Authorities Discuss Surface Owners' Rights

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A Charleston attorney and a leader in the oil and gas industry discuss severed surface and mineral owner rights.

By Andrea Lannom
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Lawsuits surround the issue of surface versus mineral rights and one Charleston attorney says oil and gas companies have gone too far.

New rules were enacted earlier this year, applying to Marcellus shale, but Dave McMahon, lawyer and member of the West Virginia Surface Owners Rights Organization says these regulations do little to protect surface owners.

"Our organization has been very disappointed with this legislative inaction and we are turning attention to the courts to try to get help," McMahon says.

Corky DeMarco, executive director of the West Virginia Oil and Natural Gas Association explained that in many counties, there are tracts of land with severed mineral and surface rights.

"Sometimes (companies) would come up here in the 1920s or 1930s and maybe some of these farms were being foreclosed and the only way to keep it was to sell the minerals," DeMarco explained.

This becomes an issue because mineral ownership has primacy over surface.

"If you own the minerals and own the land, you put up with it because you get a check," he explained. "In those places where minerals are sold, people are not happy."

"A lot of people say they have been abused and taken advantage of when, in fact, someone has already paid for those minerals."

McMahon explained that many people have been abused in these situations, citing a case in Marion County, where the plaintiff owned approximately 105 acres of surface, separated from 100 acres of minerals.

This case has bounced around from circuit court to federal court and now, the case is looking at a move back to Marion County Circuit Court. When the complaint was filed, another motion was filed to certify this question to the West Virginia Supreme Court.

"We think it's a trespass for them to use our surface to drill into neighboring mineral tracts and we know companies are doing this throughout the state, so that's why we wanted the question to be answered by the Supreme Court," McMahon said.

Although the surface owner understood that the companies had the right to use the surface to get the minerals., McMahon says the owner did not think neighboring tracts of land could be drilled as well.

"Four conventional shallow gas wells were drilled on his land but then he got a notice that a driller got permits for three horizontal wells and that they were going to have a well pad on his surface," he said. This meant that the company would drill horizontally about 3-5,000 feet in the neighboring tracts, McMahon said. The plaintiff ended up with three to six well pads on his surface, which McMahon says would drain 3,600 acres. "It put a burden on his surface," he said. "Conventional wells that drilled on him took 2 acres. The horizontal well pad took 12 acres and even more importantly, it takes five months just to finish drilling the first well. That doesn't count fracking it and drilling the next five wells. It was a permanent industrial facility."

"They say they have the right of reasonable use of the surface and they think that's reasonable," he said. "Companies bully people and just do it anyway."

Another legal question arises from this case. McMahon says even if the plaintiff had owned the minerals, the general expectation would be for conventional well pads, not horizontal well pads. These new pads are not "in the owner's contemplation, McMahon said.

"The same way that strip mining wasn't in contemplation of people who sold off coal in the early part of this century," he explained. "Courts agreed saying you can't strip mine just because you have their coal. Vertical mining is in contemplation of people and the same should be applied to wells."

McMahon recommends open communication as a way to improve the system. Along with a notification to the surface owner, McMahon says companies should also have a hearing on the application.

This type of hearing would allow the surface owner to have a better understanding of what the company plans to do with the property.

"There is no right to hearing now," he said. "Further, the state doesn't have a right to say. They only have a right to change the driller's permit to change how the well is drilled. They can't change where."

DeMarco says understands surface owners' frustration and admits that there have been times when there has

been notification.

Along with a 10-day notification, DeMarco says companies should send some sort of communication to the surface owner. He says it's "common courtesy."

Also, DeMarco says the comment period should be increased to a 30-day time frame.

"Even though the mineral owner has primacy, I don't think they should rub someone's nose in it," he said.

DeMarco also is not opposed to a secondary arbitration group, explaining that the way the law is written now, the surface owner can take the mineral owner and the driller to court. Yet, the mineral owner and the driller cannot take the surface owner to court.

"We would consider with a capital C for any of the other three to take the other two to a resolution body, but everyone pays their own way," he said.

"Also, if there is value like an open pasture and they take an acre out of their abilities to use that acre, they need to give them a reasonable amount," he said. "I don't believe that when a person says, 'well, in the future, there's going to be a Walmart there,' makes it a value of monetary amount that we would concede."

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