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The Common Law of Access and Surface Use In Mining

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Introduction

Access to and use of the land surface is essential to a mining operation. The law governing surface rights has evolved from English and American precedents drawn from several fields.

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Most courts recognize as a general proposition that the miner's claim to use the land for the mining operations will take precedence over the surface owner's claim to keep the land undisturbed. However, an examination of the history of surface rights doctrines shows that courts have sought to compel the miner to operate with a degree of care for the land surface. In a variety of factual situations and using a variety of legal theories, courts have attempted to compel reasonable mining operations that are attentive to surface values.

This article examines the factual and legal areas in which surface rights law has developed over the past century in the United States. Several hundred cases dealing with surface rights law were considered.¹ In these cases, both the fact situations giving rise to litigation and the legal theories that have arisen out of the litigation are examined. It begins with an examination of a half dozen English cases, the first decided in 1568 and the last in 1840. These decisions form the backbone of the English surface rights law that existed at the time that the first United States cases on the subject appeared. Next, it examines key early American surface access cases. These English and American cases establish the background for surface rights law in this country. The subsequent sections consider modern surface rights law, including the factual situations that have given rise to most surface access cases. The final section considers the contributions of property, contract, tort and remedies law to contemporary surface rights law.

I. THE ORIGINS OF SURFACE RIGHTS LAW

A. *The English Cases*

The origins of English surface rights law in mining date back to the reign of Queen Elizabeth. The venerable case of *The Queen and The Earl of Northumberland*,² decided in 1568, examined the royal prerogative placing ownership of gold and silver in the crown.³ The issue before the court was how the privilege was to be applied when gold and silver were mixed with

¹ We examined 351 United States cases considering surface rights issues. Cases were selected from the Mines and Minerals keynote of the West Digest System. The most pertinent key number was 55(6).

² 75 Eng. Rep. 472 (K.B. 1568).

³ *Id.*

other minerals.⁴ In the course of resolving this issue the court observed that the royal mining privilege was “with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore.”⁵

Nearly two centuries later the Court of King’s Bench decided the case of *Wilkes v. Broadbent*.⁶ While the facts are somewhat vague, the dispute resembles many 20th century use and access controversies. The plaintiff surface owners sued in trespass for defendant’s action in coming on their property to work on a coal mine.⁷ The defendant was charged with “breaking and entering the plaintiff’s close . . . , treading down the grass, subverting the plaintiff’s soil, and for laying wood, slate, and other rubbish on the land. . . .”⁸ Defendant responded that his actions were authorized by a manorial custom that allowed these workings.⁹

The court sustained the Court of Common Pleas’ determination that the custom was unreasonable and void and gave judgment for the surface owner.¹⁰ The court held the asserted custom was too broad and uncertain, and that it “laid such a great burden upon the tenant’s land, without any consideration or advantage to him, as tended to destroy his estate, and defeat him of the whole profits of his land, and savours much of arbitrary power. . . .”¹¹ The court further suggested that the “pits may be worked without this custom, for aught that appears to the contrary.”¹²

In the 1806 case of *Hodgson v. Field*,¹³ the court’s focus moved from custom to contract. In 1747, the parties’ predeces-

⁴ *Id.*

⁵ *Id.* at 510 (the court supplied no citation for the proposition).

⁶ 95 Eng. Rep. 494 (K.B. 1744).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 495.

¹¹ *Id.*

¹² *Wilkes*, 95 Eng. Rep. at 495.

¹³ 103 Eng. Rep. 238 (K.B. 1806). Stansfield deeded Marshall the right to build a drain for his coal mining operation across Stansfield’s property. The court does not quote the exact language of the deed but the court’s summary of it reflects a balancing of the needs of the two landowners. Mine operator Marshall was given the right to conduct the drainage system across Stansfield’s land, to make some small pits to assist

sors in interest entered into an agreement for the use of property.¹⁴ After a period of operation, the mine was shut down and the drainage system fell into disrepair.¹⁵ Half a century later the mine operator's successor in interest wished to start mining again.¹⁶ He entered the property and began preparing to reopen the drainage system.¹⁷ The surface owner sued in trespass and contended that the 1747 grant had allowed only a one-time access to the property.¹⁸

Lord Ellenborough construed the deed to allow continued access to the landowner's property for the purpose of the mining operation.¹⁹ Ellenborough's opinion looked to the implied intention of the parties to the 1747 agreement.²⁰ He held that it was reasonable to interpret the deed as intending more than a one-time grant of rights involving the drainage system, since none of the specific covenants in the deed negated this intent.²¹

In *The Earl of Cardigan v. Armitage*,²² access rights were again determined by implied agreements. The surface owner sued in trespass when the miner entered the property, dug pits and removed coal.²³ The miner traced his right to a 1649 reservation of coals and various access rights.²⁴ In determining that the defendant did have title to the coal,²⁵ the court observed that the reservation of the coal also gave as incident "a right . . . to get the coals, and to do all things necessary for the obtaining

the operation of the drainage system, to use stones from Stansfield's ground for the purpose and to dump rubbish on Stansfield's land. Marshall promised not to damage the trees on Stansfield's ground, to allow Stansfield inspection of the drainage system and to repair any damages to Stansfield's fence. Marshall also promised not to remove any coal from under Stansfield's property other than for that incidentally carried by the drainage system.

¹⁴ *Id.*

¹⁵ *Id.* at 239.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 240.

¹⁹ *Hodgson*, 103 Eng. Rep. at 241.

²⁰ *Id.*

²¹ *Id.*

²² 107 Eng. Rep. 356 (K.B. 1823).

²³ *Id.* at 357.

²⁴ *Id.*

²⁵ *Id.* at 360.

of them.”²⁶ This incidental or implied right, however, “would warrant nothing beyond what was strictly necessary for the convenient working of the coals.”²⁷

Harris v. Ryding,²⁸ decided in 1839, examined the rights of support. The mineral owner claimed access rights through a prior reservation.²⁹ The access rights were defined within the original reservation as:

free liberty of ingress, egress, and regress, to come into and upon the premises, to dig, delve, search for, and get &c., the said mines and every part thereof, and to sell and dispose of, take, and convey away the same, at their free will and pleasure; and also to sink shafts, &c., for the raising up works, carrying away and disposing of the same or any part thereof, making a fair compensation to P. for the damage to be done to the surface of the premises, and the pasture and crops growing thereon.³⁰

The miners’ activity caused the collapse of the land surface³¹ and the surface owner brought suit in court for the wrongful and negligent working of the mine.³² The miner argued that the miner’s use of the land included a right to collapse the surface and that any harm to the premises was controlled by the “fair compensation” clause of the reservation.³³

The court held for the surface owner by interpreting the access agreement as requiring reasonable operation by the miner.³⁴ One aspect of this reasonable operation was that the surface would not be undercut by the mining.³⁵ In the words of Baron

²⁶ *Id.* at 361 (citing the popular legal treatise, W. SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES (1675)).

²⁷ *Id.* at 362. Under this standard, such acts as the deposit of material on the surface for longer than necessary or the introduction of potential buyers to inspect the coal were probably forbidden. However, these rights were granted by the express terms of the 1649 reservation.

²⁸ 151 Eng. Rep. 27 (Ex. 1839).

²⁹ *Id.* at 28.

³⁰ *Id.* at 27.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 33.

³⁴ *Harris*, 151 Eng. Rep. at 33.

³⁵ *Id.*

Parke "All that the law gives a grantor by virtue of the exception, would be a reasonable mode of getting the mines and minerals. . . ." ³⁶ As in the *Hodgson* case, ³⁷ the court focused on the intent of the parties to the instrument. ³⁸ Baron Parke viewed it as "clearly the meaning and intention of the grantor, that the surface shall be fully and beneficially held and enjoyed by the grantee." ³⁹ As a consequence, "the [miner] can be entitled under the reservation only to so much of the mines below as is consistent with the enjoyment of the surface . . . leaving a reasonable support to the surface." ⁴⁰

Thus, the compensation clause did not change the liability of the miner. ⁴¹ The clause applied only to damage resulting from operations on the surface of the land and was not intended to bar other remedies. ⁴² Baron Alderson believed the case could be decided by the familiar maxim "that he is to use his own property so as to not do injure his neighbour [sic]." ⁴³ While all of the coal belonged to the miner, it could not be removed by a means which violated the rights of the surface owner. ⁴⁴

The final English case is *Dand v. Kingscote* ⁴⁵ decided in 1840. The 1630 deed conveyed farm land, but reserved all coal mines "together with sufficient wayleave and stayleave to and from the said mines with liberty of sinking and digging pits." ⁴⁶ Two centuries later, the miner used the surface to construct a railway and various buildings. ⁴⁷ The surface owner sued in trespass. ⁴⁸ The miner defended on the language of the reservation and the implied rights of access accompanying an ownership of minerals. ⁴⁹

³⁶ *Id.* at 30.

³⁷ *See, e.g., Hodgson*, 103 Eng. Rep. at 241.

³⁸ *Harris*, 151 Eng. Rep. at 31.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 32.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Harris*, 151 Eng. Rep. at 32.

⁴⁵ 151 Eng. Rep. 370 (Ex. 1840).

⁴⁶ *Id.*

⁴⁷ *Id.* at 371.

⁴⁸ *Id.* at 370.

⁴⁹ *Id.* at 371.

Baron Parke found that the exception of the coal and a right to dig pits "reserved, all things that are 'depending on that right and necessary for the obtaining it.'"⁵⁰ The miner's steam engine, a pond for supply of the engine, and the engine house were viewed as necessary accessories.⁵¹ Baron Parke returned to the language of the reservation to determine the propriety of the railroad.⁵² The intent of the "wayleave and stayleave" reservation was to allow the coal owner those matters which would be:

reasonably sufficient to enable the coal-owner to get, from time to time, all the seams of coal to a reasonable profit; and therefore the owner is not confined to such description of way as is in use at the time of the grant, and in such a direction as is then convenient.⁵³

B. *The Early American Cases*

In the 1862 case of *Cowan v. Hardeman*,⁵⁴ the Texas Supreme Court noted the "well established doctrine from the earliest days of the common law, that the right to the minerals [included a right of entry] . . . and all other such incidents thereto as are necessary to be used for getting and enjoying them."⁵⁵ Five subsequent decisions further developed the basic rules applicable to surface rights in this country.⁵⁶

One of the earliest American surface access cases is *Marvin v. Brewster Iron Mining Co.*⁵⁷ The miner justified his elaborate mining operation by a reservation of mineral ores along with "the privilege of going to and from all beds of ore that may be

⁵⁰ *Id.* at 379 (citing W. SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES (1675)).

⁵¹ *Dand*, 151 Eng. Rep. at 379.

⁵² *Id.* at 380.

⁵³ *Id.* While Baron Parke found that most of the railroad construction was appropriate within the terms of the reservation, he did sustain a finding that one railroad spur and certain fences and ditches were unnecessary. Plaintiff was entitled to recover for these trespasses.

⁵⁴ 26 Tex. 217 (1862).

⁵⁵ *Id.* at 222 (citing *The Queen and The Earl of Northumberland*, 75 Eng. Rep. 472 (K.B. 1568); *The Earl of Cardigan v. Armitage*, 107 Eng. Rep. 356 (K.B. 1823)).

⁵⁶ *Williams v. Gibson*, 4 So. 350 (Ala. 1888); *Ericson v. Michigan Land & Iron Co.*, 16 N.W. 161 (Mich. 1883); *Wardell v. Watson*, 5 S.W. 605 (Mo. 1887); *Marvin v. Brewster Iron Mining Co.*, 55 N.Y. 538 (N.Y. 1874); *Lillibridge v. Lackawanna Coal Co.*, 22 A. 1035 (Pa. 1891).

⁵⁷ 55 N.Y. 538 (1874).

hereafter worked on the most convenient route to and from.”⁵⁸ Plaintiff surface owner sued for injunctive relief and damages.⁵⁹ He asked the court to forbid land subsidence, waste deposits, blasting, the operation of a steam engine, and the construction of various buildings.⁶⁰

Engaging in a thorough review of the significant English cases, the court observed that the miner’s right could be drawn either from an implied incident to a grant or from express language in the instrument.⁶¹ The rights incident to the grant were to be judged by a test of “whether or not it was necessary to be done for the reasonably profitable enjoyment of its property in the minerals.”⁶² The express grant in the instrument could expand or contract the implied grant by its precise words.⁶³ However, the mere failure to mention certain surface uses in the specific grant did not forbid them.⁶⁴

In *Ericson v. Michigan Land & Iron Co.*,⁶⁵ surface owners brought an ejectment action to terminate iron ore mining.⁶⁶ The miners claimed rights under a deed reservation.⁶⁷ The deed reserved the minerals:

together with the right to enter upon such lands and explore therefor, and to mine, smelt, and refine such ores and minerals, and to quarry and dress such stone or rock, and remove the same, and for that purpose to erect or construct and maintain all such buildings, machinery, roads, or railroads, sink such shafts, remove such soil, occupy as much of said land, and use and divert such streams or ponds of water thereon as may be necessary or convenient for the successful prosecution of such business.⁶⁸

The Michigan Supreme Court’s examination of English surface use cases endorsed the proposition that a “mere reservation

⁵⁸ *Id.* at 539-40.

⁵⁹ *Id.* at 539.

⁶⁰ *Id.* at 544.

⁶¹ *Id.* at 554.

⁶² *Id.* at 565.

⁶³ *Marvin*, 55 N.Y. at 550, 554.

⁶⁴ *Id.* at 550.

⁶⁵ 16 N.W. 161 (Mich. 1883).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 161-62.

of minerals . . . must always respect surface rights of support, and will not, standing alone, permit the surface to be destroyed without some additional statutory or contract authority, and that such statute or contract authority will be construed carefully to prevent the destruction of surface rights."⁶⁹ Nevertheless, "easements to do such acts as are reasonably necessary to get out the mineral and remove it from the mine may be granted or reserved so as to attach to the mining estate."⁷⁰ On the facts of the case, the shafts, excavations, and buildings, "used solely for mining purposes," were proper easements appurtenant to the mine.⁷¹

*Lillibridge v. Lackawanna Coal Co.*⁷² addressed the miner's right to the underground space from which coal had been removed.⁷³ The miner used the underground passages beneath the surface owner's land to move coal from other properties than those involved in the original grant.⁷⁴ The agreement of the parties had not expressed a position on the matter⁷⁵ and the surface owner sought an injunction to forbid the use.⁷⁶ The Pennsylvania Supreme Court found that the coal owner had a corporeal fee in the coal and that the space from which the coal was removed should be part of that fee.⁷⁷ Nonetheless, the court found a lack of harm to the surface owner from the miner's use of the tunnel.⁷⁸

*Williams v. Gibson*⁷⁹ was another ejectment action brought by the surface owner to contest excessive use of surface rights. The reservation through which the mineral claimed provided the right to:

⁶⁹ *Id.* at 163.

⁷⁰ *Id.*

⁷¹ *Ericson*, 16 N.W. at 164 (the case was remanded to determine the exact scope of the reasonable easement).

⁷² 22 A. 1035 (Pa. 1891).

⁷³ See *Webber v. Vogel*, 42 A. 4, 5 (Pa. 1899) (as long as the mineral grantee is mining the coal in good faith, the grantee has the right to use the voids for hauling coal from adjacent lands despite the surface owner's protests).

⁷⁴ *Lillibridge*, 22 A. at 1036.

⁷⁵ *Id.* at 1037.

⁷⁶ *Id.* at 1036.

⁷⁷ *Id.* at 1037.

⁷⁸ *Id.*

⁷⁹ 4 So. 350 (Ala. 1888).

all timber and water upon the same, necessary for the development, working, and mining of said coal and other minerals, and the preparation of the same for market, and the removal of the same; also the right of way and the right to build roads of a description over the same, necessary for the convenient transportation of said coal and other minerals from said land, and the conveying and transporting to and from said land, all materials and implements that may be of use in the mining and removal of said coal and other minerals, or in the preparation of the same for market.⁸⁰

The Alabama Supreme Court first concluded that the grant of minerals was the grant of a "separate corporeal hereditament" distinct from the surface ownership.⁸¹ The court further concluded that: "[t]he express grant of all the minerals or mineral rights in a tract of land is, by necessary implication, the grant also of the right to work them, unless the language of the grant itself repels this construction."⁸² This included the right to penetrate the soil and such reasonably necessary means of removing the minerals "without injury to the support for the surface or superincumbent soil in its natural state."⁸³ The precise issue in the litigation involved the construction of miners' houses and other outbuildings on the property.⁸⁴ The surface owner argued that the specification of surface rights in the reservation should exclude any rights not specified therein,⁸⁵ but the court rejected this argument, saying that modern inventions could be used to promote a profitable mining venture.⁸⁶

In *Wardell v. Watson*,⁸⁷ the Missouri Supreme Court dealt with a similar fact situation. The reservation of minerals included "the right of mining, and removing at pleasure, coal and other minerals from under the surface of said land; also, the right and

⁸⁰ *Id.* at 351.

⁸¹ *Id.* at 352.

⁸² *Id.* (citing *W. SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES (1675)*).

⁸³ *Id.* at 352.

⁸⁴ *Id.* at 353.

⁸⁵ *Williams*, 4 So. at 353.

⁸⁶ *Id.* at 354. While the court found that the instrument did not grant any right to install coking ovens on the mining property, the issue of what would be of necessity to the mining operation was properly left to the jury.

⁸⁷ 5 S.W. 605 (Mo. 1887).

privilege of sinking, if need be, air-shafts for the purpose of working, mining, or removing the same.”⁸⁸ When the miner sank a shaft and erected a barn and stables, a blacksmith shop, and a pond, the surface owner brought an ejectment action.⁸⁹ The court rejected the surface owner’s contention that the reservation of the right to sink an air-shaft excluded any other specific rights.⁹⁰ In the court’s view, the implied right “to sink a vertical shaft, and to do all things reasonably necessary to raise the coals . . . and to carry them away” was implied as part of the reservation.⁹¹ The express reference to the air-shaft enlarged rather than restricted the implied powers.⁹²

C. *The Legacy of the Early Surface Rights Cases*

Features of English surface access law which were well developed by 1840, helped American courts define surface rights law. A review of the early English⁹³ and American cases⁹⁴ illustrate the state of surface rights law at the start of the 20th century. By this time, the courts had recognized the concept of the divided mineral estate,⁹⁵ i.e., separate surface and mineral estates can be created by grant or reservation.⁹⁶ *Hodgson v. Field*⁹⁷ reflects the

⁸⁸ *Id.* at 605.

⁸⁹ *Id.* at 606.

⁹⁰ *Id.* at 607 (citing *Armitage*, 107 Eng. Rep. at 356).

⁹¹ *Id.* (among other authorities, the court cited W. SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES (1675) for implied rights of access and use).

⁹² *Id.*

⁹³ The English cases examined most of the surface rights issues that have faced the courts in this century. Litigated issues included access for transportation, facilities used in connection with the mine, access to additional mineral properties, the responsibility for collapse of land, the need for buildings and other implements to support the working of the mine and the deposit of mine waste on the surface. From the surface owner’s perspective, these intrusions range from a significant destruction of the surface estate to minor inconveniences compatible with continued cultivation and residence on the land. See, e.g., *Dand*, 151 Eng. Rep. at 370; *Harris*, 151 Eng. Rep. at 27; *Armitage*, 107 Eng. Rep. at 356; *Hodgson*, 103 Eng. Rep. at 235.

⁹⁴ *Williams*, 4 So. at 350; *Ericson*, 16 N.W. at 161; *Wardell*, 5 S.W. at 605; *Marvin*, 55 N.Y. at 538; *Lillibridge*, 22 A. at 1035.

⁹⁵ See, e.g., *Armitage*, 107 Eng. Rep. at 363; *Marvin*, 55 N.Y. at 548; *Lillibridge*, 22 A. at 1036.

⁹⁶ See *supra* note 95 and cases cited therein.

⁹⁷ 103 Eng. Rep. 238 K.B. (1806).

court's recognition of the creation of surface rights by an express agreement. The deed language of the early cases suggests that conveyancers of the time were attuned to the need to spell out surface rights in the instrument of grant.⁹⁸ The courts were willing to enforce the terms of the express agreement even when they went beyond custom, implied grants, or reasonable expectations in the mining industry.⁹⁹

The courts also recognized implied rights arising from the ownership of minerals.¹⁰⁰ *The Queen and The Earl of Northumberland*¹⁰¹ suggested that the mineral owner is entitled to priority over the surface owner. However, the decisions generally emphasize necessity and reasonableness;¹⁰² they recognize the considerable economic value of mining activity, yet, they are solicitous of land use.¹⁰³ While the courts generally discuss the intention of the parties, they are frequently expressing their sense of what public policy should or should not allow.¹⁰⁴ The courts do not spend much time on the legal theories on which the surface rights rest. There are casual mentions of easements, covenants, or licenses in the opinions, but the courts rarely elaborate on the precise legal rights involved.

The cases are not helpful in the discussion of remedies. The actions consistently arise in trespass brought by the surface owner.¹⁰⁵ The landowner concedes that some prior mining agreement existed but argues that it was either no longer in effect or that it should not be read as broadly as contended by the miner.¹⁰⁶ Plaintiff's remedy, when successful, was some form of damages.¹⁰⁷

⁹⁸ See cases cited *supra* notes 93 - 94.

⁹⁹ *Id.*

¹⁰⁰ *The Queen and The Earl of Northumberland*, 75 Eng. Rep. at 510.

¹⁰¹ *Id.*

¹⁰² See, e.g., *Ericson*, 16 N.W. at 163; *Harris*, 151 Eng. Rep. at 32; *Marvin*, 55 N.Y. at 565.

¹⁰³ See cases cited *supra* note 102.

¹⁰⁴ See *Harris*, 151 Eng. Rep. at 31 (assumption of no surface subsidence illustrates the point, as does the court's precise tailoring of the remedy in *Dand*, 151 Eng. Rep. at 380).

¹⁰⁵ See, e.g., *Armitage*, 107 Eng. Rep. at 357; *Dand*, 151 Eng. Rep. at 370.

¹⁰⁶ See, e.g., *Hodgson*, 103 Eng. Rep. at 240 (surface owner claimed mine operator had only one-time access right); *Ericson*, 16 N.W. at 161.

¹⁰⁷ See, e.g., *Harris*, 151 Eng. Rep. at 33; *Dand*, 151 Eng. Rep. at 380.

II. THE RECURRENT ISSUES IN SURFACE RIGHTS LAW

Hundreds of reported cases since 1900 have expanded on the foundations of surface rights law. While common themes run through the cases, they vary considerably depending on the rights in question. The major recurrent fact patterns in the surface rights cases will be examined separately before seeking conclusions applicable to all surface rights cases.

A. Access

Of all the rights of the miner, access across the land is probably the most fundamental.¹⁰⁸ As numerous courts have pointed out, access to extract and remove the minerals gives value to the mineral estate.¹⁰⁹ Accordingly, the courts have been sympathetic to requests from the miner for access.¹¹⁰ In addition to enforcing express agreements, the courts have allowed a reasonable expansion of the express rights agreed upon by the parties to include recently developed technologies and provide for economical mining activity.¹¹¹

Further, even if no express language in the conveyance discusses access, courts have viewed access as an implied aspect of mineral ownership.¹¹² Several courts have treated access as an easement appurtenant to the mineral estate,¹¹³ while others have analogized to the easement of necessity by which a party having no access to the land is able to gain such access.¹¹⁴ Occasionally courts have sought to distinguish "necessary" from "merely

¹⁰⁸ The terms "miner" or "mineral owner" will be used interchangeably to designate the party asserting a claim to use the surface for mineral activity.

¹⁰⁹ *Davison v. Reynolds*, 103 S.E. 248, 250 (Ga. 1920); *Harris v. Currie*, 176 S.W.2d 302 (Tex. 1943); *Porter v. Mack Mfg. Co.*, 64 S.E. 853, 854 (W. Va. 1909).

¹¹⁰ *Porter*, 64 S.E. at 854.

¹¹¹ *See, e.g.*, *Duncan v. American Standard Asphalt Co.*, 97 S.W. 392, 393 (Ky. 1906); *Grayson v. Lyons*, 76 So. 2d 531, 533 (La. 1954); *Commonwealth v. Fisher* 72 A.2d 568, 570 (Pa. 1950); *Oakwood Smokeless Coal Corp. v. Meadows*, 34 S.E.2d 392, 395 (Va. 1945) (citing *Williams v. Gibson*, 4 So. 350, 353 (Ala. 1888)) (here the English precedent in *Dand v. Kingscote*, 151 Eng. Rep. 370, 370 (Ex. 1840) (has carried over to the United States courts).

¹¹² *Grayson*, 76 So. 2d at 533.

¹¹³ *Buck Creek R. R. Co. v. Haws*, 69 S.W.2d 333, 335 (Ky. 1934); *Neal v. Finley*, 124 S.W. 348, 349 (Ky. 1910).

¹¹⁴ *Melton v. Sneed*, 109 P.2d 509, 512 (Okla. 1940).

convenient" access, denying an implied right for mere convenience.¹¹⁵ However, the contemporary position grants reasonable access but requires the miner to exercise "due regard" for the surface owner's interest and to avoid any "unnecessary damage."¹¹⁶

B. Subsidence

A significant portion of surface rights law developed from the early subsidence cases. A series of English cases from 1850 to 1870¹¹⁷ provided a framework for subsidence law that was largely adopted by courts in the United States.¹¹⁸ The English courts took a severe view of land subsidence and made it an exception to the general rule that the grant of mining rights included all rights necessary to extract the mineral.¹¹⁹ For the most part the courts found it irrelevant that the miner had used due care or contemporary mining practices in the operation.¹²⁰ If subsidence occurred, there would be liability.¹²¹ In general, the courts proceeded either from an implied right of surface support or from the construction of grants and reservations to a rule that the miner must provide surface support even at the cost of losing some of the value of the mining operations.¹²² An exception to the rule existed when an express waiver of the right to support existed.¹²³ However, the English courts were reluctant to find such waivers.¹²⁴

¹¹⁵ See *Himler Coal v. Kirk*, 266 S.W. 355, 357 (Ky. 1924); *Friedline v. Hoffman*, 115 A. 845, 846 (Pa. 1922).

¹¹⁶ *Flying Diamond Corp. v. Rust*, 551 P.2d 509, 511 (Utah 1976) (an alternative road path would have been less destructive); *Parker v. Texas Co.*, 326 S.W.2d 579, 579 (Tex. Civ. App. 1959).

¹¹⁷ *Harris v. Ryding*, 151 Eng. Rep. 27 (Ex. 1839); *Smart and Spearman v. Morjon*, 119 Eng. Rep. 393 (K.B. 1855); *Roberts v. Haines*, 119 Eng. Rep. 1003 (Ex. 1856); *Hext v. Gill*, 41 L.J. 761, 767 (1872) (a court can grant injunctive relief to the surface owner to stop subsidence).

¹¹⁸ *Williams*, 4 So. at 353 (citing *Harris*, 151 Eng. Rep. at 27).

¹¹⁹ *Harris*, 151 Eng. Rep. at 27.

¹²⁰ *Penman v. Jones*, 100 A. 1043, 1045 (Pa. 1917).

¹²¹ *Id.*

¹²² *Griffin v. Fairmont Coal Co.*, 53 S.E. 24, 27 (W. Va. 1905).

¹²³ *Rowbotham v. Wilson*, 119 Eng. Rep. 985, 988-89 (K.B. 1856).

¹²⁴ *Harris*, 151 Eng. Rep. at 27.

The American subsidence cases compose a significant portion of the law of surface rights up to the mid-1950's. These cases generally adopt the English rules that give significant protection against subsidence to the surface owner.¹²⁵ Most courts agree that a right of surface support exists in the absence of language in the grant or reservation.¹²⁶ However, the grant or reservation can expand upon the support right or define the terms under which it may be used.¹²⁷ Most American cases also find negligence or lack of due care irrelevant in defining the support right unless they are a matter of the contractual agreement.¹²⁸

Courts have often stated that the miner must have an express waiver of the right to surface support in order to have a right to collapse the surface.¹²⁹ The cases are divided as to what constitutes sufficient evidence of a waiver.¹³⁰ Typically, a waiver is claimed based on language that granted the miner the right to remove "all" coal or relieved him from "any and all claims" stemming from the operation of the mine.¹³¹ While most courts profess to seek the intent of the parties to the agreement,¹³² in practice the courts have considerable flexibility in assessing the facts of individual cases. Some waivers of support are found in general language,¹³³ while other waivers are rejected on minor technical grounds.¹³⁴

C. Strip Mining

Strip mining has been the most controversial surface rights issue in recent decades. Strip mining concerns share some fea-

¹²⁵ *Penman*, 100 A. at 1046; *Charnetski v. Miners Mills Coal Mining*, 113 A. 683, 684 (Pa. 1921) (citing *Penman*). For example, Pennsylvania recognizes the right to support an estate in land similar to the estates owned by surface and mineral estate owners.

¹²⁶ *Penman*, 100 A. at 1043, 1045.

¹²⁷ *Id.*

¹²⁸ *Mason v. Peabody*, 51 N.E.2d 285, 287 (Ill. App. Ct. 1943); *Berkey v. Berwood-White Coal Mining*, 78 A. 1004, 1007 (Pa. 1911).

¹²⁹ *Piedmont & George's Creek Coal Co. v. Kearney*, 79 A. 1013, 1016 (Md. 1911).

¹³⁰ *Id.* at 1016.

¹³¹ *Griffin*, 53 S.E. at 28; *Stilley v. Pittsburgh-Buffalo Co.*, 83 A. 478, 479-80 (Pa. 1912); *Godfrey v. Weyanoke Coal & Coke Co.*, 97 S.E. 186, 187-88 (W. Va. 1918); *Simmers v. Star Coal & Coke Co.*, 167 S.E. 737, 737-38 (W. Va. 1933).

¹³² *Griffin*, 53 S.E. at 27; *Stilley*, 83 A. at 480.

¹³³ *Simmers*, 167 S.E. at 737.

¹³⁴ *Hall v. Harvey Coal & Coke*, 108 S.E. 491, 493 (W. Va. 1921).

tures with subsidence. The surface owner has an absolute right to the support of the surface¹³⁵ and such right must be waived by the surface owner before the miner can strip mine or otherwise destroy the surface.¹³⁶ Although a surface owner has explicitly waived his right to support, the courts may hold that permission to strip mine was not given.¹³⁷ The right to strip mine is not implied from common law rights, but must be given explicitly or by necessary implication.¹³⁸ While an express grant to strip mine will be enforced,¹³⁹ subject to the laws and regulations of the federal, state and local governments, the grants are often imprecise.¹⁴⁰

The court will start with the existing language and the circumstances under which the severance occurred. Language limited to shaft or underground mining will oppose a finding for strip mining,¹⁴¹ while language that gives extensive surface rights or waives liability for the exercise of surface rights may be interpreted to show the parties' intent that strip mining be allowed.¹⁴²

Courts often consider as controlling the fact that strip mining was or was not a known method of extraction at the time of the severance.¹⁴³ If both parties did not know that strip mining was a prevalent manner of removal, they did not intend that strip mining be an available option.¹⁴⁴ One court commented

¹³⁵ *Berkey*, 78 A. at 1007; *Erwin v. Bethlehem Steel Corp.*, 62 S.E.2d 337, 341 (W. Va. 1950); *Drummond v. White Oak Fuel Co.* 140 S.E. 57, 59 (W. Va. 1927) (the cited cases applied the absolute right to support in the context of deep mining which other cases have applied in the context of surface mining).

¹³⁶ *Berkey*, 78 A. at 1007.

¹³⁷ *Commerce Union Bank v. Kinkade*, 540 S.W.2d 861, 864 (Ky. 1976).

¹³⁸ *Id.* at 864.

¹³⁹ *Walker v. Forcey*, 151 A.2d 601, 606 (Pa. 1959).

¹⁴⁰ *Id.*

¹⁴¹ *Commerce Union Bank*, 540 S.W.2d at 864; *Rochez Bros. v. Duricak*, 97 A.2d 825, 828 (Pa. 1953).

¹⁴² *Watson v. Kenlick Coal Co., Inc.*, 498 F.2d 1183, 1184-93 (6th Cir. 1974); *Croley v. Round Mountain Coal Co.*, 374 S.W.2d 852, 854 (Ky. 1964); *Commonwealth v. Fitzmartin*, 102 A.2d 893, 897 (Pa. 1954).

¹⁴³ *Smith v. Moore*, 474 P.2d 794, 795-96 (Colo. 1970); *English v. Harris Clay Co.*, 35 S.E.2d 329, 331-32 (N.C. 1945); *Franklin v. Callicoot*, 119 N.E.2d 688, 690 (Ohio Com. Pl. 1954); *Brown v. Crozer Coal & Land Co.*, 107 S.E.2d 777, 786 (W. Va. 1959).

¹⁴⁴ *Tennessee Gas Transmission Co. v. Blackford*, 160 N.E.2d 336, 341 (Ohio Ct. App. 1958); *Wilkes-Barre Township School Dist. v. Corgan*, 170 A.2d 97, 99-100 (Pa. 1961).

that strip mining was the only way of extracting the mineral, and that the parties therefore intended the use of strip mining.¹⁴⁵ Another court has suggested that the compensation paid for the mineral estate was so great that it, in effect, included payment for the surface.¹⁴⁶ This court reasoned that since the amount paid was in excess of the estimated value of the mineral estate, the parties must have intended the payment as compensation for the right to strip mine.¹⁴⁷ Some courts directly balanced the opposing interests and costs involved.¹⁴⁸ One court allowed strip mining even though it held that the mineral owner had no right to strip mine.¹⁴⁹ This court held it inequitable to disallow the only practical method of extraction but granted damages to the surface owner.¹⁵⁰ Similarly, some courts weighed the relative value of the estate in determining whether strip mining should be allowed.¹⁵¹

Aside from the language of severance or the purported intent of the parties, courts decide cases on the basis of public policy.¹⁵² Often the public policy considerations remain unarticulated and are addressed through court discussions of what is "reasonably necessary," whether a "reasonable alternative" exists, or what the parties "intended."¹⁵³ The courts generally have based their decisions on the historical practices of the mineral developers.¹⁵⁴ When courts have abandoned past interpretations, they have done so for the purposes of reflecting a change in public policy.¹⁵⁵ A new emphasis is required, and the courts respond by

¹⁴⁵ *Bridgeview Coal Co. v. Burchinal*, 193 A.2d 755, 757 (Pa. Super. Ct. 1963).

¹⁴⁶ *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395, 398 (Ky. 1968).

¹⁴⁷ *Id.* at 398.

¹⁴⁸ *Barker v. Mintz*, 215 P. 534, 535 (Colo. 1923); *Franklin*, 119 N.E.2d at 694; *Fitzmartin*, 102 A.2d at 896-97.

¹⁴⁹ *Barker*, 215 P. at 535.

¹⁵⁰ *Id.* at 535.

¹⁵¹ *Franklin*, 119 N.E.2d at 694; *Fitzmartin*, 102 A.2d at 896-97.

¹⁵² *Franklin*, 119 N.E.2d at 694; *Wilkes-Barre Township School Dist.*, 170 A.2d at 99-100; *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 620-23. (Tex. 1971).

¹⁵³ *See supra* note 152.

¹⁵⁴ *Dewey v. Great Lakes Coal Co.* 84 A. 913, 915 (Pa. 1912) (a mineral owner can deposit debris at the mouth of the mine shaft because such was the custom and a contrary result would "startle" the mining community).

¹⁵⁵ *Getty Oil Co.*, 470 S.W.2d at 620-23. The accommodation doctrine enunciated in a non-strip mining context serves as a good example. Until *Getty Oil Co.*, very little weight was given to the hardships faced by the surface owner—at least overtly. With

re-interpreting what is "reasonable."¹⁵⁶

D. *The Use of Surface Resources*

Both the miner and the surface owner may wish to use natural resources on the property other than the granted mineral. Most frequently, these debates have involved timber,¹⁵⁷ rocks,¹⁵⁸ soil,¹⁵⁹ and water.¹⁶⁰ All of these may be useful in the mining operation, but they may also be of economic benefit to the surface owner, or the surface owner may simply not wish to see them used by the miner.

Courts have construed both express grants of the rights to surface resources¹⁶¹ and have implied the right to use them as part of the miner's ownership of the minerals.¹⁶² Courts have often treated the miner's interest as a license for the use of the resources, making clear that their ownership remained with the surface user.¹⁶³ The miner's use of surface resources has generally been sustained so long as the use is "directly connected" to the mining operation.¹⁶⁴ However, the miner's "mere license" may not give the miner any basis to object to the surface owner's use of the resources.¹⁶⁵ Occasional attempts by the miner to enjoin the surface owner's use have been rejected when the miner cannot show that the use harms the mining operation.¹⁶⁶ The

increasing concern over the environment, surface owners have received more attention.

¹⁵⁶ *Id.*

¹⁵⁷ *Wilson v. Smith*, 13 Tenn. 379, 408 (1825) (the right of a Tennessee miner to use timber on the property for smelting operations).

¹⁵⁸ *Steinman Dev. Co. v. Ritter Lumber Co.*, 290 F. 832, 839, (W.D. Va. 1922).

¹⁵⁹ See *infra* notes 189-93.

¹⁶⁰ *Mack Oil Co. v. Laurence*, 389 P.2d 955, 961 (Okla. 1964).

¹⁶¹ *Steinman Dev. Co.*, 290 F. at 837-38; *Inland Steel Co. v. Isaacs*, 143 S.W.2d 503, 505 (Ky. 1940) (concerning the right to discharge water to an adjacent stream).

¹⁶² *Prather v. Chevron U.S.A.*, 563 F. Supp. 1366, 1368 (N.D. La. 1983); *Dunn v. Southwest Ardmore Tulip Creek Sand Unit*, 548 P.2d 685, 688 (Okla. Ct. App. 1976); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 810-11 (Tex. 1972); *Stradley v. Magnolia Petroleum Co.*, 155 S.W.2d 649, 652 (Tex. Civ. App. 1941); cf. *Mack Oil Co.*, 389 P.2d at 961-62 (pertaining to subterranean water).

¹⁶³ *Steinman Dev. Co.*, 290 F. at 835; *Haughey v. Arnold*, 125 S.E. 451 (Ga. 1924); *Sun Lumber Co. v. Nelson Fuel Co.*, 106 S.E. 41, 44 (W. Va. 1921).

¹⁶⁴ *Sun Lumber Co.* 106 S.E. at 44-45 (use of timber to construct houses rather than to support mine tunnels was found to be outside the permissible use).

¹⁶⁵ *Steinman Dev. Co.*, 290 F. at 839-40.

¹⁶⁶ *Id.* at 838; *Haughey*, 125 S.E. at 451.

courts may also find an obligation on the part of the mining operation to avoid any unreasonable interference with the surface owner's use of the surface resources.¹⁶⁷

E. Mining Operations on the Surface

The grant of mineral rights justifies the expectation that the minerals will be extracted and that the extraction will require some use of the surface.¹⁶⁸ Beyond that, however, there can be a great variety of operations connected to the mineral development. Cases have involved blasting on property,¹⁶⁹ water flooding,¹⁷⁰ drilling of wells and shafts,¹⁷¹ and the operation of pumping stations,¹⁷² tipples,¹⁷³ storage tanks,¹⁷⁴ housing,¹⁷⁵ and miners homes.¹⁷⁶ These cases have caused difficulty in determining relations between surface owner and miners. Where the miners have a clear idea of the operation they anticipate, they have often spelled out their rights in detail in the agreements.

Courts have been willing to expand the terms of the express agreement by interpretation to include reasonable additional uses.¹⁷⁷ Here, the agreement may have mentioned the use, but may not have been precise as to the exact type of building, structure, or operation.¹⁷⁸ Even without the express grant of use, miners have been able to assert a variety of implied rights to operation. One approach is to assert the dominance of the mineral interest with its implied grants of privileges reasonably

¹⁶⁷ *Arkansas Louisiana Gas v. Wood*, 403 S.W.2d 54, 56, 57 (Ark. 1966) (improper to use water in a mining operation that was also necessary for the surface owner's stockpond).

¹⁶⁸ See *supra* notes 55-92 and accompanying text.

¹⁶⁹ *Atherton v. Clearview Coal Co.*, 110 A. 298 (Pa. 1920).

¹⁷⁰ *Wiser Oil Co. v. Conley*, 346 S.W.2d 718, 721-22 (Ky. 1960).

¹⁷¹ *Union Prod. Co. v. Pittman*, 146 So. 2d 553 (Miss. 1962).

¹⁷² *Lone Star Prod. Co. v. Jury*, 445 P.2d 284 (Okla. 1968).

¹⁷³ *Tolliver v. Pittsburg Consol. Coal Co.*, 290 S.W.2d 471, 172 (Ky. 1956).

¹⁷⁴ *Wall v. Shell Oil Co.*, 25 Cal. Rptr. 908 (Cal. 1962).

¹⁷⁵ *Bolen v. Standard Elkhorn Coal Co.*, 275 S.W. 372 (Ky. 1925).

¹⁷⁶ See, e.g., *Sun Lumber Co.*, 106 S.E. at 44-45.

¹⁷⁷ *Bolen*, 275 S.W. at 373 (allowing building of miner's housing on surface); *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725 (W. Va. 1980) (surface easement for electrical line for purposes of ventilating coal mine).

¹⁷⁸ *Buffalo Mining Co.*, 267 S.E.2d at 725.

necessary for operation.¹⁷⁹ A second approach is to rely on the easement of necessity¹⁸⁰ analogy to contend that without the surface right in question, the mineral right would be lacking in value.

Courts have adopted these theories, but have restricted them with standards of reasonableness and attention to the burden on the landowner.¹⁸¹ Where the use appears reasonably necessary and the burden on the surface owner is not harsh, the court will allow it as an implied use.¹⁸² By contrast, where the use goes well beyond the necessities of the mining operation, or where it imposes a significant burden on the landowner, the use will be denied.¹⁸³ Among the uses determined to be unreasonable have been the location of well sites on the exact spot of the surface owner's retirement home¹⁸⁴ or within three feet of his ensilage pit.¹⁸⁵ The cases often require the mine owner to seek injunctive relief from the court to prevent the surface owner from stopping his mining operations.¹⁸⁶

F. *Pollution of the Surface*

Mining operations may either consciously use the surface estate for the deposit of waste or pollute the surface inadvertently in the course of mining.¹⁸⁷ The other pollution cases have

¹⁷⁹ *Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980); *Flying Diamond Corp. v. Rust*, 551 P.2d 509, 511 (Utah 1976) (the Dominance Doctrine was asserted here but the court found it was not applicable when there is a reasonable and practical alternative available which minimizes damage to the surface).

¹⁸⁰ *Baker v. Pittsburgh C&W Ry.*, 68 A. 1014, 1015-16 (Pa. 1908) (citing 2 LINDLEY ON MINES § 813 (2d ed. 1903)).

¹⁸¹ *Ball*, 602 S.W.2d at 523; *Robinson v. Robbins Petroleum Corp., Inc.*, 501 S.W.2d 865, 867 (Tex. 1973); *Sun Oil Co.*, 483 S.W.2d at 810.

¹⁸² *Kentucky River Coal Corp. v. Williams*, 10 S.W.2d 617, 618 (Ky. 1928); *Lone Star Prod.*, 445 P.2d at 287; *Buffalo Mining Co.*, 267 S.E.2d at 725-26; *Squires v. Lafferty*, 121 S.E. 90, 91 (W. Va. 1924).

¹⁸³ *Wiser Oil Co.*, 346 S.W.2d at 721-22 (the court found that even though the water flooding method of oil recovery was *necessary* it could not be utilized since it would destroy the surface); *Diamond Shamrock Corp. v. Phillips*, 511 S.W.2d 160, 163-64 (Ark. 1974).

¹⁸⁴ *Diamond Shamrock*, 511 S.W.2d at 163.

¹⁸⁵ *Reeding & Bates Offshore Drilling Co. v. Jergensen*, 453 S.W.2d 853, 855-56 (Tex. Civ. App. 1970).

¹⁸⁶ *Bolen*, 275 S.W. at 372; *Squires*, 121 S.E. at 90.

¹⁸⁷ See *infra* notes 189-99 and accompanying text.

involved the piling of mining debris on the surface¹⁸⁸ and the pollution of water because of mining activities.¹⁸⁹ The water pollution cases have dealt with pollution of streams,¹⁹⁰ injuries to livestock from salt water¹⁹¹ and spillover from saltwater or slush pits.¹⁹²

The cases have recognized express agreements regarding pollution rights¹⁹³ and have also recognized implied rights to pollute either from custom allowing the polluting activity,¹⁹⁴ or as a part of the necessary or reasonable use of the mined property.¹⁹⁵ The more recent cases reflect a greater sensitivity to surface damage. While these cases recognize the miner's interest, they require "due regard" for the surface interest,¹⁹⁶ and lack of such may lead to a finding of negligent or otherwise tortious conduct by the miner.¹⁹⁷ Increasingly, mining pollution has become the subject of statute and regulation which may supplant or alter common law understandings.¹⁹⁸

¹⁸⁸ *Himrod v. Ft. Pitt Mine & Mill Co.*, 238 F. 746, 747 (8th Cir. 1916); *Phillips v. Sipsy Coal Mining Co.*, 118 So. 513, 534 (Ala. 1928); *Dewey*, 84 A. at 915.

¹⁸⁹ *Nebo Consol. Coal & Coking Co. v. Lynch*, 133 S.W. 763, 764 (Ky. 1911) (rain washing mine tailings into a stream thereby polluting it held to be a nuisance); *Oakwood Smokeless Coal Corp. v. Meadows*, 34 S.E.2d 392, 393 (Va. 1945) (pollution of a spring).

¹⁹⁰ See *supra* note 189.

¹⁹¹ *Robinson v. South Penn Oil Co.*, 163 S.E. 857, 857 (W. Va. 1932).

¹⁹² *Charles F. Hayes & Assocs. v. Blue*, 233 So. 2d 127, 128 (Miss. 1970); *Central Oil Co. v. Shows*, 149 So. 2d 306, 308-11, (Miss. 1963); *Gulf Refining Co. v. Davis*, 80 So. 2d 467, 468 (Miss. 1955).

¹⁹³ *Goodson v. Comet Coal Co.*, 31 S.W.2d 293, 294-95 (Ark. 1930) (supplemental lease allowed dumping of debris from adjacent mines on surface); *United Carbon Co. v. Webb*, 137 S.W.2d 733, 734 (Ky. 1940) (express right to dump, store and leave "much" on surface and right to pollute watercourses granted in lease agreement).

¹⁹⁴ *Dewey*, 84 A. at 914-15 (implied right to dump "gob" on surface near mouth of mine); *Robinson*, 163 S.E. at 857 (salt water pollution of surface allowed when it was result of "only practicable method known" to separate oil and salt water).

¹⁹⁵ *Himrod*, 238 F. at 748-49 (not error to instruct jury that mining company was not liable if it was necessary to dump waste material on surface lands) (emphasis added).

¹⁹⁶ See *Blue Diamond Coal Co. v. Press Eversole*, 253 S.W.2d 580, 582 (Ky. 1952); *Charles Hayes & Assocs.*, 233 So. 2d at 128 (citing *Placid Oil Co. v. Byrd*, 127 So. 2d 17 (Miss. 1968)).

¹⁹⁷ *Blue Diamond Coal Co.*, 253 S.W.2d at 582 (the "due regard" concept would not allow the deposit of debris from many properties on one surface parcel).

¹⁹⁸ See, e.g., Surface Mining Control and Reclamation Act of 1977 [hereinafter cited as SMCRA], Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (1982)); KY. REV. STAT. §§ 350.060(5)(h), 353.150, 353.160, 353.550 (1983).

G. Use of the Surface to Benefit Mining on Other Property

One of the most litigated surface rights issues has involved the *other mining property*.¹⁹⁹ "Other property" controversies have dealt with surface transport,²⁰⁰ use of underground tunnels for shipping minerals from other properties,²⁰¹ the deposit of debris from other properties on the surface,²⁰² and the use of buildings, shafts, and processing facilities on the surface to benefit extraction from other parcels.²⁰³ Typically, the surface owner and mineral owner have reached agreement on the use of their shared property. The mineral owner, in addition to the minerals, has received some or all of the surface rights described in earlier sections. A different question arises, however, when the miner is also working contiguous mineral properties.²⁰⁴ The miner believes that his venture on the contiguous property would be aided by the use of the surface. The surface owner resists the added burden brought on the surface or wishes to receive some share of the benefit to the mineral owner.

The courts have not recognized implied rights in the miner to use the surface to benefit mining on other property.²⁰⁵ While the earlier cases show some sympathy for the miner,²⁰⁶ the contemporary position is that the mineral owner is not entitled to use the surface for the benefit of other mineral ventures without express permission.²⁰⁷ The cases turn on the interpretation of the

¹⁹⁹ See *infra* notes 200-03 and accompanying text.

²⁰⁰ See *Hi Hat Elkhorn Coal Co. v. Kelly*, 205 F. Supp. 764 (E.D. Ky. 1962); *Tutwiler v. Etheridge*, 231 So. 2d 93 (Ala. 1970); *Sherwood v. Greater Mammoth Vein Coal Co.*, 185 N.W. 279 (Iowa 1921); *Gumbert v. McCracken*, 18 A. 1068 (Pa. 1890).

²⁰¹ See *Smith v. Wright*, 424 P.2d 384 (Colo. 1967); *Lillibridge v. Lackawanna Coal Co.*, 22 A. 1035 (Pa. 1891); *Kormuth v. United States Street Co.*, 108 A.2d 907 (Pa. 1954); *Clayburn v. Camila Red Ash Coal Co.*, 105 S.E. 117 (Va. 1920).

²⁰² See *Newman v. Hi Hat Elkhorn Coal Co.*, 298 F.2d 119 (6th Cir. 1962); *Phillips*, 118 So. at 534.

²⁰³ See *Ross Coal Co. v. Cole*, 249 F.2d 600 (4th Cir. 1957); *Bagley v. Republic Iron & Steel Co.*, 69 So. 17 (Ala. 1915); *Marlowe v. Mascum*, 171 S.W.2d 997 (Ky. 1943); *Miles v. Home Gas Co.*, 316 N.Y.S.2d 908 (N.Y. App. Div. 1970).

²⁰⁴ See *Ross Coal Co.*, 249 F.2d at 600.

²⁰⁵ *Id.* at 605.

²⁰⁶ See *Gumbert*, 18 A. at 1069; *Lillibridge*, 22 A. at 1039; *Moore v. Indian Camp Coal Co.*, 80 N.E. 6 (Ohio 1907).

²⁰⁷ See *Mountain Fuel Supply Co. v. Smith*, 471 F.2d 594 (10th Cir. 1973); *Ross Coal Co.*, 249 F.2d at 604-05; *Russell v. Texas Co.*, 238 F.2d 636, 642-43 (9th Cir. 1956); *Rose v. Martin*, 220 S.W.2d 385, 387-88 (Ky. 1949); *Camila Red Ash Coal Co.*, 105 S.E. at 122; *Phillips*, 118 So. at 533-34; *Tutwiler*, 231 So. 2d at 93.

agreement.²⁰⁸ The surface owner contends the agreement does not authorize the benefit to adjacent properties, while the miner contends to the contrary. Courts have sustained the claims of miners where the language expressly preserves rights involving other properties or gives indication of such claim.²⁰⁹ However, courts have strictly interpreted grants to prevent the miner from claiming rights on other properties.²¹⁰ On other occasions, courts have interpreted agreements to forbid the use of other property.²¹¹

III. THE STRANDS OF SURFACE RIGHTS LAW

The law of surface rights has evolved both as a distinctive whole and as a collection of separate responses to the varied needs of miners and surface owners. Courts assess subsidence differently from operations on the surface or requests to use the surface for mining activity on other lands. The genius of the common law has been in its ability to borrow doctrines from established law and to create new law as the needs of mining and surface preservation demanded.²¹² As a result, contemporary surface rights law contains strains of property, contract, and tort doctrines. Were this not enough, the activity of government in recent decades has added a heavy public regulatory component to surface rights law.

A. *The Property Law Contribution*

Property doctrines have played a major role in surface rights law.²¹³ As has been noted, a valuable contribution of the English

²⁰⁸ See *Ross Coal Co.*, 249 F.2d at 604-06.

²⁰⁹ See *Potter v. Rend*, 50 A. 821, 822 (Pa. 1902); *Sherwood*, 185 N.W. at 283; *Fisher v. West Virginia Coal & Transp. Co.*, 108 A.2d 907, 909 (Pa. 1954); *Smith*, 424 P.2d at 384. Co., 108 A.2d 907, 909 (Pa. 1954); *Smith*, 424 P.2d at 384.

²¹⁰ See *Reliance Coal & Coke Co. v. Kentucky Coal & Coke Co.*, 23 S.W. 1095 (Tenn. 1893); *Hi Hat Elkhorn Coal Co.*, 298 F.2d at 120 (the grant of the right to use other property for certain purposes may not include the right to make use of it for related purposes).

²¹¹ See *Vogel v. Webber*, 28 A. 226 (Pa. 1893); *Dietz v. Mission Transfer Co.*, 25 P. 423 (Cal. 1890); *Moore v. Price*, 101 N.W. 91 (Iowa 1904).

²¹² See *infra* notes 213-27.

²¹³ See generally 4 D. VISH, COAL LAW AND REGULATION § 80.01[1] (1984).

courts, carried over by the first American decisions, was the recognition of the separate mineral estate in land and the development of the mineral lease.²¹⁴ These developments gave worth to mineral ownership and provided the basis for exploitation of mineral wealth.²¹⁵ They also allowed the exploitation of both surface and mineral values on the same parcel of land, which was surely an economically efficient use of scarce resources.

Once the independent property interest in the mineral estate was recognized, property law concepts helped define the surface rights that would accompany the ownership of minerals.²¹⁶ Common law property rights developed in non-mining situations proved useful to the mining surface rights cases. The most prominent of these rights were the easement and the license.²¹⁷ The former was recognized to provide the miner access to the mineral deposit site and to assure a way of removing the extracted material for further processing en route to market.²¹⁸ Surface rights cases have recognized express and implied easements²¹⁹ as well as easements by necessity.²²⁰ Courts have also been willing to expand the terms of easements to promote commercial development of the mining enterprise.²²¹

The license, or profit, has been useful in defining the miner's right to make use of surface resources—timber, stones, water, etc.—in the mining venture. The cases have ordinarily recognized the miner's right of use.²²² Surface owners may retain the right to use certain minerals for domestic purposes.²²³ One concern in

²¹⁴ See *supra* note 55 and accompanying text.

²¹⁵ See *id.*

²¹⁶ See VISH, *supra*, note 213, § 80.01[1].

²¹⁷ *Id.* § 83.03[1].

²¹⁸ *Id.* § 83.03[5].

²¹⁹ See *Yates v. Gulf Oil Corp.*, 182 F.2d 286 (5th Cir. 1950); *Phelps v. Fitch*, 255 S.W.2d 660 (Ky. 1953); *Lester Coal Corp. v. Lester*, 122 S.E.2d 901 (Va. 1961).

²²⁰ See *Buck Creek R.R. Co. v. Haws*, 69 S.W.2d 333, 334 (Ky. 1934); *Neal v. Finley*, 124 S.W. 348, 349 (Ky. 1910); see also *Melton v. Sneed*, 109 P.2d 509 (Okla. 1940). *But see* *Greek v. Wylie*, 109 A. 529 (Pa. 1920) (rejecting easement by necessity on facts).

²²¹ See *Jones v. Island Creek Coal Co.*, 91 S.E. 391, 393 (W. Va. 1917); *Buffalo Mineral Co. v. Martin*, 267 S.E.2d 721, 723-25 (W. Va. 1980).

²²² See *Steinman Dev. Co. v. Ritter Lumber Co.*, 290 F. 832 (W.D. Va. 1922); *Haughey v. Arnold*, 125 S.E. 451 (Ga. 1924); *Sun Lumber Co. v. Nelson Fuel Co.*, 106 S.E. 41, 44-45 (W. Va. 1921).

²²³ See *Patrick v. Allen*, 350 S.W.2d 481 (Ky. 1961); *Lyons v. Gambill*, 47 S.W.2d 532 (Ky. 1932).

the license cases is whether the rights may be limited to the parties reaching the agreement and not to their successors.²²⁴

Property law has created a more comprehensive view of surface rights through the implied rights doctrine. This doctrine holds the ownership of minerals carries with it the right to use the surface in order to explore for and extract the minerals at a profit.²²⁵ The cases have not been precise about the legal pedigree of such a right. Usually, the right is phrased as an "incident" of the mineral estate.²²⁶ The cases also have varied as to the degree of necessity which the miner must show and the closeness of connection between the mining operation and the surface use that must be present.²²⁷

B. The Contract Law Contribution

The creation of distinct estates in the same parcel of land at the same time forced the law to recognize that the miner and surface owner would have to live with each other's uses of the property.²²⁸ A benefit in allowing them to tailor the living arrangements to fit their particular needs also was recognized.²²⁹ In many instances, such flexibility was essential to entering into split estate arrangements.²³⁰ Accordingly, the law recognized the right of the parties to vary the standard property assumptions regarding surface use.²³¹

The property law doctrines of covenants and equitable servitudes introduced the concept of promises between the parties to surface rights agreements.²³² The agreements bound subsequent takers of the interests²³³ and also offered the flexibility that the two parties needed. Contractual rules were employed to

²²⁴ *Lyons*, 47 S.W.2d at 534.

²²⁵ 4 D. VISH, *supra* note 213, § 81.01[2].

²²⁶ *Id.*

²²⁷ *See supra* note 115.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ For example, if the grant of mineral rights automatically passed the right to use timber on the property for mining purposes, a surface owner wanting to preserve his trees might not enter into any transfer of mining rights.

²³¹ *See supra* note 115.

²³² RESTATEMENT OF PROPERTY § 539 (1944).

²³³ *Id.*

resolve disputed cases. The central objective of the courts was to carry out the intent of the parties.²³⁴ Where language was unambiguous, the courts recognized that the agreement of the parties would override contract presumptions of surface rights law.²³⁵ However, difficulties in interpretation arise when the miner makes an unexpected demand on the surface or wishes to use a new technology that is not precisely defined in the instrument.²³⁶ Then, a search for the intention of the parties may be pointless.

Close reading of certain cases suggests the court is often faced with finding an intention that was not present at the time of an agreement.²³⁷ Courts then rely on such doctrines as construing against the drafter²³⁸ or inferring the expectations of the parties at the time of drafting.²³⁹ Alternatively, a court may fall back on the property rules that define rights in the absence of an express agreement of the parties.²⁴⁰

C. *The Tort Law Contribution*

Tort law has also contributed to surface rights law. The intrusive nature of many mining activities on surface values shows the potential of the tort action. A venerable portion of tort law addresses injury to land. Doctrines of trespass and nuisance protect, respectively, the interests in possession and use and enjoyment of property.²⁴¹ The negligence action and the

²³⁴ See *Mason v. Peabody*, 51 N.E.2d 285 (Ill. App. Ct. 1943); *Piedmont & George's Creek Coal Co. v. Kearney*, 79 A. 1013 (Md. 1911); *Stilley v. Pittsburg-Buffalo Co.*, 83 A. 478 (Pa. 1912); *Godfrey v. Weyanoke Coal & Coke Co.*, 97 S.E. 186 (W. Va. 1918); *Simmers v. Star Coal & Coke Co.*, 167 S.E. 737 (W. Va. 1933); see also *Griffin v. Fairmont Coal*, 53 S.E. 24, 30 (W. Va. 1905). Thus, a surface owner could consent to the collapse of his property or to the use of a roadway across his land for the movement of coal from another property. So, too, a miner might relinquish his otherwise existing "right" to use surface resources in the mining operation or to dump debris on the surface.

²³⁵ See *supra* note 234.

²³⁶ See *infra* notes 238-39.

²³⁷ *Id.*

²³⁸ *Compass Coal Co. v. Pennsylvania Game Comm'n*, 454 A.2d 1167, 1169 (Pa. Commw. Ct. 1983).

²³⁹ See *Bridgeview Coal Co. v. Burchinal*, 193 A.2d 755 (Pa. Super. Ct. 1963); *Gumbert v. McCracken*, 18 A. 1068 (Pa. 1890); *Oresta v. Romano Bros.*, 73 S.E.2d 622, 627 (W. Va. 1952).

²⁴⁰ See *supra* note 239.

²⁴¹ RESTATEMENT (SECOND) OF TORTS § 821D comment e (1979).

strict liability claim may also be appropriate in surface damage cases.²⁴²

The tort causes of action have often served as the means to raise a surface rights issue. The trespass action focuses on the surface owner's claim that his property interest has been harmed when a miner goes beyond the privileges of his estate.²⁴³ Where the miner is found to have privileges in the surface estate as a part of his mining rights, the issue shifts to the care or intent with which the miner engaged in the activity.²⁴⁴ Furthermore, cases frequently recognize the miner's rights to use the surface up to the point where the use is negligent, malicious, or wanton.²⁴⁵

The tort concepts of "reasonableness" and "balancing" increasingly are used to adjust surface rights controversies.²⁴⁶ The common formulation is that while the miner has the right to make use of the surface for the benefit of the mining operation, he must exercise those rights with "due regard" for the interests of the surface owner and insure that "no unnecessary damage" occurs to the surface estate.²⁴⁷ The cases also reflect a use of the balancing of interests developed in nuisance law. Courts will assess (1) the harms rendered to the surface,²⁴⁸ (2) the benefits conveyed to the miner,²⁴⁹ and (3) the cost of alternatives to the mining practice.²⁵⁰

Two recent prominent surface rights cases utilized a tort analysis. First, in *Getty Oil Co. v. Jones*²⁵¹ the court required the mineral owner to consider the impact of surface use on the

²⁴² *Id.* §§ 817-821.

²⁴³ *See infra* note 245.

²⁴⁴ *Id.*

²⁴⁵ *See* *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968); *Blue Diamond Coal Co. v. Neace*, 337 S.W.2d 725 (Ky. 1960); *United Carbon Co. v. Webb*, 137 S.W.2d 733 (Ky. 1940); *Gulf Refining Co. v. Davis*, 80 So. 2d 467 (Miss. 1955).

²⁴⁶ *See* *Blue Diamond Coal Co. v. Eversole*, 253 S.W.2d 580 (Ky. 1952); *Inland Steel Co. v. Isaacs*, 143 S.W.2d 503 (Ky. 1940); *Parker v. Texas Co.*, 326 S.W.2d 579 (Tex. Civ. App. 1959); *Speedman Oil Co. v. Duval County Ranch Co.*, 504 S.W.2d 923, 929 (Tex. Civ. App. 1973).

²⁴⁷ *Id.* §§ 817-821.

²⁴⁸ *See* *Inland Steel*, 143 S.W.2d at 505.

²⁴⁹ *See* *Blue Diamond Coal Co.*, 253 S.W.2d at 582.

²⁵⁰ *See infra* note 257.

²⁵¹ 470 S.W.2d. 618 (Tex. 1971).

surface estate.²⁵² In *Getty Oil Co.*, the surface owner wanted the oil and gas lessee to place its pumping units in concrete cellars so that the units would not interfere with an irrigation system.²⁵³ The irrigation system could clear objects under seven feet in height; however, two of the lessee's pumping units were over seven feet high.²⁵⁴ Placement of the units in the cellars would allow the system to move freely.²⁵⁵ The court held that the lessee should remove the units that interfered with the irrigation system, and suggested that the lessee place them in the cellars.²⁵⁶ The court reasoned that since the lessee's use of the surface worked a hardship on the surface owner, the lessee should desist because reasonable alternatives were available.²⁵⁷ The court stated that:

if the manner of use selected by the dominant mineral lessee is the only reasonable, usual and customary method that is available for developing and producing the minerals on this particular land then the owner of the servient estate must yield. However, if there are other usual, customary and reasonable methods practiced in the industry on similar lands put to similar uses which would not interfere with the existing uses being made by the servient surface owner, it would be unreasonable for the lessee to employ an interfering method or manner of use.²⁵⁸

Second, in *Flying Diamond Corp. v. Rust*,²⁵⁹ the Court followed the accommodation doctrine of *Getty Oil Co.*²⁶⁰ It held that the oil and gas lessee was liable for construction of an access road when an alternative route suggested by the surface owner would have minimized the damage.²⁶¹ The court stated that:

²⁵² *Id.* at 621.

²⁵³ *Id.* at 620-22.

²⁵⁴ *Id.* at 620.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 623.

²⁵⁷ 470 S.W.2d at 628.

²⁵⁸ *Id.*

²⁵⁹ 551 P.2d 509 (Utah 1976).

²⁶⁰ *Id.* at 511.

²⁶¹ *Id.* at 511-12.

[w]herever there exist separate ownerships of interests in the same land, each should have the right to use and enjoyment of his interest in the property to the highest degree possible not inconsistent with the rights of the other. We do not mean to be understood as saying that such a lessee must use any possible alternative. But he is obliged to pursue one which is reasonable and practical under the circumstances.²⁶²

D. Remedies for Deprivation of Rights

The variety of factual situations in the surface rights area suggests the need for a variety of remedies for alleged interference with surface rights. Property, contract, and tort law provide a considerable number of remedial actions. In general, the remedial actions may be classified as (1) actions to define the rights of title, (2) requests for monetary damages, and (3) requests for injunctive relief.

The title action cases include actions for ejectment,²⁶³ quiet title,²⁶⁴ and reformation.²⁶⁵ Occasionally these actions appear in the form of declaratory judgments.²⁶⁶ Typically, the plaintiff seeks to clarify his ownership of some "incident" of the surface rights.

The monetary relief cases are actions in trespass,²⁶⁷ actions for waste,²⁶⁸ and actions based on negligence,²⁶⁹ nuis-

²⁶² *Id.* at 511.

²⁶³ See *Dietz v. Mission Transfer Co.*, 25 P. 423 (Cal. 1890); *Walker v. Forcey*, 151 A.2d 601 (Pa. 1959).

²⁶⁴ See *Miller v. Ridgley*, 117 N.E.2d 759 (Ill. 1954); *Colonial Royalties Co. v. Keener*, 266 P.2d 467 (Okla. 1953); *Melton*, 109 P.2d at 509; *Yaquina Bay Timber & Logging Co. v. Shiny Rock Mining Corp.*, 556 P.2d 672 (Ore. 1976); *Campbell v. Schrock*, 10 S.W.2d 165 (Tex. Civ. App. 1928).

²⁶⁵ *Stokes v. Tutvet*, 328 P.2d 1096 (Mont. 1958).

²⁶⁶ See *Peabody Coal v. Erwin Co.*, 453 F.2d 398 (6th Cir. 1971); *Commerce Union Bank v. Kinkade*, 540 S.W.2d 861 (Ky. 1976); *Bridgeview Coal Co.*, 193 A.2d at 755.

²⁶⁷ See *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586 (5th Cir. 1957); *Tutwiler v. Etheredge*, 231 So. 2d 93 (Ala. 1970); *Rose v. Martin*, 220 S.W.2d 385 (Ky. 1949); *Hinds v. Phillips Petroleum Co.*, 591 P.2d 697 (Okla. 1979); *Coxe v. Lehigh Valley Ry. Co.*, 158 A.2d 782 (Pa. 1960); *Dewey v. Great Lakes Coal Co.*, 84 A. 913 (Pa. 1912); *Collier v. Caraway*, 140 S.W.2d 910 (Tex. Civ. App. 1940).

²⁶⁸ *Wilson v. Smith*, 13 Tenn. 379, 408-09 (1825).

²⁶⁹ See *Justice v. Pennzoil Co.*, 598 F.2d 1339 (4th Cir. 1979); *Central Oil Co. v. Shows*, 149 So. 2d 306 (Miss. 1963); *Gulf Refining Co.*, 80 So. 2d at 467; *Atherton v.*

ance,²⁷⁰ intentional wrongdoing,²⁷¹ or strict liability.²⁷² In these situations the harmful action has already occurred and the plaintiff, usually the surface owner, is seeking recompense for the damage.

The injunctive relief cases seek to prevent or mitigate threatened damage. Since the English courts first recognized the propriety of injunctive relief to enforce surface rights,²⁷³ the courts have been receptive to requests for injunctions from both surface owners and miners. The surface owners typically seek to prevent destructive uses of the property which they contend are not within the rights of the mineral owner.²⁷⁴ The miners' resort to injunctive relief typically has been asserted in the face of a surface owner attempts to block mining activity.²⁷⁵

Conclusion

This article has examined the factual situations and legal theories that have created the common law of surface rights in mining. Both the legal instruments and the courts interpreting them have recognized that the relationship between the surface owner and the miner must consider the needs of both parties. Accordingly, a law evolved that gives primacy to mineral deeds, recognizes the right of the parties to define arrangements to their

Clearview Coal Co., 110 A. 298 (Pa. 1920); *Pennsylvania Cent. Brewing Co. v. Lehigh Valley Coal Co.*, 95 A. 471 (Pa. 1915); *Texaco, Inc. v. Spires*, 435 S.W.2d 550 (Tex. Civ. App. 1968).

²⁷⁰ *Kentland-Elkhorn Coal Co. v. Charles*, 514 S.W.2d 659 (Ky. 1974); *Charles Hayes & Assoc. Inc. v. Blue*, 233 So. 2d 127 (Miss. 1970).

²⁷¹ *Arkansas-Louisiana Gas Co. v. Wood*, 403 S.W.2d 54 (Ark. 1966); *Speedman Oil Co.*, 504 S.W.2d at 923.

²⁷² *Mason v. Peabody Coal Co.*, 51 N.E.2d 285 (Ill. Ct. App. 1943); *Berkey v. Berwind-White Coal Mining Co.*, 78 A. 1004 (Pa. 1911).

²⁷³ *Roberts v. Haines*, 119 Eng. Rep. 1003, 1007 (Ex. 1856) (dicta); *Hext v. Gill*, 41 L.J.Ch. 761, 767 (1872).

²⁷⁴ *Marvin v. Brewster Iron Mining Co.*, 55 N.Y. 538 (1874); *Ryckman v. Gillis*, 57 N.Y. 68 (1874); *Shawlis v. Quemahoning Creek Coal Co.*, 105 A. 826 (Pa. 1919); *Gulf Oil Corp. v. Walton*, 317 S.W.2d 260 (Tex. Civ. App. 1958); *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971); *Speedman Oil Co.*, 504 S.W.2d at 923.

²⁷⁵ *Benton v. U.S. Manganese Corp.*, 313 S.W.2d 839 (Ark. 1958); *Davison v. Reynolds*, 103 S.E. 248 (Ga. 1920); *Bolin v. Standard Elkhorn Coal Co.*, 275 S.E. 372 (Ky. 1925); *Ball v. Dillard*, 602 S.W.2d 521 (Tex. 1980); *Parker v. Texas Co.*, 326 S.W.2d 579 (Tex. Civ. App. 1959); *Squires v. Lafferty*, 121 S.E. 90 (W. Va. 1924); *Porter v. Machine Mfg. Co.*, 64 S.E. 853 (W. Va. 1909).

own needs and forces the miner to be attentive to legitimate claims of the surface owner.

The accommodations of the common law provide a sensible pattern for the structuring of affairs between private parties. Energy law in the last third of the 20th century has added a public component to the common law doctrines. The government involves itself in surface rights matters as the owner of one or both of the estates. Even when government does not act as landowner it may enforce regulatory preferences of the public against the desires of the miner and surface owner. Thus, the rights of mineral ownership may no longer include the ability to strip mine or deposit waste products on the surface. In summary, while the common law precedents provide guidance in evaluating contemporary surface rights disputes, they are only a part of a complex and evolving legal structure.

