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Outline of Legal Theories for Representation by Lawyers of Surface Owners/Small Mineral Owners.

Contents

I. Transactional Work: Document review/advice with or without negotiation.

Note an ethical issue: I do not think a fee arrangement in negotiating a lease is ethical if the fee is only a percentage of a lease bonus and or future royalty. The lawyer would only get paid if the lease was signed, and it may be that the best advice is, "Don't sign that lease". So the interest of the lawyer and the client would conflict. I am aware of *Schrader v. Marks*, 648 S.E.2d 8 (W.Va., April 5, 2007), but that case was a contingency fee over a contested claim, and not a transactional representation fee.

A. Leases.

1) Starts with basic contract law, but lot of facts about oil and gas business drive a lot of the language, and the resulting law can get technical.

B. Amendments.

1) Usually for pooling. Circumstances of driller's intentions and the size of client's land and % of ownership can determine leverage.
2) Be careful you do not consent to surface use for horizontal wells draining neighboring mineral tracts.
3) Be careful you do not waive class claims for royalties etc.

C. Surface use agreements.

1) Be careful you only settle foreseen damages and do not waive negligence, strict liability or workman like activities.

D. Pipeline easements.

1) See my article at http://www.wvsoro.org/resources/advice/Pipelines_What_Surface_Owners_Should_Know_2010-10-13.pdf

E. Road rights of way.

II. Litigation for surface owners.

(Usually, but not always, the owner of only the surface split estate, but sometimes a surface owner who also has title to the minerals, but is subject to an old disadvantageous lease – or a new disadvantageous lease.)

A. Causes of action for surface damage from drilling – conventional wells.

1) Oil and Gas Production Compensation Act. W.Va. Code §7-1 et seq. – but damages are limited and not based on market value. Watch for 2 year Statute of limitations, and 80 days after no settlement!!!
2) More than "fairly necessary" or failed to give "due regard" to or "accommodate" surface owner interests.

a) "Disturbing the Surface: What Does Reasonably Necessary Mean in West Virginia?" W.Va. Law Review Vol 85, page 117.

b) Does dominant and servient estate means what it sounds like?

c) W.Va Code 22-7-1(a) (1983). "The Legislature finds the following: (1) Exploration for and development of oil and gas reserves in this state must coexist with the use, agricultural or otherwise, of the surface of certain land and that each constitutes a right equal to the other. . ."

3) Non-compliance with State erosion and sediment control manual (but watch out).
4) Damages not in contemplation of the parties at the time of the severance.
5) Rotary drilling specifically not in contemplation of the parties at time of the severance. See W.Va Code 22-7-1(a)
6) Violation of other DEP rules. See 354 C.S.R. 4 and nearby State rules.
7) State and possibly federal water permitting violations.
8) An agreement between the surface owner and driller for specific reclamation may give additional damages.
9) Treble damages for cut or destroyed timber. "W. Va. Code § 61-3-48a. Cutting, damaging or carrying away without written permission, timber, trees, growing plants or the products thereof; treble damages provided."
10) Double damages for "willful" trespass. W. Va. Code §61-3B-3 (but watch out for possible one year statute of limitation).

B. Surface damage from drilling – horizontal wells.

1) Same causes of action as above, but *magnified* by the difference in technology used and surface disturbance that results.
2) The imposition in terms of size and length of time may make these contingency cases where conventional drilling may not.

C. Enjoin excessive use of surface owner's land for conventional drilling activities.

1) Same causes of action as above.
2) Drill a water well. Gas well cannot be drilled within 200 feet of a water well even if permit has been issued. Diversified Resources Inc. v. Phillips (Circuit Court of Upshur County, 2010) http://www.wvsoro.org/resources/advice/adv10_KeadleOrder_Diversified_v.%20Phillips.pdf
3) The statute provides that the surface owner's consent is needed for the drilling of a deep well. Unfortunately a Circuit Court decision that the Department of Environmental Protection follows has gutted this provision. *Ashland Exploration Inc. v. Miller* Kanawha County Circuit Court Misc 82-715 (1985).
4) Strategy: sue to be sued? Meeting the injunction standard and posting a bond may be problematic. Consider having your client block access after fair warning and let them go to court or bargain with you rather than doing so.

D. The DEP permitting process:

1) Filing comments with DEP. Limited to how the well is drilled and not where. Best useful for leverage in slowing down permit process.
   a) Get the "West Virginia Surface Owner's Guide to Oil and Gas". http://www.wvsoro.org/oil_and_gas_guide/index.html
   b) Check out updates at http://www.wvsoro.org/resources/advice/index.html#wvsog.
   c) Call me!
2) The constitutional right to a hearing/appeal. *Snyder vs. Callaghan*, 284 S.E. 281 (W.Va., 1981)
3) Appealing to Circuit Court. *Lovejoy vs. Callaghan*, 576 SE.2d 246 (W.Va., 2002).

E. Enjoin or sue for damages for the drilling of horizontal wells on surface owners' land.

1) Two theories.
   a) A surface tract cannot be used for a horizontal well that will be drilled into and drain neighboring mineral tracts without the surface owner's consent. The mineral owner of Blackacre, under the common law, has the right to do what is fairly necessary to the separately owned surface of Blackacre in order to get the minerals out of the Blackacre mineral tract. However, the neighboring mineral owners of Whiteacre and Blueacre etc. do not have a right to use the surface of Whiteacre even for pipelines to get out the Blackacre or Blueacre minerals, let alone use the neighboring surface for a drilling site to produce their minerals. See http://www.wvsoro.org/resources/advice/advice9b.html "The consensus is that such veto power exists, although there is little case authority on the matter. The reason for the dearth of such authority is that such veto power appears generally assumed." Williams, Howard R. & Meyers, Charles J., *Oil and Gas Law*, Matthew Bender, "Conduct of Operator Injurious to Others" §§218.4 and http://www.wvsoro.org/resources/advice/advice11.html
2) The extent of surface use in terms of both the area used, and length of time that these processes will be conducted, were not in the "contemplation of the parties" at the time of the severance. See the "broad form deed" cases and their progeny.
   b) Four circumstances.
      1. Separation of ownership of surface from ownership of minerals was before a lease was signed. Theories 1 and 2 apply.
      2. Separation of ownership of surface from ownership of minerals was after a lease was signed, but the lease does not have a pooling clause or permission to use the surface for neighboring production. Theories 1 and 2 apply.
      3. Separation of ownership of surface from ownership of minerals was after a lease was signed, and the lease has a pooling clause or

permission to use the surface fo neighboring production. Theory 2 still applies.

4. Separation was after the lease was signed, the lease did not contain a pooling clause and after the separation the lease was amended to add a pooling clause. Theories 1 and 2 still apply.

2) A third theory: Coal owners (even those that also own the surface) can make gas well drillers drill their wells 1500 feet apart. Its in the Code!
   a) It is a theory, about the only theory, that will result in the State denying a permit. Therefore very effective and inexpensive.
   b) The surface owner must own a workable coal seam , "[A]ny seam of coal twenty inches or more in thickness, unless a seam of less thickness is being commercially worked, or can in the judgment of the department foreseeable be commercially worked and will require protection if wells are drilled through it." West Virginia Code § 22-6-1(e).
   c) There is a declaration that can be filed in the record room to be sure to get the right notice, but it is not necessary if the surface owner learns of this angle after getting the surface owner notice.
   d) For more info see http://www.wvsoro.org/resources/advice/advice11_more.html

F. Nuisance actions for drilling activities on neighboring land.
   1) No "fairly necessary" constraints.

G. Fraud/Misrepresentation on lease agreements.
   1) When is, “If you don’t sign a lease we can drain the gas out from underneath of you,” a misrepresentation – i.e. when does the Rule of Capture not work geologically or legally?
   2) Does size matter?
   3) Does the formation (sand vs. shale) matter?
   4) Is it a statutory "deep" well. The Circuit Court of McDowell County rules that "into" means "into". *Blue Eagle Land Company v. West Virginia Oil and Gas Conservation Commission* available at http://www.wvsoro.org/current_events/well_spacing.html

H. Fraud/Misrepresentation on surface use agreements.
   1) When is, “If you don’t sign, we can do these things to you anyway,” a misrepresentation
   2) Horizontal wells.
   3) More than fairly necessary activity to drill conventional wells?

III. Surface/Mineral Owner Litigation.

A. Mineral owner would like to get a new lease with increased bonuses, royalties, and protections.

1) Declare the old lease expired because it is not really held by production – which case law holds means production in paying quantities.
   a) Look closely at the facts of production -- Check State web site.
   b) Have an expert check out the well.
2) Flat rate lease has expired because it is not really held by production -- flat rate cases are tricky.
   a) The payment of royalty cannot hold a lese if there is no production (and free gas is not production for holding a lease). *Ketchum V. Chartiers Oil, Co* 5 S.E.2d 414 (W. Val., 1939).
   b) The quantity of gas is not important in a flat rate lease since the same royalty is paid for all amounts of production. *Bruen v. Columbia Gas Transmission Corporation* 426 S.E.2d 522 (W. Va. 1992). But could it now be argued that payment of a flat rate on a very low producing well is really not about the royalty, as assumed by the Court, but about holding the lease to avoid paying new bonus and higher royalty.
3) Covenant to fully develop. (You have to send a letter first.) *St. Luke's United Methodist Church v. CNG Development Company* ___ S.E. 2d ___ (W. Va., 2008)
4) Covenant to further explore. Check the treatises. Could be big for Marcellus Shale tracts.

B. Unitization issues.

1) Is the unit drawn in a gerrymandered/panhandle fashion that pays mineral owners who are not being drained?
2) Are only one or two horizontal wells drilled into a unit (including one through your client's tract) designed/big enough for six or eight wells (so the owners of mineral tracts in the opposite corner of the unit who is not being drained is getting paid royalty for the gas being drained form your client).
3) Is your client's tract excluded from the unit but close enough that it is being fraced, and is this a trespass?

C. See VII above.

D. Payment/Calculation of royalties.