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COMMENT

Breaking the Trust: Adverse Possession of Subsurface Minerals Under Kentucky Law

INTRODUCTION

Kentucky case law has long imposed restrictions upon the would-be adverse possessor of a mineral estate, the title to which has been legally severed from title to the surface of the land. Specifically, Kentucky courts, in a series of cases interpreting Kentucky Revised Statutes (KRS) section 381.430,¹ have found that a trust relationship exists between the surface owner and the owner of the subsurface minerals. This Comment reviews the implications of this trust relationship.

I. SUBSURFACE MINERAL ESTATES AND THE DOCTRINE OF ADVERSE POSSESSION

Title to the surface of land generally can be severed from title to the underlying minerals.² Once the titles are severed,³ two separate property interests exist, both with all the attributes peculiar to property ownership.⁴ The principles of property law are applied separately to each interest as though each was a different

¹ KY. REV. STAT. ANN. § 381.430 (Baldwin 1979) [hereinafter cited as KRSA]. See text accompanying note 17 *infra* for the text of the statute.

² E. KUNTZ, A TREATISE ON THE LAW OF OIL & GAS § 3.1, at 76 (1962).

³ According to one authority on this issue:

Only the owner of mineral rights is capable of effecting a severance of title to the minerals. The most obvious method of severing title to minerals is by grant or reservation in a deed. Before such deed accomplishes a severance of title, it must be effective as a deed, which includes an acceptance of delivery by the grantee.

Kuntz, *Adverse Possession of Severed Mineral Interests*, 5 ROCKY MTN. MIN. L. INST. 409, 424 (1960). See H. WILLIAMS & C. MEYERS, OIL & GAS LAW § 224.2 (1959) (stating what actions constitute a legal severance of the surface of land from underlying minerals).

⁴ E. KUNTZ, *supra* note 2, at § 3.1.

parcel of real estate.⁵ This separate legal treatment can result in complications, especially when the doctrine of adverse possession is involved.⁶ This doctrine allows title to real and personal property to be acquired by possession which is either adverse or inconsistent with the possession or title of another.⁷

More specifically, adverse possession occurs when such possession is actual, open, notorious, hostile, continuous and exclusive, under a claim of right for the statutory period.⁸ The Kentucky statute requires fifteen years of adverse possession before title can be vested in the claimant under the doctrine.⁹ These prerequisites for obtaining title by adverse possession apply equally to both the surface estate and to the subsurface mineral estate.¹⁰

If adverse possession of the surface commences before title to any mineral interests has been severed, then such possession will extend to any underlying minerals.¹¹ On the other hand, if possession of the surface commences after mineral interests have been legally severed, then no amount of surface possession alone will extend to the underlying minerals.¹² Instead, there must be an actual working of the mineral estate before title to the minerals can begin to ripen in the adverse possessor.¹³

⁵ *Id.*

⁶ *Id.* § 10.4.

⁷ BLACK'S LAW DICTIONARY 49 (rev. 5th ed. 1979).

⁸ *Tartar v. Tucker*, 280 S.W.2d 150 (Ky. 1955).

⁹ KRSA § 413.010 (1979) provides: "An action for the recovery of real property may be brought only within fifteen years after the right to institute it first accrued to the plaintiff, or to the person through whom he claims."

¹⁰ See *Pond Creek Coal Co. v. Hatfield*, 239 F. 622, 626 (6th Cir. 1917) (the statute of limitations that applies in actions for recovery of real property also applies to action for recovery of an interest in minerals).

¹¹ H. WILLIAMS & C. MEYERS, *supra* note 3, § 224.1, at 347. See *Saulsberry v. Maddix*, 125 F.2d 430, 433 (6th Cir.), *cert. denied*, 317 U.S. 643 (1942), where the court stated:

The rule prevails in Kentucky that prior to a severance, mineral lands form no exception to the general rule that the title of the owner of real property includes not only the surface thereof, but also that which lies beneath and above it; therefore, an adverse possession of the surface of mineral lands before severance may ripen into title to the minerals as well as the surface.

¹² E. KUNTZ, *supra* note 2, at § 10.4. See *Crabtree v. Petroleum Exploration, Inc.*, 137 S.W.2d 713, 716 (Ky. 1940).

¹³ In H. WILLIAMS & C. MEYERS, *supra* note 3, § 224.1, at 340-41, the rule is stated as follows:

The reason given for not allowing surface possession alone to ripen title to minerals after their legal severance is that the mineral owner has no cause of action for mere surface occupation. The owner's interest in the surface extends only to easements necessary for removal of the minerals.¹⁴ The courts do not expect the owner to take notice of mere surface occupation since he or she has no legal recourse to prevent it.¹⁵ Only activity amounting to a physical penetration of the mineral estate will be enough to alert the mineral owner of adverse possession by a surface owner.¹⁶

II. KENTUCKY'S STATUTORILY CREATED TRUST RELATIONSHIP

In Kentucky, even greater protection is given to the mineral owner by KRS section 381.430. Under this statute:

Wherever the mineral or other interest in or rights appurtenant to land in this state have passed, or shall hereafter pass, in any way, from a claimant in possession of the surface

After a severance of the minerals, adverse possession of the surface will not mature a limitation title to the minerals. Acquisition of such a title depends upon taking possession of the minerals, by drilling or conducting other mining activities. To prevent adverse possession, however, the severance must have been effective. A purported severance by one not having title does not bar acquisition of a limitation title to minerals. After a valid severance, neither continued surface occupancy by the grantor nor adverse possession of the surface by a stranger to the title will extend to the minerals, although title to the surface may be acquired thereby.

Thus occupation of land under a chain of title which contains a mineral reservation is not adverse to the reserved minerals.

See *Vorhes v. Dennison*, 189 S.W.2d 269 (Ky. 1945); *Curtis-Jordan Oil & Gas Co. v. Mullins*, 106 S.W.2d 979 (Ky. 1937); *Petroleum Exploration, Inc. v. House*, 105 S.W.2d 804 (Ky. 1937); E. KUNTZ, *supra* note 2, § 10.4, at 221.

¹⁴ H. WILLIAMS & C. MEYERS, *supra* note 3, § 224.1, at 344-45. See E. KUNTZ, *supra* note 2, § 10.4, at 220-21:

The reasons given for such results are that the mineral owner is presumed to be in possession of the minerals; that the mere possession of the surface is not inconsistent with separate ownership of the minerals; and that there would be no disseisin of the severed mineral interest without an invasion of the mineral domain by a working of the minerals, the mineral owner having no right to exclude anyone from the surface and having only such rights in the surface as is necessary to remove minerals.

¹⁵ H. WILLIAMS & C. MEYERS, *supra* note 3, § 224.1, at 345.

¹⁶ *Id.* at 340.

of land, the continuity of the possession of such mineral, interests and rights shall not be deemed thereby to have been broken; but the possession of the surface by the original claimant thereof, from whom such mineral, interest or rights passed, or by those claiming through or under him, or by virtue of a judgment against him in an action to which the holder of mineral, interests or rights is not a party, shall be deemed to be for the benefit of the person, his heirs and assigns, to whom the mineral, interests or rights have passed.¹⁷

This statute creates a trust relationship between the surface owner and the mineral owner so that the surface owner holds the minerals solely for the benefit of the true mineral owner.¹⁸ The surface owner's possession becomes adverse to that of the true mineral owner only when the surface owner successfully repudiates the trust by communicating clearly and unmistakably to the mineral owner, through acts or words, that the minerals are no longer being held for his or her benefit.¹⁹

III. REPUDIATING THE TRUST

One interpretation of the statutory language is that actual penetration and working of the mineral estate²⁰ by the surface

¹⁷ KRSA § 381.430 (1979). The statute was originally enacted in February of 1906, as Kentucky Statute § 2366 a-1. The language of the original statute was preserved with minor modifications in the current version.

¹⁸ *Kentucky River Coal Corp. v. Singleton*, 36 F. Supp. 123 (E.D. Ky. 1941). The federal district court observed that "[u]nder this statute, the Kentucky authorities are unanimous in holding that after severance of the mineral title one who acquires possession of the surface from the same grantor is deemed to hold possession of the minerals as trustee for the holder of the mineral title." *Id.* at 125.

¹⁹ *Id.* The court emphasized that:

[I]n the absence of an explicit disclaimer and clear repudiation of this subsisting relationship in a manner sufficiently open and notorious to bring home to the mineral owner knowledge or notice of the hostility of the surface holder's possession, the surface holder, being a trustee in possession, can never acquire the title of his cestui que trust by any length of possession for his possession never becomes adverse. The possession of the mineral owner being thus preserved and protected by the statute is not lost nor its continuity interrupted by any length of non-user.

Id. See *Diederich v. Ware*, 288 S.W.2d 643, 646 (Ky. 1956); *Petroleum Exploration v. House*, 105 S.W.2d at 806.

²⁰ The issue as to what substances are included in the mineral estate frequently arises. A helpful discussion is found in R. HEMINGWAY, *THE LAW OF OIL AND GAS* § 1.2

owner is enough to both repudiate the trust and satisfy the requirements of adverse possession. This conclusion logically follows from the reasonable expectation that the mineral estate holder will take notice of mining or drilling operations on the surface and know that attempts are being made to adversely possess the mineral estate holder's interest. It also is logical to think that mining or drilling is the type of activity which will alert the mineral owner clearly and unmistakably that the surface holder no longer keeps the minerals for his or her benefit.

Unfortunately, the common law in Kentucky is unclear as to what actions are sufficient to find the surface owner has repudiated the trust and gained title to the underlying minerals through adverse possession. A review of some court decisions suggests that actual working of the mineral estate by a surface possessor without a separate formal repudiation of the trust will never satisfy the requirements of the doctrine of adverse possession.²¹ In one case, the Court reasoned that the requirements could not be satisfied because the statutory trust creates a presumption that the surface owner's attempts at mineral possession are permissive; thus, the surface owner's holding of the minerals could never be hostile until a separate formal repudiation of the trust had occurred.²² On the other hand, some Kentucky decisions imply that the surface possessor's working of the mineral estate is in itself sufficiently adverse to satisfy the doctrine.²³

(1971), in which the author states: "A conveyance or reservation of 'minerals' or 'oil, gas and other minerals' will generally include substances having a special value apart from the land itself, whose removal will not substantially interfere with surface usage, and which are traditionally not associated with surface ownership."

For a discussion of how Kentucky cases have interpreted the word mineral, see generally *Rowe v. Chesapeake Mineral Co.*, 156 F.2d 752, 754 (6th Cir. 1946), *cert. denied*, 329 U.S. 776 (1946) ("It is the established rule under both state and federal law that the term 'mineral' includes gas and oil as well as solid minerals"); *Kalberer v. Grassham*, 138 S.W.2d 940, 942 (Ky. 1940) ("The word 'mineral' is not a definite term and is susceptible of limitations or extensions according to the intention with which it is used and each case must be decided on the language of the instrument, the surrounding circumstances and intention of the grantor").

²¹ See *Ward v. Woods*, 310 S.W.2d 63, 65 (Ky. 1958); *Diederich v. Ware*, 288 S.W.2d at 646; *Piney Oil & Gas Co. v. Scott*, 79 S.W.2d 394, 397 (Ky. 1934).

²² 310 S.W.2d at 65.

²³ See *Crabtree v. Petroleum Exploration, Inc.*, 137 S.W.2d at 713; *Hoskins v. Northern Lee Oil & Gas Co.*, 240 S.W. 377 (Ky. 1922).

A. *Requirement of a Separate Formal Repudiation*

Kentucky's highest court first emphasized the need for a separate formal disavowal of the trust in *Piney Oil and Gas Co. v. Scott*.²⁴ In that case, the owner of an 800-acre estate had, in 1859, granted the minerals under his land to another party. The descendants of the grantor eventually divided the 800 acres into smaller tracts for individual sale. None of the subsequent general warranty deeds for these smaller parcels mentioned any exception for the mineral interests. By 1931, Piney Oil and Gas Co. had purchased the mineral rights under the 800 acres from the original grantees, and it subsequently brought suit against the fifty-two owners who settled within the 800 acres to quiet title to the minerals. The surface owners claimed they held title to the minerals through adverse possession, even though some of them had never worked the minerals under their tracts or had mined for domestic use only. The Court rejected the surface owners' claim for two reasons: first, occasional domestic mining does not satisfy the continuity element required by the adverse possession doctrine;²⁵ and second, the surface owners had not given formal notice to the fee owner of the mineral estate repudiating their trustee relationship with him. Without such formal notice, the minerals could only have been held for the benefit of their true owner, the fee owner of the mineral estate.²⁶ The Court, commenting on the trustee relationship, stated:

This is a most serious handicap upon a would-be disseisor. [The original grantor] and those claiming under him were not thereafter in as good a position to initiate a disseisure as would have

²⁴ 79 S.W.2d at 394.

²⁵ *Id.* at 399. Traditionally, courts have held that domestic mining does not support an action for adverse possession because the intermittent nature of domestic mining fails to satisfy the *continuity* requirement of the adverse possession doctrine. *See* Claybrooke v. Barnes, 22 S.W.2d 390, 392 (Ark. 1929); *Prewitt v. Bull*, 27 S.W.2d 399, 401 (Ky. 1930); *McPherson v. Thompson*, 261 S.W. 853, 854-55 (Ky. 1924); *Central Trust Co. v. Harless*, 152 S.E. 209, 213-14 (W. Va. 1930). *See also* Annot., 35 A.L.R.2d 124 (1954) (discusses acquisition of title to mines or minerals by adverse possession). *Cf.* *Brockman v. Jones*, 610 S.W.2d 943 (Ky. Ct. App. 1980) (domestic mining does not satisfy the *hostility* requirement of the adverse possession doctrine).

²⁶ 79 S.W.2d at 397.

been a stranger. All a stranger would have to do would be to begin the necessary steps to accomplish the disseisin and perfect them, but, before any of these surface owners could become a candidate for the position of disseisor, it would be necessary for him to rid himself of his present position of trustee in possession.²⁷

If this language is taken literally, the near impossibility of an owner ever losing a mineral estate through the adverse possession of a surface owner becomes apparent. No amount of mining activity will be sufficient to satisfy the adverse possession requirements since such workings of the underlying minerals by a surface holder will never be hostile. The mining activity, deemed to be for the benefit of the true owner, will remain permissive until a separate repudiation of the trust occurs.

This requirement of formal repudiation becomes more onerous in the case of surface owners who take title to the property through a deed which makes no mention of a previous mineral severance. These surface owners will never repudiate the trust because they do not know that another person holds a fee interest in the minerals. These owners are likely to work the mineral estate under the belief that it is their property. But under the trust rationale, no amount of possession of the minerals will cause title to ripen until a separate repudiation occurs. Therefore, although the mining activity may have been continuous for over fifteen years, the true mineral owner can still return to claim his or her interest.

Piney Oil's requirement of separate repudiation of the trust by the surface owner in addition to actual penetration of the mineral estate was clarified in a later Kentucky case, *Diederich v. Ware*,²⁸ where the Court gave an example of a type of repudiation which would constitute open disavowal of the trust. In *Diederich*, the owner of a fifty-six-acre tract, conveyed in 1859 the underlying oil estate to the Gray-Mellon Oil Company. The validity of this conveyance was upheld in a 1927 case²⁹ which

²⁷ *Id.* at 398.

²⁸ 288 S.W.2d at 643.

²⁹ *Gray-Mellon Oil Co. v. Fairchild*, 292 S.W. 743 (Ky. 1927).

construed the 1859 deed in favor of the company as giving it a fee interest in the oil.³⁰ Testimony in that case revealed that there had been adverse drilling activity on the property.³¹ In 1956, a subsequent owner of the oil interest brought suit against the surface owner to gain royalties from two wells which had been producing on the property for more than fifteen years. The Court held in favor of the surface owner, finding that he had fulfilled all the elements of adverse possession, including hostility, by successfully repudiating the trust and penetrating the mineral estate. The Court, acknowledging *Piney Oil*, stated:

In the *Piney Oil* case . . . there is some language suggesting the surface owner must give the mineral owner formal notice he is taking the minerals under an adverse claim in order to repudiate the trust and initiate limitations. In the present case, the appellant's predecessor in title, the Gray-Mellon Oil Company, had actual notice as early as 1925 that oil was being taken from the G.W. Webb tract mentioned in their mineral deed. The notice was formal in that it appears in testimony in the record of the case of *Gray-Mellon Oil Co. v. Fairchild*, 219 Ky. 143, 292 S.W. 743, in which we considered the same 1859 oil deed. We think that this notice, together with the open and notorious operation of these two wells since that time, was sufficient to cause limitation to run against the mineral owners.³²

The need for a separate repudiation was reiterated in a subsequent decision by Kentucky's highest court, *Ward v. Woods*.³³

³⁰ The general rules of adverse possession relating to solid minerals such as coal may not be appropriate where fugacious minerals such as oil and gas are concerned. Adverse possession of solid minerals theoretically can be limited to those minerals over which the surface owner has actual or potential possession; the surface owner can adversely possess the immediate area of the mining activity.

Such an approach does not appear to work where fugacious minerals are concerned. Migratory by nature, oil and gas do not stay in place once drilling activity begins. Instead, the entire substrata is altered by natural forces which begin pushing the fugacious minerals to the mouth of the well. Thus, the adverse possessor of these fugacious minerals would have immediate potential occupation or use of the minerals underlying all of the surface, not just that portion at the surface in the vicinity of the drilling activity. For a detailed discussion of these concepts, see *Sanford v. Alabama Power Co.*, 54 So. 2d 562 (Ala. 1941); *Diederich v. Ware*, 288 S.W.2d at 643; Cohen, *Property Theories Affecting the Landowner in a New Oil and Gas Producing State*, 11 ALA. L. REV. 79 (1958-59).

³¹ 292 S.W. at 744.

³² 288 S.W.2d at 647.

³³ 310 S.W.2d at 63.

We have held may [sic] times that in order for the surface owner to obtain title by adverse possession to the minerals which constitute a severed estate, he must have openly disavowed or repudiated the trust declared by the statute and have exercised dominion over the mineral estate and brought notice thereof to the owner of that estate.³⁴

The foregoing cases indicate that, under Kentucky law, a surface owner who seeks title to severed mineral interests by adverse possession must, in order to satisfy the requirements of the doctrine of adverse possession,³⁵ show a separate repudiation of the trust imposed under KRS section 381.430.³⁶ Ordinarily when courts apply the adverse possession doctrine the physical possession of the property in and of itself is sufficient to satisfy the hostility requirement. But in the context of subsurface minerals which would have been legally severed from the surface, *Piney Oil*, *Diederich* and *Ward* hold that mere possession of the minerals by a surface owner is not hostile. Instead, such possession is treated as permissive possession by a trustee for the benefit of the cestui que trust. The hostility element is satisfied only after the trust has been repudiated. Thus, these three cases apparently establish that, in Kentucky, mining or drilling activity must be coupled with formal repudiation for the possession by a surface owner to be adverse.

B. *Repudiation Solely by Working the Mineral Estate*

Unfortunately, the principle set forth in the foregoing three cases has not been consistently applied in other decisions. For example, in *Crabtree v. Petroleum Exploration, Inc.*,³⁷ the Court held that a surface owner, in order to gain title to the previously severed mineral interest, must either develop and work the mineral estate continuously under claim of right for the statutory period *or* repudiate the trust and give the mineral owner notice

³⁴ *Id.* at 65.

³⁵ See notes 8-10 *supra* and accompanying text for a discussion of the elements of the adverse possession doctrine.

³⁶ KRS § 381.430 (1979).

³⁷ 137 S.W.2d at 713.

of the repudiation.³⁸ The Court in *Crabtree* viewed repudiation and possession as alternative methods of achieving ownership rather than as distinct elements which are both necessary for adverse possession.

It seems doubtful, however, that mere repudiation of the trust without exercise of actual dominion over the minerals would ever be enough for adverse possession. If repudiation were by formal notice and no physical acts occurred on the land other than mere surface occupation, the mineral owner would never have a cause of action against the surface possessor because his or her legal rights would not extend to ousting the surface owner for mere surface occupation.

Crabtree was not the first case which failed to view formal repudiation of the trust as a distinct element necessary for adverse possession of a severed mineral estate. In *Hoskins v. Northern Lee Oil and Gas Co.*,³⁹ the Court apparently ignored the formal repudiation requirement and instead implied that the exercise of dominion over the minerals, without more, could vest title in the adverse possessor.⁴⁰ The case involved a dispute over oil and gas rights. In 1901, the owner of an eight-acre tract sold his land, reserving the mineral rights in all coal, oil, iron and gas in himself. A subsequent holder of the surface claimed that she held title to the minerals under a title bond given to her by the original mineral owner. She also claimed that her domestic mining activities entitled her to the minerals under the adverse possession doctrine. The plaintiff, Northern Lee Oil Company, claimed title to the minerals traceable to the original owner.⁴¹

The Court held that the surface owner's bond was invalid and that she could not assert adverse possession because she had failed to mine the property continuously for the statutory period.⁴² In discussing the extent of mining activity needed for the surface holder to gain title through adverse possession, the Court said:

³⁸ *Id.* at 716.

³⁹ 240 S.W. at 377.

⁴⁰ *Id.* at 380.

⁴¹ *Id.* at 377-78.

⁴² *Id.* at 380.

The only way the statutes can be started running in favor of the surface holder, as against the owner of the mineral, is by the former taking actual possession of the mineral under claim of right, by opening mines or wells and operating the same. When this possession has continued for the statutory period, title to the mineral by adverse possession is perfected.⁴³

The Court in *Hoskins* failed to mention the need to separately repudiate the trust in order to satisfy the hostility requirement of adverse possession, instead indicating that the statute begins to run in favor of the surface owner once a continuous working of the mine begins. One may infer from the Court's language that repudiation is not necessary to establish hostility but, rather, that working of the mineral estate alone is sufficiently adverse to satisfy the doctrine.

The most recent Kentucky case dealing with adverse possession of subsurface minerals fails to clarify whether repudiation plus actual working of the mineral estate is necessary for adverse possession. In *Brockman v. Jones*,⁴⁴ decided in 1980, a landowner conveyed his property to another party while reserving all coal rights in himself. Subsequent surface owners obtained title to the land through two deeds, neither of which mentioned the original coal reservation.⁴⁵ The surface owners began mining coal on the property for domestic use as early as 1957. They brought suit to quiet title to the mineral rights because they wished to execute coal leases.⁴⁶ The appellate court, finding for the mineral owner, held that the surface owners' mining for domestic use did not constitute open disavowal or repudiation of the statutorily created trust.⁴⁷

This holding is inconsistent with *Piney Oil*,⁴⁸ *Diederich*⁴⁹ and *Ward*⁵⁰ in two respects. First, the language of the opinion implies

⁴³ *Id.*

⁴⁴ 610 S.W.2d at 943.

⁴⁵ *Id.* at 944. Testimony revealed that the surface owners had learned of the reservation of coal rights from one of their predecessors in title.

⁴⁶ *Id.*

⁴⁷ *Id.* at 945.

⁴⁸ 310 S.W.2d at 63.

⁴⁹ 288 S.W.2d at 643.

⁵⁰ 79 S.W.2d at 394.

that more extensive or commercial mining activity would have been sufficient to repudiate the trust.⁵¹ If this implication is intended, then it is possible that the court in *Brockman* believed, as did the Court in *Hoskins*,⁵² that mining activity alone can be sufficient to establish adverse possession without a separate formal repudiation of the trust. Second, the court articulated a new rationale for excepting domestic mining from application of the adverse possession doctrine. Previous cases⁵³ held that the requirement of continuity was not met by mining for domestic use because such mining extracted coal only when needed and not continuously. Under the *Brockman* rationale, domestic mining is ignored because the requirement of hostility is missing. The court did not regard domestic mining as truly adverse to the mineral owner's interest.

IV. A NEED FOR CLARIFICATION OF THE LAW

The preceding review of Kentucky cases reveals confusion as to the requirements which a surface owner must meet in order to establish adverse possession of previously severed mineral interests. Some cases⁵⁴ indicate that continuous mining activity alone will serve both as a repudiation of the trust and as actual, open, notorious and hostile possession of the minerals. Conversely, other cases⁵⁵ clearly call for a separate repudiation of the trust before any working of the mineral estate will be considered adverse.

The need for clarification of the law in this area is obvious in view of Kentucky's stature as a major coal producing state and its desire to increase its share of the world coal market. In 1981, total consumption of United States coal reached 838 million tons.⁵⁶ The U.S. Department of Energy predicted that 1982 coal

⁵¹ The court stated: "It is clear from the record that appellants only mined for domestic use and that their mining activity was *insufficient* to constitute open disavowal or repudiation of the trust declared by statute." 610 S.W.2d at 945 (emphasis added).

⁵² 240 S.W. at 377.

⁵³ See note 25 *supra*.

⁵⁴ See notes 37-47 *supra* and accompanying text for a discussion of these cases.

⁵⁵ See notes 24-34 *supra* and accompanying text for a discussion of these cases.

⁵⁶ Guccione, 1982: *Very Good, if . . .*, COAL MINING & PROCESSING, Jan. 1982, at

consumption would hit a record-breaking 800 million tons.⁵⁷ The competitive position of coal in relation to oil and gas grows more favorable due to the fact that coal can be used to produce one million BTU's of energy for approximately one-third of the cost of using oil and for approximately two-thirds of the cost of using natural gas.⁵⁸ Meanwhile, Kentucky continues to have one of the largest reserves of premium bituminous coal in comparison to fourteen of the other major coal producing states.⁵⁹ As of 1974, reserves in Eastern Kentucky alone were estimated at 4977.03 million net tons.⁶⁰

Disregarding for the moment the unsettled question of whether, in Kentucky, a surface owner must formally repudiate his or her trust relationship with the owner of the mineral estate in order to adversely possess the mineral interest, a more basic question remains: Does the doctrine of adverse possession, as generally construed,⁶¹ stand as an obstacle to mineral development? A number of commentators have written extensively in recent years on the need to clear title to dormant mineral interests,⁶² and many have expressed the view that the doctrine of adverse possession provides little assistance in attaining this desired result. They reason that a prudent mineral developer is unlikely to attempt to gain title to a severed mineral estate by actual working of the underlying strata as required by the doctrine.⁶³

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ NATIONAL COAL ASSOCIATION, COAL DATA I-8 (1979-80).

⁶⁰ *Id.*

⁶¹ See notes 8-10 *supra* and accompanying text for a discussion of adverse possession.

⁶² See Kuntz, *Old and New Solutions to the Problem of the Outstanding Undeveloped Mineral Interest*, 22 INST. ON OIL & GAS L. & TAXN 81 (1971); Outerbridge, *Missing and Unknown Mineral Owners*, 25 ROCKY MTN. MIN. L. INST. 20-1 (1979); Polston, *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles*, 7 LAND & WATER L. REV. 73 (1972); Smith, *Methods for Facilitating the Development of Oil and Gas Lands Burdened with Outstanding Mineral Interests*, 43 TEX. L. REV. 129 (1964); Note, *Severed Mineral Interests, a Problem Without a Solution?*, 47 N.D.L. REV. 451 (1970).

⁶³ See, e.g., Kuntz, *supra* note 62, at 94. (If title to a severed mineral interest is neither lost by non-user nor acquired by adverse possession of the surface which was begun after title to the mineral interest was severed, the mere passage of time does nothing to remove the problem of the outstanding mineral interest, but merely serves to increase the likelihood of further fragmentation of the title); Outerbridge, *supra* note 62, at 20-9 ("Although a severed mineral interest may be 'possessed' by actual working of the minerals, it is unlikely that any prudent mineral developer would intentionally adopt this approach as

Costs for mineral development are too high to encourage such an uncertain method of acquiring title.⁶⁴ The mineral severance has often occurred so many years earlier that the true owner is missing or unknown. Consequently, it is impossible to acquire mineral rights by the conventional means of obtaining the owner's consent. As noted in one treatise:

While the rule [requiring penetration of the mineral estate for adverse possession] appears to be sound enough from the mineral owner's point of view, it can cause economic inconvenience to the public. Severed minerals cannot be developed until the owners consent to their development. The older the severance (and many go back to the 19th century), the greater the difficulty in locating the owners. The problem is further complicated if the severance was of small undivided mineral interests, as was common for speculation purposes in the 1920's. Present development of such areas depends upon obtaining the consent of nearly all the mineral owners, a task that could involve locating thousands of persons.⁶⁵

Prodded perhaps by the "economic inconvenience to the public" which results from minerals lying dormant indefinitely, some states have developed alternatives to the adverse possession doctrine as a means of clearing title to dormant mineral interests, such as reversion of title to the surface owner if the mineral estate is not worked.⁶⁶ This is not the case in Kentucky, however, where

a means of acquiring an outstanding mineral interest"); Smith, *supra* note 62, at 161:

⁶⁴ Smith, *supra* note 62, at 160-61. As the author noted:

[T]here seems little likelihood of utilizing adverse possession or user as an effective method of eliminating dormant mineral claims which hinder development. Drilling and production will not take place if the operator is aware of a large outstanding claim; thus, title to oil and gas [or coal] by adverse possession will usually be acquired only when the operator has erroneously assumed that he or his lessor has good title.

Id. See Outerbridge, *supra* note 62, at 20-5, 20-6.

⁶⁵ H. WILLIAMS & C. MEYERS, *supra* note 3, at § 224.1.

⁶⁶ For example, the state of Louisiana has developed the doctrine of liberative prescription. Under this doctrine, a mineral "fee" is classified as a servitude, and nonusage for a period of ten years will result in its prescription in favor of the owner of the surface estate. Smith, *supra* note 62, at 161-72.

the true owner of a mineral estate continues to hold title regardless of the length of non-user.⁶⁷ And, as this Comment previously noted,⁶⁸ the predicament is exacerbated by the confusion in Kentucky as to the steps that surface owners must take to perfect title through adverse possession. Must the surface owner who wishes to adversely possess a severed mineral interest develop and work the mineral estate continuously under claim of right for the statutory period *and* communicate to the mineral owner a formal repudiation of the statutory trust? The Kentucky courts have yet to answer this question definitively.

CONCLUSION

In view of the importance of coal to the Commonwealth of Kentucky, the state legislature should examine the feasibility of adopting a more effective method for assuring that missing and unknown mineral owners do not hamper the advantageous development of mineral interests. Specifically, the legislature, where mineral estates are concerned, might consider replacing the largely ineffective adverse possession doctrine with a system which would work a forfeiture of the mineral estate in favor of the surface owner after a specified period of non-user.⁶⁹ Alternatively, the Kentucky Supreme Court or the legislature, at the earliest opportunity, must definitively establish the requirements that a surface owner must satisfy in order to perfect title in a mineral estate by adverse possession. In the interest of efficient utilization of our state's resources, such requirements should not mandate that a surface owner communicate to the mineral owner a formal repudiation of the statutory trusts.

M. Gabrielle Hils

⁶⁷ *Curtis-Jordan Oil & Gas Co. v. Mullins*, 106 S.W.2d at 979; *Piney Oil & Gas Co. v. Scott*, 79 S.W.2d at 394; *Scott v. Laws*, 215 S.W. 81 (Ky. 1919). For a detailed discussion of the loss of mineral rights by non-user, see *Outerbridge*, *supra* note 62, at 20-1; *Smith*, *supra* note 12, at 129.

⁶⁸ See notes 53-55 *supra* and accompanying text.

⁶⁹ The theory of extinguishment of dormant mineral interests by non-user has been adopted by at least ten states. *Outerbridge*, *supra* note 62, at 20-27 to 20-45. Such a statute must be carefully drafted, giving due consideration to constitutional due process requirements, and include 1) a provision that non-user creates a rebuttable presumption of abandonment rather than absolute loss of property, and 2) a provision for notice to the mineral owner which meets constitutional standards, coupled with a right to a hearing. *See id.*

