

Access for Exploration and Development

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Abstract

At the upstream end of the oil and gas business finding the good oil is one of those resolutely practical endeavours which requires people to physically go out into the real world and have a look. Desktop studies will only get you so far. Somewhere in the process a real look at the real rocks is required. These days the way we look at those rocks is very high-tech indeed.

The seismic tool is truly miraculous in what it can see beneath the surface and it is one of the least intrusive field activities in the industry. Seismic operations come and go leaving virtually no trace of their passing. Drilling often follows a successful seismic campaign. If we have done our jobs well and we are a little lucky we make a discovery. Our job then is to deliver the product to market and often that means building a pipeline.

All of these activities require access to land and use of land. Over the years in New Zealand the issues relating to access have become increasingly intricate and formalised. What was once often nothing more than a verbal agreement sealed by a handshake over the farm gate has been replaced by legal contracts and sometimes obscure documentation. The Land Access Code, which encapsulates much of the current state of this process, is the result of negotiations between Federated Farmers and the Petroleum Exploration Association of New Zealand (PEANZ). It is based on experience gained in more-or-less continuous interaction between explorers and landowners over many years.

Current Situation

Seismic acquisition, drilling and pipelines are the three most fundamental and visible operations of the upstream oil and gas industry. When done onshore they all obviously require access to land and in New Zealand this frequently means access to private property and very commonly that property is a farm. Anyone who has ever acquired a seismic survey in New Zealand knows about access. Anyone who has ever drilled an oil well in New Zealand knows about access. Anyone who has ever installed a pipeline in New Zealand knows about access.

Over the years in New Zealand the issues relating to access have become increasingly intricate and formalised. What was once often nothing more than a verbal agreement sealed by a handshake over the farm gate has been replaced by legal contracts and sometimes obscure documentation. The Land Access Code, which encapsulates much of the current state of this process, is the result of negotiations between Federated Farmers and the Petroleum Exploration Association. It is based on experience gained in more-or-less continuous interaction between explorers and landowners over many years.

Background

Behind all of this activity is the Crown Minerals Act 1991 (CMA). Until 1991 when the CMA came into force the industry was controlled under the provisions of the Petroleum Act 1937. Under that Act access by an explorer or operator was virtually guaranteed. The writers of the Crown Minerals Act considered that this gave too much discretion to the explorer and left the landowner with too few options.

The principal consequence of this thinking was a fundamental change to the philosophy of access to property which gave the landowner significantly more discretion in the control of the use of their property. Although there had been a high level of de facto consultation before 1991, consultation became de jure after that time.

During the early days of the latest round of intensive exploration in New Zealand (which began in the early 1980s) access arrangements were something of an unstructured affair. This casual, 'gentleman's agreement' approach had a certain honourable charm but it carried a sting in its tail: landowners were sometimes surprised to find things like vibröseis trucks crossing their land when they had expected something quite different. And explorers often found themselves embroiled in lengthy and

¹ New Zealand being what it is: a giant farm.

sometimes, unfortunately, acrimonious debates with landowners over damage claims and other post-operational problems.

In the years before 1991 operators became increasingly sensitive to the needs of landowners and the methods that were required to complete an operation with the least possible inconvenience to all involved. Operators also became increasingly mindful of the need to inform people of their intentions and town hall meetings in the district where the operation was to be carried out became the norm. During the 1980s there must have been at least one town hall meeting in every hall in the Taranaki region. Some halls had several meetings and the method was a useful adjunct to the permitting operations of many operators in New Zealand.

In 1991 it became apparent that something more structured would be desirable. Federated Farmers and PEANZ entered into discussions about developing a code which would serve as a guide for both operators and landowners when discussing questions of access. The result of those discussions was the first Land Access Code developed for use in the oil industry in New Zealand.

The Code was re-written in 1997 and in general it has served its users well. The Code is not legally binding. It serves as a guideline only and derives its force from the general wish by all participants that the questions of access be dealt with in a fair and transparent manner.

Nevertheless, as time has gone on achieving satisfactory access arrangements has become progressively more difficult and the underlying conflict between surface owners and explorers looking to use the surface to gain access to the minerals beneath has become all too apparent.

Exploration permits

An exploration permit carries a legal obligation to complete a specified work programme (Section 33²). The penalties for non-compliance are not trivial (Section 101³). Notwithstanding the legal requirement to carry out a work programme and the attendant threat of penalties for failure to do so, the CMA does not grant a right of access to the land (Section 47⁴).

Furthermore, failure to meet the requirements of a work programme can also impact on an explorers ability to secure other exploration permits. The Minerals Programme for Petroleum (1995) gives the Ministry of Commerce the power to assess the suitability of an applicant for an exploration permit (Section 5.4.21⁵). Among other things, a subsequent application can be declined on the grounds

that "... the applicant has not complied ... with work programme conditions ..."⁶

Property rights

I submit that there are two property rights - one belonging to the surface owner and the other to the explorer - both of which require access to the same surface location. This much seems self-evident. Clearly these two property rights often come into conflict when an explorer seeks access for exploration.

As the matter now stands the landowner has significant discretion in refusing access to land for the purpose of oil and gas exploration. There is an arbitration process and it is noted that it is available to petroleum explorers only. It can, however, result in considerable time delays not to mention expense for the parties involved.

The time delays are perhaps most important given the constraints that field operations frequently must work within and the time constraints of the work programme itself.

Historical Examples

I now wish to examine very briefly some of the history behind this conflict between landowners and miners.

The debate over competing land use is not new. In its more general form (access to the surface for mining of any sort) it goes back at least as far as the reign of Queen Elizabeth I. In England and the United States (since the mid-nineteenth century) there have been numerous cases which have dealt with this issue. By way of example I include here a few of the cases which have come before the courts.⁷

English cases

Crown vs Earl of Northumberland⁸

One of the earliest examples of cases examining the conflicting rights of surface owners and 'explorers' occurred in 1568 in England. The case related to the vesting in the Crown of ownership of gold and silver. The court concluded that the royal mining privilege was:

"... with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore."

⁶ It is noted that the Minerals Programme (Section 5.9 Compliance with Permit and Act, subsection 6) implies that the Minister has the power to exempt a permit holder from the requirements of a work programme. It would be expected that failure to reach a suitable access agreement would constitute grounds for exemption but this is by no means clear.

⁷ The cases quoted here are from Zillman, 1997.

⁸ 75 Eng. Rep. 472 (1568).

² Section 33. Permit holder to comply with permit and this Act.

³ Section 101. Penalties.

⁴ Section 47. Permit does not give right of access to land.

⁵ Section 5.4.21. Assessment of Applicant.

Wilkes vs Broadbent⁹

In this case the landowner brought suit against a coal miner charging:

"... breaking and entering the plaintiff's close at A., treading down the grass, subverting the plaintiff's soil, and for laying wood, slate, and other rubbish on the land, ... the plaintiff lost the use of his land."

The defendant responded that his actions were authorised by manorial custom. The court, however, disagreed and upheld an earlier judgement which asserted that the custom was too broad and uncertain and that:

"it laid such a great burden upon the tenant's land, without any consideration or advantage to him, as tended to destroy his estate, and defeat him of the whole profits of his land, and savours much of arbitrary power..."

Hodgson vs Field¹⁰

This case is an early example of customary practice being replaced by contractual obligation. The beginnings of this case go back to 1747 when a coal miner and a landowner reached agreement about certain aspects of a coal mining operation which involved use of the land surface for a drainage system. The system was built and used but the mine eventually closed down and the drainage system fell into disrepair. Over 50 years later a successor to the mine operator decided to re-open the mine and began by entering the landowner's property to repair the drainage system.

The landowners sued for trespass contending that the 1747 grant had allowed only a 'one-time' access to the property. The judge (one Lord Ellenborough) disagreed maintaining that the implied intention of the 1747 agreement sanctioned more than a single entry.

Harris vs Ryding¹¹

This case was brought in 1839 and centred around the mineral owners rights to prior reservation. The access rights were defined as:

"... free liberty of ingress, egress, and regress, to come into and upon the premises, to dig, delve, search for, and get &c., the said mines and every part thereof, and to sell and dispose of, take and convey away the same, at their free will and pleasure, and also to sink shafts, and &c., for the raising up works, carrying away and disposing of the same or any part thereof, making a fair compensation to P for the damage to be done to the surface of the premises, and the pasture and crops growing thereon."

Among other things the miner's activities caused a collapse of the land surface. The landowner was a little upset and sued on the grounds that the mine was being

negligently operated. The court found in favour of the landowner on the grounds that:

"... the [miner] can be entitled under the reservation only to so much of the mines below as is consistent with the enjoyment of the surface ..."

One of the judges in the case (Baron Alderson) summed up the case in what is a very familiar maxim that is as applicable today as it was then:

"... that he is to use his own property so as to not injure his neighbor."

Earl of Cardigan vs Armitage¹²

In this case the landowner sued for trespass after a miner entered his land, dug pits, and removed coal. For his part the miner traced his rights of access to an agreement reached in 1649 (preceding the case by nearly 175 years). The court found for the miner referencing the *Touchstone of Common Assurances*¹³ in concluding that the reservation of coal also gave:

"... a right ... to get the coals, and to do all things necessary for the obtaining of them."

But note that the court also stated:

"[the implied power] would warrant nothing beyond what was strictly necessary for the convenient working of the coals."

American Cases

Marvin vs Brewster Iron Mining

In 1874 the surface owner (Marvin) sued asking the court to forbid land subsidence, waste deposits, blasting, the operation of a steam engine, and the construction of various buildings. The court observed that the miner's right could be drawn either from an implied "incident to grant" or from the express language of the instrument. However, it also noted that the rights were to be judged by:

"... whether it was necessary to be done for the reasonably profitable enjoyment of its property in the minerals."

The case was remanded for "further fact finding".

Ericson vs Michigan Land and Iron¹⁴

In this case—brought in 1863—the surface owners sought to have a iron ore mining operation closed down. The miners quoted the deed of reservation which granted

"[the minerals] together with the right to enter upon such land and explore therefore; and to mine, smelt, and refine such ores and minerals; and to quarry and

⁹ 95 Eng. Rep. 494 (1744).

¹⁰ 103 Eng. Rep. 356 (1806).

¹¹ 151 Eng. Rep. 27 (1839).

¹² 107 Eng. Rep. 356 (1823).

¹³ Sheppard.

¹⁴ 16 N.W. 161 (Michigan 1863).

dress such stone or rock, and remove the same, and for that purpose to erect or construct and maintain all such buildings, machinery, roads, or railroads, sink such shafts, remove such soil, occupy as much of said land, use and divert such streams or ponds of water thereon as may be necessary or convenient for the successful prosecution of such business."

It is important to note that the court commented that:

"mere reservation of minerals ... must always respect surface rights of support, and will not, standing alone, permit the surface to be destroyed without some additional statutory or contract authority, and that such statute or contract authority will be construed carefully to prevent the destruction of surface rights ..."

On the other hand:

"... easements to do such acts as are reasonably necessary to get out the mineral and remove it from the mine may be granted or reserved so as to attach to the mining estate"

The case was remanded "to determine the exact scope of the reasonable easement".

Elsewhere

In many parts of the United States, Canada, and Australia the issue distills down to two titles and two sets of rights. The surface title confers ownership of the surface and the right to work it. The mineral title gives the explorer the right to explore for the oil and gas under the surface.

Typically conditions apply to the explorer's right to access to the land. Drilling and production activity must be done in a way that is environmentally and technically acceptable. Second, a company must operate in ways that cause the least possible interference to the surface owner.

Discussion

By way of preamble it is worth noting the comments of a Texas Supreme Court judge in 1862:

"... the well established doctrine from the earliest days of the common law [that the right to minerals included a right of entry and] all other such incidents ... as are necessary to be used for getting and enjoying them."

The judgement from which this quote was taken cited the cases of Earl of Northumberland and Earl of Cardigan referred to above.

The case has many similarities with the situation as it continues to exist in the late twentieth century. Clearly there are no simple answers to this question. However, Zillman reviewed a large number of cases since 1900

seeking common threads in the "major recurrent fact patterns". With respect to access he found:

"Of all of the rights of the miners, access across the land is probably the most fundamental."

and

"Occasionally courts have sought to distinguish 'necessary' from 'merely convenient' access, denying an implied right for mere convenience. The contemporary position grants reasonable access but requires the miner to exercise 'due regard' for the surface owner's interest and to avoid any unnecessary damage."

and finally:

"Both the legal instruments and the courts interpreting them have recognised that the full benefits of the surface owner-miner relationship must consider the needs of both parties. Accordingly, a law evolved that gave primacy to mineral needs, recognised the right of the parties to define arrangements to their own needs and forced the miner to be attentive to legitimate claims of the surface owner."

Other Places

Every jurisdiction evolves its own approaches to the difficulties presented by the conflicting rights of surface and sub-surface owners. The following examples are not to be taken as an exhaustive review of the various approaches but give something of the flavour of the issue. A few of those are offered here.

Australia

In Western Australia the key part of the legislation governing access is:

"... the authority conferred by [the Petroleum Act 1967] is exercisable on any land within the permit area ... whether Crown land or private land ..."

And in Queensland:

"[Authority to prospect] shall entitle the holder ... to undertake exploration or prospecting, or geological and geophysical ... testing [and] to do all things in respect of the search for and discovery of petroleum ..."

Canada (Alberta)

Under common law the mineral owner has the right to enter upon the land held by the surface owner to work and remove the minerals.

The surface owner's Certificate of Title is expressly made subject to the rights of the mineral owner.

United States

In the course of researching this paper I contacted American Association of Professional Landmen. In answer to my questions concerning access issues in the United States, my contact said:

"Here in the United States, the mineral estate is a mix of federal, state, municipality, Indian and fee (private) ownership. The administration of lands and access issues varies widely in the United States as a result of the ownership diversity. As such, there are no easy answers out of the United States to the issues which you have raised."¹⁵

Discussion

The straightforward conclusion to be drawn from this brief review of historical and current practice is simple: there is no easy solution to resolving the conflicting rights of the surface owner and the rights of the explorer. Polar approaches which give absolute or near-absolute rights to one side or the other demonstrably do not survive in the long term. Hence, the powers given to explorers under the Petroleum Act have been superseded but by legislation (the CMA) which gives a similar degree of discretion to landowners.

If the lessons of history are any guide neither solution will work in the long term. The fundamental requirement in this circumstance is for both parties to recognise the co-equal status of the rights of the other. The anomaly in the current environment is the evident lack of harmonisation between the rights of landowners and the rights of explorers. Specifically, I mean that the right to explore conferred by an exploration permit is not supported by a commensurate right to access to the land.

There is, of course, a third party in this debate: the New Zealand Government. I submit that it is time to re-visit the CMA with the view to re-aligning the Act in a way which recognises the legitimate rights of both landowners and explorers. That is, which accords equal status to the rights of the surface owner and the rights of the holder of an exploration permit.

Furthermore, I submit that an essential and fundamental part of this process is a comprehensive review of compensation provisions and the development of a clear, efficient, and effective arbitration process.

Conclusions

1. An exploration permit is a property right of equivalent status to the property right of the surface owner.
2. An exploration permit carries a legal obligation to explore.

3. The legal obligation to explore is not supported with a legal right to access to the land.

Recommendations

1. Harmonise the rights of the surface owner and the rights of the explorer by granting a right of access to the explorer. That is, the CMA should be amended so that a permit to explore carries an explicit right of access to land to carry out that exploration.
2. Ensure the rights and property of the surface owner is protected by appropriate compensation arrangements and clearly specified operational requirements.
3. Ensure rights of both are protected by a clear, efficient, and effective arbitration process.

And Finally, Some Suggestions ...

Strategic planning

Strategic plans for farms is an approach that has been used successfully in Australia to help rationalise the process of reaching robust access arrangements.

Landowners

Strategic planning for farming means developing a long-term plan (say, five years) for the farm which specifies and documents the farmers intentions with respect to the use of the property. This would form the basis of discussions concerning compensation and would also contribute to any discussions in the context of arbitration. I note in passing that such planning is a good idea anyway for unrelated reasons.

Explorers

This approach has had good success in Australia but I suggest that in New Zealand we can go a step further and include explorers in the process of strategic planning.

For an explorer strategic planning would mean early and regular contact with landowners. The process should begin when the permit is issued rather than just before a field operation. In the early days of the permit term it would be considered that all landowners in the permit area are potentially affected. All landowners within the permit would be notified when the permit is issued and details of the required work programme would be included in this notification.

Information issued early in the permit history would be necessarily general in nature but as time went on the content could be expected to become increasingly specific in nature. In this way all landowners would be aware of the progress of plans even if only in a general way. Since landowners would be aware of the intentions of the explorer from the beginning it would be expected that no landowner would be surprised to be notified of an impending field programme that involved their property.

¹⁵ Cape, David. Chairman, American Association of Professional Landmen Legislative/Regulatory Committee. pers comm.

Surface Rights Board

In Alberta, Canada the concept of a Surface Rights Board has been developed to arbitrate in conflicts between landowners and explorers. A similar body in New Zealand -

permanently established and given authority to arbitrate conflicts with respect to compensation, operational timing, etc - could be useful and should be investigated as an element of a comprehensive access rationalisation plan.

Author

Russell Plume has worked in the oil and gas exploration industry for over 20 years. He originates from the United States and first washed up on New Zealand shores in early 1971 whereupon he embarked on what might be generously termed 'study' at Victoria University of Wellington. His early years in the industry were spent in the Rocky Mountains travelling back and forth between Texas and Montana working on a seismic crew. After that thoroughly practical introduction to the industry he spent some years working in a seismic data processing house in Denver. Returning to New Zealand in the early 1980s he worked briefly in the retail end of the industry before taking a position with Petrocorp when it was still the national oil company. Petrocorp eventually transformed itself into Fletcher Challenge Energy Taranaki Limited and in 1991 Russell transformed himself into Roxburgh Plume Ltd an independent consultancy providing services in a wide range of areas including the Resource Management Act, the Crown Minerals Act, the Greenhouse Effect, oil and gas exploration, and environmental auditing. In 1996 he began in his current role of Executive Director of the Petroleum Exploration Association of New Zealand. He lives in Plimmerton with his partner and two teenage children.