# RIGHTS AND CONFLICTS AMONG SURFACE OWNERS, MINERAL OWNERS, AND LESSEES IN ARKANSAS

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## I. INTRODUCTION

Development of oil and gas resources requires use of the surface of the land. Most people would agree with this simple statement. But the inherent conflict it represents gives rise to frequent disagreements and litigation between surface landowners and the mineral owner or operator attempting to produce oil and gas. Several issues arise when oil and gas operations interfere with the surface use or when a landowner's property is damaged or destroyed by oil and gas operations. Can the surface owner stop or restrict the operator's surface use? Is the surface owner entitled to damage payments? If so, how are damages determined and when are payments due? The problems are intensified when the mineral estate has been severed from the surface. The surface-only owner faces the "predicament and frustration"[2] of intrusion and damage, yet reaps no economic benefit from oil and gas development. This paper considers these issues and the state of the law in Arkansas.

## II. GENERAL RULE: MINERAL ESTATE DOMINANCE OVER SURFACE ESTATE

Arkansas allows the severance of the surface estate from the mineral estate by proper grant or reservation, thereby creating separate estates.[3] The mineral interest owner has the inherent right to develop the minerals and the right to lease the minerals to others for development.[4] When the mineral owner leases the right to produce oil and gas, his lessee succeeds to the mineral owner's right of surface use, subject to explicit lease restrictions. Dominance of the mineral estate over the surface is a crucial legal concept for the mineral owner and lessee because ownership of subsurface minerals without the right to use the surface to explore for and produce them would be practically worthless. The rule of mineral estate dominance has been stated in various ways in Arkansas:

In *Wood v. Hay*, 206 Ark. 892, 175 S.W.2d 189 (1943), the Arkansas Supreme Court reviewed a reservation of oil and gas interests, stating:

> The right to enter and to make reasonable use of the land in achieving in a workmanlike way the only result the parties could have intended (if, in fact,

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[2] *Vest v. Exxon Corp.,* 752 F.2d 959, 960 (5th Cir. 1985).

[3] *E.g., Benton v. U.S. Manganese Corp.,* 229 Ark 181 (1958); *Wood v. Hay,* 206 Ark. 792 (1943); *Huffman v. Henderson Co.,* 184 Ark. 278 (1931).

[4] *See generally,* Wright, *The Arkansas Law of Oil and Gas*, 9 UALR L.J. 223, 225 (1986-87).

> oil and gas in place, as distinguished from the right to lease, were retained) must be implied from the nature of the matters dealt with.

*Id.,* 175 S.W.2d at 190. The Court then cited with approval the "better rule" stating that the mineral owner "has the right to enter on the surface with all usual necessary appliances, and to remove the mineral without any express authority reserved to that effect." *Id.* Thankfully, later cases provided a more cogent statement of the basic rule:

> The general rule governing the right of the mineral owner is aptly stated in 10 Thompson on Real Property § 5561 (1940): 'As against the surface owner, the owner of the minerals has a right, without any express words of grant for that purpose, to go upon the surface to drill wells to his underlying estate, and to occupy so much of the surface beyond the limits of his well or wells as may be necessary to operate his estate and to remove the product thereof. . . .'

*Diamond Shamrock Corp. v. Phillips,* 256 Ark. 886, 890-91, 511 S.W.2d 160 (1974);

> The respective rights of mineral and surface owners are well settled. The owner of the minerals has an implied right to go upon the surface to drill wells to his underlying estate, and to occupy so much of the surface beyond the limits of his well as may be necessary to operate his estate and to remove its products.

*Bonds v. Carter,* 348 Ark. 591, 601, 75 S.W.3d 192 (2002) (Hannah, J., concurring).

## III. CORRELATIVE RIGHTS AND REASONABLE USE OF THE SURFACE

Establishing mineral estate dominance over the surface, however, does not define the nature or extent of allowable surface use. How much is too much? The Arkansas courts have addressed this broad issue in a number of cases. However, the opinions frequently are fact-specific and focused on particular surface uses, making direct applicability to other situations limited. Furthermore, when (as in most cases) the surface use is conducted pursuant to a lease, the lease terms themselves may control. Nevertheless, a review of cases considering reasonable surface use provides useful guidance.

### A. Arkansas Cases Involving Reasonable Use.

- Cutting timber and digging pit at drillsite:

*LeCroy v. Barney,* 12 F.2d 363 (8th Cir. 1926) (On appeal from W.D. Ark.) – It was necessary, and therefore reasonable, for lessee to cut timber for clearing the drillsite and places where he intended to build tanks, towers, stations, or structures for the purpose of saving and taking care of the oil. Lessor was not entitled to damages for timber cut or earth removed from pit.

- Ingress and egress / access to adjacent property:

*Martin v. Dale,* 180 Ark. 321, 21 S.W.2d 428 (1929) – Lessee had right of access to leased lands only as necessary and not as matter of convenience. Where another road was available to lessee, surface owner had right to forbid lessee's use of more convenient road.

*Reimer v. Gulf Oil Corp.,* 281 Ark. 377, 664 S.W.2d 456 (1984) – Where lease provided right to construct necessary roads and also provided that a well site within the same drilling unit would be considered as upon lessor's land, lessee was allowed to cross lessor's surface estate to reach well on adjacent land within the drilling unit, and could be liable only for unreasonable use.

*Arkansas Louisiana Gas Co. v. Wood*, 240 Ark. 948, 403 S.W.2d 54 (1966) – Damages were awarded to surface owner for timber clearing and excessive surface use where lessee built road 40 feet wide (among other things).

*McFarland v. Taylor,* 76 Ark. App. 343, 65 S.W.3d 468 (2002) – Lessee forced to use alternative road for access, which required expensive improvements, because use of the favored road unreasonably interfered with surface owner's use and alternative was deemed reasonable.

- Use of surface water:

*Arkansas Louisiana Gas Co. v. Wood*, 240 Ark. 948, 403 S.W.2d 54 (1966) – Lessee was not entitled to use water from private pond or tank of lessor under "free water" lease clause; lessee liable for damages caused by unreasonable surface use.

- Drilling on planned homesite:

*Diamond Shamrock Corp. v. Phillips,* 256 Ark. 886, 511 S.W.2d 160 (1974) – Lessor was awarded actual damages where lessee drilled well on proposed homesite, thereby unreasonably interfering with the known planned use of the surface by lessor, since alternative drilling site was available. Because the damage to the homesite was considered "permanent" by the Court, diminution in value was the proper measure of damages.

## B. The Arkansas Rule – Corollary Rights and Restrictions

Unfortunately, the Arkansas courts have not yet outlined an exhaustive set of rules to be applied generally in adjudicating the correlative rights of mineral owners / lessees and surface owners / lessors. The cases on this subject contain a smorgasbord of quotes and snippets from various oil and gas treatises and cases from other states. One of the most succinct summaries of a general rule applicable to lessees is found in

*Arkansas Louisiana Gas Co. v. Wood*, 240 Ark. 948, 403 S.W.2d 54 (1966), where the Court stated:

> It is true that an oil and gas lease gives with it the right to possession of the surface to the extent reasonably necessary to enable a lessee to perform the obligations imposed upon him by the lease. This includes the right to enter upon the premises and use so much of it, and in such manner, as may be reasonably necessary to carry out the terms of the lease and effectuate its purpose.

*Id.* at 950, 403 S.W.2d at 55. In a more recent case, Justice Hannah[5] stated, in a concurring opinion, what he referred to as the "well settled" rule with regard to the rights of mineral owners and surface owners as follows:

> The respective rights of mineral and surface owners are well settled. The owner of the minerals has an implied right to go upon the surface to drill wells to his underlying estate, and to occupy so much of the surface beyond the limits of his well as may be necessary to operate his estate and to remove its products. *Diamond Shamrock Corp. v. Phillips,* 256 Ark. 886, 511 S.W.2d 160 (1974). His use of the surface, however, must be reasonable. *Id.* The rights implied in favor of the mineral estate are to be exercised with due regard for the rights of the surface owner. *See id.* (citing *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex.1971)).

*Bonds v. Carter*, 348 Ark. 591, 601-02, 75 S.W.3d 192, 199 (2002) (Hannah, J., concurring). While these two formulations are similar, a consistent rule, or set of rules, consistently applied would be helpful to guide mineral owners, surface owners, and lessees in assessing their rights and responsibilities.

Based on a combination of the Arkansas decisions, the correlative rights of mineral owners / lessees and surface owners / lessors with regard to surface use can be expressed as corollary rules of rights and limitations:

***Rights of Surface Use***

***I. The mineral owner or his lessee has an implied right to occupy and use so much of the surface as is reasonably necessary to remove and produce the minerals.*** *Bonds v. Carter,* 348 Ark. 591, 601, 75 S.W.3d 192 (2002) (Hannah, J., concurring); *Diamond Shamrock Corp. v. Phillips,* 256 Ark. 886, 511 S.W.2d 160 (1974); *Arkansas Louisiana Gas Co. v. Wood*, 240 Ark. 948, 403 S.W.2d 54 (1966); *Wood v. Hay*, 206 Ark. 892, 175 S.W.2d 189 (1943); *Martin v. Dale,* 180 Ark. 321, 21 S.W.2d 428 (1929).

***II. The mineral owner or his lessee, absent a contractual agreement otherwise, is not liable to the surface owner for surface damages unless the mineral owner / lessee is negligent or has exceeded the reasonably necessary use of the surface.*** *Diamond*

[5] The Honorable Jim Hannah is now Chief Justice of the Arkansas Supreme Court.

*Shamrock Corp. v. Phillips,* 256 Ark. 886, 891, 511 S.W.2d 160 (1974) ("It is a well-settled principle that injury necessarily inflicted in the exercise of a lawful right does not create a liability. The injury must be a direct result of the commission of a wrong."); *Koury v. Morgan,* 172 Ark. 405, 288 S.W. 929, 931 (1926); *LeCroy v. Barney,* 12 F.2d 363 (8th Cir. 1926) (Applying Arkansas law, no damages allowed for necessary activities).

***Restrictions on Rights of Surface Use***

***III. The mineral owner's or lessee's use of the surface must be reasonable (or "reasonably necessary").*** *E.g., Diamond Shamrock Corp. v. Phillips,* 256 Ark. 886, 511 S.W.2d 160 (1974); *Arkansas Louisiana Gas Co. v. Wood*, 240 Ark. 948, 403 S.W.2d 54 (1966).

***IV. The mineral owner's or lessee's use of the surface must be non-negligent.*** *Diamond Shamrock Corp. v. Phillips,* 256 Ark. 886, 891, 511 S.W.2d 160 (1974); *Koury v. Morgan,* 172 Ark. 405, 288 S.W. 929, 931 (1926).

***V. The mineral owner's or lessee's use of the surface must be exercised with due regard for the rights and uses of the surface owner.*** *Bonds v. Carter,* 348 Ark. 591, 601, 75 S.W.3d 192 (2002) (Hannah, J., concurring) ("The rights implied in favor of the mineral estate are to be exercised with due regard for the rights of the surface owner.") citing *Getty Oil Co. v. Jones,* 470 S.W.2d 618 (Tex.1971); *McFarland v. Taylor,* 76 Ark. App. 343, 346-47, 65 S.W.3d 468 (2002); See *Diamond Shamrock Corp. v. Phillips,* 256 Ark. 886, 891, 511 S.W.2d 160 (1974); *Martin v. Dale,* 180 Ark. 321, 21 S.W.2d 428 (1929) (Lessee had duty to operate "in the manner least injurious" to the surface owner.).

***VI. In the exceptional case where the mineral owner's or lessee's use of the surface completely destroys other surface uses, he may be liable to the surface owner even if the destructive use is reasonably necessary.*** *Benton v. U.S. Manganese Corp.,* 229 Ark. 181, 313 S.W.2d 839 (1958) (Severed mineral estate owner had right to conduct open pit mining for manganese and could not be enjoined. But because open pit mining resulted in complete destruction of the surface estate, leaving "the surface owner with nothing but a 'hole in the ground' for his agricultural pursuits," the surface owner was entitled to damages for complete destruction of the surface.)

## C. The Accommodation Doctrine and Reasonable Alternatives

The so-called "Accommodation Doctrine" was articulated by the Texas Supreme Court in *Getty Oil Co. v. Jones,* 470 S.W.2d 618, 621 (Tex.1971). *See also* 4 W. L. SUMMERS, THE LAW OF OIL & GAS § 652 (Supp. 2003). In general, the doctrine is a more elaborate statement of the rule above that the mineral owner/lessee must operate with "due regard" for the rights and uses of the surface owner. The *Getty Oil* decision has been cited several times by Arkansas appellate courts in describing the mineral owner's

restriction to reasonable use of the surface,[6] although the decisions have stopped short of referring directly to the "Accommodation Doctrine." Generally, the Doctrine can be summarized as follows:

> [W]here a severed mineral interest owner or lessee asserts a right to surface uses that will substantially impair existing uses of the surface owner, the mineral owner or lessee must accommodate the existing surface uses if reasonable alternatives are available.

SUMMERS OIL & GAS, *supra,* at 1.

The controversy in *Getty Oil* arose when an oil company installed a beam pump that interfered with a farmer's (Jones) center-pivot irrigation system. The beam pump was too high to permit the self-propelled irrigation system from traveling in its circular pattern to irrigate Jones' field. Jones asked the oil company to either use a shorter beam pump or place the pump in a pit to accommodate his irrigation system. The oil company refused, arguing that the pump was reasonably necessary for production of oil and gas. The Texas trial court agreed with Getty that its surface use was reasonable, but the court of civil appeals reversed. The Texas Supreme Court affirmed the court of civil appeals and introduced the Accommodation Doctrine, stating:

> [W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.[7]
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> * * *
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> 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.

*Getty Oil Co.,* 470 S.W.2d at 622-23.

Many of the principles used in constructing the Accommodation Doctrine in *Getty* have been applied in Arkansas cases noted above. The Arkansas appellate courts have repeatedly cited *Getty* in support of "reasonable use" decisions, and the Supreme Court referred to the opinion as "very persuasive."[8] It stands to reason that the underlying

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[6] *Bonds v. Carter,* 348 Ark. 591, 601, 75 S.W.3d 192 (2002) (Hannah, J., concurring); *Diamond Shamrock Corp. v. Phillips,* 256 Ark. 886, 891, 511 S.W.2d 160 (1974); *McFarland v. Taylor,* 76 Ark. App. 343, 346-47, 65 S.W.3d 468 (2002).

[7] Quoted in *Diamond Shamrock Corp. v. Phillips,* 256 Ark. 886, 891, 511 S.W.2d 160 (1974).

[8] *Diamond Shamrock Corp. v. Phillips,* 256 Ark. 886, 891, 511 S.W.2d 160 (1974).

public policy statement and later applications of the *Getty* decision in Texas may supply persuasive arguments in future Arkansas decisions.

### D. Lessee's Implied Duty to Restore the Surface

Although a mineral owner or lessee has the implied right to use (and cause damage to) the surface as reasonably necessary to produce oil and gas, when production ceases, that use and its attendant surface damage are no longer reasonable. In 1986, the Arkansas Supreme Court held that "the duty to restore the surface, as nearly as practicable, to the same condition as it was before drilling is implied in the lease agreement." *Bonds v. Sanchez-O'Brien Oil and Gas Co.*, 289 Ark. 582, 585, 715 S.W.2d 444, 446 (1986). The Court explained that: "To hold otherwise would allow the lessee to continue to occupy the surface, without change, after the lease has ended. This would constitute an unreasonable use, and no rule is more firmly established in oil and gas law than the rule that the lessee is limited to a use of the surface which is reasonable." *Id.* Furthermore, lessee's implied duty of surface restoration "runs with the lease." *Chevron U.S.A. Inc. v. Murphy Exploration & Production Co.,* 356 Ark. 324, 151 S.W.3d 306 (2004). In *Chevron*, the Court noted that an assignee of an oil and gas lease "should be held to have known that it was taking on the duty to restore any existing surface damage" on the assigned leasehold.

## IV. CONCLUSION

Many of the conflicts arising between lessees and surface owners can be avoided by using oil and gas leases which clearly identify the scope of surface use rights and provide for appropriate damage payments to the lessor. Of course, if the mineral estate is severed, the surface owner has no say in the lease terms. It is likely that the Arkansas courts will be sympathetic to surface owners burdened with leases to which they are not a party and from which they will reap no economic benefit. Many prudent operators provide damage payments to surface owners, even where the damage is reasonably necessary and the lessee has no legal liability for such payments.