

Pooled Units and the Implied Surface Easement

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On January 7, 2013, the Court of Appeals for the First District of Texas (Houston) (the "Court") held that under Texas law the implied surface easement inherent in the mineral estate limited the mineral estate owner's right to use a surface road on a pooled tract to benefit the production from the pooled unit, subject to the accommodation doctrine, to only instances in which such use benefited wells that produced from beneath the surface tract that such road crossed. In *Key Operating & Equipment, Inc. v. Will Hegar and Loree Hegar*, (2013 WL 103633 (Tex.App.-Hous. (1 Dist.))) (hereinafter "*Key Operating*") the Court affirmed the trial court's issuance of a permanent injunction against Key Operating & Equipment, Inc.'s ("Key") use of a surface road across the Hegar family's ("Hegar") surface estate because the pooled unit's production did not include any production from the portion of the pooled mineral estate beneath the Hegar's surface estate. Key's operations included two neighboring tracts of land referred to as the Rosenbaum-Curbo tract and the Richardson tract. In 1994, Key constructed a road across the Curbo tract (a subpart of the Rosenbaum-Curbo tract) that was utilized to service wells on both the Curbo and Richardson tracts. In 2000, Key's lease on the Rosenbaum-Curbo tract terminated upon the cessation of production from the well on the Curbo tract. Key's owners subsequently acquired a 1/16th interest in the Curbo tract mineral estate and leased their interest to Key. Later that year, Key pooled its mineral interests in the Richardson and Curbo tracts and Key produced from the pooled unit through wells located on the Richardson tract that it accessed via the road on the Curbo tract. In 2002, Hegar (the surface owner at issue in this case) purchased the surface estate and a 1/4th mineral interest in the Curbo tract. In 2007, Hegar sued Key for trespass and sought a permanent injunction against Defendant's use of the road after a significant increase in Key's use of the road. The court noted that neither Key's lease nor pooling agreement covering the pooled tracts were part of Hegar's chain of title because the lease (which contained a pooling clause) and pooling agreement were executed after the severance of the mineral and surface estates. Thus, Hegar was not subject to the contractual expansion of Key's right to use the surface estate to benefit a pooled unit to which such tract was a part of that were contained in those documents (e.g. through the pooling clause in the lease or the terms of the pooling agreement). Therefore, the Court decided the case based upon a determination of the scope of Key's inherent common law surface rights as a lessee of the dominant mineral estate. While Texas courts have generally held that a mineral owner or lessee's implied surface rights extend to the surface of the entire pooled unit (rather than just the surface tract at issue), these cases involved instances where the surface owner's rights were subject to prior oil and gas leases or agreements which

contractually expanded the surface rights to which the mineral owners at issue were entitled. See *Property Owners of Leisure Land, Inc., et. al. v. Woolf & Magee*, 786 S.W.2d 757, 760 (Tex. App. "Tyler 1990, no writ"); *Delphi Gas Pipeline Corp. v. Dixon*, 737 S.W.2d 96, 98 (Tex. Civ. App. "Eastland 1987, writ den'd"); *Miller v. Crown Central Petroleum Corp.*, 309 S.W.2d 876, 878-79 (Tex. Civ. App. "Eastland 1987, writ dism'd by agmt.). In a related, but importantly distinguishable, situation the Texas Supreme Court held, in *Robinson v. Robbins Petroleum Corp.*, that the implied surface easement that is part of the mineral estate does not allow a mineral owner to use a part of the surface of its leased tract (in this case saltwater) for injection into a waterflood operation to benefit production from other mineral estates because that waterflood operation was not necessary to produce oil and gas **from the surface tract in question**. 501 S.W.2d at 866-67 (Tex. 1973). In *Robinson*, like *Key Operating*, the court noted that there was no contractual expansion of the mineral owner's inherent right to use the surface as neither the reservation of minerals nor the lease in question provided any right to pool or otherwise authorized the mineral owner to increase the burden on the surface estate for the benefit of additional lands. *Id.* at 868. As such, the court was left to interpret the scope of the mineral estate owner or lessee's inherent rights to the surface estate. The court held that the mineral owners' use of the surface (saltwater) was limited to the extent such use was reasonably necessary to produce from the Robinson's (surface estate owner's) tract, if any, but was liable to the surface owner for use of the surface for production from other mineral estates. *Id.* In *Key Operating*, Hegar presented evidence that established that the production from the well on the Richardson tract did not include production from the pooled Curbo tract in which Hegar owned the surface estate and alleged that under *Robinson*, Key's use of Hegar's surface estate solely for the benefit of other mineral estates was not permitted. The Court agreed and held that Key had "no implied right to use the [Hegar's] surface for the production of oil *exclusively* from other tracts" because such surface use was not "reasonable and necessary" for the development and production of minerals from the Curbo (Hegar's surface) tract. The Court's holding in *Key Operating* provides a further clarification with respect to a variation of the issues addressed in *Robinson* and the other Texas cases noted above. While *Robinson*, generally, limits the use of the surface estate to that reasonably necessary to develop the mineral estate under the surface estate tract being used, the holding in *Key Operating* expands this limitation to apply even when the surface estate tract being used is pooled with another tract and production is only occurring under that other tract. Further, the holding in *Key Operating* distinguishes the situation in that case from the situation covered under *Miller* and its progeny by expressly addressing the fact that any contractual expansion of the inherent surface rights to which a mineral owner is entitled to must be in the chain of title of the surface owner of the tract on which such surface use is occurring. *Key Operating* highlights an important limitation on the implied surface easement inherent in the mineral estate which developers need to take into consideration when developing a particular oil and gas play that involves pooled units. In addition to access issues, the Court's ruling could be applied to other operations that implicate the surface estate on adjoining pooled tracts, such as saltwater disposal, use of groundwater and water-storage impoundment. As of the date of this post, a petition for review has been filed by Key with the Supreme Court of Texas, and the Court has requested a full briefing on the merits. The petitioner's brief on the merits was filed on September 23, 2013 and the respondent / real

party in interest's brief on the merits is due on October 14, 2013.