North Dakota Law Review

Volume 51 | Number 2 Article 5

1974

Severed Mineral Interests

Ernest R. Fleck

SEVERED MINERAL INTERESTS

ERNEST R. FLECK*

In 1920 the North Dakota Supreme Court stated, "Minerals in place are land and may be conveyed as other lands are conveyed. 'A mining right may be separated from the surface, which may be held by one person and the mining right by another, and the ownership of mines whether opened or unopened, may exist distinct from the ownership of the surface. There may be as many different owners as there are strata; . . . and each is a freehold estate of inheritance. . . . The severance of a mine and the surface of lands may be accomplished by a conveyance of the mines and minerals, or by a conveyance of the land with a reservation or exception to the mines and minerals. There is no substantial difference between these two methods in the result accomplished. . . .' "[1]

The severance of the mineral estate from the surface estate in land has caused some problems, litigation and legislation over the years, but these were minimized by general acceptance of the doctrine of mineral estate dominance. Today, however, there appears to be an erosion of this concept and an increased concern for the rights of the surface owner.

This discussion is limited to some of the more important methods of severing the mineral and surface estate and the relative rights and obligations of the owners of such mineral and surface estates.

I. RESERVATIONS UNDER UNITED STATES PATENTS

The first homestead act passed by Congress was approved on May 20, 1862.[2] Prior to that time public lands had been sold to the highest bidders.[3] Under the homestead acts the theory was to encourage settlement of the public domain by rewarding the settlers with the land after they had resided upon, cultivated and im-

* Fleck, Mather, Strutz & Mayer, Ltd., Bismarck, N.D., J.D., 1948, Notre Dame.

1. Beulah Coal Mining Co. v. Heihn, 46 N.D. 646, 651, 180 N.W. 187, 189 (1920) *quoting* 18 R.C.L. 1174-76.

2. Act of May 20, 1862, ch. 75, 12 Stat. 392.

3. The first act governing the sale, to the highest bidder, of public lands "in the territory northwest of the river Ohio" was the Act of May 18, 1796, ch. 29, 1 Stat. 464.

proved it.[4] Following the passage of the Lode Mining Acts[5] and until after 1900, lands were generally patented as mineral lands or as agricultural lands. It was not considered that lands could be patented for agriculture if the land was thought to be more valuable for mining.[6]

Starting with the Act of March 3, 1909,[7] providing for agricultural entry upon coal land, a new policy was established permitting agricultural entries upon mineral lands with a reservation of the minerals, for which the land had been classified as mineral. This act of March 3, 1909, provided for the reservation to the United States of all coal and the right to prospect for, mine, and remove the same.[8]

The act of June 22, 1910,[9] went further and opened the coal lands to entry under the homestead laws, the desert-land law, the Carey Act, and the Reclamation Act, provided a reservation to the United States was made of the coal and of the right to prospect for, mine and remove the coal. The Acts of 1909 and 1910 provided that if it could be proved that such lands should not have been classified as coal land the entryman could secure a patent without reservation of the coal.[10]

The 1909 act provided that,

> [N]o person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such condition as to security for the payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction.[11]

In the 1910 act it was provided that,

> Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the

4. Entry under the first Homestead Act required an affidavit "that said entry is made for the purpose of actual settlement and cultivation. . . ." Act of May 20, 1862, ch. 75, § 2, 12 Stat. 392. A patent was issued to the person making an entry, his widow, or his or her heirs or devisee upon proof "by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit aforesaid. . . . *Id.*

5. Act of July 26, 1866, ch. 262, 14 Stat. 251; Act of May 10, 1872, ch. 152, 17 Stat. 91.

6. *Cf.* 1 RKY MT. MIN. L. FOUND., AMERICAN LAW OF MINING § 1.10 (1974) (discussing Agriculture v. Mining).

7. 30 U.S.C. § 81 (1970) (originally enacted as Act of March 3, 1909, ch. 270, 35 Stat. 844).

8. *Id.*

9. *Id.* §§ 83-85 (1970) (originally enacted as Act of June 22, 1910, ch. 318, 36 Stat. 583). The desert-land law is the Act of March 3, 1877, ch. 107, 19 Stat. 377. The Carey Act is the Act of August 18, 1894, ch. 301, § 4, 28 Stat. 422. The Reclamation Act is the Act of June 17, 1902, ch. 1093, 32 Stat. 388.

10. 30 U.S.C. §§ 81, 85 (1970).

11. *Id.* § 81.

> surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in a action instituted in any competent court to ascertain and fix said damages.[12]

There are numerous other acts providing for the issuance of patents with reservations or exceptions of oil, gas, or other minerals to the United States. The two most important of such acts are those of July 17, 1914,[13] and December 29, 1916.[14]

Patents issued under the 1974 act provided for the excepting and reserving to the United States all of the oil and gas or other stated non-metallic minerals, i.e. phosphate, nitrate, potash or asphaltic materials, in the land so patented. Persons authorized by the United States had the right to prospect for, mine and remove such deposits.

The Stock Raising Homestead Act contains the provision for,

> a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine and remove the same.[15]

It is to be noted that the Act of 1914 specifically mentions oil and gas in the reservation, while the Act of 1916 states "coal and other minerals." It has been held[16] that the term "other minerals" in the Act did include oil and gas.

The Stock Raising Homestead Act of 1916 provides:

> Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal or other minerals, first, upon securing the written consent of waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution

---

12. *Id.* § 85.
13. 30 U.S.C. §§ 1212-23 (1970) (originally enacted as Act of July 17, 1914, ch. 142, 38 Stat. 509).
14. 43 U.S.C. §§ 291-301 (1970) (originally enacted as Act of December 29, 1916, ch. 9, 39 Stat. 862).
15. Act of December 29, 1916, ch. 9, § 9, 39 Stat. 864 (codified at 43 U.S.C. 299) (1970).
16. Skeen v. Lynch, 48 F.2d 1044 (10th Cir. 1931), *cert. denied*, 284 U.S. 638 (1931).

> of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction, against the principal and sureties thereon. . . .[17]

There appear to be no important cases involving disputes between the surface owner and the mineral claimant with respect to patents issued under the 1909 and 1910 Acts.

Howard A. Twittey noted in discussing the law of subjacent support that,

> Acts of Congress providing for the issuance of non-mineral patents with a reservation of minerals were enacted to carry out the expressed national policy of conserving the natural resources for future generations and encouraging settlement of the West.[18]

Mr. Twittey quoted from President Taft's special message to Congress on conservation of natural resources, transmitted on January 14, 1910, as follows:

> It is now proposed to dispose of agricultural lands as such, and at the same time to reserve for other disposition the treasure of coal, oil, asphaltum, natural gas, and phosphate contained therein. This may be best accomplished by separating the right to mine from the title to the surface, giving the necessary use of so much of the latter as may be required for the extraction of the deposits.[19]

Congress has provided in each of the above mentioned acts for a procedure whereby the surface owner would receive payment of damages from the holder of the mineral estate as a result of mining operations.

There have been several cases involving the Act of July 17, 1914,[20] which provided for entries under the non-mineral laws, reserving oil and gas and other specified minerals, and which contained a damage clause[21] comparable to the damage clause[22] in the 1910 act. The leading case is *Kinney-Coastal Oil Company v. Kieffer,*[23] in which it was held that the surface estate was servient to the mineral estate and in which it was indicated that the oil lessee might take the entire surface. In spite of the plain language of

17. 43 U.S.C. 299 (1970).
18. Twittey, *Law of Subjacent Support and the Right to Totally Destroy Surface in Mining Operations*, 6 RKY. MT. MIN. LAW INST., 497, 514 (1961).
19. *Id.* at 514-15.
20. 30 U.S.C. §§ 121-23 (1970).
21. *Id.* § 122.
22. *Id.* § 81.
23. 277 U.S. 488 (1927).

the statute, it was held that damages were limited to the surface owner's agricultural improvements and crops. In *Bordieu v. Seaboard Oil Corporation of Delaware,*[24] the entry of the oil company was upheld with the court stating:

> By he statutes a servitude is placed upon the surface estate for the benefit of the mineral estate, but the obligation is placed upon the holder of the dominant estate, upon entering and occupying any portion of the surface, to pay the owner of the servient estate the damages caused thereby. This liability, we believe, is clearly a liability created by statute.[25]

As to damages, the court held in *Bordieu* that the lessee was liable for all damages to the surface as provided in the 1914 act, and also for damages arising from use of a portion of the surface occupied by the lessee for purposes not related to the extraction of oil from the plaintiff's land.[26]

In *Holbrook v. Continental Oil Company,*[27] the entry of the lessee was again upheld. The court found as a matter of law that no damage had been sustained by the plaintiff in that there was no damage to growing crops or permanent improvements, nor was there any pollution of water.[28] The court noted that construction of houses by the lessee for its employees on plaintiff's premises was reasonably incident to its right under the lease and did not constitute trespass.[29]

The latest statute[30] dealing with liabilities of federal lessees to surface owners specifically recognizes the possibility of destruction of surface by strip or open-pit mining methods on land included in a stock raising or other homestead entry or patent; it provides as follows:

> Notwithstanding the provisions of any act of Congress to the contrary, any person who hereafter prospects for, mines, or removes by strip or open-pit mining methods, any minerals from any land included in a stock raising or other homestead entry or patent, and who had been liable under such an existing Act only for damages caused thereby to the crops or improvements of the entryman or patentee, shall also be liable for any damage that may be caused to the value of the land for grazing by such prospecting for, mining, or removing of minerals. Nothing in this section shall be considered to impair any vested right in existence on June 21, 1949.[31]

---

24. 38 Cal. App. 2d 11, 100 P.2d 528 (1940).
25. *Id.* at ——, 100 P.2d at 532.
26. *Id.* at ——, 100 P.2d at 535.
27. 73 Wyo. 321, 278 P.2d 798 (1955).
28. *Id.* at ——, 278 P.2d at 803-06.
29. *Id.* at ——, 278 P.2d at 802-03.
30. 30 U.S.C. § 54 (1970) (enacted as Act of June 21, 1949, ch. 232, § 5, 63 Stat. 215).
31. *Id.*

In the Senate report which accompanied the Act of July 21, 1949, the following statement as to the purpose of the section is set forth:

> In many present-day mining operations, such as that employed in the production of bentonite, for example, strip-mining methods are prevalent which permanently destroy the entire surface value of the land for grass-raising and stock-grazing purposes. Thus, the number of head of stock an entryman can raise on his homestead is limited to some extent for both the present and future by the activities of the holder of the mineral rights on the land.[32]

It would appear that Congress recognized the need for strip or open-pit mining operations and at the same time intended to provide adequate damages to the surface owner.

The House version of the Surface Mining Control and Reclamation Act of 1974 requires the written consent or acquiescence of the surface owner where the mineral estate proposed to be mined by surface coal mining operations is separately owned by the federal government.[33]

In leaving the subject of reservations in United States patents, we conclude that, where the mineral and surface estates vest in different parties as a result of the issuance of a patent, it is necessary to construe the statute under which the patent was issued and ascertain the legislative intent in order to determine the respective rights and obligations of the owners of the two estates.

II. MINERAL SEVERANCE BY DEED OR RESERVATION IN DEED

Where the mineral and surface estates have been severed by deed of private individuals, it is necessary to construe the deed severing these estates in order to determine the intent of the parties and the resulting rights and obligations of the owners of the two estates.

In considering mineral severance by deed, we should consider for a moment what minerals are so severed. Instruments of conveyance or of reservation most commonly used in the State of North Dakota refer to "all oil, gas and other minerals in and under and that may be produced. . . . " Early decisions were concerned with whether the term "minerals" included oil and gas. The Majority rule[34] is that while the intention of the parties as indicated

32. S. REP. No. 404, 81st Cong., 1st Sess. 3 (1949).
33. H.R. 11500, 93rd Cong., 2d Sess. (1974). The bill was passed by the House on July 25, 1974. At this writing, House and Senate conferees are deadlocked over this provision in the bill, which is now numbered S. 425—as is the bill which passed the Senate in 1973. S. 425, 93d Cong., 1st Sess. (1973).
34. H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 219 (1971).

by a consideration of the language of the whole instrument must control, the term "minerals" as used in real property instruments includes oil and gas unless a contrary intention or an ambiguity is manifest by the language of the instrument as a whole. More important at the present time is the question of whether or not the grant of "oil, gas and other minerals" includes coal.

Present North Dakota statutory law provides that:

> No conveyance of mineral rights or royalties separate from the surface rights in real property in this state, excluding leases, shall be construed to grant or convey to the grantee thereof any interest in and to any gravel, coal, clay or uranium, unless the intent to convey such interest is specifically and separately set forth in the instrument of conveyance.[35]

Thus the question as to whether or not coal is included in a conveyance of "minerals" arises only by virtue of instruments dated prior to July 1, 1955.[36]

While in some instances a grant or reservation has been held to apply only to minerals known to exist in the land at the time of the deed, the general rule is that the term "all minerals" includes all minerals found on the premises whether known to exist or not.[37] While there are some authorities to the contrary, as a general rule a grant or reservation of mines and minerals includes oil and gas.[38]

The results of the decisions vary not only from jurisdiction to jurisdiction, but often within the same jurisdiction. In many instances the courts attempt to determine what was intended by the language of the instrument involved. What appears to be the general rule was ably set forth in *New Mexico and Arizona Land Company v. Elkins*,[39] in which case a reservation of "oil, gas and other minerals underlying or pertinent to said land" was held to include uranium, thorium and associated fissionable materials. Judge Rogers concluded that extrinsic evidence as to the intent of the parties was not admissible because the language was unequivocal,[40] citing numerous cases[41] to support "the majority rule, the best reasoned rule and the modern rule . . . that in a grant or a reservation of mineral rights, it is immaterial whether, at the time of the conveyances, the parties thereto know what minerals were or were not present on the land."[42] The New Mexico court approved, quoted

35. N.D. CENT. CODE § 47-10-24 (Supp. 1973). This language is identical to that of N.D. Sess. Laws, ch. 235, § 1, at 316 (1955), which it replaced.
36. The effective date of N.D. Sess. Laws, ch. 235, § 1, at 316 (1955).
37. Stowers v. Huntington Development & Gas Co., 72 F.2d 969, 971 (4th Cir. 1934).
38. Skeen v. Lynch, 48 F.2d 1044 (10th Cir. 1931), *cert. denied*, 284 U.S. 633 (1931); 58 C.J.S. *Mines and Minerals* § 158 (1938).
39. 137 F. Supp. 767 (D.N.M. 1956).
40. *Id.* at 770.
41. Stower v. Huntington Development & Gas Co., 72 F.2d 969 (4th Cir. 1934); Maynard v. McHenry, 271 Ky. 642, 113 S.W.2d 13 (1938); Sellers v. Ohio Valley Trust Co., 248

and followed *Western Development Company v. Nell*,[43] where the Utah court held that one seeking to restrict the general meaning attributed by law to the word "mineral" must bear the burden of proving the intentions of the parties so to limit the reservation.[44]

In *Adams County v. Smith*,[45] the court, while considering whether the term "mineral" as used in a reservation statute included coal, stated:

> We have found no cases holding that coal is not a mineral. Whereever the question has been considered the courts have construed the term "mineral" to include coal. [citations omitted.] We therefore reach the conslusion that the term "mineral" as used in Ch. 136, Sess. Laws N.D. 1941, includes coal.[46]

In *Evangelical Lutheran Church v. Stanoilind Oil and Gas Co.*,[47] the court held that the words "all other minerals" contained in an oil and gas lease covered all other minerals which could be mined from the earth and not just oil and gas. This case was prior to the enactment of ch. 235, § 1 [1955] Laws of North Dakota 316 which required that minerals to be included in the lease be specifically named, a requirement retained in N.D. CENT. CODE § 47-10-24 (Supp. 1973).

The holding in the *Adams County* case was applied in *Abbey v. State*,[48] where the court construed the language of Section 38-0901, North Dakota Revised Code of 1943 to include coal. The statute provided that, "In every transfer of land . . . by the state of North Dakota, . . . fifty percent of all oil, natural gas or minerals . . . shall be reserved to the state of North Dakota."[49]

The most recent and far reaching case is the North Dakota Supreme Court decision in *Christman v. Emineth*,[50] where one of the questions considered by the court was whether or not the term "all other minerals" as used in a reservation made by The Federal Land Bank of Saint Paul in 1943 included lignite coal. The court stated:

> In construing the instrument to determine the intention of the parties, there is one further fact that should be noted.

S.W.2d 897 (Ky. 1952); Western Development Co. v. Neil, 4 Utah 2d 112, 288 P.2d 452 (1955); Rowe v. Chesapeake Mineral Co., 156 F.2d 752 (6th Cir. 1946), *cert. denied*, 329 U.S. 776 (1946); Anderson & Kerr Drilling Co. v. Bruhlmeyer, 134 Tex. 574, 136 S.W.2d 800 (1940); Kentucky Diamond Mining & Development Co. v. Kentucky Transvaal Diamond Co., 141 Ky. 97, 132 S.W. 397 (1910).

42. New Mexico & Arizona Land Co. v. Elkins, 137 F. Supp. 767, 771 (D.N.M. 1956).
43. 4 Utah 2d 112, 288 P.2d 452 (1955).
44. *Id.* at ——, 288 P.2d at 454.
45. 74 N.D. 621, 23 N.W.2d 873 (1946).
46. *Id.* at 624, 23 N.W.2d at 875.
47. 251 F.2d 412 (8th Cir. 1958).
48. 202 N.W.2d 844 (N.D. 1972).
49. Ch. 165, § 1 [1941] Laws of North Dakota 238 (now N.D. CENT. CODE § 38-09-01 (1960)).
50. 212 N.W.2d 543 (N.D. 1974).

> The instrument reads "all oil, gas and other minerals", which is the equivalent of saying "all oil, all gas, and all oher minerals." In MacMaster v. Onstad, 86 N.W.2d 36, 41 (N.D. 1957), this court had the opportunity to construe similar language. In that case Judge Burke said: "We do think there is signifance in the fact the lease authorized the lessee to produce not simply oil and gas and other minerals but oil and gas and all other minerals. No word is more inclusive than all, and it is difficult to see why, if the parties intended a restricted construction to be placed upon the reference to other minerals, they should use a word so completely unrestricted in its meaning." Upon analysis of the language in question it is our opinion that the words "all oil, gas and other minerals" were meant to include and do include lignite coal.[51]

It should be noted that N.D. Cent. Code § 47-10-24 (Supp. 1973), requiring the description and definition of minerals in leases and conveyances, does not mention reservations. A few natural resource lawyers note that a reservation is in fact a grant back to the grantor and that being a grant back it could be entitled a conveyance. It would then therefore follow, they contend, that if a conveyance it would fall within the purview of the statute, but this interpretation does not correspond to what appears to have been the legislative intent at the time of adoption of the Act. The Legislature was, as indicated by hearings on the bill, concerned with the effect of land owners executing and delivering leases and mineral deeds, and whether or not such documents included uranium ore which was the subject of exploration at that time.

III. RESERVATIONS BY THE STATE OF NORTH DAKOTA

Section 155 of the North Dakota Constitution, prior to its amendment in the year 1960, provided:

> The coal lands of the state shall never be sold, but the legislative assembly may by general laws provide for leasing the same. The words coal lands shall include lands bearing lignite coal.

This provision was codified as N.D. Cent. Code § 15-06-20 (1960).

N.D. Cent. Code 38-09-01 (1960) provides:

> In every transfer of land, whether by deed, conract, lease, or otherwise, by the state of North Dakota, or by any department thereof, fifty per cent of all oil, natural gas, or minerals which may be found on or underlying such land shall be reserved to the state of North Dakota. Any deed, contract, lease, or other transfer of any such land made after Feb-

51. *Id.* at 551.

> ruary 20, 1941, which does not contain such reservation shall be construed as if such reservation were contained therein. The provisions of this section shall apply to all lands owned by this state or by any department thereof regardless of how title thereto was acquired.

Between March 13, 1939 and February 20, 1941, this section provided for a 5% mineral reservation unto the State of North Dakota.[52]

In *Convis v. State*,[53] the court held that a contract for deed made by the Board of University and School Lands for sale of original school grant lands containing a one hundred per cent mineral reservation was unauthorized by Section 38-0901 of the North Dakota Revised Code of 1943, and accordingly the contract must be construed as though it contained only the reservation of a fifty per cent mineral interest as required by statute. Section 155 of the N.D. Constitution was thereafter amended to provide:

> The legislative assembly shall provide for the sale of all school lands subject to the provisions of this article. In all sales of land subject to the provisions of this article all minerals therein, including but not limited to oil, gas, coal, cement materials, sodium sulfate, sand and gravel, road material, building stone, chemical substances, metallic ores, uranium ores, or colloidal or other clays, shall be reserved and excepted to the state of North Dakota, except that leases may be executed for the extraction and sale of such materials in such manner and upon such terms as the legislative assembly may provide.[54]

Discussion of the various cases interpreting this section of the North Dakota constitution is not meant to be within the scope of this paper. However it should be noted that in *State v. Oster*,[55] and in *Permann v. Knife River Coal Mining Co.*,[56] the court held that the Board of University and School Lands must make an ultimate determination as to whether or not certain lands are or are not coal lands, and that the issuance of a contract for deed to a purchaser in the absence of fraud or bad faith, is conclusive upon the state as being a determination that the lands are not coal lands, notwithstanding a subsequent discovery of coal. In the recent decision of *Haag v. State*,[57] the court noted that N.D. Cent. Code § 38-09-01 (1960), is applicable to coal and that coal is a mineral under the provisions of such section.[58] In *Haag*, the court reversed *Permann* in part in holding that Section 155 of the Constitution as it existed

52. N.D. Sess. Laws, ch. 149, at 231 (1939).
53. 104 N.W.2d 1 (N.D. 1960).
54. N.D. CONST. art. IX, § 155.
55. 61 N.W.2d 276 (N.D. 1953).
56. 180 N.W.2d 146 (N.D. 1970).
57. 219 N.W.2d 121 (N.D. 1974).
58. *Id.* at 127 *citing* Abbey v. State, 202 N.W.2d 844 (N.D. 1972).

prior to its amendment on June 28, 1960, did not restrict the power of the state pursuant to statute to reserve the oil, gas and minerals including coal in its original grant lands to the extent permitted by statute.[59]

The various discussions of Section 155 of the N.D. Constitution are applicable only to original school land and the problems encountered in *Permann, Abbey* and *Haag* are not applicable to other lands acquired, owned and sold by various agencies of the state of North Dakota, including the Bank of North Dakota. The mineral reservation requirements of N.D. Cent. Code § 38-09-01 (1960), including coal, apply to such other lands.

Before leaving the question of what minerals are included in the phrase "Minerals" or "other minerals", a recent Texas decision warrants consideration. In *Acker v. Guinn*,[60] the plaintiff, Acker, held under the grantee of a mineral deed which conveyed "an undivided ½ interest in and to all of the oil, gas and other minerals in and under, and that may be produced from" a tract of land.[61] The deed was written on a form which was in common use in the State of Texas[62] and is not unlike deed forms used in the State of North Dakota. The deed form makes reference to an existing oil and gas lease and the fact that the conveyance to an existing oil and gas lease and the fact that the conveyance covers a one-half interest in all the oil and gas rentals and royalties to be paid under such lease.[63] The plaintiff claimed that the deed conveyed an interest in iron ore found in commercial quantities in the area. The ore deposits were solid beds varying from a few inches to three or four feet in thickness; they outcropped on the surface at places and ranged in depth to as much as fifty feet below the surface.[64] The ore could be mined only by open-pit or strip mining methods, which meant that the surface owner could make practically no beneficial use of his land where mining was in progress.[65] In holding that the deed in question did not convey an interest in the iron ore, the Texas court concluded:

> The parties to a mineral lease or deed usually think of the mineral estate as including valuable substances that are removed from the ground by means of wells or mine shafts. [Footnotes omitted.] This estate is dominant, of course, and its owner is entitled to make reasonable use of the surface for the production of his minerals. It is not ordinarily contemplated, however, that the utility of the surface for agricul-

59. *Id.* at 131.
60. 464 S.W.2d 348 (Tex. 1971).
61. *Id.* at 349.
62. *Id.* at 350.
63. *Id.*
64. *Id.* at 350-51.
65. *Id.* at 351.

> tural or grazing purposes will be destroyed or substantially impaired. Unless the contrary intention is affirmatively and fairly expressed, therefore, a grant or reservation of "minerals" or "mineral rights" should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate. . . .
>
> [T]here is nothing in the deed even remotely suggesting an intention to vest in the grantee the right to destroy the surface.[66]

With *Acker* in mind, we again briefly look at *Christman*. It was argued there that:

> the use of the words with such easement for ingress, egress and use of the surface as may be incidental or necessary to use of such rights discloses that such rights were not intended to allow the grantor to completely destroy the surface and consequently destroy its agricultural value by removing the coal by strip mining.[67]

In response the court stated:

> The language in the instant case is clear, unambiguous, and without limitation. It severs the minerals from the surface of the land, retaining in the grantor the right to enter and use the surface for any purpose reasonably necessary for the use of his mineral right. His rights are a fee simple estate in the minerals "in or under" the land in question. [Citation omitted.] It is then reasonable to assume that the parties intended that the grantor should have the right to use the surface to whatever extent reasonably necessary to remove fifty per cent of "all oil, gas, and other minerals."[68]

The court further noted that "It is reasonable to assume that the parties to the deed in question knew of the existence of lignite coal in the area and that strip mining was the best method of removing said coal. . . . "[69] Further the court noted that our legislature had foreseen the problem of disturbance of the surface by strip mining when in 1969 it provided for the reclamation of strip mined lands.[70]

Before leaving *Christman* we should note that the court also held N.D. Cent. Code §§ 4710-20, -22 (1960) to be unconstitutional because they involved an unreasonable classification and an invidious discrimination in violation of the equal protection clauses of Section 20 of the Constitution of North Dakota and the Fourteenth Amendment of the Constitution of the United States.[71] The statutory

66. *Id.* at 352-53.
67. Christman v. Emineth, 212 N.W.2d 543, 549-50 (N.D. 1973).
68. *Id.* at 550.
69. *Id.*
70. *Id.* at 551.
71. *Id.* at 556.

sections involved required that in any reservation of coal there must be an accurate description of the nature, length, width and thickness of the coal reserved.[72]

Notwithstanding *Christman* it is anticipated that questions of use and destruction of the surface and the right of subjacent support will be the subject of future litigation in the State of North Dakota.

Under the doctrine of subjacent support, the surface estate is entitled to the support it requires from the underlying mineral estate to sustain it in its natural condition.[73] The concept originally was applied to underground mining but it has in recent years been applied to cases involving strip mining. The Pennsylvania Supreme Court in *Coxe v. Lehigh Valley Railroad Company*,[74] held that the fact that coal can be removed only by strip mining does not change the principle that the surface owner is entitled to support of the surface.

The right to subjacent support may be waived but whether or not it has been waived is a question for the courts.[75] In authorizing the mineral owner to "use so much of the surface as may be necessary" did the surface owner intend to authorize the mineral owner to destroy the surface? Contrary to *Christman*, the Colorado Supreme Court in *Barker v. Mintz*[76] refused to extend that intention to stripping operations. In *Peabody Coal Co. v. Erwin*,[77] the court of appeals reversed the district court and held that only underground mining was contemplated by the wording of a 1902 deed, not strip mining. Some courts have noted that even where there is an implied waiver of subjacent support, strip mining may not have been authorized if strip mining was not practiced in the local area where the deed was made.[78] The decisions in other states appear to be inconsistent and are based upon the application of various rules,

72. N.D. CENT. CODE §§ 47-10-21, -22 (1960). The court said the two sections established a classification which "distinguishes transfers of coal by direct grant from transfers of coal by reservation or exception. It places a burden upon the latter type of transfer that it doesn't place upon the former, that burden being that in the latter case the coal must be described accurately as to nature, in length, width and thickness, whereas in the former case it need not be so described." Christman v. Emineth, 212 N.W.2d 543, 554 (N.D. 1973). The court later said: "We can conceive of no reasonable basis for requiring that the nature, length, width and thickness of coal reservations be described when such a description is not required of grants of coal. It would seem that if the description was of value it would be so regardless of how title to the coal was required." *Id.* at 556.

73. This doctrine is discussed in 2 C. LINDLEY, AMERICAN LAW RELATING TO MINES AND MINERAL LANDS §§ 818-23 (2d ed. 1903). "There is a *prima facie* inference at common law upon every grant of minerals or other subjacent strata, where the surface is retained by the grantor, that the grantor in granting them does so in a manner consistent with the retention by himself of his own right to support." *Id.* at § 818.

74. 398 Pa. 424, 158 A.2d 782 (1960).

75. *See* Twitty, *Law of Subjacent Support and the Right to Totally Destroy Surface in Mining Operations*, 6 RKY. MT. MIN. LAW INST. 497 (1961).

76. 73 Colo. 262, 215 P. 534 (1923).

77. 453 F.2d 398 (6th Cir. 1971).

78. *See, e.g.*, Merrill v. Manufacturers Light and Heat Co., 409 Pa. 68, 185 A.2d 573 (1962).

with some courts considering extrinsic evidence or local customs and practice while others refused such consideration.[79]

If a trend in these decisions is developing it may be manifest in *Steward v. Chernicky*,[80] where the Supreme Court of Pennsylvania stated:

> [T]his Court recognizes that "*strip mining* is an accepted *manner* or *method* of coal mining, which, with the use of modern huge and efficient machinery, has become progressively more in vogue". [Citation omitted.] And this Court does not wish to interfere with its use or hinder its economic viability. Yet we cannot help but realize that "in view of the surface violence, destruction and disfiguration which inevitably attend strip or open mining, . . . no land owner would lightly or casually grant strip mining rights, nor would any purchaser of land treat lightly any reservation of mining rights which would permit the grantor or his assignee to come upon his land and turn it into a battleground with strip mining". [Citation omitted.] Therefore, "the burden rests upon him who seeks to assert the right to destroy or injure the surface" [Citation omitted.] to show some positive indication that the parties to the deed agreed to authorize practices which may result in these consequences. Particularly is this so where such operations were not common at the time the deed was executed.[81]

If the mineral estate is to be truly dominant with respect to the surface estate, it must carry with it as a matter of law the absolute right to use, damage or destroy so much of the surface estate as is necessary or convenient to the removal of minerals from the property. However it is doubtful that many jurisdictions will accord the mineral estate that degree of dominance as a matter of law. In all probability the courts will not merely imply a right to damage or destroy the surface in order to remove the minerals. If the right is to exist, it must arise by virtue of the deed or other instrument of conveyance or reservation.

Many coal companies are diminishing possible problems with surface owners by obtaining surface leases providing for the payment of a per ton royalty, notwithstanding the fact that the surface owner owns no interest in the coal.

IV. RIGHTS OF A COTENANT TO REMOVE MINERALS

It appears that operation of a mine can proceed in most jurisdictions, including North Dakota, so long as the mine operator ac-

79. A good recent discussion of these cases is found in Ferguson, *Severed Surface and Mineral Estates—Right to Use, Damage or Destroy the Surface to Recover Minerals*, 19 ROCKY MT. MIN. LAW INST. 411 (1974).

80. 439 Pa. 43, 266 A.2d 259 (1970).

81. *Id.* at ——, 266 A.2d at 263 (footnote omitted).

counts for all ores removed from the lands, subject to the non-joining cotenancy interest. Except in three jurisdictions, West Virginia, Illinois and Louisiana, a cotenant may mine without the consent of the other cotenants. The mining cotenant will be required to account to the other cotenants for the ore removed from the lands affected by their interest.[82] The general rule has been stated as follows:

> Although the cotenant may extract minerals to the extent of his undivided interest therein, he may not exclude the other cotenants from also mining the property. If such mining activity does exclude the other cotenants, it is a trespass. Probably, the trespassing cotenant would not acquire title to the ores thus severed. By the same reasoning, if the lessee or licensee of a cotenant undertakes mining operations purporting to hold the exclusive right to mine on the premises and thereby excludes other cotenants or their lessees or licensees, such action constitutes a trespass as to the non-consenting cotenants, and while no cases have been found on the point, it is likely that no title is acquired to ores thus severed.[83]

In *Campbell v. Homer Ore Co.*,[84] the court was concerned with an action to recover damages for the unauthorized mining and removal of iron ore after defendant's lease was terminated as to plaintiffs who had a 1/24th interest in the property. The court held that the defendant could not escape liability to the plaintiffs for their proportionate share of the ore on the ground that 1/24th of the total ore had not been removed and was still left, since neither the quality or the amount of the iron ore is capable of precise determination and lessee as a tenant in common in possession has no superior right to choose the ore most convenient to mine.[85] The court further went on to hold that the defendant lessee "was entitled to mine the ore and to deduct the cost though such cost might not be deductible to a mere willfull trespasser without any right or claim of title."[86]

In *Ellison v. Strandback*,[87] the court held in an action to quiet title that as a co-owner of realty each tenant in common "had a right to enter upon the common estate and take possession of the whole thereof, subject only to the equal rights of his companions in interest."[88]

Thus it would appear that as a general rule, mining operations may continue subject to the mine operator's being fully account-

82. Co-ownership of mines and minerals is discussed in 4 RKY. MT. MIN. LAW FOUND., AMERICAN LAW OF MINING title XXII (Supp. 1974).
83. *Id.* § 25.3, at 513 (1974) (footnotes omitted).
84. 309 Mich. 693, 16 N.W.2d 125 (1944).
85. *Id.* at ——, 16 N.W.2d at 127.
86. *Id.* at ——, 16 N.W.2d at 127.
87. 62 N.W.2d 95 (N.D. 1954).
88. *Id.* at 99.

able to the non-consenting tenant in common. Whether or not cost of operations can be deducted from the non-consenting tenant's share of the mined substances seems to turn somewhat on whether or not the other cotenants or the mine operator are in fact trespassers.

The rights of co-tenants are further discussed by the North Dakota Supreme Court in the case of *Schank v. North American Royalties, Inc.*[89] In this case the court noted the general rule that

> The owners of undivided portions of oil and gas rights in and under the same land are tenants in common and each cotenant may enter upon the premises for the purpose of exploring for oil and gas and may drill and develop such premises. [without the consent of the other].[90]

The court further noted that each cotenant acts for himself in such situation and one is not the agent of the other, nor has he the authority to bind the other merely because he is a co-tenant, unless he is authorized to do so.[91] Upon discovery of oil and gas upon the premises, the court noted, "the producing cotenant must account to the nonconsenting or nonproducing cotenant for his pro rata share of the net profits apportioned according to the fractional interest of said cotenant."[92]

V. PARTITION

N.D. Cent. Code § 32-16-01 (Supp. 1973) provides that, "When several cotenants hold and are in possession of real or personal property as partners, joint tenants, or tenants in common, in which one or more of them have an estate or inheritance, or for life or lives, or for years, an action may be brought by one of more of such persons for a partition . . . and for a sale of such property or a part thereof, if it appears that a partition cannot be made without great prejudice to the owners." An action for partition may be commenced by a proper party having such right by the filing and service of a complaint joining all owners of an interest in such property as parties defendant.[93] There do not appear to be any North Dakota decisions indicating whether or not this statute may be applied to the mineral estate. However in a Kansas decision[94] the court indicated that the right of partition was applicable to all property capable of being owned in cotenancy and accordingly is applicable to stone, coal, oil,

89. 201 N.W.2d 419 (N.D. 1972).
90. *Id.* at 429.
91. *Id.*
92. *Id.* For further discussion of the rights of cotenants, see 4 G. THOMPSON, REAL PROPERTY § 1800, at 134 (repl. 1961) and 2 C. LINDLEY, AMERICAN LAW RELATING TO MINES AND MINERAL LAND. §§ 788-92 (2d ed. 1903).
93. N.D. CENT. CODE ch. 32-16 (1960), *as amended* (Supp. 1973).
94. Holland v. Schaffer, 162 Kan. 474, 178 P.2d 235 (1947).

gas and other minerals in place.[95] Generally the decision indicates that tenants in common of deposits of oil, gas, coal and other minerals under the surface of the land, are entitled to partition either by sale and division of the proceeds or in kind as may be demanded by the circumstances. The courts have generally agreed that partition was necessary for the best interests and benefit of all the tenants in common.[96]

VI. STATE STATUTORY RESTRICTIONS ON USE OF THE SURFACE

In Colorado and Wyoming statutes have been enacted providing that where the surface and mineral estates are separate the owner or rightful occupant of the surface estate may demand satisfactory security from the mine operator, and if it be refused may enjoin him until security is given.[97]

The Landowner Notification Act[98] adopted by the Montana Legislature in 1971[99] and amended in 1973[100] requires notice to the land owner of surface operations including disclosure of the plan of work and operations contemplated.[101] Before commencement of any work or operations on any such lands, the operator must first obtain from the surface owner written approval of the proposed work and operations.[102]

95. *Id.* at ——, 178 P.2d at 240.
96. *E.g.* Stern v. Great S. Land Co., 148 Miss. 649, 114 So. 739 (1927); White v. Smyth, 147 Tex. 272, 214 S.W.2d 967 (1948); Kentucky Bell Corp. v. Moss, 311 Ky. 114, 223 S.W.2d 580 (1949); Schnitt v. McKellar, 244 Ark. 377, 427 S.W.2d 202 (1968).
97. COLO. REV. STAT. ANN. 92-24-6 (1963), WYO. STAT. ANN. § 30-19 (1957).
98. MONT. REV. CODES ANN. § 50-13 (Supp. 1974).
99. Ch. 335, [1971] Laws of Mont. 1324-25.
100. Ch. 194, § 1, [1973] Laws of Mont. 335.
101. MONT. REV. CODES ANN. § 50-1303 (Supp. 1974).
102. *Id.*