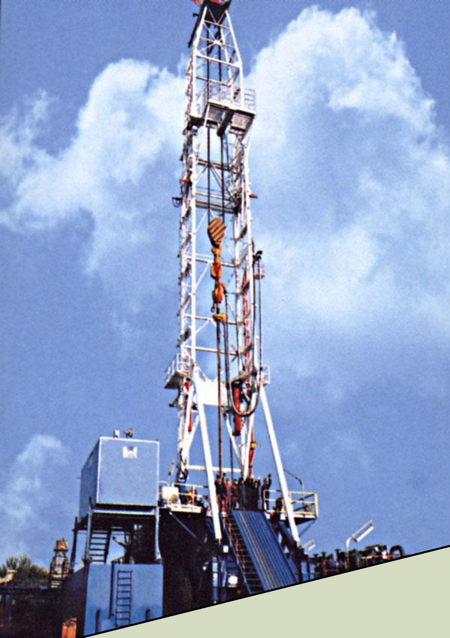
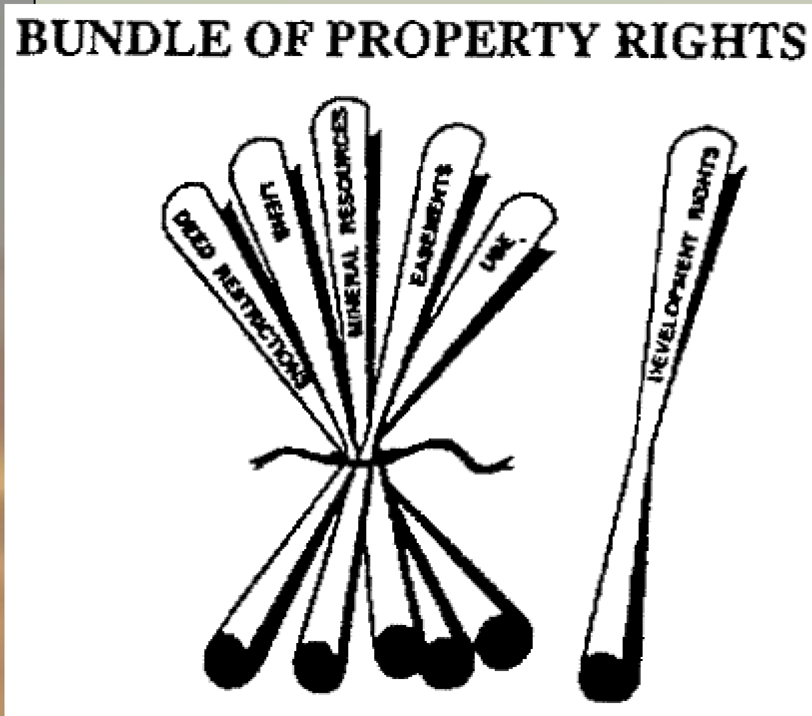
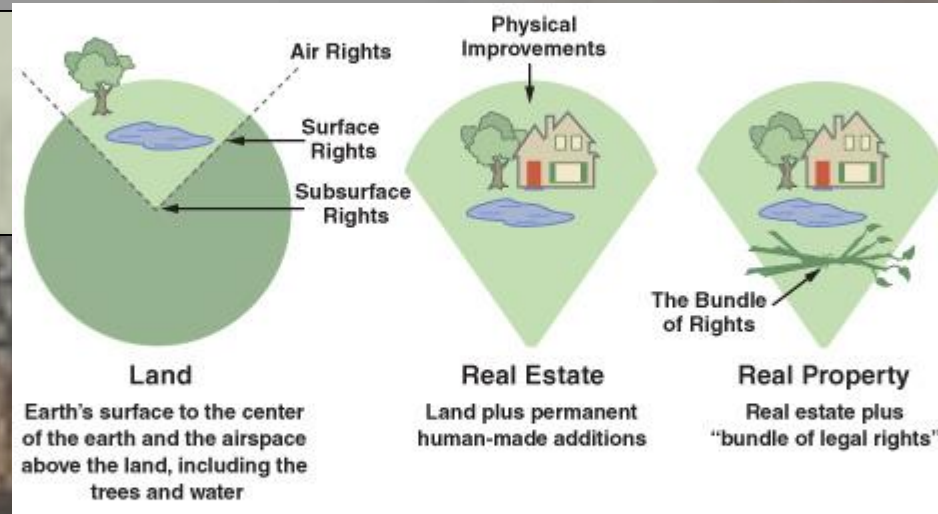


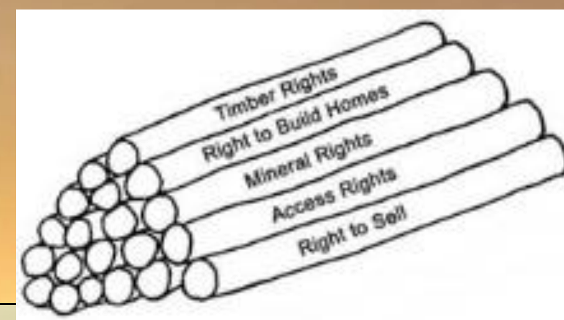
Rights and Conflicts Among Surface Owners, Mineral Owners, and Lessees in Arkansas – Comparing Sticks in the Bundle

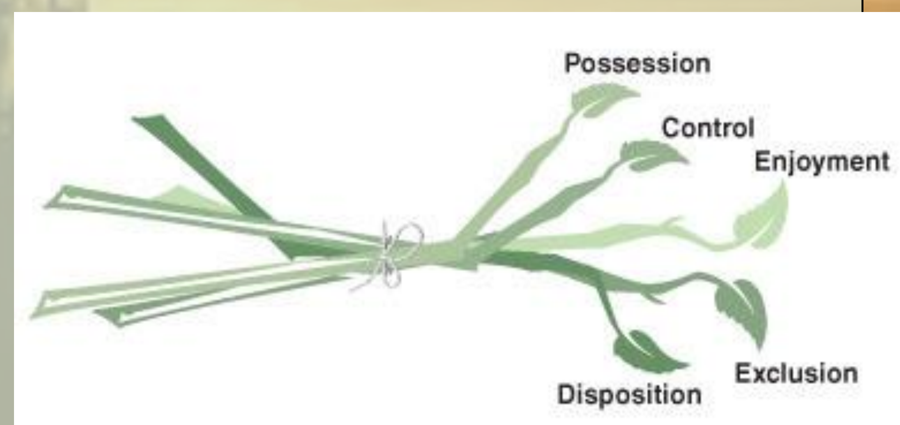
by G. Alan Perkins

PPGMR Law, PLLC


BUNDLE OF PROPERTY RIGHTS
DEED RESTRICTIONS
LIENS
MINERAL RESOURCES
EASEMENTS
DEVELOPMENT RIGHTS

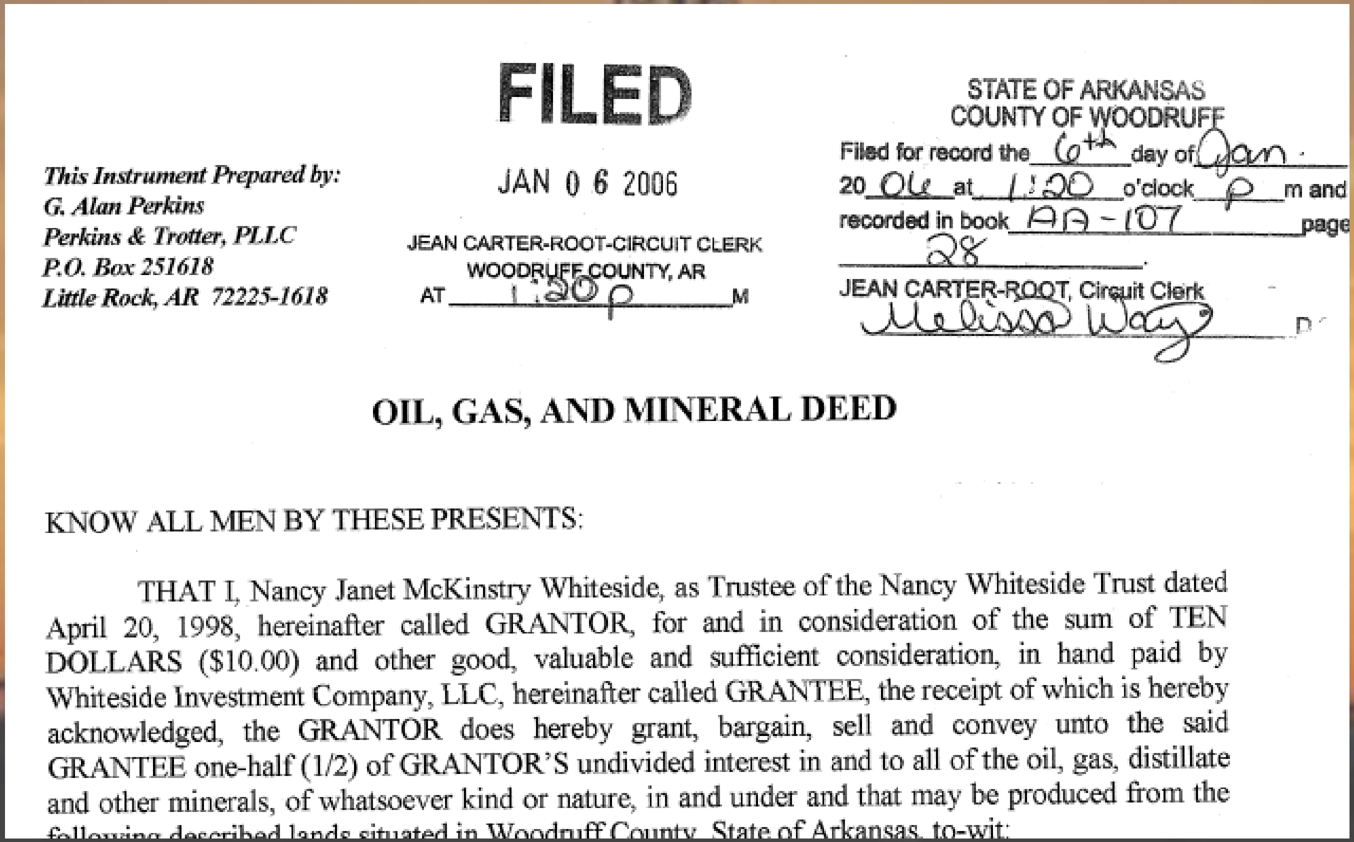

Air Rights
Physical Improvements
Surface Rights
Subsurface Rights
The Bundle of Rights
Land
Earth's surface to the center of the earth and the airspace above the land, including the trees and water
Real Estate
Land plus permanent human-made additions
Real Property
Real estate plus "bundle of legal rights"


Timber Rights
Right to Build Homes
Mineral Rights
Access Rights
Right to Sell


Possession
Control
Enjoyment
Exclusion
Disposition

- **MINERAL INTEREST**
- **LEASEHOLD INTEREST**
- **ROYALTY INTEREST**

MINERAL INTEREST



FILED

This Instrument Prepared by:
G. Alan Perkins
Perkins & Trotter, PLLC
P.O. Box 251618
Little Rock, AR 72225-1618

JAN 0 6 2006

JEAN CARTER-ROOT-CIRCUIT CLERK
WOODRUFF COUNTY, AR
AT 1:20 p M

STATE OF ARKANSAS
COUNTY OF WOODRUFF
Filed for record the 6th day of Jan.
20 06 at 1:20 o'clock p m and
recorded in book AA-107 page
28.
JEAN CARTER-ROOT, Circuit Clerk
Melissa Way D.C.

OIL, GAS, AND MINERAL DEED

KNOW ALL MEN BY THESE PRESENTS:

THAT I, Nancy Janet McKinstry Whiteside, as Trustee of the Nancy Whiteside Trust dated April 20, 1998, hereinafter called GRANTOR, for and in consideration of the sum of TEN DOLLARS ($10.00) and other good, valuable and sufficient consideration, in hand paid by Whiteside Investment Company, LLC, hereinafter called GRANTEE, the receipt of which is hereby acknowledged, the GRANTOR does hereby grant, bargain, sell and convey unto the said GRANTEE one-half (1/2) of GRANTOR'S undivided interest in and to all of the oil, gas, distillate and other minerals, of whatsoever kind or nature, in and under and that may be produced from the following described lands situated in Woodruff County, State of Arkansas, to-wit:

MINERAL INTEREST

IMPLIED EASEMENT OF SURFACE USE

The mineral owner's right to reasonable use of the surface for development and production of the minerals exists without any express words of grant and is due in part to the impossibility of reaching the minerals in any other manner.

LEASEHOLD INTEREST

Arkansas Lease Form (Paid-Up)
Rev. (0605) with Option

OIL AND GAS LEASE

(Five Year Paid-Up Lease with Option)

This agreement made and entered into on ____________________ by and between ______________________________________ ______________________________, whose address is ______________________________, hereinafter called Lessor (whether one or more) and ____________________________________, hereinafter called Lessee.

WITNESSETH: Lessor for and in consideration of Ten and No/100 Dollars ($10.00) and other good and valuable consideration in hand paid, receipt of which is hereby acknowledged, and of the agreements of Lessee hereinafter set forth, hereby grants, demises, leases and lets exclusively unto said Lessee the lands hereinafter described for the purpose of prospecting, exploring by geophysical and other methods, drilling, mining, operating for and producing oil or gas, or both, including, but not as a limitation, casinghead gas, casinghead gasoline, gas-condensate (distillate) and any substance, whether similar or dissimilar, produced in a liquid or gaseous state, together with the right to construct and maintain pipelines, telephone and electric lines, tanks, power stations, ponds, roadways, plants, equipment and structures thereon to produce, save and take care of said oil and gas and all other substances, and the exclusive right to inject air, gas, water, brine and other fluids from any source into the subsurface strata and any and all other rights and privileges necessary, incident to, or convenient for the economical operation of said land, alone or conjointly with neighboring land, for the production, saving and taking care of oil and gas and all other substances and the injection of air, gas, water, brine and other fluids into the subsurface strata, said lands being situated in the County of __________, State of Arkansas, and being described as follows to-wit:

Mineral Estate Dominance Over Surface Estate

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 for exploration and production would be practically worthless. Stated another way, it is an absolute necessity for the mineral owner to use the surface in order to enjoy his estate.

EARLY PATCHWORK OF CASES

Koury v. Morgan, 172 Ark. 405, 288 S.W. 929 (1926)

Express Easement in Oil & Gas Lease: "to mine and operate for oil and gas, to lay pipe lines and build tanks, towers, stations, and structures on the land for the purpose of producing saving, and taking care of oil and gas products."

Koury v. Morgan, 172 Ark. 405, 288 S.W. 929 (1926)

From Texas, the Court quoted *Grimes v. Goodman Drilling Co.*, 216 S. W. 202, 204 (Tex. Civ. App. 1919):

As appellant purchased the premises burdened with the terms of the lease, he is in no position to complain of conditions produced by appellees, such as are usual and customary during the drilling of an oil well.

The Court also quoted *Coffindaffer v. Hope Natural Gas Co.*, 74 W. Va. 107, 81 S. E. 966, 967 (1914):

The principle is well established that injury necessarily inflicted in the exercise of a lawful right does not constitute liability. The injury must be the direct result of the commission of a wrong. * * * If defendant did no wrong, it is not liable, notwithstanding the injury.

Koury v. Morgan, 172 Ark. 405, 288 S.W. 929 (1926)

"Interesting Discussion" 6 Thompson on Real Property, p. 282, §5136:

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. This is a right to be exercised with due regard to the rights of the owner of the surface, but, subject to this limitation, it is a right growing out of the contract of sale, the position of the stratum sold, and the impossibility of reaching it in any other manner. * * * 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 the direct result of the commission of a wrong.

Martin v. Dale, 180 Ark. 321, 21 S.W.2d 428 (1929)

Lessor/Lessee Dispute where OGL contained no express easement – implied easement for ingress and egress. The Court relied on "settled" easement by necessity principles:

"If one sells to another a tract of land surrounded by other land of the grantor, a right of way across such other land is a necessity to the enjoyment of the land granted, and is implied from the grant made."

***Wood v. Hay*, 206 Ark. 892, 175 S.W.2d 189 (1943)**

“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, 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. Thornton, *The Law of Oil and Gas*, vol. 1, § 342, states the better rule to be that in case of either a reservation or an exception, a grantor 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. In case of a reservation of minerals, such property descends to the grantor's heirs.”

Arkansas Louisiana Gas Co. v. Wood, 240 Ark. 948, 403 S.W.2d 54 (1966)

Reasonably Necessary

Free water clause - "Lessee shall have free use of oil, gas and water from said land, except water from Lessor's wells, for all operations hereunder."

Surface use – "The lease further provided for reasonable use of the land in drilling operations."

"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."

CORRELATIVE RIGHTS / REASONABLE USAGE EMERGES

Diamond Shamrock Corp. v. Phillips, 256 Ark. 886, 511 S.W.2d 160 (1974)

"This case involves the correlative rights of the owners of the surface estate and the separate owner of the minerals."

- Justice Brown

Diamond Shamrock Corp. v. Phillips, 256 Ark. 886, 511 S.W.2d 160 (1974)

General Rule
Respective Rights of the mineral owner and surface owner

"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. * * * 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 the direct result of the commission of a wrong."

- 10 Thompson on Real Property § 5561 (1940); *Koury v. Morgan*

Diamond Shamrock Corp. v. Phillips, 256 Ark. 886, 511 S.W.2d 160 (1974)

1. “An injury to the surface may be said to be the result of the commission of a wrong when the use of the surface is unreasonable.”

2. When exercising the right of ingress and egress, the driller has a “duty to do so in the manner least injurious to his grantor.”

3. The “rules of reasonable usage of the surface” as set out in *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Sup.Ct.Tex.1971) are highly persuasive. “‘[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.’”

4. “If the acts (of the lessee) complained of are found not to constitute a reasonable use of the surface, the lessee is liable for the injury done.”

Reimer v. Gulf Oil Corp., 281 Ark. 377, 664 S.W.2d 456 (1984)

"The appellees' lease grants to appellees the express right to construct such roads as are necessary to drill for gas on appellant's lands and also provides that if the well site is within the same drilling unit as is appellant's surface estate, the well will be considered as upon appellant's land. Since the well is within the drilling unit, the appellees have an express right to cross appellant's surface estate and can be liable only for unreasonable use."

McFarland v. Taylor, 76 Ark. App. 343, 65 S.W.3d (2002)

"We are not prepared to hold that, as a matter of law, a mineral owner is always entitled to choose between two or more means of access to the minerals, without regard to necessity or to the harm it may cause the surface owner, if the surface owner's use did not predate the mineral owner's use. 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. His use of the surface, however, must be reasonable. The rights implied in favor of the mineral estate are to be exercised with due regard for the rights of the surface owner. In *Martin v. Dale*, 180 Ark. 321, 21 S.W.2d 428 (1929), the Arkansas Supreme Court made it clear that, in all circumstances, the mineral owner's use must be necessary and the potential harm to the surface owner must be considered . . . ."

DeSoto Gathering Company, LLC v. Smallwood, 2010 Ark. 5, 362 S.W.3d 298 (2010)

“The non-mineral lease from the Chandlers to Appellee occurred prior to any severance of the surface and mineral estates; however, by its specific terms, the lease restricted Appellant's use of the ten acres for purposes of a single-family residence. Appellee therefore obtained a restricted-use leasehold interest in the surface. Since the lease was for a restricted surface use, and not a conveyance of the minerals, it operated as a severance of the mineral estate owned by the Chandlers from the leasehold surface estate acquired by Appellee under her residential lease. *See Stanolind Oil & Gas Co. v. Wimberly*, 181 S.W.2d 942 (Tex.Civ.App.1944). As the restricted-use surface lessee, Appellee took her leasehold as a servient estate subject to the burden of a right of way or easement in favor of the dominant mineral estate, allowing the use of so much of the surface as is reasonably necessary for the development and production of the minerals.”

Pollard v. SEECO, Inc., 2013 Ark. App. 331, 427 S.W.3d 776 (2013)

"Appellees argue, and we agree, that appellants' arguments do not address the substantive point of law at issue. It is undisputed that the oil and gas lease gave appellees the right to use the property in question for its gas exploration and production operations and that the lease also permitted appellees to select the construction site for the drill pad. Controversy arose when appellees declined appellants' requests to construct the drill pad in another location.

Generally, as against the surface owner, the owner of mineral rights has a 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 that may be necessary to operate his estate and remove the product. An injury to the surface of the land by the owner of minerals may be said to be the result of the commission of a wrong when the use of the surface is unreasonable. An injury necessarily inflicted in the exercise of a lawful right does not create a liability, and a lessee will only be liable to the surface owner for damages when the lessee's use of the surface is unreasonable. Here, appellees established that their use of the surface was reasonable, preventing any recovery at law for injury under the oil and gas lease."

Lessee's Implied Duty to Restore the Surface:

Bonds v. Sanchez-O'Brien Oil and Gas Co.,
289 Ark. 582, 715 S.W.2d 444 (1986)

"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."

"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."

The implied duty to restore the surface runs with the lease. *Chevron U.S.A. Inc. v. Murphy Exploration & Production Co.*, 356 Ark. 324, 151 S.W.3d 306 (2004).

Special Exception to the Rule: Complete Destruction of the Surface

***Benton v. U.S. Manganese Corp.*, 229 Ark. 181, 313 S.W.2d 839 (1958).** 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. U.S. Manganese Corp., the severed mineral estate owner had the 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.

CONTACT INFORMATION

G. Alan Perkins
PPGMR Law, PLLC
P.O. Box 251618
Little Rock, AR 72225-1618

501-603-9000
alan@ppgmrlaw.com