Easement Basics: A Primer on Easements in Oil and Gas Exploration and Production

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§ 3.01. Introduction.

Once there has been a separation of the mineral estate from the surface estate, numerous issues arise in regard to the permissible uses of the surface estate for purposes of exploring mining, extracting, storing, transporting
or marketing minerals. Resolution of those issues may turn upon the law relating to easements. If anything should be derived from the sections that follow, it is that a mineral owner’s reasonable anticipation of the scope of needed uses of the surface estate for recovery activity ought to be thought out, agreed to, and reduced to writing as part of the initial severance of the mineral estate from the surface estate. Otherwise, both the surface owner and the mineral owner might be unpleasantly surprised by the operation of the law relating to easements.

§ 3.02. Nature of Easements in General.

An easement is a non-possessory interest in the land of another that gives the holder the right to use the land for a particular purpose. An easement is not an estate in land, but is an interest in land such that the Statute of Frauds may be implicated when resolving questions relating to an easement. Land that is subject to an easement is referred to as the “servient” or “burdened” estate, whereas, land that is benefited by the existence of an easement on another parcel of property is referred to as the “dominant estate.”

§ 3.03. Types of Easements In General.


An easement appurtenant is created for the benefit of the dominant estate. One owner’s land (the servient estate) is burdened for the benefit of the physical use of another’s land (the dominant estate). It is usually


2 Restatement of Property, § 450 (1944).


the case that an appurtenant easement will not exist separate from the
dominant estate to which it belongs.\textsuperscript{5} As an example, where the surface
and mineral estates have been separated, the owner of mineral rights (the
dominant estate) usually has a right to use the surface (the servient estate)
for ingress and egress, but cannot transfer the easement to the owner of
some other parcel of land in the vicinity. The easement is attached to the
mineral estate and can generally be used only for the benefit of that estate.
If the mineral estate is assigned, the assignee receives the benefit of the
easement.\textsuperscript{6}

\textbf{[2] — Easements in Gross.}

An easement in gross is for the benefit of the holder, regardless of
whether that person owns or possesses an interest in other land.\textsuperscript{7} There is
a servient estate, but there is no dominant estate. It is not a license to use
land, because a mere license implies that land is being used with the
revocable permission of the owner. On the contrary, an easement in gross
is irrevocable.\textsuperscript{8} Examples include utility lines or pipelines which cross
many parcels of property (the servient estates), yet there is no dominant
estate to which the easements are attached.

\textsuperscript{5} Carbone v. Vigliotti, 610 A.2d 565, 568 (Conn. 1992); Coastal Ready-Mix Concrete
Co. v. Board of Commrs. of Nags Head, 265 S.E.2d 379, 385 (N.C. 1980)(easement
appurtenant is incident to and exists only in connection with the dominant estate owned
by the same person); Waller v. Hildebrecht, 128 N.E. 807, 809 (Ill. 1920)(holding that
the appurtenant easement “must be attached to the dominant estate, and it can become
legally attached only by unity of title in the same person to both the dominant estate and
the easement claimed”).

\textsuperscript{6} Keen v. Paragon Jewel Coal Co., 122 S.E.2d 543 (Va. 1961)(right of a mineral right
lessee to transport coal across the dominant estate); Hunt Oil Co. v. Kerbaugh, 283 N.W.2d
131, 135 (N.D. 1979)(citing Christman v. Emineth, 212 N.W.2d 543, 550, 70 A.L.R.3d
366 (N.D. 1973))(owners of minerals have a right to enter, occupy, and make use of
surface lands as is reasonably necessary in exploring, mining, removing, and marketing
the minerals).

\textsuperscript{7} Abbott v. Nampa Sch. Dist. No. 131, 808 P.2d 1289, 1295 (Idaho 1991); Barrett v.

\textsuperscript{8} Leach v. Anderl, 526 A.2d 1096, 1099 (N.J. 1987); Town of Kearny v. Municipal
Sanitary Landfill Auth., 363 A.2d 390 (N.J. 1976)(license is a personal privilege while
an easement is irrevocable and non-possessory).
There has been a long history of judicial disfavor toward easements in gross, as a result of which they were generally held not to be assignable or inheritable. Accordingly, it is often important to determine whether an easement is one in gross or appurtenant for purposes of determining its assignability.

The law has developed, however, such that commercial easements in gross — such as utility easements — are generally alienable, whereas personal easements in gross — i.e., those that produce no economical benefit — are not. Because the law is uncertain, an attorney should not assume that any given easement in gross is alienable.

§ 3.04. Creation of Easements.

Easements are created by express grant or reservation, by implication, or by prescription. For purposes of mineral interests, easements are usually either express or implied.

[1] — Express Grant of an Easement.

Easements are subject to the Statute of Frauds because they are interests in land. Accordingly, the creation of an express easement
requires a writing signed by the grantor.\textsuperscript{14} Similarly, a contract to create an easement in the future must be in writing, and signed by the party to be charged.\textsuperscript{15} Oral modifications or terminations of an easement are generally ineffective under the Statute of Frauds as well.\textsuperscript{16}

The writing creating an easement must identify the servient estate and must comply with all local laws in regard to the creation of an interest in property.\textsuperscript{17} It need not, however, identify the dominant estate or the location of the easement on the servient estate (although failure to specify the easement’s location may lead to future controversy and litigation).\textsuperscript{18}

No technical or special words (such as “grant”) are required to be used when creating an express easement, so long as the court can ascertain the intent of the parties to create an easement from the language that is used. The court must be able to determine that it was the intent of the grantor to create a servitude on his or her property. The court will resolve against the grantor any ambiguity in the instrument creating an easement.\textsuperscript{19}

The requirement that an express easement be in writing and signed by the party to be charged under the agreement may be enforced absent such a writing under the equitable doctrine of part performance. What constitutes part performance differs from state to state. In very general terms, however, if the parol grantee of an easement has taken actions in

\footnotesize
\textsuperscript{15} Webb v. Shultz, 198 S.W.2d 333, 335 (Tenn. 1946)(promise to convey land in the future is within the Statute of Frauds); Warren v. Cudd, 550 S.W.2d 773, 775 (Ark. 1977).
\textsuperscript{16} Kohlleppel v. Owens, 613 S.W.2d 168, 173 (Mo. 1981)(oral modification outside the Statute of Frauds; both the dominant and servient estates need to be identified); Continental Banking Co. v. Katz, 439 P.2d 889 (Cal. 1968)(extrinsic evidence can be used to determine the dominant estate when it is not established in the agreement).
\textsuperscript{17} Chase v. Nelson, 507 N.E.2d 640 (Ind. 1987).
\textsuperscript{18} Von Meding v. Strahl, 30 N.W. 2d 363, 370 (Mich. 1948)(appurtenance will pass with the estate although not specifically mentioned).
\textsuperscript{19} Ezikovich v. Linden, 68 A.2d 570, 572 (Conn. 1993)(construe ambiguity in favor of the grantee).
reliance on the easement or has paid valuable consideration for the oral easement, the easement may be removed from the Statute of Frauds.20


In addition to an express grant of an easement, a document may expressly reserve an easement. For example, when a person sells some but not all of his property, the seller may expressly reserve an easement on the property that is sold for the benefit of the property that is retained. Unlike the grant of an express easement, a person seeking to reserve an easement should use the word “reserve” in the document.21

When granting or reserving an easement, the parties should take care that the writing accurately and adequately reflects their intent, because the courts will look to the specific language of the writing to ascertain that intent. Indeed, the courts will not resort to parol or extrinsic evidence unless the intent of the parties as evidenced in their writing is ambiguous. Accordingly, the parties ought to give due consideration to the location of the easement, as well as to the scope of the right to use the easement.


There are generally two situations under which the courts will find an easement to exist by operation of law. The first is the so-called easement by necessity. The second is an implied easement.

In order for an easement by necessity to arise the following elements must be established:

prior common ownership of the dominant and the servient estates;
transfer or severance of the two parcels;
necessity for the easement at the time of severance; and
continuing necessity for the easement following severance.22

20 Rutt v. Roche, 87 A.2d 805 (Conn. 1952)(part performance may result in equitable relief); Rajendara Leekha v. Wentcher, 586 N.E.2d 557, 562 (Ill. 1991)(part performance is an equitable doctrine that can remove an oral contract from the Statute of Frauds).
22 Powell v. Miller, 785 S.W.2d 37, 38-39 (Ark. 1990); Shadowood Lake Club, Inc. v. King, 1994 Tex. App. LEXIS 2243, at p. 27 (1994)(required elements for an easement by necessity). The necessity that must exist at the time of severance may be legal, rather than actual. See, e.g., Finn v. Williams, 376 Ill. 95, 33 N.E.2d 226 (1941), where a
One obvious example of an easement by necessity is the right of an oil and gas lessee to cross adjacent land retained by the lessor in order to reach the leased property.\textsuperscript{23} An easement by necessity may also arise when there is a severance of a mineral estate from the remaining interests in land. There is a necessity for the owner of the mineral interest to use the surface of the land to recover the minerals. Accordingly, the law implies an easement by necessity to use the surface of the land to reach and produce the mineral interests that have been severed.\textsuperscript{24} The rights implied on behalf of the mineral estate typically exceed those implied for the benefit of a landlocked tract, where the easement by necessity entitles its holder only to rights of ingress and egress. Indeed,

\[n\]umerous authorities could be cited to the effect that, unless the conveyance itself repels the construction, one who owns the mineral rights in the tract of land by implication of law acquires the right to use as much of the surface as may be reasonably necessary for the beneficial and profitable operation of his mines.\textsuperscript{25}

In ascertaining the intent of the parties to the transfer of interests in property, the courts may also create easements that are ostensibly implied from the intent of the parties.\textsuperscript{26} In such a case, the grantor and grantee are presumed to have intended to create an easement necessary for the beneficial enjoyment of either the parcel transferred or the parcel

\textsuperscript{23} See Peacock v. Schroeder, 846 S.W.2d 905 (Tex. App. 1993). A lessee in this situation may also be able to assert an implied easement.
\textsuperscript{24} Richardson v. Citizens Gas & Coke Util., 422 N.E.2d 704 (Ind. 1981)(easements impliedly reserved for drilling purposes).
\textsuperscript{25} Wiser Oil Co. v. Conley, 346 S.W.2d 718, 721 (Ky. App. 1960)(quoting General Refractories Co. v. Swetman, 197 S.W.2d 769, 770 (Ky. 1946)).
\textsuperscript{26} Story v. Hefner, 540 P.2d 562, 566 (Okla. 1975)(implication of an easement may always be prevented by language in the deed sufficiently explicit to negate it).
The following elements are generally necessary to establish such an easement:

- prior common ownership of the dominant and servient estates;
- the common owner’s apparent and continuous use of part of his land to benefit another part of his land;
- the transfer or severance of one of the parcels; and
- the necessity at severance for the preexisting use to continue.

§ 3.05. Easements by Prescription.

Easements can also arise from the adverse use of someone else’s property. While easements by prescription are not favorites of the law, and state laws differ on what must be shown, a minimum of four elements must usually be established:

- the use of the easement must be adverse;
- the use of the easement must be open and notorious;
- the use of the easement must be continuous and uninterrupted; and
- the use of the easement must be for the period of prescription.

The burden of proving an easement by prescription falls upon the party claiming its existence, and generally must be done by clear and convincing evidence. Because an easement by prescription is by
definition a creature involving litigation, it should be used as a last resort when efforts to obtain a consensual easement have failed.

§ 3.06. Scope and Right of Use of Easements.

The problems do not end with a determination that an easement exists. Indeed, once it is established that there is an easement, the larger issues concern its location, scope of use, and maintenance.


Although an express grant of an easement need not contain a description of its location and dimension, drafters of any easement should take the time and effort to sufficiently describe where an easement will be located upon the servient estate and what its dimensions will be. Failing that effort, the courts will resort to extrinsic evidence to ascertain the parties’ intent.31

The law appears to be settled that where the width, length and location of an easement for ingress and egress have been expressly set forth in the instrument, the easement is specific and definite. The expressed terms of the grant or reservation are controlling in such case and considerations of what may be necessary or reasonable to a present use of the dominant estate are not controlling. If, however, the width, length and location of an easement for ingress and egress are not fixed by the terms of the grant or reservation the dominant estate is ordinarily entitled to a way of such width, length and location as is sufficient to afford necessary and reasonable ingress or egress.32

1968)(to establish an easement by prescription, the elements must be shown by clear and convincing evidence); Dolph v. Magnus, 400 N.E.2d 189, 190 (Ind. App. 1980)(the burden of proof is on the party asserting the easement); Davis v. Townsend, 435 So. 2d 1280, 1283 (Ala. 1983)(the burden of proof is on the party who asserts the easement by prescription).
Accordingly, absent express language in the documents creating or reserving an easement, the court will look to the totality of surrounding circumstances, including the nature and purpose of the easement, to ascertain its location and dimensions. Likewise, when an easement arises by implication, the courts must determine what is reasonable under the circumstances in regard to the location, dimension, and scope of the use of the easement.


The scope of an easement defines the purpose for which it can be used. Usually, the scope is determined by the agreement that created the easement. Problems can occur when the agreement is not clear as to these matters. If the details of the agreement are not clear, a general principle of reasonable use is implied, and the reasonableness of the use is dependent on the surrounding circumstances.

The purposes of the easement are subject to change and growth. How much change is determined by the following formula: the purposes may keep up with those changes that might be reasonably anticipated by the dominant tenant. Basically, evolutionary but not revolutionary changes are allowed. For easements created by implication or prescription, the original scope and location of the easement must first be determined. After that, the easement is subject to change and growth in the same manner as a granted easement of the same original description.

An easement appurtenant can only be used to serve the land to which it is appurtenant; however, it may be used to serve all parts of the dominant

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33 Koplin v. Hinsdale Hosp., 564 N.E.2d 1347, 1355 (Ill. 1990)(if no width is specified, the court will interpret dimensions that are reasonably necessary for the purposes of the easement); Clearwater Realty Co. v. Bouchard, 505 A.2d 1189 (Vt. 1985); Hamlin v. Pandapas, 90 S.E.2d 829 (Va. 1956).
tenement. A problem arises when the land is subdivided after the easement is granted. This does not *per se* prevent the easement’s serving the individual parts unless the easement is being used in ways beyond what might have been reasonably anticipated.37

§ 3.07. **Special Issues Involving Mineral Interests and Estates.**

Mineral interests are often severed from the remaining interests in land.38 Once severed, the mineral estate becomes the dominant estate, and the surface estate becomes the servient estate.39 The following sections will address issues unique to mineral easements once a severance has occurred.

[1] --- **Right to Conduct Seismic Operations.**

Because of public policy considerations concerning the prevention of waste and the promotion of the recovery of valuable minerals, the owner of the mineral estate has largely been granted wide latitude for using the surface estate in a reasonable and necessary manner for purposes of recovering minerals.40 That typically means that the surface can be used so long as the mineral owner does not act in an excessive, wanton or negligent manner.41

One issue that has arisen lately is whether a standard oil and gas lease carries with it the right to conduct seismic operations, or, more specifically, whether a standard “operations” clause will permit the lessee to conduct those operations despite the fact that seismic technology did not exist

37 Green v. Lupo, 647 P.2d 51, 54 (Wash. 1982); Mahoney v. Devonshire, 86 Md. App. 624, 634 (1991) (easements by prescription may be apportioned when the dominant tenement is subdivided); Martin v. Music, 254 S.W.2d 701 (Ky. 1953).
38 Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55 (1898); Stevens Mineral Co. v. State of Michigan, 418 N.W.2d 130, 133, (Mich. 1987) (severance of all of the interests in minerals from the remainder of the land can be done through a reservation or exception in the deed).
39 Getty Oil Co. v. Royal, 422 S.W.2d 591 (Tex. 1967).
41 *Id.* at 626.
when the lease was made. That issue frequently arises where the value of deep wells has caused landowners to become more sophisticated and assertive in protecting and promoting their rights.

Although the matter has seldom been squarely at issue, the courts that have addressed the question have expressed the view that a lessee under an oil and gas lease has the right to utilize geophysical or seismographic exploration methods in the development of the lease, despite the fact that the granting clause of the lease does not specifically address such methods of exploration. In fact, such a right has been held to be implicit, even though the lease antedates the use of such methods of exploration.\footnote{See generally Annot., “Construction of Oil and Gas Lease as to the Lessee’s Right and Duty of Geophysical or Seismographic Exploration or Survey,” 28 A.L.R.3d 1426; and Keller, “Legal Aspects of Geophysical Exploration,” 13 E. Min. L. Inst. ch. 17 (1992).}

The issue was most clearly addressed by the Fifth Circuit Court of Appeals, applying Texas law, in \textit{Yates v. Gulf Oil Corp.}\footnote{Yates v. Gulf Oil Corp., 182 F.2d (5th Cir. 1950).} The occupants of the surface claimed that the lessee did not have the right to conduct geophysical operations, including seismographic work, because the granting clause in the 1924 lease only provided for the “mining and operating” for oil and gas. They further asserted that the original parties to the lease could not have contemplated conducting geophysical operations because seismic tests were unknown to the parties at the time of the contract, and, as a result, the right to conduct seismic testing could not have been contemplated.

In addressing the surface holders’ argument, the Fifth Circuit Court of Appeals stated:

\begin{quote}
In view of the fact that the lessors retained a royalty under the lease, and in view of the fact that there is an implied obligation on the part of the lessee to make reasonable and appropriate efforts to develop the oil possibilities of the leased lands, we, in the absence of impelling precedent from the Courts of Texas, are unwilling to hold that in the discharge of such obligation to develop, the lessee is prohibited from taking advantage of the recent, modern, and effective developments
\end{quote}
of science in exploring for, or producing, the minerals covered by the lease.\textsuperscript{44}

The court went on to conclude that a right to prospect for oil and gas was incidental to the right conveyed to the lessee to mine and operate for oil and gas on the land, and that in prospecting for oil and gas the lessee had a right to conduct seismic testing.\textsuperscript{45}

A like result was reached by the Wyoming Supreme Court in \textit{Ready v. Texaco},\textsuperscript{46} There the court stated unequivocally:

It could not well be questioned, and is not here, that a lessee has an incidental right to explore by geophysical means the lands he has leased.\textsuperscript{47}

\[2\] — Gas Transportation Pipeline Issues.

\[a\] — Right to Construct Gas Pipeline.

An implied easement to conduct surface activities necessary to recover minerals extends only to that activity necessary to recover minerals on the dominant or burdened estate. Accordingly, an oil and gas lease does not carry with it the implied right to construct a pipeline to carry gas produced from adjacent properties.\textsuperscript{48} Accordingly, if a trans-property gas pipeline is the goal, there must be an express grant of such a right. Care should also be taken as to the type of document that creates that right. For example, a provision in an oil and gas lease that permits gas transportation from other properties may only be valid so long as the oil and gas lease is in effect.

\textsuperscript{44} \textit{Id.} at 289.
\textsuperscript{45} \textit{Id.}
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Wiser Oil Co.}, 346 S.W.2d at 721 (“[t]he rule is that in the absence of an express agreement the holder of [mineral rights] cannot use the surface owned by his grantor or lessor in producing...[the minerals] on the lands of another. The mining privileges and rights contained in the lease or deed relate to [minerals] to be produced from the land covered by the instrument and none other.”)(citation omitted).
[b] — Pipeline Abandonment and Trespass Issues.

Issues may arise relating to the ownership interest of a gas pipeline once it is no longer being put to use. Of course, the better practice would be to address this contingency in any document creating the right for the pipeline to be in place in the first instance, such as the oil and gas lease or easement document. By doing so, the parties will eliminate the need for a court to ascertain the character of the pipeline and intent of the parties after-the-fact.

Absent an express agreement between the parties to the contrary, a lessee may usually remove its fixtures from the property following conclusion of the lease. The issue, then, is whether a pipeline is a trade fixture, which is removable following the term of the lease, or whether instead it has become appurtenant to the property, and therefore belongs to the owner of the property at the conclusion of the lease. Generally speaking, the courts will look to the following indicia in determining whether an item is a removable trade fixture or a non-removable attachment to property:

1) Was there an actual annexation to the property?
2) Was there an appropriation to the use of the property to which the item was attached?
3) Was there an intention on behalf of the party making the annexation to make the item a permanent part of the freehold?

For example, in Zangerle v. Standard Oil Co., the court determined that machinery and equipment of a steam boiler plant of an oil refinery, although firmly attached to the land, were removable fixtures. The court reasoned that the plant was specifically built for purposes of use by Standard Oil as a refinery and was therefore simply an accessory to the business and not intended to become a permanent fixture on the land.

49 See R. Hemingway, The Law of Oil and Gas, § 7.10, at p. 385 (West Publishing Co. 1983)(“[w]here no provision exists in the lease, the lessee may remove his fixtures, i.e., equipment, machinery, derrick, pumps, casing, etc., during the term of the lease or within a reasonable time after the termination thereof.”).
50 See Zangerle v. Standard Oil Co., 60 N.E.2d 59 (Ohio 1945).
51 Id.
Similarly, gas pipelines not installed to furnish gas for the benefit of the burdened estate, but rather installed for purposes of transporting or producing gas as part of the business of the lessee, might be considered by the courts to be trade removable fixtures belonging to the lessee. Alternatively, a state statute might address the issue. For example, a Louisiana statute dealing with “constructions permanently attached to the ground and plantings made on the land of another with his consent” has been held applicable to gas pipelines.\(^\text{52}\) According to the statutory provisions, such pipelines remain the property of the person attaching them to the real estate and become the property of the landowner only after the lessee’s failure to remove them within 90 days following written demand at the conclusion of the lease.\(^\text{53}\)

If a pipeline remains the property of the lessee following termination of the easement, an issue may arise over the landowner’s ability to maintain an action in trespass in the event the pipeline is not removed once the lease has concluded or the pipeline has been abandoned.\(^\text{54}\) A landowner may have a claim against the lessee to a continuing trespass if the pipeline is not removed.\(^\text{55}\) Accordingly, the lessee is placed in a somewhat anomalous position following the conclusion or abandonment of a gas pipeline. If the lessee removes the pipeline, the surface owner may claim that the pipe became affixed to the property and that, therefore, the removal constitutes a conversion or taking of the pipe from the lessor. On the other hand, if the pipeline is not removed, the lessor may claim a continuing trespass. Obviously, the best way to deal with this issue is to address it as part of the written document creating the right to place the pipeline.


Recently, there have been significant developments regarding whether the owners of an easement may be liable for environmental contamination

\(^{53}\) La. C.C. Art. 493.
\(^{54}\) Guzzetta at 510 n. 1 ("a ‘thing is abandoned when the owner relinquishes possession with the intent to give up ownership.’") (quotation omitted).
on the servient estate under the Comprehensive Environmental Response, Conservation and Liability Act (CERCLA).\textsuperscript{56} CERCLA imposes liability upon the “owners” of property or the “operators” of a toxic waste facility.\textsuperscript{57} Importantly, the issue in these cases did not involve whether the owner of an easement that created an environmental hazard could be liable under CERCLA, but instead whether, if the burdened property suffered from environmental pollution not caused by the easement, the owner of the easement could nevertheless be held liable for the clean-up costs. There are those who have suggested that liability under CERCLA ought to extend to the owners of an easement over contaminated property, even though the use of the easement did not cause the contamination.\textsuperscript{58}

In \textit{Long Beach Unified School Dist.},\textsuperscript{59} the school district purchased property that it learned contained a contaminated pit. It sued not only the vendor of the property, but also Mobil Oil Corporation and Powerline Oil Corporation, for clean-up costs under CERCLA. As stated by the court:

[The oil companies’] tie here is not that they helped pollute the property — plaintiff never alleges this. Rather, each held an easement to run a pipeline across the property and the [plaintiff] says this makes them automatically “owners” or “operators” under 42 U.S.C. §9607.\textsuperscript{60}

The court found that public policy does not support a reading of the CERCLA statute that would impose liability upon an easement holder in the absence of the easement holder contributing to the contamination.\textsuperscript{61} It found that the common law had always “distinguished between

\textsuperscript{56} 42 U.S.C. §§ 9601 \textit{et. seq.}
\textsuperscript{59} 32 F.3d at 1366.
\textsuperscript{60} \textit{Ibid.}
\textsuperscript{61} \textit{Id.} at 1369.
ownership of an easement and ownership of burdened land.” It therefore refused to impose CERCLA liability upon the oil companies by virtue of their easement. The court did recognize, however:

[t]he holder of an easement can clearly be an operator under CERCLA. For example, CERCLA expressly includes pipelines in its definitions of “facility.” 42 U.S.C. §9601(9). As a result, when a party uses the easement to operate a pipeline that releases hazardous materials it is liable as an operator provided the other statutory elements are satisfied. In this respect, the easement holder is no different from anyone else.63


[a] — Gas Storage Rights.

“The majority American rule is that an owner of the fee simple interest in minerals or mineral rights has the exclusive right to use and enjoyment of the excavated cavity so long as the mine has not been exhausted or abandoned.” Accordingly, in most states that have ruled on the issue, so long as there are recoverable minerals in a well or mine, the storage rights belong to the owner of those mineral interests. However, once the reservoir has been depleted, the storage rights revert to the owner of the fee. Unless the lease contains provisions to the contrary, once the oil and gas has been produced from a well, the lessee has no interest remaining in the formations for gas storage purposes.

[b] — Eminent Domain of Gas Storage Elements.

Of particular interest to landowners, or persons owning mineral interests in land, is the ability of the government or a public utility to condemn property for use as a gas storage easement. Many states have statutes expressly providing that land may be condemned for use as a gas storage easement.

62 Id. at 1368.
63 Id. at 1367.
64 International Salt Co. v. Geostow, 878 F.2d 570, 575 (2d Cir. 1989)(collecting causes).
storage easement. When that happens, the mineral owner loses the potential for royalties from the production of minerals in place, and the lessee of the mineral interest loses its ability to explore, produce and market the minerals in accordance with the terms of its lease.

The issue therefore becomes the value of the taking of the gas storage easement. This issue was recently addressed by the Ohio Supreme Court. In *Columbia Gas*, the court recognized that the “just compensation” required for the taking of a gas storage easement was the “fair market value” of the interest taken. Fair market value, in turn, was “the fair and reasonable amount which could be attained in the open market at a voluntary sale.”

The court upheld the following methods of establishing the fair market value of a taking for a gas storage easement:

**Comparable Sales.** Evidence is presented for comparable sales of gas storage easements, if such evidence is available.

**The Existence of Sufficient Natural Gas Allowing for the Commercial Recovery in Sale of the Natural Gas.** Evidence establishing that sufficient natural gas remains under the land so as to allow the commercial recovery and sale of that natural gas. In that event, fair market value would include the foreseeable net income flow from the property for its productive life reduced to present value.

**Fair Market Value of the Storage Easement Based upon a Capitalization of Retail Income for the Right to Store the Gas.** If there are no commercially recoverable reserves of oil and gas, another alternative is to determine the fair market value of the storage easement based upon a capitalization of the rental income for the right to store the gas. In that case, the date of the condemnation is used as the starting point, and the termination of the storage easement is used as the ending point. In this scenario, the value is determined by multiplying the acreage rental by the

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67 Id. at 49.
68 Id.
comparable storage rights to arrive at the present worth of the future income stream. The fair market value is equated to a capital sum which, when invested as of the date of filing, would earn income equal to the comparable storage rentals for the future.

**Depreciation in the Fair Market Value of the Concerned Tract as a Whole by Reason of the Taking of the Storage Easement.** Under this approach, the court must ascertain the difference in value of the entire tract of land before and after the taking of the easement.

**Mineral Leases.** While the existence of an existing oil and gas lease is not evidence of the existence of oil and gas, the court must award at least nominal damages to the owner of such a lease.

Finally, the court emphasized that the value of the taking is measured in terms of what the landowner has lost, and not in terms of what the gas company has gained, by virtue of the taking. In short, when property is taken for use as a gas storage facility, it is permissible to prove the loss of value of minerals in place if evidence of their value — such as reserve analysis, seismic, *etc.* — is available.

§ 3.08. **Issues Relating to Coal and Other Hard Minerals.**


Throughout the years, mining techniques have changed and improved. Along the way, surface owners have complained that those new techniques — such as strip mining and auger mining — present an unwarranted and unreasonable use of the surface estate.

Under traditional legal theory the mineral estate is dominant and the surface estate is servient. The mineral owner’s rights of surface use are, however, limited by requirements that the use not be excessive and that the mineral owner employ due care. In some states the theory has been that the owner of the mineral estate and the owner of the surface estate enjoy correlative rights such that the owner of one estate must act with due regard and care for the rights of the other estate.69 In practice, even under the correlative rights theory, judicial decisions have given preference

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to the mineral estate over the surface estate. That “preference” was thought to be founded upon public policy concern for promoting the development of natural resources.

However, many believe that the national priorities are changing, such that there is an increasing interest in better protection of the rights of the surface owner. Toward that end, the common law, which used to permit most mining activities under a “reasonable use” analysis, has begun to change. More and more courts are beginning to apply the “accommodation doctrine.”

[T]he accommodation doctrine mandates examination of surface as well as mineral owner concerns. If the mineral owner proposes to use a mining method that will interfere with an existing surface use, the accommodation doctrine compels the mineral owner to utilize reasonable alternative mining methods, if such methods exist. Generally, it does not matter that the alternative methods cost more to implement than the proposed method, so long as the alternative cost is reasonable.

[2] — The Demise of the Broad Form Lease?

The standard broad form lease or deed contains the following three elements: (1) the right to use and operate on the surface; (2) a release of liability for surface damages; and (3) a description of the access easement. Under the broad form lease, mineral owners were usually successful in applying any operational technique they thought reasonably necessary without fear of compensation to the surface owner for damages incurred as a result.

70 Comment, 42 Am. U. L. Rev. at 625.
71 Id.
72 Id. at 629.
73 Id. (footnotes omitted).
74 Id. at 620 n. 48 (citing Burke, et al., Cases and Materials on Mineral Law (West Publishing Co. 1994)).
In part as a response to concerns raised by its citizens in regard to the broad form lease, Kentucky has amended its Constitution as follows:

In any instrument heretofore or hereafter executed purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals, which fails to state or describe in express or specific terms the method of coal extraction to be employed, or where said instrument contains language subordinating the surface estate to the mineral estate, it shall be held, in the absence of clear and convincing evidence to the contrary, that the intention of the parties to the instrument was that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed, and that the mineral estate be dominant to the surface estate for the purposes of coal extraction by only the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed.75

That amendment has been upheld as constitutional by the Kentucky Supreme Court.76

§ 3.09. Conclusion.

Obtaining a judicial determination regarding the rights and liabilities associated with an easement can take a long while. The best course is to work on a cooperative basis with the landowner, and avoid the time, cost and expense associated with litigation. Clients are often advised to go onto the property and do what they believe they have a right to do, in a reasonable and non-violent manner.77 So failing those extra-judicial efforts, when immediate action is required, seeking a temporary restraining order is usually

75 Kentucky Constitution, § 19(2).
77 At the same time, clients should be reminded of Canada Bill’s maxim that “a Smith & Wesson beats four aces every time.”
the best bet. And to maximize your chances for success, reduce as much as possible to writing, as soon as it is possible to do so.