citing *Koonce v. Brite Estate*, 663 S.W.2d 451, 452 (Tex. 1984)). At the time that the original owner of the Dale and Johnson properties severed the two tracts in a conveyance of the Dale property, there was evidence of just one road that provided access to the Dale property from the nearest public road, being the same road Texas Royalty used for operations on the Dale property. *See id.* The appellate court agreed that the proof was sufficient to establish an easement by necessity in favor of Texas Royalty over the Johnson property. *Id.*

B. *Natural Gas Pipeline Co. of Am. v. Pool* and the Adverse Possession of an Oil and Gas Leasehold Interest

We now understand that oil and gas operators can seek to establish surface rights for mineral production, where they otherwise have received no express grant of such rights, by relying on several common law easement theories. So, if the common law allows operators to obtain an easement without an express grant, can they also rely on the common law or a statute to acquire lessee rights under an oil and gas lease without an express grant? Would the court-created oil and gas lease also carry with it the implied right to use the surface estate?

The Texas Supreme Court answered that question in *Natural Gas Pipeline Co. of Am. v. Pool*. 124 S.W.3d 188 (Tex. 2003). In *Pool*, there were periods of time ranging from 30 to 153 days with no actual production on three old oil and gas leases. *Id.* 189-90. All of the leases at issue provided for secondary terms that would perpetuate the lease for “as long thereafter as natural gas is produced.” *Id.* at 190. Although at least two wells on the leases had been producing without interruption for several years prior and up to the filing of the lessors’ suit, the lessors still sought a judicial termination of the leases due to the past periods of cessation of production. *Id.* at 190-91. As part of their defense to the termination claims, the lessees argued that they had acquired title to the leases by adverse possession. *Id.* The trial court ruled in favor of the lessors and found that the leases had terminated, to which the appellate court affirmed. *Id.* at 192. The Texas Supreme Court, however, disagreed. *Id.*

> In Texas it has long been recognized that an oil and gas lease is not a “lease” in the traditional sense of a lease of the surface of real property. In a typical oil or gas lease, the lessor is a grantor and grants a fee simple determinable interest to the lessee, who is actually a grantee. Consequently, the lessee/grantee acquires ownership of all the minerals in place that the lessor/grantor owned and purported to lease, subject to the possibility of reverter in the lessor/grantor. The lessee's/grantee's interest is “determinable” because it may terminate and revert entirely to the lessor/grantor upon the occurrence of events that the lease specifies will cause termination of the estate.

Id. (citations omitted).

When a mineral lessor conveys an oil and gas lease, it typically reserves a royalty interest in the production from the mineral estate, which is a non-possessory interest. *Id.* A severed mineral estate can be adversely possessed by actual possession of the minerals. *Id.* at 192-93. "In the case of oil and gas, that means drilling and production of oil or gas." *Id.* at 193. Adverse possession title is achieved by limitations, for which there are four different statutory periods (three-, five-, ten-, and twenty-five-year periods), each with their own requisites to be met. *See* TEX. CIV. PRAC. & REM. CODE § 16.021-16.038. "'Adverse possession' means an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." *Id.* § 16.021(1).

The last periods of cessation of production on the leases in *Pool* were in 1984 and 1969, and the lessees' suit was filed in 1998. *Pool*, 124 S.W.3d at 193. The appellate court held that the leases had terminated due to the cessation of production, and the lessees' continuation of production operations thereafter "was not adverse because no notice of repudiation had been given to the lessors." *Id.* at 194. The Texas Supreme Court noted, however, that "actual notice of repudiation is not required. Rather, notice can be inferred, or there can be constructive notice." *Id.* (citing *Tex.-Wis. Co. v. Johnson*, 534 S.W.2d 895, 899 (Tex. 1976)). Quoting from its decision in *Tex-Wis Co. v. Johnson*, the Court stated a "jury [may] infer notice of a repudiation without any change in the use of the land," if there has been "long-continued use." *Id.* (quoting *Tex.-Wis.*, 534 S.W.2d at 899). The lessors had not asserted superior title to the mineral estate due to termination of the leases for fourteen (14) and twenty-nine (29) years, which the Court found to be "a strong circumstance tending to authorize an inference of notice of adverse possession." *Id.* at 195. During that time, the lessees continued to operate their wells, drilled additional wells, sold production therefrom, and continued to pay the lessors a royalty, all of which were open, notorious, and hostile acts to the ownership of the minerals by the lessors after an alleged termination of the leases. *Id.* at 197. As a result, the Texas Supreme Court held that "[t]he lessees acquired the same interest that they adversely and peaceably possessed, that is, the oil and gas leasehold estates as defined by the original leases." *Id.* at 199.

"The same interest in the oil and gas leasehold estates" that the lessees adversely possessed from the lessors in *Pool* also included the implied right to use the surface for reasonable development of the mineral estate. It is unclear from the opinion whether the lessors in *Pool* also owned the surface estate of the oil and gas leases at issue. However, an undiscussed part of the holding in *Pool* was this result to the surface owner who might otherwise have believed they were about to reclaim full ownership of the surface estate—unburdened by the oil and gas leases that had covered the property for so long—only to be disappointed that everything would be allowed to continue unchanged for another indefinite period into the future.

V. CLAIMS FOR INJURY TO LAND WHERE THERE IS NO AUTHORITY TO USE THE SURFACE

We have reviewed extensively the boxes that have to be checked before a landowner has a viable claim of trespass against an operator. Is there a valid oil and gas lease, or is the land pooled with one that authorizes the trespass? Is the trespass within the scope of a valid express easement? Is there any other way for the common law or a statute to create a leasehold or easement right that would authorize the trespass? If the answer to all of these questions is no, then you may be cleared to file your trespass claim. However, there are still multiple ways for an operator to successfully defend a claim of trespass against it.

A. *Envtl. Processing Sys., L.C. v. FPL Farming Ltd.* and the Burden to Prove Lack of Consent to Trespass

In *Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, the Texas Supreme Court took a dive into the underworld of subsurface trespass, applying old principles of common law trespass to the modern context of wastewater disposal. 457 S.W.3d 414 (Tex. 2015). FPL Farming Ltd. ("FPL") was the owner of a tract of land that it used for rice farming. *Id.* at 416. Environmental Processing Systems ("EPS") operated a wastewater disposal facility on a neighboring tract. *Id.* FPL sued EPS for trespass, alleging that wastewater from the EPS facility had migrated into the deep subsurface of FPL's property. *Id.* at 417. After a jury trial, the charge to the jury included lack of consent as an element of the cause of action of trespass, to which FPL had objected, arguing that consent is an affirmative defense to trespass. *Id.* The jury found in favor of EPS that there had been no trespass by migrating wastewater into FPL's subsurface. *Id.*

On its second trip to the Texas Supreme Court, *FPL* brought forward two issues for review from a holding by the appellate court reversing the trial court that: "(1) Texas recognizes a common law trespass cause of action for deep subsurface water migration; [and] (2) consent is an affirmative defense to trespass, on which EPS bore the burden of proof . . . ." *Id.* at 418. The appellate court found that EPS failed to carry its burden of proof to show consent to the trespass by FPL as an affirmative defense. *Id.* The Texas Supreme Court admitted, however, that it had not "squarely addressed the question of which party bears the burden of proving consent in a trespass action, nor have the courts of appeals answered it uniformly." *Id.* (citing a comparison between multiple appellate court opinions related to consent in a trespass action). In looking at historic Texas Supreme Court precedent, the Court provided that it "has consistently defined a trespass as encompassing three elements: (1) entry (2) onto the property of another (3) without the property owner's consent or authorization." *Id.* at 419. While the elements of a trespass cause of action were settled, the question of which party bore the burden to prove consent, or the lack thereof, remained.

FPL pointed to the Restatement (Second) of Torts in support of its contention that lack of consent is an affirmative defense that places the burden of proof on the defendant. *Id.* at 422 (citing RESTATEMENT (SECOND) OF TORTS § 167 cmt. c (1965)). However, the guidance provided by the Restatement was that "[t]he burden of establishing the possessor's consent is upon the person who relied upon it." RESTATEMENT (SECOND) OF TORTS § 167 cmt. c (1965). The Court disagreed that this language from the Restatement placed the burden on the defendant to prove lack of consent as an affirmative defense to trespass and was equally unclear if the burden was instead on the plaintiff as "the person who relies upon [consent]." *FPL*, 457 S.W.3d at 422 (quoting RESTATEMENT (SECOND) OF TORTS § 167 cmt. c (1965)).

The Court next looked to the courts of appeals for guidance and found that "[a] handful of courts of appeals have stated that consent is an affirmative defense to be pleaded and proven by the defendant, but the issue is far from settled." *Id.* at 422. No pattern jury charge for trespass existed at the time of the Court's review of *FPL*, and at least one appellate court had used a charge containing lack of consent as an element of the cause of action for trespass—not as a defense. *Id.* (citing *Watson v. Brazos Elec. Power Coop., Inc.*, 918 S.W.2d 639, 645-46 (Tex. App.—Waco 1996, writ denied)). For additional guidance, the Court next looked to the factors for burden allocation outlined in its *20801, Inc. v. Parker* opinion. *Id.* at 424 (citing 249 S.W.3d 392 (Tex. 2008)). "In determining the burden allocation of a fact a party must prove, we consider: (1) '[t]he comparative likelihood that a certain situation may occur in a reasonable percentage of cases"; and (2) the difficulty in proving a negative. *Id.* (quoting *20801, Inc.*, 249 S.W.3d at 397).

As to the first *20801* factor, the Court found that consent is rarely an issue in trespass cases since "landowners or possessors will normally not be presented with the opportunity to provide consent or authorization before an entry occurs." *Id.* As to the second factor, the Court felt it would not be difficult for a plaintiff claiming trespass to prove lack of consent. *Id.* "After all, the landowner or possessor who is bringing suit is in the best position to provide evidence on whether an alleged trespasser's presence was unauthorized because only 'someone acting with the authority of the landowner or one with rightful possession' can authorize, or consent to, the entry." *Id.* (quoting *Gen. Mills Rests. Inc. v. Tex. Wings, Inc.*, 12 S.W.3d 827, 835 (Tex. App.—Dallas 2000, no pet.)). Accordingly, the Court settled the issue and held that lack of consent, as an element of the cause of action of trespass, is the plaintiff's burden to prove and not an affirmative defense. *Id.* "Otherwise, a trespass cause of action would require plaintiffs to prove only an entry onto their property, which ignores our well-established definition that the entry is actionable only if it is unauthorized or without consent." *Id.*

Therefore, the Texas Supreme Court reversed the appellate court decision and reinstated the judgment of the trial court that there was no trespass by EPS for wastewater migration into the subsurface of FPL's property. *Id.* at 426. Unfortunately, because of the holding that lack of consent is an element of a trespass cause of action, which FPL failed to prove, the Court did not "need to address whether Texas law recognizes a trespass cause of action for deep subsurface wastewater migration." *Id.*

B. *Gilbert Wheeler, Inc. v. Enbridge Pipelines* and Establishing Permanent or Temporary Injury to Land

If your claim survives the threshold elements to bring a trespass cause of action as a landowner against an operator for unauthorized conduct on your surface, the final hurdle to clear is the recovery of damages.

In *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, the Wheeler family owned a 153-acre tract of wooded land in a family held entity, Gilbert Wheeler, Inc. ("Wheeler"). 449 S.W.3d 474, 476 (Tex. 2014). Enbridge Pipelines (E.Tex.), L.P. ("Enbridge"), desired to install a pipeline across the Wheeler property. *Id.* at 477. Wheeler agreed but required in its easement grant to Enbridge that it must bore underground to install the line for preservation of the trees on the property. *Id.* Enbridge hired a contractor to build the line shortly thereafter but neglected to inform the contractor of the boring requirement. *Id.* Consequently, the contractor cut and bulldozed several hundred feet of the trees Wheeler specifically sought to protect in its easement grant. *Id.* Wheeler sued Enbridge for trespass and breach of contract, and at trial Enbridge requested a jury question as to whether the damage to the property was temporary or permanent, "contending that the question was a necessary predicate to determine whether the jury should award damages commensurate with the cost to restore the trees . . . or damages commensurate with the loss in the [property]'s fair market value." *Id.* Wheeler's position was that the distinction between a temporary or permanent injury was irrelevant, to which the trial court agreed, submitting a charge to the jury without the question. *Id.* The jury found in favor of Wheeler and awarded $300,000 on its breach of contract claim "for the reasonable cost to restore the property" and $288,000 for the intrinsic value of the trees on the trespass cause of action. *Id.* Wheeler elected the breach of contract award. *Id.*

On appeal, however, the appellate court held that Wheeler had waived its entitlement to a damage award for their failure to obtain a finding as to whether the injury to their property was temporary or permanent. *Id.* The Texas Supreme Court granted review to address the "broad concerns about the boundaries of the temporary-versus-permanent distinction and its application to the calculation of damages for injury to real property" and "[i]n order to resolve the confusion surrounding this distinction." *Id.* at 477-78. The Court stated further that distinguishing between temporary or permanent injuries is a "vexing task," since "injury to real property often appears permanent in the sense that the exact real estate in question—a demolished house or destroyed tree—no longer exists." *Id.* at 478. Yet, the law has historically recognized that the items frequently lost to property damage can be replaced. *Id.*

The historic rules with respect to temporary versus permanent injuries to land were: 1) if the injury is reparable, it is temporary, and the recovery of damages is the "amount necessary to repair the injury, and put the land in the condition it was at the time immediately preceding the injury . . . [,]" s*ee id.* (quoting *Trinity & S.Ry. Co. v. Schofield*, 10 S.W. 575, 576-77 (Tex. 1889)); and 2) if the injury is irreparable, it is permanent, and the recovery of damages is "the difference between the value of the land immediately before the injury and its value immediately after." *See id.* (quoting *Fort Worth & D.C. Ry. Co. v. Hogsett*, 4 S.W. 365, 366 (Tex. 1887)). "These rules are rules premised on the notion that the ordinary measure of damages is the cost to restore the property. When the restoration is not possible, however, we award damages equal to the loss in fair market value of the property as a whole." *Id.*

However, Wheeler's position is that the temporary-versus-permanent distinction for injury to real property is inapplicable to damages stemming from breach of contract, since a breach of contract action is designed to protect the benefit of the bargain in the agreement, regardless of the nature of the injury. *See id.* at 479. Prior to *Gilbert Wheeler*, the Supreme Court of Texas had never directly addressed this issue. *Id.* The Court looked to its prior holding in *DeWitt Cnty. Electric Coop., Inc. v. Parks*, which also dealt with the measure of damages for breach of an easement by impermissibly damaging trees, where it held "the measure of damages for breach of an easement that restricted a right to cut trees would be the same as the measure for negligently cutting trees." *Id.* (quoting 1 S.W.3d 96, 105 (Tex. 1999). Because the ultimate injury to the property is identical, whether pled as a tort or breach of contract action, the Texas Supreme Court's view was to give injuries pled under either cause of action equal treatment. *Id.* "Accordingly, we hold that the temporary-versus-permanent distinction underlies the determination of the proper measure of damages for both the trespass and breach-of-contract claims at issue." *Id.* at 479-80.

Next, for the sake of additional clarity, the Texas Supreme Court provided reformulated definitions for temporary and permanent injuries to real property as follows:

> An injury to real property is considered permanent if (a) it cannot be repaired, fixed, or restored, or (b) even though the injury can be repaired, fixed, or restored, it is substantially certain that the injury will repeatedly, continually, and regularly recur, such that future injury can be reasonably evaluated. Conversely, an injury to real property is considered temporary if (a) it can be repaired, fixed, or restored, and (b) any anticipated recurrence would be only occasional, irregular, intermittent, and not reasonably predictable, such that future injury could not be estimated with reasonable certainty. These definitions apply to cases in which entry onto real property is physical (as in a trespass) and to cases in which entry onto real property is not physical (as with a nuisance).

Id. at 480.

The Texas Supreme next analyzed whether the question of a temporary or permanent injury is one for the factfinder or if it is a question of law for the court. The Court first noted its historical position that the question has been "for the determination of the jury under proper instructions." *Id.* (quoting *Trinity & S. Ry. Co. v. Schofield*, 10 S.W. 575, 577 (Tex. 1889)). However, in the more recent context of a claim of nuisance, the Court held "that jurors should determine whether a nuisance works temporary or permanent injury only 'to the extent there is a dispute regarding what interference has occurred or whether it is likely to continue." *Id.* at 480-81 (quoting *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, (Tex. 2004)). Therefore, the Court held that the same principle for nuisance damages ought to also extend to injuries to real property, and therefore, "whether an injury is temporary or permanent is a question of law for the court to decide." *Id.* at 481.

Likewise, Wheeler's failure to request a jury question as to permanent or temporary injury was not fatal to his breach of contract cause of action against Enbridge. *Id.* at 483. Though the temporary-versus-permanent distinction did apply to Wheeler's injury for breach of contract, it was a question of law for the court, and therefore would be improperly posed in a charge to the jury. *Id.* at 484 The Court found that based on evidence presented at trial and the jury's findings, Wheeler's injury was temporary. *Id.* However, the Court found further that the economic feasibility exception to restoration damages for temporary injuries applied here since "restoration of the land is technically possible but exceeds the diminution in market value to such a disproportionately high degree that the repairs are no longer economically feasible." *Id.* Where the economic feasibility exception applies, "the injury is deemed permanent," and the recovery of damages is limited to the diminution in market value before and after the trespass. *Id.* (citing *Pac. Express Co. v. Lasker Real—Estate Ass'n*, 16 S.W. 792, 793-94 (Tex. 1891)). The additional exception to the temporary-versus-permanent injury question of intrinsic value of trees might have applied here as well, since the diminution in value to the Wheeler property was at most less than one percent (1%), but the Court did not reach a holding as to its applicability. *Id.* at 485 ("[A] landowner may recover for the intrinsic value of the trees on his property so long as the diminution in the fair market value of the land is essentially nominal.").

VI. CONCLUSION

Whether you are a practitioner who represents operators or landowners, the nature and ownership of surface rights are of paramount importance. In both transactional and litigation matters alike, oil and gas attorneys armed with the understanding of how all of the parties are situated according to their respective interests have a distinct advantage. Still, tackling the evidentiary requirements and burdens for claims on injuries to land is difficult, no matter if you are pursuing or defending the claim. However, this shared challenge between landowner and operator attorneys is what strengthens our bond as colleagues in our chosen field and often leads to lasting connections. So, while landowners and operators themselves may not always enjoy one another, we as oil and gas attorneys will always have common ground to fight over.