

Pennsylvania & Coalbed Methane: Reviving the Traditional Willingness to Protect Surface Owners

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INTRODUCTION

Many articles have been written regarding conflicts between surface and subsurface owners.¹ Yet prior articles have generally approached this topic from a Western perspective: focused on Western law and Western circumstances. Pennsylvania natural resource law, however, is quite distinct from other states, particularly as it relates to the modern practice of coalbed gas or coalbed methane production. First and foremost, despite Pennsylvania's status as the birthplace of commercial oil development in 1859, there is often a dearth of decisions available to guide practitioners involved in this area of law. As a result, attorneys often must rely upon case law that dates back to the turn of the twentieth century, when it exists at all. Moreover, as this Article will illustrate below, basic elements of Pennsylvania law governing coalbed gas production are at odds with the prevailing view of many other states involved in coalbed gas production. The law, as recognized in Pennsylvania, has had negative consequences for property owners impacted by coalbed gas production.

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¹ See, e.g., Elizabeth A. McClanahan, *Coalbed Methane: Myths, Facts, and Legends of its History and the Legislative and Regulatory Climate into the 21st Century*, 48 OKLA. L. REV. 471, 472 (1995) (discussing judicial questions dealing with the determination of ownership of coalbed methane in situations where mining and mineral rights have been separated from the other ownership rights); Michelle Andrea Wenzel, Comment, *The Model Surface Use And Mineral Development Accommodation Act: Easy Easements For Mining Interests*, 42 AM. U.L. REV. 607, 613 (1993) (analyzing the Model Surface Use and Mineral Development Accommodation Act as a response to instances where the mineral rights and surface rights were in conflict).

This issue has renewed energy at least partly because of the resurgence in the coal, oil, and gas industries in Appalachia.² High prices have opened shuttered mines in Pennsylvania and West Virginia and have also spurred large increases in the number of oil and gas permits sought from state agencies.³ In addition, the production of coalbed methane has rapidly expanded.⁴ Conflicts have arisen where new drilling has occurred, particularly in instances involving damages to the surface owner's estate.⁵ The new production has added to the industry's visibility in Pennsylvania but has also led to contests and news articles documenting perceived abuses and chronicling surface owners' dissatisfaction with the current state of affairs.⁶ This, in turn, has been followed by a spate of legislative proposals to empower surface owners against coalbed methane producers in an effort to alter the balance of power between the two.⁷

This article seeks to explain the laws affecting coalbed gas in Pennsylvania and to suggest a departure from the prevailing understanding of *United States Steel Corporation v. Hoge*, which held that coal owners, not surface owners, have the right to produce coalbed gas.⁸ That landmark 1983 Pennsylvania Supreme Court case has left surface owners uncompensated and relatively powerless against coalbed gas production occurring on their own surface property.⁹ Part one of this article will provide background material on property and mineral law necessary to understand the conflict between surface owners and producers using the surface estate to produce coalbed methane. Part two will explain the current state of affairs in Pennsylvania jurisprudence as it relates to the balance of power between surface owners and lessees. Part three proposes a change in the interpretation of *Hoge* that is consistent with existing precedent and more accommodating to affected surface owners. The proposed change would effect a welcome change in the balance of power between surface owners and producers.

² See Caitlin Cleary, *Mineral Rights give Gas Drillers Free Rein*, PITTSBURGH POST-GAZETTE, Apr. 23, 2006, at A1 (noting the difficulties experienced by landowners in Western Pennsylvania who found that their mineral rights have been separated from their surface property rights years ago).

³ Pa. Bureau of Oil & Gas Mgmt., *Reported Oil and Gas Production Summary for Pennsylvania, 1985-2005*, Apr. 2007, <http://www.dcnr.state.pa.us/topogeo/oilandgas/prodreports.aspx> (reporting that between 1986 and 2004, gas production in the Commonwealth has more than tripled and oil production has increased ten fold).

⁴ Pa. Bureau of Oil & Gas Mgmt., *CBM And Water Production for 1988-2005*, at 34, <http://www.dcnr.state.pa.us/topogeo/cbm/cbmproduction.pdf> (last visited Jan. 26, 2008) (reporting that from 1998 to 2005 coalbed methane production increased from 212,016 McF (thousand cubic feet) to 1,830,913 McF).

⁵ See Cleary, *supra* note 3, at A1 (reporting the advocacy of a bill in the Pennsylvania General Assembly that would require surface estate owners to be compensated for damage, lost land value, and decreased agricultural production from natural gas drilling).

⁶ *Id.*; see also, A. J. Panian, *Property Owners Concerned About Rights*, PITTSBURGH TRIBUNE-REV., Mar. 19, 2007, at A1 (reporting complaints by surface property owners regarding their lack of control over the placement of wells on their property); Don Hopey, *Allegheny Forest to Tighten Regulations on Wells*, PITTSBURGH POST-GAZETTE, March 30, 2007, at A1 (noting public and surface owner acrimony regarding oil and gas and coalbed methane production in Pennsylvania).

⁷ See, e.g., H.B. 414, 191st Leg., 1st Sess. (Pa. 2007) (presenting a legislative proposal in the Pennsylvania General Assembly that would require coalbed gas producers to enter into surface use agreement with surface owner prior to onset of production).

⁸ *United States Steel Corp. v. Hoge*, 468 A.2d 1380, 1383 (Pa. 1983).

⁹ Panian, *supra* note 6, at A1.

PART I

A. Severance

The problem of uncompensated damages ultimately derives from American laws that allow property owners to sever valuable portions of their lands.¹⁰ That is, persons other than the surface owner are given the right to produce via use of the surface estate.¹¹ This has created conflicts arising between the surface and subsurface estates.¹²

At common law, property owners in fee simple absolute were said to own their property “to an indefinite extent, upwards as well as downwards.”¹³ That traditional understanding of property ownership is no longer valid. Concomitant with their ownership, property owners now have the right to use and sell valuable interests in their property.¹⁴ This includes, for example, an owner’s right to remove trees from the soil and minerals from underneath it, or to sell these rights to others.

The idea of transferring a valuable interest in property can be effected in several ways. This article will focus on deeds and oil and gas leases, which are two of the most prominent instruments used. Deeds are responsible for conveying interests in minerals, which often include coal, but not normally oil and conventional natural gas (at least in Pennsylvania). Oil and gas leases are responsible for transferring oil and natural gas. Both of these instruments are important for the purposes of this article, as we will see, because, although coalbed gas is indistinguishable from conventional natural gas, Pennsylvania treats the two differently in certain important respects. This seemingly insignificant distinction has created heartache for Pennsylvania surface owners whose property has been utilized for coalbed gas recovery.

1. Deeds

A sale via deed severs or divides the formerly unified estate according to the minerals conveyed by the deed. The buyer would be the owner in fee simple¹⁵ of the subsurface strata,¹⁶ with the buyer purchasing a valuable natural resource and the surface owner retaining whatever remains.¹⁷ In contrast to the “deed of minerals”

¹⁰ See EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 3.1 (2007) (“[E]arly recognition was given to the proposition that an owner of land might convey the mineral estate separate and apart from the surface ownership and accomplish a separation of ownership of the mineral and surface estates.”).

¹¹ *Id.*

¹² Tom Yerace, *Residents Raise Questions About Gas Wells*, PITTSBURGH TRIBUNE-REV., June 8, 2006, A1.

¹³ HOWARD R. WILLIAMS & CHARLES MEYERS, OIL AND GAS LAW § 202 (2006) (noting that “the owner of land in fee simple absolute was said at common law to own the land to an indefinite extent upwards as well as downwards; ‘*Cujus est solum, ejus est usque ad coelum et ad inferos*’”).

¹⁴ See KUNTZ, *supra* note 10, § 3.1 (discussing the severance of title to oil and gas rights).

¹⁵ “Fee simple” is defined as “[a]n interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs.” BLACK’S LAW DICTIONARY 648 (8th ed. 2004).

¹⁶ U.S. Geological Survey, *Rocks and Layers*, Aug. 14, 1997, <http://pubs.usgs.gov/gip/fossils/rocks-layers.html> (“Rock layers are also called *strata* (the plural form of the Latin word *stratum*).”).

¹⁷ *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 598 (Pa. 1893) (“Now the surface of the land may be separated from the different *strata* underneath it, and there may be as many different owners as there are *strata*.”).

described above, the infamous “broad form deed . . . is a particular, if not unique, form of deed which normally conveys all of the minerals under the surface.”¹⁸ An outright severance of the surface and subsurface in the form of a broad form deed has been recognized by the Pennsylvania Supreme Court since at least 1889.¹⁹

In seeking to explain the resulting relationship between the surface and mineral or subsurface estate owner, a leading treatise provides that the two estates’ “relationship is more like that of adjoining landowners, and there is no privity of estate between them, except that privity which might exist by virtue of the mutually dominant and servient nature of their respective estates.”²⁰ That is, though they occupy portions of what was previously unified, their relationship is akin to neighbors.

Additional judicially created doctrines have further ordered their respective rights and obligations. While the two interests are distinct, they frequently overlap and the estates depend upon one another.²¹ For example, the subsurface estate is considered dominant in that it is entitled to occupy so much of the surface (which is servient, or obligated to the mineral estate in this respect) as is reasonably necessary to produce according to the terms of its deed.²² Similarly, in Pennsylvania, the surface estate is the dominant estate in that it is entitled to subjacent support, or protection from subsidence, from the servient mineral estate’s efforts to produce.²³ These implied rights, also known as implied easements, will be expanded upon and examined later in greater depth.

Oil and gas interests were not traditionally treated like other “minerals” in Pennsylvania land transactions. Rather, oil and gas were not considered minerals at all and were thus not transferred in broad form deed transactions. Instead, oil and gas interests were retained by the surface estate despite the conveyance of nearly everything else of value to the mineral estate.²⁴ The justification for the disparate treatment of oil and gas derived from the early understanding of its nature.²⁵ Because of what was conceived of as its fugacious or migratory character, oil and gas were not considered inert and motionless, unlike other mineral interests.²⁶ As a result, early cases analogized to common law decisions relating to wildlife and the

¹⁸ James Walsh, *Energy Law and Transactions—Scope*, THE ENERGY HANDBOOK (2005).

¹⁹ *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 18 A. 724, 725 (Pa. 1889) (“[The gas company lessee] still remained in possession of their well, which gave them the sole control of the gas . . . and the sole possession of which it was capable, apart from the land, from which it had been legally severed by the lease.”).

²⁰ KUNTZ, *supra* note 10, §3.2[a].

²¹ *Chartiers Block Coal Co.*, 25 A. at 598 (“The difficulty is to so apply the law as to give each owner the right of enjoyment of his property or strata without impinging upon the right of the other, where the owner of the surface has neglected to guard his own rights in the deed by which he granted the lower strata to other owners.”).

²² *Greek v. Wylie*, 109 A. 529, 530 (Pa. 1920) (“The purchaser of unmined coal has a right to use so much of the surface as is necessary in its mining. . .”).

²³ *Clearfield Bank & Trust Co. v. Shaffer*, 41 Pa. D. & C.3d 542, 545-46 (Pa. Ct. Com. Pl. Clearfield County Sept. 10, 1984).

²⁴ *Westmoreland & Cambria Natural Gas Co.*, 18 A. at 725

²⁵ *Id.*

²⁶ *See id.* (depicting water, oil, and gas as “minerals *ferae naturae*” with the power and tendency “to escape without the volition of the owner,” and therefore, not necessarily limited to any particular piece of land).

rule of capture to attempt to decide ownership.²⁷ In 1889, the Pennsylvania Supreme Court decided *Westmoreland & Cambria National Gas Company v. De Witt*, wherein the court made this early understanding explicit, providing:

Water and oil, and still more strongly gas, may be classed by themselves . . . as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their ‘fugitive and wandering existence within the limits of a particular tract is uncertain.’²⁸

As a result of this determination, the court denied that ownership without capture was possible.²⁹

This decision followed earlier decisions applying the so-called *Dunham* rule,³⁰ “peculiar to the law of Pennsylvania, that natural gas is not a mineral . . . and thus does not pass under a deed severing coal and other minerals from the surface tract.”³¹ This rule is responsible for the fact that many surface owners in Pennsylvania still retain rights to oil and gas on their property, though they parted with their mineral rights long ago. This discussion is more than academic; the consequences of these early decisions are far reaching, particularly as they relate to coalbed methane development in Pennsylvania.

2. Oil and Gas Lease

Though denominated in terms of a “lease” or “leasehold,” oil and gas leases are entirely unique and do not operate like garden variety commercial leases.³² Under an oil and gas lease in Pennsylvania “the land itself is granted and demised, and not simply the right to enter upon and prospect . . . for oil or gas.”³³ An oil and gas lease is thus more akin to a conveyance of property than a conveyance of a right or “license to enter upon the land and operate for mining purposes.”³⁴ In 1996, the Pennsylvania Superior Court provided that an oil and gas lease effects a “sale of an estate in fee simple until all the available minerals are removed” at which point the mineral estate reverts back to the lessor.³⁵ Thus, unlike a normal lease of real property, its term is indefinite; “[i]n fact, [the term] may be perpetual” extending for

²⁷ See *id.* (comparing the commonality of an animal’s ability to escape their owners without permission to water, oil, and gas).

²⁸ *Id.*; The term *ferae naturae* derives from the Latin phrase meaning “of a wild nature,” and also describes “wild; untamed; undomesticated” animals. BLACK’S LAW DICTIONARY 653 (8th ed. 2004).

²⁹ See *Westmoreland & Cambria Natural Gas Co.*, 18 A. at 725 (“They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another’s control, the title of the former owner is gone.”).

³⁰ *Dunham v. Kirkpatrick*, 101 Pa. 36 (1882).

³¹ *U.S. Steel Corp. v. Hoge*, 450 A.2d 162, 169 (Pa. Super. Ct. 1982).

³² *Davis v. Cramer*, 808 P.2d 358, 359 (Colo. 1991) (“There is no standard oil and gas lease, and each lease must be construed to give effect to the particular wording that has been agreed to by the parties. . . . In addition, certain implied covenants in oil and gas leases arise out of the lessor/lessee relationship. We have previously noted that the law of oil and gas is unlike any other area.”).

³³ *Snyder Bros. v. Peoples Natural Gas Co.*, 676 A.2d 1226, 1230 (Pa. Super. Ct. 1996) (quoting *Barnsdall v. Bradford Gas Co.*, 74 A. 207, 208 (Pa. 1909)).

³⁴ *Barnsdall v. Bradford Gas Co.*, 74 A. 207, 209 (Pa. 1909).

³⁵ *Snyder Bros.*, 676 A.2d at 1230.

so long as production occurs.³⁶ In addition, unlike other leases, “[t]he [oil and gas] lessee under this instrument is given the exclusive authorization to go upon the land for the purpose of prospecting for oil and gas . . . severing and removing the same.”³⁷

Unlike Pennsylvania, most jurisdictions traditionally considered oil and gas as minerals transferred via broad form deed to the mineral estate.³⁸ Indeed, in other jurisdictions an oil and gas lease so closely resembles a deed of minerals that it is unnecessary to attempt to distinguish the two. Both devices convey an interest giving the grantee or lessee the indefinite exclusive right “to take substances—the oil and gas produced—from the land”³⁹ and are tempered by the surface owner’s continued right to occupy and use the surface.

B. Implied Rights

An interest in oil and gas conveys certain rights to the leaseholder. In addition to the right to produce oil and gas and whatever rights are bargained for expressly, implied rights are also conferred where the agreement is silent.⁴⁰ Key among these is the “implied right to reasonable use of the land surface to locate, develop and produce oil and gas from the land.”⁴¹ This right is implied since the conveyance of the right to produce oil and gas found in the mineral estate necessarily requires surface access.⁴² Without surface access, any right to produce oil and gas would be rendered unusable and without value.⁴³ It is unsurprising that this fundamental interest is central to the conflicts that have arisen.

Typically it is the scope of the implied right to access that has proved contentious. That is, “[t]he general principle . . . gives the lessee discretion both as to the *kinds* of uses and to the *location* of those uses.”⁴⁴ Courts have given expression to this right in many ways, such as allowing for the building of roads, the laying of transmission pipes, and the construction of drilling sites.⁴⁵ These actions by the lessee, though performed by right, frequently result in interference with the surface owner’s use or enjoyment of his property.

In the usual oil and gas relationship in Pennsylvania, surface use agreements are used to forestall problems. Because the surface owner has typically retained his

³⁶ JOHN S. LOWE, OIL AND GAS LAW IN A NUTSHELL 63 (4th ed. 2003).

³⁷ WILLIAMS & MEYERS, *supra* note 13, § 202.1.

³⁸ LOWE, *supra* note 36, at 62.

³⁹ *Id.* at 63.

⁴⁰ *Chartiers Block Coal Co.*, 25 A. at 598 (“As against the owner of the surface each of the . . . purchasers would have the right, without any express words of grant for that purpose, to go upon the surface to open a way by . . . well, to his underlying estate, and to occupy so much of the surface, beyond the limits of his . . . well, as might be necessary to operate his estate, and to remove the product thereof. This is a right to be exercised with due regard to the owner of the surface . . .”).

⁴¹ LOWE, *supra* note 36, at 179.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* (emphasis in original).

⁴⁵ KUNTZ, *supra* note 10, § 3.2 (“[I]t has been recognized that the right of the mineral owner to use and occupy the surface of the land includes the right . . . to lay pipe to gather production; to build roads for access and structures for housing employees; to construct salt water disposal pits; to conduct waterflood operations even though such operations were unknown to the industry and were not contemplated by the parties at the time of the granting of the lease . . . and after termination of the lease . . . the implied right of access for . . . plugging abandoned wells.”).

right to produce oil and gas, he is also in the position to bargain effectively with the lessee to restrict the lessee's use of the surface estate, prevent harmful surface uses, and ensure compensation for damages. Thus, private agreements between the surface owner and lessees are a crucial element in the equation of production.⁴⁶

In the absence of such agreements, the surface owner is not afforded meaningful protection from the law. Rather, the law treats the surface estate as servient to the dominant mineral estate in many respects, guaranteeing the mineral estate's ability to interfere with surface estate uses. Interference includes not only the obstruction and physical occupation of the property caused by the oil and gas owners' competing uses, but actual destruction, often including removing tree stands and crops where necessary for production.⁴⁷ Though lessees typically volunteer to pay for damages even in the absence of an express agreement, and some jurisdictions require them to do so,⁴⁸ Pennsylvania does not. While the absence of such a "surface damage" statute has previously caused problems for surface owners who have conveyed oil and gas rights, it is currently creating difficulties in the area of coalbed methane production as well.⁴⁹

PART II

A. Introduction to Coalbed Gas

Because it was explosive and poisonous, coalbed methane was considered a nuisance to generations of coal miners; to many surface owners, that viewpoint remains correct to this day.⁵⁰ Unlike deeper-lying natural gas, coalbed methane is found in the coal seams. Though reports exist of coalbed methane development as far back as the early 1900's, the typical industry response was to vent the gas into the atmosphere.⁵¹ By the time of the *United States Steel Corp. v. Hoge* decision, discussed *infra*, the commercial interest in developing the gas had replaced the earlier practice of wasting it.

Although still relatively insignificant compared to the amount of traditional

⁴⁶ Christie M. Hayes, *What Every Farmer Should Know About Mining Law*, Feb. 2007, at 2 available at <http://www.dsl.psu.edu/centers/aglawpubs/MiningLaw.pdf> ("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.").

⁴⁷ KUNTZ, *supra* note 10, § 49.5 ("If the lease contains no special provision . . . the lessee has no liability for such loss unless such lessee negligently or wantonly destroyed the crops or unless the destroyed crops were grown on land which was not reasonably necessary for oil and gas development under the lease.").

⁴⁸ See, e.g., ARIZ. REV. STAT. ANN. § 27-252(A)(2) (2000) ("The permittee shall be liable to and shall compensate the owner and lessee of the surface of the state land covered by the permit, or across which the permittee exercises the right of ingress and egress, for any loss to such owner and lessee from damage or destruction caused by the permittee or the permittee's agents or employees to grasses, forage, crops or improvements upon such state land").

⁴⁹ Richard Robbins, *Municipalities to Submit Ideas for Gas Well Drilling Legislation*, PITTSBURGH TRIBUNE-REV., Sept. 30, 2006, at A1 (noting problems caused by coalbed methane development in Southwestern Pennsylvania and efforts by affected municipalities and landowners seeking legislative and judicial resolution).

⁵⁰ *Unconventional Natural Gas Resources*, NATURALGAS.ORG, http://www.naturalgas.org/overview/unconvent_ng_resource.asp (last visited Jan. 27, 2008).

⁵¹ *Hoge*, 468 A.2d at 1383 ("As early as the year 1900 . . . wells were drilled in Greene County . . . and some . . . produced coalbed gas in paying quantities.").

natural gas produced annually, coalbed gas production has risen dramatically over the past two decades.⁵² Today, coalbed methane production is big business in Appalachia: nearly 2 million McF (thousand cubic feet) were produced in Pennsylvania in 2005.⁵³ Pennsylvania jurisprudence specifically related to the issue of coalbed methane is scarce, but the decisions that do exist have created an inequitable regime in which surface estate owners suffer. Any discussion of coalbed gas production in Pennsylvania must start with the Pennsylvania Supreme Court's first and only decision on the issue: *United States Steel Corp. v. Hoge*.⁵⁴

B. *United States Steel Corp. v. Hoge*

The 1983 Pennsylvania Supreme Court decision in *United States Steel Corp. v. Hoge* is the cause of many of the problems confronting property owners in Southwest Pennsylvania. In *Hoge*, the Pennsylvania Supreme Court considered whether a 1920 coal severance deed conveyed with it the coalbed methane found within the coal seams.⁵⁵ The divided court concluded that it did, providing, "such gas as is present in coal must necessarily belong to the owner of the coal, so as it remains within his property and subject to his exclusive dominion and control."⁵⁶

The case was initiated by the coal seam owner when a gas lessee, who acquired his lease from the surface estate, began developing coalbed gas.⁵⁷ In an initial step, the court decided that like all minerals, the gas was owned by the estate, providing "as a general rule, subterranean gas is owned by whoever has title to the property in which the gas is resting."⁵⁸ The majority then looked to the language of the "coal severance deed" and sought to ascertain whether the parties to the original transfer sought to alter the underlying transfer of the coalbed methane interest.⁵⁹ The deed expressly contemplated that the surface estate would retain the interest in oil and gas, stating that the "[t]he [surface estate] hereby reserve[s] the right to drill and operate through said coal for oil and gas without being liable for damages."⁶⁰ Nevertheless, the Court concluded that because the coalbed gas was a nuisance, the surface estate would have been loathe to retain it.⁶¹ Having decided that the gas resides in the coal, and that that construction was not altered by the deed of severance, the Court concluded that the owner of the coal seam also owned the coalbed methane residing

⁵² Paul Lyons, *Coalbed Methane Potential in the Appalachian States of Pennsylvania, West Virginia, Maryland, Ohio, Virginia, Kentucky, and Tennessee--An overview*, <http://pubs.usgs.gov/of/1996/of96-735/> (last visited Jan. 27, 2008).

⁵³ Pa. Bureau of Oil & Gas Mgmt., *CBM And Water Production for 1988-2005*, *supra* note 4, at 34.

⁵⁴ 468 A.2d 1380 (Pa. 1983).

⁵⁵ *Id.* at 1382 (noting the deed language conveyed "all the coal" to the mineral estate, but reserved to the surface owner the right to produce oil and gas, including "the right to drill and operate through said coal for oil and gas without being held liable for any damages").

⁵⁶ *Id.* at 1383.

⁵⁷ *Id.* at 1381-82.

⁵⁸ *Id.* at 1383.

⁵⁹ *Id.* at 1384 ("The plain meaning, in the common understanding, of the provisions in a severance deed has been utilized as the best construction, where it may safely be assumed that such was the understanding which the parties themselves accorded the terms").

⁶⁰ *Id.* at 1382 (emphasis omitted).

⁶¹ *Id.* at 1385 ("We find implicit in the reservation of the right to drill through the severed coal seam for 'oil and gas' a recognition of the parties that the gas was that which was generally known to be commercially exploitable.").

within the seam.⁶²

Justice Flaherty argued in dissent that the ownership equation was upset by the deed, although he did not disagree with the majority's key conclusion regarding coalbed gas ownership residing in the mineral estate.⁶³ Rather, because the deed did not qualify its reservation of "gas" and the historical evidence indicated that production of coalbed gas was occurring at the time, the dissent argued that the deed accorded the surface owner the right to extract the coalbed gas.⁶⁴

1. *Hoge's Impact*

Hoge was a landmark case⁶⁵ and resolved the question of who owns coalbed gas in the Commonwealth. The impact of the determination continues to reverberate more than two decades later.⁶⁶ The decision has not been followed by other jurisdictions encountering the same problem,⁶⁷ has prompted cries for legislative repeal, and has been the bane of homeowners within the Commonwealth.⁶⁸ Though it has had a profound impact on the rights of estate owners in Pennsylvania, its holding has never been challenged, cited or construed by another Pennsylvania court.⁶⁹ As a result, *Hoge's* scope and the allocation of rights between surface and mineral estates remain uncertain.

For many homeowners and farmers, *Hoge* represented a new legal regime that impaired their ability to enjoy their property, or worse, led to interference and outright destruction. Prior to *Hoge*, surface owners likely considered themselves secure from interference despite having severed the coal interest from their estates. In many instances the coal was already mined for production or was not viable for other reasons.⁷⁰ In the aftermath of *Hoge*, even in instances where coal cannot be developed, coalbed gas production remains a viable option for producers.⁷¹ As a result, surface owners without coal development rights live in a state of uncertainty, unsure of whether their land will be used to develop coalbed gas.⁷²

This is all the worse from the surface owners' position, because their divestitures

⁶² *Id.*

⁶³ *Id.* at 1388 (Flaherty, J., dissenting) ("[C]oalbed gas contained in coal is, ab initio, property of the coal owner.").

⁶⁴ *Id.* at 1389.

⁶⁵ Sarah Kathryn Farnell, *Methane Gas Ownership: A Proposed Solution for Alabama*, 33 ALA. L. REV. 521, 525-26 (1982) (citing the *Hoge* case as "the first major case to directly consider the issue" of coalbed gas ownership).

⁶⁶ Don Hopey, *Why Gas Bonanza is No Boon to Landowners*, PITTSBURGH POST-GAZETTE, April 29, 2007 at A1. (referencing the *Hoge* case as "a big part of the problem" confronting surface owners, and reciting a litany of negative consequences arising from the decision, including the absence to any right to royalties) [hereinafter Hopey, *Gas Bonanza*].

⁶⁷ See *Energy Dev. Corp. v. Moss*, 591 S.E.2d 135, 147 (W. Va. 2003) ("[W]e believe the important fact about *Hoge* is not so much our different theories of ownership, but that the court found that a limited reservation of a right to drill *through* the coal did not include the right to drill *into* the coal and develop the coalbed methane.").

⁶⁸ Hopey, *Gas Bonanza*, *supra* note 66, at A1.

⁶⁹ *Id.* (quoting University of Pittsburgh School of Law Professor Cyril Fox as saying, "there's been no litigation since the beginning of the coalbed methane boom to confirm [the rules of law as provided for in *Hoge*]").

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

of any ownership interest denies them a stake in production decisions. Key amongst these is the fact that surface owners have no right to royalties or compensation, because the court ruled that the mineral estate, and not the surface estate, owns and leases the rights to produce the gas.⁷³ By contrast, ordinary oil and gas lessors are guaranteed at least “one-eighth royalty of all oil, natural gas or gas of other designations removed or recovered from the subject real property.”⁷⁴

Potentially even more problematic is the disempowerment of the surface estate, which is denied the opportunity to engage in the bargaining and cooperative relationship that typifies oil and gas lease making. Moreover, the normal convention of paying damages to the surface estate, even where not required by the lease, is not adhered to by coalbed lessees.⁷⁵ Not surprisingly, the relationship of the oil and gas lessee with the surface owner is often less than amicable. The head of a leading oil and gas lessee trade association, testifying before a Joint Committee of the Pennsylvania General Assembly, echoed this sentiment, observing that “[w]here the surface owner has no direct financial interest in the well is where most of the difficulty and disagreements occur.”⁷⁶

2. *Hoge and the Implied Right of Surface Access for Coalbed Gas Producers*

Ultimately, Pennsylvania surface owners affected by *Hoge* are harmed by the implied right of access. It is peculiar, then, that the implied right to access the surface estate in the coalbed methane context was not discussed by the Pennsylvania Supreme Court in *Hoge*, nor has it been challenged in Pennsylvania courts in the intervening years. Perhaps it is simply an indication of the role of implied right of access as a precept of property law; challenging it would be akin to challenging gravity. In this situation, however, the respect for that principle demonstrated by the reluctance to challenge the decision may have been misplaced. It appears as though the underlying rationale for the application of the easement is not fulfilled, and in this instance at least, gravity may be susceptible to attack.

The justification for implied surface easements is typically couched in terms of accommodation to mineral owners. Williams & Meyers provide that when the deed or lease is silent as to surface access, “surface easements are implied as will permit the lessee . . . to enjoy the interest conveyed. Hence, by implication, the lessee . . . may make such use of the surface of the land as is reasonably necessary for exploration, development and production of minerals.”⁷⁷ This broad allowance is typically viewed as a necessary accommodation to mineral owners to facilitate the use and production of their property. Indeed, in the many contests that have been adjudicated between surface and mineral owners over surface access, the

⁷³ *Hoge*, 468 A.2d at 1384-85.

⁷⁴ 58 PA. STAT. ANN. § 33 (West 1995) (guaranteeing lessors minimum royalties on leases for new production of oil and gas).

⁷⁵ Hopey, *Gas Bonanza*, *supra* note 66, at A1.

⁷⁶ *Testimony of Louis D’Amico—Executive Director, Independent Oil and Gas Association of PA*, IOGA NEWS, March 2003, Number 185, available at: http://iogapa.org/files/185_Mar_03.pdf (The prepared testimony of Louis D’Amico, the Executive Director of the Independent Oil and Gas Association of Pennsylvania for Feb. 28, 2003 appearance before the Pennsylvania Legislature’s Joint Legislative Air and Water Pollution Control and Conservation Committee).

⁷⁷ Williams & Meyers, *supra* note 13 at § 218.

presumptive result has been that the mineral estate wins.⁷⁸ Yet, there is ample support for a far more restrictive approach applied in similar real property contexts. In Pennsylvania, courts have been willing to deny the easement in instances where other reasonable alternatives exist.

C. *Friedline v. Hoffman*

In *Friedline v. Hoffman*, the Pennsylvania Supreme Court considered whether a coal owner could be restrained from using the surface to obtain subsurface access to his coal where the parties' land sale contract was silent as to the matter.⁷⁹ Therein, the defendant coal owner purchased 85 acres of coal from the original owner.⁸⁰ In a contemporaneous transaction, the defendant bought five acres of the surface overlying his coal, to "be used in connection with their coal-mining operations," from the plaintiff and subsequent owner of the surface estate.⁸¹ The defendant thereafter unsuccessfully sought to purchase an additional acre, unconnected from the others previously conveyed, that he thought better-suited to facilitating his intended mining activities. Despite their failure to reach accord and against the plaintiff's protests, the defendant asserted his implied right to access the surface and used the plot that he sought to buy to take "possession of the acre[s], cut timber, sunk a shaft thereon . . . in preparation for coal mining."⁸²

Though the Court agreed that the default rule "entitled [the grantee] to such use of the surface as is necessary to make his reservation effective," it held that a "way of access to property . . . will be implied only when necessary to give effect to the grant or reservation but never merely as a matter of convenience."⁸³ Where the grantee "owns adjoining property, through or over which it is practically possible to mine and remove the reserved coal, he will not be entitled to use for that purpose the conveyed surface."⁸⁴ Applying its rule to the facts before it, the court enjoined the defendant's continued use of the surface estate, requiring the defendant to utilize his own surface property for access.⁸⁵ Thus, the Court conditioned use of the implied right, limiting its application in circumstances where alternate means of access make use of the surface unnecessary.

The Court expanded the breadth of its holding by liberally construing the terms "matter of convenience" upon which the court conditioned use of the implied right of access. It concluded that surface access will not be available where an alternative means of access exists.⁸⁶ Even when the alternative "is not the most convenient

⁷⁸ See, e.g., *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 599 (Pa. 1893) (stating that courts often refused to enjoin efforts to deny access, treating production as in the public interest, because "[c]oal, oil, gas and iron are absolutely essential to our common comfort and prosperity. To place them beyond the reach of the public would be a great public wrong. Abounding, as our state does, with these mineral treasures, so essential to our common prosperity, the question we are considering becomes of a quasi public character.").

⁷⁹ *Friedline v. Hoffman*, 115 A. 845, 845 (Pa. 1922).

⁸⁰ *Id.* at 845.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 846.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

avenue of approach,” it must be used so long as it “can . . . be mined at a profit and . . . is commercially feasible.”⁸⁷ Thus, the court ruled, only in instances where use of the alternative means of access was commercially infeasible or would make production unprofitable would surface access be available through the implied right. Though not credited for it, the court had anticipated developments in the law that would occur decades later regarding the balance of power between competing surface and subsurface owners.⁸⁸ The court betrayed no knowledge of the novelty of its decision, though its rule was at odds with the prevailing thinking of its time and is still at odds with *Hoge*.

1. Introduction to Argument Against the Implied Right of Access

At its essence, *Friedline* stands for the proposition that no implied right of access to the surface estate attaches where the mineral estate has other viable means of accessing and working its property.⁸⁹ In formulating its *Hoge* decision more than twenty years ago, the Pennsylvania Supreme Court did not cite to *Friedline*. Nor, as discussed above, did the court seek to elucidate the scope of the implied right of access, though it was a necessary corollary to the question of ownership of the coalbed gas. In the vacuum created by the *Hoge* decision, surface owners and gas owners have simply taken for granted that gas owners are due surface access.⁹⁰ Yet this interpretation does not fit with *Friedline*. Furthermore, the *Hoge* court referenced, without emphasis, an instance in which *Friedline* should arguably apply to restrict surface access for coalbed gas production. The court intended the passage to be innocuous and provided it as a means of background: “[m]ore recently there has developed an industrial capacity to drill into coal seams both horizontally and vertically to recover coalbed gas.”⁹¹ This passage should renew optimism of weary surface owners in Pennsylvania, for it may present a viable line of challenge to the scope of the *Hoge* decision.

2. Horizontal Drilling

The quote from *Hoge* is important because it mentions horizontal drilling, which was still a developing technology when it was decided in 1983.⁹² To understand the importance of the distinction between horizontal and vertical drilling, it may help to provide some background on drilling gas. Regardless of what a producer is drilling for, be it coal, conventional natural gas or coalbed methane, production requires someone to drill a shaft into the earth into which piping is sunk and the resource is

⁸⁷ *Id.*

⁸⁸ *See, e.g.,* Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971) (providing that “where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.”).

⁸⁹ *Friedline*, 115 A. at 846.

⁹⁰ *See* Hopey, *Gas Bonanza*, *supra* note 66, at A1 (“[A] big part of the problem is the . . . *Hoge* decision that gave ownership of the methane gas in coal seams to the owners of the coal, and has been used by gas companies to validate their rights to access private property.”).

⁹¹ United States Steel Corp. v. Hoge, 468 A.2d 1380, 1383 (Pa. 1983).

⁹² *Hoge*, 468 A.2d at 1383 (noting that “[t]here has recently developed an industrial capacity to drill into coal seams both horizontally and vertically to recover coalbed gas”).

recovered. This occurs regardless of whether “horizontal” or “vertical” production will take place. The difference in production methods only becomes apparent below the surface. A horizontally drilled hole turns sharply, running horizontally through the producing strata, whereas a vertical shaft simply terminates in the destination strata.⁹³

There are several important consequences stemming from the choice of horizontal and vertical production. Most important from the point of view of surface owners is the decreased surface interference or “footprint” caused by horizontal production activities.⁹⁴ Thus, “operators often are able to develop a reservoir with a sufficiently smaller number of horizontal wells, since each well can drain a larger rock volume about its bore than a vertical well could.”⁹⁵ As a result of the fewer number of production sites, the necessary byproducts of production itself, such as roads and pipelines, are also reduced.⁹⁶ This decreased need for surface access would likely be heralded as an imperfect solution by surface owners, but is clearly desirable to conventional vertically dug wells. Finally, recovery by means of horizontal drilling is also faster, meaning that the production process ends sooner—as does the adversarial relationship between surface and coal owners.

For the purposes of this article, horizontal drilling is particularly noteworthy because it is increasingly cost feasible. Since *Hoge* was decided, horizontally-drilled coalbed gas recovery has expanded in Appalachia and is now widely used.⁹⁷ Though it is still more costly at the outset, technological advances have made horizontal drilling a viable alternative to vertical drilling.⁹⁸ These advances have led some production experts to conclude that horizontal drilling is actually the lowest cost option when advanced production methods are applied and increased production and speed of recovery are factored into cost.⁹⁹

⁹³ *Id.*; ENERGY INFO. ADMIN., U.S. DEPT. OF ENERGY, DRILLING SIDEWAYS – A REVIEW OF HORIZONTAL WELL TECHNOLOGY AND ITS DOMESTIC APPLICATION 1 (1993), available at <http://tonto.eia.doe.gov/FTPROOT/petroleum/tr0565.pdf>. The Energy Information Administration describes horizontal drilling as

the process of drilling and completing . . . a well that begins as a vertical or inclined linear bore which extends from the surface to a subsurface location just above the target oil or gas reservoir called the ‘kickoff point,’ then bears off on an arc to intersect the reservoir at the ‘entry point,’ and, thereafter, continues at a near-horizontal attitude tangent to the arc, to substantially or entirely remain within the reservoir until the desired bottom hole location is reached. *Id.*

⁹⁴ *Id.* at 4 (“An added advantage relative to the environmental costs or land use problems that may pertain in some situations is that the aggregate surface ‘footprint’ of an oil or gas recovery operation can be reduced by use of horizontal wells.”).

⁹⁵ *Id.*

⁹⁶ *Id.* at 1 (noting that horizontal drilling, when applied correctly, reduces the environmental impact of drilling).

⁹⁷ Megan Server, *Coalbed Gas Enters the Energy Mix*, GEOTIMES, Sept. 2006, http://www.geotimes.org/sept06/feature_EnergyMix.html (describing the use of horizontal drilling methods to recover coalbed methane in Appalachia).

⁹⁸ PETROLEUM TECH. TRANSFER COUNSEL, HORIZONTAL DRILLING - A TECHNOLOGY UPDATE FOR THE APPALACHIAN BASIN 1 (2004), available at http://www.pttc.org/solutions/sol_2004/535.pdf (indicating that “[a]lthough initially more costly, when accelerated production and higher recovery rates are considered, reserve unit development cost is actually lower than conventionally drilled projects.”).

⁹⁹ *Id.*

3. *The Case for a Broad Interpretation of Friedline*

There are two requirements necessary for *Friedline*'s holding to attach and restrict surface access: an alternative means of access must 1) exist and 2) be economically feasible. The second element of the *Friedline* holding requires that where two means of access to coal are available, an implied right of access over the surface owner's property will be denied even when the alternative means of access "is not the most convenient avenue of approach to the coal."¹⁰⁰ So long as the alternative means of access "can thereby be mined at a profit and that it is commercially feasible to do so," the court will insist that production utilize that means of access.¹⁰¹ As demonstrated above, horizontal drilling is a developing technology whose benefits make it a viable commercial alternative to vertical drilling. As noted above, it is currently widely used for the recovery of oil, conventional natural gas, and coalbed methane in Appalachia. Production experts have likewise concluded that utilization of horizontal drilling will continue to grow.¹⁰² This does not necessarily mean that it is adequate for every recovery site; however, its use is consistent with profitable production and it is a commercially feasible alternative in many instances.

The first component in *Friedline* requires that an alternative means of access be available. The court provided that if the coal owner "owns adjoining property, through or over which it is practically possible to mine and remove the reserved coal, he will not be entitled to use for that purpose the conveyed surface."¹⁰³ The court is thus restricting access where alternative means of access are available. This holding can be read in one of two ways: first, it could be read narrowly to prevent surface use only in instances where the coal owner has his own surface property that can serve as an access point for commercially viable production. In a typical situation in which the coalbed gas owner does not own any portion of the surface estate, a narrow reading of *Friedline* would result in surface owners not receiving any accommodation from gas lessees. A broader interpretation of *Friedline*, however, provides that if an alternative means of access exists, additional use of the surface estate will not be allowed. This article advocates use of the latter theory, supported by decisions by courts in Pennsylvania, and elsewhere, that mirror principles set forth in *Friedline*.

Friedline specifies that "a way of access to property . . . will be implied only when necessary to give effect to the grant or reservation, but never merely as a matter of convenience."¹⁰⁴ Implicit in this statement is a recognition of the distinction between reasonableness and necessity. Some surface access will almost always be necessary, because without such a right of access, the coalbed gas owner's rights would be rendered valueless.¹⁰⁵ This argument seeks to restrict the scope of that right where an alternative means of access renders additional use of the surface superfluous.

This effort to distinguish between necessary and unnecessary or superfluous

¹⁰⁰ *Friedline v. Hoffman*, 115 A. 845, 846 (Pa. 1922).

¹⁰¹ *Id.*

¹⁰² ENERGY INFO. ADMIN., U.S. DEPT. OF ENERGY, *supra* note 93, at 20.

¹⁰³ *Friedline*, 115 A. at 846.

¹⁰⁴ *Id.*

¹⁰⁵ *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 598 (Pa. 1892).

access is consistent with other cases. For instance, in *Chartiers Block Coal Company v. Mellon*, the Pennsylvania Supreme Court spoke to the relationship between surface and subsurface owners.¹⁰⁶ The Court noted that

As against the owner of the surface, each of the several purchasers would have the right . . . to go upon the surface to open a way by shaft, or drill, or well, to his underlying estate, and to occupy so much of the surface . . . as might be *necessary* to operate his estate, and to remove the product thereof. This is a right to be exercised with *due regard* to the owner of the surface, and its exercise will be restrained within proper limits.¹⁰⁷

This statement of the law can be read as a limitation on the rights of the mineral estate vis-à-vis the surface, requiring that every use of the surface must be necessary. Thus, this decision is consistent with *Friedline*: even where a single necessary use is made, additional uses may be restricted where they are not necessary.

The “due regard” language used by the court in *Chartiers Block Coal Company* seeks to balance the power between competing uses for the surface.¹⁰⁸ Rather than giving the producer an unrestricted right to do all that is reasonably necessary to the recovery of coal, the producer must take into account the methods and impact of the proposed recovery plan.¹⁰⁹ This idea, that the methods of recovery can also be constrained where they will conflict with the surface use, also finds support elsewhere in Pennsylvania case law.

In *Gillespie v. American Zinc & Chemical Co.*, for instance, the Pennsylvania Supreme Court provided that the surface owner may affect the locations of wells to be dug.¹¹⁰ The Court stated that

as between two proposed locations for the drilling and operation of a well, when one would injure, harass and annoy the owner of the land, without benefit or advantage to the [producer], while the other would result in no such injury, the [producer] is bound . . . to choose the latter location, if in so doing he is not substantially injured, or put to disadvantage thereby.¹¹¹

Again, the Court showed a willingness to curb producers’ surface excesses where there was a negligible impact on production and a reasonable alternative available. This decision is also consistent with *Friedline*’s protection of the surface estate; the Court therein was unwilling to grant surface access where production was possible via an alternative means of access without material economic harm to the producer.¹¹²

The Pennsylvania Supreme Court decision in *Gillespie* is also consistent with *United States v. Minard Run Oil Company*, a 1980 decision from the United States District Court for the Western District of Pennsylvania expanding upon *Gillespie*’s

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 598 (emphasis added).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Gillespie v. Am. Zinc & Chem. Co.*, 93 A. 272, 274 (Pa. 1915).

¹¹¹ *Id.*

¹¹² *Friedline*, 115 A. at 846.

holding.¹¹³ In that unpublished decision, the court went beyond *Gillespie* in regulating the production methods chosen, providing “where two alternative *methods* of proceeding are available to the mineral operator, neither of which is of detriment to the mineral operation and one of which is detrimental to the surface owner, the mineral operator must select the method which does not act to the detriment of the surface owner.”¹¹⁴ The court granted an injunction to bar oil and gas producers from clearing sites of valuable timber in a government-owned forest without giving the government the notice necessary to prepare it to sell the felled timber.¹¹⁵ Thus, where a producer’s production practices harmed the interests of the surface owner, the court was willing to grant a remedy.¹¹⁶ In that instance, the added burden of providing notice was placed upon the producer that did not ordinarily apply.¹¹⁷ In the coalbed gas context, this principle could similarly apply to require that between competing methods of production, the surface owner may require the use of the least harmful alternative. *Minard*, *Gillespie*, and *Chartiers Block Coal Company* all require producer accommodation of surface estate uses in various ways.¹¹⁸

The same thread binds these cases to a development in the law occurring in some Western states. Known popularly as the “accommodation doctrine,” it has been adopted by some Western states to better protect the rights of surface owners from avoidable interference at the hands of mineral estates.¹¹⁹ This approach has been described as requiring courts to take a “multi-dimensional view, balancing the interests of both the mineral and surface owners.”¹²⁰ In announcing the new theory, the Texas Supreme Court provided in *Getty Oil Co. v. Jones*, that “the dominant mineral estate has the right to reasonable use of the surface estate to produce minerals but this right is to be exercised with due regard for the rights of the surface estate’s owner.”¹²¹ In application, courts have not supported efforts by producers to utilize the surface estate where interference could be mitigated by viable alternate methods of production. Thus, the usage will be denied if “it could be unreasonable for the mineral owner . . . to employ an interfering method or manner of use.”¹²²

Of course, the accommodation doctrine is not entirely consistent with Pennsylvania’s jurisprudence. Courts applying the accommodation doctrine require interference with an existing productive use of the surface by the servient estate.¹²³

¹¹³ *United States v. Minard Run Oil Co.*, No. 80-129, 1980 U.S. Dist. LEXIS 9570, at *19-20 (W.D. Pa. Dec. 16, 1980).

¹¹⁴ *Id.* at *18-19 (citing *Gillespie*, 93 A. at 273-74) (emphasis added).

¹¹⁵ *Id.* at *21-22.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at *19 (providing that “[i]n order properly to avoid an unnecessary impairment of surface resources incident to contemplated mineral operations, plaintiff is entitled to receive from defendant reasonable advance notice in writing”).

¹¹⁸ *Minard Run Oil Co.*, 1980 U.S. Dist. LEXIS 9570, at *20-21; *Gillespie*, 93 A. at 274; *Chartiers Block Coal Co.*, 25 A. at 598 (Pa. 1892).

¹¹⁹ *See, e.g., Getty*, 470 S.W.2d at 622-23 (noting that “[u]nder [some] circumstances the right of surface owner to an accommodation between the two estates may be shown”).

¹²⁰ WILLIAMS & MEYERS, *supra* note 13.

¹²¹ *Tex. Genco, LP v. Valence Operating Co.*, 187 S.W.3d 118, 121 (Tex. App. 2006) (citing *Getty*, 479 S.W.2d at 622).

¹²² *Id.* at 122 n.1.

¹²³ *Id.* at 121-22 (“Where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives

That is, use of the surface, in and of itself, would not be considered interference. Absent competing uses, courts have been unwilling to bar mineral estate use of the surface estate. Even though the two are denominated in different terms, the underlying themes of *Friedline* and *Getty* seek to protect the surface estate from mineral estate encroachments where reasonable alternatives exist.

A recent Texas decision may further unify the laws of east and west. In that case, *Texas Genco, LP v. Valence Operating Co.*, the Court of Appeals of Texas permanently barred the mineral estate from interfering with an existing surface use where the mineral estate could utilize an economically reasonable alternative means of access.¹²⁴ In *Texas Genco*, a gas well lessee sought access to drill through an as yet unused section of a landfill.¹²⁵ The landfill owner sought to bar the lessee's use of the planned site because it would have a deleterious effect on the owner's present use of other portions of the landfill and his future use of the planned site.¹²⁶ Where a conflict prevented both the mineral and surface estates' uses, the Court of Appeals ruled for the landfill owner in requiring the gas lessee to accommodate the surface estate.¹²⁷ In an effort to prevent needless interference with the surface estate, the court required the dominant mineral estate to occupy a lesser desired portion of the surface and use directional drilling despite the added expense and reduced profitability it would entail.¹²⁸ Thus, application of the doctrine can be applied to require action to prevent needless interference with the surface estate where alternative production methods or production locations can be utilized profitably.

D. A New Standard

The standard expounded here seeks to prevent unnecessary use of the surface where alternative viable means of production make additional use unreasonable and unnecessary. Given the case delineated above for a broader interpretation of *Friedline*, this article argues that whenever economically viable, an alternative method of production should be required to accommodate surface owners that would be injured otherwise. In the context of coalbed gas development, horizontal drilling serves as such an accommodation; it is an alternative means of production and is increasingly economically feasible. Effectively, this theory would require the use of horizontal drilling and would bar drilling any well that would not be required if horizontal recovery were used.

In *Friedline*, the Court was willing to enjoin even routine use, that is, use that would not in other circumstances be actionable. The court grounded its decision on the fact that "defendants have a practicable way over their own lands for the removal of the coal in question; hence, the law cannot allow them a right-of-way by necessity

available to the mineral owner whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the mineral owner.").

¹²⁴ *Id.* at 118.

¹²⁵ *Id.* at 120.

¹²⁶ *Id.* at 121.

¹²⁷ *Id.* at 122.

¹²⁸ *Id.* at 124 ("Genco had an existing use that would be substantially impaired by Valence's straight-hole drilling its Holmes No. 8 well, and (2) directional drilling is a reasonable, industry-established, alternative method for Valence to access its gas. These findings established Valence's duty to accommodate Genco's surface use.").

over plaintiff's land."¹²⁹ Thus, because the defendant had a means of access via his own property, the court would not allow unnecessary surface use as a mere accommodation. Similarly, in garden variety coalbed gas production, numerous wells are drilled in the course of exploration and production. The surface owner cannot prevent the coalbed gas owner from sinking a well to produce gas. Having sunk a well, however, the producer has obtained access to the subsurface estate. Horizontal drilling, as discussed previously, can recover via one access point what it takes numerous vertical wells to accomplish—thus avoiding the disruptive need to drill multiple wells.

Surface owners who have balked at the uncompensated use of their land would benefit from a judicial or legislative application of *Friedline* to restrict surface access. In such an instance, two things could happen, both advantageous to surface owners. One, horizontal production could ensue without surface owner consent or compensation. This option would still lead to reduced interference, a reduced production footprint, and a faster recovery process. Second, the gas owner could bargain with the surface owner for the right to drill vertically. This could serve to empower surface owners, giving them the right to extract rent payments or other concessions on the place or manner of production.

¹²⁹ *Friedline*, 115 A. at 846.