

# Striking the Balance

*Enforcing surface restrictions on mineral estate in Mississippi following Petro Harvester v. Keith*



**A recent decision by the 5th U.S. Circuit Court of Appeals highlights the continued tensions between surface estates and mineral estates in oil and gas producing areas.** The decision reiterates the dominance of the mineral estate but provides a glimpse into a developing area of conflict and considerations for analyzing potential contractual surface restrictions placed on the mineral estate.

## INTRODUCTION

Severance of the mineral estate from the surface estate has been foundational to property law across the United States and has permitted the effective and efficient development of subterranean resources.<sup>1</sup> As energy has grown in importance, so has the mineral estate itself. Energy producing states — including Texas, Mississippi, and Pennsylvania — recognize the mineral estate as dominant over the surface estate, granting mineral estate holders' rights to use the surface as necessary in order to develop the mineral estate.<sup>2</sup> Conflict between surface estate holders and mineral estate holders is, expectedly, a long-standing feature of estate severance, and courts have largely been responsible for developing mechanisms and doctrines to balance parties' competing interests in the surface.

In a recent decision by the 5th U.S. Circuit Court of Appeals applying Mississippi law, the court was asked to resolve a dispute between surface and mineral estate holders where a surface lease entered into subsequent to a mineral lease included provisions in direct contravention to the mineral estate's development rights under the mineral lease and Mississippi common law.<sup>3</sup> The court rejected the surface owner's claims and held that the rights of the mineral lessee to use the surface for ongoing operations survived the expiration of the surface lease, despite the surface lease requiring site restoration upon its expiration.

The court's holding reemphasized Mississippi's policy on the dominance of the mineral estate — even in light of conflicting, subsequent agreements that seemed to provide otherwise — and gave insights into what has been a growing area of tension. The case offers lessons for how mineral and surface estate holders should approach protecting and expanding their rights, particularly as more intensive uses of the surface — including those related to alternative energy — push into traditionally mineral-producing areas.



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- 1 See Robert Montgomery, "Water to Wind: The Path Texas Groundwater Law Provides to Sever the Wind Estate and Prioritize Mutually Dominant Estates," 50 Tex. Envtl. L.J. 107, 115 (2020).
  - 2 See, for example, *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622-23 (Tex. 1971); *Reynolds v. Amerada Hess Corp.*, 778 So. 2d 759, 762 (Miss. 2000); *Babcock Lumber Co. v. Faust*, 156 Pa. Super. 19, 31, 39 A.2d 298, 303-04 (1944); *Hayes v. A.J. Assocs. Inc.*, 960 P.2d 556, 567 (Alaska 1998).
  - 3 *Petro Harvester Operating Co. LLC v. Keith*, 954 F.3d 686 (5th Cir. 2020).

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### CASE SUMMARY

In 1985, the Keiths purchased only the surface estate of approximately 4.3 acres of land in Mississippi; the mineral estate beneath had long since been severed and was subject to a mineral lease dating back to 1959 and presumably continuing through today. Thereafter, the Keiths entered into a surface lease with the mineral lessee under the mineral lease in 1988, and Petro Harvester Operating Co. ultimately acquired the mineral rights under the mineral lease in 2010. Despite the 4.3-acre tract comprising a relatively small fraction of the overall property leased by Petro Harvester in the area, the Keiths' surface estate was heavily developed, including "six wells, three pumps, buried flowlines and piping, and an electric power panel."<sup>4</sup>

When the surface lease expired, Petro Harvester sought to continue its oil and gas operations on the Keiths' property, claiming continuing

rights as a mineral lessee under the mineral lease and Mississippi common law despite provisions to the contrary in the surface lease that required the mineral lessee to return the surface to its original state when the surface lease expired. Under such provision, Petro Harvester would presumably be required to remove all such oil and gas infrastructure, machinery and improvements on the property and to perform extensive remediation operations, despite the continued existence of a valid and continuing oil and gas lease covering the mineral estate thereunder.<sup>5</sup>

Beyond its rights under common law, the mineral lease granted Petro Harvester the right to explore, drill and operate for minerals as well as construct such infrastructure as was necessary for such purpose on the surface. The surface lease, conversely, provided that the "Tenant agrees at the end of the lease term

that it shall return the premises to Landlord in the same or similar condition as the property was in at the commencement hereof except for normal wear."<sup>6</sup> Importantly, the surface lease was executed nearly 30 years after the mineral lease but made no reference to the mineral lease.<sup>7</sup>

At trial, and again on appeal, the Keiths argued that the subsequently entered surface lease controlled, in addition to bringing various counterclaims, including breach of contract and breach of the implied duty of good faith and fair dealing, and affirmative defenses, including waiver, ratification, and estoppel, none of which persuaded the courts. The U.S. District Court for the Southern District of Mississippi emphasized common features of severed estates — that the mineral lessee holds the dominant estate and has the right to "use the surface of the lands for all reasonable purposes to explore and drill for oil and gas and may use as much of the surface as is reasonably necessary to exercise its rights."<sup>8</sup> The trial court, relying primarily on the Mississippi Supreme Court's decision in *Reynolds v. Hess*, was plain in its holding that Petro Harvester did not — and could not — bargain away its rights as mineral lessee, stating categorically that "a surface lease does not supersede a preexisting mineral lease," reasoning that "[s]urface leases, surface damage agreements, or other contractual arrangements favoring the mineral estate merely expand the mineral owner's extant right to use as much of the surface as is reasonably necessary to conduct its operations."<sup>9</sup>

4 *Id.* at 690.

5 *Id.* at 689-90.

6 *Id.* at 690.

7 *Id.*

8 *Petro Harvester Operating Op. LLC v. Keith*, No. 2:18-cv-00042-KS-MTP, 2019 U.S. Dist., at 5 (S.D. Miss. Feb. 28, 2019), citing *EOG Resources, Inc. v. Turner*, 908 So. 2d 848, 851 (Miss. Ct. App. 2005).

9 *Id.* at 7-9, citing *Reynolds v. Amerada Hess Corp.*, 778 So. 2d 759 (Miss. 2000). The *Reynolds* court, in an analogous case involving a surface owner's interference with the operations of mineral owners, held in favor of Hess, the operator, despite its being explicitly bound by a surface lease, effectively permitting Hess to rely on the implied and explicit surface rights granted to it as mineral lessee to avoid conflicting contractual obligations under the surface lease. *Reynolds v. Amerada Hess Corp.*, 778 So. 2d 759 (Miss. 2000).

On appeal, the 5th Circuit largely affirmed the trial court's holding, again relying heavily on long-standing Mississippi case law on the dominance of the mineral estate, as well as *Reynolds* and its progeny, but walked back some of the trial court's reasoning that seemed to find it functionally impossible for a surface owner to contract for binding and enforceable obligations that impede a mineral owner's development of its estate in ordinary circumstances.

In affirming the decision, the Court of Appeals stated, "the Surface Lease here, *as written*, did not supersede Petro Harvester's explicit and implicit surface rights as a mineral lessee after expiration of the Surface Lease."<sup>10</sup> The court took the crucial step of explicitly limiting its holding in a manner distinct from the trial court:

We emphasize that our holding should not be construed to preclude the possibility that a surface owner who also owns the mineral rights could include surface-use restrictions in the mineral lease. Indeed, an appropriately drafted surface lease that refers explicitly to the mineral lease may be capable of modifying the mineral lease; and a mineral deed that initially severs the surface from the mineral rights might also establish surface-use restrictions.<sup>11</sup>

While this language is not binding, it clearly contemplates scenarios in which surface owners may actually be able to ensure their rights relative to mineral lessees are adequately



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established and protected under Mississippi law and are enforceable in court where necessary.

### **GENERAL USE PRINCIPLES, THE ACCOMMODATION DOCTRINE AND SURFACE OWNER PROTECTIONS**

Throughout mineral producing jurisdictions, an oil and gas lease is viewed as granting the mineral lessee the right, either implied or express, to reasonable use of the surface estate so as to locate, develop and produce oil and gas, as mineral rights would be useless without such meaningful and enforceable rights. With this approach came the commonly stated "reasonably necessary" principle that provides the mineral estate holder all such access and use

as is reasonably necessary to obtain their minerals.<sup>12</sup> Stated another way, in light of such principles, the mineral lessee's estate is considered the dominant estate, and the surface estate is, therefore, considered the servient estate.<sup>13</sup>

As exploration and development of minerals increased and the reasonable use doctrine was applied broadly, however, it was generally adopted over time that greater protections of the surface estate were required to refine the dominant / servient estate balance. Led by Texas, states began to adopt the "accommodation doctrine," which generally requires that the mineral estate holder act in "due regard" for the surface estate holder, with particular protection being afforded

<sup>10</sup> *Petro Harvester*, 954 F.3d at 689 (emphasis added).

<sup>11</sup> *Id.* at 696.

<sup>12</sup> See, for example, *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967) ("The lessee had the right to use as much of the premises, and in such a manner, as was reasonably necessary to comply with the terms of the lease and to effectuate its purposes."); see also *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 136 (N.D. 1979).

<sup>13</sup> *Hunt Oil Co.*, 283 N.W.2d at 135 (stating that past cases "recognize the well-settled rule that where the mineral estate is severed from the surface estate, the mineral estate is dominant ... Thus, the surface estate is servient in the sense it is charged with the servitude for those essential rights of the mineral estate.").

where there is a planned or existing use of the surface.<sup>14</sup> Other states have moved beyond just common law protection, opting for statutory solutions to balance the interests of the mineral and surface estates.<sup>15</sup>

Mississippi, however, stands as a notable outlier against this trend in favor of the surface estate. In *Abraham v. Sklar*, the court reiterated the state's position limiting recovery to instances of unreasonableness and held that the surface owner could not "recover damages for the location of the well, drilling pad, or pipeline, without any evidence that the location was unreasonable. They may, however, recover damages if [the operator] unnecessarily and unreasonably damaged the surface, or used more of the surface than was reasonably necessary to the mining operations."<sup>16</sup> That same year, the Mississippi Court of Appeals refused to find a duty to accommodate for planned uses as is described in the accommodation doctrine as applied by other states.<sup>17</sup> The court refused recovery to the surface owner as they failed to demonstrate that the operator was "wanton or negligent," insisting on a higher degree of culpability than in other states.<sup>18</sup>

The decision in *Petro Harvester*, then, sits against a background of case law that provides surface estate holders with potentially fewer avenues to protect surface



uses and planned surface uses than some other mineral producing states, reiterating the importance of establishing effective means to guard against competing or encroaching mineral development. This is particularly true as land-intensive renewable energy development gets a foothold in the state.<sup>19</sup>

### MISSISSIPPI IMPLICATIONS

As contemplated by the Court of Appeals in *Petro Harvester*, a surface estate holder may be able to enforce limitations on the mineral estate where such limitations are memorialized in a surface lease or other agreement that references the mineral deed explicitly (even if such surface owner does not own

the mineral rights or the surface restrictions were not contained in the original mineral deed or instrument severing the surface and mineral estates).<sup>20</sup> In essence, if the mineral estate and surface estate holders in Mississippi intend to deviate from traditional dominant estate principles, they have to carefully and unequivocally state as much in their written agreement.

Beyond wholesale preclusions or potentially onerous covenants, surface owners may also consider opting for or adding provisions related to damages, should the mineral lessee's actions — permitted or not — cause certain injuries to the surface. In a 1952 decision by the Court of Civil Appeals of Texas, the court held that the "operator of an oil and gas lease ... has the right to use as much of the surface of the land, and to use it in such manner, as is reasonably necessary," but stated, "if they so desire, the parties may by special contract provide that although the lessee has a right to use the surface of the land, he shall pay therefor or make the lessor whole for any damages done to the land or growing things situated thereon."<sup>21</sup> A similar result was reached by the Mississippi Supreme Court where it held that a clause in a mineral lease regarding well placement that was violated by lessee entitled the lessor to damages resulting

14 See *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971) (establishing the accommodation doctrine under Texas law); *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244 (Tex. 2013) (setting forth the burden of evidence for a surface owner); *United States v. Minard Run Oil Co.*, Civil Action No. 80-129 Erie, 1980 U.S. Dist. LEXIS 9570, at \*14 (W.D. Pa. Dec. 16, 1980) (application under Pennsylvania law); *McFarland v. Taylor*, 76 Ark. App. 343, 346-47 (2002), citing *Diamond Shamrock Corp. v. Phillips*, 511 S.W.2d 160 (1974) (application under Arkansas law); *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997), as modified on denial of reh'g (Oct. 20, 1997) (application under Colorado law).

15 For example, statutes in Oklahoma, Montana, North Dakota, and South Dakota require that lessees provide notice and negotiate access and damages issues in good faith. Okla. Stat. tit. 52, § 318.3; Mont. Code § 82-10-504; S.D. Codified Laws § 45-5A-4.1; Wyo. Stat. § 30-5-402.

16 *Abraham v. Sklar Expl. Co.*, 408 F. Supp. 2d 244, 250 (S.D. Miss. 2005).

17 *EOG Res., Inc. v. Turner*, 908 So. 2d 848, 854-57 (Miss. Ct. App. 2005).

18 *Id.* at 854-55.

19 Geoff Pender, "Mississippi's first wind farm planned for Tunica," *Mississippi Today* (Feb. 24, 2021), <https://mississippitoday.org/2021/02/24/mississippis-first-wind-farm-planned-for-tunica>; Solar Energy Ind. Assoc., *Mississippi Solar*, <https://www.seia.org/state-solar-policy/mississippi-solar>.

20 954 F.3d at 696.

21 *Meyer v. Cox*, 252 S.W.2d 207, 208 (Tex. Civ. App. 1952) (lease between lessor and lessee provided that "[n]o wells shall be bored or any operations under this lease conducted within 100 yards of any existing water well or building upon said premises without the written consent of lessors").

from the misplaced well.<sup>22</sup> A well-drafted surface use agreement will not only restrict and/or dictate a variety of oil and gas operations or locations (which may or may not be enforceable based on the competing tensions and doctrines referenced in *Petro Harvester*), but frequently will also or alternatively set forth a detailed and specific surface use or damage fee structure that further incentivizes reasonable development by the mineral lessee and better aligns the parties' interests concerning surface development.

These and other considerations are critical for both surface and mineral estate holders to consider, particularly in mineral producing states and in areas with more permissive frameworks for mineral

lessees. The nature of the limitations themselves, the parties that entered into the instruments, and the timing and documentation surrounding the instruments under which they appear may all impact the enforceability thereof and potentially result in a contracting party receiving something less than what was originally bargained for in the plain words set forth in the underlying agreement at issue. ▲

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22 *Union Oil Co. v. Bishop*, 236 So. 2d 434 (Miss. 1970).

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