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COLORADO REAL ESTATE JOURNAL

THE COMMUNICATION CHANNEL OF THE COMMERCIAL REAL ESTATE COMMUNITY

JULY 20, 2011 – AUGUST 2, 2011

Niobrara shale play demands strong surface use agreement

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Following the early success of new horizontal drilling techniques, the Niobrara play is in its early stages of development and companies have been busy leasing land for future drilling. The Niobrara play is situated in northeastern Colorado, including the Denver vicinity, and parts of adjacent Wyoming, Nebraska and Kansas. At these sites, the potential for future oil and gas development is a risk a surface owner or developer disregards at its peril. While current or completed oil and gas operations may not preclude development, surface owners are well-advised to seek a protective surface use agreement both for protection and certainty regarding the potential impact on the use of their property.

■ **Potential impacts.** As a general matter, Colorado law provides that mineral interest owners have a right to "reasonable use" of the surface estate to access and develop the mineral interest, without a separate grant of access from the surface owner. This right includes the rights of ingress, egress, exploration, and surface usage as are reasonably necessary to the successful exploitation of the mineral interest.

Well locations, health and safety, and environmental aspects of oil and gas production operations, with some exceptions, are regulated by the Colorado Oil and Gas Conservation Commission. Land use and aesthetic impacts also may be regulated by the local land use authority, whether a county or a municipality. New statutory and regulatory protections have emerged in the past several years that clarify that the contours of "reasonable use" generally follow these regulatory requirements. They also add substantial new operational requirements for protection of water supplies and wildlife areas, tighter cleanup standards, and better disclosure of chemicals used during drilling and production operations, all of which are beneficial to surface owners.

Regulatory requirements, while they provide many protections to the surface owner and developer, may not be sufficient to assure that production activities are consistent with planned or potential surface development or will not result in liability to a developer. Spills and practices associated with historical wells may have predated current regulatory requirements, and current regulatory requirements have important weaknesses. For example, despite the often-cited "petroleum exclusion," many of the wastes associated with oil and gas production fit the definition of "hazardous substances" that can trigger strict joint and several surface owner liability under the federal Comprehensive Environmental Response, Compensation and Liability Act if cleanup is required. If a surface owner inadvertently exacerbates existing contamination, for example, by spreading wastes from historical operations during rough grading or surface preparation activity, liability under the Resource Conservation and Recovery Act and related state laws can be triggered.

■ **Managing risks with a surface use agreement.** Existing regulations provide broad latitude for mineral and surface owners to define the contours of "reasonable use" by agreement. These agreements are called "surface use agreements." Surface use agreements are typically recorded and run with the land to bind all future mineral interest lessees and their operators. Careful legal attention can make these agreements an important protection for the surface owner and developer.

The owner of both the surface and associated subsurface mineral interests has the greatest leverage in defining the scope of the surface use and will have broad latitude to confine mineral development to specified locations, to impose mitigation measures, such as noise and aesthetic standards, and to demand indemnities and financial assurances from the mineral developer. Any surface owner who owns and is planning to lease subsurface mineral interests should require compliance with surface use requirements in the lease or in a separate agreement signed concurrently with the lease.

For surface owners and developers who do not also own the minerals beneath their property, the opportunity to negotiate a surface use agreement may come at a different point in time. Colorado Oil and Gas Commission regulations require mineral developers to make a good-faith effort to consult with the surface owner prior to drilling and certain oil and gas development activities. Conversely, House Bill 1088 (C.R.S. § 24-65.5-101 *et seq.*) requires that mineral interest owners receive notice and an opportunity to object prior to final local government approval of surface development plans. Both requirements provide incentives for the mineral and surface owner to negotiate an appropriate surface use agreement. While the surface owner may not have the leverage of also controlling the mineral interests at the time of negotiation, it still will be possible to set by agreement requirements consistent with existing regulatory standards that lock in drilling, access and pipeline locations, coordination requirements, setbacks, basic aesthetic standards, and waiver of the mineral interest owner's rights to object to development plans under H.B. 1088. At a minimum, defining these terms will allow certainty and facilitate planning that can pay off in the long term.▲