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Oil and Gas - Rights of the Mineral Lessee in Use of Surface Owner's Fresh Water for Secondary Recovery Purposes, Sun Oil Co. v. Whitaker

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CASE NOTE

OIL AND GAS—Rights of the Mineral Lessee in Use of Surface Owner's Fresh Water for Secondary Recovery Purposes, Sun Oil Co. v. Whitaker, 483 S.W. 2d 808 (1972).

Petitioner, Sun Oil Company, was the lessee of a mineral estate in a 267-acre tract of land leased from L. D. Gann and wife in 1946 and extended beyond its primary term of five years by production of eight oil wells producing from the San Andres formation in Western Texas. Respondent Whitaker purchased the surface estate in 1948 as owner in fee subject to Sun's lease and subject to the reservation of all minerals that might be produced from the land by the Ganns, their heirs and assigns.

In 1956 oil production from Sun's wells diminished because of insufficient pressure in the San Andres formation. Sun sought to increase the pressure by drilling a 200-foot water well into the Ogallala fresh water sand formation on Whitaker's land, pumping not more than 100,000 gallons per day from the well, and injecting the fresh water into the San Andres sand formation. The fresh water would then mix with the already present salt water and increase the reservoir pressure. This injection method would increase the oil worth by about $3,200,000. Sun proposed to take a total of some 4,200,000 barrels of Whitaker's water with a market value by Sun's estimation of $42,000. Evidence presented showed that there was no other available fresh water source upon the 267 acre tract and that efforts to use salt water in the injection process had failed.

Whitaker utilized the surface estate for agricultural purposes and depended upon the Ogallala fresh water reservoir for irrigation. Loss or damage to this water source would substantially damage the Whitaker farm. The Ogallala formation beneath Whitaker's land had an estimated water supply yield of 40 years at current rates of usage. The proposed use of Sun would shorten this by eight years or 20 percent of the total. Upon application by Sun the Texas Railroad Commission approved the proposed waterflooding by

use of injection wells. However, no water supply was designated.[1]

The granting clause of the lease grants and leases the tract to Sun " 'for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals. . . .' "[2] The lease further provides: " '*Lessee shall have free use of* oil, gas, coal, wood and *water from said land except water from Lessor's wells for all* operations hereunder. . . .' "[3]

Sun contended that it had the implied and express right under the lease to take and consume this portion of the surface estate without compensation. The trial court jury found, apparently on the basis that Sun could purchase water from external sources, that it was not "reasonably necessary" for Sun to use the water underlying the Whitaker farm for its waterflood project. On appeal, the Texas Supreme Court held that to require Sun to purchase water from outside sources would be in derogation of the dominant estate in that Sun, by virtue of the mineral lease, had the implied right to use such part of the surface estate as was reasonably necessary to effectuate the purpose of the lease. There was thus no need to consider the question of any expressed contractual right to use the water. Sun's request for a permanent injunction restricting interference with its secondary recovery operation was granted.

Sun Oil Co. v. Whitaker[4] is apparently the first state decision granting the lessee as the owner of the dominant estate an implied easement to use fresh water resources owned by the surface estate landowner in such manner that the surface estate landowner would be substantially and irreparably injured. The mineral estate is dominant because the lessee's rights to use of the surface estate are superior to those retained by the lessor insofar as necessary to the full enjoyment

1. Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 813 (Tex. 1972) (Daniel, J., dissenting).
2. 483 S.W.2d 808 (Tex. 1972).
3. *Id.*
4. *Id.*

of the mineral grant.[5] *Acker v. Guinn*[6] limits this relationship by saying that the mineral lessee cannot make "unreasonable" use of the surface estate.

An oil and gas lease gives the lessee the right to use of the surface estate to the extent reasonably necessary to enable him to perform the lease obligations.[7] Such right may be given by express grant but it may also be implied by law based upon the inference of the intention of those making the conveyance.[8] The decision of Whitaker is an interpretation of such implied easement. In recent years various cases have ruled favorably on the implied right of the lessee to use that amount of water required for primary recovery of the mineral resources.[9] However, these cases were concerned only with the normal primary operations and no allegations were present that the surface owner would suffer substantial harm. *Stradley v. Magnolia Petroleum Co.*[10] was an early case allowing the use of fresh water for primary drilling and production purposes. Subsequent cases have, however, limited the use where an implied right was concerned by ruling that lessee must drill his own wells and cannot take advantage of either the wells or the storage water of the surface owner.[11]

The extent of the *Stradley* decision was tested and expanded in *Holt v. Southwest Antioch Sand Unit, Fifth Enlarged*[12] and *Ambassador Oil Corp. v. Robertson.*[13] Both cases permitted lessee mineral owner to take salt water for pressurization purposes for use on other lands within a unitization agreement. In neither case was there any harm to the surface estate. *Holt*[14] was a similar case to *Whitaker* in

5. 2 AMERICAN LAW OF PROPERTY § 10.58 (Casner ed. 1952).
6. 464 S.W.2d 348 (Tex. 1971).
7. Kenny v. Texas Gulf Sulphur Co., 351 S.W.2d 612 (Tex. Civ. App. 1961); 4 SUMMERS, OIL AND GAS § 652 (1962).
8. Reed v. Williamson, 164 Neb. 99, 82 N.W.2d 18 (1957); RESTATEMENT OF PROPERTY § 474(b) (1944).
9. Mack Oil Co. v. Laurence, 389 P.2d 955 (Okla. 1964); Stradley v. Magnolia Petroleum Co., 155 S.W.2d 649 (Tex. Civ. App. 1941); McFarland v. Connell, 344 S.W.2d 493 (Tex Civ. App. 1961).
10. 155 S.W.2d 649 (Tex. Civ. App. 1941).
11. Arkansas Louisiana Gas Co. v. Wood, 240 Ark. 919, 403 S.W.2d 54 (1966); Mohawk Drilling Co. v. Wolf, 262 P.2d 892 (Okla. 1953).
12. 292 P.2d 998 (Okla. 1955).
13. 384 S.W.2d 752 (Tex. Civ. App. 1964).
14. 292 P.2d 998 (Okla. 1955).

that it passed on the problem of an implied grant of water for use in secondary recovery purposes. The water though was saltwater and the court declined to consider if the same rules applied to fresh water.[15] The salt water belonged to the surface owner, but the mineral lessee was said to be entitled to that amount which was reasonably necessary for the use of waterflooding processes in the production of the oil resources.

Wiser Oil Co. v. Conley,[16] a Kentucky case, is almost directly in point. The surface estate owner asked for damages to both his surface estate and coal strata occasioned as a result of lessee's secondary recovery of oil by the use of waterflooding. The court cites these reasons for upholding the surface owner's claim:

> [W]here, as here, there is no express release of damages and a new method of withdrawing oil is employed, which was not in the minds of the parties at the time the lease was executed and which will destroy or substantially damage the landowner's remaining estates, principles of justice and humanity would require that reasonable compensation be paid the landowner for the devastation wrought.[17]

The decision of the court is that waterflooding was not a practical method of oil recovery when the mineral rights were leased in 1917; yet part of the reasoning was apparently based on the substantial harm to be suffered by the surface owner. On second appeal[18] the decision was somewhat modified when the surface owner could not prove substantial damage. The decision was further restricted in *Martin v. Kentucky Oak Mining Co.*[19] where operations were not limited to methods known at the time of the mineral severance. The court in *Martin* did, however, purport to follow the intention of the parties by considering value paid for the land. The price lessee paid for the mineral estate was sufficient consideration to purchase both mineral and surface estate.[20]

15. *Id.* at 1000.
16. 346 S.W.2d 718 (Ky. 1960).
17. *Id.* at 721.
18. 380 S.W.2d 217 (Ky. 1964).
19. 429 S.W.2d 395 (Ky. 1968).
20. *Id.* at 398.

In the absence of express provision, other cases dealing with strip mining have restricted the owner of the mineral estate from damaging or destroying the surface estate.[21] *Smith v. Moore*[22] is an example of these restrictions on the removal of coal by strip mining operations. The lease granted the right to mine coal along with use of all the surface which might be necessary and reasonable. The court ruled that the right to damage or destroy by strip mining could have been transferred, but the right would not be implied unless it is clear and expressed in terms so plain as to admit of no doubt.[23]

In considering that Sun should prevail on the basis of an implied covenant rather than considering the lower court's opinion of the express provision, the Supreme Court was able to point to the trend in past cases. Texas has shown such a trend toward upholding the rights of the mineral lessee over those of the surface owner.[24] *Getty Oil Co. v. Jones*[25] would, on first reading, appear to be a reversal of this trend, but the case was distinguished by the *Whitaker* court. The oil and gas lessee had installed pumps in *Jones,* the height of which interfered with the already existing irrigation system of the surface owner. Expert witnesses testified that different pumping devices set beneath the surface could be installed which would allow the irrigation system to operate, but that such installation would be at a greater expense to the mineral lessee. The jury was allowed to find that this use of the land by the mineral lessee was not reasonably necessary and that he must conform his pumps so as not to interfere with the irrigation system of the surface owner. *Whitaker* stated that *Jones* was limited to situations where lessee has reasonable alternate methods that exist on the lease premises to accomplish the purpose of the lease. But there was no discussion on why there should be a difference in the lessee expending reasonable amounts on the lease premises to protect the surface

21. Stewart v. Chernicky, 266 A.2d 259 (Pa. 1970); Acker v. Guinn, 464 S.W.2d 348 (Tex. 1971); West Virginia-Pittsburgh Coal Co. v. Strong, 129 W. Va. 832, 42 S.E.2d 46 (1947).
22. 474 P.2d 794 (Colo. 1970).
23. *Id.* at 795.
24. Guffy v. Stroud, 16 S.W.2d 527 (Tex. Com. App. 1929); Stradley v. Magnolia Petroleum Co., 155 S.W.2d 649 (Tex. Civ. App. 1941); Carroll v. Roger Lacy, Inc., 402 S.W.2d 307 (Tex. Civ. App. 1966).
25. 470 S.W.2d 618 (Tex. 1971).

owner and not expending similar amounts off the premises to protect him. Also important is that the mineral lessee in *Jones* was restricted in his ordinary and expected operations; yet in *Whitaker* which involved secondary recovery, the operations were unrestricted.

Justice Daniel, joined by three other justices, refused to acknowledge extension of the dominant estate as set forth by the majority. His premise was that the express provision pertaining to use of water should govern and that if an easement is to be implied, it should not extend further than what may be reasonably necessary for ordinary and customary primary drilling and producing operations. The argument is:

> [A]ny right to destroy or substantially diminish and consume the surface estate should be clearly spelled out in the contract and not be implied from general provisions relating to substantially non-consuming and non-destructive occupancy and uses of the surface.[26]

To hold such an implied grant would be "far reaching, regressive, and without direct precedent."[27] Justice Daniel relies upon policy factors, *inter alia,* as reason not to extend the rule further than past cases have already held. He said Texas courts in the past have led the way in working out accommodations which preserve unto the lessee mineral owner a reasonable dominant easement while at the same time preserving a viable servient estate. Agricultural and oil resources depend upon water and both must be able to function properly if the economy of the state is to prosper.

The court ruled as a matter of law as to what was "reasonably necessary" to effectuate the lease. In giving by law an easement by implication, the court should be doing only what the parties themselves meant to do. The court should ascribe "to them an intention such as it seems likely they would have had and probably would have expressed had they foreseen the particular problem."[28] The parties could have specifically included the fresh water in the lease, just as they

26. *Supra* note 1, at 814.
27. *Supra* note 1, at 816.
28. 2 AMERICAN LAW OF PROPERTY § 8.33 (Casner ed. 1952).

have power to restrict the use of that water. It would appear that the express provision of the lease relating to use of the water should be controlling. An overwhelming majority of cases conclude that any expression by the parties upon the subject of the covenant negates the presumed intention which is the basis of all implied covenants.[29] Thus, an express covenant without fraud or mutual mistake precludes an implied covenant of a different or contradictory nature.[30]

In *Whitaker* the court seemed to say that the intent of the parties at the time of leasing is immaterial and the sole criterion is the "reasonably necessary" test. Yet "reasonably necessary" should be considered along with other factors such as previous, continuous and apparent uses at the time of lease.[31] Testimony concerning these factors was presented to the lower court in the form of evidence of no waterflooding in Western Texas during 1946. The ruling of the jury and of the lower court was that it was not the intent of the parties to include waterflooding. The only proper basis for the Texas Supreme Court's decision should have been that the intent of the parties was to include all means of producing oil regardless of consequences suffered by the surface owner. Yet in determining this intent, it seems obvious that men may reasonably differ. Persons do not normally sell mineral rights for less than the value of the land if they are aware that the mineral lessee will destroy or substantially damage the uses of the land.

Martin v. Kentucky Oak Mining Co.,[32] refuted this lack of intent argument by showing that value paid for the minerals at time of the lease execution was approximately equal to the value of the land as a whole. This reasoning has its fallacies but it effectively neutralizes equity and justice considerations and presents a strong argument that the surface owner intended to grant unlimited use of his land.

29. Malone, *Problems Created by Express Lease Covenants Affecting Implied Covenants*, 2 ROCKY MT. MIN. L. INST. 133, 137-38 (1956).
30. Brimmer v. Union Oil Co., 81 F.2d 437 (10th Cir. 1936), *cert. denied*, 298 U.S. 668 (1936).
31. 2 AMERICAN LAW OF PROPERTY §§ 8.42, 8.43 (Casner ed. 1952).
32. 429 S.W.2d 395 (Ky. 1968).

In considering the issues presented in this case, Texas is rather unique in that it could concentrate solely on oil and gas law in determining the intent of the parties. Groundwater is regarded as the property of the landowner in Texas, part of the soil, and subject only to malice, he may withdraw any and all of such water and may use it where and as he pleases.[33] This use of groundwater is regulated by statute only to the extent of preventing waste—not to control rights or use.[34] In contrast to Texas, most oil-producing states provide for state control over the development of both surface and ground water[35] and an appropriation of water is a separate and distinct property right.

Such control and supervision over ground water regulates the rights, purpose and extent of the use of water. These states thus exhibit a substantial interest in the ownership of water right. The rights become a property interest in themselves[36] and no longer an incident of ownership to be lightly and impliedly transferred as an appurtenance to the mineral estate. If the surface owner "expressly" transfers all or part of an existing water right to the mineral lessee, most states would permit the change in use if such transfer of rights be not injurious to the junior appropriators. And if mineral lessee submits a water appropriation, few states would refuse him a permit to use the water for purposes of secondary recovery.[37] These requirements can usually be met without undue expense or difficulty.

The regulations for obtaining a permit to appropriate demonstrate the importance that states place on water rights. When such public policy is expressed, water rights are placed on the same level of importance as both the surface and mineral estates. Particularly in the arid western states, a lease of the mineral estate cannot be deemed to include all fresh water even if necessary for the use of the mineral estate. At

33. Corpus Christi v. Pleasanton, 154 Tex. 289, 276 S.W.2d 798, 800 (1955).
34. TEX. REV. CIV. STAT. Arts. 7600 to 7602 (1948); HUTCHENS, THE TEXAS LAW OF WATER RIGHTS 583 (1961).
35. 1 HUTCHENS, WATER RIGHTS IN THE NINETEEN WESTERN STATES 5-6 (1971).
36. King v. White, 499 P.2d 585, 588 (Wyo. 1972).
37. Trelease, *The Use of Fresh Water for Secondary Recovery of Oil in the Rocky Mountain States*, 16 ROCKY MT. MIN. L. INST. 605 (1970).

least where a lease is concerned, the conveyance of an interest in real property must clearly indicate intention to convey specific property and describe it.[38] Three property interests exist, each of which has the potential of being the most valuable estate. It appears reasonable to conclude that there should be no transfer of water rights with the mineral estate unless there is a clear intention so stated.

Whether or not the mineral lessee has unlimited fresh water rights in the surface owner's estate rests upon the answer to three interrelated problems: the intent of the parties, the extent of the "reasonably necessary" doctrine, and the restrictions and purposes of a state's water law. *Whitaker* considered only the second problem and found no reason to discuss intent or water law. Intent has been the controlling factor in too many cases ruling opposite *Whitaker* to regard it as unimportant. And where water law is concerned, and the state itself, instead of the surface owner, has ultimate ownership or control over the water, there will be less inclination for a court to impliedly transfer a valuable water right with the oil and gas estate. In the absense of a showing of adequate consideration paid by the mineral lessee for his substantial taking of the surface estate, the courts should not attempt to transfer a valuable property interest without clear evidence that this was the intent of the parties.

38. *Supra* note 36.