

MEMORANDUM

TO: Locke Mountain Ranch POA
CC: LMR POA File (L0017-0001)
FROM: Adam Davenport
DATE: March 18, 2014
RE: Issues Regarding Mineral Development

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1. EXECUTIVE SUMMARY:

- a. Use of the surface by Austin Exploration is limited to that reasonably necessary to conduct exploration and production activities.
- b. Austin Exploration must also reasonably accommodate Locke Mountain Ranch (“LMR”) property owners’ use of the surface of their property in conducting exploration and production activities.
- c. Any unnecessary or unreasonable use of the surface of LMR property may subject Austin Exploration to legal liability.
- d. Vested water rights are afforded the same protections as the surface of LMR property.

2. INTRODUCTION AND BACKGROUND:

Austin Exploration will begin oil production activities in the LMR this spring. LMR is comprised of approximately 75 parcels that are 35 acres each. All properties in LMR have had the mineral estate severed; therefore LMR property owners own only the surface of their respective properties.

3. ANALYSIS:

- a. **Austin Exploration must reasonably use the surface estate.** Under Colorado law, the owner of a severed mineral estate or lessee is privileged to access the surface and “use that portion of the surface estate that is reasonably necessary to develop the severed mineral interest.” *Grynberg v. City of Northglenn* (“*Grynberg*”), 739 P.2d 230, 234 (quoting *Notch Mountain Corp. v. Elliot*, 898 P.2d 550, 556 (Colo. 1995)).

- i. Reasonable use does not include damaging or destroying LMR property. The right of reasonable surface use does not include the right to destroy, interfere with or damage the surface estate. *Grynberg* 739 P.2d at 23.
 - ii. Unreasonable use is a trespass. Under Colorado law, a trespass occurs where the conduct of an operator in accessing, exploring, drilling, and using the surface is unreasonable or unnecessary to develop the mineral estate. *Grynberg* 739 P.2d at 234.
 - (a) Standards for determining trespass. Trespass requires a determination that the mineral owner’s “conduct was not reasonable and necessary for the exploration or extraction of the minerals[.]” *Grynberg* 739 P.2d at 234.
- b. Austin Exploration must reasonably accommodate the surface owners’ use of the property.** Both the surface and mineral owner must have due regard for the rights of the other in making use of the estate in question. *Grynberg* 739 P.2d at 234. “This ‘due regard’ concept requires mineral rights holders to accommodate surface owners to the fullest extent possible consistent with their right to develop the mineral estate.” *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 927 (Colo. 1997).
- i. Legal meaning of reasonable accommodation. Under Colorado law, oil and gas “operators shall conduct oil and gas operations in a manner that accommodates the surface owner by minimizing intrusion upon and damage to the surface of the land.” C.R.S. § 34-60-127(1)(a). Oil and gas operations include “exploration for oil and gas, including the conduct of seismic operations and the drilling of test bores.” C.R.S. § 34-60-103(6.5).
 - (a) Legal meaning of minimizing intrusion. “Minimizing intrusion upon and damage to the surface” means “selecting alternative locations for wells, roads, pipelines, or production facilities, or employing alternative means of operation that prevent, reduce, or mitigate the impacts of oil and gas operations on the surface, where such alternatives are technologically sound, economically practicable, and reasonably available to the operator.” C.R.S. § 34-60-127(1)(b).
 - ii. Reasonable accommodation does not prevent use of surface estate. Provided the owner of the mineral interest reasonably accommodates the surface user, the mineral owner may enter “upon and us[e] that amount of the surface as is reasonable and necessary to explore for, develop, and produce oil and gas.” C.R.S. § 34-60-127(1)(c).

(a) *Liability for failure to reasonably accommodate surface uses.* By statute, a mineral owner's failure to reasonably accommodate the surface owner allows the surface owner to seek damages against the mineral owner. C.R.S. § 34-60-127(2).

(i) *Standards for demonstrating lack of reasonable accommodation.* The surface owner must "present evidence that the operator's use of the surface materially interfered with the surface owner's use of the surface of the land." C.R.S. § 34-60-127(3)(a). The mineral owner may defend against such evidence by showing it has "conducted oil and gas operations in accordance with regulatory requirements, contractual obligations, or land use plan provision[s] [that are] specifically applicable to the alleged intrusion or damage." C.R.S. § 34-60-127(3)(b).

c. **Water rights are afforded the same protections as the surface.** In Colorado, water is not considered to be a part of the mineral estate. *Bd. of County Com'rs of County of Park v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693, 710 (Colo. 2002). Water rights come into existence by applying state waters to beneficial use. *Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 34 (Colo. 1997). A water court decree adjudicating a right to waters of the State confirms the existence of a vested property right and the amount of water that may be taken according to that right. *Id.* "Water rights created by appropriation are property rights and are protected as such." *Three Bells Ranch Associates v. Cache La Poudre Water Users Ass'n*, 758 P.2d 164, 170 (Colo. 1988).

4. **CONCLUSION.** The owner of the mineral estate underlying LMR has the right to lease the minerals to Austin Exploration that in turn has a right to reasonable use of the surface to explore for and produce the mineral estate. This use must reasonably accommodate surface owners' use of their property. Failure to meet these requirements will subject Austin to legal liability.