Analyzing Surface Use Issues in Oil and Gas Development

Presented by:
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Overview of Issues

• Express v. Implied Rights
• Unidimensional v. Multidimensional Standard
  – Reasonable necessity v. reasonable accommodation (due regard)
• Horizontal Drilling-specific Issues
  – Theories of extraction differ from Vertical
  – Permitting Concerns
• Litigation v. Legislation
Mineral Rights
Express v. Implied Easements

• Owner of a severed mineral estate cannot exploit his resources without some type of interest in the surface estate (easement).

• Express Easements (typical language in oil and gas lease)
AN ARTICLE OF AGREEMENT, made the ______ day of ________.

A. D. 1857, between

WILLIAM F. WILSON, Deedor,

and

HARRISON D. HAMBURG, Deedee.

of

District, County, State of West Virginia, Lessor,

and

State of West Virginia, Lessee.

WITNESSETH, That the Lessor, in consideration of $1.00, the receipt of which is hereby acknowledged, do hereby demise and grant unto the lessees, all the oil and gas in and under the following described tract of land, and also the said tract of land for the purpose and with the exclusive right of operating thereon for said oil and gas, together with the right of way, the right to lay pipes over, and to use water from said land, and also the right to remove, at any time, all property placed thereon by the lessees, which tract of land is situated in ________ District, County of ________ and State of West Virginia, and is bounded substantially as follows, to-wit:

On the North by lands of ________.

On the East by lands of ________.

On the South by lands of ________.

On the West by lands of ________.

containing ________ acres; more or less, to have and hold the same unto the lessees for the term and period of five years from the date hereof, and as much longer as oil or gas is found in paying quantities thereon: yielding and paying to the lessor in part of all the oil produced and saved from the premises, delivered free of expense into tanks or pipe lines to the lessor's credit.

The lessor shall be paid at the rate of $300.00 per year for each gas well so long as gas therefrom is sold.

In case no well shall be commenced on the above described premises, or on territory leased by said second party within ________ from the date hereof, the lessees shall pay for further delay at the rate of ________ dollars per year, at or before the end of each year thereafter, until a well shall be commenced. Such payment may be made in hand or by deposit to the lessor's credit in the Trader's National Bank of Clarksburg, W. Va.

The lessor shall have gas for the dwelling from any gas well on said premises free by making connections. No well shall be drilled within one hundred yards of dwelling house except by mutual consent.

The lessees.

WITNESS my hand.

__________________________

WILLIAM F. WILSON
Typical Modern O&G Rights

“for the purpose of exploring, prospecting, drilling and mining for and producing oil and gas and all other hydrocarbons, laying pipe lines, building roads, tanks, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, transport and own said products, and housing its employees, and without additional consideration, does hereby authorize Lessee to enter upon the land covered hereby to accomplish said purposes.”
Beyond Express Rights

- **Implied Rights**
  - Any right to use surface that isn’t express must be implied.
  - Mineral estate is the dominant estate

- **Implied Easements** “took over” and the language of the lease or deed became irrelevant.

- **Easement by Necessity** analysis not usually applied.

- **Chartiers Block Coal Co. v. Mellon**
Reasonable Use v. Due Regard

• Unidimensional approach: “Reasonable use” or “reasonably necessary”

• Multidimensional approach: “Reasonable accommodation” or “due regard”

• Courts unwilling to apply a “true” multidimensional approach
TO COMPLICATE MATTERS...
Horizontal Drilling

--Horizontal drilling necessitates the use of the surface in connection with operations on other premises.

--Surface owners argue that surface use limited to the surface lying above the severed mineral estate.

--Surface owners argue that horizontal well pads take up too much of the surface.
What was state of the art at the time of the severance deed?
Selected Issues Related to Horizontal Drilling
Is a Horizontal Well Pad Reasonable Use of the Surface?

Source: Energy Information Administration, Office of Oil and Gas.
Horizontal Well Pad – What is on the Surface During Fracking?
HORIZONTAL DRILLING ISSUES

• Trespass
• Permitting
• Disposal/Restoration
TRESPASS CONCERNS

- Drill sites are often not located at the target site for mineral production
- Trespass liability may arise when the mineral owner crosses another subsurface parcel
- Operators may lose their ability to deduct expenses if they have intentionally trespassed

How to Avoid?? Horizontal Drilling Statutes and Pooling
Permitting Issues

• State-issued permits are designed to promote safety, uniformity and consistency of mineral extraction; each state decides how to balance the interests of servient surface estates versus dominant mineral estates

• Does a state permit-sanctioned process protect a mineral owner from being sued by a landowner?
  – What is the test? Is there a test?
    » Depends on the state’s interpretation of the balance between mineral and surface owners
Permitting Issues

Selected Permitting Issues:

• Does a state-issued permit create property rights?
  – Generally, NO

• Can a state-issued permit be reviewed in the Courts, outside the process set forth in the relevant enactment statutes?
  – In W. Va., Surface owners may not challenge validity of DEP permit granted to mineral owner in the courts.
  – Martin v. Hamblett, No. 11-1157, in the Supreme Court of Appeals of West Virginia (Nov. 21, 2012) (oil/gas, not coal)

• What if permitting doesn’t promote best available current technology?
Permitting and Disposal Issues

State Permit v. State of the Art Technology

• Does state permitting supersede common law rights regarding disposal of materials appurtenant to production? Mud, brine, cuttings?


- Selected Issues:
  - Damages not capped at FMV of land disturbed
  - Permit Disposal – permitted burial of drill cuttings versus closed-loop system – not required – NOT TRESPASS
Permitting and Disposal Issues

Teel v. Chesapeake Appalachia L.L.C. / Whiteman v. Chesapeake Appalachia L.L.C.

- Owners sued, claiming that surface damages, as contemplated under Surface Damages Act, were insufficient to compensate for damages
  - Ownership interests – owners purchased surface in entirety
    » Sister/Brother receiving surface damage payments/owner not
  - Privacy issues from contractors and alleged damage to animals
  - Freshwater Pits were allegedly not reclaimed properly
  - Wastewater and cuttings from other leased areas disposed at sites
  - Burying drill cuttings is improper, regardless of permit and is trespass
  - State permit cannot, logically, permit energy company to bury materials that also contain dangerous chemicals (wants formula?)
    » Frack fluids are dangerous? Muds are Volatile? Radiation?
  - Did not conduct conclusive testing to show migration of chemicals – relying on common law – relied on anecdotal evidence and color
Permitted Disposal?
Permitted Disposal?
Surface Damages?
Surface Damages?
Where will it end?
Choose Your Own Adventure

Litigation?

Legislation?
Litigation v. Legislation

What legislation achieves better results than litigation for complex oil/gas issues?

- Surface Damage Statutes
- Horizontal Drilling Statutes
- Pooling and Missing Heirs Statutes
Legislation can address current issues and changes to technology and industry faster and without judicial interpretation on each issue.

Common Law rights (enforced by litigation) are still important to protect surface owners from situations which deviate from those projected and expected by the legislature.
Surface Owner Damages Statutes

• Compensation of surface owners for drilling operations
• Common law right of action preserved
• Notification of process and claim
• Agreement; offer of settlement
• Rejection; legal action; arbitration; fees/costs
• Legislative findings
Surface Owner Damages Statutes

9 states have enacted surface owner damages statutes, although many are still based on vertical technology only

• North Dakota - N.D. Cent. Code §§ 31-11.1-01 – 38.11.1-10
• West Virginia - W. Va. Code § 22-7-1 et seq.
• Illinois - 765 Ill. Comp. Stat. 530/1 – 530/7
• Indiana - Ind. Code § 32-5-7-2
• Montana - Mont. Code Ann. §§ 82-10-501 – 82-10-511
• Oklahoma – Okla. Stat. §§ 318.2 – 318.9
• South Dakota – S.D. Codified Laws §§ 45-5A-1 – 45-5A-11
In addition to the 9 states with underlying surface owner damages statutes, some states have enacted horizontal-drilling-specific legislation.

Ohio, W. Va., N.D., Colo., Texas, Ky.

(more coming soon)
Horizontal Drilling Statutes

• Address concerns specific and unique to horizontal issues
• Vertical drilling statutes and common law cannot respond quickly enough to changes in horizontal drilling
• Statutes specific to horizontal drilling allow for public comment and discussion as the technology develops and changes
Surface Owner Damages Statutes

North Dakota - N.D. Cent. Code §§ 31-11.1-01 – 38.11-1-10

It is hereby declared to be in the public interest to foster, encourage, and promote the development, production, and utilization of all natural resources of coal, oil, gas, and subsurface minerals in a manner as will prevent waste and allow a greater ultimate recovery of the natural resources, and to protect the rights of all owners so that the greatest possible economic recovery of natural resources be obtained in the state, to the end that landowners, royalty owners, producers, and the general public realize and enjoy the greatest possible good from these vital natural resources.
North Dakota - N.D. Cent. Code §§ 31-11.1-01 – 38.11-1-10

- In the past, the mineral owner only had to compensate the surface owner if the mineral owner caused extraordinary or unreasonable damage to the surface.
- North Dakota law has been revised to require a mineral developer to compensate the surface owner for all damages to the surface.
North Dakota law now addresses two types of surface damages: “damages and disruption” and “loss of production.”

- Payments for “damages and disruption” are intended to compensate the surface owner for “lost land value, lost use of and access to the surface owner’s land, and lost value of improvements caused by drilling operations.”
- Payments for “loss of production” are intended to compensate the surface owner for “loss of agricultural production and income caused by oil and gas production and completion operations.”
Does the statute adequately protect surface owners?

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Pooling Statutes

- Promotes efficient use of land – one drill bore may replace hundreds of former sites
- Forced pooling and missing heirs statutes promote efficient prospecting of minerals – pockets of minerals aren’t left behind
- Takings concerns and balancing rights of mineral owners
Choose Your Own Adventure

Litigation?

Legislation?
QUESTIONS?
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