# COMPETITION AND CONFLICTS BETWEEN OWNERS OF COAL & LIGNITE RIGHTS AND OWNERS OF OIL & GAS RIGHTS IN TEXAS

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## I. COAL AND LIGNITE - ARE THEY PART OF THE MINERAL OR SURFACE ESTATE UNDER TEXAS LAW?

In order to understand the various rights and obligations of the owners of coal and lignite and the owners of oil and gas and how those rights and obligations will impact the resolution of conflicts between such owners, it is important first to determine whether coal and lignite occupy the same status as oil and gas; i.e., whether they are part of the mineral estate, which under Texas law is the dominant estate, or whether they are part of the subservient surface estate.

The determination whether coal and lignite are part of the surface estate or part of the mineral estate is based upon the tests announced in *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971), which was modified by *Reed v. Wylie,* 554 S.W.2d 169 (Tex. 1977) (*Reed I*), which was then modified by *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980) (*Reed II*).

However, when the State is involved and claiming title to reserved/severed mineral interests, a different rule is applied. *See Schwarz v. State,* 703 S.W.2d 187 (Tex. 1986).

### *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971)

*Acker* did not deal with coal and lignite as did *Reed I* and *Reed II*, but instead dealt with iron ore. However, the mining techniques for near surface iron ore and near surface coal and lignite are essentially the same. In *Acker* the issue was stated as follows:

> The question to be decided is whether an interest in the iron ore passed to the grantee under a deed executed in 1941 and purporting to convey 'an undivided 1/2 interest in and to all of the oil, gas and other minerals in and under, and that may be produced from' a tract of 86 1/2 acres in Cherokee County

*Acker* announced the surface destruction test as to whether a mineral, such as iron ore (or for that matter, coal and lignite) was part of the mineral or surface estates:

> In our opinion the basic approach there suggested is entirely sound. A grant or reservation of minerals by the fee owner effects a horizontal severance and the creation of two separate and distinct estates: an estate in the surface and an estate in the minerals. *See Texas Co. v. Daugherty*, 107 Tex. 226, 176 S.W. 717; Walker, Fee

> Simple Ownership of Oil and Gas in Texas, 6 Tex.L.Rev. 125. The parties to a mineral lease or deed usually think of the mineral estate as including valuable substances that are removed from the ground by means of wells or mine shafts. This estate is dominant, of course, and its owner is entitled to make reasonable use of the surface for the production of his minerals. It is not ordinarily contemplated, however, that the utility of the surface for agricultural or grazing purposes will be destroyed or substantially impaired. Unless the contrary intention is affirmatively and fairly expressed, therefore, a grant or reservation of 'minerals' or 'mineral rights' should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate. *See* Clark, Uranium Problems, 18 Tex.B.J. 505.
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> That is the rule to be applied in determining whether an interest in the iron ore was conveyed by the deed in this case. In terms of its location with respect to the surface, methods by which it must be mined, and the effect of production upon the surface, the ore is quite similar to gravel and limestone. Aside from the general reference to 'other minerals,' moreover, there is nothing in the deed even remotely suggesting an intention to vest in the grantee the right to destroy the surface. It is our opinion that in these circumstances the ore, like gravel and limestone, should be considered as belonging to the surface estate and not as part of the minerals. We accordingly hold that as a matter of law no interest in the ore passed by the deed.

***Reed v. Wylie,* 554 S.W.2d 169 (Tex. 1977) (*"Reed I"* )**

*Reed I* involved the construction of a 1950 deed and determination as to whom owned the coal and lignite under a specific tract of land. The minerals had been severed from the surface and the reservation in the deed read as follows:

> In addition to the above and foregoing exception there is hereby excepted and reserved to the Grantors herein a one-fourth (1/4) undivided interest in and to all oil, gas and other minerals on and under the land and premises herein described and conveyed; and it is hereby expressly agreed and understood that Grantors herein, their heirs and assigns shall have, and they hereby have the right of ingress and egress for the sole and only purpose of mining and operating for oil, gas and all other minerals, on and under said land, and to produce, mine, save and take care of said products, and to take all usual,

> necessary and convenient means for working, preparing and removing said minerals from under and away from said land and premises.

The Texas Supreme Court reaffirmed the holding of *Acker* and also incorporated the following additional holdings:

(1) *Acker* controls all substances which would otherwise be considered minerals, and includes coal and lignite:

> "*Acker v. Guinn* stands for the rule that a substance is not a "mineral" if substantial quantities of that substance lie so near the surface that the production will entail the stripping away and substantial destruction of the surface.:

(2) Ownership of the mineral at whatever depth it is found is controlled by whether the mineral is owned by the surface owner due to the surface destruction test announced in *Acker*:

> "That being the circumstance, and there being no contrary affirmative expression in the instrument, it controls the construction of the instrument as to the same substance at all depths."

This holding clarified that ownership of a mineral such as coal and lignite would not be split between the surface estate and mineral estate based solely upon its proximity to the surface and mining technique despite the urgings of the dissent that the Court should adopt a rule where the surface owner would be the owner only of that amount of coal and lignite which had to be strip mined and the mineral owner would be the owner of the minerals which would be extracted by mining which would not destroy the surface.

(3) The Court clarified that the burden to prove that a mineral such as coal or lignite is part of the surface estate falls on the surface owner and established that the surface owner's burden of proof required a showing that extraction of the mineral at the date of the instrument creating the severance had to be of a surface depleting or destructive nature:

> "Instead, the surface estate owner must prove that, as of the date of the instrument being construed, if the substance near the surface had been extracted, that extraction would necessarily have consumed or depleted the land surface."

The court also noted that disputes of this type rarely involve substances about which the parties had *any* specific intent whatsoever; rather, they are inclined to concern unnamed minerals which later become very valuable, the subsequent controversy determining only who will be enriched by the extraction of the substance.

***Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980) (*"Reed II"*)**

*Reed II* overruled *Reed I* to a limited extent:

(a) That part of the *Reed* opinion which required a fact finding that the surface must have been destroyed as of the date of the instrument was overruled.

(b) *Reed II* also substituted/clarified the following tests:

(1) In substitution of the two portions of *Reed I* specifically overruled, the following test was instead substituted:

> "The test now is whether any reasonable method, including such a method as of the date of this opinion, of removal of the lignite, coal or iron will consume, deplete or destroy the surface." In other words, if at any point from the date of the severance to the present, a reasonable method for mining would be surface depleting or destructive, then the surface owner owns the near surface minerals

(2) The opinion clarified that "at the surface" as stated in *Reed I* also means and includes near the surface and that, as a matter of law, "[a] deposit which is within 200 feet of the surface is "near surface"".

(3) The Court then restated the rule regarding ownership of a mineral substance found at or near the surface:

> "to restate the rule for clarity, it is this: if the surface owner satisfies the tests set out above, and establishes ownership of the substance at or near the surface, he or she owns the lignite, iron, or coal beneath such land at whatever depth it may be found."

***Schwarz v. State,* 703 S.W.2d 187 (Tex. 1986)**

Schwartz stands for the proposition that *Acker, Reed I,* and *Reed II* do not apply, however, when the State is the owner of the "minerals". In a dispute between the

state and a private citizen over the ownership of coal and lignite, the Texas Supreme Court ruled that any ambiguities concerning what minerals the state conveyed to a private citizen should be resolved in favor of the State. *See Schwarz v. State,* 703 S.W.2d 187 (Tex. 1986). As a result, the ubiquitous mineral reservation contained by the State meant that the State retained all of a tract's coal and lignite and that the surface owner did not own the coal and lignite, despite the fact that it lay within 200 feet of the surface. As summarized by the Court:

> Thus, after tracing the history of mineral reservations in public land grants, it is clear that the sovereign in Texas has always claimed all of the substances commonly classified as "minerals" and only gives away those substances by an express release or conveyance. Even disregarding the historical basis, however, there remains a very valid reason for the distinction between conveyances by private parties and conveyances by the State. The State holds the public lands in trust for the benefit of all of her people. The State subsidized and encouraged settlement in frontier areas by offering the land to settlers on extremely favorable terms. The Alexanders did not purchase this land in the open market place and they did not pay the full market price for it. Furthermore, the legislature has provided by statute that money paid for certain minerals reserved by the State, the extraction of which is usually destructive to the surface, such as coal, lignite, and uranium, will be divided with the surface owner. TEX.NAT.RES. CODE ANN. § 53.065 (Vernon 1978) provides that the surface owner will receive 40% of all bonuses, rentals and royalties. Section 53.066 provides that these payments are in place of all damage to the soil. Section 53.061 allows the surface owner to negotiate the lease. Chapter 131 of the Code mandates reclamation of the surface by a strip mine operator. These statutory protections were not purchased in the open market place but rather are part of the same broad public policy which reserved to the State the lignite under the Schwarz' property.

**Answer to Initial Question**

From a theoretical standpoint and based upon the foregoing decisions, the answer to the initial question as to whether coal and lignite are owned by the owner of the surface or mineral estates would be that it depends upon the factual circumstances, both those relating to any grant or reservation and the location of the coal and lignite on the property. As *Schwartz* has made clear, the State would own the coal and lignite as to tracts under which it reserved the minerals. Further, if coal

and lignite were expressly reserved or conveyed (as opposed to the more common practice where conveyances or reservations merely state "other minerals", then the person reserving or to whom such a specific grant of the coal and lignite was made would own the coal and lignite. *See Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 789-790 (Tex. 1995) However, historically, very few deeds either conveyed or reserved coal and lignite specifically, and, as a result and because essentially all coal and lignite currently being mined in Texas is extracted by strip mining rather than by underground mining techniques, ownership of such coal and lignite would, in the vast majority of situations be vested in the owner of the surface estate rather than the mineral estate.

## II. WHAT ABOUT COALBED METHANE?

I was unable to find any Texas statutes or caselaw which addresses who would own coalbed methane. However, unless, pursuant to *Reed II*, coal and lignite existed on a particular tract within 200 feet of the surface and a reasonable method for mining such coal and lignite would be surface depleting or destructive, any coalbed methane under such tract should be treated as a mineral and owned by the mineral estate owner rather than the surface estate owner. Under *Schwartz*, the State would own coalbed methane on tracts in which the State had reserved the minerals regardless of the existence of coal and lignite within 200 feet of the surface

However, in those situations where the State has not reserved minerals and there are coal and lignite deposits within 200 feet of the surface for which a reasonable method for mining would be surface depleting or destructive and much deeper coal seams where coalbed methane is also located, *Reed II* would hold that the surface owner owns the coal and lignite at all depths. Since coalbed methane is a byproduct of coal and lignite, the unanswered question in those limited circumstances will be whether the methane, as a byproduct of coal, is to be treated just as if it were coal or lignite and owned by the surface estate owner or whether the coalbed methane should be treated similarly to natural gas and owned by the mineral estate owner.

I am also currently unaware of any significant attempts to produce coalbed methane in Texas. However, the US Department of Energy Energy Information Administration shows some limited production from the Eagle Pass area as well as reserves in north central Texas.

As traditional supplies of oil and natural gas are depleted in Texas, coalbed methane may become more financially attractive and Texas courts may be faced with having to decide ownership issues in those circumstances where coal and lignite is found at both near surface and deeper depths.

## III. UNDERSTANDING RIGHTS RELATING TO THE MINERAL/DOMINANT ESTATE AND SURFACE/SUBSERVIENT ESTATE

In Texas, the mineral estate, which includes oil and gas, is the dominant estate and the mineral owner has the right to use as much of the surface estate as may be reasonably necessary to enjoy the mineral estate.

In *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 789 (Tex. 1995), the rationale for the dominance of the mineral estate was stated as follows:

> It has historically been held that the mineral estate is dominant, meaning, the mineral owner has the right to use so much of the surface as may be reasonably necessary to enjoy his mineral estate. *See Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971); *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302, 305 (1944); *Cowan v. Hardeman*, 26 Tex. 217, 222 (1862) (noting that these rights existed both in Spanish civil and English common law). Practically speaking, the mineral estate would be wholly worthless if the owner of the minerals could not enter upon the land in order to explore for and extract them. *Harris*, 176 S.W.2d at 305.

However, the Court in *Plainsman* also recognized the inherent conflict between the owner of a severed mineral estate and the owner of a surface estate:

> Just as the mineral estate would be worthless absent a right to make use of the surface, the surface estate would be worthless if the reasonable use granted to the mineral owner encompassed the right to consume or deplete the surface. Thus, in *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971), this court created the presumption that a surface owner conveying "minerals" did not intend to convey the right to destroy his interest. Likewise, we presumed the grantee of a surface estate from which "minerals" are reserved did not intend to accept an estate with little or no value. We followed the rule that where a deed conveyed or reserved minerals generally, it did not convey or reserve any substance the extraction of which, by any reasonable means, would consume or deplete the surface. *See Reed v. Wylie*, 597 S.W.2d 743 (1980)

**Accommodation Doctrine/Due Regard for the Rights of Surface Estate**

In *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971), the Court articulated the concept that the mineral lessee must exercise its rights with due regard for the rights of the surface owner. As explained in the opinion in *Getty Oil*, Jones had erected a self propelled above ground irrigation system, commonly known as a center-pivot irrigation system or circle irrigation system. For those who have been to West Texas or other fairly dry parts of the country, you may have seen this example of an irrigation system. It has a central hub which is the pivot point and the irrigation sprinklers are suspended from a tube about 7-10 feet above ground with wheeled assemblies spaced along the length of the tube/sprinkler assembly and the tube and sprinklers rotate around the central hub so that you get a circular irrigation pattern. The oil and gas lease was in existence at the times that Jones acquired the surface. Prior to installation of the system, Getty had drilled one well, which did not interfere with the irrigation system following its installation. By the time Getty drilled two additional wells, Jones had installed his irrigation system and the additional wells which Getty had drilled required pumping units taller than the sprinkler system could accommodate unless the pumping units were submerged below the surface. Getty's placement of the wells and planned installation of pumping units would have effectively made it impossible for Jones to continue to use his irrigation system to water his crops. Adobe also owned part of the lease on other lands owned by Jones and had built cellars to install its pumping units and oriented the cellars so that its wells and pumping units would not interfere with Jones' irrigation system.

Although the *Getty Oil* Court sent the case back to the trial court for further proceedings, the Court provided the following guidance to the trial court in how to proceed in determining the respective rights of Getty and Jones:

> But under the circumstances indicated here; i.e., where 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.
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> There must be a determination that under all the circumstances the use of the surface by Getty in the manner under attack is not reasonably necessary. The burden of this proof is upon Jones, the surface owner. *Cf. Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133 (Tex.Sup. 1967). Jones sought to discharge this burden by showing that the use which Getty is making of the surface is not reasonably necessary because of non-interfering and reasonable ways and means of producing the minerals that are available to Getty, the

> use of which will obviate the abandonment by Jones of his existing use of the surface, and that the alternatives available to Jones would be impractical and unreasonable under all the conditions. These are the elements to be considered by the trier of facts and the jury should be so instructed in resolving the issue of the reasonable necessity of the surface use by Getty, the mineral lessee.

*Texas Genco, LP v. Valence Operating Co.*, 187 S.W.3d 118, 125 (Tex.App.-Waco 2006, pet. denied) also addressed the issue of due regard and held:

> The dominant mineral estate has the right to reasonable use of the surface estate to produce minerals, but this right is to be exercised with due regard for the rights of the surface estate's owner. *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971). This concept of "due regard," known as the accommodation doctrine, was first articulated in *Getty Oil* and balances the rights of the surface owner and the mineral owner in the use of the surface. *Tarrant County Water Control & Improvement Dist. No. 1 v. Haupt, Inc.*, 854 S.W.2d 909, 911 (Tex. 1993) (*Haupt I*). Upon remand of *Haupt I*, we reiterated the elements of the accommodation doctrine that have been established by the supreme court: [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 [mineral owner] whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the [mineral owner]. *Haupt, Inc. v. Tarrant County Water Control & Improvement Dist. No. 1*, 870 S.W.2d 350, 353 (Tex.App.-Waco 1994, no writ) (*Haupt II*) (quoting *Getty Oil*, 470 S.W.2d at 622). And while we noted that the accommodation doctrine preserves the mineral owner's absolute right to use the surface if there is only one way to produce the minerals, we repeated the core of the accommodation doctrine: *Getty recognizes that if there is but one means of surface use by which to produce the minerals, then the mineral owner has the right to pursue that use, regardless of surface damage.* [citation omitted]. On the other hand, if 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 (especially when there is only one reasonable manner in which the surface may be used) 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 I*, 854 S.W.2d at 911-12) (emphasis in original); *see also id.* at 912-13 ("if reasonable alternative drilling methods exist that protect [the surface owner's existing use], then an accommodation by the mineral owners would be *required*") (emphasis added). We then delineated the surface owner's burden of proof: [T]he surface owner must show that the particular manner of surface use being challenged is not reasonably necessary to the mineral owner under all circumstances. *Haupt*, 854 S.W.2d at 911; *Getty Oil*, 470 S.W.2d at 623. This may be done by proving that the mineral owner has available other reasonable means of production, in addition to the method under attack, that will not interfere with the surface owner's existing use. *Id.* Moreover, the surface owner must also show that any alternative uses of the surface, other than the existing use, are impracticable and unreasonable under all the circumstances. *Getty Oil*, 470 S.W.2d at 623. All of these elements of the surface owner's burden are fact-sensitive and must be established either conclusively or by appropriate findings in determining the reasonable necessity of the mineral owner's surface use. *Haupt*, 854 S.W.2d at 911; *Getty Oil*, 470 S.W.2d at 623.

*Valence Operating Co. v. Texas Genco, LP*, 255 S.W.3d 210 (Tex.App.–Waco 2008) reinforces the accommodation doctrine and makes clear that directional drilling is an acceptable alternative to accommodate an existing surface use. Valence attempted to raise on appeal the issue of whether it could be compelled to directionally drill from a surface location outside of its unit or lease, but the Court would not address this issue as there was evidence that the surface location for a directionally drilled well could be located on the unit and lease so as not to interfere with the ash-disposal landfill operated by Texas Genco incident to its lignite coal plant operations.

**Degree of Surface Use Required under the Accommodation Doctrine**

As indicated by both *Getty* and *Texas Genco*, the use of the surface for which protection is to be extended under the due regard/accommodation doctrine is only existing surface use and facilities. A surface owner's unrealized plans to make some future use of its property will not bring into play such doctrine.

However, in order for the owner of a coal and lignite lease to apply for and obtain a surface mining permit, such owner is required to commit significant resources and time in commissioning and completing various studies required to be submitted as part of the permit application process. *See* 16 TEX. ADMIN. CODE §12.100-12.221. Texas courts have not yet ruled on whether the issuance of a mining permit, the

existence of an application for a mining permit, or even the commencement or partial or substantial completion of the massive and expensive amount of work necessary to obtain a mining permit would constitute an unrealized plan to use the surface or would be sufficient use of the surface to bring the accommodation doctrine into play. Considering the amount of time and expense which the owner of a coal and lignite lease has to invest as part of the permit application process before it can receive a mining permit and the public notice which such owner has to give as part of the permit application process, I suspect that a court, if faced with this question, will ultimately hold that there will be some level at which the preparatory work to obtain a permit will trigger the accommodation doctrine. Factors in such a decision will probably include, but not necessarily be limited to: (i) the state of the mining project and financial commitments already invested by the owner of the coal and lignite lease covering the tract as to which there is a conflict; (ii) the projected timeline for approval of a mining permit by the Railroad Commission, (iii) the projected timeline for mining the tract at issue and whether mining of such tract could be postponed without any great hardship on the coal and lignite lessee, (iv) the estimated time period that an oil and gas well would be producing from such tract, and (v) available options to directionally drill the oil and gas well

## IV. COMPETING MINERAL ESTATES

What happens when there is a conflict regarding reasonable use of the surface between the owner of an oil and gas lease and the owner of a coal, lignite or coalbed methane lease in a situation where Texas law would hold that such substances are part of the mineral estate rather than part of the surface estate?

I don't know the answer to this question and have not found any cases which definitively address this issue. Factors/issues to consider in determining a possible answer to this question would be:

(i) Since both owners own interests in the mineral estate which under Texas law is the dominant estate, there would be no priority based upon dominant/servient estates.

(ii) Would dominance be based upon whose lease was recorded first; i.e., if the coal, lignite or coalbed methane lease has been executed and recorded at the time the oil and gas lease was granted, does the oil and gas lessee take subject to the rights of the coal, lignite or coalbed methane lessee? Typically, record notice of the rights of another party means that the subsequent purchaser takes and exercises its

rights subject to the rights of the owner whose instrument was already of record.

(iii) Would a more fair and equitable manner of handling this issue be to adopt the due regard/accommodation doctrine espoused in *Getty* and its progeny?

(iv) Would the timing of the application for a drilling or mining permit from the Railroad Commission be determinative on a first come, first served type of basis?

If I were counseling a client faced with this potential situation, I would highly recommend that the parties attempt to come to an agreement prior to conducting operations on the land in question to avoid the possibility of future problems.

From a practical standpoint, however, the chances of this type of conflict are currently essentially nonexistent in Texas inasmuch as virtually all mining of coal and lignite is based upon strip mining, which renders the coal and lignite part of the surface estate rather than the mineral estate in the vast majority of cases.

## V. COAL MINING LAWS AND REGULATIONS

Coal mining is covered by the federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328, and in Texas by the Texas Surface Coal Mining and Reclamation Act, TEX. NAT. RES. CODE §§ 134.001 *et seq*., and Texas Railroad Commission regulations found at 16 TEX. ADMIN. CODE §12.01 *et seq*.

The various laws exempt, except under certain very limited circumstances, the following types of lands as unsuitable for surface coal and lignite mining:

(1) Any lands within the boundaries of:

(A) the National Park System;
(B) the National Wildlife Refuge System;
(C) the National System of Trails;
(D) the National Wilderness Preservation System;
(E) the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act, 16 U.S.C. 1276(a), or study rivers or study river corridors established in any guidelines issued under that Act; or
(F) National Recreation Areas designated by Act of Congress.

(2) Any federal lands within a national forest, except that this prohibition must not apply if the Secretary finds that there are no significant recreational, timber, economic, or other values that may be incompatible with surface coal mining operations, and:

> (A) any surface operations and impacts will be incident to an underground coal mine; or
> (B) with respect to lands that do not have significant forest cover within national forests west of the 100th meridian, the Secretary of Agriculture has determined that surface mining is in compliance with the Act, the Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. 528-531; the Federal Coal Leasing Amendments Act of 1975, 30 U.S.C. 181 et seq.; and the National Forest Management Act of 1976, 16 U.S.C. 1600 et seq.

(3) Any lands where the operation would adversely affect any publicly owned park or any place listed in the National Register of Historic Places; however, this prohibition does not apply if, as provided in §12.73(d) of this title (relating to Commission Obligations at Time of Permit Application Review), the Commission and the federal, state or local agency with jurisdiction over the park or place jointly approve the operation.

(4) Within 100 feet, measured horizontally, of the outside right-of-way line of any public road, except:

> (A) where a mine access or haul road joins a public road, or
> (B) when, as provided in §12.72(a) of this title, the Commission (or the appropriate public road authority designated by the Commission) allows the public road to be relocated or closed, or the area within the buffer zone to be affected by the surface coal mining operation, after:
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> > (i) providing public notice and opportunity for a public hearing in accordance with §12.72(a)(3) of this title; and
> > (ii) finding in writing that the interests of the affected public and landowners will be protected.

(5) Within 300 feet, measured horizontally, of any occupied dwelling; except when:

> (A) the owner of the dwelling has provided a written waiver consenting to surface coal mining operations within the protected zone, as provided in §12.72(b) of this title; or

(B) the part of the operation to be located closer than 300 feet to the dwelling is an access or haul road that connects with an existing public road on the side of the public road opposite the dwelling.

(6) Within 300 feet, measured horizontally, of any public building, school, church, community or institutional building, or public park.

(7) Within 100 feet, measured horizontally, of a cemetery; however, this prohibition does not apply if the cemetery is relocated in accordance with all applicable laws and regulations.

16 TEX. ADMIN. CODE §12.71

In addition the following types of areas may, upon application, be (but are not required to be) designated as unsuitable for certain types of surface coal mining operations, if the operations will:

(1) be incompatible with existing state or local land-use plans or programs;
(2) affect fragile or historic lands in which the operations could result in significant damage to important historic, cultural, scientific, or esthetic values or natural systems;
(3) affect renewable resource lands in which the operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products; or
(4) affect natural hazard lands in which the operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

16 TEX. ADMIN. CODE §12.75.

None of such designations of unsuitable or potentially unsuitable areas for coal and lignite mining include lands upon which oil and gas wells and other production facilities are located.

## VI. CONFLICTS AND POSSIBLE RESOLUTIONS

As previously noted, almost all of Texas' current coal and lignite production is obtained by strip mining so the conflict, if it arises, will almost always be characterized, from a legal standpoint, as a conflict between the owners of the surface estate and those of the mineral estate and subject to the prior stated rules regarding

such conflicts, with the oil and gas lessee/owner's dominant rights tempered by the accommodation doctrine stated in *Getty Oil* and its progeny.

I have been unable to find any reported decisions in Texas on the issue of resolution of conflicts regarding use of the land between owners of oil and gas rights and owners of coal and lignite rights. Instead, all reported decisions have been concerned with identifying the owner of such rights and in the nature of *Reed I*, *Reed II* and *Schwartz*. The closest cases are the two cases previously cited between Texas Genco, LP and Valence Operating Co.

Why there have been a lack of reported appellate decisions in Texas on the subject may be the result of several different factors, including the fairly small number of mines in existence in Texas and the willingness of the owners of the respective estates to work out an agreement ultimately allowing both estates to be enjoyed. The factors which either or both of the parties would need to consider as a part of negotiating such agreements would include, but not are necessarily limited to, the following:

> <u>As to proposed oil and gas drilling operations in an area which is already included within a coal and lignite mining area</u>
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> 1. An analysis of the extent that the accommodation doctrine will come into play and impact such proposed operations, including alternate surface locations outside of the mining area and the ability of the oil and gas lessee to directionally drill its proposed well or wells.
>
> 2. The costs for directionally drilling versus non-directionally drilling.
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> 3. The ability to postpone drilling operations until the mining has been performed, including extending applicable leases.
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> 4. Problems subsequent drilling may cause with regard to the reclamation duties and obligations of the mine operator and the additional cost to the mine operator resulting from any increase in the mine operator's reclamation obligations.
>
> 5. The estimate of the amount of coal and lignite which would be lost if not mined due to development of the oil and gas estate.

6. The costs of litigation, the likely period during which litigation would be ongoing, and likely outcome of all temporary and permanent relief requested by either side.

As to existing oil and gas wells in an area which is included within a coal and lignite mining area

1. The possibility of temporarily plugging back the well below the level of the mine, removing surface equipment during the mining on the tract, and then reconnecting the well following conclusion of the mining.

2. If feasible to temporarily plug back the well, the risk of formation damage and permanent loss or diminution in amount of production which will ultimately be obtained from the well, loss of production sales income during the period the well is not producing, possible lease expiration problems associated with a voluntary agreement to cease production, and costs of plugging back the well and then reconnecting the well.

3. The projected life of the well and the ability of the mine operator to alter its order of mining to postpone mining operations on the tract on which an oil and gas well is located.

4. If the well is to be permanently abandoned and plugged, the present value of the estimated production which will be lost by such plugging and abandonment.

5. The cost and feasability for drilling a replacement well from a location outside the mine area.

6. The estimate of the amount of coal and lignite which would be lost if not mined due to the existence of the oil and gas well.

7. The costs of litigation, the likely period during which litigation would be ongoing, and likely outcome of all temporary and permanent relief requested by either side.

I also have not attempted to research the laws of other states regarding the issues covered by this paper. How and to what extent conflicts are resolved in other states between owners of oil and gas leases and owners of coal and lignite leases will, to a

fairly large degree, depend upon the rights and duties the statutes and caselaw in such other states provide and impose on the respective owners of such estates, which may or may not be similar to those of Texas.

## VII. INTERESTING ONLINE ARTICLES ON TEXAS COAL AND LIGNITE MINING

I found the following online articles regarding coal and lignite mining in Texas to be interesting:

Dwight F. Henderson & Diana J. Kleiner, "COAL AND LIGNITE MINING," Handbook of Texas Online (http://www.tshaonline.org/handbook/online/articles/dkc03), accessed March 24, 2011. Published by the Texas State Historical Association.

"LIGNITE MINING," Texas Mining and Reclamation Association (http://www.tmra.com/mining-resources/lignite-mining), accessed March 24, 2011

"TEXAS AND COAL", Sourcewatch (http://www.sourcewatch.org/index.php?title=Texas_and_coal), accessed March 24, 2011

Jim Douglas, "ARLINGTON SCIENTISTS FIND WAY TO MAKE CHEAP GAS FROM COAL," WFAA TV Dallas/FortWorth (http://www.wfaa.com/news/gasoline-84801677.html), February 20, 2010, accessed March 24, 2011

"INFORMATION AND STATISTICAL FACTS ON COAL AND URANIUM MINING IN TEXAS," Texas Railroad Commission (http://www.rrc.state.tx.us/forms/publications/smrd/statiscalfactsonming.pdf), accessed March 24, 2011

"HISTORICAL COAL MINING IN TEXAS," Texas Railroad Commission (http://www.rrc.state.tx.us/forms/maps/historical/historicalcoal.php), accessed March 24, 2011