Surface Use in the Age of Horizontal Drilling

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Overview of Issues

• Surface vs. Minerals
• Express Rights vs. Implied Rights
• Unidimensional Approach vs. Multidimensional Approach
• Horizontal Drilling-Specific Issues
• Litigation vs. Legislation
Attributes of the Mineral Estate

- Right to develop
- Right to lease (the “executive” right)
- Right to receive royalty
  - Share of production or money from production
- Right to receive bonus
  - Money for executing lease
- Right to receive delay rentals
  - Money paid in lieu of drilling during primary term
Express Rights vs. Implied Rights
Express Rights

• Sometimes, the mineral owners’ rights are described in legal instruments
  – Severance deeds
  – Oil and gas leases
  – Surface use agreements
  – Right of way agreements
  – Other easements
AN ARTICLE OF AGREEMENT, made the 1st day of
A. D. 1805, between

[Signatures]

of

District

County, State of West Virginia, Lessors, and

State of West Virginia, Lessees.

WITNESSETH, That the Lessors, in consideration of...
dollar..., 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 thereof; yielding and paying to the lessors the one

Eighth... 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 lessors shall be paid at the rate of THREE HUNDRED DOLLARS 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 lessors 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.

No well is to be drilled in any of the

[Additional handwritten notes]
Typical Modern Oil & Gas 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”
Another Look At “Typical” Modern Oil & Gas Rights

“for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas, sulphur, fissionable materials and all other minerals (whether or not similar to those mentioned), conducting exploration, geologic and geophysical tests and surveys, injecting gas, water and other fluids and air into subsurface strata, laying pipelines, establishing and utilizing facilities for the disposition of salt water, dredging and maintaining canals, building roads, bridges, tanks, telephone lines, power stations and other structures”
More “Typical” Modern Oil & Gas Rights

“for the purposes of prospecting, exploring by geophysical and other methods, drilling, operating for, producing oil or gas, or both, together with the right and easement to construct, operate, repair, maintain and remove pipelines, telephone, power and electric lines, tanks, ponds, roadways, plants, equipment and structures thereon to produce, save, store and take care of such substances, and the exclusive right to inject air, gas, water, brine and other fluids into the subsurface strata and any and all other rights and privileges necessary, incident to, or convenient for the economical operation of the lands”
Implied Rights

• Where the severance deed is silent as to the rights of the mineral owner, courts must read implied rights into such deeds
  – “Reasonable and necessary” use of the surface
  – Does the mineral owner need to accommodate the surface owner’s use of the land?
General Rule

• Where minerals are severed from the surface, the mineral owner generally has an implied right (and may have express rights) to reasonable use of the surface to develop and produce the minerals
  – This implied right is transferred from the mineral owner to the mineral lessee
Reasonably Necessary vs. Reasonable Accommodation

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

• Multidimensional approach: “Reasonable accommodation” or “due regard”
What is “Reasonable Use”? 
Burning Springs, West Virginia
Sistersville, West Virginia
Storytown, West Virginia
Huntington Beach, California
Spindletop, Texas
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 is limited to the surface lying above the severed mineral estate
• Surface owners argue that horizontal well pads take up too much of the surface
Is A Horizontal Well Pad A Reasonable Use of the Surface?
Upshur County, West Virginia
Reasonable Use in the Context of Horizontal Drilling

• Who decides what is a “reasonable use”?
• What about advancements in technology?
• What if the mineral owner’s use of the surface goes beyond that which is “reasonably necessary”? 
Horizontal Drilling Litigation

- Over 180 cases filed in 10 states including AR, CO, LA, NY, ND, OH, OK, PA, TX, WV
  - Trespass
  - Permitting
  - Negligence
  - Nuisance
Trespass Litigation

- Trespass liability may arise when the mineral owner crosses another subsurface parcel.
- Operators may lose ability to deduct expenses if intentional trespass occurs.

How to Avoid?
Horizontal Drilling Statutes and Pooling
Permitting

- State-issued permits are designed to promote safety, uniformity, and consistency in mineral extraction
- Each state decides how to balance the interests of the surface owners and mineral owners
Permit Shield?

• Does a state-issued permit protect a mineral owner from being sued by a surface owner?

• What if the permit does not require best available technology?
Nuisance Litigation

• A **public nuisance** is a substantial and unreasonable interference with a right common to the general public.

• A **private nuisance** is a substantial and unreasonable interference with the private use and enjoyment of property.
Where Will It End?  

Litigation?  

Legislation?
Legislation vs. Litigation

• Legislation to address current legal issues and advancements in technology

• Litigation to enforce common law rights through judicial application and interpretation
Horizontal Drilling Legislation

- Address concerns specific and unique to horizontal drilling
- Allow for public comment and discussion as technology advances
Horizontal Drilling Legislation

- Surface owner damage statutes
- Pooling statutes
- Missing heirs and partition statutes
Surface Owner Damage Statutes

Most states with extensive oil and gas development have enacted legislation to compensate surface owners for the use of the surface for drilling operations.
Typical Elements of Surface Owner Damage Statutes

- Required notice to surface owner
- Good faith attempt to negotiate an agreement
- Bonding requirements
- Payment for damages to land and crops
- Prescribed method for determining damages
- Preservation of common law causes of action
- Dispute resolution
- Statute of limitations for claims
Adequate Protection?

Do surface damage statutes adequately protect surface owners? Mineral owners?

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. – W. Va. Surface Damages Act
Pooling Statutes

Promote efficient use of surface by reducing total surface disturbance
Missing Heirs and Partition Statutes

• Efficient prospecting of minerals
• Remove obstacles to development to allow mineral owners to realize benefit of mineral estates
Choose Your Own Adventure

Litigation?

Legislation?
Now is the time to ask QUESTIONS?
Material Disclaimer

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Thank you!

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