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ADR AND THE EXTRACTION OF COAL BED METHANE FROM SPLIT-OWNERSHIP ESTATES

By
Alyssa Looney *

I. INTRODUCTION

Coal bed methane, also known as coal seam gas, is methane gas (CH₄) that is formed as part of the coal formation, or coalification.¹ Just 100 years ago, coal bed methane was not known as a valuable mineral.² Methane is a highly combustible and potent greenhouse gas;³ thus, it has historically been regarded as one of the greatest dangers in the coal mining industry.⁴ Traditionally, coal bed methane was exploded or vented to protect coal miners from accidental explosions or asphyxiation.⁵ Caged canaries were kept in coal mines to warn miners of the presence of this hazardous gas.⁶ The first serious research on coal bed methane production did not occur until the 1970s when the U.S. Bureau of Mines and United States Steel Corporation developed a test project in Alabama's Black Warrior Basin.⁷ Utilizing modern extraction techniques, coal bed methane extraction is now practical.⁸

In all industries of mineral extraction, conflicts can arise. Issues regarding coal bed methane are especially prevalent in situations where there is a split-estate.⁹ It is relatively common to find in land titles that the surface has been severed from the mineral

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¹ *What is Coal Seam Gas?*, WORLD COAL ASSOCIATION, <http://www.worldcoal.org/coal/coal-seam-methane/> (last visited May 5, 2014).

² *S. Ute Indian Tribe v. Amoco Prod. Co.*, 874 F. Supp. 1142, 1155 (D. Colo. 1995).

³ *What is Coal Seam Gas?*, *supra* note 1. Methane is twenty-three times more harmful than carbon dioxide (CO₂).

⁴ Elizabeth A. McClanahan, *Coal Bed Methane: Myths, Facts, and Legends of its History and the Legislative and Regulatory Climate to the 21st Century*, 48 OKLA. L. REV. 471, 471 (1995) (discussing the history of coal bed methane production).

⁵ *Id.*

⁶ *S. Ute Indian Tribe*, 874 F. Supp. at 1155.

⁷ McClanahan, *supra* note 4, at 473.

⁸ *Id.* at 471.

⁹ *See, e.g.*, *S. Ute Indian Tribe*, 874 F. Supp. at 1142. A split-estate situation is where the surface rights and subsurface rights are owned by different parties. *Split Estate*, BUREAU LAND MGMT., http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/best_management_practices/split_estate.html (last visited May 5, 2014).

or subsurface estate.¹⁰ Because the extraction of coal bed methane for energy use is a relatively new process, the issues that arise are not necessarily addressed by traditional oil and gas law.¹¹ For example, a common issue is determining who has the right to extract the coal bed methane and who has ownership over the gas.¹² Because coal bed methane was previously seen as valueless, the deeds or leases creating the split-estate generally did not address the ownership issue.¹³ Conflicts can also arise between split-owners during the actual drilling process, as neither mineral nor surface rights may be enjoyed without effecting the other.¹⁴ Some states have addressed these issues by codifying dispute resolution systems that limit property litigation between owners of split estates. Three such states include Virginia, Pennsylvania, and West Virginia.

This article will discuss the composition of these states' dispute resolution systems. First, it will look at the law in Virginia creating an arbitration system for resolving coal bed methane ownership disputes. Then, it will discuss Pennsylvania's statute creating a system to resolve disputes over the proposed location of coal bed methane wells or access road associated with such wells. Next, this article will explore the law in West Virginia creating a dispute resolution system to hear and resolve disputes arising when drilling for coal bed methane. Lastly, this article will discuss how the statutes in Virginia, Pennsylvania, and West Virginia could serve as examples to Wyoming and other states in need of coal bed methane adjudication systems.

II. VIRGINIA

Coal bed methane is a large economic resource in the Commonwealth of Virginia.¹⁵ Over eighty-percent of the gas produced in the Commonwealth of Virginia is from coal bed methane.¹⁶ Virginia ranks fourth in the nation for production of coal bed methane, with the majority of the coal bed methane comes from three main fields: Oakwood, Nora, and Middle Ridge.¹⁷ Because coal bed methane was practically

¹⁰ Drake D. Hill & P. Jaye Rippley, *The Split Estate: Communication and Education Versus Legislation*, 4 WYO. L. REV. 585, 587 (2004) (discussing what is a split-estate).

¹¹ *See, e.g.*, *S. Ute Indian Tribe*, 874 F. Supp. at 1142.

¹² *See, e.g., id.*

¹³ *See, e.g., id.*

¹⁴ Hill, *supra* note 10, at 587.

¹⁵ *See Coalbed Methane in Virginia*, VIRGINIA NATURAL GAS FACTS, <http://vanatgasfacts.org/coalbed-methane.html> (last visited May 5, 2014).

¹⁶ *Id.*

¹⁷ *Id.*

valueless until 1990,¹⁸ ownership of the gas was typically not contemplated when severing mineral estates from surface estates.¹⁹ Consequently, Virginia courts have settled a number of ownership issues with little legislative or precedential guidance.²⁰

In 1990, the Virginia General Assembly enacted the Virginia Gas and Oil Act, regulating methods by which coal bed methane could be developed.²¹ The Act allowed mining companies subject to methane ownership disputes to extract gas prior to determining ownership, provided that these companies deposit the relevant royalties into escrow accounts until the judiciary issued an ownership decision.²² In 2009, it was estimated that eighty-three percent of the royalties in escrow were coal bed methane royalties.²³ In 2004, the Supreme Court of Virginia unanimously ruled that mineral owners which severed just their coal estate retained ownership to the coal bed methane;²⁴ however, the Virginia Department of Mines, Minerals and Energy (DMME) interpreted the ruling as applying only to the specific deed at issue in the case.²⁵ Thus, there was still no definite answer as to who owned the coal bed methane in a split-estate.

On December 19, 2013, a Virginia state statute went into effect outlining an arbitration system for resolving coal bed methane gas ownership disputes.²⁶ The cost of the arbitration is covered by an accrued interest if DMME determines that there are sufficient funds to conduct the arbitration.²⁷ The accrued interest includes funds

¹⁸ The Virginia General Assembly enacted the Virginia Gas and Oil Act regulating methods by which coal bed methane could be captured for commercial use. Virginia Gas and Oil Act, VA. CODE ANN. §§ 45.1-361.1 through 45.1-361.44 (2013).

¹⁹ W. Taylor Corbett, *Coalbed Methane: The Struggle for Consistency and Predictability in Mineral and Property Law in Virginia*, 11 APPALACHIAN J. L. 231, 232 (2012) (discussing the history of coal bed methane production in Virginia). See generally, §45.1-361.21:1; Hale v. CNX Gas Co., No. 1:10cv00059, 2011 U.S. Dist. LEXIS 52935 (W.D. Va. Jan. 21, 2011); Harrison-Wyatt, LLC v. Ratliff, 593 S.E.2d 234 (Va. 2004).

²⁰ Corbett, *supra* note 19, at 232. See, e.g., Adair v. EQT Prod. Co., No. 1:10-cv-00037, No. 1:10-cv-00041, No. 1:11-cv-00031, No. 1:10-cv-00059, No. 1:10-cv-00065, 2013 U.S. Dist. LEXIS 142005 (W.D. Va. June 5, 2013); Powers v. Equitable Prod. Co., No. 1:09CV00055, 2012 U.S. Dist. LEXIS 45589 (W.D. Va. Mar. 31, 2012); Adkins v. EQT Prod. Co., No. 1:11cv00031, 2012 U.S. Dist. LEXIS 43171 (W.D. Va. Mar. 28, 2012); Hale, 2011 U.S. Dist. LEXIS 52935; Harrison-Wyatt, 593 S.E.2d at 234.

²¹ See §§ 45.1-361.1 through 45.1-361.44.

²² *Id.*; Corbett, *supra* note 19, at 232; Daniel Gilbert, *Legislators Looking into Escrow Solutions*, BRISTOL HERALD COURIER (Dec. 27, 2009), <http://www.pulitzer.org/archives/8865> (last visited May 5, 2014).

²³ Gilbert, *supra* note 22. The remaining royalties in escrow belong to owners that gas producers cannot find. *Id.*

²⁴ Harrison-Wyatt, 593 S.E.2d at 238.

²⁵ Gilbert, *supra* note 22.

²⁶ 30 Va. Reg. Regs. 247780 (Nov. 18, 2013).

²⁷ § 45.1-361.22:1(A).

accumulated during the preceding thirty-six months on total proceeds held in the state escrow account,²⁸ which is mostly comprised of coal bed methane royalties from land where there is an ownership dispute.²⁹ If DMME determines that the funds for arbitration are not available, it will maintain a waiting list of parties willing to arbitrate, or the parties can continue with arbitration and bear the costs.³⁰

DMME also keeps a list of arbitrators which they select through an application process.³¹ Qualified applicants must have at least ten years of experience in real estate law and demonstrate substantial expertise in mineral title examination.³² DMME maintains a list of qualified arbitrators and updates it annually.³³ Arbitrators are required to update their disclosures to DMME at least annually in order to maintain the list's accuracy.³⁴

When someone has an ownership issue, he or she submits a request to arbitrate to the Virginia Gas and Oil Board on a form from DMME.³⁵ When the board issues an arbitration order, DMME submits the list of arbitrators to a Commonwealth Circuit Court in the circuit where the majority of the land at issue is located.³⁶ Within thirty days, the court chooses an attorney from the list, or they have the discretion to choose an individual not on the list that meets the qualifications.³⁷ An arbitrator may not hear an arbitration if the arbitrator is related to one of the parties, has a personal interest in the subject of the arbitration, or has any other conflicts of interest.³⁸

Once an arbitrator is appointed, the arbitrator determines an appropriate time and place for the arbitration and provides each surface owner, gas or oil owner, coal owner, mineral owner, or operator of a gas storage field which has an interest in the land at issue with written notification of the hearing. Some discovery is allowed for the arbitration proceeding; the arbitrator is allowed to issue subpoenas, take oaths, and take

²⁸ § 45.1-361.22:1(E).

²⁹ Gilbert, *supra* note 22.

³⁰ § 45.1-361.22:1(B).

³¹ § 45.1-361.22:1(B).

³² § 45.1-361.22:1(C).

³³ *Id.*

³⁴ *Id.*

³⁵ § 45.1-361.22:1(A).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

depositions.³⁹ The parties must share any documents it intends to use with the opposing party and the arbitrator at least five days before the arbitration.⁴⁰ If the documents are not shared within the five day window, the arbitrator may still elect to continue with the arbitration proceeding.⁴¹ The only communication allowed between the arbitrator and any party concerning the merits of the arbitration is at the arbitration hearing.⁴² If any ex parte communication occurs, the arbitrator is required to notify the other parties of the time, date, place, and contention of the communication.⁴³

Following the arbitration, the arbitrator makes a determination on ownership of the coal bed methane within six months of when the board ordered the arbitration, or longer if the parties agree.⁴⁴ If there is an extension, the arbitrator must notify the board.⁴⁵ The arbitrator's determination must be made in writing and sent to the board and all parties.⁴⁶ The determination must include, at minimum, a finding of facts and an explanation for the arbitrator's determination.⁴⁷ The arbitrator's determination is binding on the parties and may be entered as the judgment by the circuit court that chose the arbitrator at the party's request.⁴⁸ A determination can be confirmed, vacated, corrected, or appealed by any party.⁴⁹ Once the parties affirm the determination, the operator has thirty days to petition the board for disbursement of the proceeds.⁵⁰

³⁹ § 45.1-361.22:1(D).

⁴⁰ 30 Va. Reg. Regs. 247780 (Nov. 18, 2013).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ § 45.1-361.22:1(E).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 30 Va. Reg. Regs. 247780 (Nov. 18, 2013).

⁴⁸ § 45.1-361.22:1(G).

⁴⁹ *Id.* The confirmation, vacation, correction, or appeal of the determination must be pursuant to the grounds set forth in Title 8.01, Chapter 21 of the Virginia Code. *Id.*

⁵⁰ 30 Va. Reg. Regs. 247780 (Nov. 18, 2013).

III. PENNSYLVANIA

Until 1993, the coal bed methane produced in the Commonwealth of Pennsylvania was practically negligible.⁵¹ In 1999, methane production in Pennsylvania increased to approximately 770,000 thousand cubic feet. Nine years later, the reported production of coal bed methane reached 11.6 billion cubic feet, which would produce enough energy to heat approximately 168,000 households per year.⁵² With the increase in coal bed methane production comes an increase in ownership conflicts surrounding methane production.

In 1983, the Supreme Court of Pennsylvania determined that when a deed is severed, the rightful owner of the coal bed methane is the one who has the right to the coal, not the owner of the surface rights nor the owner of the gas rights;⁵³ thus the issue of who owns the rights to the coal bed methane is not an area of dispute in the state. However, disputes arise over the location of coal bed methane wells or access roads associated with coal bed methane wells between split-owner estates.⁵⁴ Consequently, the state legislature enacted a law promulgating a mechanism for adjudicating these disputes without litigation.⁵⁵

On February 1, 2010, Pennsylvania Governor Rendell signed into law the Coal Bed Methane Dispute Resolution Act (“Dispute Resolution Act”),⁵⁶ which amended the 1968 Coal Refuse Disposal Control Act.⁵⁷ The Dispute Resolution Act established an alternative dispute resolution procedure for disputes arising between surface owners and well operators. Subject matter covered by the Dispute Resolution Act included disputes over the proposed location of coal bed methane wells or access road associated with such wells.⁵⁸

⁵¹ Coal bed methane production in Pennsylvania is booming. *See Production Statistics*, PA. DEP’T CONSERVATION & NATURAL RES., http://www.dcnr.state.pa.us/topogeo/econresource/cbm/cbm_stats/index.htm (last visited May 5, 2014) (showing graphs of Pennsylvania coal bed methane production statistics).

⁵² *Id.*

⁵³ *U.S. Steel Corp. v. Hoge*, 468 A.2d 1380, 1383 (Pa. 1983) (“Thus, as a general rule, subterranean gas is owned by whoever has title to the property in which the gas is resting.”).

⁵⁴ *See* H.B. 1847, 2009 Gen. Ass., Reg. Sess. (Pa. 2009) (“The purpose of the [Coal Bed Methane Review] Board shall be to consider objections and attempt to reach agreement on or determine a location for the coal bed methane well or access road.”).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Coal Refuse Disposal Act, 52 PA. STAT. ANN. §§ 30.51-30.66 (West 1968) (P.L. 1040, No. 318).

⁵⁸ H.B. 1847.

The Pennsylvania legislature created a three-person Coal Bed Methane Review Board (“Board”) in order to resolve such disputes without court action.⁵⁹ One board member is appointed by the governor from a list of three individuals submitted by the Pennsylvania Farm Bureau.⁶⁰ Another member is appointed by the governor from a list of three individuals submitted jointly by the Pennsylvania Oil and Gas Association, the Independent Oil and Gas Association of Pennsylvania, and the Pennsylvania Coal Association.⁶¹ The third member is appointed by the governor from a list of three individuals prepared jointly by the Deans of the College of Agricultural Sciences and the College of Earth and Mineral Sciences of the Pennsylvania State University.⁶² The third appointee is required to have expertise in petroleum geology or petroleum engineering and at least three years of practical experience in Pennsylvania.⁶³ Each board member serves either a term of three years or until a successor is duly appointed.⁶⁴ Board members may be appointed for successive terms.⁶⁵

The Dispute Resolution Act requires that a well operator intending to drill a coal bed methane well or construct an access road must provide the surface owner written notification of their right to resolve any objections to the proposed project before the Coal Bed Methane Review Board.⁶⁶ The law specifies that a uniform notification should be provided to all surface owners with standardized font size and statement language.⁶⁷

If the surface owner intends to initiate alternative dispute resolution regarding a proposed well or access road, he or she must file written objections with the Board within fifteen days of receiving the written notification of the right to challenge the proposed project.⁶⁸ If there are no timely objections filed, the Pennsylvania Department of Environmental Protection (DEP) can proceed to issue or deny a well permit; however, a permit will not be approved unless the well operator demonstrates that it fulfilled the notification requirements under the statute.⁶⁹ When objections are filed with the DEP,

⁵⁹ H.B. 1847.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ H.B. 1847.

⁶⁵ *Id.* The number of terms a board member may serve is not limited in the state statute.

⁶⁶ *Id.*

⁶⁷ *Id.* An example of this statement is provided by the Pennsylvania Department of Environmental Protection at <http://www.eLibrary.dep.state.pa.us/dsweb/Get/Document-83278/5500-FM-OG0053.pdf>.

⁶⁸ *Id.*

⁶⁹ H.B. 1847.

the DEP must notify the well operator and Board of the objections within two days of filing.⁷⁰ The Board will then determine the time and location of the alternative dispute conference, which must occur within ten business days from the date of service of the objections on the operator, and must be located at the DEP regional or district office that is closest to the land in dispute.⁷¹

At the conference, the well operator and land owner will be asked to agree upon the location of the proposed well or access road.⁷² If necessary, multiple conference sessions may be held, and each must be completed within ten business days of the original conference session.⁷³ If an agreement has not been reached after ten days, the Board has the discretion to extend the conference by an additional five days, and the parties may extend the conference completion to a date that is mutually agreed upon.⁷⁴ Agreements reached in the conference must be consistent with the Oil and Gas Act⁷⁵, articulated in writing, and submitted to the DEP at the of the end of the conference.⁷⁶ If the parties fail to reach an agreement in the conference, the Board has the discretion to make a written determination as to the location of the well or access road.⁷⁷ The Board must consider the interests of both parties, and must ensure the only damage to the surface is reasonably necessary for methane extraction.⁷⁸ This agreement is binding upon the DEP; however, either party has the right to appeal the Board's decision within fifteen days to a Court of Common Pleas in the judicial district where the property at issue is located.⁷⁹

The court will hear the appeal and render a decision within sixty days of the filing.⁸⁰ During the appeal, the court is authorized to review only whether the location of

⁷⁰ H.B. 1847.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ 58 PA. CONS. STAT. §§ 601.101-601.607 (2014). The Oil and Gas Act is one of the primary laws that regulates the extraction of oil and natural gas in Pennsylvania.

⁷⁶ H.B. 1847.

⁷⁷ *Id.*

⁷⁸ *Id.* Going forward, this standard shall be called the “reasonable damages rule.”

⁷⁹ *Id.* The Court of Common Pleas is a trial court of general jurisdiction that can also act in an appellate capacity. See *State Court Organization Chart: Pennsylvania Court Structure*, WESTLAW, <http://wlwatch.westlaw.com/aca/west/statecrtorg.htm#PA> (last visited May 5, 2014).

⁸⁰ H.B. 1847.

the disputed well or access road will comply with the reasonable damages rule.⁸¹ The court's ruling will either affirm the Board's decision or specify a different location which the court finds more compliant with the reasonable damages rule.⁸² The DEP will then accept the application from the well operator and proceed to issue or deny the permit.⁸³

IV. WEST VIRGINIA

Coal bed methane is produced in West Virginia from the Appalachian Basin, which also accounts for production in both Pennsylvania and Virginia.⁸⁴ As of July 2010 there were 963 wells in the state.⁸⁵ In 2011, it was estimated that West Virginia produced eighteen billion cubic feet of coal bed methane.⁸⁶ Like its Appalachian Basin neighbors, West Virginia courts have heard a variety of issues arising from coal bed methane production.⁸⁷

In West Virginia, the state legislature also enacted legislation creating a Coal Bed Methane Review Board ("Review Board").⁸⁸ When a well operator wants to drill a new coal bed methane well, it must file an application for a permit with Chief of the Office of Oil and Gas of the Division of Environmental Protection.⁸⁹ Before the permit can be

⁸¹ H.B. 1847.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ U.S. ENVTL. PROT. AGENCY, EPA-820-R-10-022, COALBED METHANE EXTRACTION: A DETAILED STUDY REPORT 1.1 (2010), available at http://water.epa.gov/scitech/wastetech/guide/304m/upload/cbm_report_2011.pdf (last visited May 5, 2014).

⁸⁵ *Summary Data and Statistics*, W. VA. GEOLOGICAL & ECON. SURVEY, <http://www.wvgs.wvnet.edu/www/datastat/cbm/dtcmdn90.htm> (last visited May 5, 2014).

⁸⁶ *Data: Coalbed Methane*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/dnav/ng/ng_enr_coalbed_dcu_SWV_a.htm (last visited May 5, 2014).

⁸⁷ *See, e.g.*, CBC Holdings, LLC v. Dynatec Corp., USA, 680 S.E.2d 40 (W. Va. 2009); Energy Dev. Corp. v. Moss, 591 S.E.2d 135 (W. Va. 2003).

⁸⁸ W. VA. CODE §§ 22-21-1 through 22-21-29 (2013).

⁸⁹ § 22-21-2(i); § 22-21-6. Every permit must contain the names and addresses of the well operator, the agent of the well operator, and every other person or entity the well operator is required to notify; the name and address of each coal operator and owner that is to be penetrated by the well, is within seven hundred fifty horizontal feet of the well bore, or is within one hundred vertical feet of the coal seams affected by the well; the well name or other identification; the approximate depth to which the well will be drilled; a description of any means used to stimulate the well; the casing program for the well, if applicable; a plan and design for the well to protect all workable coal seams which will be penetrated by the well if the well will be completed in some but not all coal seams for production; a description of horizontal drilling, if applicable; and any other information the chief may require by rule. § 22-21-6(b).

approved, the well operator must obtain and file a consent and agreement from each owner and operator of any workable coal seam that is at least twenty-eight inches thick and within 750 feet from the proposed well bore.⁹⁰ Absent consent, the applicant can request a hearing before the Review Board.⁹¹ The request and its accompanying information, along with any other objections or notices that may require a hearing, are sent to the Review Board for consideration.⁹²

The applicant must also deliver copies of the application, well plat, and erosion sediment control plan to any surface owners and mineral owners that may be affected by the project.⁹³ The applicant must also publish a notice with information about the proposed well in the county where the well is located.⁹⁴ All of these notifications should include the time limits and methods for filing comment and objection,⁹⁵ and all of the people receiving notice may file comments within fifteen days after the permit application is filed with the Chief.⁹⁶

If a comment or objection is filed with the Chief, the Review Board must schedule a hearing to consider them.⁹⁷ Notice will be given fifteen days before the hearing to those who filed comments or complaints, to any person the applicant was required to notify, and to any applicant.⁹⁸ The hearing will be held before the Review Board within thirty days after the objection or comment filing deadline.⁹⁹ At the hearing, the Review Board will consider any of the matters raised, which may include surface topography and use and the ability to safely mine the coal seam.¹⁰⁰ When considering the

⁹⁰ § 22-21-7(a)

⁹¹ § 22-21-7(b). The request for hearing must be accompanied by an affidavit including a statement that a coal owner or operator refused to provide written authorization, a statement outlining the efforts undertaken to obtain such an authorization, a statement detailing any known reasons for denying the authorization, and a statement or other information necessary to provide prima facie evidence that the proposed method of stimulation will not render the coal seam unworkable or impair mine safety.

⁹² § 22-21-7(c). If the authorization was not obtained due to safety concerns, the Chief will submit a copy of the affidavit to the director of the office of miners' health, safety and training who will then provide recommendations to the board as to issues of mine safety. § 22-21-7(d).

⁹³ § 22-21-9(a)

⁹⁴ § 22-21-9(c).

⁹⁵ § 22-21-9(d). Anyone filing comment or objection is also entitled to receive a copy of the permit as issued or the order denying the permit, if they so request.

⁹⁶ §§ 22-21-10 and 22-21-11.

⁹⁷ § 22-21-13(a).

⁹⁸ § 22-21-13(b).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

latter, the Review Board will consider factors such as the proximity of the drilling to any currently existing or proposed mine opening or shaft,¹⁰¹ the reasonability of drilling through or in close proximity to any existing or planned pillar of coal, the safety of proposed drilling, the feasibility of moving the proposed drilling site, the methods proposed, the surface topography and use, and other factors the Review Board deems necessary to consider.¹⁰² The applicant carries the burden of proving by clear and convincing evidence that the stimulation of a workable coal seam will not render the seam or any other workable coal seam unmineable or unsafe for mining.¹⁰³

After taking all factors into consideration, the Review Board will provide a written order containing fact-based conclusions addressing all relevant issues raised at the hearing.¹⁰⁴ The order will contain a recommendation to either refuse a drilling permit, issue the permit for the proposed location, issue the permit at an alternate location, issue the permit at the proposed or an alternate location but not allow drilling for a year or less from the date the permit is issued, or issue a permit authorizing the drilling without the consent of the affected owners or operators.¹⁰⁵ The Chief is then bound to follow through with the Review Board's recommendation provided that all other application requirements are met.¹⁰⁶

The Review Board also has authority to resolve issues that arise when someone wants to create drilling units or pool interests.¹⁰⁷ To create a drilling unit or pool absent a voluntary agreement, an owner or other party claiming ownership interest in the coal bed methane may file a pooling application with the Chief.¹⁰⁸ At least thirty days before the hearing on the pooling application, the applicant must deliver notice to all affected coal owners, methane owners, coal seam or natural gas operators, surface landowners, and leaseholders.¹⁰⁹ The applicant is also required to publish a notice in the county or counties where the proposed unit is located at least thirty days prior to the hearing.¹¹⁰ All

¹⁰¹ This includes any mines that are abandoned, operating, or already surveyed and platted but not yet being operated. § 22-21-13(b)(1).

¹⁰² § 22-21-13(b).

¹⁰³ § 22-21-13(c).

¹⁰⁴ § 22-21-13(d).

¹⁰⁵ *Id.* A permit authorized without consent of affected well operators or owners must include evidence of financial security. § 22-21-13(d)(5).

¹⁰⁶ § 22-21-13(d).

¹⁰⁷ § 22-21-15.

¹⁰⁸ § 22-21-15(a). A pool request may consist of separately owned interests in a single tract, separately owned tracts, separately owned interests in any tract, or any combination thereof to form a drilling unit from one or more wells.

¹⁰⁹ § 22-21-16(a).

¹¹⁰ § 22-21-16(b).

of the required notices must contain information specifying the time and place for a hearing on the application where affected parties may be present and offer comment or objection.¹¹¹ Before the Review Board holds a hearing, the Review Board sets a time and place for a conference to be held between all affected parties to try to reach a voluntary agreement.¹¹²

If an agreement is reached, the Review Board issues an order allowing the unit.¹¹³ If an agreement is not reached, the Review Board sets a date and time for a hearing on the application.¹¹⁴ When reviewing the application, the Review Board considers whether the area may be drained efficiently and economically by the proposed well(s), whether the development plan provides for proper ventilation, whether the integrity of any coal seam(s) which may be affected, and whether conflicting ownership claims exist between surface and mineral owners. The Review Board also considers the authority of the applicant to request the pooling agreement, the estimated cost of drilling submitted by each interested well operator, whether there is disagreement over the designation of the operator, and any other relevant scientific or geological data.¹¹⁵ After taking into account all of the evidence presented and comments or objections raised, the Review Board determines whether a drilling unit should be established and, if so, to what specifications and limitations.¹¹⁶

Once the pooling order is issued, the coal bed methane owners or lessees have thirty days to decide whether to sell or lease its interest to the operator, to become a working interest owner¹¹⁷ by sharing the risk and cost of the well, or to participate in the operation of the well as a carried interest owner.¹¹⁸ After the elections are made, the

¹¹¹ § 22-21-16(c).

¹¹² § 22-21-17(a).

¹¹³ *Id.*

¹¹⁴ § 22-21-17(b). The date of the hearing must be no sooner than thirty-five days nor more than sixty days of the date of the hearing request.

¹¹⁵ *Id.*

¹¹⁶ § 22-21-17(c). If a board determines that a drilling unit should be established, it shall issue a pooling order that establishes the boundary of the unit, authorizes the drilling and operation of a coal bed methane well or wells within the unit, establishes minimum distances for any wells in the unit and for other wells that could drain the pooled area, designates the operator who is authorized to drill and operate any well(s) on the unit, establishes a reasonable fee for the operator for operating costs, and sets out any other findings or provisions that are necessary. *Id.*

¹¹⁷ “A working interest in an oil or gas property is one that is burdened with the cost of development and operation of the property, such as the responsibility to share expenses of drilling completing or operating an oil and gas property, according to working or operating mineral interest in any tract or parcel of land...” *Prodigy Oil and Gas Glossary*, PRODIGY OIL & GAS, <http://prodigyoilandgas.com/oil-and-gas-glossary.html> (last visited May 5, 2014).

¹¹⁸ § 22-21-17(e). If the owner chooses to sell or lease its interest to the operator, the terms of that action are either agreed upon by the parties or determined by the board. § 22-21-17(e)(1). Any owner not making

Review Board enters a division order setting out the net revenue interest of each working interest owner.¹¹⁹ The Review Board's final order also enacts rules for the administration and protection of funds delivered to escrow accounts.¹²⁰

A person who is adversely affected by the Chief's order has the right to appeal the order to the Circuit Court.¹²¹ The Circuit Court's judgment is final, unless reversed, vacated, or modified on appeal to the Supreme Court of Appeals.¹²² The Chief or Review Board also has the authority to apply to the Circuit Court for injunctive relief if it appears that there are violations of the state statute governing coal bed methane.¹²³

V. HOW THE VIRGINIA, PENNSYLVANIA, AND WEST VIRGINIA STATUTES COULD SERVE AS AN EXAMPLE FOR A WYOMING STATUTE

Wyoming is home to the Powder River Basin. In 1986, the first coal bed methane wells were drilled into the Powder River Basin.¹²⁴ Since then, coal bed methane production has steadily increased, with Wyoming producing 506 billion cubic feet of methane in 2011.¹²⁵ The Powder River Basin is estimated to be one of the larger sources of natural gas in the country, with estimates of six to forty trillion cubic feet of coal bed methane reserves.¹²⁶ While approximately sixty-three percent of the subsurface mineral

an election within the thirty days is deemed to have elected to sell or lease. § 22-21-17(e). A carried interest is "[a] fractional interest in an oil and gas property conveyed or assigned to another party by the operator or owner of the working interest. In its simplest form, a carried working interest is exempt from all costs of development and operation of the property. However, the carried interest may specify "to casing point," "to setting of tanks," or "through well completion." If the arrangement specifies through well completion, then the carried interest may assume the equivalent fractional interest of operating costs upon completion of the well. There are many different types of carried interests, the details varying considerably from arrangement to arrangement..." *Prodigy Oil and Gas Glossary*, *supra* note 117.

¹¹⁹ § 22-21-17(j).

¹²⁰ § 22-21-17(l).

¹²¹ § 22-21-25(a).

¹²² § 22-21-25(b). West Virginia does not have any intermediate appellate courts, so all appeals go directly from the trial court (i.e. Circuit Court) to the Supreme Court of Appeals. *See State Court Organization Chart: West Virginia Court Structure*, WESTLAW, <http://wlwatch.westlaw.com/aca/west/statecrtorg.htm#WV> (last visited May 5, 2014).

¹²³ § 22-21-27.

¹²⁴ Michele Straube & Melinda Holland, *A Conflict Assessment of Split Estate Issues and a Model Agreement Approach to Resolving Conflicts Over Coalbed Methane Development in the Powder River Basin*, U.S. INST. FOR ENVTL. CONFLICT RESOLUTION 1, 2 (Feb. 10, 2003), <http://www.ecr.gov/pdf/CAR.pdf> (last visited May 5, 2014) (revised Mar. 14, 2003).

¹²⁵ *See Data: Wyoming Coalbed Methane Production*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/dnav/ng/hist/rngr52swy_1a.htm (last visited May 5, 2014).

¹²⁶ Straube, *supra* note 124, at 2.

rights in the area are owned by the federal government, about sixty-five percent of the surface over the federally-owned minerals are privately owned.¹²⁷ Further, over fifty-percent of the state's coal bed methane resources are held in split-estates.¹²⁸ The high prevalence of split-ownership has caused issues to arise during coal bed methane production.¹²⁹

The Wyoming Department of Agriculture created the Wyoming Agriculture & Natural Resource Mediation Program (“Mediation Program”), a United States Department of Agriculture certified mediation program,¹³⁰ as a way to assist its citizens in resolving disputes in a low-cost, time-saving, voluntary, and confidential manner.¹³¹ The Mediation Program is available for resolving split-estate issues;¹³² however, the resolution reached is nonbinding and must be mutually agreed upon because it is a mediation program and not an arbitration proceeding/alternative dispute resolution system.¹³³ In order to more effectively resolve split-estate issues, the State of Wyoming should implement a mandatory state alternative dispute resolution system to reach decisions that are binding on the parties.

The issues arising in Wyoming split-estates extend past ownership issues and into other issues, including the use of the surface estate for drilling activities and damages to the surface estate caused by coal bed methane production.¹³⁴ The state should create a Coal Bed Methane Review Board similar to those utilized in Pennsylvania and West

¹²⁷ Straube, *supra* note 124, at 2.

¹²⁸ *Id.* at i.

¹²⁹ See Hill, *supra* note 10, at 585; see generally Straube, *supra* note 124.

¹³⁰ See *Program Fact Sheets: Agricultural Mediation*, U.S. DEP'T OF AGRIC. FARM SERV. AGENCY (July 2003), http://www.fsa.usda.gov/FSA/newsReleases?area=newsroom&subject=landing&topic=pfs&newstype=prfactsheet&type=detail&item=pf_20030701_admin_en_agmedi03.html (last visited May 5, 2014), for more information on the USDA Agricultural Mediation Program.

¹³¹ *Mediation Program*, WYO. DEP'T OF AGRIC., <http://wyagric.state.wy.us/divisions/nrp/mediation-program> (last visited May 5, 2014).

¹³² See *Frequently Asked Questions About the Wyoming Agriculture & Natural Resources Mediation Program*, WYO. DEP'T OF AGRIC., <http://wyagric.state.wy.us/images/stories/pdf/natres/mediation/mediationfaq.pdf> (last visited May 5, 2014) (listing “split-estate issues” as a type of conflict that can be mediated); *Split Estate Issue*, COALBED NATURAL GAS ALLIANCE, <http://cbnga.org/landowners/split-estate-issue/> (last visited May 5, 2014) (suggesting the Wyoming Agriculture & Natural Resource Mediation Program in split-estate issues).

¹³³ See BLACK'S LAW DICTIONARY (9th ed. 2009) (definition of “mediation”); *Mediation Program*, *supra* note 131.

¹³⁴ See generally Straube, *supra* note 124.

Virginia.¹³⁵ Similar to the Pennsylvania Coal Bed Methane Review Board,¹³⁶ the proposed board should consist of individuals from the various groups who represent those potentially affected by coal bed methane production, such as state agricultural organizations (Wyoming Farm Bureau,¹³⁷ Wyoming Stock Growers Association,¹³⁸ and Wyoming Wool Growers Association¹³⁹), environmentally oriented groups (Powder River Basin Resource Council¹⁴⁰ and Wyoming Outdoor Council¹⁴¹), the United States Bureau of Land Management,¹⁴² and the Petroleum Association of Wyoming.¹⁴³ A board consisting of individuals representing all types of impacted parties would ensure that no one party is disproportionately favored.

Like the West Virginia Coal Bed Methane Review Board, the proposed board would need to hear a plethora of issues arising during coal bed methane production in split-estate situations.¹⁴⁴ Hearings should be held promptly to quickly resolve issues and facilitate drilling. The proposed board should hear comments and concerns from all interested parties then quickly make a decision on the issue. The proposed board's decision should be binding upon the parties to further facilitate drilling and limit time and money spent on litigation. Because of the high prevalence of split-estates in Wyoming, a Coal Bed Methane Review Board could mitigate litigation by providing a binding way to resolve issues arising in coal bed methane production. However, the state should look

¹³⁵ See generally W. VA. CODE §§ 22-21-1 through 22-21-29 (2013) (West Virginia statute governing the West Virginia Coal Bed Methane Review Board); H.B. 1847, 2013 Gen. Ass., Reg. Sess. (Pa. 2013) (Pennsylvania bill creating and outlining the duties of the Pennsylvania Coal Bed Methane Review Board).

¹³⁶ See H.B. 1847 (describing how Coal Bed Methane Review Board members are chosen).

¹³⁷ See WYO. FARM BUREAU, <http://www.wyfb.org/> (last visited May 5, 2014), for more information on the Wyoming Farm Bureau.

¹³⁸ See WYO. STOCK GROWERS ASSOC., <http://www.wysga.org/> (last visited May 5, 2014), for more information on the Wyoming Stock Growers Association.

¹³⁹ See WYO. WOOL GROWERS ASSOC., <http://wyowool.com/> (last visited May 5, 2014), for more information on the Wyoming Wool Growers Association.

¹⁴⁰ See POWDER RIVER RES. COUNCIL, <http://www.powderriverbasin.org/> (last visited May 5, 2014), for more information on the Powder River Resource Council.

¹⁴¹ See WYO. OUTDOOR COUNCIL, <http://www.wyomingoutdoorcouncil.org/> (last visited May 5, 2014), for more information on the Wyoming Outdoor Council.

¹⁴² See U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., <http://www.blm.gov/> (last visited May 5, 2014), for more information on the Bureau of Land Management and its participation in coal bed methane production in the Powder River Basin.

¹⁴³ See PETROLEUM ASSOC. OF WYO., <http://www.pawyo.org/> (last visited May 5, 2014), for more information on the Petroleum Association of Wyoming.

¹⁴⁴ See generally W. VA. CODE §§ 22-21-1 through 22-21-29 (2013) (West Virginia statute governing the West Virginia Coal Bed Methane Review Board).

into the costs that would be associated with such a board before creation. Adding a government organization costs money for personnel, supplies, etc., and, as a government agency, these costs are covered by taxpayers.

VI. CONCLUSION

While each states' legislation promulgates a slightly different dispute resolution system, the basics of each system are the same. Namely, each state legislature created a government-related body consisting of individuals who are knowledgeable about the industry and its issues to resolve one or more types of disputes that might arise when an operator wants to drill a coal bed methane well on property where there is a split-estate. In Virginia, there is no law creating a firm determination of who owns the coal bed methane rights, so the state created a system to resolve these issues without bogging down the court system. In Pennsylvania, case law has established ownership of coal bed methane reserves; however, issues arise regarding the location of proposed wells or access roads relating to such wells. Accordingly, the state legislature has established a dispute resolution to resolve these issues. In West Virginia, the state legislature established a system that allows a state body to rule on a myriad of potential issues including both ownership and well or access road location. In each jurisdiction, the court is still involved, whether it be to appoint an arbitrator in Virginia, or as a source of appeal for a board determination in Pennsylvania or West Virginia. Even though the court is still involved, it is generally not having to make the determination on the issue; thus, limiting the litigation of coal bed methane issues.

A state like Wyoming, which has a large amount of coal bed methane production and a high prevalence of split-estates, would benefit from an alternative dispute resolution system similar to those in Virginia, Pennsylvania, or West Virginia. In such states, there is an increased probability that an issue will arise during production, and a state-mandated alternative dispute resolution system would result in less litigation in state courts and dispute resolutions that are timely, less expensive, and reached by individuals that are knowledgeable of the industry and its issues.