SURVEY OF PRODUCING STATES' COMMON LAW ON RIGHTS & LIABILITIES OF CO-TENANTS OF SEVERED MINERAL ESTATES

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By Jeffrey M. Swann

PPGMR Law, PLLC
P.O. Box 251618
Little Rock, AR 72225-1618
(501) 603.9000
jeff@ppgmrlaw.com

I. Introduction

One of the well-established principles of property law is that land may be horizontally severed into surface and subsurface estates so that legal title vests in different owners.[1] This severance can occur via an express grant, reservation, or exception. Over time, as a severed mineral estate is devised, sold, gifted or otherwise transferred down the line, its title inevitably vests in more than one person or entity. When it does, issues often arise amongst the co-owners of the mineral estate concerning its development. As these issues are as age-old as concept of subsurface estates themselves, courts in producing states have long-standing and predictable property laws which govern these relationships in severed estates.

The purpose of this memo is to survey producing states' common law protections and liabilities afforded the mineral co-tenant relationship in the decision to develop the severed estate. Importantly, the subject of this article is not the relationship between mineral co-tenants and the surface owner or between co-tenants of a property that includes both the surface and mineral estates, as these relationships may be treated differently by the courts in determining rights and liabilities of development. [2] This survey is not a recitation of every case from all producing jurisdiction; rather, its purpose is to highlight the preeminent cases of producing jurisdictions and the two prevailing approaches that courts have taken when faced with this issue under a variety of circumstances.

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[1] *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 U.S. 55, 60 (1898).
[2] Summers on Oil & Gas, 3rd Ed., § 2.31 (2004).

II. **Co-ownership of Severed Mineral Estates**

There are three types of concurrent estates: tenancy in common, joint tenancy and tenancy by the entirety. While all three are heavily incorporated into modern property law of the United States, the tenancy in common estate is most commonly encountered with respect to oil and gas ownership rights and disputes. As such, this article is limited to only the rights and liabilities of tenants in common, i.e. co-tenants. A tenancy in common is characterized by co-owners holding the same property by separate and distinct titles, but having a unity of possession.[3] Each co-tenant is entitled to possession and enjoyment of any part or all of the common property, as long as he or she does not exclude the co-tenant.[4]

III. **Majority Versus Minority Approaches to Development Rights/Liabilities**

There are two general approaches among mineral-producing jurisdictions on the development of severed minerals by a co-tenant without the consent of the other co-tenant(s). Under both approaches, the law has struggled to balance the competing interests of the individual co-tenants while maintaining a policy to efficiently develop natural resources for the benefit of society.

A. Majority View States.

The usual approach, adopted by the majority of producing jurisdictions, is to allow each co-tenant the right to develop without permission of the all other co-tenants, subject to a duty to account to other co-tenants for their share of minerals, less the reasonable cost of production.[5] The developing cotenant may not, however, prevent other cotenants from developing the minerals directly or through a lessee. And, a non-consenting co-tenant may be able to seek a partition, but usually cannot enjoin development absent some evidence of reckless injury to the property. This approach is fundamentally rooted in the principle of unity of possession in the entirety.[6]

Producing jurisdictions expressly or implicitly adopting the majority approach, or some facet thereof, include: Alabama, Arkansas, California, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Montana, Missouri, New York, Ohio, Pennsylvania, Tennessee, and Wyoming. Noticeably, this approached is not limited to a particular producing region, as it has been adopted by numerous states within the

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[3] *Black's Law Dictionary* 5th Ed. 1315 (1979).
[4] Summers on Oil & Gas, at § 2.31.
[5] *Prairie Oil and Gas Co. v. Allen*, 2 F.2d. 566 (8th Cir. 1924); *see also* Summers on Oil and Gas, at § 2.46.
[6] Summers on Oil and Gas, at § 2.32.

Southeast (Alabama, Arkansas, Florida, Georgia, Louisiana, Tennessee, Kentucky), Northeast (New York, Pennsylvania), Midwest (Illinois, Indiana, Kansas, Missouri, Ohio), and Northwest (California, Montana, Wyoming).

[1] **Alabama**. The Supreme Court of Alabama has held that if a tenant in common develops minerals in the land for commercial purposes and reaps the benefit of such severance, he does not commit a tort. Rather, each other tenant has a cause of action against him to the extent of his disproportionate share of the mineral. *Sun Oil Co. v. Oswell*, 62 So.2d 783 (Ala. 1953) (citing *Clark v. Whitfield*, 218 Ala. 593, 595, 119 So. 631, 663 (1928)).

[2] **Arkansas** – The Supreme Court of Arkansas, in *Ashland Oil & Refining Co. v. Bond*, 222 Ark. 696, 263 S.W.2d 74 (1953), recognized its well-established and "plainly just" rule that when one tenant in common lawfully produces minerals from the common property, he is entitled to credit for his reasonable expenses upon being required to account to his cotenant for the minerals withdrawn. This holding was reiterated in *McMillan v. Powell*, 235 Ark. 934, 362 S.W.2d 721 (1962), where the same Court held that credit for reasonable expenses is only available from the proceeds, if any, of the well on which the costs were expended, not others within the common property that are accounted for separately.

[3] **California** – In one of the oldest relevant opinions, the Supreme Court of California provided that "one of several tenants in common of a quicksilver mine, who does not exclude his co-tenants, may work the mine in the usual way without being chargeable with waste or liable to the other co-tenants for damages; if an account should be allowed, offsets should be allowed against proceeds. *McCord v. Oakland Quicksilver Mining Company*, 64 Cal. 134, 27 P. 863 (1883).

[4] **Florida** – In 1968, the court of appeals surveyed the then-existing law amongst producing states and eventually sided with the prevailing view that one of several co-owners of the severed mineral estate has the right to extract oil without the consent of the other co-owners and has the right to be reimbursed for the reasonable and necessary expenses of extraction and marketing, all subject to the right of non-consenting mineral owners to an accounting. *P&N Inv. Corp. v. Florida Ranchettes, Inc.*, 220 So.2d 451 (Fla. Int. App. Ct. 1968).

[5] **Georgia** – The Supreme Court of Georgia, facing the issue of first impression, adopted the prevailing view that co-tenants have the right to enter and mine the common property, without the consent of his co-tenants, subject to his

accounting duties for their respective shares, because "it makes sense." *Slade v. Rudman*, 237 Ga. 848, 230 S.E.2d 284 (1976).

[6] **Illinois** – *Knight v. Mitchell*, 97 Ill.App.2d 178, 240 N.E.2d 16 (1968); *Pure Oil Co. v. Byrnes*, 57 N.E.2d 356, 362 (Ill. 1944) (stating "The stern rule of liability of a co-tenant, who commits waste or damage to the common property, has been relaxed where the profit taken from the land is of a fugacious nature and liable to be exhausted by adjacent operators.")

[7] **Indiana** – *Price v. Andrew*, 10 N.E.2d 436 (Ind. Ct. App. 1937) (possession by one co-tenant is possession of all, but rent from third party must be accounted for to other co-tenants).

[8] **Kansas** – In *Kumberg v. Kumberg*, 232 Kan. 692, 659 P.2d 823 (1983), the Supreme Court of Kansas discusses Texas's law of development rights of co-tenants of mineral interests, although the finds rule inapposite in dividing royalty interest divided amongst beneficiaries.

[9] **Kentucky** – *Stephens v. Click*, 287 S.W.2d 630 (1955); *Taylor v. Bradford*, 244 S.W.2d 482 (Ky. 1951) (stating that the lawful right to use and enjoy the estate is held by each co-tenant); *Kentucky West Virginia Gas Co. v. Hatfield*, 260 Ky. 315, 85 S.W.2d 672 (1935); *York v. Warren Oil & Gas Co.*, 229 S.W. 114 (Ky. 1921) (stating co-tenant had authority to develop shared oil and gas, subject only to right of other co-tenants to receive accounting of royalties or demand of division of production); *New Domain Oil & Gas Co. v. McKinney*, 221 S.W. 245 (Ky. 1920).

[10] **Louisiana** – *Huckabay v. Texas Co.*, 227 La. 191, 78 So.2d 829 (1955); *Gulf Ref. Co. v. Carroll*, 82 So. 277 (La. 1919).

[11] **Montana** – Since 1928, when it first weighed in on the issue, the Supreme Court of Montana has consistently upheld its general rule that a cotenant who extracts and sells the mineral or oil may charge against its proceeds the reasonable and necessary expense of its extraction and marketing. *See Amundson v. Gordon*, 134 Mont. 142, 328 P.2d 630 (1958); *Marias River Syndicate v. Big West Oil Co.*, 98 Mont. 254, 38 P.2d 599 (1934); *Hochsprung v. Stevenson*, 82 Mont. 222, 266 P. 406 (1928).

[12] **Missouri** – *Davis v. Byrd*, 185 S.W.2d 866 (Mo. Ct. App. 1945) (ruling that a tenant in common commits no trespass, willful injury, destruction, or waste in mining common property in the usual way).

[13] **New York** – In 1897, the appellate court of New York set the precedent that no liability arises for the mere severance of rock from the freehold, except liability to account for the stone which is sold, at its fair value, which is still the law today. *Cosgriff v. Dewey*, 47 N.Y.S. 255 (N.Y. Int. App. Ct. 1897).

[14] **Ohio** – In affirming a court of appeals judgment in favor of partitioning the rights and interest to leases for oil and gas, the Supreme Court of Ohio because the co-tenant refused to pay their fair and just share of the expenses incident to the full use and development under the lease, statutory and/or equitable partition was in order. *Black v. Sylvania Producing Co.*, 137 N.E. 904 (Ohio 1922).

[15] **Pennsylvania** – *Lichtenfels v. Bridgview Coal Co.*, 496 A.2d 782 (Pa. Super. Ct. 1985) (co-tenant cannot restrain another with an undivided interest in the land from realizing the value of the estate by producing or consuming minerals, and such right is only subject to an accounting to his fellow co-tenants).; *McIntosh v. Ropp*, 82 A. 949 (Pa. 1912).

[16] **Tennessee** – *Harlan v. Central Phosphate Co.*, 62 S.W. 614 (Tenn. Ct. App. 1901) (providing that a lease is binding upon the co-tenant who makes it, but cannot in any way impair the rights of other tenants who did not joint thereto).

[17] **Wyoming** – In a quiet title action between co-owners of two BLM leases, the Supreme Court of Wyoming discussed its recognition of rights under oil and gas leases generally, then stating: "owners of undivided portions of oil and gas rights in and under real estate are tenants in common and each of them may enter upon the premises to explore for and develop gas and oil. One of them cannot exercise such right to the exclusion of the other, and the one who does not proceed must account to a non-consenting co-tenant for the pro rata share of the net profits to be determined by deducting from the amount received the necessary expense of exploring, developing, extracting, and marketing." *Torgeson v. Connelly*, 348 P.2d 63, 71 (1959)

B. Minority View States

The other approach, adopted by a minority of producing states, is to adhere to the principle that development of the estate by a co-tenant without the consent of all other co-tenants constitutes destruction and is prohibited.[7] This minority approach is sourced from the English rule providing that tenants in common are liable to each other for any use or destruction of common property that amounted to waste.[8] Producing

[7] *Davis v. Byrd*, 185 S.W.2d. 866 (Mo. Ct. App. 1945)
[8] See Summers on Oil and Gas, at § 2.32.

jurisdictions expressly or implicitly adopting the minority approach, or some facet thereof, include: Michigan, Virginia, and West Virginia.

[1] **Michigan** – *Campbell v. Homer Ore Co.*, 16 N.W.2d 125 (Mich. 1944).

[2] **Virginia** – *Chosar Corp. v. Owens*, 370 S.E.2d 305 (Va. 1988) (providing that a co-tenant who changes or alters common property to the injury of other co-tenants without their consent constitutes waste).

[3] **West Virginia** – *Law v. Heck Oil Co.*, 145 S.E. 601 (W.Va. 1928) (holding an unqualified owners of real property is entitled to have it remain in such condition as he sees fit, and the fact that the non-consenting co-tenant only owned 1/768th interest was immaterial); *South Penn Oil Co. v. Haught*, 78 S.E. 759 (W.Va. 1913)(holding that a co-tenant's removal of oil and gas without consent of other co-owners constituted waste); *Hall v. Vernon*, 34 S.E. 764 (W.Va. 1899); *Williamson v. Jones*. 27 S.E. 411 (W.Va. 1897)

IV. Practical Effect of Case Law on Modern Development

Modern mineral development under expansive industry-leasing programs and unitization and pooling rules enforced by state regulatory bodies largely eliminates the circumstances that often gave rise to disputes related to development rights between co-tenants of mineral interests. Disputes amongst co-tenants of severed mineral interest arose almost entirely when co-tenants could not agree on if, how, when, where, or why the minerals should be developed. That is, co-tenants were unable and/or unwilling to agree on how their interest, collectively (or "pool"), was to be developed under a common plan; the objection by one co-tenant led to the development of the body of case law above. This "pooling" and common plan concept is precisely what most state regulatory schemes are designed to accomplish, only on a larger, governmental-section scale.

The pooling of all interests (including co-tenants' undivided interests) within a defined unit, developing the unit under a common plan, and allocating profits on a net mineral acre basis effectively treats co-tenant and fee owners equally. Under these schemes, co-tenants are afforded the same rights of development as fee-interest owners, i.e. it eliminates the concern of non-consenting or non-participating co-tenants. Further, the regulatory requirements placed on lessees/unit operators to pay profits/royalties directly to mineral interest owners (including co-tenant interests) arguably alleviates potential liabilities of the developing co-tenant arising under common law to account to other co-tenants.

That being said, there exists some instances, albeit limited, where this line of cases remains significant. The most obvious of these instances are mostly limited to the enforcement of rights ancillary to development, prior to the integration process. For example, case law supporting a co-tenants' right to develop the estate over the objection of the co-tenant(s) (i.e. majority approach) provides the foundation for other ancillary rights such as the right to conduct geophysical surveys on the entire undivided mineral estate, or the right to make reasonable use of the entire surface estate above the undivided mineral estate, both over the objection of co-tenant(s) or surface estate owners, without fear of trespass. Not so obvious instances include when the integration process fails and an un-leased co-tenant interest is mistakenly left un-integrated. In such a scenario, a co-tenant or his lessee may rely upon development rights at common law to defend against trespass.

On the other hand, in the jurisdictions taking the minority approach, the case law plainly does not exist to support these ancillary rights to development.