

## MEMORANDUM OF LAW

TO:

FROM: Lisa C. Coppolo, Esq.

DATE: October 4, 2009

RE: The Accommodation Doctrine in Pennsylvania

### **QUESTION PRESENTED**

What is the "Accommodation Doctrine" and does it apply in the Commonwealth of Pennsylvania?

### **DISCUSSION**

The accommodation doctrine is a judicial, non-statutory construct that signifies a shift from the traditional dominance of the mineral estate. Generally, the doctrine requires the mineral rights developer to act with prudence and to have due regard for the interests of the surface owner in exercising its right to use the surface to explore for and extract minerals. Specifically, the doctrine allows the surface owner to recover damages caused by the mineral owner if (1) the mineral developer's use of the surface is unreasonable, and (2) reasonable alternatives exist on the leased premises. The doctrine has no application where there are no conflicting uses of the surface. Originating in Texas, the doctrine has been adopted by courts in many states, including Utah, Arkansas, Alaska, Colorado, New Mexico, North Dakota, Pennsylvania, and Wyoming.

As adopted in *Getty Oil v. Jones*, 470 S.W.2d 618 (Tex. 1971), the accommodation doctrine requires the lessor to meet three requirements to invoke it: (1) there must be an existing use of the surface; (2) the mineral lessee's proposed use of the surface must preclude or impair the existing use of the surface; and (3) the mineral lessee must have reasonable alternatives available. Under this test, if there is only one means of surface use by which to produce the minerals, the mineral owner is not bound by the accommodation doctrine and may pursue that use regardless of potential damage to the surface.

An early Pennsylvania case applying the same principles is *Babcock Lumber Company v. Faust*, 156 Pa. Super. 19, 39 A.2d 298 (1944), in which the Pennsylvania Supreme Court held that the owner of mineral rights had an easement or servitude appurtenant to the dominant mineral state to restrict it to reasonable use justifiable to related activities essential to the orderly removal of the mineral rights. The *Babcock Lumber* court found that the easement that a mineral owner has over the surface is not limitless and does not confer upon mineral rights owners "a roving commission to subject any part of the surface through occupation at their pleasure." *Babcock Lumber*, 156 Pa. Super. at 30, 39 A.2d at 303. The court noted,

Where an easement is granted in general terms without definitely fixing its location or limits, so that the land affected by the exercise of the right cannot be ascertained from an inspection of the writing, the grantee does not thereby acquire a right to use the servient estate without limitation as to place or mode of use.... "The authorities establish the proposition that a right of way expressed in general terms is to be construed to include any *reasonable* use to which it may be put": *Bowers v. Myers*, 237 Pa. 533, 538, 85 A. 860. (Italics supplied). The uses made by defendants of plaintiff's lands should therefore be restricted to reasonable ones justifiable both as to place and mode of user by an apparent and direct relationship between the occupation of the surface and the economic prosecution of the mining and related activities essential to the orderly removal of defendants' coal and fire clay to the extent that they may be discovered. Cf. *Heffley v. Lohr*, 149 Pa. Superior Ct. 586, 592, 27 A. 2d 275, where the lawful extent of easements was delineated.

*Id.*, 156 Pa. Super. at 30-31, 39 A.2d at 303-04.

Distilled to its essence, the *Babcock Lumber* case stands for the proposition that the mineral rights developer and surface owner should attempt to reach a reasonable accommodation so that each may reasonably enjoy his respective property rights. See also *Pennsylvania Water and Power Company v. Reigard*, 127 Pa. Super. 600, 193 A. 311 (1937) (construction of lightning arresters for the protection of power lines); *Bowers v. Myers*, 237 Pa. 533, 85 A. 860 (1912) (right to use alley).

In *United States v. Minard Run Oil Co.*, 1980 U.S. Dist. LEXIS 9570 (W.D. Pa. Dec. 16, 1980), the district court recognized the application of the accommodation doctrine in Pennsylvania. The case involved a dispute between the government, which owned the surface rights to lands that formed part of the Allegheny National Forest, and Minard Run Oil Company, which owned the

mineral rights covering gas, oil, and other minerals. The government sought a preliminary injunction to regulate the operations of Minard Oil pending a permanent decision of the case.

The court granted the injunction and enjoined Minard Oil from engaging in the clearing of well sites and/or road or pipeline accesses without first providing written reasonable notice to the government. The court found that damage done without notice and without cooperative planning between the parties resulted in irreparable damage to the surface of the land occupied by the Allegheny National Forest for timbering operations and the use of the public.

In making its decision, the court held that the parties were required to exercise due regard for the rights of the other and to attempt to reach a reasonable accommodation so that each could reasonably enjoy its respective property rights. The court determined that while an owner of mineral rights has unquestioned right to enter upon the property for the purpose of access and extracting his minerals, he nevertheless is required to exercise such rights with a recognition of surface rights and taking appropriate action to prevent unnecessary disturbance to the owner of the surface. *Id.* at 13 (citing *Chartiers Block Coal Company v. Mellon*, 152 Pa 286, 25 A 597 (1893)). See also *Belden & Blake Corp. v. Dep't of Conservation & Natural Res.*, 969 A.2d 528; 2009 Pa. LEXIS 664 (Pa. 2009) (dissenting opinion).

The *Minard* court applied a three-pronged test established in *Dewey v. Great Lakes Coal Company*, 236 Pa. 498, 84 A. 913 (1912). That test measured the reasonable extent of surface use by a mineral owner by the following standards: (1) the necessity for the use, (2) the customs of the country, and (3) the construction put upon the instruments of severance by the parties by long acquiescence. The court determined that no evidence existed as to previous construction by the parties and no unequivocal testimony was available with regard to the customs existing in McKean County, although McKean County was a county producing large quantities of oil and gas where such controversies might be expected to arise. Finally, the court determined that there was no question as to the necessity of the mineral rights owner to cut access roads, wells and their appurtenances to extract the oil and gas underlying the forest.

The court concluded that under the language of the operative conveyances, Minard Oil possessed, inter alia, the right of access for roads and pipelines to wells drilled by it, the right to clear areas for road and pipeline access to the extent reasonably necessary to the exercise of its

oil and gas rights, the right of possession of well sites, and the right to such timber only as was necessary to constitute construction materials in the structures on wells or drilling rigs. The court also determined that by the same conveyances, the government was the owner of the areas utilized by Minard Oil for road and pipeline access, was the owner of all timber and other surface resources thereon, and was entitled to realize the benefit of the timber and other surface resources, subject to Minard Oil's oil and gas rights and rights appurtenant thereto.

Although the court found that Minard Oil had the right to occupy so much of the surface as was necessary to operate its estate, it determined that the right was to be exercised with due regard to the owner of the surface and that where two alternative methods of proceeding were available to the mineral operator, neither of which was of detriment to the mineral operation and one of which was detrimental to the surface owner, the mineral operator was required to select the method that did not act to the detriment of the surface owner. *Id.* at 18 (citing *Gillespie v. American Zinc and Chemical Co.*, 247 Pa. 222, 227 (1915).) The court determined that Minard Oil, as a mineral operator, could not presume to be capable of adjudging unilaterally and without reasonable advance notice to the government, as surface owner, whether its operations would unnecessarily impair the use of the surface. Accordingly, the court required Minard Oil to provide the government with reasonable advance notice in writing of a multitude of requirements, including a plan and map of intended development.

Although these cases have applied the accommodation doctrine in the surface owner/mineral rights owner situation, it is likely that a Pennsylvania court would also apply the doctrine to a lessee-lessor relationship absent a specific contractual clause addressing the rights of the parties as to the use of the surface resources. Accordingly, in any situation in which the development of minerals conflicts with the rights of the surface owner in Pennsylvania, the accommodation doctrine should apply to require the developer to use the least invasive means to develop the minerals but to allow development over the objection of the surface owner if no reasonable alternative exists.