

# The Marcellus Shale Natural Gas Rush: The Impact of Drilling on Surface Owner Rights

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## I. Introduction to Surface Estate Impacts

- A. Generally – Natural gas extraction necessarily will have some impact on the surface of land, and thus, on surface owner rights. The amount of the surface estate impacted by drilling and the extent of surface disturbance is dependant upon many factors including the target formation of the well and the technologies used by the drilling company.
- B. Surface Impacts from Marcellus Wells – The technologies utilized by many companies to date in the extraction of natural gas from the Marcellus formation differ in several respects from those utilized historically in the extraction of natural gas from sandstone wells in Pennsylvania. The use of these new and different technologies changes the impact that drilling has upon the surface estate. In some cases, the use of these technologies reduces the surface impact from drilling, while other technologies increase the surface impact. The following illustrates how a few common features of Marcellus wells alter the surface impact:
1. Larger well pad sites – Extraction of natural gas from the Marcellus formation is accomplished through the use of hydraulic fracturing, which requires a large amount of water. As a result, well sites must be able to accommodate a large amount of water storage, through construction of a water impoundment and/or through the parking of a large number of tractor-trailers.
  2. Fewer well pads sites – Through the use of horizontal drilling, a well operator can reach areas that are up to a mile or more from the well pad. This has the result of requiring that fewer wells be drilled overall in order to extract natural gas

from a defined area. Additionally, horizontal drilling techniques allow multiple wells to be drilled from the same well pad, further reducing the surface impact.

- C. Sources of Protection – Surface owners rights relative to the impacts of natural gas drilling are defined by three primary sources:
1. Lease agreement provisions – Lease agreements between a landowner and a gas company typically will include some provisions to reduce the adverse surface impacts of drilling or to compensate the landowner for those impacts.
  2. Statutory provisions – Pennsylvania law also provides some minimal protection to surface owners, primarily through the Oil and Gas Act, 58 PA. STAT. §§ 601.101 – 601.607.
  3. Common law – Although Pennsylvania oil and gas case law is undeveloped in many areas, there are important cases that address the rights of surface owners with respect to impacts from natural gas drilling.
- D. Severed Estates – Not all surface owners own the rights to oil and natural gas beneath their land. In many instances, these subsurface property interests were severed from the surface estate long before the current surface owner acquired title. The current surface owner may or may not have purchased their property interest for a reduced price due to this severance. By owning the surface estate, but not the corresponding oil and gas interests, these surface owners bear the adverse impacts of drilling without receiving any of the financial benefits associated with natural gas production.
1. These surface owners have unique challenges in that they generally are afforded no protections or rights through the provisions of a lease agreement.
  2. The protections and rights afforded through statutory provisions and judicial opinions need to be considered carefully to determine if they are applicable to all surface owners, whether or not the surface and natural gas estates have been severed.
- E. Scope of Outline
1. This outline will address those issues that pertain directly to the use of, or impact upon, the surface estate regardless of whether the surface estate has been severed from the corresponding oil and gas interests. This outline also will address some issues pertaining to the impact of natural gas drilling upon tracts in close proximity to the well site.
  2. This outline will not address property issues that may be important to landowners, but that are not related directly to surface use, such as the distribution of royalties. This outline also will not address the interplay between natural gas drilling and coal operations.

## II. Protection of Surface Estate through Provisions in the Lease Agreement

### A. Generally

1. The lease agreement governs nearly all aspects of the relationship between the lessor landowner and the gas company. A prudent landowner will negotiate terms in the lease agreement to ensure that surface impacts are minimized consistent with the manner in which the land is used.
2. The surface owner of a severed estate likely will have no ability to influence the terms that are negotiated in a lease agreement.

### B. Limitation on Operations – A lease agreement may limit activities that can take place, or the facilities that can be located, on the surface estate. Some examples of manners in which surface activities can be limited are listed below:

1. No surface rights lease – A lease agreement can permit extraction of the oil and gas underlying the property, but prohibit any use of the surface estate for extraction activities. A landowner with a relatively small acreage is more likely to be able to successfully negotiate a no surface rights lease with a gas company. The landowner may or may not receive a lower lease bonus payment in exchange for a no surface rights lease, depending on market conditions.
2. Approval of well site and access road location – If a landowner is not successful in negotiating a no surface rights lease, arguably the most important provision in the lease agreement to limit the impacts on the surface estate is a provision that permits the landowner to provide final approval of the specific location of the well site and all access roads.
3. Limit drilling activities to specific portions of the leased property.
4. Specifically define the facilities that can be located on the property.
5. Pipelines, gas storage, and injection wells – A lease agreement can prohibit the use of the subject property for the transportation of foreign gas, for use as a gas storage facility, or for location of an injection well.
6. Require the installation of gates or other security measures.
7. Limit subsurface substances included in lease – Limiting the lease grant to natural gas, and no other substances, may limit surface use by reducing the extraction activities related to non-gas substances in the future. Also, doing so may prevent these non-gas extraction activities from initiating or extending the secondary term of the lease.

### C. Compensation for Damages

1. A landowner should consider inclusion of provisions addressing the various types of damages that could occur to the surface estate as well as how to value said damages.
2. A landowner who leases his land for another purpose, such as to a neighbor for the production of agricultural crops, should consider the impact that natural gas drilling will have upon his tenant. Such a landowner should ensure that drilling operations will not adversely impact him in this landlord/tenant contractual relationship.

D. Restoration of Well Site – A lease agreement can require that the land affected by drilling be reclaimed in any matter agreed to by the parties.

E. Termination of Lease Agreement – A landowner can limit long-term surface impacts by seeking to prevent the lease from extending into the future any longer than is necessary. Specific considerations include:

1. Automatic renewal of the primary term – A provision of this nature or one providing for renewal at the option of the lessee will effectively extend the primary term.
2. Clearly defined lease terms – The activities that will cause the primary term to be converted into the secondary term and the conditions that will cause the secondary term to end should be clearly defined.
3. Force majeure clause – The landowner should limit or clarify any force majeure clauses in the lease agreement.
4. Pooling / Unitization concerns – Lease agreements often give the gas company the authority to combine a portion of the lessor's property with parts of other properties to form a drilling unit. Inclusion of even a small portion of the lessor's land within the drilling unit may cause the entire leasehold to be converted into the secondary term. The landowner should consider inclusion of a Pugh Clause to alleviate this concern.
5. Forfeiture and abandonment – The circumstances that constitute forfeiture and abandonment should be clearly defined. The lease agreement also should address the gas company's responsibility to remove all equipment upon the completion of drilling operations.

### **III. Statutory Protections – Notification Requirements**

A. Permitting Requirement – Any party who proposes to drill a new well or alter an existing well must first obtain a permit from the Pennsylvania Department of Environmental Protection (DEP). 58 PA. STAT. § 601.201(a).

- B. Submission of Plat with Permit Application – Each permit application submitted to DEP must include a plat describing specified information pertaining to the proposed location of the well. The specific information required to be provided to DEP includes “the name of the surface landowner of record and lessor, the name of all surface landowners or water purveyors whose water supplies are within 1,000 feet of the proposed well location.” 58 PA. STAT. § 601.201(b).
- C. Provision of Plat to Interested Parties
1. Provision of plat to surface owner of tract upon which well to be drilled – Each permit applicant must send a copy of the plat by certified mail to the surface landowner upon whose land the well will be drilled. This notification is complete when provided to the person to whom tax notices for the property are mailed. The applicant must demonstrate proof of this notification when the permit application is submitted to DEP. 58 PA. STAT. § 601.201(b).
  2. Provision of plat to those with nearby water supplies – Each permit applicant also must send a copy of the plat by certified mail to “surface landowners or water purveyors whose water supplies are within 1,000 feet of the proposed well location.” This notification is to be provided on forms prescribed by DEP, and proof of compliance with this requirement must be demonstrated to DEP when the permit application is submitted. 58 PA. STAT. § 601.201(b).
- D. Objections to the Granting of Permit
1. Submission of objections to the granting of permit – A surface owner upon whose land a well is proposed to be located has the right to object to DEP’s grant of a permit on two bases: (1) the siting of the well violates the locational restrictions contained in section 205 of the Oil and Gas Act; or (2) information in the permit application “is untrue in any material respect.” Objections must be filed with DEP within fifteen days of the surface owner’s receipt of the plat, and a presumption of receipt may exist when notice is provided to the surface owner at the address listed with the county assessment office. If an objection is not filed within the fifteen day time period, DEP will then “proceed to issue or deny the permit.” 58 PA. STAT. § 601.202(a).
  2. Request for conference to resolve permit objection – A surface owner can request that a conference be conducted under the provisions of section 501 of the Oil and Gas Act to resolve the matters raised in the objection. 25 PA. CODE § 78.21.
- E. Renewal of Permit
1. A permit will expire one year from the date of issuance if drilling operations are not commenced unless the permit is renewed. 58 PA. STAT. § 601.201(i).

2. The well operator can request that the permit be renewed for an additional one-year period. Operators must notify surface owners and owners of water supplies within 1,000 feet of the well of this request for renewal. 25 PA. CODE § 78.17.

F. Notification of Commencement of Drilling – After a permit has been granted, the well operator may drill at the precise location specified in the permit upon providing “24 hours’ notice of the date that drilling will commence” to the surface owner, the subject political subdivision, and DEP. 58 PA. STAT. § 601.201(f).

#### **IV. Statutory Protections – Well Location Restrictions**

A. Generally – Lessors can provide limitations on the siting of wells through provisions in the lease agreement. Pennsylvania law, through the Oil and Gas Act, 58 PA. STAT. §§ 601.101 – 601.607, and the Oil and Gas Conservation Law, 58 Pa. Stat. §§ 401 – 419, also provides for restrictions upon the location of wells.

##### **B. Location Restrictions Under the Oil and Gas Act**

###### **1. Distance from buildings**

- a) A well must be located a minimum distance of 200 feet from existing buildings. This minimum set-back may be waived in writing by the owner of the affected building. 58 PA. STAT. § 601.205(a).
- b) This minimum set-back also may be waived “[w]here the distance restriction would deprive the owner of the oil and gas rights of the right to produce or share in the oil or gas underlying said surface tract.” In such a case, DEP may grant a variance upon a showing that additional measures will be taken to ensure the safety of any affected persons or property. 58 PA. STAT. § 601.205(a).

2. Distance from water wells – A well must be located a minimum distance of 200 feet from existing water wells. Just as with the minimum building set-back, this restriction can be waived upon written consent of the water well owner or upon the grant of a variance by DEP. 58 PA. STAT. § 601.205(a).

3. Distance from water course – A well must be located a minimum distance of 100 feet from any stream, spring, body of water, or wetland greater than one acre. This minimum set-back may be waived by DEP where additional measures are in place to safeguard “the waters of the Commonwealth.” 58 PA. STAT. § 601.205(b).

##### **C. Location Restrictions Under the Oil and Gas Conservation Law**

1. Application of Oil and Gas Conservation Law – This law applies to wells that penetrate the Onondaga horizon or that are drilled to a depth of 3,800 feet, whichever is deeper. 58 PA. STAT. § 406(a). The Marcellus formation is more

shallow than the Onondaga horizon, and thus, this law generally does not apply to wells drilled into the Marcellus formation.

2. Distance from property lines – If a spacing order has not been issued, then wells must be located at least 330 feet from the boundary of the leased property. Where the leased property is included within a voluntary unit, wells must be located at least 330 feet from the closest unit boundary. DEP can waive this requirement after notice and hearing. 58 PA. STAT. § 406(a).

## **V. Statutory Protections – Restoration Requirements**

### **A. Surface Restoration Requirements**

1. Restoration generally – All well owners and operators are required to restore the surface lands that they disturb during the drilling process. 58 PA. STAT. § 601.206(a).

2. Erosion and Sediment Control Plans – Appropriate measures must be implemented to address surface disturbances during all “activities related to siting, drilling, completing, producing, and plugging the well.” 58 PA. STAT. § 601.206(b). *See also* 25 PA. CODE § 78.53.

3. Restoration of site if well not drilled – When a well site is prepared, but a well is not drilled, the site generally must be restored within thirty days of the expiration of the permit. 25 PA. CODE § 78.65.

4. Restoration after drilling – Well owners and operators must restore the well site and remove all unnecessary supplies and equipment within nine months after completion of drilling. Drilling equipment may remain on the site past the nine-month deadline, however, if the surface owner consents in writing. 58 PA. STAT. § 601.206(c). This nine-month restoration deadline can be extended for an additional six months upon a showing of certain conditions. 58 PA. STAT. § 601.206(g)

5. Restoration after plugging – Similar to the requirement for restoration after completion of drilling, well owners and operators must restore the surface estate and remove all equipment within nine months after plugging the well. 58 PA. STAT. § 601.206(d). This restoration also can be extended for an additional six months. 58 PA. STAT. § 601.206(g).

### **B. Water Supply Restoration Requirements**

1. Restoration generally – Well operators are required to restore or replace any public or private water supplies that are affected “by pollution or diminution.” 58 PA. STAT. § 601.208(a).

2. DEP investigation of causation – Any landowner with a polluted or diminished water supply that is believed to result from drilling operations can request that DEP investigate the causation of said pollution or diminution. DEP is required to make a determination of causation within 45 days of the request. 58 PA. STAT. § 601.208(b).

3. Presumption of responsibility

- a) A well operator is presumed to be responsible for polluted water supplies that are located less than 1,000 feet from an oil or gas well if the pollution occurs within six months of the completion of drilling. 58 PA. STAT. § 601.208(c)
- b) The well operator can rebut this presumption of liability by proving that the pollution existed prior to drilling or that the pollution was caused by something other than the drilling activity. 58 PA. STAT. § 601.208(d)(1) and (5).
- c) The presumption also is rebutted if the landowner refuses to allow a pre-drill test of the water supply. 58 PA. STAT. § 601.208(d)(2).
- d) NOTE: The statutory presumption of liability does not encompass diminished water supplies.

4. Specific restoration requirements – Where a well operator has the duty to replace or restore the water supply, the operator must provide “plumbing, conveyance, pumping, or auxiliary equipment and facilities necessary” for utilization of the water supply. 25 PA. CODE § 78.51(f). Bottled water or tank trucks can be used only as a temporary measure. 25 PA. CODE § 78.51(g).

5. Additional landowner remedies – Landowners may seek remedies for the pollution or diminution of their water supplies beyond those provided by DEP. 58 PA. STAT. § 601.208(f).

## VI. Recent Case Law Addressing Use of Surface Estate

A. Restrictions Upon Drilling in Oil Creek State Park – *Belden & Blake Corp. v. Commonwealth Dep’t of Conservation and Natural Res.*, 969 A.2d 528 (Pa. Apr. 29, 2009).

1. Facts and procedural history

- a) Belden & Blake Corporation (Belden) owned oil and natural gas leases on parcels within Oil Creek State Park and sought to develop gas wells on the parcels.
- b) The Department of Conservation and Natural Resources (DCNR), however, would not permit surface access unless Belden complied with a “coordination agreement” that provided for a performance bond and double stumpage fees for removed timber.

- c) DCNR cited its status as a trustee for the Commonwealth's public natural resources as a basis for imposing conditions on the use of the surface estate.
- d) Belden filed suit seeking to enjoin DCNR from interfering with its implied easement to enter upon the parcels to exercise its ownership of the natural gas rights.
- e) The Commonwealth Court ruled in Belden's favor on a motion for summary judgment, and DCNR appealed to the Supreme Court.

2. Court ruling – The Supreme Court, in a 4-2 opinion, affirmed the ruling of the Commonwealth Court in holding that DCNR could not require that Belden comply with the “coordination agreement.”

3. Court reasoning

- a) In its opinion, the court first addressed the relationship between the owners of the surface estate and the subsurface estate. The court reaffirmed *Chartiers Block Coal Co. v. Mellon*, 25 A. 597 (Pa. 1893) as the governing law on this issue and relied upon *Chartiers* for the proposition that “an owner of an underlying estate, such as Belden & Blake here, has the right to go upon the surface in order to reach the estate below, ‘as might be necessary to operate his estate.’” *Belden* at 532.
- b) The owner of the subsurface rights is constrained by the fact that his surface use must be reasonable, but the court found that *Chartiers* places the burden on the surface owner, not the subsurface owner, to file a legal action to challenge the reasonableness of the surface use.
- c) After finding that Belden's use of the surface estate would be reasonable, the court addressed the impact of DCNR's statutory duties to preserve and maintain natural resources. On this issue, the court ruled that “[a] subsurface owner's rights cannot be diminished because the surface comes to be owned by the government.” *Belden* at 532.
- d) DCNR could negotiate a surface use agreement with the energy company just as a private landowner could do so. If a voluntary agreement was not reached, DCNR could impose conditions only through the exercise of eminent domain, and payment of just compensation would then be required for the diminution of the subsurface owner's rights.

4. Dissenting opinion – Justice Saylor opined that DCNR's status as a custodian and trustee of the Commonwealth's natural resources was a relevant factor in the application of *Chartiers*. As such, the proper inquiry should have been whether the conditions required by DCNR were reasonable.

B. Restrictions on Drilling in Allegheny National Forest – *Minard Run Oil Co. v. U.S. Forest Service*, 2009 WL 4937785 (W.D. Pa. Dec. 15, 2009).

1. Facts

- a) Pursuant to a settlement agreement to resolve prior litigation that had been filed by an environmental advocacy group, the Forest Service had agreed to perform environmental reviews of proposed drilling on split mineral estates within the Allegheny National Forest. *See Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 2009 WL 1324154 (W.D. Pa. May 12, 2009).
- b) Minard Run Oil Company and other plaintiffs argued that the Forest Service did not have authority to require such a review for the drilling of wells to access privately held natural gas interests.

2. Ruling

- a) The court ruled that the Forest Service did not have the authority to assert regulatory authority by requiring environmental review. This ruling was based, in part, upon Pennsylvania law addressing severed estates.
- b) The court then went on to state that the Forest Service did have some ability to “prevent undue degradation to the surface estate” by using the framework established in *United States v. Minard Run Oil Co.*, 1980 U.S Dist. Lexis 9570 (W.D. Pa. 1980).
- c) The court also stated that the Forest Service “retains all of the rights of a servient estate holder under Pennsylvania law, including the right to seek appropriate judicial intervention where necessary to protect its interests.”

C. Damages to Surface Estate – *Gates v. Exco Resources, Inc.*, 2010 WL 1416740 (W.D. Pa. Apr. 8, 2010).

1. Facts

- a) Ronald and Catherine Gates executed an oil and gas lease with Exco Resources in 1998, and subsequently granted pipeline right of ways on the property.
- b) Three gas wells were drilled on the property in 2001.
- c) In 2002 and 2003, pipelines were installed on the property to service the three wells on the property along with 67 wells located elsewhere.

2. Claims – Among the many claims asserted in the lawsuit, the plaintiffs sought damages for a devaluation of their property due to improper reclamation of the property following the installation of pipelines.

### 3. Court Findings

- a) The court agreed with plaintiffs that 20 acres of land had been “rendered almost unable to be used again” due to damaged drainage tiles and the presence of rocks near the transmission lines.
- b) As a result, the court awarded plaintiffs \$16,000 for the diminution in value to their land.

### 4. Analysis

- a) Although the plaintiffs had executed a lease agreement and pipeline right of ways, the court did not base its award on a contractual theory. Rather, the court relied upon the gas company’s obligation, as expressed in the Restatement (Third) of Property, “to repair and maintain the portions of the servient estate and the improvements used in the enjoyment of the servitude that are under the beneficiary’s control, to the extent necessary to . . . prevent unreasonable interference with the enjoyment of the servient estate.” Restatement (Third) of Property: Servitudes § 4, 13.
- b) The plaintiffs’ appraiser opined that the amount of damage caused to the devalued land was typical of gas production activities. While Exco argued that this meant that recovery was not permissible, the court found “that his opinion lends credence to the accuracy of plaintiff’s loss computation.”

## VII. Selected Case Law Addressing Various Surface Estate Issues

### A. Reasonable Use of Surface Estate – *United States v. Minard Run Oil Co.*, 1980 U.S. Dist. LEXIS 9570 (W.D. Pa. 1980).

1. Facts – Minard Run Oil Company owned oil and gas interests within the Allegheny National Forest. The Forest Service was concerned about the surface impacts caused by Minard Run’s drilling activities, and thus, filed suit seeking to restrain these activities.
2. Court ruling – The court granted the requested injunction. Accordingly, Minard Run was prohibited from “engaging, directly or indirectly, in the clearing of well sites and/or road or pipeline accesses thereto” unless appropriate notice was provided to the Forest Service.
3. Recitation of general principles – In its ruling, the court reviewed some general principles governing the relationship between a surface owner and the owner of subsurface mineral interests under Pennsylvania law.
  - a) Under the basic rule, “the parties must each exercise due regard for the rights of the other, that while the owner of the mineral rights has unquestioned right to enter upon the property for the purpose of access and extracting his minerals, he nevertheless must exercise such rights

- with a recognition of surface rights and taking appropriate action to prevent unnecessary disturbance to the owner of the surface.” (citing *Chartiers Block Coal Co. v. Mellon*, 25 A. 597 (Pa. 1893).
- b) The mineral estate holder’s right to use of the surface is restricted “to reasonable use justifiable to related activities essential to the orderly removal of the mineral rights. (citing *Babcock Lumber Co. v. Faust*, 39 A.2d 298 (Pa. Super. Ct. 1944).
  - c) “The easement which the mineral owner has over the surface is not limitless and has been stated as not conferring a roving commission to subject any part of the surface through occupation. In other words, the parties should attempt to reach a reasonable accommodation so that each may reasonably enjoy his respective property rights. (citing *Pennsylvania Water and Power Co. v. Reigart*, 193 A. 311 (Pa. Super. Ct. 1937), and *Bowers v. Myers*, 85 A. 860 (Pa. 1912).
  - d) There are “three tests to measure the extent of surface use by a mineral owner, viz: (1) the necessity for the use, (2) the customs of the country, and (3) the construction put upon the instruments of severance by the parties by long acquiescence.” (citing *Dewey v. Great Lakes Coal Co.*, 84 A. 913 (Pa. 1912).
  - e) “[W]here two alternative methods of proceeding are available to the mineral operator, neither of which is of detriment to the mineral operation and one of which is detrimental to the surface owner, the mineral operator must select the method which does not act to the detriment of the surface owner.” (citing *Gillespie v. American Zinc and Chemical Co.* 93 A. 272 (Pa. 1915).
  - f) Based upon the foregoing authorities, the court concluded that “[a] mineral operator cannot presume to be capable of adjudging without reasonable advance notice to the surface owner and therefore, unilaterally, that his operations will not unnecessarily impair the use of the surface.” Thus, the surface owner is entitled to reasonable advance notice of drilling.
  - g) “Injunctive relief is a long recognized remedy for the unnecessary occupancy of the surface by the owner of the mineral estate.” (citing *Chartiers Block Coal Co.*, *supra*).

B. Measure of Damages – *P.G.W. Assocs. v. Lago de Vita, Inc.*, 10 D & C.4<sup>th</sup> 490 (Westmoreland Co. Ct. Com. Pl. 1991).

1. Facts

- a) Pursuant to a valid lease agreement, one acre of trees were removed as a necessary part of the drilling operations.
- b) The lease agreement stated, “Lessee further agrees to pay lessor for any damage to growing crops, trees and fences, caused by lessee in operating this lease.”

- c) Lessor sought damages for the replacement value of the trees (\$265,528) while lessee countered that the appropriate measure of damages was the value of timber (\$2,624).

2. Ruling – The court limited the damages to the value of the timber.

3. Reasoning

- a) The appropriate measure of damages in a tort action is the replacement cost. This action, however, is based in contract, not negligence.
- b) The intention of the parties, based upon the lease agreement, was to provide compensation solely for the basic value of the trees.
- c) For the lessor to recover for the aesthetic value of the trees, it would have been necessary for the lease agreement to provide for replacement cost as the appropriate measure of damages.

C. Recovery of Gas Through Possible Trespass – *Hamilton v. Foster*, 116 A. 50 (Pa. 1922).

1. Facts – Plaintiff Hamilton had executed an oil and gas lease to defendant, in an agreement which prohibited drilling within a certain portion of the land subject to the lease. Defendant ultimately drilled a well within this restricted land. Whether defendant had received permission to drill said well on the restricted land was in dispute.

2. Ruling – The court determined that the gas recovered from the well in question belonged to defendant whether or not he had permission to drill the well at the precise location where it had been drilled. In so ruling, the court stated that “we do not have to decide whether or not title can be acquired by trespass, but at most what recovery can be had against one who, by a trespass, obtains possession of his own property; and certainly this cannot be measured by its value.”

D. Abandonment – *See Jacobs v. CNG Transmission Corp.*, 332 F. Supp.2d 759 (W.D. Pa. 2004).

## **VIII. Reunification of Surface Estate with Subsurface Estate**

A. Dormant Mineral Interest Acts – Some states provide a statutory remedy to reunite all, or portions, of the mineral estate with the corresponding surface estate upon the satisfaction of specified conditions. Pennsylvania’s Dormant Oil and Gas Act, 58 PA. STAT. §§ 701.1 – 701.7, makes no such provision.

B. Pennsylvania Dormant Oil and Gas Act

1. Statute was enacted on July 11, 2006.

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3. Statutory purpose – 58 PA. STAT. § 701.2
  - a) “to facilitate the development of subsurface properties by reducing the problems caused by fragmented and unknown or unlocatable ownership of oil and gas interests and to protect the interests of unknown or unlocatable owners of oil and gas.”
  - b) “It is not the purpose of this act to vest the surface owner with title to oil and gas interests that have been severed from the surface estate.”

**IX. Statutory Treatment of Treatment of Surface Owner Rights With Respect to Coal Bed Methane – Establishment of Coal Bed Methane Review Board**

- A. Enactment – House Bill 1847 was enacted into law on February 1, 2010.
- B. Purpose – “To establish an alternative procedure to court action for consideration and resolution of objections to the location of certain coal bed methane wells or roads associated with those wells to be constructed on surface lands and to modify the procedure for review of well permit applications to the extent necessary to allow for the procedure for alternative dispute resolution.
- C. Composition of Board – The board consists of a three member board appointed by Governor in consultation with the Pennsylvania Farm Bureau, industry associations, and Penn State.
- D. General Procedure
  1. Notification – Any coal bed methane operator with plans to drill a well or construct an access road must provide the surface owner with written notification.
  2. Objections – The surface owner can file written objections to the location within 15 days of receipt of the written notification.
  3. Conference – If objections are filed, DEP will convene the Coal Bed Methane Review Board within 10 days of the date that objections are served upon the well operator.
  4. Resolution – At the conference, the surface owner and the well operator will attempt to reach an agreement as to an appropriate location for the well or access road. If the parties are unable to agree, the Board will make a determination as to location.
  5. Appeal – An aggrieved party can appeal the Board’s determination to the appropriate Court of Common Pleas.

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**XI. Introduced Legislation – Surface Owners’ Protection Act (H.B. 1155)**

- A. Purpose – The legislation does not contain a stated purpose, but the preamble identifies the bill as “[p]roviding for duties of oil and gas well operators, for notice of operations and surface use and compensation agreement, for entry without surface use compensation agreement, for restriction on issuance of permits for wells, for attorney fees and costs and for emergency situations.”
- B. Basic Provisions

1. A well operator would be required to compensate a non-lessor surface owner fully for damages including:
  - a) lost agricultural production and income,
  - b) lost timber production,
  - c) lost land value,
  - d) lost use of and access to the surface owner's land or water sources; and
  - e) lost value of property improvements caused by operations
2. Surface use and compensation agreement
  - a) The well operator would be required to send a proposed surface use and compensation agreement to the surface owner prior to application for the drilling permit.
  - b) The surface owner could agree to the agreement as presented, negotiate for a modified agreement, or reject the agreement.
3. Entry without surface use and compensation agreement
  - a) The well operator could file an application for a drilling permit 45 days after sending the proposed agreement to the surface owner regardless of whether or not the agreement has been executed.
  - b) The well operator would be subject to certain bonding requirements.
4. Attorney fees, court costs, and treble damages would be authorized under the legislation.
5. Enhanced protection of water supply

C. Status

1. Introduced on March 31, 2009.
2. Not enacted during 2009-2010 Legislative Session.



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