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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. 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, decided in 1568, examined the royal prerogative placing ownership of gold and silver in the crown. The issue before the court was how the privilege was to be applied when gold and silver were mixed with

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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).
3 Id.
other minerals. 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."

Nearly two centuries later the Court of King's Bench decided the case of *Wilkes v. Broadbent.* 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. 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. . . ." Defendant responded that his actions were authorized by a manorial custom that allowed these workings.

The court sustained the Court of Common Pleas' determination that the custom was unreasonable and void and gave judgment for the surface owner. 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. . . ." The court further suggested that the "pits may be worked without this custom, for aught that appears to the contrary."

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

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4 *Id.*
5 *Id.* at 510 (the court supplied no citation for the proposition).
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.* at 495.
11 *Id.*
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. After a period of operation, the mine was shut down and the drainage system fell into disrepair. Half a century later the mine operator's successor in interest wished to start mining again. He entered the property and began preparing to reopen the drainage system. The surface owner sued in trespass and contended that the 1747 grant had allowed only a one-time access to the property.

Lord Ellenborough construed the deed to allow continued access to the landowner's property for the purpose of the mining operation. Ellenborough's opinion looked to the implied intention of the parties to the 1747 agreement. 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.

In *The Earl of Cardigan v. Armitage*, 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. The miner traced his right to a 1649 reservation of coals and various access rights. In determining that the defendant did have title to the coal, 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

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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.
20 *Id.*
21 *Id.*
23 *Id.* at 357.
24 *Id.*
25 *Id.* at 360.
of them.” This incidental or implied right, however, “would warrant nothing beyond what was strictly necessary for the convenient working of the coals.”

_Harris v. Ryding,_ decided in 1839, examined the rights of support. The mineral owner claimed access rights through a prior reservation. 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.

The miners’ activity caused the collapse of the land surface and the surface owner brought suit in court for the wrongful and negligent working of the mine. 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.

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

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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.
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...." As in the *Hodgson* case, the court focused on the intent of the parties to the instrument. 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." 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."

Thus, the compensation clause did not change the liability of the miner. The clause applied only to damage resulting from operations on the surface of the land and was not intended to bar other remedies. 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]." 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.

The final English case is *Dand v. Kingscote* 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." Two centuries later, the miner used the surface to construct a railway and various buildings. The surface owner sued in trespass. The miner defended on the language of the reservation and the implied rights of access accompanying an ownership of minerals.

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36 Id. at 30.
39 Id.
40 Id.
41 Id. at 32.
42 Id.
43 Id.
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.'" The miner's steam engine, a pond for supply of the engine, and the engine house were viewed as necessary accessories. Baron Parke returned to the language of the reservation to determine the propriety of the railroad. 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.

B. The Early American Cases

In the 1862 case of Cowan v. Hardeman, 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." Five subsequent decisions further developed the basic rules applicable to surface rights in this country.

One of the earliest American surface access cases is Marvin v. Brewster Iron Mining Co. 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

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50 Id. at 379 (citing W. Sheppard, Touchstone of Common Assurances (1675)).
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)).
57 55 N.Y. 538 (1874).
hereafter worked on the most convenient route to and from." Plaintiff surface owner sued for injunctive relief and damages. He asked the court to forbid land subsidence, waste deposits, blasting, the operation of a steam engine, and the construction of various buildings.

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. 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.” The express grant in the instrument could expand or contract the implied grant by its precise words. However, the mere failure to mention certain surface uses in the specific grant did not forbid them.

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

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

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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 matter 75 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.  

The Alabama Supreme Court first concluded that the grant of minerals was the grant of a "separate corporeal hereditament" distinct from the surface ownership. 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." 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." The precise issue in the litigation involved the construction of miners' houses and other outbuildings on the property. The surface owner argued that the specification of surface rights in the reservation should exclude any rights not specified therein, but the court rejected this argument, saying that modern inventions could be used to promote a profitable mining venture.

In Wardell v. Watson, 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

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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." 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. The court rejected the surface owner's contention that the reservation of the right to sink an air-shaft excluded any other specific rights. 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. The express reference to the air-shaft enlarged rather than restricted the implied powers.

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 English and American cases 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, i.e., separate surface and mineral estates can be created by grant or reservation. Hodgson v. Field reflects the

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88 Id. at 605.
89 Id. at 606.
90 Id. at 607 (citing Armitage, 107 Eng. Reg. 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.
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. 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.

The courts also recognized implied rights arising from the ownership of minerals. The Queen and The Earl of Northumberland suggested that the mineral owner is entitled to priority over the surface owner. However, the decisions generally emphasize necessity and reasonableness; they recognize the considerable economic value of mining activity, yet, they are solicitous of land use. 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. 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. 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. Plaintiff’s remedy, when successful, was some form of damages.

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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).
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.
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. As numerous courts have pointed out, access to extract and remove the minerals gives value to the mineral estate. Accordingly, the courts have been sympathetic to requests from the miner for access. 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.

Further, even if no express language in the conveyance discusses access, courts have viewed access as an implied aspect of mineral ownership. Several courts have treated access as an easement appurtenant to the mineral estate, 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. Occasionally courts have sought to distinguish "necessary" from "merely

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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.


110 Porter, 64 S.E. at 854.


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).

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

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).
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.
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. Most courts agree that a right of surface support exists in the absence of language in the grant or reservation. However, the grant or reservation can expand upon the support right or define the terms under which it may be used. 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.

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. The cases are divided as to what constitutes sufficient evidence of a waiver. 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. While most courts profess to seek the intent of the parties to the agreement, in practice the courts have considerable flexibility in assessing the facts of individual cases. Some waivers of support are found in general language, while other waivers are rejected on minor technical grounds.

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.


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

130 Id. at 1016.


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

133 Simmers, 167 S.E. at 737.

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

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, 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.

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. 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. One court commented...

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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.
138 Id. at 864.
140 Id.
141 Commerce Union Bank, 540 S.W.2d at 864; Rochez Bros. v. Duricak, 97 A.2d 825, 828 (Pa. 1953).
that strip mining was the only way of extracting the mineral, and that the parties therefore intended the use of strip mining. Another court has suggested that the compensation paid for the mineral estate was so great that it, in effect, included payment for the surface. 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. Some courts directly balanced the opposing interests and costs involved. One court allowed strip mining even though it held that the mineral owner had no right to strip mine. This court held it inequitable to disallow the only practical method of extraction but granted damages to the surface owner. Similarly, some courts weighed the relative value of the estate in determining whether strip mining should be allowed.

Aside from the language of severance or the purported intent of the parties, courts decide cases on the basis of public policy. 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." The courts generally have based their decisions on the historical practices of the mineral developers. When courts have abandoned past interpretations, they have done so for the purposes of reflecting a change in public policy. A new emphasis is required, and the courts respond by

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146 Id. at 398.
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."  

**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, rocks, soil, and water. 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 resources and have implied the right to use them as part of the miner's ownership of the minerals. 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. The miner's use of surface resources has generally been sustained so long as the use is "directly connected" to the mining operation. However, the miner's "mere license" may not give the miner any basis to object to the surface owner's use of the resources. 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. The increasing concern over the environment, surface owners have received more attention.

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156 Id.
159 See infra notes 189-93.
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).
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).
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

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\(^{167}\) 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.


\(^{170}\) 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).


\(^{175}\) 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. A second approach is to rely on the easement of necessity 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. 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. 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. Among the uses determined to be unreasonable have been the location of well sites on the exact spot of the surface owner’s retirement home or within three feet of his ensilage pit. The cases often require the mine owner to seek injunctive relief from the court to prevent the surface owner from stopping his mining operations.

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. 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.


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 surface and the pollution of water because of mining activities. The water pollution cases have dealt with pollution of streams, injuries to livestock from salt water and spillover from saltwater or slush pits.

The cases have recognized express agreements regarding pollution rights and have also recognized implied rights to pollute either from custom allowing the polluting activity, or as a part of the necessary or reasonable use of the mined property. 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, and lack of such may lead to a finding of negligent or otherwise tortious conduct by the miner. Increasingly, mining pollution has become the subject of statute and regulation which may supplant or alter common law understandings.

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188 Himrod v. Ft. Pitt Mine & Mill Co., 238 F. 746, 747 (8th Cir. 1916); Phillips v. Sipsey 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.
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).
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.99 "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

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99 See infra notes 200-03 and accompanying text.
202 See Newman v. Hi Hat Elkhorn Coal Co., 298 F.2d 119 (6th Cir. 1962); Phillips, 118 So. at 534.
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. 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. However, courts have strictly interpreted grants to prevent the miner from claiming rights on other properties. On other occasions, courts have interpreted agreements to forbid the use of other property.

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. 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. As has been noted, a valuable contribution of the English

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208 See Ross Coal Co., 249 F.2d at 604-06.
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).
212 See infra notes 213-27.
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. These developments gave worth to mineral ownership and provided the basis for exploitation of mineral wealth. 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. 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. 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. Surface rights cases have recognized express and implied easements as well as easements by necessity. Courts have also been willing to expand the terms of easements to promote commercial development of the mining enterprise.

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. Surface owners may retain the right to use certain minerals for domestic purposes. One concern in

\[^{214} \text{See supra note 55 and accompanying text.}\]
\[^{215} \text{See id.}\]
\[^{216} \text{See Vish, supra, note 213, § 80.01[1].}\]
\[^{217} \text{Id. § 83.03[1].}\]
\[^{218} \text{Id. § 83.03[5].}\]
\[^{219} \text{See Yates v. Gulf Oil Corp., 182 F.2d 286 (5th Cir. 1950); Phelps v. Fitch, 255 S.W.2d 660 (Ky. 1953); Lester Coal Corp. v. Lester, 122 S.E.2d 901 (Va. 1961).}\]
\[^{220} \text{See Buck Creek R.R. Co. v. Haws, 69 S.W.2d 333, 334 (Ky. 1934); Neal v. Finley, 124 S.W. 348, 349 (Ky. 1910); see also Melton v. Sneed, 109 P.2d 509 (Okla. 1940). But see Greek v. Wylie, 109 A. 529 (Pa. 1920) (rejecting easement by necessity on facts).}\]
\[^{221} \text{See Jones v. Island Creek Coal Co., 91 S.E. 391, 393 (W. Va. 1917); Buffalo Mineral Co. v. Martin, 267 S.E.2d 721, 723-25 (W. Va. 1980).}\]
\[^{223} \text{See Patrick v. Allen, 350 S.W.2d 481 (Ky. 1961); Lyons v. Gambill, 47 S.W.2d 532 (Ky. 1932).}\]
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

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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. Where language was unambiguous, the courts recognized that the agreement of the parties would override contract presumptions of surface rights law. 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. 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. Courts then rely on such doctrines as construing against the drafter or inferring the expectations of the parties at the time of drafting. Alternatively, a court may fall back on the property rules that define rights in the absence of an express agreement of the parties.

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. 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.


240 See supra note 239.

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. Jones251 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. 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. The irrigation system could clear objects under seven feet in height; however, two of the lessee’s pumping units were over seven feet high. Placement of the units in the cellars would allow the system to move freely. 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. 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. 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.

Second, in *Flying Diamond Corp. v. Rust*, the Court followed the accommodation doctrine of *Getty Oil Co.* 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. The court stated that:

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252 *Id.* at 621.
253 *Id.* at 620-22.
254 *Id.* at 620.
255 *Id.*
256 *Id.* at 623.
257 *Id.*
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-

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\(^{262}\) Id. at 511.


\(^{265}\) 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.


\(^{268}\) 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.
intentional wrongdoing, or strict liability. 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, 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. The miners' resort to injunctive relief typically has been asserted in the face of a surface owner attempts to block mining activity.

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

271 Arkansas-Louisiana Gas Co. v. Wood, 403 S.W.2d 54 (Ark. 1966); Speedman Oil Co., 504 S.W.2d at 923.
274 Marvin v. Brewster Iron Mining Co., 55 N.Y. 538 (1874); Ryckman v. Gillis, 57 N.Y. 68 (1874); Shaulis 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.
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.