

# **What Every Farmer Should Know About Mining Law**

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## **I. Introduction**

Farming and mining are both vital industries to the economy of Pennsylvania. According to the National Mining Association, mining has a \$3 billion impact on Pennsylvania's economy. In Pennsylvania, the coexistence of farming and mining has not always been a compatible one. Farmers are increasingly encountering legal issues concerning minerals, mineral rights, and mineral development operations. The goal of this paper is to provide an overview of the issues surrounding mineral rights that most frequently confront Pennsylvania farmers.

## **II. Land Ownership in Pennsylvania**

Pennsylvania law is unique in that it recognizes three discrete estates in land: the surface estate, the mineral estate, and the right to subjacent (surface) support. These estates are severable and different owners may thus hold title to separate and distinct estates in the same land.<sup>1</sup> In fact, it is theoretically possible that each estate is owned by a distinct owner so that three potential owners have a vested economic interest in three separate estates of the same plot of land. It is therefore pertinent that the Pennsylvania farmer analyze deeds and leases very carefully to determine what he or she holds title to.

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Does this mean that each estate owner may automatically disregard the interests of the other estate owners? The law is firmly established in Pennsylvania that, in the absence of express waiver or the use of words from which the intention to waive clearly appears, the grantee of minerals takes the estate subject to the burden of surface support.<sup>2</sup> What this means is that the mineral estate owner must mine the estate in such a way that sufficient support remains to sustain the surface estate. When the mineral estate destroys or modifies the surface estate, the surface estate owner may be able to hold the mineral estate owner liable for damages that result from the encroachment.

This concept is perhaps best illustrated by the frequently cited Pennsylvania Supreme Court case of *Youghiogeny Coal Co. v. Allegheny National Bank*<sup>3</sup> In that case, the court concluded that "If the owner of the whole fee conveys the coal in the land in general terms, as in this case, retaining the residue of the tract, the purchaser acquires the coal with the right to mine and remove it, provided he does so without injury to the superincumbent estate. His estate in the coal, like that of the owner of the surface, is governed by the maxim *sic utere tuo ut alienum non laedas*. The owner of the surface is entitled to absolute support of his land, not as an easement or right depending on a supposed grant, but as a proprietary right at common law."

While this is generally considered to be the "rule of law" in Pennsylvania, it is also important to understand that contractual terms, such as those located in a deed or lease, may serve to alter this well-established rule of law. For example, many mining companies have boilerplate leases that may seek to restrict their damages in the event that their use of the mineral estate harms the other land estates. Relative to surface damages, the "standard" leases go from no damages to unnecessary damage to crops, trees, and

buildings.<sup>4</sup> Therefore, a lease most protective of the surface estate will provide for damages to soils, crops, trees, fertility, loss of land use, and damages to water and physical structures on the property. Surface estate damage can clearly have a negative impact on the surface estate owner.

### **III. Land Ownership and Longwall Mining**

As a surface owner, it is also important to understand the possible ramifications of a process known as longwall mining. Portions of southwestern Pennsylvania are particularly attractive to mining companies because of the existence of a remarkably consistent coal seam that is roughly 90 miles by 90 miles and lies 500 feet under the ground.<sup>5</sup> Ever since coal companies bought the mineral rights for huge tracts of land in the area around the turn of the century, people who buy residential homes in this area typically have to accept deeds with language that allows underground mining.

Longwalling has become one of the major methods of coal extraction in these underground mines. This process is first begun by driving two parallel side shafts away from the main shaft and on each side of the coal seam to be mined. Longwalling machines then extract the entire face of the seam at once. Although longwalling is quicker and more productive than older methods employed to mine coal, it also has the most noticeable side effects. As the supports advance with the longwalling equipment, the unsupported roof caves in, usually within months of the removal of support. This collapsing of the land is known as “subsidence.”<sup>6</sup>

As evidenced by instances of such damage in the news recently, subsidence from longwall mining can have devastating effects. The most visible effects can be seen in structural damage to homes, businesses, and farm structures. However, water supplies

may also be severely damaged. Streams can drain, natural springs can relocate, and drinking wells can go dry or change in composition. For example, the owners of the Spring House Dairy in southwestern Pennsylvania have had their water pumped to their property since longwall mining began there in 1999.

Under 1994 amendments to Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, companies that mine coal underground are responsible for "repairing or compensating for damage they cause to structures on the ground surface and to immediately provide temporary water and permanently replace water supplies lost or contaminated due to mining." These amendments also specify the procedures for resolving damage claims between the mine operator and property owner, with the Department of Environmental Protection becoming involved when those efforts fail. DEP is also required to intervene in cases where homes and agricultural buildings are likely to experience irreparable damage.

In 1999, the Pennsylvania Department of Environmental Protection issued its first official report on the "Impact of Underground Coal Mining" in Pennsylvania. Statistics such as structural damage and reported loss or contamination of water supplies are contained in the report. The entire report and maps from DEP's geographic information system showing where underground coal mining is occurring in the 10-county study area are available by visiting DEP at [www.dep.state.pa.us](http://www.dep.state.pa.us).<sup>7</sup> Additionally, the Pennsylvania Surface Subsidence Agent Program, provides agents that monitor and document conditions in areas impacted by longwall mining prior to, during, and after mining has occurred. Surface Subsidence Agents may also assist with the settlement of claims filed under the Bituminous Mine Subsidence and Land Conservation Act.

## **IV. The Granting of Interests to the Mineral Estate**

Because Pennsylvania allows for the separation of estates in land, it is pertinent to first research whether you own the mineral estate. Pennsylvania does not maintain ownership records of mineral properties and county governments often have these records. Therefore, the starting place should often be the County Recorder of Deeds Office. An older mineral deed may or may not be recorded in this office. If you own property, your deed may state ownership in “fee simple.” “Fee simple” means that you own the surface and mineral deposits. Otherwise, someone else may own mineral properties on the tract.

In its most basic form, a mineral lease is a contractual agreement between the owner of the mineral estate (the lessor) who grants the right to develop deposits of the mineral to a producer (the lessee). Although the document may be characterized as a “lease” or a “deed,” one must first look at the substance of the document to determine the exact type of interest that has been transferred. A summary of the basic distinctions between types of interests can be found below.

### **A. Fee Simple Absolute**

The owner of an estate in “fee simple absolute” controls both the surface and mineral estates. The fee simple absolute owner has exclusive rights to prospect for, develop, and extract from the land anything found on or beneath the surface. Fee simple absolute owners may sever mineral interests from surface estates in private deed or lease transactions by grant, reservation, or exception.

### **B. Fee Simple Determinable and Fee Simple on Condition**

An example of a “free simple determinable” conveyance is one in which states that

“the estate ends when minerals are no longer being produced in paying quantities.” An example of a “fee simple on condition” is one in which states that “if production does not begin within 10 years of this Agreement, or once product ceases for a period of 12 months, Lessor may terminate this agreement.”

### **C. Lease**

A lease creates the relationship of landlord and tenant. A lease can end by abandonment, forfeiture for condition broken, expiration of the lease term, or exhaustion of the minerals.<sup>8</sup>

### **D. Profit a' Prendre**

A profit can end by the same means as a lease and can be defined as “a right or privilege to go on another’s land and take away something of value from its soil or from the products of its soil.”<sup>9</sup>

### **E. License**

A license can be coupled with an interest in the mineral estate, which is irrevocable while the interest continues. A license may also be a revocable contract right.<sup>10</sup>

## **V. Monetary Consideration For the Grant of a Mineral Interest**

With the exception of a mineral estate that is received in “fee simple determinable,” the result of severing the mineral estate from the other estate creates a “continuing relationship between the owner of the larger estate and the owner of the mineral estate, with consideration for severance coming from the production of the minerals.”<sup>11</sup> The most common type of monetary consideration for the grant of a mineral interest is in the form of a royalty. A royalty can be defined as “a share of the product or profit of the mines leased, paid for permitting the operator to use the Lessor’s property.”<sup>12</sup> A royalty

share is also free of the costs of production. The most common royalty is set at one-eighth (1/8).<sup>13</sup> A royalty may be increased higher depending on the lessor's bargaining position and the circumstances surrounding the transaction. The royalty interest can be separated from the estate of which it was originally a part. For example, a surface landowner may agree to sell his farm, reserving only a royalty interest in the coal produced. It is in a situation such as this in which the royalty can become severed from the land which originally supported it. According to the case of *Duquesne Nat'l. Gas Co. v. Fefolt*,<sup>14</sup> when the royalty has been severed from the land which originally supported it, the royalty becomes personal property of its owner and is no longer treated as real estate. Whether something is in fact a true royalty also depends on whether the share is a present or future share of actual production. Because certain income from mineral development is entitled to tax advantaged treatment, it is important to consult an attorney on the possible implications from royalty arrangements.

## **VI. The Interplay of Oil, Gas, and Coal in Pennsylvania**

As stated earlier, the mineral estate may be separate from the surface estate in Pennsylvania. Ownership of minerals on the same tract may also be separated from each other. Oil and gas can be sold or leased separately to different parties. The minimum royalty on production paid to oil and gas lessors in Pennsylvania is set by law at 1/8 of the value of the produced oil or gas. This is a statutory requirement that cannot be negotiated in Pennsylvania.<sup>15</sup> The interests of coal owners, mine operators, and oil and gas drillers frequently conflict in Pennsylvania. One party is often required to give up the right to extract some of its resources to preserve the interests of the other party. In an oil and gas lease, substances other than true oil, such as sulfur, helium, and other gaseous

substances are often included. Methane, a typical coal gas, has created problems in Pennsylvania. As peat turns into anthracite, about 5,000 cubic feet of methane is generated for every ton of coal.<sup>16</sup> The Supreme Court of Pennsylvania addresses this issue for the first time in *U.S. Steel v. Hogue*.<sup>17</sup> The court determines that, “as a general rule, subterranean gas is owned by whoever has title to the property in which the gas is resting. When a landowner conveys a portion of his property, in this instance coal, to another, it cannot thereafter be said that the property conveyed remains as part of the former's land, since title to the severed property rests solely in the grantee.” The Court went on to conclude that “such gas as is present in coal must necessarily belong to the owner of the coal, so long as it remains within his property and subject to his exclusive dominion and control. The landowner, of course, has title to the property surrounding the coal, and owns such of the coalbed gas as migrates into that surrounding property.” It is important to note that in this case, the Court was trying to decipher the meaning of a coal severance deed from 1920. The broader issue of who would own the gas in the absence of a deed was never reached by the court. Therefore, a proper lease will address this issue and not leave it to the courts.

## **VII. Conclusion**

Mineral resources, including coal, remain an important energy source in the United States. Pennsylvania has had a long history of both coal mining and agricultural activities. While both industries provide valuable resources and create thousands of jobs every year, the intersection of mining and agriculture is often a conflicting one. As evidenced by the recent proposals by the Pennsylvania Environmental Quality Board to raise subsidence safeguards, the difficulties resulting from conflicts between mining and

agriculture remain unsettled.<sup>18</sup> The basic purpose of this article has been to highlight some of the concerns that Pennsylvania farmers might encounter in the realm of mining law. Having a working knowledge of the central issues in mining law may indeed be helpful to Pennsylvania producers.

More information on issues related to mining law may be obtained at the following sources:

- Pennsylvania Department of Environmental Protection  
Bureau of Mining and Reclamation  
Rachel Carson State Office Building  
P.O. Box 8461  
Harrisburg, PA 17105-8461  
[www.dep.state.pa.us](http://www.dep.state.pa.us)
  
- Surface Subsidence Agent Program  
California District Office  
25 Technology Drive  
California Technology Park  
Coal Center, PA 15423  
This may also be assessed through the DEP website.

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<sup>1</sup> *Smith v. Glen Alden Coal Co.*, 32 A.2d 227, 234 (Pa. 1943).

<sup>2</sup> *Jones v. Wagner*, 66 Pa. 429, 434 (1871).

<sup>3</sup> 211 Pa. 319 (Pa. 1905).

<sup>4</sup> George A. Conti, Jr., "Negotiating an Oil and Gas Lease," Pennsylvania Bar Institute, CLE Book, 1984.

<sup>5</sup> [www.csmonitor.com/durable/1999/07/21/fp1s4-csm.shtml](http://www.csmonitor.com/durable/1999/07/21/fp1s4-csm.shtml)

<sup>6</sup> Mineral Law Cases and Materials, 1994.

<sup>7</sup> Choose Subjects/Mineral Resources/Bureau of Mining and Reclamation/Act 54

<sup>8</sup> Cyril A. Fox, "What types of interests can be granted to the Mineral Estate to provide for development and why does it matter?," Natural Resources Chapter 1.

<sup>9</sup> Black's Law Dictionary, page 1227, 1999.

<sup>10</sup> Cyril A. Fox, Natural Resources Chapter 1.

<sup>11</sup> *Id.*

<sup>12</sup> *Commissiner v. Clairton*, 148 F.2d 671, 673 (D.C. Cir. 1945).

<sup>13</sup> George A. Conti, Jr., Pennsylvania Bar Institute CLE Book, 1984.

<sup>14</sup> 198 A.2d 608 (Pa. Int. App. Ct. 1964).

<sup>15</sup> Oil and Gas Leases, 58 P.S. § 33 and § 34. Although the lessor may seek greater royalty amounts, the lessee is not required by law to pay more.

<sup>16</sup> Mineral Law Cases and Materials, 1994, page 87.

<sup>17</sup> 503 Pa. 140; 468 A.2d 1380 (Pa. 1983).

<sup>18</sup> Pittsburgh Post Gazette, July 15, 2003 article.