

Testimony of the
PENNSYLVANIA OIL & GAS ASSOCIATION
and the
INDEPENDENT OIL & GAS ASSOCIATION
OF PENNSYLVANIA

before the
SENATE ENVIRONMENTAL RESOURCES AND ENERGY COMMITTEE
on
COAL BED METHANE ISSUES

May 22, 2007

STATEMENT OF CRAIG L. MAYER, ESQ.
for the Pennsylvania Oil and Gas Association
and the Independent Oil & Gas Association of Pennsylvania

To begin I would like to refer you to my paper which summarizes the common law in Pennsylvania with respect to the respective rights of split-estate property owners.

In my legal practice on behalf of an exploration and production company, I have gained extensive experience with split estate situations involving federal lands, State game lands, State forest lands and private lands. The paper cites controlling case law that has governed this area of the law and the relationship between split-estate owners in Pennsylvania since at least 1893.

To make a long story short, in Pennsylvania, mineral owners are required:

- (1) to act reasonably or within the description/confines of the express or implied surface easement; and
- (2) to accommodate the surface owner by selecting any reasonably available option that has the least impact on the surface estate.

If these principles are obeyed, then the mineral estate has no liability to the surface estate, and once any accommodation has been made, the mineral owner may proceed free of charge.

Surface rights legislation such as last session's House Bill 2899 proposes to create a totally new liability and to extinguish a previously held right.

In dealing with this issue, it is important to step back from the detail in legislation and to view it for what it in fact purports to do. Essentially, bills like this terminate the mineral owner's existing surface easements or rights of way, whether created impliedly or expressly, and replace them with an option for the mineral owner to re-purchase the previously held easement or right of way. Viewed another way, the legislation is nothing more than an exercise of eminent domain by the State on behalf of a private third party.

The only effect of such legislation is to enrich surface owners at the expense of mineral developers and owners. There is no public purpose served and therefore no valid jurisdiction to legislate when the upshot of the legislation is simply adjusting rights as between private parties.

The legislation also suggests that one of the purposes served is the preservation of productive agricultural lands. The legislation does nothing to prevent land from being used for non-agricultural purposes, by either the surface owner or the mineral developer. The Act simply requires a payment where none was required before.

The current relationship between split-estate mineral and surface owners developed over the course of the past 100 years has stood the test of time. When disputes arise, Pennsylvania courts have, in applying the Accommodation Doctrine, ably balanced and adjudicated the respective rights of the parties. As between the accommodation doctrine and the proposed surface rights legislation, the accommodation doctrine is far superior to legislative fiat that serves to impose additional costs on mineral owners and to invert the dominant and servient estates.

THE PENNSYLVANIA ACCOMMODATION DOCTRINE

With regard to the respective rights of the owners of separate surface and mineral estates, (split-estates), since the 19th century it has been the longstanding law of Pennsylvania, and across the country, that the owner or lessee of oil, gas, or minerals (OGM) has the right to occupy so much of the surface as may be necessary to operate his estate, such right to be exercised, however, with due regard to the owner of the surface.

The leading case establishing this doctrine and which has been followed ever since in Pennsylvania is the Pennsylvania case of *Chartiers Block Coal Co. v. Mellon*, 25 A. 597 (Pa. 1893). The Pennsylvania Courts have defined this right of access as an implied easement of necessity or servitude appurtenant to the dominant mineral estate. *Westmoreland & Cambria Nat'l Gas Co. v. Dewitt*, 18 A. 724 (Pa. 1889); *Baker v. Pittsburg, C. & W. R. Co.*, 68 A. 1014 (Pa. 1908). *United States v. Minard Run Oil Co.*, 1980 (W.D. Pa. Dec. 16, 1980)

In 1915, the Pennsylvania Supreme Court, stating the principle somewhat alternatively and applying it to determine the extent of surface use available to a mineral owner, refined the Chartier's Doctrine and enunciated what, some 65 years later, would be rediscovered by the Texas courts and coined by legal scholars as the "Accommodation Doctrine."

In *Gillespie v. American Zinc & Chem.Co.*, 93 A. 272 (Pa. 1915), the Court held that where two alternative methods of proceeding are available to a mineral operator, neither of which is of detriment to the mineral operation and one of which is detrimental to the surface owner, the mineral owner must select the method which does not act to the detriment of the surface owner. Accordingly, the duty owed to surface owners is that of restricting use to reasonable use that does not unnecessarily impair the use of the surface.

If a mineral owner makes "unreasonable" use of the surface by unnecessarily impairing or disturbing the surface, redress is available to a surface owner by resort to the courts. Typically, a surface owner's damages are redressable as a matter of law in the form of compensation for injury to fences, other improvements, growing crops, timber and such other immediate damages sustained as a result of the drilling and operations. See *Silvis v. Peoples Natural Gas Co.*, 126 A.2d 706, 710 (Pa. 1956).

The basis for recovery of damages is measured by either (1) the diminution in the value of the land caused by the mineral owner's operations (if permanent) or (2) the cost of restoration. See *Hughes v. Emerald Mines Corp.*, 450 A.2d 1, (Pa. Super. 1982). If there has not been any "unreasonable" use of the surface, then no damages or relief are available. *Belden & Blake Corporation v. Commonwealth of Pennsylvania Department of Conservation and Natural Resources*, No. 25 M.D. 2006, Filed March 5, 2007; *Hodges v Rodriguez*, 645 A. 2d. 1340 (Pa. Super. 1994)

Equitable relief in the form of an injunction is available in unusual instances where the surface owner proves that: (1) the mineral owner's actions threaten the surface owner's improvements, crops, or timber, and (2) the mineral owner, without detriment to its production, could avoid such harm in a way that would not materially impede the mineral owner's extraction operations. This is a summary of the test or set of conditions necessary to support injunctive relief announced in the Gillespie case noted above. See also *Einsig v. Pennsylvania Mines Corp.*, 452 A.2d 558 (Pa. Cmwlt. 1982).

STATEMENT OF STEPHEN W. RHOADS for the Pennsylvania Oil and Gas Association and the Independent Oil & Gas Association of Pennsylvania

While the Constitutional and common law issues are of utmost importance here, two other matters must be addressed in the context of the coal bed methane controversy.

Oil and Gas Act

First of all, I would like to dispel a concern that we've heard raised on a number of occasions over the last few years, one that is without foundation and raises unnecessary alarm. It is rumored that coal bed methane wells are not currently regulated under Pennsylvania law. That simply is not true.

The Oil and Gas Act, Act No. 223 of 1984, established a comprehensive regulatory program governing the drilling of all oil and gas wells in this state, and that includes coal bed methane wells. While some of the technical issues related to coal bed methane wells are not directly addressed in the Department of Environmental Protection's oil and gas regulations, the regulations are flexible enough to allow the department to exercise its authority in a manner that will ensure that the drilling, construction and operation of coal bed methane wells will satisfy the environmental protection and public safety purposes of the Oil and Gas Act.

Act 223 contains a variety of provisions that are specifically designed to protect the surface owner's property from potential harm caused by oil and gas operations and to give the surface owner an opportunity to participate in the well permitting decision.

Attached to our testimony is a handout that lists the key provisions in the Oil and Gas Act that are meant to protect the surface owner and his property.

Two of the most important provisions of the act that I would draw your attention to are:

- the rebuttable presumption that damage to a landowner's water supply is caused by permitted well drilling activities; and
- the surface owner's opportunity to object to a well location and to seek a conference with the department and the permittee to resolve by mutual agreement any matter dealt with in the Oil and Gas Act.

Accommodation

The second point I would like to make is that the accommodation doctrine as discussed by Mr. Mayer is a matter of law that producers understand and take very seriously.

It is a routine matter for producers to contact the owner of the land on which they intend to drill a well in advance of submitting a permit application to DEP. They understand the importance of early contact to identifying water wells and springs, high value farm fields, timber and other surface assets that are important to the landowner. Early discussions allow the producer to modify his drilling plans by placing well sites, pipelines, access roads and other earth disturbances on locations that cause as little intrusion and inconvenience to the landowner as possible.

These contacts and accommodations are particularly important in situations where the surface owner has no financial stake in the development work, a concern that is particularly acute with coal bed methane because the coal estate is almost always severed from the surface estate. Such is typically not the case with oil and natural gas properties. With a few important exceptions, most oil and natural gas estates are not severed from the surface.

Recommendations

As discussed by Mr. Mayer, the Commonwealth enjoys long-established principles of settled common law that recognize rights and duties of different property interests when the surface estate is severed from the underlying mineral estate.

Implicit in Pennsylvania common law is a requirement for a mineral owner to give a surface owner reasonable advance notice of planned use of the surface for mineral extraction. That usually leads to some form of accommodation with the landowner over the mineral owner's use of the surface.

It is difficult to make any recommendation on possible legislation to improve on this scheme of things. Any attempt to reduce 100+ years of common law to a few succinct sections of legislation would likely do more harm than good and set the stage for even more litigation.

One of the biggest threats we fear from any such legislation – a threat that is implied in all of the complaints you hear from surface owners who are upset by the *Hoge* decision – would be a legislative attempt to overturn the doctrine of mineral estate dominance.

There is a very good public policy reason why the mineral estate has always been granted deference by the courts in conflicts between surface owners and developers of our indigenous energy resources.

Energy, in all of its forms, is the bedrock upon which our economy and culture are built. Oil, gas, coal, and now coal bed methane, are absolutely essential to our entire way of life, and they will continue to be essential to our society for at least another generation or two, regardless of how much private and public resources we invest in the development of alternative energy.

Today, our nation relies on coal bed methane for nine percent of our total dry gas production. In Pennsylvania, the most recent estimates of coal bed methane reserves I've seen total 2.7 trillion cubic feet of gas. The production value of those reserves at today's market prices for natural gas would equal more than \$20 billion.

Pennsylvania common law has long recognized that access to our nation's rich mineral wealth should not be jeopardized by a conflict between two private parties over a piece of ground. It is just too important, too essential to our common comfort and prosperity to set unnecessary roadblocks to its development.

The mandatory surface use agreement provisions of recent legislation that are designed to redress surface owner complaints about coal bed methane development have the potential to become such a roadblock. The bills that have been introduced over the last few years have included a variety of provisions that would reject Pennsylvania common law and create serious constitutional issues for owners of coal bed methane in particular, but all mineral owners generally.

The most basic effect of mandatory surface use agreement legislation would be a state-imposed impairment of contract and the effective transfer a critical element of the mineral estate to the surface owner.

Not only does such a provision of law impair and diminish the value of the mineral estate and associated leases, it also allows the surface owner to hold the mineral estate hostage by forcing coal bed methane owners and lessees to pay ransom for a right of access they already own.

SURFACE OWNER PROTECTION

provisions of the Oil & Gas Act

SECTION	PROVISION
201(b)	<p>Well permit notification</p> <p>The applicant shall forward, by certified mail, a copy of [the] plat to the surface landowner, all surface landowners or water purveyors whose water supplies are within 1,000 feet of the proposed well location.</p>
202(a)	<p>Well permit objections</p> <p>In case any well location referred to in section 201(b) is made so that the well, when drilled, will be located on a tract whose surface is owned by a person other than the well operator, then the surface landowner affected shall be notified of the intent to drill and have right to file objections, in accordance with section 501, based on the assertion that the well location violates section 205 or that information in the application is untrue in any material respect, within 15 days of the receipt by the surface owner of the plat provided for in section 201(b).</p>
205(a)	<p>Well site restrictions</p> <p>Wells may not be drilled within 200 feet measured horizontally from any existing building or existing water well without the written consent of the owner thereof. Where 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, the well operator may be granted a variance from said distance restriction upon submission of a plan which shall identify the additional measures, facilities or practices to be employed during well site construction, drilling and operations. The variance, if granted, shall include such additional terms and conditions as the department shall require to insure the safety and protection of affected persons and property.</p>
205(b)	<p>Well site restrictions</p> <p>No well site may be prepared or well drilled within 100 feet measured horizontally from any stream, spring or body of water as identified on the most current 7 1/2 minute topographic quadrangle map of the United States Geological Survey or within 100 feet of any wetlands greater than one acre in size. The department may waive such distance restrictions upon submission of a plan which shall identify the additional measures, facilities or practices to be employed during well site construction, drilling and operations. Such waiver, if granted, shall impose such permit conditions as are necessary to protect the waters of the Commonwealth.</p>
206	<p>Well site restoration</p> <ol style="list-style-type: none">(a) Each oil or gas well owner or operator shall restore the land surface within the area disturbed in siting, drilling, completing and producing the well.(b) During and after all earthmoving or soil disturbing activities, including, but not limited to, the activities related to siting, drilling, completing, producing and plugging the well, erosion and sedimentation control measures shall be implemented in accordance with an erosion and sedimentation control plan prepared in accordance with the act of June 22, 1937 (P.L. 1987, No. 394), known as The Clean Streams Law.(c) Within nine months after completion of drilling of any well, the owner or operator shall restore the well site, remove or fill all pits used to contain produced fluids or industrial wastes and remove all drilling supplies and equipment not needed for production. Drilling supplies and equipment not needed for production may be stored on the well site if the express written consent of the surface landowner is obtained.(d) Within nine months after plugging a well, the owner or operator shall remove all production or storage facilities, supplies and equipment and restore the well site.(e) Restoration activities required by this act or in regulations promulgated hereunder shall also comply with all applicable provisions of The Clean Streams Law.

SECTION PROVISION

- (f) Failure to restore the well site as required in this act or in regulations promulgated hereunder is a violation of this act.

207(b) **Protection of fresh groundwater**

To prevent the migration of gas or fluids into sources of fresh groundwater and to prevent pollution or diminution of fresh groundwaters, there shall be run and permanently cemented a string or strings of casing in each well drilled through the fresh water bearing strata to a depth and in a manner prescribed by regulation by the department.

208 **Protection of water supplies**

- (a) Any well operator who affects a public or private water supply by pollution or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity or quality for the purposes served by the supply.
- (b) Any landowner or water purveyor suffering pollution or diminution of a water supply as a result of the drilling, alteration or operation of an oil or gas well may so notify the department and request that an investigation be conducted. Within ten days of such notification, the department shall investigate any such claim and shall, within 45 days following notification, make a determination. If the department finds that the pollution or diminution was caused by the drilling, alteration or operation activities or if it presumes the well operator responsible for pollution pursuant to subsection (c), then it shall issue such orders to the well operator as are necessary to assure compliance with subsection (a). Such orders may include orders requiring the temporary replacement of a water supply where it is determined that the pollution or diminution may be of limited duration.
- (c) Unless rebutted by one of the five defenses established in subsection (d), it shall be presumed that a well operator is responsible for the pollution of a water supply that is within 1,000 feet of the oil or gas well, where the pollution occurred within six months after the completion of drilling or alteration of such well.
- (d) In order to rebut the presumption of liability established in subsection (c), the well operator must affirmatively prove one of the following five defenses:
- (1) The pollution existed prior to the drilling or alteration activity as determined by a predrilling or prealteration survey.
 - (2) The landowner or water purveyor refused to allow the operator access to conduct a predrilling or prealteration survey.
 - (3) The water supply is not within 1,000 feet of the well.
 - (4) The pollution occurred more than six months after completion of drilling or alteration activities.
 - (5) The pollution occurred as the result of some cause other than the drilling or alteration activity.
- (e) Any operator electing to preserve its defenses under subsection (d)(1) or (2) shall retain the services of an independent certified laboratory to conduct the predrilling or prealteration survey of water supplies. A copy of the results of any such survey shall be submitted to the department and the landowner or water purveyor in a manner prescribed by the department.
- (f) Nothing herein shall prevent any landowner or water purveyor who claims pollution or diminution of a water supply from seeking any other remedy that may be provided at law or in equity.

209 **Use of safety devices**

Any person engaged in drilling any oil or gas well shall equip the well with casings of sufficient strength and with such other safety devices, as may be necessary in a manner as prescribed by regulation of the department, and shall use every effort and endeavor effectively to prevent blowouts, explosions and fires.

SECTION	PROVISION
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215	Bonding
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Any such bond filed with an application for a well permit shall ... conditioned that the operator shall faithfully perform all of the drilling, water supply replacement, restoration and plugging requirements of this act.

501(a)	Conferences
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The department or any person having a direct interest in the subject matter of this act may, at any time, request that a conference be held for the purpose of discussing and endeavoring to resolve by mutual agreement any matter arising under the provisions of this act. Unless otherwise provided, conferences shall be held within 90 days after a request for a conference is received by the department, and notice of any such conference shall be given by the department to all such interested parties. At such conference a representative of the department shall be in attendance and the department may make such recommendations as it deems appropriate. Any agreement reached at such conference shall be consistent with the requirements of this act and, if approved by such representative of the department, it shall be reduced to writing and shall be effective, unless reviewed and rejected by the department within ten days after the close of the conference. The record of any such agreement approved by the department shall be kept on file by the department with copies furnished to the parties. Scheduling of a conference shall not affect the authority of the department to issue an appropriate order to compel compliance with this act.

SURFACE USE AGREEMENT PROVISIONS that would confiscate a property right from the mineral owner and bestow that right on the surface owner

A key principle of Pennsylvania property law is the right of the holder of mineral rights to the reasonable use of the surface to produce the minerals. This right is based upon an easement or servitude appurtenant to the dominant mineral estate. This easement gives the mineral estate owner a property interest in the subservient surface estate, i.e., the right to use the surface within the scope of the easement. If the use is reasonable, the mineral estate owner does not owe compensation or damages to the surface owner.

The right to use the surface to develop the mineral estate is a fundamental element of the ownership of the mineral estate, without which the estate is severely impaired if not worthless. That right was affirmed most recently by the Pennsylvania Superior Court in *Hiltabidle v. BBC/DRI Blacklick*, No. 2336 Pittsburgh 1996 (Pa. Super. Ct. 1997), which applied these principles to a case involving Coal Bed Methane development. In *Hiltabidle*, the Court held that a mineral rights owner cannot be obstructed in utilizing his “right of access” and that his only obligation to the surface owner is to be reasonable in his use of the surface.

Legislation introduced in the House of Representatives last session, House Bill 2899, contained certain requirements that attempt to realign private property rights by conferring mineral rights on the surface owner at the expense of the owner of the mineral estate. The provisions are as follows:

- (i) the operator must provide the surface owner with a proposed surface use agreement that includes compensation for damage to the surface and for loss of agricultural production and income and lost land value;
- (ii) if the operator and surface owner are not able to execute a surface use agreement within a prescribed period, the operator must escrow an amount “equal to the last best offer of compensation” made by the operator to the surface owner, with a financial institution approved by the surface owner;
- (iii) “the parties may apply to the court of common pleas” with jurisdiction over the area of the property at issue for “an order establishing surface-use guidelines and reasonable compensation”; and
- (iv) in the absence of a surface use agreement, the Pennsylvania Department of Environmental Protection shall allow the operator to commence operations based on an approved permit upon receipt of proof from the operator that (A) the required amount has been escrowed, and (B) a monthly statement of escrowed funds will be provided to the surface owner.

The most basic effect of mandatory surface use agreement legislation would be the state-imposed impairment of contract and the effective transfer a critical element of the mineral estate to the surface owner. Not only does such a provision of law impair and diminish the value of the mineral estate and associated leases, it also allows the surface owner to hold the mineral estate hostage by forcing mineral owners and lessees to pay ransom for a right of access that they already own.

These aspects of the Bill would deprive the owners of the Coal Bed Methane of property rights protected by both the Pennsylvania Constitution and the U.S. Constitution in violation of two Constitutional principles: impairment of contract and taking without just compensation.