

THE MARCELLUS SHALES

The need to change real estate transaction documents

By David McMahon

The Marcellus Shale, a rock formation under most of West Virginia, is the source of the latest and maybe largest ever oil and gas “play” in our state! This play exposes and magnifies a problem that has festered for years in West Virginia for the purchasers in rural real estate transactions. We as a profession need to make changes to contracts, title reports and deeds to deal with the problem. In addition, we need to advise our clients to avoid separating the ownership of minerals from the ownership of the surface where it has not yet occurred, or at least to do so in a way that ameliorates the problems this separation has caused where it has already occurred in West Virginia.

What is the problem? I hear it time and time and time again. “I thought I was getting all the

minerals when I bought it.” They did not.

In my private practice I concentrate on advising small and medium mineral owners who are approached by a landman with a “standard” oil and gas lease (or who have other issues regarding oil and gas interests). My clients tell me that they had a title search done at the time of sale and that they own all of the minerals. We negotiate a lease and an addendum, but the subsequent title search that the lessee does brings a big surprise. Another party owns all or some of the minerals.

I also work part-time for a public interest law firm where I advocate for surface owners who for the most part own no mineral interests under their land. I received a call from a man who

bought a 10-acre tract in a “development” in the Highlands. The title report carefully disclosed a right of way for a power line across the tract. And it mentioned that the purchaser was not getting the minerals or their “appurtenances.” A few months later an appurtenance appeared in the form of a five-acre well site partly on his property, the nicest part of the property, for a new well for a gas storage field being developed under his property. The power line right of way was carefully described, but the mineral owner/lessee’s right to put a five-acre well site and its access road on the land were only described by the “appurtenance” language.

I get these kinds of calls all the time.

The problem for surface-only owners is that the mineral owner,



The Marcellus Shale, a rock formation that extends throughout much of the Appalachian Basin, contains largely untapped natural gas reserves and is an attractive target for energy development. However, its rise in importance has amplified the difference between owning the surface with or without owning the underlying minerals, presenting an urgent need to change the real estate transaction documents in our state.

unless otherwise stated, has a right to use the surface to get out the minerals. Language in the cases varies, but the mineral owner is generally allowed to do what is "fairly necessary" to get the minerals out "accommodating" or giving "due regard" to the surface owner's use. The case law speaks of the mineral interest being "dominant" and the surface interest "subservient," although West Virginia's Oil and Gas Production Compensation Act makes the interests equal if the severance was after its enactment in 1983 (and subservience may just be designation of the party with the burden). So by virtue of merely owning the minerals, a mineral owner and his lessee/driller have the right to bulldoze an access road right of way, clear or bench a well site, use water out of streams, lay a pipeline and more, and to keep them there for generations. Too often the purchaser/surface owner is not aware that things of this sort could happen, assuming the pur-

chaser even knows he is not getting the mineral rights. So for years surface owners have been surprised by the things gas drillers can do to their land and even surprised that they did not own the minerals and were not entitled to any royalty. And now comes the Marcellus Shale play.

The Marcellus Shale play is different from traditional gas well drilling in huge ways.

First, the royalty/financial stakes are higher. Being a shale and not a sand formation, these wells produce much, much more gas than traditional wells. The royalty could be \$5,000 - in the first month.

Second, traditional wells use using a couple of tractor trailer loads of water pumped into the formation during drilling in order to fracture the formation and allow the gas flow to the well bore. Marcellus Shale wells use 600,000 gallons of water and upward! Next to the gas well, in addition to the traditional drilling

"pit," the driller builds an Olympic swimming pool-sized pond to hold the water to be used. The picture accompanying this article is a typical vertical Marcellus Shale well with its drilling pit and Olympic pool-sized "frac" water pond. This well had yet another pond out of sight that catches the frac water that flows back out of the well after the fracture is done. This site is huge. In fact it may be argued that the use of this much surface was not in the contemplation of the parties at the time of the severance so that the surface owner could stop this size site, but that case has not been brought yet.

Buying surface land without being aware a traditional well can be drilled on your land is bad enough. Imagine the situation with a five-acre Marcellus well site! And this is only a vertical well. Even newer technology enables drillers to drill down and then turn horizontally 4,000 feet, six wells drilled from one site, using three times the 600,000-gallon amount of water – per well!

Thirdly, although it is more or less productive from place to place, the Marcellus Shale is under almost all of West Virginia! It is under counties such as Hardy, Randolph and Greenbrier counties, where not even native West Virginia families are familiar with severed mineral estates.

A woman who purchased a 35-acre farm in Doddridge County came to me believing she owned the minerals. And sure, in the last paragraph the deed language says that the conveyance is subject to reservations of record (not described), but only after a long discussion of the general warranty and the description of the land. And sure, the title insurance says it excludes any and all oil and gas agreements embracing or affecting the property, but only after the page before says the property is in "fee simple." And sure, the standard practice is to go back only 60 years, and the title report states that it only goes back 60 years and that oil and gas information is beyond the scope of the examination. But nowhere does the deed point out that there is a chance that someone else may own the minerals, or that a driller might have a right to bulldoze an access road and a five-acre well site on the land and that she will get none of the royalties for having this monstrosity on her land.

The language I see in contracts, deeds and title opinions does not let potential buyers know what they are agreeing they are buying, not buying or may or may not be buying.

In real estate transactions buyers should be agreeing in writing to one of three conveyances. First, the buyers who are lucky can be agreeing to buy the surface and all of the ownership of all of the mineral rights (with no leases signed by prior owners). And if that is what they are agreeing to, a 60-year title search is not enough.

Second, buyers can be agreeing to buy the surface and not be buying ownership of the mineral rights. If that is the case, they need to be specifically agreeing that what they are purchasing can have an access road and a multi-acre gas well site bulldozed on it, a gas well and a pipeline installed on it and that the mineral owners can keep all of that on the surface for generations to come with no royalties paid to the surface owner.

Third, the buyers can be agreeing to buy the surface without knowing whether or not they are buying all of the mineral rights. They should understand a complete title search can be done so they would know for sure whether or not they are agreeing to buy all of the mineral rights. And if they decide to agree to purchase the surface without knowing whether or not they are buying all of the mineral rights, they need to clearly agree that what they are purchasing may allow the owner of the mineral rights to bulldoze an access road and a multi-acre gas well site on their land, to drill a gas well and install a pipeline and to keep all of that on their land for generations to come with no royalties to the surface owner.

We as a profession owe a duty to the client public to put all of what is being agreed to in the contracts, title opinions and deeds. We should not continue to draft documents that duck the issue of mineral ownership and, even more importantly, leave out the burdens on the land that are the consequences of the lack of mineral ownership. The contracts, the title reports, and the deeds need to be changed. The increased financial significance and impact on the surface of the Marcellus Shale play, however, demand changes be made now.

Finally, one wag once said that what we learn from history is that we do not learn from history. I hope in this case an exception can be made. Almost everyone bemoans the effects of the separation of the ownership of the surface from the ownership of the minerals that happened in large tracts in much of southern West Virginia and that happened in small tracts in west-central West Virginia. It will happen again east of I-79

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and the Turnpike unless we do something now either to prevent it happening again, or to at least ameliorate the impact.

Current owners of fee simple land in the Highlands and other parts of West Virginia east of I-79 and the Turnpike now see their land as much more valuable than it once was because of the Marcellus Shale underlying it. Their ship has come in. When they sell the surface they are likely not to want to part with the right to lease the Marcellus Shale. Or if they would sell the ship, they would want a very hefty premium that someone wanting a little surface of Almost Heaven may not be able to pay.

My hope is that the motivations to sever the surface and mineral estates can be resisted so that the problems, abuses and economic unfairness that severance

has caused in other parts of the state will not happen again. But it probably is going to happen in lots of instances, in which case I urge a partial solution. If you represent a buyer, and the seller will not sell, or the buyer cannot afford, the mineral rights, then advise the buyer to insist on getting at least some portion of any future royalty. The seller will probably insist on keeping the ability to sign the lease without the surface owner's signature. That can be done and still give the surface owner some portion of the royalty as real compensation for the burden that will be imposed on them. It is only fair, and it is likely to make the surface owner a more cooperative partner. Also require the mineral owner to obtain “the consent of the surface owner to the location of the well site and access road, which consent may not unreasonably be withheld or delayed.”

Even oil and gas industry members bemoan the problems caused by severed minerals. We as a profession should do what we can to avoid or ameliorate future problems arising out of severing surface and mineral ownership. **WV**

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