CHAPTER 7

CHAINED GATES AND NO TRESPASSING SIGNS: DEALING WITH WARY LANDOWNERS IN A BRAVE NEW WORLD

by

James J. O'Malley
Anadarko Petroleum Corporation
The Woodlands, Texas

and

Kendor P. Jones
Welborn Sullivan Meck & Tooley, P.C.
Denver, Colorado

Synopsis

§ 7.01 Introduction. The issues involved in the conflict between the owners of the surface estate and the owners of the mineral estate have received increased attention in recent years[1], primarily due to steadily rising surface values, burgeoning residential and urban growth and the culmination of decades of anti-mining and anti-oil and gas development rhetoric. These issues were highlighted by the two-day Special Institute on the subject presented by the Rocky Mountain Mineral Law Foundation in Denver, Colorado in February 2005.[2] This paper will first review the legal background of the conflict; it will then address the developing trend, through legislative and regulatory action, to attempt to balance the scales in favor of the heretofore servient surface estate; and it will conclude with an analysis of industry's efforts to reach accommodation with its surface owners without resorting to the courts or regulatory agencies, first through the simple Damage Release, with a one-time payment; then, with the more complex Surface Damage Agreement, with multiple payments; and most recently, with the comprehensive Surface Use Agreement, with detailed, forward-looking provisions that may call for payments by both parties and, in essence, make the surface owner and the operator co-developers of the surface and of the minerals.

§ 7.02 The Law of Severed Estates.

[1] The Creation of Split Estates.

---

[1] See, e.g., Christopher M. Alspach, "Surface Use by the Mineral Owner: How Much Accommodation is Required Under Current Oil and Gas Law?", 55 Okla. L. Rev. 89 (2002); Polly Jessen and Carleton Ekberg, "Mixing Surface Development with Oil and Gas Operations – Part I", 34 Colo. Law 11 (May 2005); Polly Jessen and Carleton Ekberg, "Mixing Surface Development with Oil and Gas Operations – Part II", 34 Colo. Law 11 (June 2005); Bruce M. Kramer, "The Legal Framework for Analyzing Multiple Surface Use Issues, Severed Minerals, Split Estates, Rights of Access, and Surface Use in Mineral Extraction Operations, 2-1 (Rocky Mtn. Min. L. Fdn 2005); Phillip Wm. Lear and Stephanie Barber-Renteria, "Split Estates and Severed Minerals: Rights of Access and Surface Use After the Divorce/and Other Leasehold Access-Related Problems", 50 Rocky Mtn. Min. L. Inst. 10-1 (2004); John F. Welborn, "New Rights of Surface Owners: Changes in the Dominant/Servient Relationship Between the Mineral and Surface Estates", 40 Rocky Mtn. Min. L. Inst. 22-1 (1994).

[2] "Severed Minerals, Split Estates, Rights of Access, and Surface Use in Mineral Extraction Operations", (Rocky Mtn. Min. L. Fdn 2005).

The first severance of the surface estate from the mineral estate was created in England by the "royal mine", with the sovereign reserving depositis of gold and silver.[3] This constituted an exception to the common law rule that the owner of the fee estate owned from the sky to the depths.[4] The "royal mine" led to the creation of split estates in America, where the royal charters of many of the eastern colonies reserved to the Crown one-fifth of all gold and silver.[5] The practice of split estates became common and was universally recognized by the courts.[6] While ownership-in-place jurisdictions speak in terms of severance of minerals and surface, and courts in non-ownership-in-place states treat it as more of a separation than a severance, there would appear to be little difference today between possessory and nonpossessory theories.[7]

[2] Case Law.

[a] Dominance of the Mineral Estate.

The doctrine of the dominance of the mineral estate over the surface estate developed with severance and the creation of split estates. The judicial policy behind this doctrine was that a grant or reservation of the minerals without the right to obtain them would be worthless.[8] One of the rights included with the ownership of the mineral estate and its dominance over the servient surface estate is the implied right of the mineral owner to use the surface required to develop its minerals.[9]

[b] The Early Due Regard Approach.

The earliest cases dealing with the respective rights of owners of the split estate limited the harshness of the dominance of the mineral estate by narrowly interpreting the express or implied easement granted the mineral owner to use the surface to develop its minerals, with due regard for the rights of the surface owner. For example, in Westmorland & Cambria Natural Gas Co. v. DeWitt, [10], the court declared that an oil and gas lease created a surface easement for the lessee, but narrowly construed such easement:

> The subject of possession was not the land, certainly not the surface. All of that, except the portions actually necessary for operating purposes, was expressly reserved by the lease to Brown, the lessor. Except of such portions, the complainants had no possession that was not concurrent with that of the lessor, if, indeed, it could be

---

[3] See, Lear and Barber-Renteria, note 1, *supra* at 12-3.
[4] *Id.*
[5] Owen M. Lopez, "Upstairs/Downstairs: Conflicts Between Surface and Mineral Owners", 26 Rocky Mtn. Min. L. Inst. 995, 996 (1980).
[6] See, e.g., Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 60 (1898) ("[T]he owner of the soil might convey his interest in mineral beneath the surface without relinquishing his title to the surface."); Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488 (1927); Bodcaw Lumber Co. v. Goode, 254 S.W. 345 (Ark. 1923); Humphreys-Mixin Co. v. Gammon, 24 S.W. 296 (Tex. 1923).
[7] See, 1 Harold R. Williams and Charles J. Meyers, Oil and Gas Law, §203.2 (2003)
[8] See, e.g., Harris v. Currie, 176 S.W. 2d 302, 305 (Tex. 1944) ("a grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved.") See also, Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488 (1927); Moser v. U.S. Steel Corp., 676 S.W. 2d 99 (Tex. 1984).
[9] See, e.g., Union Producing Co. v. Pittman, 146 So. 2d 553 (Miss. 1962); Placid Oil Co. v. Lee, 243 S.W. 2d 860 (Tex. App. 1951)
[10] 18 A. 724 (Pa. 1889).

> possession of the land at all. Complainant's right in the surface of the land under the lease was rather in the nature of an easement of entry and examination, with a right of possession arising where a particular place of operation should be selected, and the easement of ingress, egress, storage, transportation, etc., during the continuance of the operation.[11]

Similarly, in Dietz v. Missouri Transfer Co. [12], a case involving a mineral deed, the court limited the express or implied easements of surface use by the mineral owner, stating:

> As we construe the deed to the plaintiff, it conveyed to him the fee-simple title to the land subjkect to the right of the grantors and the defendants, as their successors in interest, to enter upon the land and occupy it for the purposes mentioned in the deed. For those purposes, and none other, the defendant was entitled to the possession of the land, or so much thereof as was necessary for such purposes, and for such a length of time as it was necessary for it to occupy it for such purposes, and no longer . . .[13]

The key early case for the doctrine of due regard or mutual accommodation is Chartiers Block Coal Co.v. Mellon [14], which involved a mineral development dispute between the owner of the severed coal estate and the oil and gas lessee who received his lease after the coal estate had already been severed. The court was concerned about correlative rights of both of the owners of the mineral estates and the effect of the development of such estates on the owner of the surface estate.

> As against the owner of the surface, each of the several purchasers would have the right, without any express words of grant for that purpose, to go upon the surface to open a way by shaft, or drift, or well, as might be necessary to operate his estate, and to remove the product thereof. This is a right to be exercised with due regard to the owner of the surface, and its exercise will be restrained within proper limits by a court of equity, if this becomes necessary; 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.[15]

The court in Chartiers Block adopted a balanced approach by attempting to give the owner of the mineral estate the right to full enjoyment of that estate while restraining the exercise of such right by requiring due regard for the rights of the owner of the surface estate. Following such decision, the balanced approach disappeared from judicial

---

[11] 18 A. at 725.
[12] 25 P. 423 (Cal. 1890).
[13] 25 P. at 425.
[14] 25 A. 597 (Pa. 1893). See, Kramer, *supra*, at 2-8 and George Bryan, The Law of Petroleum and Natural Gas, 412 (1898) for an analysis of this case.
[15] 25 A. at 598.

decisions in favor of what was "necessary" or "reasonably necessary" for the mineral owner to develop its minerals.

[c] The Reasonably Necessary Test.

The "reasonably necessary" test apparently originated in a 1918 decision giving the mineral owners the "right to possession of the land to the extent reasonably necessary to perform the obligation imposed upon them by the terms of the lease."[16] For the next fifty years, the terms "necessary" or "reasonably necessary" dominated the court's opinions and the due regard doctrine disappeared. Many of the early cases used the term "necessary" to limit the mineral owner's use of the surface.[17] But, perhaps starting with the West Virginia Supreme Court of Appeals 1914 decision in Coffindaffer v. Hope Natural Gas Co.[18], the courts began to adopt what one commentor[19] has characterized as the "unidimensional approach"; that is, "so long as the mineral owner acts within the scope of the easement and in a non-negligent manner, it will not be liable for any damages caused to the surface estate since those damages are not the direct result of the commission of any wrong."[20] By the 1950's, the almost uniform use of this unidimensional reasonably necessary test had given the mineral owner the predominant role in the surface/mineral owner relationship.[21]

---

[16] Brennan v. Hunter, 172 P. 49, 50 (Okla. 1918).

[17] See, e.g., Fowler v. Delaplain, 87 N.E. 260, 262 (ohio 1909); Rennie v. Red Star Oil Co., 190 P. 391, 392 (Okla. 1920).

[18] 81 S.E. 966 (W. Va. 1914).

[19] Kramer, note 1, *supra* at 210.

[20] *Id.* Examples of cases supporting this rationale include, Mid-Texas Petroleum Co. v. Concord, 235 S.W. 710 (Tex. Civ. App. – Ft. Worth 1921); Cozart v. Gunshaw, 299 S.W. 499 (Tex. Civ. App. – Ft. Worth 1927). But, see, Gregg v. Caldwell-Guadalupe Pick-Up Stations, 286 S.W. 1083, 1084 (Tex. Com'n App. 1926), where the court states that the right to do these things on the land that are necessary to produce the oil and gas must be expressly authorized or necessarily implied as a "necessary incident" to such production.

[21] See, cases cited in Martin & Kramer, Williams & Meyers, Oil and Gas Law, §§ 218, 218.7, 218.8 (2004) (hereinafter cited as "Martin & Kramer").