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*Editor-in-Chief*

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# Preface

Thank you for supporting the Energy & Mineral Law Foundation's (EMLF) efforts to foster the study of energy, mineral and natural resources law, as well as provide a continuing forum for examination and debate of the legal issues relevant to energy and natural resources development.

Membership is the backbone of any good organization. However, it's your enthusiastic support of the Annual and Special Institutes throughout the year that makes the EMLF great. Whether it be through scholarly writing, speaking engagements, chairing an institute or tract within an institute, participation on a program planning committee, sponsoring an institute reception, serving on the Board and/or a standing or special committee, financial contributions for EMLF scholarships, or one of any number of other ways you commit your time and resources to the success of the EMLF.

Special thanks to those who were involved in the various programs the EMLF sponsored this year: David Morrison, Program Chair for the 33rd Annual Institute held in Charleston, South Carolina this past June; Russ Schetroma, who chaired the Oil and Gas Tract, and Brian Wells, who served as the Coal Tract Chair for the Annual Institute. Maureen Carman, who kicked off our conference schedule on a high note as Program and Coal Chair for the Kentucky Mineral Law Conference held in Lexington, Kentucky in October 2011, and finished the year on an even higher note as our esteemed McClaugherty Award recipient; Tim Miller, who was both my Vice President and Chair of the Oil and Gas Tract at the Kentucky Institute. Jerry Eyster and Bruce Reed for their continued excellence as Co-Chairs and long-time planners for the Winter Workshops on Energy Law, held this past February in Fort Lauderdale, Florida. Tom Lane for taking the reins as Program Chair for our always popular Special Institute dedicated to title issues around shale gas development, which was held in May in Wheeling, West Virginia. Dan Wolff, Program Chair for the Mine Safety and Health Special Institute held in Las Vegas, Nevada in conjunction with the National Mining Association's 2012 MINExpo.

There would be no EMLF if not for the dedication, loyalty, and extraordinary efforts of Sharon Daniels, Executive Director, and Carolyn May, CLE and Membership Coordinator. Officers come and go, but Sharon and Carolyn remain in the trenches of everyday decisions and all the necessary behind-the-scenes work to produce successful programs year after year.

These proceedings of the 33rd Annual EMLF Institute include 22 chapters on topics presented during the General, Oil & Gas, and Coal Tracts at the Annual Institute held in Charleston, South Carolina from June 24-26, 2012. We appreciate the contribution of this year's authors and presenters to the EMLF's extensive directory of scholarly papers, which can now be searched by keyword on our new and improved website (www.emlf.org).

To the countless law students who will rely on current and past Proceedings in their legal research, please note that the EMLF awarded $50,000 in scholarships again this year. You are encouraged to contact your law school or the EMLF directly to learn more about EMLF scholarship eligibility and the application process.

It's been a pleasure to preside over such a dynamic group of professionals.

John T. Boyd II
John T. Boyd Company
*President, 2011-2012*

# Chapter 9

# Oil & Gas Easements

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**Synopsis**

## § 9.01. Oil & Gas Rights Are a Collection of Easements.

The oil and gas lease is a collection of easements. So are the rights associated with a mineral interest that has been conveyed separately from the surface estate. Each give the lessee, or mineral owner, the right to enter the grantor's property to search for, develop, extract, possess, and market oil and gas. Whether classified as a fee simple determinable or a *profit à prendre* determinable,[1] the oil and gas "lease" authorizes the lessee to use land owned by others to conduct development operations, and acquire possession and title to the oil and gas extracted from the land. The severed mineral estate, whether classified as a possessory interest in real property, or a nonpossessory right to enter the property to search for and extract oil and gas, also enjoys a number of appurtenant easements to facilitate reasonable, necessary, and convenient development.[2]

Any time more than one owner has the right to use property, there is opportunity for conflict. This chapter examines how courts, and the terms of the *Restatement (Third) of Property: Servitudes*, resolve conflicts associated with oil and gas development. Most land use conflicts are resolved by defining the rights of the easement owner.[3] To properly define easement rights in

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1 Classification, not labeling, plays an important role in oil and gas law. For example, one of the few uniform concepts among all producing states is that the oil and gas "lease" is not really a "lease." Instead of a landlord and tenant relationship, the oil and gas lease, for example in Texas, is a transfer of title to the oil and gas in place, a possessory interest in land that cannot be lost through abandonment. Stephens Cty. v. Mid-Kansas Oil & Gas Co., 254 S.W. 290, 293 (Tex. 1923). Contrast the Texas approach with that of Kansas, where the oil and gas lease creates a *profit à prendre*, which is a nonpossessory interest in land that, like any easement, can be abandoned to the holder of the servient estate. Burden v. Gypsy Oil Co., 40 P.2d 463, 466 (Kan. 1935). Classification can also be inaccurate, or at least not fit with traditional property law concepts. For example, although Kansas classifies the oil and gas lease as a *profit à prendre*, which is clearly an interest in land, the Kansas Supreme Court has found it expedient to classify it as "personal property." *See generally* 1 David E. Pierce, *Kansas Oil and Gas Handbook* 4-15 (1986).

2 1 Eugene Kuntz, *A Treatise on the Law of Oil and Gas* § 2.4 (1987) [hereinafter Kuntz].

3 The *Restatement* provides: "A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." *Restatement (Third) of Prop.: Servitudes* § 4.1(a) (2000).

oil and gas, it must first be acknowledged that the easement rights will be exercised within a reservoir community.

## § 9.02. The Physical Realities of Oil & Gas: The Reservoir Community.

No oil and gas easement is an island.[4] Although an owner of land can construct a fence, and delineate his or her surface boundaries, this is not possible when the line is drawn within an oil and gas reservoir. Yet, all oil and gas conveyances and leases draw lines that purport to neatly carve up the oil and gas reservoir. This is the product of one of the most basic rules of property law: the owner of land "owns" all that lies above and below the surface boundaries of the land.[5]

Commonly known as the *ad coelum* doctrine, surface boundaries become the essential physical definition of property ownership. But, as soon as the *ad coelum* doctrine was applied to oil and gas, it became necessary to create the rule of capture to define ownership of oil and gas that migrate, within the reservoir, across surface boundary lines.[6] As Professor Kuntz has observed

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4 John Donne (1572-1631), wrote, in *Meditation XVII* (modern translation): "No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were: any man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee." http://www.online-literature.com/donne/409/ (last visited June 19, 2012).

5 This rule has been qualified to accommodate air travel above the surface. The rule was further qualified, as to subsurface rights, in *Chance v. BP Chem., Inc.*, 670 N.E.2d 985 (Ohio 1996). In *Chance* the landowners sought damages for trespass from alleged migration of injected wastes from an adjacent injection well. The court limited the landowners' right to recovery, and therefore their property rights in the subsurface of their land, to situations where they could prove "the injectate interfered with the reasonable and foreseeable use of their properties." *Id.* at 993. The landowners failed to meet their burden of proof. *Id.* This remains an open issue in other jurisdictions.

6 Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 4 (Tex. 2008) (applying the rule of capture to avoid liability for alleged trespass from cross-boundary fissures caused by hydraulic fracturing); *see* David E. Pierce, "Carol Rose Comes to the Oil Patch: Modern Property Analysis Applied to Modern Reservoir Problems," 19 *Penn. St. Envtl. L. Rev.* 241, 260-61 (2011) [hereinafter *Modern Property Analysis*].

in his treatise: "Because of the peculiar nature of oil and gas, the rights of the owner of oil and gas rights differ substantially from the rights of the owner of solid minerals."[7]

Oil and gas easements exist in a fundamentally different environment from those associated with the land surface. Any owner within the oil and gas reservoir can potentially impact the rights of other owners. Therefore, their rights must be defined as members of an interwoven society — a reservoir community.[8] Activities that may be unacceptable among surface owners may be acceptable, and indeed required, in the reservoir community.

For example, if a landowner overlying an oil and gas reservoir can object to hydraulic fracturing fissures that extend into its part of the reservoir, this will negatively impact the ability of the community to effectively maximize production of oil and gas from the reservoir. The reservoir owner's "property" right may be to participate in the activity, but not to prevent it, because preventing it would unreasonably injure other members of the reservoir community. Similarly, when defining the easement rights of the oil and gas developer, the connected nature of the reservoir is one of the critical circumstances that must be considered.

Once it is recognized that an owner within an oil and gas reservoir can impact, and be impacted by, other owners in the reservoir, what at first appears to be an absolute right is actually a qualified right. Equally important, what appear to be absolute limitations on the right also become qualified. Something that is a trespass in the surface domain becomes an acceptable use within the reservoir community. Instead of being absolute, the rights of the owners within the reservoir community are relative — correlative.[9] Therefore, the first step in defining oil and gas easements is to recognize the connected nature of the reservoir in which the easement will operate.

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7 Kuntz, *supra* note 2, at 60.

8 David E. Pierce, "Developing a Common Law of Hydraulic Fracturing," 72 *U. Pitt. L. Rev.* 685, 693-95 (2011) (discussing the "reservoir community analysis") [hereinafter *Hydraulic Fracturing*].

9 After more than a century of oil and gas development, the correlative rights doctrine remains relatively undeveloped as a basic ownership concept. *Modern Property Analysis*, *supra* note 6, at 255-57.

The ultimate purpose of any oil and gas easement is to efficiently develop the oil and gas resources found in reservoirs beneath the defined surface boundaries. It is this subsurface reality that guides the scope of the oil and gas easement, whether the activity to accomplish the purpose is taking place above, or below, the land surface. The second step in defining an easement owner's development rights is to ascertain the origin of its oil and gas rights. This requires an examination of how the oil and gas interest was created.

## § 9.03. Creating Oil & Gas Interests.

Rights in oil and gas are created separate from the balance of the landowner's rights in one of two ways: (1) a separation, or "severance," by exception or grant, of a mineral estate in the oil and gas; or (2) a grant of an oil and gas lease.

### [1] — Mineral Estate.

Once the mineral potential of an area becomes a topic of discussion, landowners, and potential developers, will view the minerals as a distinct asset from the balance of rights in land. As a result, landowners may "except" the minerals from a conveyance of the land, or separately convey the minerals to a grantee.[10] Whether by exception or by grant, the end result is the same: one party owns a "mineral estate" in the oil and gas and the other party owns the balance of rights, often called the "surface estate."[11]

However, it should be noted that every "surface estate" will often include a number of "mineral estates." For example, if ***O*** conveys to ***A*** the "oil and gas" in land, ***A*** will have a mineral estate in the oil and gas and ***O*** will own the surface estate. ***O*** will also own all the minerals in the land not encompassed by the grant of "oil and gas." ***O***'s surface estate will also be burdened by an easement in ***A*** to use the surface to develop the oil and gas.[12]

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10 *See generally* Kuntz, *supra* note 2, at §§ 14.1 & 14.2 (discussing the distinction between an "exception" and a "reservation").

11 Kuntz, *supra* note 2, at § 3.1.

12 Kuntz, *supra* note 2, at 90 ("The owner of the oil and gas rights has the right to enter upon and make reasonable use of the surface in connection with exploring for and exploiting the mineral deposits.").

Each mineral estate will also be burdened by an implied easement to allow other mineral estate owners to gain access to their minerals. This easement-by-necessity arises as the creation of mineral estates, in turn, create horizontal barriers to accessing minerals above and below a severed mineral estate.[13]

The fundamental rule to remember when dealing with a severed mineral estate is that the deed creating the estate defines the scope of any express or implied easements to develop the mineral estate. It is not possible for the severed mineral owner to grant greater easement rights to its oil and gas lessee than were created by the severance.[14] However, when the owner of the unsevered surface and mineral estates enters into an oil and gas lease, their ability to grant easements to use the surface is unlimited.

### [2] — Oil & Gas Lease.

The first inquiry regarding easement rights under an oil and gas lease is identifying "who" granted the oil and gas lease. If the lessor was the owner of the severed oil and gas mineral estate, the severance deed must be examined to determine the lessor's authority to grant easement rights.[15] If the lessor was the owner of the unsevered surface and mineral estates, the terms of the oil and gas lease will control.[16]

In contrast to the sparse language of deeds creating mineral estates, oil and gas leases typically contain extensive language granting a number of

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13 *Restatement (Third) of Prop.: Servitudes* § 2.15 cmt. b, at 204 (2000) ("A conveyance dividing property into horizontal estates will include implied servitudes for access from the surface estate to the estates above and below the ground.").

14 John S. Lowe, *Oil and Gas Law in a Nutshell* 188 (5th ed. 2009) ("The grant of express easements for surface use is inherently limited when the lease is from a severed mineral-interest owner.").

15 *Id.* at 188-89 ("When the lessor is the holder of a severed mineral interest, however, the lessor does not have rights of surface use beyond those normally implied and so cannot grant them.").

16 *Id.* at 188 ("A fee-simple owner may grant specifically to the mineral lessee broader rights than those usually implied in an oil and gas lease.").

easements to develop the oil and gas.[17] A preliminary question is whether, from a drafting perspective, it is better to be precise or general when describing easement rights. The answer to this question depends on how courts go about defining the scope of specific and general easement language, and the scope of express and implied easements.

## § 9.04. Express and Implied Easements.

### [1] — Express Easements.

The express easement also includes rights necessary to fully enjoy the expressly granted rights. These rights are sometimes referred to as "secondary easements." As the *Restatement* notes, "[c]onceptually, a secondary easement can be regarded either as an easement by necessity or as inherently included within the primary-use rights granted by the easement."[18] An example of a secondary easement is the primary grant of an easement for a pipeline. If the easement does not address use of the land to construct and maintain the pipeline, these rights will either be deemed to be encompassed by the express purpose of the grant, or implied as a necessary right to enjoy the rights expressly granted.[19] The section that follows addresses the most common form of implied oil and gas easement: the easement by necessity.

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17 Professor Sullivan describes the oil and gas lease granting clause as a statement of "the underlying purpose of the lease, *i.e.*, the right to take oil and gas." Robert E. Sullivan, *Handbook of Oil and Gas Law* 89 (1955). He continues, noting:

> [T]he granting clause has been referred to as investing the lessee with a "purpose right." In other words, the purpose of the lease is the development of the mineral estate, and the lessee should have all those incidental rights and privileges that are necessary to accomplish the underlying purpose of the lease whether they are specifically enumerated or not.

*Id.*

18 *Restatement (Third) of Prop.: Servitudes* § 4.10 cmt. c, at 594 (2000).

19 *Id.* at illus. 3. However, to the extent the express terms of the easement address the precise limits on surface use, the express terms will control. *Compare* Phillips Pipe Line Co. v. Clear Creek Prop., Inc., 553 S.W.2d 389, 392 (Tex. Civ. App. 1977) (easement holder limited to defined 20-foot strip), *with* Hall v. Lone Star Gas Co., 954 S.W.2d 174, 178 (Tex. App. 1997) (interpreting general easement language to distinguish construction area limitations in the *Clear Creek* case; industry custom and usage used to define appropriate pipeline replacement procedures).

### [2] — Implied Easements.

The classic implied easement arises when the parties to a conveyance create an isolated property interest, such as a mineral interest, and the conveyance document is silent regarding access to the interest. The *Restatement* collects the basic rules regarding the most common implied easement of interest to the oil and gas developer: the easement by necessity. Under the *Restatement* "[t]he creation of a servitude burden may be implied by the circumstances surrounding the conveyance of another interest in land . . . ."[20] Section 2.15 of the *Restatement* provides: "A conveyance that would otherwise deprive the land conveyed to the grantee, or retained by the grantor, of rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights . . . ."[21] The purpose of the easement by necessity, in the oil and gas context, is to permit use of the burdened land for the efficient development of the oil and gas estate.

As with express easements, implied easements in the oil and gas context present complex issues. First, the benefited enterprise must function within a rock structure that extends beyond the easement surface boundaries, and is intimately connected with parts of the reservoir owned by third parties.[22] Second, express and implied easements must be flexible enough to accommodate issues associated with the scope and intensity of easement use, and with changes in technology, technique, and development and use of the dominant and servient estates.[23]

## § 9.05. Easement Scope, Intensity, and Change.

### [1] — Are These Contract Law or Property Law Issues?

Defining the scope and intensity of easements, and the effect of change on easement rights, are initially "property" issues, not "contract" issues.

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20 *Restatement (Third) of Prop.: Servitudes* § 2.11(a) (2000).

21 *Id.* at § 2.15. As with all *Restatement* provisions, this is subject to any contrary statement clearly made in the conveyance document.

22 *See* text, *supra*, § 9.02. for further discussion.

23 *Restatement (Third) of Prop.: Servitudes* § 4.10 (2000). Section 4.10 seeks to account for "developments in technology" and to "accommodate normal development of the dominant estate or enterprise benefited by the servitude."

Although contract principles are employed to interpret easements, it is property law, not contract law, that establishes the parties' foundational rights before interpretation takes place. Property law defines the "bundle of sticks," with contract law providing ancillary interpretation of the property-defined bundle.

The role of contract law in this setting is to interpret an "easement," not a contract. Therefore, the first step in analyzing any easement problem is to identify the "easement" requiring interpretation. This process has been aided considerably by the American Law Institute's adoption of the *Restatement (Third) of Property: Servitudes.*

### [2] — Can the *Restatement (Third) of Property: Servitudes* Be Applied to Oil & Gas Interests?

An initial question is whether the *Restatement* can be applied to oil and gas interests. It seems like an odd question, since the *Restatement* principles are offered merely as persuasive authority for courts to accept or reject as they please. The question, however, is raised by Section 1.1(2) of the *Restatement* that provides:

> (2) The servitudes covered by this Restatement are easements, profits, and covenants. To the extent that special rules and considerations apply to the following servitudes, they are not within the scope of this Restatement: . . . (c) profits for the removal of timber, oil, gas, and minerals.[24]

The limited scope of this provision is further explained in the comment, where it states:

> Servitudes are used in several specialized areas where the rules and considerations governing their operation are different from those ordinarily applied to the servitudes covered in this Restatement. . . . "[O]il and gas law . . . and the law governing extraction of other minerals are such specialized areas. No attempt has been

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24 *Restatement (Third) of Prop.: Servitudes* § 1.1(2) (2000).

made in this Restatement to take account of the special rules and considerations governing servitudes used in those contexts. . . . *To the extent that special rules and considerations do not apply to profits and mortgages and lease covenants, the rules and principles set forth in this Restatement may be applied.*"[25]

The drafters of the *Restatement* sought to avoid addressing the vagaries of oil and gas law, but at the same time wanted to make the *Restatement* principles available to supplement oil and gas law. This analytical process is applied by the court in *Amoco Prod. Co. v. Thunderhead Invs., Inc.*[26] After finding the Colorado Supreme Court had already adopted an "oil and gas" rule to resolve the dispute, the court refused to apply the *Restatement* provisions on relocation of an easement, because it would "run contrary to the Colorado Supreme Court's ruling in *Gerrity* . . . ."[27] The dispute in *Amoco* concerned a surface owner's objection to the location of a well, and the impact it might have on future development of the surface. The Colorado Supreme Court, in *Gerrity Oil & Gas Corp. v. Magness*, set out a detailed analysis to be applied to resolve this sort of "reasonable accommodation" dispute.[28] Under the facts, the court found there was nothing for the *Restatement* to supplement.

### [3] — Defining Easement Scope and Intensity.

Once an easement is found to exist, the most common disputes relate to the scope of the easement and the intensity of use that is permitted. Stating the scope of an easement is simple: unless expressly limited by the terms of the easement, the owner of the easement can use the servient estate to the extent "reasonably necessary for the convenient enjoyment of the servitude."[29]

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25 *Id.* at cmt. e, at 11 (emphasis added).

26 Amoco Prod. Co. v. Thunderhead Invs., Inc., 235 F. Supp. 2d 1163 (D. Colo. 2002).

27 *Id.* at 1171-72. The court rejected the rule, stated in § 4.8 of the *Restatement*, that adopts the civil law approach giving the servient owner the power, under certain circumstances, to relocate easements. *Restatement (Third) of Prop.: Servitudes* § 4.8 cmt.f., at 563 (2000). Section 4.8 is one of the more controversial *Restatement* provisions.

28 Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913, 926 (Colo. 1997).

29 *Restatement (Third) of Prop.: Servitudes* § 4.10 (2000).

Professors Stoebuck and Whitman note: "The 'scope' of an easement or profit is what its holder may do with it, the purposes for which it may be used."[30]

The first step is to interpret the easement. This is broader than contract interpretation because the easement terms will be interpreted to give effect to the "purpose" for which the easement was granted. This purpose-centric analysis will establish a generic basis for defining the easement owner's rights. If the parties desire to limit these purpose-centric rights, the burden is on the servient estate owner to ensure they are reflected in the document creating the easement. The *Restatement* adopts this approach by providing, in Section 4.1(1), that: "A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, *and to carry out the purpose for which it was created.*"[31]

Under the *Restatement*, ascertaining intent requires two inquiries: (1) examining the easement language; and (2) determining the purpose of the easement. In cases where there is no easement language to examine, as would be the case with an implied easement, the "circumstances surrounding creation of the servitude" will be considered in conjunction with the purpose of the easement.[32]

### [4] — Addressing Change and Easement Rights.

An indicator that courts interpreting easements are defining a property interest instead of merely interpreting a contract, is their approach to change. The basic rule of contract interpretation considers the situation of the parties at the time the contract is entered.[33] The interpretive approach to easements

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30 Willam B. Stoebuck and Dale A. Whitman, The Law of Property 458 (3rd ed. 2000).

31 *Restatement (Third) of Prop.: Servitudes* § 4.1(1) (2000) (emphasis added).

32 *Id.*

33 For example, comment e to the *Restatement (First) of Contracts* § 235 states:

> The court in interpreting words or other acts of the parties puts itself in the position which they occupied at the time the contract was made. In applying the appropriate standard of interpretation even to an agreement that on its face is free from ambiguity it is permissible to consider the situation of the parties and the accompanying circumstances at the time it was entered into — not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning to be given to the agreement.

is to identify the purpose of the easement and then seek to provide it with longevity by allowing it to respond to circumstances as they change. This is fundamentally different from other contract and property contexts where the goal is to ensure that rights do not change with the mere passage of time.[34] The rationale for change in the easement context is captured by the following comment: "Because servitudes are intended to bind successors and, frequently, to last indefinitely, the parties ordinarily are assumed to have intended that the servitude be interpreted dynamically to maintain its utility under changing circumstances."[35] In addition to this party "intent" rationale, the public policy rationale is to promote the productivity of the land or the enterprise that depend upon the easement keeping pace with change.[36]

The classic cases illustrating these broad purpose and public policy rationales concern easements granted at a time when a specific technological change could not have been contemplated by the parties. For example, the automobile,[37] electricity,[38] the telephone,[39] and a full menu of utilities, including cable TV.[40] They also include situations where the use or needs of the benefited land or enterprise have changed.[41]

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34 David E. Pierce, "Interpreting Oil and Gas Instruments," 1 *Tex. J. of Oil, Gas, and Energy L.* 1, 23-24 (2006).

35 *Restatement (Third) of Prop.: Servitudes* § 4.1 cmt.d., at 501 (2000).

36 *Id.* at § 4.10 cmt. f, at 598.

37 Rowe v. Lavanway, 904 A.2d 78, 85-87 (Vt. 2006) (1881 easement grant of a "lane about thirty-feet wide" between pastures encompassed motorized travel noting "horses had been replaced by automobiles and cows by ATVs.").

38 Dowgiel v. Reid, 59 A.2d 115, 116 (Pa. 1948) (1835 easement grant of a "private road or cartway of twenty feet in width" encompassed setting poles and stringing wires to bring electricity to the home).

39 Davis v. Jefferson Cnty. Tel. Co., 95 S.E. 1042, 1043, 1044 (W. Va. 1918) (1884 easement grant of "a right of way for the benefit of the land hereby conveyed" encompassed setting poles and stringing wires to provide telephone service).

40 Stroda v. Joice Holdings, LLC, 207 P.3d 223, 231 (Kan. 2009) ("A house generally is not considered to be a residence without water, electricity, and similar utilities, *e.g.*, the ability to be heated and cooled, lit in the dark, and equipped for communication with the outside world.").

41 *E,g*, PARC Holdings, Inc. v. Killiam, 785 A.2d 106, 114-15 (Pa. 2001) (relying upon *Restatement (Third) of Property: Servitudes* § 4.10 to interpret easement for "ingress and egress" to include placement of utilities to serve subdivision).

Oil and gas easements enjoy a precise, but necessarily broad, purpose: whatever is reasonably necessary for the convenient and efficient development of the oil and gas resource. "Efficient development" is a timeless concept that will evolve with the technology and techniques employed by the industry. For example, no servient owner, regardless of how far back in time the lease or mineral interest was granted, would be able to insist today that drilling be done with the standard cable-tool rig being used in 1900.[42] Instead, the lessee will have both the right, and in many situations the obligation, to apply modern technology and techniques to develop the leased land.[43]

Current disputes, however, are not a simple choice between a cable-tool rig or a rotary rig. The cable-tool versus rotary choice has no extralateral implications. That is not the case when considering the technological advancements that allow developers to drill horizontally within the oil and gas reservoir.

## § 9.06. Oil & Gas Easements and Horizontal Drilling.

Horizontal drilling often requires multiple tracts of land to accommodate the lateral sections of a horizontal well. The horizontal well often penetrates, and produces from, several separately owned tracts of land. Typically, development will be from a drilling pad which will be the surface location for several separate well bores.[44]

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42 Norman J. Hyne, *Dictionary of Petroleum Exploration, Drilling & Production* 63 (1991) (the "standard cable-tool rig" was used up to about 1925 with the last standard cable-tool rig "retired in the late 1950s").

43 *See, e.g.*, Crocker v. Humble Oil & Ref. Co., 419 P.2d 265, 271 (Okla. 1965) (further development obligation was triggered by the successful application of hydraulic fracturing technology to wells in the reservoir); *see* J. Thomas Lane, "Fire in the Hole to Longwall Shears: Old Law Applied to New Technology and Other Longwall Mining Issues," 96 *W. Va. L. Rev.* 577, 589-91 (1994) (addressing technological change and easements to mine coal).

44 *See generally* Michael J. Wozniak and Jamie L. Jost, "Horizontal Drilling: Why It's Much Better to 'Lay-Down' than to 'Stand-Up' and What Is an '18° Azimuth' Anyway?" 57 *Rocky Mtn. Min. L. Inst.* 11-1, 11-3 (2011) (explaining the horizontal drilling process).

Development using drilling pads reduces the total impact on the surface and the environment,[45] but accomplishes this overall reduction by making a more intense use of a smaller portion of the surface. The impact on the surface owner, where the pad is located, can be significant. The burden will be particularly difficult to bear when the severed surface owner is not sharing in any of the mineral production wealth.[46] The burden can also be further magnified by voluntary subdivisions made by the severed surface owner.[47]

In addition to this increased intensity of use associated with well pads, there are also challenging easement scope issues. The extralateral realities of horizontal drilling require close analysis whenever the surface estate has been severed from the mineral estate.[48] For example, can the lessee of a severed mineral owner, without additional consent from the surface owner, voluntarily combine its leased land with other lands to conduct horizontal drilling operations? This requires an inquiry into the scope of the severed mineral owner's extralateral rights to make reasonable use of the surface to develop the granted minerals.

### [1] — Extralateral Easement Rights.

As Professor Kramer has noted: "It is an axiomatic rule of oil and gas law that 'the use of the surface by a mineral owner or lessee, in connection

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45 *Id.* at 11-9. There have even been law suits asserting excessive surface use when the developer drilled vertical wells instead of consolidating wells on a pad and employing horizontal drilling. A-W Land Co., LLC v. Anadarko E&P Co. LP, No. 09-cv-02293, 2010 WL 3894107 (D. Colo. Sept. 29, 2010); Zeller Farms, Inc. v. Anadarko E&P Co. LP, No. 07-cv-01985-WYD-MJW, 2010 WL 2681724 (D. Colo. July 1, 2010).

46 Among the most wretched of conditions is that of the severed surface owner when there is successful mineral development on their land. The severed surface owner must endure disruption of the surface without sharing in any of the resulting production revenue.

47 For example, ***A*** owns a severed surface interest in 640 acres and conveys five acres of the surface to ***B***.

48 "Extralateral" is the term used to describe activities or conditions associated with lands other than the base tract where the pad is located. In the horizontal drilling context, the off-tract activities or conditions will be the lateral extent of the well bore that extends beyond the base tract.

with operations on other premises, constitutes an excessive user of his surface easements."[49] Section 4.11 of the *Restatement* addresses the axiomatic situation stating: "Unless the terms of the servitude determined under Section 4.1 provide otherwise, an appurtenant easement or profit may not be used for the benefit of property other than the dominant estate."[50] The mineral owner's surface rights depend upon whether the activity benefits the mineral interest underlying the surface boundaries. Therefore, the axiomatic situation would be when the well pad tract mineral owner derives no benefit from wells located on the pad.

However, what if the well pad tract mineral owner derives a direct benefit from wells located on the pad? Does it matter whether the mineral owner must share some of the production with the other tract owners? Will a benefit proportional to their acreage contribution to the horizontal well unit area be a sufficient benefit? Is there any situation where a well could be placed on the pad, even though the well pad tract mineral owner does not share in revenue from the well? The discussion that follows offers answers to these questions.

### [a] — Pooling in a Vertical Context.

"Pooling" is the closest vertical drilling analogue to the horizontal drilling situation. When pooling to accommodate vertical drilling, a single tract of land within a pooled unit will typically suffer all, or a disproportionate share, of the surface use burdens. The mineral owners contributing their

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49 Bruce M. Kramer, "Pooling for Horizontal Wells: Can They Teach an Old Dog New Tricks?" 55 *Rocky Mtn. Min. L. Inst.* 8-1, 8-9 (2009) (quoting 1 Williams & Meyers Oil and Gas Law 218.6 (2008)).

50 *Restatement (Third) of Prop.: Servitudes* § 4.11 (2000). The *Restatement* rule, however, would not apply to an oil and gas lease, classified as a profit, granted by the owner of the surface and mineral estates. Comment b to § 4.11 states: "The rule stated in this section applies only to an appurtenant benefit since benefits that are in gross are, by definition, useable without regard to the beneficiary's ownership or occupancy of any particular parcel of land." *Id.* cmt. b, at 620. Therefore, application of the *Restatement* rule would turn on whether the oil and gas lease is classified as creating a fee simple determinable in the oil and gas mineral estate or a profit. This seems like an artificial distinction for defining the scope of the developer's easement rights.

surface use easement to the pool will share only in a portion of the pooled production.

For example, assume ***A*** owns a severed mineral interest in 5 acres of land that ***A*** voluntarily pools, with 635 acres owned by ***B***, to form a 640-acre gas unit. As a matter of geology, and operational necessity and convenience, the best place to drill the well is on ***A***'s part of the unit. ***A*** receives 5/640ths of the production revenue, but the ***A*** tract surface will suffer all the disruption. Although the ***A*** tract surface owner has no interest in the ***A*** tract mineral owner's share of the production revenue, the surface owner will argue that it is not possible, without his consent, to use the ***A*** tract to create benefits that are shared with the ***B*** tract owners. The surface owner will have considerable incentive to pursue this theory because requiring the surface owner's consent is the only leverage they have to try and obtain money as a result of the drilling venture. It is the surface owner's "piece of the action" in the event the surface owner has something the operation must acquire before proceeding. Professors Kramer and Martin would have no problem recognizing the right to use ***A***'s land to develop the ***A/B*** unit. Considering similar circumstances, they conclude: "There is no logical reason why the mineral interest owner should not have the same implied easement rights wherever the unit well should be located when the use of the land is reasonably necessary for the enjoyment of the mineral rights."[51]

Voluntary pooling, by a severed mineral owner, presents many of the same issues, in a vertical well context, that confront the horizontal well. Courts have both accepted, and rejected, giving the developer's easement extralateral effect under voluntary pooling. The court in *Robinson v. Robbins Petroleum Corp.* refused to recognize extralateral rights.[52] In 1943 the owner of a 221-acre tract of land leased the oil and gas to Petroleum Corp., drilling occurred, and the lease was held by production. In 1964 Robinson obtained his severed surface estate in 80 acres of the 221-acre tract.[53] Following the

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51 2 Bruce M. Kramer and Patrick H. Martin, *The Law of Pooling and Unitization* § 20.06[1], at 20-90.1 (3d ed. 2011).

52 Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865, 866 (Tex. 1973).

53 *Id.*

Robinson conveyance, the 221-acre tract was included in three different waterflood operations with the size of the voluntary units varying from 1,295 acres to 1,807 acres. Petroleum Corp., as operator of the units, converted an oil well on the Robinson tract to a salt water production well to obtain salt water supplies for unit waterflood operations.[54] Robinson objected, arguing the salt water could not be used to support operations benefiting lands other than the 221-acre tract.

The court first examined the terms of the 1943 oil and gas lease. The lease granted Petroleum Corp. rights "'for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas, and all other minerals . . . .'"[55] The lease also granted Petroleum Corp. "'free use of oil, gas, coal, wood and water from said land, except water from Lessor's wells for all operations hereunder . . . .'"[56] The court noted that "[e]ven if the waterflood operation is reasonably necessary to produce oil from premises of the Wagoner lease, it does not follow that the operator is entitled to the use of Robinson's surface for the secondary recovery unit that includes acreage outside the Wagoner lease."[57] The court held that under these circumstances Petroleum Corp. failed to "give due regard to the rights of the surface estate."[58]

The Texas Supreme Court noted: "This more extensive use is permitted in Oklahoma."[59] However, in the Oklahoma case cited by the court, the "defendant was a corporation set up by order of the Corporation Commission for the purpose of increasing the production of oil and gas from said unit . . . ."[60] This public element was not involved in the Texas case.

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54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.* at 867.
58 *Id.*
59 *Id.*
60 Holt v. Southwest Antioch Sand Unit, Fifth Enlarged, 292 P.2d 998, 999 (Okla. 1955).

The Texas Court of Appeals, in *Delhi Gas Pipeline Corp. v. Dixon*,[61] arrived at a result that appears to conflict with the Supreme Court's holding in *Robinson v. Robbins Petroleum Corp.*[62] Dixon owned the severed surface estate in a 29.98-acre tract that had been voluntarily pooled with other lands to form a 687.59-acre pooled unit. Although the well was not located on the 29.98-acre tract, the oil and gas lessee, pursuant to a lease from the severed mineral owner, authorized Delhi to construct a pipeline from the unit well, across the 29.98-acre tract, to Delhi's gas transmission line.[63] The surface owner objected, arguing the surface of the 29.98-acre tract could be used only to support a well located on, and solely developing, the 29.98-acre tract.[64]

The court in *Delhi*, without reference to the *Robinson* case, first noted that the mineral owner had the right to "use as much of the premises as is reasonably necessary to produce and remove the oil, gas, and other minerals."[65] The court expanded this right to include production from a voluntarily pooled unit stating: "We hold that the mineral owner's lessee can grant the gas purchaser an easement to lay a pipeline to transport gas from the well [on a production unit which includes the surface owner's land] to the gas purchaser's pipeline system."[66]

However, the court in *Delhi* would apparently not allow a pipeline configuration where the well is connected to a loop instead of a single line that takes the production from a single well connection to the purchaser's off-tract pipeline. The "loop" system would be a pipeline containing gas produced from other lands that passes through the surface tract to collect gas produced from the pooled unit well. The commingled gas from other wells, and the unit well, would then be moved across the pooled unit on its way to an ultimate pipeline connection. Perhaps anticipating the loop situation, the

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61 Delhi Gas Pipeline Corp. v. Dixon, 737 S.W.2d 96 (Tex. Ct. App. 1987), *writ denied* (Tex. App.– Eastand Mar.30 1988).

62 Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865, 866 (Tex. 1973).

63 *Delhi*, 737 S.W.2d at 97.

64 *Id.*

65 *Id.*

66 *Id.* at 98.

court cautioned: "The gas purchaser would not have the right to transport any other gas in the line across the surface owner's land without condemnation proceedings or an easement from the owner of the surface estate."[67] The court apparently assumed the loop situation would not be a "reasonable" use within the scope of the implied easement.[68]

### [b] — "Primary Purpose" Analysis.

The court, in *Gill v. McCollum*,[69] applied a "reasonable" use analysis to an easement scope issue stating: "Since the primary purpose of an oil and gas lease is to obtain production the above provisions must be read with this purpose in mind."[70] This "purpose" analysis is the correct starting point for assessing easement scope and intensity.[71] If the activity has no relation to the production of oil and gas from the land, the use will not be "reasonable," and therefore not within the scope of the implied easement. If the activity is appropriately related to production from the land, then the facts regarding the use must be examined to determine if, under the particular circumstances, it is a reasonable use.

In *Gill* the lessee, McCollum, was injecting salt water produced from adjacent lands, into a well located on Gill's leased land. The water was being injected into the Cypress formation; McCollum was not developing this formation as to Gill's leased land. The court found: "Since there was no attempt to produce the Cypress formation, it was admitted that it was of no benefit to plaintiff to inject salt water from other leases into the well."[72]

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67 *Id.*

68 Often, however, a loop system will be the most efficient and appropriate way to construct a pipeline system, and may offer production and operational benefits that are shared with each impacted tract. This is particularly the case with the development of coalbed methane resources. Randy Allen, *Coalbed Methane Primer*, Special Institute on Regulation and Development of Coalbed Methane 1-1, 1-6 (Rocky Mtn. Min. L. Fdn. 2002). This is another instance in which the land and operations at issued must be considered in the proper context, as part of a reservoir community. *See* text, *supra*, § 9.02. for further discussion.

69 Gill v. McCollum, 811 N.E.2d 741 (Ill. App. Ct. 1974).

70 *Id.* at 743.

71 *See* text, *supra*, § 9.05.[3] for further discussion.

72 *Gill, 811 N.E.2d.* at 742.

Finding no express authority in the oil and gas lease to use the leased land for the disposal of off-lease salt water, the court applied the first step in its reasonable use analysis and concluded the injection had no relation "to the primary purpose of obtaining production."[73] The water disposal activities benefiting only off-tract properties had no relation to the production of oil and gas from the base tract where the water was being injected. Therefore, McCollum's disposal activities were properly enjoined.

But, what if there is some "relation" between the extralateral off-tract activity and the "primary purpose" of obtaining production from the base tract? Can the severed mineral owner, or oil and gas lessee, have an extralateral relationship with other tracts of land, and still be engaged in a reasonable use when it incidentally benefits the surface owner's tract of land? The Kansas Supreme Court offers insight on this issue in *Crawford v. Hrabe*.[74]

In *Crawford v. Hrabe* the lessee, Crawford, was bringing off-lease water onto Hrabe's leased land to conduct a waterflood. The operation was conducted solely on Hrabe's leased land and the only off-tract activity was the use of produced water from adjacent leases operated by Crawford.[75] Hrabe objected to the use of off-lease produced water to conduct the waterflood, arguing the water must be produced from a well on the leased land.[76]

Essentially, Hrabe wanted Crawford to incur the additional expense to drill a salt water source well on Hrabe's leased land.[77] This would eliminate

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73 *Id.* at 743.

74 Crawford v. Hrabe, 44 P.3d 442 (Kan. 2002).

75 *Id.* at 444.

76 Hrabe initially registered his objection to Crawford's activities by "severing the pipeline running to the Hrabe G-2 well." *Id.*

77 The hold-up value of a ruling in Hrabe's favor would mean he could hold out for payment of money approaching the cost of drilling a salt water production well on his land. If this would make the waterflood operation uneconomic, Hrabe would also accomplish the goal of preventing operations that might otherwise impact his surface, even though it might mean a loss of current royalty revenue. Of course, if Hrabe were a severed surface owner, he would have nothing to lose by seeking to maximize his hold-up rights.

the need for off-tract water and prevent Crawford from capturing any additional benefit he may obtain by being able to dispose of off-tract produced water as part of the waterflood operation.[78] The court observed: "The history of operations on the property disclose a disposal agreement permitting the lessee to dispose of salt water from off-lease property, a pipeline right of way, complaints concerning salt water related to faulty operations, and the plugging and abandonment of the salt water disposal well in 1988."[79] When Crawford commenced the waterflood in 1996, Hrabe was probably disappointed to see another salt water injection operation, particularly since there was no attempt to obtain another salt water disposal agreement and pipeline easement to move the water across his land. Crawford asserted its oil and gas lease authorized the transport and injection of the off-tract water to conduct waterflood operations.

Although Crawford was required to obtain a permit to conduct the waterflood, the Kansas Corporation Commission, in issuing the required permit, noted: "the right to use off-lease water in the Hrabe G-2 well was a 'civil matter between the operator and mineral/or surface owner which is outside the jurisdiction of the Commission.'"[80] Hrabe protested issuance of the permit. However, the Commission approved Crawford's permit application finding the injection would "prevent waste and likely allow additional oil to be recovered from the Hrabe lease . . . ."[81] Hrabe conceded that if Crawford had obtained an order unitizing the area, he would have no

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78 The court observed: "Hrabe looks to the water being injected as placing a burden on his property which improperly benefits Crawford, who is also the operator of the two adjacent leases from which the water is obtained." *Crawford*, 44 P.3d at 447. The court also noted that Hrabe believed allowing the disposal to take place "provides operators with an unfair economic benefit of obtaining money to dispose of water from a third party under the guise of injecting it for secondary recovery . . . ." *Id.*

79 *Id.* at 444.

80 *Id.*

81 *Id.* The Commission's order "acknowledged it could not be certain which direction the water flood would drive the oil but it was more likely the oil would be driven to the higher structure G-1 and C-1 wells on the Hrabe property." *Id.*at 444.

complaint.[82] But, all the Commission authorized was the injection, without altering the existing property rights of the parties.

In a thorough and scholarly opinion, Justice Larson, writing for the court, addressed the core issues and concluded Crawford's use of off-lease water was within the scope of the easements granted by his oil and gas lease.[83] The oil and gas lease granted Crawford the right to use Hrabe's land "'for the sole and only purpose of mining and operating for oil and gas, and laying pipe lines, and building tanks, power stations and structures thereon to produce, save and take care of said products.'"[84] The lease also included a "free use" clause providing Crawford with "the right to use, free of cost, gas, oil, and water produced on said land for operation thereon . . . ."[85] Neither clause expressly authorized off-tract activities or expressly referenced extralateral easement rights.

The court first observed that there was "amazingly little case law, treatise discussions, or law review writings" addressing the issue.[86] After considering *Gill v. McCollum*, the court focused on the *Gill* requirement that: "The injection must have some relation to the primary purpose of obtaining production."[87] Applying the "logic" of *Gill* to *Crawford*, the court concluded: "because Crawford's salt water injection is related to the primary purpose of obtaining additional oil production, it should be found permissible under the lease."[88]

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82 *Id.* at 447. Unitization can be compelled to conduct a waterflood operation, when the appropriate procedural and technical findings are made, and at least 63 percent of the working interest owners and royalty owners consent to the proposed waterflood. Kan. Stat. Ann. § 55-1305 (2005) (if the operation is undertaken before "abandonment of oil or gas wells is imminent," then the percentage of royalty owner approval increases from 63 percent to 75 percent).

83 Justice Edward Larson, before becoming an appellate judge, and later a member of the Kansas Supreme Court, had a distinguished career as a private practitioner, including the practice of oil and gas law as both a transactional lawyer and a litigator.

84 *Crawford*, 44 P.3d at 444.

85 *Id.*

86 *Id.* at 448.

87 *Id.* (quoting Gill v. McCollum, 311 N.E.2d 741, 743 (Ill. App. Ct. 1974)).

88 *Id.*

The court examined party stipulations and the Commission order to establish that the waterflood was being pursued to produce additional oil from the Hrabe lease. The court then focused on whether using off-lease water was a reasonable way to conduct the waterflood. Noting that use of off-lease waster was not required to conduct the waterflood, the court found that the off-lease water was the most "economically sound and prudent source of water" under the circumstances.[89] The court went further, noting: "To establish a rule which prevents importation of water for secondary recovery, yet requires additional wells to be drilled on the lessor's premises to produce water for the same purpose, would appear to undermine conservation, promote waste, and foster uneconomic actions."[90]

The court's analysis in *Crawford v. Hrabe* properly defines the scope of the basic easement to develop oil and gas. As the court noted: "We . . . do not believe that our decision should be reached on the language or lack thereof, in the oil and gas lease involved in this case."[91] The lease did not address the precise issue, so the court was forced to evaluate Crawford's conduct to see if he was promoting the general production-maximizing purpose of the easement. Equally important, the court recognized Crawford's right to determine how best to achieve his production goals. This included using off-lease water to gain a collateral benefit, by solving disposal problems at other leases, while pursuing waterflood operations on the Hrabe lease. No obligation exists to share this economic benefit with the lessor, so long as the activity is being pursued to increase production from the leased land. It is a benefit solely available to the cost-bearing party to the transaction. The right to conduct oil and gas development operations encompasses the right to do so in the most prudent and cost-effective manner.

The conclusions in *Crawford* were based upon the lessee's easement rights. In *Crawford* the use of off-lease water fell within the scope and intensity of the lessee's oil and gas easements. Can there ever be a situation

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89 *Id.* at 452.
90 *Id.*
91 *Id.* at 453.

where the activity is admittedly beyond the lessee's easement rights, but failing to allow the lessee to use the surface would "undermine conservation, promote waste, and foster uneconomic actions"? Might courts recognize a *reciprocal* accommodation doctrine to address situations where it makes sense to allow the lessee to make an incidental use of the surface?

### [2] — A *Reciprocal* Accommodation Doctrine?

#### [a] — The Texas Accommodation Doctrine.

Several states have adopted some form of accommodation doctrine that requires the oil and gas developer to "accommodate" the lessor or surface owner under certain circumstances.[92] Technically, the accommodation doctrine is a limitation on easement rights the lessee or developer otherwise possesses.[93] The analysis begins with an admitted "reasonable use." For example, in *Getty Oil Co. v. Jones* there was no dispute that Getty had the authority, under its oil and gas lease, to install a pump jack on the surface to produce oil from its well.[94] The dispute most likely arose because other producers in the area routinely selected pump jacks that allowed the surface owner to use automated irrigation systems that could be elevated only seven feet above the ground.[95]

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92 The contours of the doctrine were most famously articulated by the Texas Supreme Court in *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971).

93 Although the doctrine can be viewed as an inherent part of the reasonable use rule, it is applied as a potential limitation on what would otherwise be considered reasonable use. Therefore, the lessee has the right to use the surface in the desired manner. This acceptable use, however, is subject to the lessor making the case that, under the circumstances, and considering reasonable alternatives practiced by the industry in the area, the lessee must pursue a less surface-disruptive means to exercise its rights. *See also* Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 139 (1979) ("The oil companies were not required to show their proposed activities were the most reasonable or even that other alternatives were unreasonable in the absence of the Kerbaughs' bringing the reasonableness of other alternatives into issue.").

94 Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971) ("Jones does not . . . deny Getty's right to . . . install some type of pumping equipment when necessary for production.").

95 *Id.* at 620.

As developed by the Texas Supreme Court, the accommodation doctrine requires the surface owner to prove that: (1) the mineral developer's surface use materially interferes with "the uses then being made by the servient surface owner"; (2) the surface owner lacks reasonable alternatives to its existing use; (3) the mineral developer has alternative means readily available to it that are equally effective, but without materially interfering with the existing surface use; and (4) the proposed alternative "method or manner of using the dominant mineral estate" represents what are "usual, customary and reasonable practices in the industry under like circumstances of time, place and servient estate uses."[96] If the surface owner is able to carry its burden of proof, the developer becomes obligated to pursue an alternative, even though it is more costly to the developer than its preferred "method or manner" of operation.

### [b] — Accommodation Under the *Restatement.*

Under certain defined circumstances, The *Restatement* provides for "mutual accommodation."[97] Section 4.9 states: "Except as limited by the terms of the servitude determined under Section 4.1, the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude."[98] The reference to Section 4.1 is to ensure the scope of the easement, whether express or implied, is not reduced by the accommodative process. Consistent with this principle, Section 4.9 provides that, to the extent the right has not been granted, the servient owner has the ability to exercise its residual rights in any manner it desires, so long as it "does not unreasonably interfere with" the easement holder's rights. Comment a to Section 4.9 describes the basis for mutual accommodation as follows: "In the absence of detailed arrangements between them, it is assumed that the owner of the servitude and the holder

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96 *Id.* at 627.

97 *Restatement (Third) of Prop.: Servitudes* § 4.9 cmt. a (2000).

98 *Id.* at § 4.9.

of the servient estate are intended to exercise their respective rights and privileges in a spirit of mutual accommodation."[99]

Comment b discusses the rationale for mutual accommodation: "public policy favoring socially productive use of land."[100] The process is one of "striking a balance that maximizes the aggregate utility of the servitude and the servient estate."[101] The *Restatement*'s mutual accommodation approach attempts to adjust conflicting principles. Comment c first cautions: "Actions that make it more difficult to use an easement, that interfere with the ability to maintain and repair improvements built for its enjoyment, or that increase the risks attendant on exercise of rights created by the easement *are prohibited* by the rule stated in this section, *unless justified by needs of the servient estate.*"[102] This is followed by direction that whether the servient estate owner has "unreasonably interfered" with the easement is a balancing process "to strike a reasonable accommodation that maximizes overall utility," but only if it can be accomplished "consistent with effectuating the purpose of the easement or profit . . . ."[103] All of this is subject to "any different conclusion based on the intent or expectations of the parties determined under Section 4.1."[104]

The limited scope of § 4.9 is revealed by the existence of Section 4.8(3) which, under defined circumstances, allows the servient estate owner "to make reasonable changes in the location or dimensions of an easement, at

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99 *Id.* at cmt. a. Therefore, it would be unreasonable to conclude that the surface owner intended to give up all use of the burdened surface estate merely because it is subject to an easement. The challenge is defining what the surface owner can do with its surface estate while: (1) avoiding *any* interference with express limitations stated in the easement; and (2) avoiding *any unreasonable* interference with the non-express limitations created by the easement.

100 *Id.* at § 4.9 cmt. b.

101 *Id.*

102 *Id.* at § 4.9 cmt. c (emphasis added).

103 *Id.*

104 *Id.*

the servient owner's expense . . . ."[105] While Section 4.9 defines how the servient estate owner's residual rights can be exercised, Section 4.8 gives the servient estate owner the right to alter the easement holder's rights when: (1) the servient estate owner agrees to compensate the easement holder for any cost associated with the change; (2) the change is necessary to "permit normal use or development of the servient estate"; (3) the change does not "significantly lessen the utility of the easement"; (4) the change does not "increase the burden on the owner of the easement in its use and enjoyment"; and (5) the change does not "frustrate the purpose for which the easement was created."[106] Section 4.8(3) is designed to limit the hold-up value otherwise enjoyed by the easement holder.

The servient owner is given the limited right to alter the location of an easement, when it does not materially impact the easement holder's needs. Presumably the relocation right will not be abused, or exercised frivolously, because the servient owner is required to compensate the easement holder for any additional cost associated with the relocation.

Comment f to Section 4.8 notes: "This rule is not reciprocal."[107] The rationale for only permitting the servient estate owner to relocate is: "It complements the rule that the easement holder may increase use of the easement to permit normal development of the dominant estate, if the increase does not unduly burden the servient estate."[108] Therefore, the easement holder's basic rights already include the ability to alter "the manner, frequency, and intensity of use" to "*accommodate normal development of the dominant estate or enterprise benefited by the servitude.*"[109]

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105 *Id. at* § 4.8(3)(2000); *see generally* McNaughton Prop., LP v. Barr, 981 A.2d 222, 227-28 (Pa. Super. Ct. 2009) (finding the *Restatement*'s easement relocation principles inconsistent with Pennsylvania law).

106 *Id.*

107 *Id.* at cmt. f, at 563.

108 *Id.*

109 *Restatement (Third) of Prop.: Servitudes* § 4.10 (2000) (emphasis added). Rights granted by an oil and gas lease, are an example of an "enterprise" covered by § 4.10.

Regarding compensation, the Texas accommodation doctrine is fundamentally different from the result under the *Restatement* analysis. First, if accommodation requires a limit on the mineral owner's or lessee's easement rights, it would have to occur under Section 4.8, and therefore "at the servient owner's expense."[110] Under the Texas analysis, once the obligation to accommodate is found to exist, the easement holder must incur any additional expense associated with accommodation.

### [c] — Reciprocal Accommodation.

A reciprocal accommodation doctrine would consider the developer's need for accommodation by the lessor and surface owner. For example, suppose a lessee has constructed an eight-well drilling pad on the surface of tract ***A***. Six of the eight well locations on the tract ***A*** pad are used to produce oil and gas from horizontal wells in which tract ***A*** shares in production. However, the developer desires to drill a seventh well and eighth well from the pad to develop lands in which tract ***A*** will not share. Recall that it is "axiomatic," as Professor Kramer has noted, that a developer cannot use tract ***A*** to drill a well solely to produce oil and gas from an adjacent tract in which tract ***A*** will not share.[111] But, suppose the multi-well pad was constructed on the tract ***A*** surface, for the primary purpose of developing oil and gas from tract ***A***. Would it be possible for the developer to use two open well locations on the existing pad to drill a well to develop tract ***B***? Would it matter if: (1) it proved more technically prudent to use an available tract ***A*** pad well location to develop a portion of tract ***B***; or (2) it is proven to be more efficient to develop two locations on tract ***A*** with locations from a pad on tract ***B***, or tract ***C***?

These issues must be evaluated by first recognizing that the oil and gas easement exists to develop lands within a reservoir community and not an isolated, disconnected tract of land. As noted previously, the "rights" and "obligations" of the servient estate owner, and of the easement holder, are

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110 *Restatement (Third) of Prop.: Servitudes* § 4.8(3) (2000).

111 *See* text, *supra*, § 9.06. [1] for further discussion.

defined by the connected nature of the oil and gas reservoir in which they coexist. It is within the reservoir community context that courts seek to define the purpose, needs, and convenience of the easement holder. This means that in many instances the right to make incidental use of the surface for off-lease operations may be part of the granted express or implied easement rights. In cases where the off-lease operation is found not to be encompassed by express or implied easement rights, then the operation must be authorized, if at all, by a reciprocal accommodation theory.

A reciprocal accommodation doctrine would allow lessees to pursue technically prudent development of an oil and gas reservoir, even when it imposes an additional burden on the surface. This would be a burden beyond that authorized by the scope of the existing easement.[112] Before a surface owner would be required to accommodate the developer, the developer would have the burden of proving: (1) the existing use of the surface is primarily for development of oil and gas from the base tract where the use is occurring; (2) the additional use is technically justified prudent development of off-tract land from the base tract land; and (3) the additional burden on the surface is incidental when compared to the surface use required for development of the base tract.

These three proposed requirements would ensure that accommodation of the developer is an exceptional event, as it is for the surface owner under the existing accommodation doctrine. Reciprocal accommodation would allow the developer to use the surface when it makes sense to do so, without having to deal with the hold-up hold-out seeking to capitalize on the situation. Consider the situation where the lessor finds that their lessee owns the residual "stick" that would allow sensible use of the surface. Under the

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[112] This is similar to the lessor accommodation doctrine: although within the scope of "reasonable use," but for the accommodation doctrine the lessor could not insist upon a limitation on the lessee's easement. *See* text, *supra*, § 9.06.[2] [a] for further discussion. When the lessee seeks accommodation, it recognizes that the right lies outside their existing easement, but seeks to be "accommodated" if special circumstances justifying accommodation exist.

accommodation doctrine, the lessee can be required to give up the "stick" when it can do so without significantly impacting its development rights.[113]

For example, in *Getty Oil Co. v. Jones* the "stick" was the right to operate pump jacks that required a certain level of clearance at the up-stroke.[114] Giving up this stick allowed the lessor to pursue his irrigated agriculture activities on the surface while still allowing the lessee to pursue development of the oil and gas. Oil and gas developers should have a reciprocal right to pursue incidental use of the surface when the facts, including those relating to the reservoir community, suggest it is the sensible and prudent thing to do.

However, the developer should be obligated to compensate the surface owner when relying upon a reciprocal accommodation doctrine to use the surface. The primary reason for recognizing this reciprocal right is to prevent the surface owner from becoming a hold-up hold-out that can negatively impact prudent development within the reservoir community. This purpose can be accomplished by allowing the developer to exercise the incidental rights while being required to compensate the surface owner.

### [3] — Current Disputes.

#### [a] — *Cain v. XTO Energy Inc.*

Horizontal drilling easement issues are illustrated by the plaintiff's complaint in *Cain v. XTO Energy Inc.*[115] In an opinion addressing diversity jurisdiction issues, the court described the nature of the dispute as: "what are permissible oil and gas surface operations on a leasehold where the title to the surface has been severed from the underlying oil and gas estate."[116] In 1907 the land was conveyed to Fortney, but reserving in the grantors "all of the oil and gas within and underlying said tract of land aforesaid, as well as all rights and privileges necessary and convenient for the mining and removal

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113 *See* text, *supra*, § 9.06. [2] [a] for further discussion.

114 *Id.*

115 Cain v. XTO Energy Inc., No. 1:11CV111, 2012 WL 10689199 (N.D. W. Va. Mar. 29, 2012).

116 *Id.* at *1.

of said oil and gas, or either of them."[117] Cain succeeded to the rights of Fortney in a portion of the land. XTO obtained its oil and gas lease through the owners of the severed oil and gas estate. Therefore, XTO's easement rights, under its oil and gas lease, cannot be any greater than those held by the owners of the severed oil and gas estate.

XTO purchased an easement from Cain to lay pipelines on Cain's property to transport oil, gas, water, and other substances over Cain's property.[118] However, Cain and XTO were unable to agree "whether XTO possessed the right to drill certain horizontal wells on Cain's surface, *i.e.*, wells that would utilize Cain's surface but bore horizontally, beyond the borders of the original 138.05 acre tract, in order to extract oil and gas from a shared pool of oil and gas estates."[119] These facts present a classic case regarding the scope of the express and implied easements created by the severance of the oil and gas estate in 1907.

Whether viewed as an issue of scope, intensity, technological change, or reciprocal accommodation, the first task will be to account for the geological environment in which the issue arises. This is not a case where it is optional whether to place, for example, a tank battery on the surface of tract **A** instead of tract ***B***. Instead, it is a matter of determining how best to remove oil and gas from an interconnected body of reservoir rock that extends beyond the surface boundaries of the tracts at issue. These are issues more suitable for technical, prudent-operation, and prevention-of-waste inquiries instead of simply identifying a surface boundary.

If a court operates in the unidimensional world of surface boundaries, it will most likely interpret easement rights narrowly by simply looking for, and prohibiting, any activity extending beyond tract boundaries. Easement scope, intensity, and technological change issues will be dominated by a line drawn on the surface of the land. Any form of reciprocal accommodation analysis would offer little assistance where surface boundaries are allowed

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117 *Id.*
118 *Id.* at *2.
119 *Id.*

to negate consideration of the connected nature of the reservoir community involved.

The multidimensional view of oil and gas easements considers their purpose in conjunction with the subsurface reservoir environment in which the easement holder must operate. This has been most prominently recognized in the context of pooling.[120] When defining the scope and intensity of rights that are "necessary and convenient" under an easement to develop oil and gas, the inquiry is one of science, technology, and technique; matters within the province of the prudent operator instead of a surveyor. The tiebreaker in these situations should consider the collective rights of the reservoir community owners as well as public rights in the prevention of waste and protection of correlative rights. Although the most fundamental of rights is the right to own, possess, or protect property, this right must always be considered in the proper context, as rights subject to the development of an underlying oil and gas reservoir that is part of an interconnected reservoir community. The following case demonstrates a unidimensional approach to the issues.

### [b] — *Jewett Sportsmen & Farmers Club, Inc. v. Chesapeake Exploration L.L.C.*

The court of common pleas, in *Jewett Sportsmen & Farmers Club, Inc. v. Chesapeake Exploration L.L.C.*,[121] considered easement scope issues, in a horizontal drilling context. In a 1959 conveyance of land the grantor excepted the coal and "all oil, gas or other minerals and land at such points and in such manner as may be properly and necessary for the purposes of digging, mining, draining, ventilating and carrying away said coal, oil, gas or other minerals . . . ."[122] The focus of the dispute was, as the court noted, a "together with" clause which identified rights "in addition to the rights previously reserved

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120 *See* text, *supra*, § 9.06. [1] [a] for further discussion.

121 Jewett Sportsmen & Farmers Club, Inc. v. Chesapeake Exploration, L.L.C., No. CVH-2011-0113, slip op. (Ct. of Common Pleas, Harrison County, Ohio Jan. 17, 2012).

122 *Id.* at 3.

. . . ."[123] The court, however, held this "in addition to" language actually reduced the scope of the granted rights instead of explicating an included right.[124] Therefore, retained rights that "may be proper and necessary for the purposes" of developing the oil and gas, were limited by rights referenced in the "together with" clause, a clause purportedly included to state rights "in addition to" the other rights.

Chesapeake proposed to place "two drill pads for the purpose of drilling up to eight wellbores from each drill pad to use hydraulic fracturing and to recover oil, gas, water and other substances from the subject premises and from areas outside the subject premises through the use of vertical and horizontal drilling."[125] The court issued a permanent injunction enjoining Chesapeake and the other defendants from "engaging in any activities upon the [Jewett] premises . . . for the purpose of accessing and recovering oil, gas or other substances from areas outside the premises . . . ."[126] The injunction was based upon the court's interpretation of language in the "together with" clause which authorized the owner of the coal, oil, gas, and other minerals to mine and remove them "through and under" the land.[127] After defining the words "through," "and," and "under," the court held: "Although oil and gas accessed from properties adjoining the subject premises would travel by way of a horizontal wellbore and then come to the surface it would not meet the requirements of 'through and under' because the oil and gas and water recovered would not stay under the surface."[128]

The court employs many techniques to ensure the oil and gas easement is interpreted narrowly to prevent the use of horizontal drilling. First, it reads the

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123 *Id.* at 4.

124 The court observed: "This clause [the together with clause] clearly reserves to the Grantor the authority to use the premises described in the deed to mine and remove coal, oil, gas and other minerals which are not located in and under the described premises with the *limitation* that said activities be carried on 'through and under' said premises." *Id.* at 4-5 (emphasis added).

125 *Id.* at 1.

126 *Id.* at 14.

127 *Id.* at 9.

128 *Id.*

"together with" clause as a limiting clause instead of being supplemental or explanatory. Second, it engages in an interpretation of the word "through and under" without considering the purpose and context of the easement retained by the grantor. Third, it interprets the "through and under" language in the solid-mineral, surface boundary-driven coal context instead of considering the interconnected nature of the oil and gas reservoir. Fourth, although the court "previously ruled that the deed . . . is not ambiguous,"[129] it nevertheless accepts the "Plaintiff's argument that the instrument should be construed against the drafter" noting the deed was "*most likely* drafted on behalf of the grantor . . . ."[130] The court then considers extensive extrinsic evidence of language in other conveyances as a basis for concluding the grantor "knew how to draft language which would have clearly and unequivocally reserved the rights now claimed by Defendants . . . ."[131] It seems more reasonable to conclude that the court could take judicial notice that in 1959 the grantor would *not* have known how to draft language to anticipate the technological advancements in horizontal drilling that would make the oil and gas in the area more valuable than the coal.

Horizontal drilling and hydraulic fracturing are "proper and necessary" means for pursuing the "purpose of mining, draining . . . and carrying away . . . oil, gas or other minerals . . . ." This is where the law of easements should trump the court's contract interpretation techniques designed to protect the severed surface owner by giving them new hold-up hold-out rights. Easement law would consider the underlying purpose of the easement as part of the interpretive process.[132] Easement law would also find that horizontal drilling, as an accepted technological advancement for developing oil and gas in the area, is encompassed within the scope and intensity of the granted easement rights.[133] The developer in *Jewett* should not have to resort to a reciprocal

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129 *Id.* at 2.

130 *Id.* at 7 (emphasis added).

131 *Id.* at 10.

132 *See* text, *supra*, § 9.05. [3] for further discussion.

133 *See* text, *supra*, § 9.05. [4] for further discussion.

accommodation analysis because the express and implied terms of the easement would encompass horizontal drilling and hydraulic fracturing.

### [4] — Compulsory Pooling and Horizontal Drilling.

The North Dakota Supreme Court, in *Continental Resources, Inc. v. Farrar Oil Co.*,[134] considered objections to horizontal drilling raised by a lessee of two quarter sections of land included in a spacing unit consisting of section 17. Continental, as owner of the other two quarter sections in section 17, proposed drilling a horizontal well beginning on Continental's Northwest Quarter and ending in Farrar's Southwest Quarter. Farrar refused Continental's offer to participate in drilling the well.[135] Continental then obtained a forced pooling order, pooling all oil and gas interests in section 17.[136]

Despite the pooling order, Farrar contended Continental lacked the authority to drill into Farrar's leased lands without Farrar's consent.[137] Had this been the case, Farrar would have had considerable hold-up hold-out value, allowing it to effectively veto any horizontal development of the pooled area. Productive development of the reservoir would only take place after the "stick" purportedly held by Farrar was purchased.

Rejecting Farrar's trespass theory, the court observed that the police power to pool substituted the pooling act for "the property law of trespass" and "to that extent, property law is necessarily superseded."[138] The court's quotation of a Louisiana Supreme Court case offers a more accurate view of Farrar's property, or lack of property, in this situation:

> "[L]andowners share a common interest in a reservoir of natural resources beneath their adjacent tracts, such common interest does not permit one participant to rely on the concept of individual ownership to thwart the common right to the resource as well as

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134 Continental Res., Inc. v. Farrar Oil Co., 559 N.W.2d 841 (N.D. 1997).
135 *Id.* at 842-43.
136 *Id.* at 843.
137 *Id.* at 843, 844.
138 *Id.* at 846.

the important state interest in developing its resources fully and efficiently."[139]

In reality, no property right was "necessarily superseded" by the pooling because the right Farrar asserted to limit prudent development of the reservoir community did not exist. The court concluded: "since Continental is authorized by the Industrial Commission's forced pooling order, it will not trespass upon Farrar's property rights by drilling the authorized horizontal well through Farrar's subsurface formation."[140]

## § 9.07. Oil & Gas Easements and Hydraulic Fracturing.

Hydraulic fracturing continues to be the current lightning rod for fossil fuel opponents and severed surface owners seeking to prevent development of shale resources.[141] Therefore, it is likely to be attacked at some point as an unreasonable use of the surface estate. The attacks should fail.[142] Hydraulic fracturing, like horizontal drilling, is a classic example of technology and techniques designed to improve the production of oil and gas. Like horizontal drilling, once the extralateral elements are removed, it becomes a simple matter of evaluating whether hydraulic fracturing is an appropriate operation to maximize the efficient recovery of oil and gas.[143]

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139 *Id.* (quoting Nunez v. Wainoco Oil & Gas Co., 488 So. 2d 955, 964 (La. 1986)).

140 *Id.* at 846.

141 The ability to economically develop vast deposits of oil and gas within the United States is the single most devastating set-back for the environmental movement. This same event will surely rank as one of the most beneficial events for the American economy, and for national security. Nevertheless, the environmental imperative has been built around dwindling domestic supplies of oil and gas. In an effort to secure the environmental agenda, environmental groups have targeted hydraulic fracturing, which is an essential element of any shale or other unconventional oil and gas operation.

142 *Hydraulic Fracturing*, *supra* note 8, at 688-89.

143 *Id.* at 697-98 (discussing the obligation to engage in hydraulic fracturing to satisfy the implied covenant to further develop). The extralateral elements of hydraulic fracturing should not pose a problem to its use. *Modern Property Analysis*, *supra* note 6, at 259-64.

## § 9.08. Conclusion.

Oil and gas easements are defined by their purpose: the efficient development of oil and gas resources. These easements are also defined by the reservoir community where the oil and gas resources reside. Courts should be able to properly resolve most disputes regarding easement scope, intensity, and change, by ascertaining whether the questioned activity was undertaken to support efficient development within the reservoir community.