

A Primer on Mineral Severance for West Virginia Farmers

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This Primer does not contain legal advice and is not a legal document. Those with legal questions about severed minerals or other land use issues should consult a licensed attorney.

1. Background

a. What Is Mineral Severance?

In most countries around the world, minerals, such as coal, oil, and gas, underlying the earth are owned by the government. The United States, however, has a unique system that allows for private ownership of minerals. Normally, under traditional American property law, when someone owns land, he or she owns everything above it up to the sky, and everything beneath it to the center of the earth. But the legal doctrine known as “mineral severance” allows the “surface estate” and the “mineral estate” to be bought and sold separately from one another.

Having different owners for the surface estate and the mineral estate means that the surface estate owner may be living or working on top of someone else’s mineral estate. Different states’ laws have evolved to establish surface owners’ rights and mineral owners’ rights. Traditionally, the mineral estate has been “dominant.” This means the mineral owner has the right to use the surface estate to access the mineral estate. Because mineral estates often involve valuable, difficult-to-reach resources, the use of the surface estate can involve long-term industrial activity resulting in environmental degradation and disruptions to the surface owner’s way of life.

For many years, West Virginia has experienced very active land speculation, both for surface and mineral estates.ⁱ This means that much of West Virginia’s surface estates are separated from mineral estates. It is estimated that in southern West Virginia, as much as 90% of estates are divided into surface and mineral estates.ⁱⁱ Further, substantial portions of both types of estate are owned by out-of-state, corporate

entities.ⁱⁱⁱ But even where a surface owner does technically retain ownership over the mineral estate, a previous owner may have leased the minerals out; if the lease is still applicable, the landowner faces the same issues as someone who owns the surface only.

b. Unique Concerns for Farmers

Severed mineral estates can be highly problematic for West Virginia farmers. As an initial issue, it can simply be very difficult to determine who owns the title to a particular estate. One potential avenue is to seek a title opinion from an attorney, but title opinions can be very expensive. Title opinions for mineral estates in West Virginia are often particularly complicated because most mineral estates were severed many decades ago. The historical exploitation of mineral estates can also be problematic for West Virginia farmers. Issues such as acid mine drainage and other environmental problems can make land unsuitable for agriculture.

Severed minerals can therefore be a barrier to entry for new farmers, as purchasing property carries with it these risks and expenses. Severed minerals can also be highly problematic for current farmers. Current farmers may lack information about whether someone owns the resources beneath their land, and if so, who. This, in turn, may impose limitations on farmers' ability to control how they use their land, and the certainty they have in pursuing agricultural activities.

Because farmers' livelihoods are so closely linked to their land, many issues make mineral development uniquely hazardous to farmers. If a mineral estate owner chooses to exploit minerals while a farmer is farming, damage to crops or water quality and other harms may occur. Severed minerals can be an impediment to agricultural conservation easements, discussed below. Mineral development could also compromise a farm's organic certification status.

2. What Are Surface Owners' Rights and Obligations?

The owners of surface estates and mineral estates each have certain rights and obligations under West Virginia law. For any estates severed prior to 1983, which is the majority of estates, the surface estate is "servient" and the mineral estate is "dominant."^{iv} This means that a surface estate owner may not refuse to allow development, as the mineral owner has "an implied right to use the surface in such

manner and with such means as would be fairly necessary for the enjoyment of the mineral estate.”^v Mineral owners may do whatever is “reasonably necessary” for the extraction of minerals so long as they can demonstrate “that the right can be exercised without any substantial burden to the surface owner.”^{vi} However, “a right to surface use will not be implied where it is totally incompatible with the rights of the surface owner.”^{vii}

A surface owner may be able to force changes to the mineral owner’s desired course of action through a legal tool known as the “Accommodation Doctrine.” To benefit from the accommodation doctrine, the surface owner must show (1) that the surface land is subject to an existing use; (2) that the proposed use by the mineral owner or lessee would prevent or significantly impair that use; and (3) a reasonable alternative is available to the mineral owner or lessee.^{viii}

The West Virginia legislature has made some attempts to better protect surface owners through legislative reform. The Oil and Gas Production Damage Compensation Act of 1983 provided that if mineral and surface estates were severed after 1983, the estates were equal, rather than dominant and servient.^{ix} Under the Act, surface owners may be compensated for five types of harms: (1) lost income and expenses; (2) the market value of lost crops; (3) damages to any water supply that was in use; (4) damages to personal property; and (5) compensation for any reduction in value of the surface lands the driller used.^x The standard for these harms is strict liability, meaning that surface owners do not need to show the uses were unreasonable.^{xi}

In 2011, the West Virginia legislature adopted two pieces of legislation applicable to horizontal wells used in hydraulic fracturing. The 2011 Oil and Gas Horizontal Well Production Damage Act provided similar protections to surface owners as existed under the 1983 Act, but specific to the use of hydraulic fracturing.^{xii} The Natural Gas Horizontal Well Control Act of 2011 required mineral developers to provide the surface owner with a “Notice and Application for a Well Work Permit.”^{xiii} This Act provides that a horizontal gas well may not be drilled within 250 feet of an existing water well or developed spring used for domestic or animal consumption, and 625 feet from an

occupied dwelling or building 2,500 square feet or larger used to house or shelter dairy cattle or poultry husbandry, although the well operator may be granted a variance.^{xiv}

3. Issues with Agricultural Conservation Easements

a. What Is an Agricultural Conservation Easement?

An easement generally means the right to do something on someone else's land, like walking across it to access a road. An agricultural easement is a "negative easement" or an agreement to give up the right to do something on your own land. These types of easements "restrict the amount and variety of development that may occur on a specified tract of land . . . restrict[ing] development only to the extent necessary to preserve the significant attributes of the property."^{xv}

If a landowner sells or donates an agricultural easement on her land, she is essentially selling or donating the right to develop the land for non-agricultural uses. This means that after the easement is donated, the land can only be used for agricultural purposes. The holder of the easement, typically either a non-profit organization or a governmental entity, will conduct regular inspections to ensure that the terms of the easement are being met.

People usually pursue easements for a combination of altruistic and financial reasons. Agricultural easements benefit the landowner financially either through a purchase for fair market value, or tax deductions for donations. Agricultural easements also benefit the public by protecting the food supply and certain environmental conservation values.

Agricultural easements and related easements "are illustrative of federal and state government working together to provide incentives for land conservation . . . provid[ing] a free market alternative to land use regulation."^{xvi} Thus, an easement may be created under federal or state law, so long as an entity qualified under either federal or state law is the holder of the easement;^{xvii} usually, state and federal actors work together on administration. At the state level, the West Virginia Conservation and Preservation Easements Act of 1995 authorized conservation easements.^{xviii} At the federal level, the Agricultural Conservation Easement Program (ACEP) is administered

by the United States Department of Agriculture Natural Resources Conservation Service (NRCS).^{xix}

ACEP provides financial and technical assistance to help conserve agricultural lands and limit non-agricultural use of particular parcels.^{xx} “NRCS provides financial assistance to help eligible partners for purchasing Agricultural Land Easements that protect the agricultural use and conservation values of eligible land. In the case of working farms, the program helps farmers and ranchers keep their land in agriculture.”^{xxi} Cropland, grassland, and pastureland are among types of land eligible for agricultural easements.^{xxii} Easements may be permanent or for terms of years.^{xxiii}

In West Virginia, applications for ACEP may be submitted through the NRCS West Virginia office.^{xxiv} County Farm Bureaus and the Agricultural Lands Protection Authority, also devoted to preserving farmland in West Virginia,^{xxv} are also heavily involved in farmland protection and the administration of agricultural conservation easements.^{xxvi}

Conservation easement transactions are complex and time-consuming, and will require planning and consultation with an attorney. Properties of less than twenty acres are usually not considered eligible under the state criteria.^{xxvii} For Frequently Asked Questions about agricultural conservation easements, see *Frequently Asked Questions*, West Virginia Farmland Protection, <http://wvfp.org/about/frequently-asked-questions/#.Vmb6BNAUwqY>.

b. Barriers to Easing Land with Severed Minerals

It is more difficult to secure conservation easements on lands with severed or leased minerals. The West Virginia Farm Bureau explains that county farmland protection boards will accept easements where third parties own the minerals only if:

1. The third party mineral owner agrees to prohibit any surface mining; and
2. The third party oil and gas owner agrees to construct a maximum number of wellheads as determined by the Board; or
3. The probability of surface mining is considered to be extremely unlikely as determined by the Board after consideration of all facts and circumstances. Such considerations shall include, but shall not be limited to:

- a. Past or current surface mining in the vicinity;
- b. The identity of the third party owner and whether they are still in existence;
- c. The probable extent of such minerals and the resultant financial attractiveness.^{xxviii}

“The West Virginia Agricultural Land Protection Authority has adopted guidance recommending prohibitions against accepting easements with severed mineral rights unless the right to those minerals is subordinated to the easement; the mineral rights are repurchased; or the likelihood of extraction is so remote as to be negligible, in accordance with IRS regulations.”^{xxix} It does, however “provide a list of issues to be addressed in a policy that does accept easements that allow minor mineral development leases.”^{xxx}

The guidelines recommended by the state authorities are drawn in part by the IRS’s standards for what easements qualify for tax deductions. Primarily, deductions or prohibited for conservation easements with the potential for surface mining,^{xxxi} and the exceptions to this standard mirror the standard articulated by the Farm Bureau above. Namely, the easement will be eligible for the deduction “if the probability of surface mining occurring on such property is so remote as to be negligible.”^{xxxii} The conservation must also be granted in perpetuity (forever) to qualify for the federal tax deduction.^{xxxiii}

c. Potential Steps to Take

Landowners who wish to seek an agricultural conservation easement on land where the minerals are owned by a third party may:

- Negotiate with the other party for a subordination agreement (in which the other party agrees that the terms of the easement are controlling over potential development);
- Attempt to purchase the minerals; or
- Show that the likelihood of mineral development is remote.

4. What Is Being Done to Change the Current Situation?

a. In West Virginia

The organizations discussed below a role in either protecting farmland or advocating enhanced measures for protecting surface owners' rights. They are also excellent resources for landowners with questions about farmland protection and severed minerals.

i. The West Virginia Surface Owners Rights Organization

The West Virginia Surface Owners Rights Organization (SORO) was formed in 2007 with the mission to protect landowners from abuses by oil and gas drillers.^{xxxiv} The organization now enjoys statewide membership. "WV SORO focuses on public policy and regulatory changes needed to expand surface owners' rights and help West Virginians protect their land and water resources."^{xxxv}

Since its founding, SORO affiliates have organized meetings with stakeholders and legislators, coordinated community efforts, testified in front of legislative committees, monitored legislative developments, and pursued legislative lobbying. In 2011, SORO began focusing on litigation as well. The organization aims to spread awareness about how oil and gas drilling affects people and damages their property, and to "help[] surface owners have their rights recognized and respected, and giv[e] them more say when oil and gas development occurs on their land."^{xxxvi} SORO has developed numerous, in-depth resources that provide guidance to surface owners, including the Surface Owner's Guide to Oil and Gas.^{xxxvii}

SORO has been trying for several years to pass a "Surface Owners' Bill of Rights" to enhance legal protections for surface owners. SORO advocates a bill with the following provisions: earlier notice to the surface owner of the intent to develop; a required meeting between parties to encourage the formation of a surface use agreement; pre-drilling mediation between the parties; bonding requirements; and better compensation for the surface owner.^{xxxviii}

ii. The West Virginia Farm Bureau & The Agricultural Land Protection Authority

The West Virginia Voluntary Farmland Protection Act was passed in 2000. It sought to:

- Assist in sustaining the farming community;
- Provide sources of agricultural products within the state for citizens of the state;
- Control the urban expansion which is consuming the agricultural land, topsoil and woodland of the state;
- Curb the spread of urban blight and deterioration;
- Protect agricultural land and woodland as open-space land;
- Enhance tourism;
- Protect worthwhile community values, institutions and landscapes which are inseparably associated with traditional farming.^{xxxix}

The Act also established the Agricultural Land Protection Authority and provided for it to be comprised in part by nominees from the West Virginia Farm Bureau.^{xl}

The West Virginia Farm Bureau (WVFB) is a grassroots, member-run organization that represents more than 17,000 member families.^{xli} It monitors legislative developments, informs its constituents about them, and engages in legislative advocacy on agricultural issues.^{xlii}

The Farm Bureau advocates stricter enforcement of existing laws, the development of laws to deal with subsidence, and the requirements of an agricultural representative on the West Virginia Oil and Gas Conservation Committee.^{xliii}

The WVFB's 2015 legislative priorities included:

- Promote action to secure an agriculture exemption for aboveground storage tanks not located in critical concern areas.
- Promote reasonable and responsible legislation regulating oil and gas exploration that will protect private property/surface owners' rights and the environment, while encouraging the development of our resources. Farm Bureau supports the rights of land and mineral owners to negotiate with other parties to achieve the desired use of resources.

5. Action Steps for Individual Farmers

a. For Current or Potential Landowners

Do Your Due Diligence: Anyone who owns or wishes to own land in West Virginia should attempt to understand the title to the land in question as well as possible. Unfortunately, the typical way to do this is with a potentially expensive and time-consuming title opinion. However, this initial expense could help offset later expenses, either by allowing you to decide not to purchase land with severed minerals,

or by making you as well-informed as possible about the owner or lessor of minerals under land you currently own. If at all possible, seek to acquire the rights to any minerals under your land. SORO argues that even acquiring a small fraction of an ownership interest could be beneficial.^{xliv}

Current and potential landowners can:

- Research the title to their own property and to any severed mineral estate in order to be better informed about what risks they may be exposed to;
- Attempt to acquire the mineral interests under their land;
- Challenge or comment on a permit application after they receive notice of an intent to drill;
- Challenge whether the self-proclaimed mineral owner or lessor does, in fact, have the right to the minerals, or other terms of existing deeds or leases—for instance, a mineral deed drafted long ago without knowledge of modern technological advancements may not have had certain drilling methods “within the contemplation of the parties,”^{xlv} and a mineral developer could be exceeding its rights;
- Negotiate for a surface use agreement;
- Challenge the mineral owner’s course of action;
- Seek compensation for damages;
- Exercise the right to use arbitration;

Know Your Rights: The summary above is a very brief outline of the complex area of the rights of owners of surface land and mineral estates. Whether the minerals underneath your land have unknown ownership, were leased by your predecessor to the surface estate, or were sold a century ago, you can protect your land by exercising your rights if you are dealing with oil and gas or other mineral development. If you are unable to consult with an attorney, the organizations listed above provide many great resources for landowners.

ⁱ See generally *Who Owns West Virginia?*, WEST VIRGINIA CENTER ON BUDGET & POLICY (DEC. 2013), available at <http://www.wvpolicy.org/wp-content/uploads/2013/12/land-study-paper-final3.pdf>.

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- ii Sarah Danly, *Impacts of Severed Mineral Estates on Agricultural Surface Owners in West Virginia*, WEST VIRGINIA FOOD AND FARM COALITION (2015), available at <http://wvfoodandfarm.org/wp-content/uploads/2015/10/severed-mineral-estates-agricultural-surface-owners.pdf>
- iii *Who Owns West Virginia?*, *supra* note 1.
- iv Heron, DuClos, & Goho, *The Interpretation of Surface Easements in Severance Deeds as a Limit on Hydraulic Fracturing Practices*, 19 BUFF ENVTL. L.J. 71, 81 (2011-2012), available at <https://jduclos.com/pdf/easement.pdf>.
- v *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 386 (4th Cir. 2013).
- vi *Id.*
- vii *Buffalo Min. Co. v. Martin*, 165 W. Va. 10, 18 (1980)
- viii *Id.*
- ix W. Va. Code § 22-7-1(a)(1).
- x W. Va. Code § 22-7-3(a)(1).
- xi Heron et al, *supra*, at 83.
- xii *Id.* 83-84.
- xiii W. Va. Code §22-6A-16(b).
- xiv W. Va. Code § 22-6A-12.
- xv Anderson at 618.
- xvi *See generally Who Owns West Virginia?*, WEST VIRGINIA CENTER ON BUDGET & POLICY (DEC. 2013), available at <http://www.wvpolicy.org/wp-content/uploads/2013/12/land-study-paper-final3.pdf>.
- xvii R. Christopher Anderson, *Some Green for Some Green in West Virginia: An Overview of the West Virginia Conservation and Preservation Easements Act*, 99 W. VA. L. REV. 617, 623 (1997).
- xviii W. Va. Code § 20-12-1 et seq.
- xix *Agricultural Conservation Easement Program*, USDA Natural Resources Conservation Service, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/>.
- xx *Id.*
- xxi *Id.*
- xxii *Id.*
- xxiii *Id.*
- xxiv *Agricultural Land Easements*, Natural Resources Conservation Service West Virginia, <http://www.nrcs.usda.gov/wps/portal/nrcs/detail/wv/programs/easements/acep/?cid=nr cseprd388626>.
- xxv *See* W. Va. Code § 8A-12-1 et seq.
- xxvi *See* W. Va. Code § 8A-12-2.
- xxvii *Frequently Asked Questions*, West Virginia Farm Bureau, <http://wvfp.org/about/frequently-asked-questions/#.Vmb6BNAUwqY>
- xxviii <http://wvfp.org/about/frequently-asked-questions/#.Vmb6BNAUwqY>
- xxix Anderson, *supra*, at 618.
- xxx *Id.*
- xxxi 26 USC § 170(h)(5)(B)(i).
- xxxii 26 USC § 170(h)(5)(B)(ii).
- xxxiii 26 USC § 170(h)(5)(A).
- xxxiv Danly, *supra* note 1.
- xxxv *West Virginia Surface Owners' Rights Organization*, <http://www.wvsoro.org>.

^{xxxvi} *Surface Owners' News*, West Virginia Surface Owners' Rights Organization 5 (Summer 2012), <http://www.wvsoro.org/newsletters/2012/summer.pdf>.

^{xxxvii} *West Virginia Surface Owners' Guide to Oil and Gas*, WV SORO (2004/2005), http://wvsoro.org/oil_and_gas_guide/OilGasSurfaceOwnerGuide2004v7.pdf.

^{xxxviii} Danly, *supra* note 1.

^{xxxix} See W. Va. Code § 8A-12-1.

^{xl} W. Va. Code § 8A-12-8(a)(2).

^{xli} *About the WV Farm Bureau*, West Virginia Farm Bureau, <https://www.wvfarm.org/whoweare.asp>.

^{xlii} *Id.*

^{xliii} Danly, *supra* note 1.

^{xliv} <http://www.wvsoro.org/resources/advice/advice19.html>

^{xlv} *Brown v. Crozer Coal & Land Co.*, 144 W. Va. 296, 309 (1959).