THE LEGAL FRAMEWORK FOR ANALYZING MULTIPLE SURFACE USE ISSUES

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Introduction

- Issues related to developmental conflict are caused by power given the owner of the unified fee simple absolute in all jurisdictions to:
  1) sever the surface and mineral estates; and
  2) to further sever the various minerals that make up the surface estate
- Look at historical development of implied easement of surface use
- Relationship between severed mineral owner and surface owner is multidimensional
  - “Due regard” standard or “reasonable accommodation doctrine”

Common Law Heritage – Express or Implied Easements

- In most situations, owner of a severed mineral estate cannot exploit its resources until it receives some type of interest in the surface estate
  - Commonly called an *easement*
    - Existence and scope may be expressly stated (i.e. oil and gas lease) or implied (e.g. most deeds)
- Implied easement doctrine took over and language of deed or lease became irrelevant
  - Ignoring express agreements reverses what should be the primary focus of the courts

Common Law Heritage – Express or Implied Easements (cnt'd)

- *Landreth v. Melendez*, 948 S.W.2d 76, 137 (Tex. App.—Amarillo 1997)
  - One of the few surface use cases which analyzed the scope of the easement of surface use by only looking at the express language and not applying general common law rules
  - Mineral deed specifically set out the scope of the easement of surface use
  - "[I]t is a situation where the mineral owners are under no obligation to accommodate the surface owners in the existing use. . . . "

Common Law Heritage – Express or Implied Easements (cnt'd)

- Requirements for an implied easement (rarely mentioned in any surface use cases):
  1. A conveyance;
  2. Of a physical part only of the grantor's land;
  3. Before the conveyance there was a usage on the land that, had the two parts then been severed, could have been the subject of an easement appurtenant to the one and servient upon the other;
  4. This usage is, more or less, "necessary" to the use of the part to which it would be appurtenant; and
  5. The usage is "apparent."

Common Law Heritage – Express or Implied Easements (cnt'd)

- Easements by necessity
  - Many of the same requirements as for an implied easement, courts have regularly ignored the strict necessity element
  - *Peacock v. Schroeder*, 846 S.W.2d 905 (Tex. App.—San Antonio 1993)
    - One of the few cases to apply the traditional implied easement by necessity doctrines
    - Court identified requirements for an implied easement by reservation of a right of way
    - Notwithstanding the lack of proof of a quasi-easement, court found surface easement

Common Law Heritage – Doctrine of Subjacent Support

- Doctrine of subjacent support (and its cousin: the doctrine of lateral support) are applicable when there has been a horizontal division of the property interest
- Right of subjacent support "is support in a horizontal plane from underlying strata of earth owned or occupied by other persons."
- *Restatement (Second) of Torts* provides that one who withdraws the naturally necessary subjacent support of the land in another's possession is liable for the damage caused to that land from which the support has been withdrawn

Common Law Heritage – Doctrine of Subjacent Support (cnt'd)

- Strict liability regime: Unforeseeability of the subsidence, impossibility of removing the mineral without damage, and the use of utmost skill and care to prevent subsidence are irrelevant to the liability issue
- Deep mining activities must be conducted in manner that does not cause the surface estate to subside either through a loss of lateral or subjacent support
  - Right to subjacent support may be waived
- May be conflict between implied easement doctrine and doctrine of subjacent support
  - i.e. *Kenny v. Tex. Gulf Sulphur Co.*, 351 S.W.2d 612 (Tex. App.—Waco 1961, writ ref'd)

Early Development of the Implied Easement

- Earliest case dealing with respective rights of surface and mineral owners arose, not in the context of mineral deeds, but in the context of leases where there are express easements
  - *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 18 A. 724 (Pa. 1889)
    - View of the scope of the lessee's easement was quite narrow
    - Express language of the lease contained limits on the easement
- Seeds of a multidimensional approach to dealing with the implied easement of surface use

Early Development of the Implied Easement (cnt'd)

- *Dietz v. Mission Transfer Co.*, 25 P. 423 (Cal. 1890)
  - Mineral deed expressly provided for a laundry list of uses the mineral owner could engage in on the surface
  - Could see a conflict between unidimensional and multidimensional approaches to the express or implied easement of surface use
  - Court suggested rights of surface owner were not subordinate to the uses specifically reserved to the severed mineral owner
    - Yet mineral owner entitled to possess surface

Early Development of the Implied Easement (cnt'd)

- *Chartiers Block Coal Co. v. Mellon*, 25 S. 597 (1893)
  - Not a surface mineral dispute but a multiple mineral development dispute between owner of the severed coal estate and the oil and gas lessee
  - Coal deed contained express right for coal owner to enter mines, carry coal away, and have ingress and egress over surface estate
  - Court concerned with rights of severed coal and oil and gas estates
  - Sown the seeds for multidimensional approach

Early Development of the Implied Easement (cnt'd)

- "Due regard" language comes from *Chartiers Block*
  - Next 20-30 years, due regard or similar language tended to disappear from judicial decisions
  - "Necessary" or "reasonably necessary" began to dominate the court's opinions
    - Many of these early cases lifted those terms from the deed or oil and gas lease express easement clause
  - *Coffindaffer v. Hope Natural Gas Co.*: lead to predominance of unidimensional test

Early Development of the Implied Easement (cnt'd)

- Movement toward unidimensional approach solidified in context of the implied easement of surface use by its adoption in Texas in *Mid-Texas Petroleum Co. v. Colcord*, 235 S.W. 710 (Tex. Civ. App.—Ft. Worth 1921)
  - Right to part of the surface was "reasonably necessary"
  - Ignored due regard or concurrent multidimensional standard
- By 1950s, became clear the unidimensional reasonably necessary test had subsumed any concerns about need for due regard

The Reasonably Necessary Test Applied

- Factual issues in most cases relate to whether the mineral owner's use was 1. reasonable, 2. not excessive and, 3.not negligent
  - Reasonable = consistent with good oilfield practices
  - Mineral owner is not liable for any surface damages unless the surface owner could show unreasonable, excessive or negligent use, unless the parties contract otherwise
- *Mary Oil & Gas Co. v. Raines*, 235 P. 1085 (Ok. 1925)
  - When courts apply the unidimensional reasonably necessary test, surface owner ends up on the losing side

The Reasonably Necessary Test Applied (cnt'd)

- *Franz Corp. v. Fifer*, 295 F. 106 (9th Cir. 1924)
  - Court was viligant in protecting the surface owner from excessive use
- With the possible exception of Texas in which the surface owner almost always lost, other jurisdictions would occasionally find the lessee was either negligent or engaged in excessive or unreasonable use of the surface
  - *Warren Petroleum Corp. v. Martin*, 271 S.W.2d 888 (Tex. App.—El Paso 1993, no writ)
  - *Warren Petroleum Corp. v. Monzingo*, 304 S.W.2d 362 (Tex. 1957)

The Reasonably Necessary Test Applied (cnt'd)

- *Anthony v. Chevron USA, Inc.*, 284 F.3d 578 (5th Cir. 1961) (applying Texas law)
  - Plaintiffs claim Chevron used more surface than was reasonably necessary and acted negligently
  - Court applied the Texas reasonably necessary standard by requiring the surface owner to "establish that this water and soil contamination was the result of either Chevron's specific acts of negligence or Chevron's use of more of the Anthony Family's surface estate than reasonably necessary to carry out its operations."

The Reasonably Necessary Test Applied (cnt'd)

- *Brown v. Lundell*, 344 S.W.2d 863 (Tex. 1961)
  - Surface owner sued lessee for disposing of brine in a surface pit that seeped into an aquifer
  - Jury found lessee's negligence proximately caused permanent injury to the surface estate
  - Jury finding of a duty not to pollute the freshwater aquifer was supported by evidence
  - Court recited "due regard" standard
    - Rights of the lessor and lessee are reciprocal and distinct
  - Court held lessee should have known amount of brine would cause pollution

The Reasonably Necessary Test Applied (cnt'd)

- *Oryx Energy Co. v. Shelton*, 942 S.W.2d 637 (Tex. App.—Tyler 1996)
  - Applied analysis similar to *Brown*
  - Upheld jury verdict finding both negligent and unreasonable use of the surface by lessee
  - No evidence to show causation and the amount of damages suffered
- Most jurisdictions that apply the reasonably necessary test reach results consistent with *Martin* and *Monzingo*
- Oklahoma has several cases that follow the unidimensional reasonably necessary test

The Reasonably Necessary Test Applied (cont'd)

- General Crude Oil v. Aiken, 344 S.W.3d 668 (Tex. 1961) (salt water pollution caused by lessee negligence);
- Currey v. Ingram, 397 S.W.2d 484 (Tex.Civ.App.—Eastland 1965) (improper salt water disposal = negligence);
- Texaco, Inc. v. Spires, 435 S.W.2d 550 (Tex.Civ.App.—Eastland 1968) (cattle guard negligently constructed/damages recoverable);

The Reasonably Necessary Test Applied (cnt'd)

- Where courts do find unreasonable surface use, it is largely in cases where the jury has made a factual finding the court was loath to overturn
- *Stradley v. Magnolia Petroleum Co.*, 155 S.W.2d 649 (Tex. Civ. App.—Amarillo 1941)
  - Surface owner complained about excessive use
  - Jury found lessee occupied 6 acres more than was reasonably necessary for its full enjoyment of the mineral estate
- What constitutes unreasonable or excessive surface use depends on individual circumstances
- Mineral owner under the reasonably necessary test is in the driver's seat!

Due Regard or Reasonable Accommodation Doctrine – The Multidimensional Approach

- Unidimensional and multidimensional approaches should be mutually exclusive ways of dealing with the implied easement of surface use
- Prior to 1967 Texas was the bedrock of unidimensional approach
- Multidimensional Approach in Texas
  - *Getty Oil Co. v. Royal*, 422 S.W.2d 591 (Tex. Civ. App.—Beaumont 1967, writ ref'd n.r.e.)
  - Focus of court's opinion was on the nature of the dual possessor rights of both the surface and the mineral owners
  - Set the stage for multidimensional approach

Due Regard or Reasonable Accommodation Doctrine – The Multidimensional Approach (cnt'd)

- Texas Supreme Court follows lead set by *Royal* court
  - *Getty Oil Co. v. Jones*, 470 S.W.2d618 (Tex. 1971)
  - Court nominally announces it is applying the reasonably necessary test
  - Moved to multidimensional approach
    - Muddled by reference and reliance on two cases not directly on point
      - *Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971); *Kenny v. Tex. Gulf Sulpher Co.*, 351 S.W.2d 612 (Tex. .Civ. App.—Waco 1961)

Due Regard or Reasonable Accommodation Doctrine – The Multidimensional Approach (cnt'd)

- *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972)
  - Court seemingly reverted to the unidimensional approach in resolving a classic mineral owner/surface owner dispute
  - Surface owner and lessee were using groundwater for their respective uses
  - Majority opinion ignores *Jones* and returns to *Martin/Monzingo*
  - Opinion stated it relied on due regard test of *Jones*, but clearly applied the unidimensional approach

Due Regard or Reasonable Accommodation Doctrine – The Multidimensional Approach (cnt'd)

- Multidimensional approach recevied another boost in a rather unusual context in *Tarrant County Water Control & Improvement Dist. No. 1 v. Haupt, Inc.*, 854 S.W.2d 909 (Tex. 1993)
- Surface owner planned to inundate the surface for purposes of constructing a reservoir
- Court relied on *Jones*
  - Looked not just to impact on mineral owner
  - Court did not deal with commonplace issues where one party does not totally foreclose use

Due Regard or Reasonable Accomodation Doctrine – The Multidimensional Approach (cont'd)

- Elements
  - Pre-existing surface use
  - Limited options for alternative surface use
  - Mineral owner has reasonable alternatives
    - Off or on-site
    - Usual, customary and reasonable methods
    - Cost factor

Due Regard or Reasonable Accomodation Doctrine – The Multidimensional Approach (cont'd)

- The Genco cases: Texas Genco L.P. v. Valence Operating Co., 255 S.W.3d 210 (Tex.App.—Waco 2008); 187 S.W.3d 118 (Tex.App.—Waco 2006, writ denied)
  - Unusual surface use
  - Slant drilling
  - Off versus on-lease accommodation

Due Regard or Reasonable Accommodation Doctrine – The Multidimensional Approach (cnt'd)

- Several other states then adopt the multidimensional approach
  - Arkansas: *Diamond Shamrock Corp. v. Phillips*, 511 S.W.2d 160 (Ark. 1974)
  - Utah: *Flying Diamond Corp. v. Rust*, 551 P.2d (Utah 1976)
  - North Dakota: *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131 (N.D. 1979)
  - West Virginia: *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721 (W.Va. 1980)
  - New Mexico: *Amoco Prod. Co. v. Carter Farms Co.*, 703 P.2d 894 (N.M. 1985)

Due Regard or Reasonable Accommodation Doctrine – The Multidimensional Approach (cnt'd)

- Wyoming: *Mingo Oil Producers v. Kamp Cattle Co.*, 776 P.2d 736 (Wyo. 1989)
- Colorado: *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997)

- Multidimensional approach or reasonable accommodation doctrine is an evolutionary, not revolutionary change from the traditional unidimensional, reasonably necessary approach
- Common law has evolved slowly by giving the surface owner something more than the traditional view of *damnum absque injuria*

Special Problem Areas – Use of Surface in Connection with Operations on Other Premises

- In most oil and gas leases, the express easement, and certainly any implied easement of surface use, will be limited to the surface lying above the severed mineral estate
- Parties are free to expressly grant easements, though
  - *Caskey v. Kelly Oil Co.*, 737 So.2d 1215 (La. 1999)
- Often litigated off-lease use is salt water injection for either disposal or secondary recovery
  - *Gill v. McCollum*, *Colburn v. Parker & Parsley Dev. Co*., *Farragut v. Massey*, etc.

Special Problem Areas – Use of Surface in Connection with Operations on Other Premises (cnt'd)

- Widely-accepted general rule is that the implied easement of surface use does not extend to support activities benefiting off-leasehold premises
  - Rule changes when either voluntary or compulsory pooling or unitization occurs
    - Number of states have decided cases dealing with surface rights for unit operations
      - Oklahoma has the lion's share of the common law developments

Special Problem Areas – The Duty to Restore

- Where an oil and gas lease or other instrument requires the mineral owners to restore the surface, courts will regularly enforce such provisions
- Legislative mandates to restore the surface estate will be enforce either through state enforcement actions or through private causes of action where allowed
- Louisiana Supreme Court has applied a damage model that is of dire consequences to oil and gas operators
  - *Corbello v. Iowa Production*, 850 So.2d 686 (La. 2003) - surface lessee heldover and court awarded $40mm+ in damages

Special Problem Areas – The Duty to Restore (cnt'd)

- Other issue when it comes to the duty to restore is whether or not that duty should be implied
  - Division of authority on this issue
  - Texas takes the position there is no implied duty to restore the surface
    - *Warren Petroleum Corp v. Monzingo*, 304 S.W.2d 362 (Tex. 1957)
      - Texas usually takes a strong stance against adding additional terms to any written instrument – especially oil and gas leases
    - *Exxon Corp. v. Pluff*, 94 S.W.3d 22 (Tex. App.—Tyler 2002, pet. denied)

Special Problem Areas – The Duty to Restore (cnt'd)

- Issue that needs to be resolved is whether the *Corbello* damage model will be used in cases dealing with an implied, as opposed to, an express duty to restore
- Arkansas has followed the Louisiana approach by implying a duty to restore the surface
  - *Bonds v. Sanchez-O'Brien Oil & Gas Co.*, 715 S.W.2d 444 (Ark. 1986)
    - Court specifically notes that it is taking the minority position but that it believes it is following the modern trend to impose this duty on the lessee

Special Problem Areas – Surface Damage Acts

- Common law has evolved over the past 100 years, a number of state legislatures have determined that the balance of interests between the surface and mineral owners reached by the courts is not in tune with policy choices
- At least 11 states have some type of surface damage compensation act, mostly enacted in the 1980s and early 1990s
  - Colorado, Illinois, Indiana, Kentucky, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Tennessee, West Virginia, Wyoming
- Model Surface Use and Mineral Development Accommodation Act

Special Problem Areas – Surface Damage Acts (cnt'd)

- Recent revival of legislative interest in surface damages provision
  - Wyoming in 2005
  - Colorado in 2007
- Most commentators trace this legislative disenchantment with the common law to the North Dakota surface damages statute enacted in 1975
- Professor Polston correctly identified Indiana as the first state to make a significant statutory change to the common law of implied easements
  - Indiana's statute is the most unique

Special Problem Areas – Surface Damage Acts (cnt'd)

- North Dakota act survived attack on its constitutionality
  - *Murphy v. Amoco Production Co.*, 729 F.2d 552 (8th Cir. 1984)
    - Court spend most of its time dealing with the substantive due process claim
    - The 2 real constitutional issues were dealt with in a very summary fashion
      - Ignored both the contractual damage provision and the nature of the express or implied easements that follow from the severance of the mineral and surface estates

Conclusion

- The inevitable disputes that arise between surface and mineral owners have been historically resolved by the application of traditional common law property principles
- After a half-century or more of resolving disputes in a one-sided manner, courts began to balance the competing interests through the multidimensional approach
  - But due regard or reasonable accommodation doctrine never lost its grounding in property law
- Surface damage acts eliminated implied easements of surface use, replacing it with a strict liability regime

Questions?

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