

ATTACHMENT I

PCA's Concerns with SB61

* SB 61's "statutory first refusal right" is a state imposed restraint on the free alienation of property, which is disfavored by the common law. *See, e.g., Lauderbaugh v. Williams*, 186 A.2d 39 (Pa. 1962) (restraints on alienation are not favored in the law).

* SB 61 will impair existing contracts. Many "mineral owners" have already entered into binding option agreements with third parties or already agreed with others to afford them a right of "first refusal" on a mineral property they own for valid business reasons---these agreements are between the current "mineral owner" and persons other than those who own the surface above their mineral estates. By imposing a "new" statutory obligation on the "mineral owner" to afford another person (the overlying "surface owner") a "right of first refusal" SB 61 will impair these options and the "first refusal" rights of pre-existing third parties in contravention of the Pennsylvania and United States Constitutions.

* If enacted, SB 61 will immediately reduce the value of every mineral property in the Commonwealth because the owners' ability to sell that property to whom they chose and at its true market price will be seriously impaired, and ultimately, completely destroyed.

Simply put, why would any third party interested in acquiring the coal, limestone, oil or gas or other mineral estate holdings of a Pennsylvania company or individual invest the time and effort to negotiate a transaction if that transaction will be delayed or ultimately changed because its buyer has been forced by the General Assembly to individually identify and then "negotiate with" numerous other third parties? The answer, PCA submits, is that no third party with any business acumen would be interested in doing so. As a result, property now worth billions of dollars will be significantly devalued, an outcome which violates the Takings and Due Process Clauses of the Pennsylvania and United States Constitutions. The right to sell real property to the "highest bidder" of one's own choosing is among the bundle of rights which encompass "property" in this Country and SB 61 seriously, and unconstitutionally, impairs this right.

* SB 61 would apply to the prospective sale of every "interest in real property relating to minerals beneath the surface of the land" now held by individuals and business entities in Pennsylvania. It would, therefore, encumber every mineral interest with a statutory right of first refusal including, without limitation, property interests in oil, natural gas, methane gas, bituminous coal, anthracite coal, limestone, bluestone, fieldstone, iron ore, sand, gravel and any other "real property interest relating to minerals beneath the surface of the land." See Section 2, Definition of "Mineral estate." Thus the "value" of real property throughout the Commonwealth, not just in those counties where bituminous coal is found, will be adversely affected.

* By forcing mineral owners to potentially "sell" parts of their mineral reserve to the overlying surface owner SB 61 will remove from the tax rolls property which can now be separately valued because un-severed mineral assets are not generally subject to separate taxation and also adversely impact the value of the mineral holder's remaining reserves.

* SB 61 will frustrate, not further, the development of minerals in Pennsylvania. Effective development of the Commonwealth's mineral resources can occur only if these resources are acquired and held in large, contiguous blocks. Minerals cannot be removed efficiently (and in many instances safely) if the operator is constantly required to leave undeveloped within a projected operating field parcels of mineral that it does not own. By creating a scheme which may allow third parties to remove from an existing reserve or operating field, minerals that would otherwise have been removed (and in some instances must be removed to assure the continued, safe and efficient operations in the field) SB 61 runs counter to sound energy policy.

* As drafted, SB 61 also will impair the ability of lenders to protect their security interests in "mineral property," because before a lender could "foreclose" (or have its borrower voluntarily surrender encumbered collateral in lieu of foreclosure) it would have to delay taking action until its borrower "negotiated" with a third party.

* If SB 61 were to become law each and every proposed "conveyance or grant" of a "real property interest relating to minerals beneath the surface of the land" could not occur without the "mineral owner" first having to delay his sale to "negotiate" with a third party. Therefore, it places a minimum 60 day hold on all transactions involving the sale of "mineral estates" to other third party mineral developers. In other words, and even assuming SB 61 does not ultimately preclude the "mineral owner" from selling his property for the highest and best price the market will bear, it effectively deprives the "mineral owner" of the value of these proceeds for up to 60 days. In the case of "mineral estate" transactions this minimum 60 day time value loss of the bargain will, in many transactions, amount to hundreds of thousands of dollars---an extra cost of doing business in Pennsylvania that will make our State even less attractive to the mineral development industries than it already is.

* This "statutory first refusal right" is unreasonable in that it forces the "mineral owner" to negotiate with a third party without defining what "rights" the party with which it must negotiate has. For example, in the typical "first refusal situation" the party holding this right does not get to "negotiate" but instead is afforded a period of time within which to agree to purchase the seller's property on the same terms and conditions as the seller has already negotiated with a third party. Even if this is what SB 61 contemplates, there will be no "set price" for any one single parcel of "mineral" a "mineral owner" could provide to the "surface owner" because "mineral owners" DO NOT sell off their assets one parcel at a time. Instead, they sell off all, or most, of their holdings to one purchaser in one transaction, where the value is set by reference to all the parcels as a whole, not individually. An orchard is not sold off "one tree at a time," and mineral reserves are not sold off "parcel by parcel."

If, on the other hand, SB 61 contemplates an actual period of negotiation, these "negotiations" will prove futile simply because the mineral owner will always be able to obtain a

better "bargain" by selling its property as a "unit" than it would receive if it sold off these parcels one at a time. The value of minerals is the ability to remove and sell them, not to sterilize their development. Thus, the "negotiating" period imposed by SB 61 will, in fact, afford no real benefit to the "surface owner" while imposing a significant and severe restraint on the ability of the "mineral owner" to close a sale of its property in a timely manner and at the best price. Simply put, SB 61 will not result in any benefits to surface owners but will seriously burden mineral owners.

* Also, in the typical proposed sale of a "mineral estate" thousands (or at a minimum, hundreds) of acres of "mineral" will be involved, which property will be located beneath countless "small" surface parcels owned by others. Consequently, the "mineral estate" owner will be forced by SB 61 into countless individual negotiations. This will impose an enormous administrative and cost burden on the coal, oil, gas, limestone, and other mineral extraction industries thus making Pennsylvania an even less attractive place for mineral developers to do business.

* As noted above, SB 61 evidences a complete lack of understanding as to how property rights in minerals are acquired and how they are transferred and assigned and, a result, will ultimately effectively preclude the future profitable sale of these rights.

As drafted, before a PCA member company could "convey" or "grant" any interest in its coal or other mineral interests to a third party it would be required to send individual certified mail notices to each "surface estate owner" giving them notice of a "statutory right" to first offer to purchase the mineral interest beneath their individual surface parcel before that property can be sold to another party. The failure to properly notify even one of the "surface estate owners" voids the conveyance to a third party.

In Pennsylvania mineral reserves and active mineral development operations often encompass thousands of square miles. While "title" to these "mineral estate holdings" is generally held by one entity (or one or more affiliated or related entities), title to the overlying surface is owned by numerous individuals, businesses, estates, trusts and other legal entities and changes daily. Indeed, every time someone dies or gets divorced or defaults on a loan in this Commonwealth "title" to "surface land" can change hands without instantly, without notice to anyone that Parcel A is now owned by a "new" owner. Also, "title" to a single parcel of surface can, and often is, "owned" by numerous individuals, each of whom owns a fractional share and, apparently, each of whom is entitled to a SB 61 "right of first refusal." There is no way to "freeze" the market place so as to enable anyone to know who owns what on any particular day and, therefore, it will be impossible for any "mineral estate holder" to comply with the "notice" requirement of SB 61 in any situation where it wants to "convey" or "grant" to a third party a large block of its reserves or an active operating facility.

More importantly to the functioning of the market place, it will be equally impossible for any "mineral BUYER" to be comfortable that it has acquired "good title" to the "mineral estate" it has purchased because the failure to have properly notified the true "surface owner" (note SB 61 does not expressly indicate that only persons with "record" title have to be notified) will void at least some part of its transaction. Furthermore, since SB 61 sets no time

limit within which a "surface owner" can seek to "void" a sale for allegedly not having received the required notice all future "title" to "mineral estates" in this Commonwealth will be effectively "clouded."

No rationale buyer is going to proceed with a transaction where it cannot obtain title insurance nor will it risk having its acquisition of mineral rights "voided" (possibly years after its purchase) because its seller failed to notify one or more "surface estate holders" of a right to first purchase the "mineral" beneath their property.

This is not an "idle" concern. The "mineral estate" title which could be voided (apparently at any time after a closing) could be the "keystone" parcel in a planned and projected mining operation and a subsequent "voiding" of its acquisition could effectively shut an operation down completely.

Finally, imagine trying to convince any responsible lender that it is "safe" to take a security interest in a Pennsylvania "mineral estate" if SB 61 were enacted.

* Section 4 of SB 61 is incomprehensible. This section treats "mineral estates" created by "reservations" and "exceptions" differently from those created by "grants." This difference in treatment will require "mineral owners" contemplating the sale of their holdings to first determine how each of the parcels it intends to convey to a third party was initially acquired--- a task that will involve tracing its title back to the original "severance" instrument and one that is costly and time consuming. Second, what does the phrase "required to provide written notice to the title holder of the surface estate at the time the mineral estate is placed for sale for a specified period time, which period of time may not exceed one year," mean? Does it mean that "surface owners" who trace their title back to someone who "excepted" or "reserved" rights to the mineral beneath their surface are given up to 1 year to negotiate a purchase? If that is what is intended then mineral transactions will be statutory delayed for up to a year, not just a minimum of 60 days, because virtually every "mineral reserve" in Pennsylvania contains some reserves which were initially severed from the overlying surface via an "exception" or "reservation." If not, what then does it mean?

* SB 61 is essentially a "re-enactment" of the provisions of former Section 15 of the Bituminous Mine Subsidence Act, 52 P.S. § 1406.15 which afforded surface owners the right to "reacquire" a right of surface support by "purchasing" this property interest from the owner of this estate and which was repealed in 1994. Section 15 never worked in practice and was properly repealed. Why then, over ten years later, would the General Assembly want to impose on EVERY mineral estate owner a statutory requirement that proved ineffectual in the case of bituminous coal owners?

* SB 61 purports to give a "statutory right of first refusal" whenever there is contemplated a "conveyance or grant of real property in which only a mineral estate is transferred." Section 3 (a). Therefore, by its terms, SB 51 would apply not only to proposed "fee sales" of mineral interests but also to proposed transfers or assignments of leasehold or other "lesser" interests in a "mineral estate." Thus, if the surface owner has entered into a lease with a mineral owner and that lease affords the mineral owner the right to assign or transfer its rights in

this mineral to a third party SB 61 would now force the mineral owner to give its own lessor a right to effectively cancel its lease. This outcome impairs an existing contract. Furthermore, it would enable lessors who believe they may have made a "bad bargain" (for example the price of the leased mineral has substantially increased in value) to attempt to reacquire the mineral so they could lease it to someone else if its lessee wanted to assign its lease to a third party. In addition, if successors to the original lessor would prefer that their property not be subjected to mineral development these individuals, despite being bound by the terms of a lease their predecessors had executed, would now be afforded the opportunity to effectively "cancel" this lease if the lessee desired to transfer or assign its rights.

* Since giving a lender a security interest in minerals can easily be construed to be "granting" a third party an interest in a "mineral estate," what impact will SB 61 have on the ability of mineral operators to obtain secured loans to expand their operations?

* SB 61 further improperly interferes with the ability of "mineral owners" to sell their property because it will make "public" prospective sales which the parties have a right (and sometimes a legal or fiduciary obligation) to not disclose until the transaction is about to close, or has actually closed.

In this regard, many proposed transactions involving "mineral estates" are negotiated by the parties under and subject to very strict confidentiality requirements which, if the deal does not close, the parties are precluded from disclosing. Many of the "mineral owners" in this Commonwealth are publicly traded companies or entities that which have fiduciary obligations to investors, whose value can be significantly affected by the premature public disclosure that some or all of its assets are "up for sale." If SB 61 passes, it will be impossible for any seller to avoid a "premature" disclosure of the fact that its assets are up for sale.

It is "bad business" (and, in some instances may expose companies to security law problems and claims by shareholders) to force any business to "make public" its plans to sell off some or all of its assets before it is otherwise appropriate (or required) to do so---yet this is precisely what SB 61 will do.