UPDATE ON SURFACE USE AGREEMENTS AND DISPUTES

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CHAPTER ____

TABLE OF CONTENTS

Page

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I. INTRODUCTION

It has been said in the context of royalty clauses that "[t]he best way to draft for the future is to learn from the past."[1] For surface use agreements, the best drafting approach is two-fold. Not only must the drafter of a surface use agreement incorporate lessons from recent bad experiences, the drafter must also be forward thinking enough to address foreseeable conflicts between multiple parties with concurrent rights to use the surface of the same property.

As recently as a few decades ago, surface provisions in a standard oil and gas lease form were limited to a few lines addressing the burial of pipelines at plow depth, reimbursement for crop damages and perhaps a limitation on the use of water for secondary recovery. The remaining space between the operator and the surface owner was left to the arena of common law and the accommodation doctrine. The evolution of this strand of case law has been addressed ad nauseam in prior legal education seminar materials and this paper will spare the reader a detailed review of the early decisions that have defined application of the doctrine.

Instead, the purpose of this paper is to highlight recent cases and how they reflect upon the current state of the law. Surface use agreements and corresponding surface protection provisions incorporated into oil and gas leases have grown to encompass a wide range of activities conducted by the operator and the surface owner. As a result, many disputes are relegated to the interpretation of the contract between the parties and its application to the situation at hand. Occasionally, a novel or unanticipated situation presents facts that require a refinement of accommodation doctrine principles by a court of law. But the goal of the legal practitioner should be to draft a document that provides a clear set of rights and obligations for both parties, in order to avoid a subsequent dispute.

The increasingly lengthy and detailed nature of surface use agreements is in one sense a natural result of the maturation of the industry. But it also reflects the multiplication of potential surface uses that confront the surface owner and the operator in the modern era. Oil and gas operations and urban environments increasing coexist in the same space. Likewise, the arrival of the renewable energy industry has multiplied the potential for conflicting use of the surface estate. Where open space does exist, the surface owner likely has a grazing or agricultural tenant to help retain certain tax benefits. The operator also has to worry about other mineral lessees that may hold retained rights under a previous lease or pipeline and access easements. All of these conflicting uses may require additional roads, transmission lines and corresponding infrastructure that impinges upon the mineral lessee's right to reasonable use of the surface estate under its implied easement.

The following material contains a review of recent case law relating to surface use issues as well as an evaluation of emerging topics of importance to both operators and surface owners. At the center of most of these discussions are scenarios where multiple parties hold rights of access to the property and a right to use the same resources, whether it be shared use of surface acreage, water or airspace. The hope is that the reader will come away with an ability to better anticipate potential conflict and to draft around certain issues before trouble arises.

II. INTERPRETATION OF THE SURFACE USE CONTRACT

Before turning our attention to shared use by multiple parties, let us first address interpretation of the contract itself. It must be remembered that a surface use agreement will be subject to basic contract interpretation principles with respect to its assignability, survival and the interpretation of its terms addressing payment of damages, remediation and other core areas of concern. The surface owner must also reflect upon the nature of its ownership interest in the property and how it relates to other parties that hold interest in the surface estate and mineral estate beneath the property. Failure to use the correct language or to address the position of the parties in the correct manner could result in the inability of a party to enforce the terms of the agreement in the desired manner. For the operator, an unclear or inoperative term within the agreement creates space for potential confusion and litigation between the parties. Therefore, it is in the interest of both parties to create a contract that clearly recognizes the position of the parties and their intended rights and obligations.

A. Assignability and Survivability

The surface use agreement, if negotiated separately from the oil and gas lease, could find the scope of its application limited following an assignment of the lease or other change in circumstances such as bankruptcy or the segregation of the lease as to surface parcels or depths. While an oil and gas lease is a conveyance of real property, a surface use agreement is not a conveyance but a

[1] "The clauses in the modern oil and gas lease [have evolved] through many years of trial and error and after a great amount of litigation and judicial construction." *See* A.W. Walker, Jr., "Defects and Ambiguities in Oil and Gas Leases," 28 TEX. L. REV. 895, 909 (1950).

covenant.[2] A covenant is an agreement between two or more individuals to do or refrain from doing something. Covenants are typically "personal covenants," meaning that they only bind the parties who sign the agreement; and will not bind their successors in interest.[3] A real covenant, however, is said to "run with the land," meaning it will bind the heirs and assigns of the covenanting parties.[4] A covenant is considered to run with the land if: (1) it touches and concerns the land; (2) it relates to a thing in existence or specifically binds the parties and their assigns; (3) it is intended by the original parties to run with the land; and (4) the successor to the burden has notice.[5]

For the purposes of a surface use agreement, where the agreement itself or a memorandum is recorded, the essential focus is going to be whether the parties intended the covenant to run with the land. One effective way to evidence this intent in an instrument such as a surface use agreement is to include the following words after describing the parties to be bound by the agreement: "[party name], its successors, heirs and assigns." However, by far the most common and iron-clad method of ensuring the surface use agreement will run with the land is to include an "Inurement Clause" in the agreement, such as the following:

> All covenants, agreements, warranties, representations, and conditions contained in this Agreement shall bind and inure to the benefit of the respective parties to this Agreement, their personal representatives, successors, heirs and assigns. This Agreement, and its covenants and restrictions, shall run with the land.

It is also important to define the scope of the agreement with regard to the parties involved. References to the "surface owner" or "landowner" should be inclusive of a broad variety of persons and entities involved with ownership and enjoyment of the property. This is especially important in the event that various interests in the surface and subsurface of the property are held by family limited partnerships, trusts, limited liability companies and heirs and successors of the owner when the property was acquired. This same group will need to be covered by the insurance and indemnity provisions of the agreement.

If the property is used by agricultural, hunting or grazing lessees, these parties should also be defined and their respective degree of protection under the agreement should be spelled out. A non-party to a contract cannot bring suit unless the contracting "parties intended to secure some benefit to that third party, and only if the contracting parties entered into the contract directly for the third party's benefit."[6] In the absence of clear terms establishing the rights and obligations as between the operator and a lessor's surface lessee, an aggrieved grazing or farming tenant will have the difficult task of establishing that they are an intended third-party beneficiary of the agreement.[7]

The number of oil and gas lessees and operators operating under a lease often multiplies over time. If the oil and gas lease is freely assignable, the lessee can segregate the lease into separate geographic areas and distribute them to different operators. As a result, the lessee or operator should be described to include all of the successors, affiliates, subsidiaries, assignees and receivers of the lessee's interest.

B. Damages

1. Scope of Damages Covered

The scope of damages covered by a surface use agreement is a key area that must be given careful consideration. Agreeing in advance to compensation terms can save significant time and expense should such a claim arise. The scope of negotiated damages should be specified, and (from the operator's perspective) items and actions that are not specified should be excluded, to avoid open-ended claims and cumulative relief. It is not uncommon for an operator to request a waiver of the surface owner's right to lost profits, indirect, consequential, special or punitive damages in connection with the surface use agreement. From the point of view of the surface owner, a mechanism to recover for unspecified, unanticipated damages should be provided.

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[2] *See* Hitzelberger v. Samedan Oil Corp., 948 S.W.2d 497, 503 (Tex. App.—Waco 1997, writ denied) (noting that an oil and gas lease, in addition to being a conveyance of real property, contains covenants and conditions that must be interpreted under the same rules that apply to other contracts).

[3] *See* Fallis v. River Mt. Ranch Prop. Owners Ass'n, 2010 WL 2679997, at *9 (Tex. App.—San Antonio 2010, reh'g overruled (stating that a covenant running with the land "may be enforced by a successor-in-interest")).

[4] Inwood N. Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632, 635 (Tex. 1987).

[5] Fort Worth 4th St. Partners, LP v. Chesapeake Energy Corp., 882 F.3d 574 (5th Cir. 2018), aff'g 2016 U.S. Dist. LEXIS 163758 (N.D. Tex. Nov. 28, 2016).

[6] Grinnell v. Munson, 137 S.W.3d 706, 712 (Tex. App.—San Antonio 2004, no pet.) (citing MCI Telecomms. Corp. v. Tex. Utilities Elec. Co., 995 S.W.2d 647, 651 (Tex. 1999)).

[7] *See* EOG Resources, Inc. v. Hurt, 357 S.W.3d 144 (Tex. App.—Fort Worth 2011, pet. denied) (surface lessee of oil and gas lessor not third party beneficiary to oil and gas lease's surface use and damages provisions).

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