AUG. 6, 2012 | USD 10

OIL&GAS JOURNAL®

PennWell®

OFFSHORE EUROPE

REFINING REPORT

US SHALE PRODUCTION POTENTIAL

LABOR, MATERIAL FOR US JACK UPS

PIPELINE LEAK-DETECTION SELECTION

POSTER: DELAYED COKING

How old 'other coal' deed or lease clauses sanction Appalachian horizontal drilling

Jeffery D. Ubersax
Jones Day
Cleveland

Mineral rights in the Appalachian basin are often governed by deeds or leases that were recorded decades, even a half century or longer ago. The courts are increasingly being asked to determine whether these old deeds permit the use of modern methods to extract minerals—in particular, hydraulic fracturing ("fracing") to extract natural gas and oil.

An essential part of fracing as practiced today is horizontal drilling. The operator drills thousands of feet vertically to the Utica or Marcellus shale formation and then thousands of feet horizontally within the formation. A single well pad can support multiple bores that are drilled in this fashion and radiate outward in a spider-like pattern.

These horizontal wellbores often pass through multiple individual tracts of land and cross property lines. This has given rise to legal disputes between drillers and surface owners, who challenge the extraction through wells on their property of gas and oil from surrounding properties.

In Ohio, for example, one surface owner recently obtained an injunction against horizontal drilling for this purpose.[1] A motion for reconsideration is pending. Another surface owner is seeking an injunction that would halt production from an active well that alone accounted for about 2% of Ohio's total gas production in 2011.

These disputes turn on the language of deeds or leases that were written mainly with coal in mind. Typically the coal and other minerals, including oil and gas, were severed from the surface estate. Sometimes a coal company, having strip-mined the property, would sell the surface and reserve the rights to deep coal seams that it might mine in the future or might lease to others interested in deep coal mining.

Sometimes a property owner would sell or lease the coal under his land. In any case, the language of the deed or lease is critical to determining the rights of the mineral owner vis-a-vis the surface owner; and the intent of the original parties to a decades-old deed that contemplated deep coal mining can be critical to determining the rights of the mineral owners and lessees to conduct fracing operations today.

Other coal, other lands clauses

One common, almost universal provision in these contracts is especially important: the so-called "other coal" (or "other lands") clause. Such a clause gave the mineral owner express permission to make use of the property in extracting coal from other, adjoining lands where it then owned or might in the future acquire mineral rights.

These "cross mining rights" could be essential to economically feasible deep coal mining. "When a mineralized zone crosses property boundaries, a logical mining plan might contemplate removing ores from both areas through a single shaft or portal."[2] A clause permitting the removal of coal from other lands made such "logical mining" possible.

"A single mining lease might embrace sufficient land to allow the lessee to perform most of the mining related activities that must accompany mining on the leased parcel. More often than not, however, rights to use other lands in the vicinity will be needed. Such lands are often already held by a mine operator under mineral agreements, and if those agreements contain provisions permitting the operator to make use of the surface and underground workings in aid of mining on other lands, much time and expense can be avoided."[3]

Indeed, because a shaft or portal for deep coal mining requires a very large capital expenditure, it would simply not be feasible to locate a portal on every one of the many individual surface tracts that overlie an underground mine. Coal companies thus typically bought or reserved the right to remove coal from other lands through the deeded property.

It was not strictly necessary to bargain for an express right to transport coal from other lands through tunnels or passages under the property—that right is generally implied by law. In 1907, for example, the Ohio Supreme Court was asked to determine whether a mine owner could use underground passages to haul coal from adjacent properties.[4] The court held that the owner could do so and that he could use not only any empty spaces created by mining but also any passages cut specifically for the purpose of carrying minerals from adjoining lands:

"The empty space is therefore, not merely property which may be used as an incident to the removal of mineral included in the grant, but...he may use the space created by removal of mineral within the grant, as a way for the carriage of minerals from his adjoining lands, or, if he prefers to do so he may cut a passage through the minerals and use it for the carriage of minerals from his other lands." The court cited with approval a similar decision of the Pennsylvania Supreme Court in 1891.[5]

A mine owner is thus entitled by law to move minerals from his other lands through spaces cut or drilled under the property.

Implied rights to surface use

In most jurisdictions, however, there is no clear implied right to bring minerals from other lands to the surface.

"The general and well-established rule is that the implied or granted rights of the mineral lessee or a mineral owner (including the lessee of a mineral owner) to make such use of the surface of the tract of land as is reasonably necessary for the extraction of minerals therein do not extend to surface uses conducted in aid of mining operations on other lands."[6]

There is an argument in some states that the mineral owner does have an implied right to use the surface as well as any underground passages to remove minerals from other lands. In 1890, for example, the Illinois Supreme Court considered a case in which the plaintiff sought an injunction to prevent a mine operator from transporting coal from other lands under plaintiff's property or hoisting such coal to the surface.[7]

There was no "other coal" provision in the lease. The court nevertheless held that surface use was permitted: "It is not conceivable how the proposed use of appellant's mine and shaft can result in damage to appellee. Any action brought by her for supposed trespass for running its cars and tram ways through the entries in the mines, or for hoisting and delivering the same at the shaft, or for any use of the leased land, would be answered by the fact that appellant was rightfully in possession under the contract."

This case was cited by the Ohio Supreme Court as "sound law" which "should be followed."[8] But in general, absent an "other coal" clause, there is no right of surface use for mining adjacent lands. Hence the utility of an "other coal" clause permitting use of the surface.

Judicial interpretations

Many cases illustrate and interpret "other coal" clauses.

A 1902 Pennsylvania Supreme Court case, for example, considered a conveyance of coal "together with the privilege of mining and removing through any entries made in said coal other coal belonging to" the grantor.[9] The plaintiff argued that this language did not permit bringing coal from adjacent lands to the surface. The court disagreed, stating that "[t]he right of passage through the entries on the...tract meant passage through them to their exit"—in other words, to the surface.

Another Pennsylvania case decided 3 years later involved a conveyance that granted coal rights "together with the privilege of mining and removing through said described premises, other coal belonging to said party...or which may hereafter be acquired."[10]

The court held that the "natural, obvious and prima facie meaning of the phrase 'through said described premises'" was that "defendants have the right through any entry or coal road that they make under the surface of the plaintiffs' land by taking out the coal which belongs to them...to transport other coal through said openings, or in case they had a shaft sunk on plaintiffs' farm, they would have the right to bring coal from under other lands owned by them to the surface through such shaft."

Cases involving similar "other coal" clauses can be found outside of Pennsylvania.

Courts have thus consistently interpreted the use of the word "through" in "other coal" clauses to confer the right to remove coal from other lands through the surface of the deeded or leased property.

If the grantor intended to convey only the right of subsurface transportation and not to permit use of the surface, he might include an "other coal" clause without the word "through." For example, a deed might convey mining rights "together with the free and unrestricted right to remove and carry away, under said described premises, other coal...." Or the grantor or lessor might "put in language limiting the right of surface use to that reasonably required to mine and treat ores 'from the leased lands only.'"[11]

Where fracing comes in

How does all of this apply to fracing?

"Other coal" clauses are not always just about coal; they commonly authorize the removal of oil, gas, and other minerals, as well as coal, from adjoining lands. If a deed authorizes the removal not only of coal but also of oil and gas on the same terms as coal, then there should be no legal impediment to horizontal drilling and fracing to remove gas and oil from other lands.

Just as the mineral owner can bring coal to the surface, so can he bring gas to the surface. An "other coal" clause may not be necessary to permit fracing—there may be other clauses that permit it, or implied rights under applicable state law—but it should be sufficient.

A proper understanding of "other coal" clauses thus shows that there is a sound legal basis for removing oil and natural gas by horizontal drilling from multiple properties where such a clause is in the deed or lease.

It is important to fully inform any court considering these issues about the original purpose and context of these clauses and the ample case law that grew up around them in the early 20th century. Erroneous decisions in this area could impede or prevent the development of tremendous untapped energy resources in the Appalachian basin, defeating not only private interests but public policies that expressly favor the production of oil and gas. OGJ

References

1. Jewett Sportsmen & Farmers Club Inc. vs. Chesapeake Exploration LLC (CVH-2011-0113, Harrison County, Ohio, Jan. 17, 2012).

2. American Law of Mining, Second Edition 2011, § 112.03[1], at 112-9.

3. Am. Law of Mining, § 112.01[1], at 112-3.
4. Moore vs. Indian Camp Coal Co., 7 Ohio St. 493, 501 (1907).
5. Lillibridge vs. Lackawanna Coal Co., 143 Pa. 293 (1891).
6. Am. Law of Mining, § 112.02[2], at 112-4.
7. Consolidated Coal Co. vs. Schmisseur, 135 Ill. 371, 25 N.E. 795 (1890).
8. Moore vs. Indian Camp Coal Co., 75 Ohio St. 493, 501, 80 N.E. 6 (1907).
9. Potter vs. Rend, 201 Pa. 318, 50 A. 821 (1902).
10. Farrar vs. Pittsburg & Eastern Coal Co., 28 Pa. Super 280, 1905 Pa. Super. LEXIS 184, at *2 (1905).
11. Am. Law of Mining, § 112.04[3], at 112-18.

The author

Jeffery D. Ubersax (jdubersax@jonesday.com) is a partner at the Jones Day law firm in Cleveland. In almost 25 years at Jones Day, he has won major trial and appellate victories for clients across the country in a variety of individual and class actions, including product liability and toxic tort cases as well as commercial disputes involving contract, antitrust, fraud, and securities claims. Most recently, he has become involved in disputes concerning the removal of gas and oil from Ohio's Utica or Marcellus shales. He is currently defending mineral rights owners against claims by surface owners who have sued to enjoin the removal of natural gas by horizontal drilling and hydraulic fracturing.

Reprinted with revisions to format, from the August 6, 2012 edition of *Oil & Gas Journal*