

Beyond Six Feet Under: Mineral Ownership and Development Issues Involving Cemeteries

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Recent news coverage has spurred discussion on the rights that burial plot owners have in cemeteries and whether or not drilling for oil and gas should be prohibited on or under lands reserved for the dead.¹ As horizontal drilling brings oil and gas development closer to population centers, the oil and gas industry will need to address some of the unique title and public policy issues surrounding mineral development under cemeteries.

Often, individual burial plot deeds read like warranty deeds and do not contain mineral reservations. However, burial plot deeds may contain a qualifier that the deed is granted for the sole purpose of the burial of human remains. If a burial plot deed grants fee title and contains no mineral reservations, it is conceivable that the burial plot owner (or his or her estate) could attempt to make a claim to the minerals underneath. Under general rules of deed interpretation in most states, a deed with no mineral reservations is deemed to convey fee title, including mineral rights.

On the other hand, burial plot transactions are not typical real property transactions. It is arguable that burial plot deeds are not intended to grant fee simple title to the land. The general rule is that “one who owns or has an interest in a cemetery for burial purposes does not acquire any title to the soil, but only an easement or license for the use intended.”² Case law suggests that a burial plot deed should be interpreted as conveying only such interests in the burial plot that are necessary for the purpose of burying human remains (in other words not mineral rights). However, it is not clear that this rule applies in each state.³ From a public policy standpoint, it could be very difficult to track down the heirs or devisees of burial plot owners who died centuries ago.

If burial plot owners do not have a valid mineral claim, then who does? Public entities, common-law dedicators, and cemetery operators are likely candidates. For example, if a parcel of land is owned in fee simple by a public entity and dedicated for a cemetery, then the public entity (such as the city) would own the fee title, including mineral rights. If a parcel of land is privately owned in fee simple and dedicated on a subdivision plat or conveyed as a common-law dedication for use as a cemetery, then arguably the mineral title remains with the dedicator.⁴ If a cemetery operator acquired fee simple title, including minerals, by conveyance, then the operator may be deemed to own the minerals after deeding out the burial plots under the general rule discussed above.

Although the value of mineral rights under individual burial plots are likely to be economically miniscule, particularly if a cemetery is contained within a large drilling and spacing unit, there are risks involved if the proper mineral owners are not identified. Unfortunately, because of the small amount of oil and gas development near cemeteries to date, there are very few states that have addressed issues of mineral title in cemeteries. Therefore, title examiners and land departments should carefully examine burial plot deeds and thoroughly analyze the applicable state's law in order to determine the correct mineral ownership under cemeteries.

Knowing who owns the minerals is only part of the issue if an operator intends to drill within the boundaries of a cemetery. Conducting drilling operations on actual cemetery land will likely be against public policy in many states. For example, in *Chas. E. Knox Oil Co. v. McKee*, a church signed a lease with the operator for the purpose of drilling for oil and gas.⁵ Some of the church congregation members had family members buried in the cemetery and filed an injunction against the operator. The court held that it was against public policy to permit an operator to drill for oil and gas in a cemetery.⁶

Today with technological advancements in horizontal drilling, operators now have the ability to drill for minerals underneath cemeteries without having to conduct surface activities on the surface of the cemeteries. Arguably, the public policy rule established in cases like McKee would not apply to horizontal drilling. However, there have been recent oil and gas opposition groups claiming that underground fracking would disturb gravesites and not allow the dead to effectively “rest in peace.”⁷ Although mineral extraction occurs at depths that would likely never have any impact on gravesites, operators should be prepared to discuss and address these concerns when electing to drill for minerals on or beneath cemeteries.

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¹Manny Fernandez, *Drilling for Gas Under Cemeteries Raises Concerns*, N.Y. TIMES, July 8, 2012, available at

<http://www.nytimes.com/2012/07/09/us/drilling-for-natural-gas-under-cemeteries-raises-concerns.html>; see also Julie Carr Smyth,

PRESSCONNECTS, *Gas Drilling under Cemeteries Raises Money, Moral Questions*, July 3, 2012,

<http://archive.pressconnects.com/article/20120704/NEWS01/207040337/Gas-drilling-under-cemeteries-raises-money-moral-questions>.

²*Walker v. Georgia Power Co.*, 177 Ga. App. 493, 496 (1986); see also *Heiligman v. Chambers*, 338 P.2d 144, 148 (Okla. 1959); *Evergreen-Washelli Memorial Park Co. v. Dep't of Revenue*, 574 P.2d 735 (Wash. 1978); *Petition of First Trinity Evangelical Lutheran Church in City of Pittsburg*, 251 A.2d 685 (Pa. 1969).

³See, e.g., Wyo. Stat. Ann. §§ 35-8-102; Colo. Rev. Stat. Ann. § 12-12-116 (2006).

⁴See *Taylor v. Con't S. Corp.*, 280 P.2d 514 (Cal. App. 2d 1955).

⁵*Chas. E. Knox Oil Co. v. McKee*, 223 P. 880 (Okla. 1924).

⁶*Id.* at 882.

⁷See *infra* note 1.

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