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Surface owner, mineral holder: negotiating for surface use

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The oil and gas industry is booming in Colorado. Operators, drilling companies, and other oil and gas services companies are in need of locations to operate, but there is a shortage of entitled, industrial-zoned developments near the areas of the oil and gas development. Oil and gas companies, and real estate developers are turning to farmers and ranchers to find land to develop. In many cases, subsurface mineral rights have been severed from the surface estate. This is relevant to real estate developers because development of the surface estate needs to reasonably accommodate access and extraction of the subsurface minerals. Often, the surface owner and the mineral holder will negotiate and enter a surface use agreement. The following is a discussion of the competing interests between surface and mineral owners and a summary of the law that guides that relationship.

■ **Historical Perspective and the Split Estate.** The traditional understanding of the ownership of real property, going all the way back to medieval Italy, is summarized in the Latin phrase, *"Cuius est solum, eius est usque ad coelum et ad inferos,"* which means that the owner of the surface also possesses ownership "all the way up to Heaven, and down to Hades." While the U.S. largely adopted this concept as part of its general adoption of the Common Law of England, certain economic realities, including coal, iron, and oil and gas extraction, of the 19th century produced a change in this concept. When a *severance* of the minerals from the surface occurs, the resulting property is referred as a "split estate." This idea presented a colossal question of priority: Which estate is dominant? The surface or the mineral estate?

The general consensus realized that the mineral estate must be dominant, because if the surface would be deemed dominant, then the surface owner could constructively nullify the property of the mineral owner by blocking entry by the mineral estate owner for the extraction of minerals. This would be an unjust result for the mineral owner without compensation or other assorted legal remedies that would overly burden our property law and obstruct the free flow of commerce.

For years, oil and gas operators, as holders of mineral estate, long supported a nearly unfettered right of the mineral estate owner to assert above the rights of the surface owner of the same tract. Laws requiring surface restoration, bonding, and compensation for lost crops only created a patchwork of minor cures to a larger problem.

This problem began to change after the 1971 case *Getty Oil Co. v. Jones (Texas, 1971),* which established a concept known as the *Accommodation Doctrine.* While the case only applied in Texas, a four-part test would become an archetype, at a minimum, for other states that would deal with the same concerns. This case did nothing to elevate the status of the surface estate in terms of the overarching question of dominance. The mineral estate still controlled; it was just subject to a certain analysis when dealing with surface owners. Almost every oil- and gas-producing state now recognizes some form of this *Accommodation Doctrine.* Colorado, though, would add to it.

■ **The Colorado Approach.** In the case of *Gerrity Oil & Gas Corp v. Magness (Colorado, 1997),* Colorado expanded the principles of the *Accommodation Doctrine* by adding, among other things, a "due regard" component. This meant that now the operator had to consider changing its *planned use of the surface* in a manner that respects the surface and mineral estates as "mutually dominant and mutually servient" to the other. This due regard was further applied in *Burkett v. Amoco Production Co. (Colorado App. 2003),* relying in part on *Gerrity:* "The lessee of a severed mineral estate is privileged to use that portion of the surface that is reasonably necessary to develop the mineral interest. However, the surface owner continues to enjoy the right to use the surface consistent with the burden of the mineral lessee's privilege to develop the mineral interest. Neither the owner nor the lessee has an absolute right to exclude the other from the surface, but rather, each must have due regard for the rights of the other in making use of the surface …"

In the wake of the two cases above, Colorado codified its variation of the *Accommodation Doctrine* on Sept. 1, 2007, as "Reasonable Accommodation" (Colo. Rev. State. Ann. § 34-60-127). While this statute contains many provisions relevant to the balance between surface and mineral owners, section 1(d) and (2) suggest a protection for surface use agreements as the vehicle for balancing surface use interests:

(d) The standard of conduct set forth in this section shall not be construed to abrogate or impair a contractual provision binding on the parties that expressly provides for the use of the surface for the conduct of oil and gas operations or that releases the operator from liability for the use of the surface.

(2) An operator's failure to meet the requirements set forth in this section shall give rise to a cause of action by the surface owner …

■ **Application for the Commercial Real Estate Developer.** Colorado's "Reasonable Accommodation" doctrine relies heavily on *good faith* surface use agreement negotiation for its application. However, there are no black letter requirements, even within the rules of Colorado Oil & Gas Conservation Commission, that such an agreement *must* be executed between a surface owner and an operator. This means that while entry by an operator is not completely barred by Colorado law once surface use agreement negotiations fail, it does mean that legal and industry norms highly favor the working toward an agreement that is mutually acceptable.

When considering developing land, and particularly rural farm and ranch land, it is important to understand early in the process whether the mineral estate has been severed from the surface estate. If so, developers need to determine whether they will be able to negotiate an acceptable surface use agreement with the mineral owner. If a surface use agreement already is in place, it should be examined to confirm the restrictions on surface use development are acceptable. It is our experience that once a surface use agreement is in place, it can be difficult to get the attention of the mineral owner later on to discuss changes to the prior agreements.

Understanding the status of title and whether there is a severed mineral estate is one of the first steps when considering the development of rural land. As always, this is merely a summary and overview of the law of surface use and *Reasonable Accommodation* in Colorado. Contact your general counsel or outside counsel, as appropriate, when further questions present.▲