

Pennsylvania Coalbed Methane Gas: Is it Coal or Gas?

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Real Estate Alert

5.6.15

Rights of certain subsurface estate owners to coalbed methane gas (CBM), once thought to be valueless, were affirmed last month by the Pennsylvania Superior Court in *Earl Kennedy et al. v. Consol Energy, Inc. et al.*, rejecting the claim of the owners of the surface of the land who argued that methane gas contained in the coalbed beneath their property belonged to them. (2015 WL 1813997, 2015 PA Super 93 (Apr. 22, 2105)) To understand the importance of ownership rights to CBM, it is helpful to review the split estate concept and the history of methane gas extraction in Pennsylvania.

Split Estates and Methane Gas

In Pennsylvania, the concept of "split estates" often governs the rights to gas, oil and minerals located on and beneath the surface of real property. Under that concept, one landowner may own the surface of land (Surface Estate) while another owner, such as an energy or mining company, owns or leases the right to gas, oil and minerals on or beneath the surface of the land (Mineral Estate). Split estates were conceived to promote the production of natural resources. The ownership rights are governed by the language of the severance deed to the property, which should address methods of extraction, liability for harm and the right to support. In the severance deed at issue in the *Consol* case (*Consol Deed*), the predecessor in title to the Kennedys retained the Surface Estate in addition to "all of the oil and gas in place...", while Consol was conveyed "all of the coal in the Pittsburgh or River vein in and beneath" the property.

CBM is highly combustible and must be ventilated during the coal mining process to prevent explosion or inhalation. The gas was traditionally vented into the atmosphere by mining companies; however, about 15 years ago, a nationwide increase in natural gas exploration and development helped to identify CBM as a valuable alternative source of energy. CBM can be used in the same way as natural gas from conventional reservoirs, but is unique because coalbeds are both gas generators and efficient storage reservoirs. It is attractive as an alternative energy source because coal deposits are easily identified, shallow and quick to exploit. Pennsylvania has an abundance of recoverable CBM and much of it is easily harvested from existing "degasification" wells that were used to remove the CBM prior to mining to prevent explosions.

The Court's Analysis in *Consol*

The Court in *Consol* noted that, when the *Consol Deed* was executed in 1932, CBM "was not commercially marketable and was regarded as a nuisance", thus it made no specific mention of CBM. The owners of the Surface Estate argued that the reservation of an estate of "all of the oil and gas in place" must necessarily include all of the gas, including the CBM in the Pittsburgh or River vein. Consol, the owner of the Mineral Estate, argued that since CBM was not perceived as a valuable resource in 1932, when the *Consol Deed* was executed, there could not have been an intent to reserve the rights to that particular gas.

In *Consol*, the Court affirmed an earlier decision of the Pennsylvania Supreme Court (*U.S. Steel Corporation v. Hoge*, 468 A.2d 1380 (Pa. 1983)), establishing the general rule that "when a coal severance deed is silent as to the ownership of the coalbed methane, or does not expressly reserve coalbed methane from the coal conveyance or specifically define coalbed methane as a gas, the coalbed methane gas contained in the coal belongs to the owner of the coal." (*Kennedy*, 2015 WL 1813997 at *5) The court also relied on certain language in the *Consol* deed that also reserved to the Surface Estate "the exclusive right to lease any part or all of said lands

for the purpose of drilling and operating thereon for natural gas and petroleum oil...”, with no mention of reserving the right to drill for CBM, which would have made no economic sense at the time. Thus, the court concluded that the only gas reserved by the Surface Estate was natural gas, and that the CBM was conveyed along with the coal.

Conclusion

The court reached its decision by closely examining the language of the severance deed and divining the intent of the parties from not only that language, but the circumstances surrounding the mining and energy extraction industry at the time the deed was executed. Landowners of Surface Estates that were formed many years ago as a result of a severance deed may find that valuable natural resources under their properties are not part of the Surface Estate. The *Consol* case establishes that, at least with regard to CBM, courts are willing to interpret silence in a severance deed as evidence that the Mineral Estate owns the CBM emanating from the coal seam. It is critical for landowners to carefully negotiate, with the assistance of legal counsel, the scope of mineral rights conveyed or retained in severance deeds with an eye to accurately capture the intent of the parties and protect their interests.

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