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Surface Owner Consent Laws: The Agricultural Enterprise versus Surface Mining for Coal

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I. INTRODUCTION

With the increased development of coal as an energy source in the last few years, and especially with the prospect of an even greater increase in the near future, several important concerns have arisen. Because there has been a substantial amount of coal ownership severed from surface ownership and because much of this severed coal is extracted by surface mining methods, one concern that has been voiced is that of the relationship of the coal owner to the surface owner.[1] The surface owner is recognized as an integral part of the agricultural enterprise which consists of (1) the land, (2) the going concern and (3) the operator who is usually the owner of both the land and the concern. The interest is really for the continued viability of the agricultural enterprises upon which the economic well-being of the area as a whole will depend once the surface mining process is over.

Several approaches have developed to achieve a balance between the need for coal and the protection of the agricultural enterprise. Courts have at times given a narrow interpretation to the scope of the development easement granted at the time of severance so that it does not include the right to surface mine.[2] States have enacted reclamation

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1. *See* Comment, *Between A Rock and a Hard Place: Surface Mining on the Severed Estate—A Legislative Proposal*, 17 WM. & MARY L. REV. 140 (1975); Comment, *Broad-Form Deed—Obstacle to Peaceful Coexistence Between Mineral and Surface Owners*, 60 KY. L.J. 742 (1972); Comment, *Montana's Statutory Protection of Surface Owners from Strip Mining and Resultant Problems of Mineral Deed Construction*, 37 MONT. L. REV. 347 (1976).

Although no Illinois statistics have been found that would detail the amount of severance that has occurred within the state, it appears from litigated cases that the amount is not insignificant. *See, e.g.*, Kinder v. LaSalle County Carbon Coal Co., 310 Ill. 126, 141 N.E. 537 (1923); Patterson v. Peabody Coal Co., 3 Ill. App. 2d 311, 122 N.E.2d 48 (4th Dist. 1954).

2. *See, e.g.*, Commerce Union Bank v. Kinkade, 540 S.W.2d 861 (Ky. 1976); Skivolocki v. East Ohio Gas Co., 38 Ohio St. 2d 244, 313 N.E.2d 374 (1974); Stewart

laws requiring that land be restored to a productive condition after the surface mining has been completed and disallowing mining permits if it cannot be put into a productive condition.[3] Furthermore, in some states, counties have enacted zoning controls over strip mining as well as reclamation regulations.[4] Various aspects of these approaches have been discussed in the law journals[5] and this article will not deal with them. Rather, it will deal with another device that seeks to affect the relationship between the coal owner and the surface owner—the surface owner consent law.

While the consent law can take different forms, it is distinguishable from the laws that merely require a listing of surface owners in the surface mining permit application,[6] from laws that require a state-

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v. Chernicky, 439 Pa. 43, 266 A.2d 259 (1970). *See also* Reppert, *Strip Mining and the Construction of Mineral Deeds in Ohio*, 4 CAP. U.L. REV. 134 (1974).

3. *See, e.g.*, N.D. CENT. CODE § 38-14-05.1 (Supp. 1977); OHIO REV. CODE ANN. § 1513.07(B) (Page Supp. 1976).

4. See the ill-fated efforts of Knox County, Illinois, as described in Midland Elec. Coal Corp. v. County of Knox, 1 Ill. 2d 200, 115 N.E.2d 275 (1953); American Smelt. & Ref. Co. v. County of Knox, 60 Ill. 2d 133, 324 N.E.2d 398 (1974). *Cf.* Village of Spillertown v. Prewitt, 21 Ill. 2d 228, 171 N.E.2d 582 (1961). Reclamation statutes in several states specifically authorize local zoning and regulation. *See, e.g.*, COLO. REV. STAT. § 34-32-109(6), (8) (Supp. 1976). In Georgia Marble Co. v. Walder, 236 Ga. 545, 224 S.E.2d 394 (1976), the court held the Georgia Surface Mining Act of 1968 did not preempt county regulation and that, therefore, the Georgia Marble Company had to comply with the Newton County Zoning regulations or be enjoined from continuing its mining activity. On the other hand some state zoning enabling legislation expressly prohibits local control over certain mineral exploitation aspects. *See, e.g.*, WYO. STAT. § 18-289.1 (Supp. 1975).

5. In addition to the articles cited in notes 1 and 2, *supra, see* Patton, *Recent Changes in the Correlative Rights of Surface and Mineral Owners*, 18 ROCKY MT. MINERAL L. INST. 19 (1973); Maxwell, *The Meaning of "Minerals"—The Relationship of Interpretation and Surface Burden*, 8 TEXAS TECH. L. REV. 255 (1976); Imes & Wali, *An Ecological/Legal Assessment of Mined Land Reclamation Laws*, 53 N.D.L. REV. 359 (1977).

6. ALA. CODE tit. 26, § 166 (129h)A(5) (Interim Supp. 1975); COLO. REV. STAT. § 34-32-112(2)(b) (Supp. 1976); ILL. REV. STAT. ch. 93, § 205(e)(1) (1975); KAN. STAT. § 49-406(b)(2) (1976); MO. ANN. STAT. § 444.550(1)(2) (Vernon Supp. 1977); N.M. STAT. ANN. § 63-34-9A(4) (1974); N.Y. ENVIR. CONSERV. LAW § 23-2711(2)(c) (McKinney Supp. 1976); OHIO REV. CODE ANN. § 1513.07(A)(4) (Page Supp. 1976); OR. REV. STAT. § 517.790(e) (1975); TENN. CODE ANN. § 58-1544(a)(4) (Supp. (1976); TEX. REV. CIV. STAT. ANN. art. 5920-10, § 8(e)(2) (Vernon Supp. 1976); VA. CODE § 45.1-202(c) (1974); WASH. REV. CODE ANN. § 78.44.080(1) (Supp. 1976); W. VA. CODE § 20-6-8(3) (1973); WIS. STAT. ANN. § 144.85(3)(c) (West 1974); WYO. STAT. § 35-502.24(a)(iv) (Supp. 1975).

In addition, Texas, for example, requires the listing of persons residing on the property, TEX. REV. CIV. STAT. ANN. art. 5920-10, § 8(e)(3) (Vernon Supp. 1976), and Washington requires the listing of the "purchaser of the land under a real estate contract," WASH. REV. CODE ANN. § 78.44.080(a) (Supp. 1976).

The 1977 federal act requires permit applications to include the names and ad-

ment in the surface mining permit application that the applicant has the legal right to enter on the surface and conduct surface mining operations,[7] from laws that give surface owners the right to appear and protest in the mine permit granting process,[8] and from laws that allow surface owners to enjoin surface mining if the miner fails to post security for damages that may accrue during the mining operations.[9]

The basic principle of the consent laws is stated simply: Before a severed coal owner can surface mine for coal, he must obtain the consent of the surface owner to do so. At that point, however, the matter ceases to be simple. This article, then, will explore the nature of the

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dresses of "every legal owner of record of the property (surface and mineral) . . . the holders of record of any leasehold interest in the property . . . any purchaser of record of the property under a real estate contract" and where one is other than a sole proprietor, the names and addresses of "the principals, officers, and resident agent." § 507 (b)(1), 91 Stat. 475.

7. *E.g.*, ALA. CODE tit. 26, § 166(129g)A(8) (Interim Supp. 1975), requires that in each surface mining permit application, there be "[a] statement by the applicant that he has obtained, or before mining will obtain, from the surface and mineral owner the legal right to mine by surface mining methods, the land to be affected in each permit."

Arkansas, Illinois, Oklahoma, South Dakota, and Wyoming require a statement that the applicant has the "right and power by legal estate owned to mine by surface mining." ARK. STAT. ANN. § 52-905(a) (Supp. 1975). ILL. REV. STAT. ch. 93, § 205(a) (1975); OKLA. STAT. ANN. tit. 45, § 724(b) (West Supp. 1976); S.D. COMPILED LAWS ANN. § 45-6A-7(7) (Supp. 1976); WYO. STAT. § 35-502.24(a)(ii) (Supp. 1975).

Iowa, Kansas, Missouri, Ohio, Tennessee, Texas, Virginia and West Virginia require an identification of the source of, or an explanation of, the legal right to surface mine. IOWA CODE ANN. § 83A.13(1) (West Supp. 1977) (explanation); KAN. STAT. § 49-406 (b)(4) (1976) (source); MO. ANN. STAT. § 444.550(1)(2) (Vernon Supp. 1977) (source); OHIO REV. CODE ANN. § 1513.07(A)(5) (Page Supp. 1976) (copy of the source); TENN. CODE ANN. § 58-1544(a)(6) (Supp. 1976) (source); TEX. REV. CIV. STAT. ANN. art. 5920-10, § 8(e)(6) (Vernon Supp. 1976) (information concerning); VA. CODE § 45.1-202(c) (1974) (source); W. VA. CODE § 20-6-8(5) (1973) (source).

The 1977 federal act requires "a statement of those documents upon which the applicant bases his legal right to enter and commence surface mining operations on the area affected, and whether that right is the subject of pending court litigation." § 507 (b)(9), 91 Stat. 476.

8. *See, e.g.*, COLO. REV. STAT. §§ 34-32-112(10)(c), 34-32-114 (Supp. 1976); KAN. STAT. ANN. § 49-407 (1976); LA. REV. STAT. ANN. § 30:905(D) (West Supp. 1977); TENN. CODE ANN. § 58-1544(h) (Supp. 1976); TEX. REV. CIV. STAT. ANN. art. 5920-10, § 16 (Vernon Supp. 1976); UTAH CODE ANN. § 40-8-13 (Supp. 1975); W. VA. CODE § 20-6-8 (1973).

The 1977 federal act requires an advertisement indicating the boundary lines of the proposed mining tract and where mining and reclamation plans are available for inspection and provides for written objections, for an informal conference and, ultimately, for a hearing if the proceedings are carried that far. §§ 513-514, 91 Stat. 484-86. Objectors are not limited to surface owners, however.

9. *See, e.g.*, IDAHO CODE § 47-609 (1948); WYO. STAT. § 35-502.33 (Supp. 1975) (no injunction available). *See also* WYO. STAT. § 30-19 (1967). Perhaps this statute is limited in application to underground mining.

existing surface owner consent laws and the problems associated with their implementation. To date, such laws have been enacted only in Kentucky,[10] Montana,[11] North Dakota,[12] and Wyoming;[13] however, the new federal surface mining control act may spur additional enactments.[14]

II. The Nature and Scope of Existing Surface Owner Consent Laws

A. *The Four State Acts Summarized*

(1) Kentucky

Kentucky's law, enacted in 1974, was the shortest of the four. In its entirety it provided:

> Each application [for a strip mining permit] shall also be accompanied by a statement of consent to have strip mining conducted upon the area of land described in the application for a permit. The statement of consent shall be signed by each holder of a freehold interest in such land. Each signature shall be notarized. No permit shall be issued if the application therefor is not accompanied by the statement of consent. This statement of consent shall not be required for coal mined under the provisions of KRS Chapters 351 and 352 [underground mining].[15]

In 1975 the Kentucky Court of Appeals declared it unconstitutional.[16]

(2) Montana

Montana has two enactments providing for surface owner consent, the first dating from 1971[17] and the second dating from 1975.[18] The relationship between the two is not clear.

The 1971 law provides that prospectors or miners, before engaging in any surface disturbance, must ascertain "the ownership and

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10. Ky. Rev. Stat. Ann. § 350.060(8) (Baldwin 1976).
11. Mont. Rev. Codes Ann. §§ 50-1039.1; 50-1301-50-1306 (Supp. 1975).
12. N.D. Cent. Code § 38-18 (Supp. 1975).
13. Wyo. Stat. § 35-502.24(b)(x)-(xii) (Supp. 1975).
14. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445-532 (to be codified in 30 U.S.C. §§ 1201-1328). See the discussion of the federal act requirements at notes 98-102, *infra*. See also notes 6, 7 and 8, *supra*, concerning other requirements.
15. Ky. Rev. Stat. Ann. § 350.060(8) (Baldwin 1976).
16. Dept. for Natural Resources & Environmental Protection v. No. 8 Limited, 528 S.W.2d 684 (Ky. 1975).
17. Mont. Rev. Codes Ann. §§ 50-1301—50-1306 (Supp. 1975).
18. *Id.* § 50-1039.1.

possessory right to any land,"[19] and if not owned in fee by the prospector or miner, give in writing notice of proposed entry and disturbance, the nature of the same and other details. The law then provides "before commencement of any work or operations on any such lands, such person must first obtain from the surface owner of private land specific written approval of the proposed work or operations."[20] Failure to notify and obtain approval constitutes a misdemeanor and absolves the surface owner from liability for injury to persons on the land.[21]

The law does not apply when the operations are conducted "in accordance with the terms of a prospecting permit or a lease covering any mineral interest in said land or other valid agreements authorizing such operations which are in full force and effect."[22]

The 1975 law reads as follows:

> In those instances in which the surface owner is not the owner of the mineral estate proposed to be mined by strip mining operations, the application for a permit [to strip mine] shall include the written consent, or a waiver by, the owner or owners of the surface lands involved to enter and commence strip mining operations on such land, except that nothing in this section applies when the mineral estate is owned by the federal government in fee or in trust for an Indian tribe.[23]

"Written consent," "surface owner," and "waiver" are all defined by statute.[24]

(3) North Dakota

The North Dakota law, enacted in 1975, is more complex than any of the other three. While it provides for written notice to the surface owner as to the type of land disturbance contemplated by the miner, and while it provides that no mining permit shall be issued without the surface owner's statement of consent as to surface mining, it goes on to provide for an action in the district court whereby the prospective miner can get a court order in lieu of surface owner consent.

> Upon a showing to the satisfaction of the court that the surface owner will be adequately compensated for lost production, lost land value, and loss of the value of improvements due to mining activity,

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19. *Id.* § 50-1302.
20. *Id.* § 50-1303(a).
21. *Id.* § 50-1306. It is also significant that each day of violation constitutes a separate misdemeanor offense.
22. *Id.* § 50-1305.
23. *Id.* § 50-1039.1.
24. *Id.* §§ 50-1036 (23), (24), (25) (respectively).

> the court shall issue an order which will authorize the public service commission to issue a permit to surface mine land without the [surface owner's] consent.[25]

If the court-awarded damages exceed those proffered by the miner, the surface owner is entitled to reasonable attorney's fees in addition. The act then goes on in some detail to specify the nature of surface damage and disruption payments.

One general problem that arises from the court-order-in-lieu-of-consent approach is whether it gives mineral developers who otherwise had no easement for surface mining the right to acquire one. The answer appears to be that the act was intended to apply only where a surface mining easement already exists and to restrict that easement's use.[26]

(4) Wyoming

The Wyoming statute, enacted in 1973, deals separately with three different situations. First, as to mining operations for which permits were granted after July 1, 1973, and before March 1, 1975, the statute requires "an instrument of consent from the surface landowner . . . to the mining plan and reclamation plan."[27] The statute then provides that if such consent cannot be obtained there can be a hearing before the environmental quality council, and it is directed to issue an order in lieu of consent if it finds that the mining and reclamation plans have been submitted to the surface owner for approval, that these plans are detailed enough to show "the full proposed surface use," that this use does not "substantially prohibit" the surface owners operations, and that the reclamation plan calls for reclamation "as soon as feasibly possible."[28] Second, for applications filed after March 1, 1975, it re-

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25. N.D. CENT. CODE § 38-18-06(5) (Supp. 1975).

26. The law is entitled "Surface Owner Protection Act." N.D. CENT. CODE § 38-18-01 (Supp. 1977). It certainly would not constitute surface owner protection to give a mineral owner the right to surface mine where none existed before the law.

27. WYO. STAT. § 35.502.24(b)(x) (Supp. 1975).

28. WYO. STAT. § 35.502.24(b)(x)(D) (Supp. 1975), states in relevant part: "The council shall issue an order in lieu of consent if it finds:" Nothing further is stated in the codification. It appears from the legislative history, however, that the following items should appear as a continuation of § 35.502.24(b)(x):

> (A) That the mining plan and the reclamation plan have been submitted to the surface owner for approval;
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> (B) That the mining plan and the reclamation plan is detailed so as to illustrate the full proposed surface use including proposed routes of egress and ingress;
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> (C) That the use does not substantially prohibit the operations of the surface owner;
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> (D) The proposed plan reclaims the surface to its approved future use,

quires "an instrument of consent from the resident or agricultural landowner . . . granting the applicant permission to enter and commence surface mining operation, and also written approval of the applicant's mining and reclamation plan."[29] The statute defines "resident or agricultural landowner."[30] No council order in lieu of consent is provided for in this situation. Third, as to applications filed after March 1, 1975, which are not covered by the second category, it requires "an instrument of consent from the surface landowner . . . to the mining and reclamation plan."[31] Again, there is provision for a hearing before the environmental quality council to obtain an order in lieu of consent if consent cannot be obtained. The council is directed to issue such an order whenever it makes the same findings as in the 1973-75 permit cases above.

B. *The Four State Acts Analyzed*

It will facilitate analysis of the four acts to ask several specific questions and detail what each act provides concerning each question.

(1) From Whom Must Consent Be Obtained?

The Kentucky act required it from "each holder of a freehold interest"[32] in the land. North Dakota requires it from "each surface owner" and defines "surface owner" to "mean the person or persons who have valid title to the surface of the land, regardless of whether or not a portion of the land is occupied for a residence."[33] While the 1971 Montana law requires it from "the surface owner of private land"[34] and the 1975 law from "the owner or owners of the surface lands,"[35] the two are not the same. First, the 1975 law defines "surface owner" to mean

> a person (a) who holds legal or equitable title to the land surface; and (b) whose principal place of residence is on the land; or who

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in segments if circumstances permit, as soon as feasibly possible.

See 1973 Wyo. Sess. Laws ch. 250, § 1 (original enactment); 1973 Wyo. Sess. Laws ch. 14 (no change); (1975) Wyo. Sess. Laws ch. 198, § 2 (most recent enactment). In the 1975 enactment, the stated purpose is to adopt "a new . . . 35-502.24(b)(x) *introductory* paragraph." *Id.* (emphasis added). Thus the old subparagraphs (A)-(D) should have been carried forward by the codifier since all that was being changed was the introductory paragraph of (b)(x).

29. WYO. STAT. § 35.502.24(b)(xi) (Supp. 1975).
30. *Id.* § 35.502.24(b)(xi)(A), (B) (respectively).
31. *Id.* § 35.502.24(b)(xii).
32. KY. REV. STAT. ANN. § 350.060(8) (Baldwin 1976).
33. N.D. CENT. CODE § 38-18-05(10) (Supp. 1975).
34. MONT. REV. CODES ANN. § 50-1303(a) (Supp. 1975).
35. *Id.* § 50-1039.1.

> personally conducts farming or ranching operations upon a farm or ranch unit to be directly affected by strip mining operations; or who receives directly a significant portion of his income, if any, from such farming or ranching operations; (c) or the state of Montana where the state owns the surface . . . .[36]

No similar definition exists in the 1971 law. Second, the 1971 law does not require obtaining consent from a governmental entity that owns the surface, but the 1975 law requires getting consent from the state when it owns the surface.

Wyoming specifies that for permits after March 1, 1975, the consent should come from "the resident or agricultural landowner,"[37] if one exists. For permits before March 1, 1975, and for permits after March 1, 1975, where there is no resident or agricultural landowner, consent should come from "the surface landowner."[38] While the Wyoming statute does not define surface landowner, it does define "resident or agricultural landowner." The phrase refers to either natural persons who, or a corporation where the majority stockholder(s),

> (A) Hold legal or equitable title to the land surface directly or through stockholdings, such title having been acquired prior to January 1, 1970, or having been acquired through descent, inheritance or by gift or conveyance from a member of the immediate family of such owner; and
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> (B) Have their principal place of residence on the land, or personally conduct farming or ranching operations upon a farm or ranch unit to be affected by the surface mining operation, or receive directly a significant portion of their income from such farming or ranching operations.[39]

In any of the four states, is consent required from a lessee? A life tenant? a mortgagee? a contract purchaser? In North Dakota do these people have "valid title"? Under the 1971 Montana law are they "surface owners"? Under the 1975 Montana law are they holders of "legal or equitable title"? Under Wyoming law are they either "surface landowners" or "holders of legal or equitable title?" Kentucky appears to specifically exclude lessees and include life tenants by using the term "freehold." Contract purchasers would probably qualify as holders of equitable title. As to mortgagees the outcome may depend on whether the state is a title theory or a lien theory jurisdiction. Cer-

36. *Id.* § 50-1036(24).
37. WYO. STAT. § 35-502.24(b)(xi) (Supp. 1975).
38. *Id.* § 35.502.24(b)(x), (xii).
39. *Id.* § 35-502.24(b)(xi).

tainly all of these persons have legitimate interests in the protection of the surface estate, and the statutes should be clear as to whether they are or are not included.

What none of these statutes makes clear in reference to "surface owners" from whom consent must be obtained is whether they mean the original surface owner at the time of severance, the current surface owner, some surface owner in between, or whether consent from any one of these will suffice. The answer must be the current surface owner or else the laws would serve little, if any, useful purpose since no mineral owner has ever had or could have the right to surface mine without the consent, express or implied, of some surface owner along the way. There are problems with this answer, however. Consider the following hypothetical situation:

> *O* owns both the surface and minerals of Blackacre in fee simple absolute. On September 10, 1977, *O* sells and conveys the coal rights to *X* by a severance deed that states: "Grantee and successors in interest shall have the right to recover the coal by conducting surface mining operations on the land." On September 11, 1977, *X* records his deed. On September 12, 1977, *O* sells and conveys the surface in fee simple absolute to *A*. *X* files his application for a surface mining permit on September 28, 1977.

Must *X* get the consent of *A* since he is the current surface owner? If so, (1) what could justify such a requirement; (2) how much would *X* be willing to pay *O* for the coal rights under such conditions; (3) is there some provision *X* could insist on including in the severance deed that would protect him from the subsequent events?

(2) Who Must Obtain Consent?

Under the Kentucky,[40] North Dakota,[41] Wyoming[42] and 1975 Montana[43] laws, applicants for mining permits must obtain consent. This normally will be the mineral developer, who may or may not be the mineral owner. The 1975 Montana law specifically exempts those who mine coal that is owned "by the federal government in fee or in trust for an Indian tribe."[44] The 1971 Montana law specifically includes prospectors as well as miners.[45]

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40. KY. REV. STAT. ANN. § 350.060 (Baldwin 1976).
41. N.D. CENT. CODE § 38-18-06(2) (Supp. 1977).
42. WYO. STAT. § 35-502.24(b) (Supp. 1975) (part of reclamation plan, but plan must accompany permit application).
43. MONT. REV. CODES ANN. § 50-1039.1 (Supp. 1975).
44. *Id.*
45. *Id.* §§ 50-1303(a), 50-1302.

(3) What Form Must The Consent Take and What Must It Consent To?

In Kentucky the consent was to be for having strip mining conducted upon the land and in the form of a statement "signed" by each freeholder with each signature notarized.[46] North Dakota requires the consent for having surface mining conducted upon the land and in statement form "executed" by each surface owner.[47] "Execution" should not require notarization. The 1971 Montana law requires "specific written approval of the proposed work or operations."[48] The 1975 Montana law requires "written consent" which it defines to mean

> such written statement as is executed by the owner of the surface estate, upon a form approved by the department, demonstrating that such owner consents to entry of an operator for the purpose of conducting strip mining operations and that such consent is given only to such strip mining and reclamation operations which fully comply with the terms and requirements of this chapter.[49]

The principal difference among these three is the 1971 Montana requirement that the proposed work or operations be consented to, which appears to require consent to the specific mining and reclamation plan, whereas in Kentucky and North Dakota and under the 1975 Montana law a general consent to surface mining appears to suffice. Consistent with the general consent approach, North Dakota provides that a certified copy of a mineral lease or a surface lease executed by the surface owner will suffice, as long as it is in favor of the mineral developer who is proposing the project or his agent,[50] and the 1975 Montana law allows "waiver" by the surface owner.[51] It defines "waiver" to mean "any document which demonstrates the clear intention to release rights in the surface estate for the purpose of permitting the extraction of subsurface minerals by strip mining methods."[52]

Wyoming requires for the 1973-75 permits and for those after March 1, 1975, where there is no resident or agricultural landowner, "an instrument of consent" as "to the mining and reclamation plan."[53] Where there is a resident or agricultural landowner, the statute requires

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46. KY. REV. STAT. ANN. § 350.060(8) (Baldwin 1976).
47. N.D. CENT. CODE § 38-18-06(2) (Supp. 1975).
48. MONT. REV. CODES ANN. § 50-1303(a) (Supp. 1975).
49. *Id.* § 1306(23).
50. N.D. CENT. CODE § 38-18-06(3) (Supp. 1975).
51. MONT. REV. CODES ANN. § 50-1039.1 (Supp. 1975).
52. *Id.* § 50-1036(25).
53. WYO. STAT. § 35-502.24(b)(x), (xii) (Supp. 1975).

"an instrument of consent . . . to enter and commence surface mining operation" and "written approval of the applicant's mining and reclamation plan."[54]

(4) When Must Consent Be Acquired?

Kentucky,[55] North Dakota,[56] Wyoming[57] and the 1975 Montana law[58] require the consent to accompany the application for a surface mining permit. The 1971 Montana law requires it "before commencement of any work or operation on any such lands."[59] While "such lands" refers to lands for which a mining permit is required, it appears that the applicant need not show the consent to obtain the mining permit, since it is required only before commencement of work or operations on the land.

If consent need only accompany an application for a permit or relates only to lands that cannot be mined without a permit, when is a permit required? While Kentucky,[60] North Dakota,[61] and Wyoming[62] require permits for all surface mines; Montana[63] excludes operations where ten thousand or under cubic yards of "mineral or overburden" will be removed.

The requirement that surface owner consent accompany the application does not solve fully the problem raised in the discussion above as to which surface owner must consent. It should mean that consent of a surface owner subsequent to the filing of the application is not necessary, but it does not give any answer as to the surface owners before the filing of the application and would not assist in answering the hypothetical where *A* became the surface owner before *X* filed his application. Under the 1971 Montana law it can be argued that "surface owner" refers to the surface owner at the time operations commence on the land.

(5) What Exceptions or Alternative Approaches Are Provided For?

While the codified portions of the Kentucky law did not provide

54. *Id.* § 35-502.24(b)(xi).
55. KY. REV. STAT. ANN. § 350.060(8) (Baldwin 1976).
56. N.D. CENT. CODE § 38-18-06(2) (Supp. 1975).
57. WYO. STAT. § 35-502.24(b)(x)-(xii) (Supp. 1975).
58. MONT. REV. CODES ANN. § 50-1039.1 (Supp. 1975).
59. *Id.* § 50-1303(a).
60. KY. REV. STAT. ANN. § 350.060(1) (Baldwin 1976).
61. N.D. CENT. CODE § 38-14-03 (Supp. 1977).
62. WYO. STAT. § 35-502.24 (Supp. 1975).
63. MONT. REV. CODES ANN. §§ 50-1039, 50-1036(7) (Supp. 1975).

for any relevant exceptions, the session laws made it clear that the section was to apply only to the Kentucky "broad-form" deed[64] so that as the Kentucky Court of Appeals pointed out: "[I]t does not apply to situations . . . in which the owner of the mineral rights was granted specific authority to conduct strip mining in the deed which conveyed the mineral rights to him."[65]

The 1971 Montana law excepts some discovery pits on federal lands[66] and activities conducted pursuant to prospecting permits, mineral leases, or other valid agreements that authorize such activities.[67] The 1971 law does not say whether such permit, lease, or other agreement has to come from a surface owner or whether one from the mineral owner will suffice nor whether "valid agreement" includes a deed from a former surface owner as contrasted with the current surface owner. However, the elimination in 1973 of the original 1971 provision, to the effect that no consent was required where the operations were conducted by the owner "of one hundred percent (100%) of the rights of any mineral interest"[68] should suffice to show that it must come from a surface owner. The provision relating to prospecting permits, mineral leases, or other valid agreements would not constitute an exception if they must come from the current surface owner, but would relate merely to the form of the consent.

North Dakota has the most elaborate exception in that if the mineral developer is unable to obtain the surface owner's consent, he can proceed in district court and obtain an order authorizing the state public service commission to issue a permit without the surface owner's consent.[69] The statute authorizes the judge to issue such an order when the judge is satisfied that the surface owner will receive adequate compensation for "lost production, lost land value, and the loss of the value of improvements" incurred because of the mining activity.[70] If the court-awarded damages exceed those proffered by the miner, the court must award reasonable attorney's fees as well.[71]

The Wyoming statute also allows a substitute for consent but only where the permits involved predate March 1, 1975, or where those after March 1, 1975, involve surface owners who do not qualify as

64. 1974 Ky. Acts ch. 373, § 1.

65. Dept. for Natural Resources & Environmental Protection v. No. 8 Limited, 528 S.W.2d 684, 685 (Ky. 1975).

66. MONT. REV. CODES ANN. § 50-1304 (Supp. 1975).

67. *Id.* § 50-1305.

68. 1971 Mont. Laws ch. 335, § 5; 1973 Mont. Laws ch. 194, § 1.

69. N.D. CENT. CODE § 38-18-06(5) (Supp. 1977).

70. *Id.*

71. *Id.*

resident or agricultural landowners.[72] In those instances, when the applicant is unable to obtain consent, he can request a hearing before the state's environmental quality council. The council is directed to issue an order in lieu of consent where it finds that the mining and reclamation plans have been submitted to the surface owner for approval, that the plans are detailed enough to illustrate the "full proposed surface use," that the use would not "substantially prohibit" surface owner operations, and that the plan would reclaim the surface "as soon as feasibly possible."[73]

(6) What Are the Statutory Consequences of Failure to Obtain Consent?

In Kentucky[74] and North Dakota[75] surface mining permits must be denied if consent is not a part of the permit application. On the other hand, in Wyoming the statute merely provides that "the director shall not deny a permit except for one (1) or more of the following reasons: (1) The application is incomplete . . . ."[76] This appears to leave discretion in the director to decide whether or not to deny the permit. He can do so if he chooses, but he is not required to do so. In all three states, surface mining without a permit can subject the operator to civil and criminal penalties and injunctive relief.[77] Violation of the 1971 Montana law constitutes a misdemeanor and frees the surface owner or lessor from liability for injury to others present on the land.[78] While the 1975 Montana law states that the consent "shall" accompany the application, the absence of consent is not stated as a ground for denying the permit.[79]

None of the statutes are clear as to what extent they give the surface owners direct causes of action against mine operators.[80] The question probably would not arise except in Montana and Wyoming where granting of permits is not contingent upon the consent being

72. WYO. STAT. § 35-502.24(b) (Supp. 1975).
73. *Id.*
74. KY. REV. STAT. ANN. § 350.060(8) (Baldwin 1976).
75. N.D. CENT. CODE § 38-18-06(2) (Supp. 1977).
76. WYO. STAT. § 35-502.24(g) (Supp. 1975).
77. KY. REV. STAT. ANN. § 350.990 (Baldwin 1976); N.D. CENT. CODE § 38-14-12 (Supp. 1977); WYO. STAT. § 35-502.49 (Supp. 1975).
78. MONT. REV. CODES ANN. § 50-1306 (Supp. 1975).
79. *See* MONT. REV. CODES ANN. § 50-1042 (Supp. 1975).
80. The North Dakota statutes does make it clear that a surface owner has a direct cause of action to collect the damages that are specified in the statute. However, those are damages determined primarily as a part of the judicial process for obtaining a mining permit without surface owner consent. N.D. CENT. CODE § 38-18-08 (Supp. 1977).

given. Certainly there should be little question that these statutes are intended to benefit surface owners so that they would meet that qualification for private action based on statute.

C. *The Constitutional Problem*

The Kentucky Court of Appeals has ruled the Kentucky Surface Owner Consent Statute to be unconstitutional.[81] There is some difficulty in sorting out from the court's opinion the actual basis for its decision, but in substance it appears to be as follows: The court stated that the Act was "an obvious retrospective diminution of rights granted by a specific form of contract."[82] Noting that such a diminution may be permitted if enacted pursuant to the police power "only if the legislation bears a real and substantial relation to public health, safety, morality or some other phase of the general welfare," the court found that "the consent of the surface owner bears no rational relationship to environmental conservation."[83] Therefore, the legislation was unconstitutional. In other words the law was passed to help surface owners, not to protect the land. It becomes necessary then to evaluate the benefits of such a law in terms of public purpose and the burdens it imposes on private property.[84]

(1) Benefits

In view of the Kentucky court's analysis, it appears that two questions must be asked. First, is there any rational basis for saying the law was passed to protect the land? Second, even if it was enacted to protect surface owners, is that necessarily repugnant to the Constitution? What makes these questions difficult and somewhat unrealistic

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81. Dept. for Natural Resources & Environmental Protection v. No. 8 Limited, 528 S.W.2d 684 (Ky. 1975).

82. *Id.* at 685.

83. *Id.* at 686.

84. Cases and journals are replete with the discussion of impairment of contract, violation of due process and unconstitutional taking of property. It is not the purpose of this article to rehash them, but only to point out some of the specific arguments about surface owner consent laws that should be relevant whenever questions concerning these basic constitutional doctrines are raised for purposes of invalidating the consent laws. Suffice it to point out that in a recent 4-3 decision, the United States Supreme Court found a contract clause violation. United States Trust Co. v. New Jersey, 97 S. Ct. 1505 (1977). The contract clause has been little considered by the United States Supreme Court since the passage of the fourteenth amendment since most cases which might otherwise have been analyzed as possible contract clause violations could be and were analyzed as possible due process clause violations. *Id.* at 1514-15. The court's most recent previous consideration was of the contract clause in 1965. El Paso v. Simmons, 379 U.S. 497 (1965).

is that the legislatures generally have been concerned with the protection of the agricultural enterprise which, as pointed out earlier, consists of three basic components: (1) the land, (2) the going concern, and (3) the operator who usually is the owner of both the land and the concern. The enterprise on which the economy of the locality, region, or even the state, may depend, cannot function effectively with any of these components injured. Thus, if protection of the enterprise is a legitimate concern, the protection of its essential components should be as well. However, several observations can be made under those headings.

(a) *Land protection*

Keeping in mind that surface owner consent legislation would be only one item of many in the arsenal to protect a state's land from the perceived ravages of surface mining, could the legislature rationally believe that if surface owner consent was required for surface mining, a substantial number of surface owners would deny consent, thereby preserving the land from surface mining?[85] Why is this not a rational belief? Simply because some, maybe even many, surface owners would sell their consent and thus the land would be surface mined anyway may not be sufficient grounds for saying that the legislation is irrational. Would a number sufficient enough to make it meaningful withhold consent? Furthermore, could the legislature rationally believe that a surface owner who is enjoying the use of the surface would wish to continue using the surface after the mining is completed, and, therefore, place himself in the best position to see to its continued usability after mining? Thus, although he might sell his consent, he would do so only for a specific and demanding agreement as to the condition of the land after the mining is completed. There is no law in any jurisdiction that says lessors of minerals cannot demand reclamation standards more stringent than the minimum required by state or federal law. Legislatures should react to the realities of life, not legal abstractions. Justice Holmes told us long ago that "the life of the law has not been logic; it has been experience."[86] What is the legislative experience with surface owners?

On the other hand if it is data that a court needs, why not ask:

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85. *See* Comment, *Montana's Statutory Protection of Surface Owners from Strip Mining and Resultant Problems of Mineral Deed Construction*, 37 MONT. L. REV. 347, 355 (1976).

86. O.W. HOLMES, THE COMMON LAW 5 (Howe ed. 1963). The original publication was in 1881.

"Has every person who owned *both* surface and subsurface and had the opportunity to lease for surface mining done so, or have some refused? Has any lessor who owned both minerals and surface insisted on a demanding land reclamation provision?" Although this type of data may not exist in compiled form at the present time, it is data that should be obtainable in several ways, and there should be little if any question about its relevance.

(b) *Surface owner protection*

Admittedly the key thrust of these provisions is to protect surface owners; however, the thrust is not to protect them as individuals or citizens but to protect them in their role as a key part of the agricultural enterprise. The North Dakota act is entitled "Surface Owner Protection Act."[87] In the statement of purpose, the Legislative Assembly noted:

> "[I]t is necessary to exercise the police power of the state as described in this chapter to protect the public welfare of North Dakota which is largely dependent on agriculture, and to protect the economic well-being of individuals engaged in agricultural production. This finding recognizes that the people of North Dakota desire to retain a strong agricultural economy."[88]

87. N.D. CENT. CODE § 38-18-01 (Supp. 1977).

88. *Id.* § 38-18-02(1).

The common law prospect that a surface owner might collect damages from the mineral owner's use of the surface would not be much protection for the surface owner. If the mineral owner has an easement to use the surface for purposes of extracting the mineral, the common law would not require the payment of damages for the reasonable use of the surface. *See generally* Thompson, *Surface Damages—Claims By Surface Estate Owner Against Mineral Estate Owner*, 14 WYO. L.J. 99 (1960). However, unreasonable use of the surface could result in recovery of damages by the surface owner. This would include recovery for unnecessary use of the surface, for negligence, and for wilfull misconduct. The types of injury most likely to occur would be damages to crops, to improvements, to livestock, and to water supplies. It would be more difficult for a surface owner to recover when the mineral owners easement for use of the surface is for general use such as surface mining than it would be to recover when it is for more limited use such as drilling wells for oil and gas production and conducting attendant operations.

The North Dakota surface owner consent law appears to expand on the common law damage recovery rights when it provides automatically

(1) for damages for loss of agricultural production (grass, crops, farm animals) caused by mining activity;

(2) for payment of the fair market value of any farm building if mining comes within 500 feet of the building, or in lieu thereof for payment of the cost of removing the building to a site where mining will not come within 500 feet of it; and

(3) that the damages cannot be waived, although the formula for agricultural production loss payments can be agreed upon between the surface owner and the mineral developer.

N.D. CENT. CODE §§ 38-18-07(1), (2), (3) (Supp. 1977).

The Wyoming law and the 1975 Montana law specifically define the surface owners entitled to the greatest protection to be those directly related to the agricultural enterprise. The reasoning appears to be two-fold: first, that agricultural surface owners who must give consent will not do so until assured of the continued agricultural productivity of their surface after mining; second, that the necessity for consent may keep the agricultural entity alive so that the agricultural enterprise will continue for the good of the public after the surface mining is completed. This is made more explicit in both the 1971 Montana law and in Wyoming where a general consent to surface mine is not sufficient and where there has to be approval of the specific mining and reclamation plans. This allows the farmer/rancher an opportunity to consider the amount of acreage that will be mined at any given time, the length of mineral recovery time from the first disturbance of the surface, the amount of notice needed to remove crops or cattle from the land to be disturbed, the promptness with which reclamation will begin once the mineral has been removed, and so on. All of these are important elements in the conduct of a farming/ranching operation.

While it is unlikely that many western surface owners would go on welfare if their surface livelihood was disrupted, this result cannot be ruled out as a possibility in states such as Kentucky. There should be a public interest in keeping people off welfare. What is more likely in the West is that the surface owner, once disrupted, will not return to surface operations after the disruption ends, and others will not be enticed into it, unless the process is consensual.

So the question which must be asked is: Is it unreasonable for the legislature to place its reliance as to the continued viability of the agricultural enterprise upon those who have over the years brought it to the level of efficiency and prominence that it occupies today by giving them the opportunity to protect it?

(2) Burdens

When the mineral rights were acquired in 1890 or 1906 or 1915 or in that general period, there was no more expectation on the part of the mineral owner that he would be able to extract the mineral in 1977 than there was on the part of the surface owner that the surface would be torn up in 1977. Why then should it be an unconstitutional taking to say in 1977 to the mineral owner that he cannot surface mine even though at the moment it may be the only feasible method of extraction? As we have discovered over and over again, in the period from 1900 to 1977, technologies and economies can change, and dra-

matically so. What is not recoverable today may well be recoverable tomorrow. In many oil fields that had been "pumped out" production is flourishing again today. Water flooding operations for secondary recovery either because unknown or uneconomic were not widely used until recently. But now these operations are known and are economic. Surface ownership may change and consent may be given by the next surface owner.

The notion that denial of exploitation in 1977 or 1978 is an unconstitutional taking does not comport with the nature of the property in an exhaustible mineral either. The mineral in the ground can only be enjoyed once as contrasted with land surface which is subject to continuous enjoyment and profit; thus a denial of land use now can be substantial enough to constitute a taking. If exploitation of the mineral is denied now, it still remains for its one time enjoyment. This fundamental distinction between the nature of the two properties should not be overlooked when fashioning constitutional doctrines about the "taking" of "property."

In some states the courts have made it clear that even though a mineral owner may have a right to surface mine, he has no right to destroy the surface, only to use it temporarily.[89] Thus if the land surface could not be put back into productive use, the mineral owner would have no right to surface mine. Under those circumstances it clearly would not be an unconstitutional taking to tell the mineral owner that he cannot surface mine even though it is the only feasible method at the time to recover the mineral. The purpose of the no destruction rule is that of balancing the interests of the surface owner and the mineral owner. Surface owner consent could be justified then as an aspect of enforcing the antidestruction rule. The surface owner could withhold his consent if it is based on a reasonable belief that the surface might be destroyed as a result of the mining operation. The surface owner would be in a better position to make this judgment about the land than some bureau official in the state capitol.

In addition to the no rational connection conclusion, it appears that the Kentucky court found that even if there was a rational connection, the method used would involve an impermissible delegation of governmental powers to private parties similar to that in the zoning cases where the consent of a certain percentage of neighbors had been required before a particular use of the property could be made.[90] How-

89. *See, e.g.*, Olson v. Dillerud, 226 N.W.2d 363, 367 (N.D. 1975). *See also* Barker v. Mintz, 73 Colo. 262, 215 P. 534 (1923).

90. Dept. for Natural Resources & Environmental Protection v. No. 8 Limited, 528

ever, as the Illinois Supreme Court has pointed out, the cases generally distinguish the giving of consent which, in effect, establishes a law from the giving of consent which removes a disability.[91] The classic example of the former is the ordinance that authorized two-thirds of the abutting property owners in a block to establish a set-back line for the block.[92] This, absent enunciated standards, was an unconstitutional delegation of legislative power. The classic example of the latter is the ordinance that prohibited billboards in a particular district, a disability that could be removed by getting consent from one half of the lot owners in the district.[93]

While this distinction may place form over substance, it appears to be legally accepted. The Kentucky surface owner consent law would fall within the latter category. The legislature had said, in effect: We prohibit surface mining wherever the mineral estate has been severed from the surface via the broad-form deed; however, this disability can be removed through the consent of the surface owner. The issue in the case should not be whether there is impermissible delegation but whether the prohibition in the first instance is a valid exercise of the police power[94] and then whether the exception renders it nugatory.

Having set forth some general thoughts about benefit and burden and about delegation in relation to surface owner consent laws, it remains to comment on the four specific consent laws dealt with in this article.

First, is there any distinction between Kentucky on the one hand and the other three states on the other? Perhaps. At least there should be little argument that agriculture is the mainstay of the economies of Montana, North Dakota, and Wyoming and that those

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S.W.2d 684, 686-67 (Ky. 1975). The court cites two prior Kentucky cases: Tilford v. Belknap, 126 Ky. 244, 103 S.W. 289 (1907), and McCown v. Gose, 244 Ky. 402, 51 S.W.2d 251 (1932). *Tilford* does not seem in point, however, since the decision there was that when the state has vested a particular legislative function in a particular body such as a city council, it is ultra vires for it to delegate that authority to anyone else. *McCown*, on the other hand, involved a state law that required a written consent from two-thirds of the neighborhood property owners before a gasoline station could be constructed in the neighborhood. This the court found unconstitutional since no standard for exercise of the consent was specified; it distinguished billboards from gasoline stations on the basis that billboards constitute a nuisance while gasoline stations do not.

91. Valkanet v. City of Chicago, 13 Ill. 2d, 268, 272, 148 N.E.2d 767 (1958).

92. Eubank v. City of Richmond, 226 U.S. 137 (1912).

93. Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917).

94. The court recognizes that "the General Assembly, in the exercise of its legislative wisdom, might strike a balance between the 'nergy crunch' and the necessity to conserve the environment which, for example, would prohibit strip mining entirely." 528 S.W.2d at 686.

states have a legitimate interest in preserving their future by protecting agricultural enterprise. All components of the enterprise must continue in healthy condition. Does agriculture play as dominant a role in Kentucky? Arguably not. Furthermore, it has not been proved that meaningful reclamation can be accomplished in the arid and semi-arid western lands. Except for the question of what to do with slopes, reclamation appears much more feasible in Kentucky.

Second, to the extent that the North Dakota and Wyoming laws allow state agency consent in lieu of surface owner consent, do they vitiate the arguments of unconstitutionality?[95] Perhaps. Certainly a strong argument can be made to that effect in each state, although the thrust of each would be different. The Wyoming law appears the preferable of the two because, while allowing a substitute, the consenting agency must be satisfied that the mining plan is consistent with the continuation of agricultural operations. The North Dakota provision puts greater emphasis on protecting the surface owner and the mineral owner as contrasted with protecting the agricultural enterprise as an entity.

Third, it has been argued that under the 1975 Montana law the courts could interpret the "waiver" concept broadly to include deeds from previous surface owners as constituting a waiver.[96] This then would protect mineral owners from an unconstitutional taking. However, besides the problem that such an interpretation would render the whole statute nugatory, it appears difficult to reach that result based on the statutory wording. If it is true, as it must be, that the statute requires consent from the current surface owner in the first instance, the statute seems clear that the waiver would have to come from the same person.[97] To illustrate, *X* who ten years ago obtained a coal lease together with a strip mining easement from *O*, does not need to get written consent from *O* today to submit with his permit application. The lease constitutes a waiver. This it seems is what the Montana legislature intended by "waiver."

95. While it may have been possible under the pre-1973 Montana law to condemn the surface in order to gain access to the coal, this approach would not have been available in the other three states where the eminent domain laws appear limited to acquiring roadways and similar types of rights-of-way. MONT. REV. CODES ANN. § 93-9902(15) (1947); N.D. CENT. CODE § 32-15-02(4), (5) (1976); WYO. STAT. § 1-794 (Supp. 1975); KY. REV. STAT. ANN. §§ 381.580, 277.040 (Baldwin 1976) (repealed after being declared unconstitutional).

96. Comment, *Montana's Statutory Protection of Surface Owners From Strip Mining and Resultant Problems of Mineral Deed Construction*, 37 MONT. L. REV. 347, 356 (1976).

97. MONT. REV. CODES ANN. § 50-1039.1 (Supp. 1975) ("shall include the written consent, or a waiver by, the owner or owners of the surface lands involved").

III. The Federal Surface Mining Control and Reclamation Act of 1977[98]

The federal act deals not only with the surface mining of federally owned coal but with the mining of private coal. With reference to the latter, it requires federally approved state programs for control of surface mining. The surface owner consent provisions are different for the two.

First, the law *requires* surface owner consent for the surface mining of federally owned coal[99] although it contains a restrictive definition of surface owner.[100] Second, it contains substantive provisions regarding surface owner consent in federally-approved state programs. But such consent is only one *optional* way of showing the right to surface mine. The provision on the federally approved state program reads as follows:

> No permit or revision application [for surface mining] shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing . . . that—
>
> . . .
>
> (6) in cases where the private mineral estate has been severed from the private surface estate the applicant has submitted to the regulatory authority—
>
> (A) the written consent of the surface owner to the extraction of coal by surface mining methods; or
>
> (B) a conveyance that expressly grants or reserves the right

98. Pub. L. No. 95-87, 91 Stat. 445 (to be codified at 30 U.S.C. § 1201-1328).

99. § 714(c):

> The Secretary shall not enter into any lease of Federal coal deposits until the surface owner has given written consent to enter and commence surface mining operations and the Secretary has obtained evidence of such consent. Valid written consent given by any surface owner prior to the enactment of this Act shall be deemed sufficient for the purposes of complying with this section.

91 Stat. 525.

100. § 714(e):

> For the purpose of this section the term "surface owner" means the natural person or persons (or corporation, the majority stock of which is held by a person or persons who meet the other requirements of this section) who —
>
> (1) hold legal or equitable title to the land surface;
>
> (2) have their principal place of residence on the land; or personally conduct farming or ranching operations upon a farm or ranch unit to be affected by surface coal mining operations; or receive directly a significant portion of their income, if any, from such farming or ranching operations; and
>
> (3) have met the conditions of paragraphs (1) and (2) for a period of at least three years prior to the granting of the consent.
>
> In computing the three year period the Secretary may include periods during which title was owned by a relative of such person by blood or marriage during which period such relative would have met the requirements of this subsection.

91 Stat. 525. In addition, the Act provides some protection for federal surface lessees. § 715, 91 Stat. 525-26.

to extract the coal by surface mining methods; or

(C) if the conveyance does not expressly grant the right to extract coal by surface mining methods, the surface-subsurface legal relationship shall be determined in accordance with State law: *Provided*: That nothing in this Act shall be construed to authorize the regulatory authority to adjudicate property right disputes.[101]

Putting aside the lack of syntax for subsection (C) and looking instead to the substance of this provision, there are three alternatives available to a permit applicant where a severance has occurred: (1) written consent, (2) conveyance with express grant or reservation of right to surface mining, or (3) determination of the right to surface mine pursuant to state law. Alternative (1) is the only one of the three that relates to the consent of the current surface owner. The conveyance in alternative (2) most likely refers to the conveyance that affected the severance in the first instance and could easily have come from a previous surface owner. Similarly, alternative (3) does not require consent from the current surface owner. It could be fulfilled by a severance conveyance from a previous surface owner that gave the mineral owner the implied right to surface mine. However, since under alternative (3) the regulatory agent is not authorized to adjudicate whether state law gives the mineral owner the right to surface mine, does the agent have the authority to require a state adjudication on the matter?

In 1976 the Kentucky Supreme Court stated as to implied surface mining rights: "Realizing the potential fact that no two grants of mining rights may be identical, it is necessary that a proper construction of such rights be confined to a deed-to-deed interpretation of clauses in a mineral deed which grant or modify mining rights."[102] Since this appears to be the generally applicable principle in the interpretation of mineral deeds, how can alternative (3) be used without a judicial construction of the deed granting the mineral rights in any given case? The only known exception to the case-by-case construction approach is the Kentucky broad-form deed where the Kentucky courts have consistently ruled that the language of this form includes the right to surface mine.[103]

It should be asked in connection with alternative (2) whether a statement in a conveyance to the effect that "the mineral owner shall have the right to remove the minerals by any and all possible means

101. § 510, 91 Stat. 481-82.

102. Commerce Union Bank v. Kinkade, 540 S.W.2d 861, 863-64 (Ky. 1976).

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

and methods that he in his discretion shall determine to be feasible" is an *express* grant or reservation of the right to surface mine? Or is it more properly treated as an implied grant under alternative (3)? In order to keep the two alternatives distinct, it should be required for alternative (2) that the conveyance state in so many words that "the mineral owner may surface mine."

What the federal act requirement seems to translate into is that to have a federally approved state program for surface mining of severed minerals, the program has to require either (1) written consent from the current surface owner, or (2) a conveyance that states in so many words that the mineral owner can surface mine, or (3) a judicial decree that states that the mineral owner can surface mine.

Regardless of the ultimate interpretation of these provisions in the federal law, their presence should cause most states to examine the question of surface owner consent in the process of enacting compliance legislation.

IV. Conclusion

The surface owner consent laws constitute legislative efforts to protect agricultural enterprises from the adverse effects of surface mining for coal, with a focus more on enterprise owners than on the lands involved. The laws that have been enacted to date are not without interpretative problems and easily could be clarified. While the Kentucky courts have declared the Kentucky law to be unconstitutional, this should not be accepted as precedent in the other states without careful analysis. A strong argument can be made (1) that these laws relate to an important public purpose: the protection and preservation of the agricultural enterprise upon which the economy of the locality, region, and maybe even the state now rests, and upon which it will have to rest again when the surface mining has been completed; and (2) that the method chosen is reasonable when considered in conjunction with other legislative efforts within the state. The question would then shift from that of public purpose and rationality of method to whether an unconstitutional taking had resulted in that the coal owner was denied the opportunity to exploit the resource and thus deprived of its value. Here the nature of the mineral interest, the potential rehabilitation of the surface land and the exceptions provided in the statutes all would bear on the outcome. It is well recognized that even if the operation of a nuisance is the only productive use that can be made of land, the nuisance can be banned without resulting in a taking.[104]

104. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).