Surface Access to Severed Federal Minerals

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ROADMAP

1. Split Estates: What & where are they?
2. Management and Disposal of Federally Owned Minerals: Unitization & the MLA
3. Mineral Estate Dominance: The Implied Easement & Express Reservations of the SHRA
4. Entek GRB, LLC v. Stull Ranches, LLC
5. Implications of Unitization on Surface Access in Federal Units
6. Limits of Participating Areas & Unit Contraction
7. Surface Owner Compensation
8. Questions
THE ERA OF PUBLIC LAND DIVESTITURES

- 1862 Homestead Act; 1877 Desert Lands Act
  - Classification as Mineral or Non-Mineral
- 1906 Withdrawal of 64 Million Acres of land thought to contain coal
- 1909 Coal Lands Act
- 1914 Agricultural Entry Act
- 1916 Stock Raising Homestead Act
RESERVATION OF MINERALS

“[A]ll entries made and patents ... shall be subject to and contain a reservation to the United States of all the coal and other minerals...together with the right... to reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals...

The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.”
MINERAL LEASING ACT (1920)

- Authorizes Secretary to lease the millions of acres of federally held minerals which were reserved under the SHRA and other acts.
- First exercise of reserved right of disposal
- Sets Royalty rate and lease terms
MINERAL LEASING ACT (1931)

- Authorizes combination of interests “for the purposes of more properly conserving the natural resources of any single oil or gas pool or field”
- Secretary may “establish, alter, change, or revoke drilling, producing, and royalty requirements of such leases, and to make regulations with reference to such leases as he may deem necessary or proper to secure the proper protection of such public interest.”
FORMING A FEDERAL EXPLORATORY UNIT

- Application Letter: Request for Designation
- Enter and Seek Approval of Unit Agreement
  - Between BLM and Unit Operator
  - Establish size based on boundaries of common source of supply
  - Must be approved by owners of 85% unit area on an acreage basis
  - Approval by Secretary of Interior - may modify underlying leases
- Enter Unit Operating Agreement –
  - Between Operator and other Working Interest owners
EFFECTS OF UNITIZATION

• Operations anywhere within the unit extend all leases during the initial unit term (still must pay rentals of Federal leases)
• One producing well will extend all leases in the participating area for purposes of the habendum clause of the lease
“Drilling and producing operations performed hereunder upon any tract of unitized lands will be accepted and deemed to be performed upon and for the benefit of each and every tract of unitized land, and no lease shall be deemed to expire by reason of failure to drill or produce wells situated on the land therein embraced.”
SURFACE RIGHTS OF THE UNIT OPERATOR

“May the interest owner and his or her lessee also use the surface for access to drill operations on adjacent acreage when the land is included in the unit for which the operations are being undertaken?”

Williams & Meyers, Oil and Gas Law, §20.06
MINERAL ESTATE DOMINANCE

“The [Agricultural Entry Act and Stock Raising Homestead Act] disclose an intention to divide oil and gas lands into two estates for the purposes of disposal—one including the underlying oil and gas deposits and the other the surface—and to make the latter servient to the former, which naturally would be suggested by their physical relation and relative values.” Kinney-Coastal Oil Co. v. Kieffer
ACCESS AND RE-ENTRY ARE LIMITED TO THE SUBJOINING ESTATE

On private land, the implied easement does not apply to extra lateral parcels.

“It is an axiomatic rule of oil and gas law that ‘the use of the surface by a mineral owner or lessee, in connection with operations on other premises, constitutes an excessive user of his surface easements.’” - Williams and Meyers
BUT... IN POOLS AND DRILLING UNITS, USE OF EXTRA LATERAL PARCELS HAS BEEN ALLOWED

• “The Unit Operator has the right to use any surface within the unit for purpose of efficiently carrying out the approved unit plan, so long as such use is reasonable and not unduly burdensome to any particularly surface area.”

ENTEK GRB V. STULL RANCHES
DISTRICT COURT DECISION

2012: District court denies Entek’s request for a preliminary injunction to enjoin Stull from restricting access to the #3-1 well by way of the existing road. Holds that: “the Court finds that nothing in the SRHA expressly or impliedly expands the rights of a mineral lessee to use the surface area for the development of adjacent mineral”

2013: District Court grants Stull summary judgment that Entek may not cross its surface to reach a well located on BLM property and that Entek’s surface access is “limited to the geographic boundaries of the lease from which Entek intends to extract minerals”
PRIOR AUTHORITIES

*Bourdieu v. Seaboard Oil Corp. of Delaware* (Cal. App. 1940): Right of Re-entry “could not be and is not enlarged by the terms of the lease.”

*Mt. Fuel Supply Co. v. Smith* (10th Cir. 1973): The fact that the field has been unitized is of no significance other than to the extent that the particular leases covering the minerals under the defendants’ surface may have been actually and legally modified thereby.

*Stone & Wolf, LLC v. Three Forks Ranch* (D. Colo. 2004): Part 226(m) of MLA “does not expressly or impliedly alter the burden on any surface estate whose subjacent mineral estate may be included within the unit.”
“The fact that the [SHRA] reserved mineral estate is included in an exploratory unit where no oil or gas has been discovered does not independently create a right to burden SRHA-patented lands with uses that apparently will benefit only operations to discover or exploit minerals located on other properties contained within the exploratory unit.”
“Middle By-Pass Re-Route”

Approved 10/13
“Under [226(m)], any mining activity on any leasehold in the unitized area is deemed to occur on all leaseholds. Given this, and given the first reservation in the 1916 Act, it follows that Entek, the designated Focus Ranch Unit operator, can enter and occupy the surface above any leasehold in the unitized area to the extent that surface access is reasonably incident to mining in any leasehold in the unitized area. No longer is the right to enter and occupy the surface even arguably limited to particular leaseholds or surface estates”
“The [unit] agreement's designated operator may now use any portion of the surface in the unit to aid its mining activities in the unit without respect to individual lease or surface boundaries. Put differently, the operator may now “reenter and occupy” so much of the surface in the unitized area as may be “reasonably incident” to extracting minerals from the unit.”
THE ENTEK REASONING

- Congress reserved broad right of disposal with minerals
- Congress exercised its right of disposal when it enacted the MLA
- MLA includes provision stating that “Operations or production pursuant to such an [Drilling or Communitization] agreement shall be deemed to be operations or production as to each lease committed thereto” 30 U.S.C. 226(m)
- Thus, unitization permits use of surface for extra lateral development within the unit, where Secretary has exercised its authority to combine leases
DOES NOT OVERRULE MT. FUEL

• **Mt. Fuel:** “The fact that the field has been unitized is of no significance *other than to the extent* that the particular leases covering the minerals under the defendants’ surface may have been actually and legally modified thereby.”

• **MLA** authorizes the Secretary to “establish, alter, change, or revoke drilling, producing, and royalty requirements of such leases.”

• **Entek:** “The Agreement expressly modifies all mineral leases in the region to make plain that operations "upon any tract of unitized lands" are deemed to occur on all other portions of unitized lands.”
IMPLICATIONS OF ENTEK

- Roads
- Wastewater Disposal
- Production Facilities
- Carbon Sequestration and Gas Storage
- Dwellings
- Changes in Reasonable Use Standard
THE EXPLORATION STAGE: GEOPHYSICAL AND SEISMIC OPERATIONS

• Right of entry and use by unit operator already implied by right of reasonable ingress and egress for purposes of exploration
• May simplify logistics for unit operators
  • staging of equipment
  • laying of source points
THE DRILLING STAGE:

• Horizontal Drilling Locations
• Multi-Well Pads
• Access Roads
• Pits
• Pipe Storage
• Trespass Issues – slant drilling, fracturing, and proppant
THE PRODUCTION STAGE:

• Gathering, storage, and processing facilities
• Wastewater disposal
• Use of Salt Water for EOR
• Gas Storage
• Employee Housing
WHAT IS REASONABLE USE?

The operator may now “reenter and occupy” so much of the surface in the unitized area as may be “reasonably incident” to extracting minerals from the unit.”

• Is it reasonably incident?
• In Accommodation Doctrine states, does this allow “off lease” accommodation? How to balance competing interests of surface owners?
LIMITATION OF PARTICIPATING AREAS

- Unit automatically contracts to “participating area” after a term between 5-12 years
- Participating Area may include additional lands “necessary to unit operations”
  - More than an indirect benefit
  - Must directly relate to increased production from unit wells
  - Wastewater disposal excluded
- Be aware of locating uses of surface permitted by Entek on lands that may later be excluded by unit contraction.
SURFACE OWNER COMPENSATION

• Surface Damage Agreement /Bonding / Compensation still required per BLM regulations
• Paying for access is different than paying for damages
• Can now bond on to greater scope of use
COULD THERE BE A TAKING?

“Maybe—despite all this—some lawful authority limits the government's ability to update its disposition plans or at least affords some measure of compensation to those property owners the updates adversely affect.”
“In the never-ending tug of war between ranchers and miners – all of whom derive their interests from federal land grants – it is for congress to set policy and this court to construe it. If Stull seeks revisions to federal land use policy its efforts would be better directed to legislators than courts.”
QUESTIONS?
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