

Chapter 8

When Does “Surface” Mean Only Surface?

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§ 8.01. Introduction.

The recent explosion in the production of natural gas in the Marcellus Shale play has led to a rapid increase in property values of the region that extends “from southern New York across Pennsylvania, and into western Maryland, West Virginia, and eastern Ohio.”¹ The Marcellus Shale play is about a mile or more beneath the surface of the earth.² Leasing oil and gas rights to companies for drilling can be quite lucrative for landowners. There-

¹ Lynn Kerr McKay, *et al.*, “Science and the Reasonable Development of Marcellus Shale Natural Gas Resources in Pennsylvania and New York,” 32 *Energy L.J.* 125, 126 n. 1 (2011); *see also* *Marcellus Shale – Appalachian Basin Natural Gas Play*, www.geology.com/articles/marcellus-shale.shtml (last visited April 24, 2014); Anne Kates Smith, “Cash in on the Natural Gas Shale Boom,” *Kiplinger* (Nov. 2011), www.kiplinger.com/article/business/T019C000-S002-cash-in-on-the-natural-gas-shale-boom.html (last visited March 24, 2014); Krista Weidner, *Natural Gas Exploration: A Landowners Guide to Leasing Land in Pennsylvania*, <http://pubs.cas.psu.edu/FreePubs/pdfs/ua448.pdf> (last visited March 24, 2014).

² *Marcellus Shale – Appalachian Basin Natural Gas Play*, www.geology.com/articles/marcellus-shale.shtml (last visited April 24, 2014).

fore, it is becoming increasingly common where drilling is most actively taking place, to find landowners selling their surface estate but excepting and reserving their rights to minerals, including oil and gas. Many times these landowners will already have an oil and gas lease on their property. Unfortunately, most landowners, and indeed many attorneys not familiar with oil and gas title, may attempt to make a severance between the surface and mineral estates without fully realizing the implications that seemingly simple words such as “only” may have on title. Deeds may include conveyances relating specifically to surface, *e.g.*, “to convey the surface only,”³ “the surface rights only,”⁴ and “All the surface or right of soil.”⁵ Different courts interpret the word “surface” with varying results. This makes it difficult for the oil and gas professional in determining how to proceed with operations. In title examination, it is important to note how the surface and mineral estates can be separated through exceptions and reservations and the importance of contract law in interpreting ambiguities. Moreover, many definitions of surface exist. The purpose of this chapter is to examine these issues and to look to instances of interpretation of the term “surface” in several jurisdictions.⁶ Furthermore, it will address certification dilemmas resulting from deeds conveying “surface” in title certificates for property subject to surface deeds.

§ 8.02. Different Strata of Estates Within Land.

It is the general rule that “subterranean gas is owned by whoever has title to the property.”⁷ Mineral estates are a distinct subterranean property right that may be severed from the surface of the land.⁸ This means that different people may own title to separate and distinct estates in the same

³ *Jividen v. New Pittsburgh Coal Co.*, 187 N.E.124 (Ohio Ct. App. 1933).

⁴ *Mack Oil Co. v. Laurence*, 389 P.2d 955 (Okla. 1964).

⁵ *Yuscavage v. Hamlin*, 137 A.2d 242 (Pa. 1958).

⁶ For a brief summary of the development and extraction techniques from the Marcellus Shale, *see Robinson Township v. Commonwealth*, 83 A.3d 901, 914-915 (Pa. 2013).

⁷ *U.S. Steel Corp. v. Hoge*, 468 A.2d 1380, 1383 (Pa. 1983).

⁸ *See* 53A Am. Jur. 2d *Mines and Minerals* § 159 (2014); 58 C.J.S. *Mines and Minerals* § 192 (2014); 1A Nancy Saint-Paul, *Summers Oil and Gas* § 7:4 (3d ed. 2013); 2 Tiffany Real Property § 587 (3d 2013) [hereinafter “*Tiffany*”].