Chapter 11

Underground Disposal of Slurry and Coal Refuse in Mine Voids: Does the Coal Owner/Lessee Have the Legal Right to Dispose of Slurry and Coal Refuse in the Mine Voids?

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§ 11.01. Introduction.

In preparation of coal for market, coal operators must separate non-combustible materials from clean coal product. This processing of the coal creates various by-products, referred to as “slate,” “gob,” “slurry” or “refuse” which the operator is required to dispose of in connection with its mining operations. On a yearly basis, United States coal operators dispose approximately two billion tons of fine coal or slurry produced as by-product in the preparation of raw coal for market.\(^1\) Traditionally, the by-product created by coal processing has been disposed in landfills or sediment ponds. Due to increased disposal costs resulting from inflated land values, site development, transportation and other factors, the coal industry has been forced to pursue disposal alternatives.

One alternative is utilization of underground mine workings for such disposal. Underground disposal of coal by-product presents many issues for coal operators relating to the ownership of underground mine workings and the legal rights necessary to use the underground mine workings for disposal purposes.

§ 11.02. Determination of Disposal Rights Conveyed by Coal Grant.

On some properties, the express terms of the grant contained in the deed or lease will govern disposal into mined-out voids following the extraction of coal, either permitting it or forbidding it. More commonly, disposal is not addressed in the document and a determination of the right of use of the mined-out voids will depend upon whether the coal operator possesses sufficient implied incidental mining rights or whether the coal owner possesses a continued and valid ownership interest in the mining voids following the extraction of coal.

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§ 11.03. Express Rights.

As with any right to use real estate, the express terms of the grant, usually in a deed or lease, govern the use of the mining voids for the injection of coal by-product. Like many modern day mining techniques, subsurface disposal of coal by-product is not typically addressed by severance grants. Accordingly, the legal right of disposal will likely be determined under mining rights implied within the grant or by ownership principles according to state law.

§ 11.04. Incidental Mining Rights.

When the mineral estate is severed from the surface estate, it is implied that the means of obtaining or enjoying the mineral estate are also granted and pass with the grant of the minerals. The rights of the mineral owner are not limited to particular rights specifically mentioned in the grant or reservation but include such rights and privileges as are necessary to extract the minerals. Accordingly, a grant of coal will necessarily include the implied right to extract the coal or to make reasonable use of the surface for mining operations necessary to extract the coal.

The only reported case in the United States dealing with underground disposal did so based, in part, upon the incidental mining rights of the coal owner. In *Pittsburg & Midway Coal Min. Co.*, the coal owner acquired its interest in the coal by virtue of a 1912 deed. The deed did not contain an express grant of the right of subsurface disposal of coal by-product, but did grant the following:

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2 McIntire v. Marian Coal Co., 227 S.W. 298, 299 (Ky. 1921).
3 Jilek v. Chicago, Wilmington & Franklin Coal Co., 47 N.E.2d 96, 100 (Ill. 1943).
6 *Id.* at 1534.
the right of way and the right to build use and operate roads, highways tunnels and canals of any description over and under the same necessary for the convenient transportation of said coal, iron ore, gas, oil and other minerals and ores from said lands or any other lands: and the conveying and transporting to and from said lands or other lands all materials animals and employees and implements that may be of use in mining and removal of coal, iron ore, gas, oil and other minerals and ores from said lands or from other lands or in the preparation of the same for market: and also the right to construct and use such buildings and structures on said lands as may be necessary or convenient for mining said minerals preparing them for and transporting them to market, for coking coal and carrying on any business of the purchaser or his assigns connected with the mining, preparing and marketing of said coal, iron ore, gas oil and other minerals and ores and also the right to enter beneath the surface of said lands and mine dig and remove the coal iron ore gas oil and other minerals and ores there from to drive and maintain under said lands entries and ways to connect with other lands now owned or hereinafter to be acquired by the purchaser, his grantee or assigns or with mines, entries or ways underlying other lands and to drain and ventilate the same and to remove through or under said lands coal iron ore gas oil and other minerals and ores mined or taken from other lands and premises . . .

The coal owner in *Pittsburg and Midway Coal Min. Co.* had previously used a sediment pond to dispose of coal by-product, but when the pond reached capacity, sought to inject by-product into the mining voids underlying the tract. The surface owner asserted that the rights provided by the grant only provided the coal owner the right to use the surface of the property for

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7 *Id.* at 1534-35.
8 *Id.* at 1535.
disposal of coal by-product and did not grant the right to dispose coal by-products in the underground workings of the mine.\textsuperscript{9} The Eleventh Circuit held that the coal owner possessed the right to dispose of the coal by-product in the underground voids, stating that this right was incidental to the mining of coal.\textsuperscript{10} According to the court, the “incidental rights of the miner, which are appurtenant to the grant of the mineral rights, are to be gauged by the necessity of the particular case, and therefore vary with changed conditions and circumstances.”\textsuperscript{11} Since the mining operations required disposal of coal by-product and the surface impoundment facilities had reached capacity, the conditions present at the mine made sub-surface disposal of the slurry necessary and reasonable.\textsuperscript{12} The court noted that the conveyance expressly provided the right to use the surface for the mining of coal from other lands and for the preparation of the coal for market and that the disposal program is not only incidental to mining of the coal, but is related to the express grant of the right to use the surface of the property for the preparation of the coal for market.\textsuperscript{13}

\textit{Pittsburg and Midway Coal Min. Co.} also held that a coal operator is not limited to the practices used at the time of the conveyance.\textsuperscript{14} Although not specifically mentioned in an original grant, a coal operator may employ modern day advances and techniques used in the industry.\textsuperscript{15} According to the court,

where there is broad language describing the rights conveyed it is appropriate to imply a right to use modern technological knowledge in accomplishing that which was intended to be

\begin{itemize}
  \item \textsuperscript{9} \textit{Id.}
  \item \textsuperscript{10} \textit{Id.} at 1536.
  \item \textsuperscript{11} \textit{Id.}
  \item \textsuperscript{12} \textit{Id.}
  \item \textsuperscript{13} \textit{Id.}
  \item \textsuperscript{14} \textit{Id.} at 1536-37.
  \item \textsuperscript{15} \textit{Id.}
\end{itemize}
accomplished in the original conveyance, that is, the mining of coal and the preparation of it for market.\textsuperscript{16}

The court in \textit{Pittsburg & Midway Coal Min. Co.} appears to base its decision allowing sub-surface disposal on two conclusions; first, the court held that the disposal of coal by-product both on the surface and in the underground voids was incidental to the mining of the coal. Second, the court found that the coal operator also possessed the express right to use the surface for the preparation and marketing of the coal, and the disposal of by-product in the underground voids was related to preparation of the coal for market.

\section*{§ 11.05. Incidental Mining Rights in Eastern United States Jurisdictions.}

Since \textit{Pittsburg & Midway Coal Min. Co.} was based at least in part on the incidental right of disposal, an operator contemplating a sub-surface injection of coal by-products would be well advised to examine the incidental mining rights recognized by the jurisdiction where the mine is located. \textit{Pittsburg & Midway Coal Min. Co.} stands alone in directly approving an underground coal by-product injection program, but several jurisdictions have examined a coal operator’s incidental right to use the surface itself for disposal. It could reasonably be argued that if disposal upon the surface is permitted, then subsurface disposal, which is generally less invasive, should be permissible as well. As a general rule, an owner of coal may, as incidental to mining the coal or other minerals underlying the land, use an appropriate part of the surface thereof to dispose of coal waste products. While not every jurisdiction has resolved the right of the coal operator to dispose of waste product on the surface, there is legal precedent in nearly every Eastern coal producing state regarding the incidental mining rights of a coal operator.

\textsuperscript{16} \textit{Id.}

Indiana has held that a coal owner possesses the implied right to use the surface for the benefit of mining operations. Moreover, in Creasy v. Pyramid Coal Corp., a case involving the installation of electric power lines upon the surface of a mine that had previously been operated by steam, the court noted that use of modern day advances in technology should be implied in the original grant. According to the court,

At the time of the grant the operation of coal mining machinery by electricity was unknown. There was, therefore, no necessity for mentioning this type of motivating power and the appurtenances necessary for its delivery nor for excluding them. The terms of the grant are so broad and all inclusive that it is clear to us that the grantors intended to give the grantees any and all rights reasonably necessary to the maintenance and operation of the said mine and, indeed, they included therein everything which at that time was known to be reasonably necessary, not only to the mining and removal of the minerals under their own land but from under adjoining lands and other lands.


Under Illinois law, the coal owner possesses the implied right to occupy so much of the surface as may be needed to open and work the mineral estate. When the mineral estate is severed from the surface estate, the means of obtaining or enjoying it are also granted and pass with the grant of the minerals without an express covenant for such purpose. However,

18 Id.
19 Id.
20 Jilek v. Chicago, Wilmington & Franklin Coal Co., 47 N.E.2d at 101 (Ill. 1943).
21 Id. at 100-01.
an implied right to use the surface of the property overlying the mine is not unlimited. The surface of the land cannot “be covered with railway tracks, reservoirs, structures and manufacturing equipment upon the bare license to enter the mineral estate for the purpose of removing the mineral.” 22 Such rights must necessarily be “covered by an express contract or covenant or they will not exist, and are therefore rights in addition to the implied right to enter, and an extension thereof.” 23


By implication of law, a mineral owner acquires the right to occupy and use so much of the surface as may be reasonably necessary for the beneficial and profitable working of the mine. 24 Moreover, Kentucky courts have held that a lease granting “coal, salt, water, oil and gas, with all the usual mining privileges,” provides the mineral owner the right to dispose of mining waste upon the surface of the property. 25 However, the mining by-products should be distributed in a reasonable measure through the entire leasehold surface. 26


In Pennsylvania, a grant of minerals impliedly grants the mineral owner the limited right to use the surface overlying the minerals for disposal of mining by-products. 27 Since the disposal of mining by-products constitutes a mining purpose, the coal owner is granted the right to use the surface of the property to dispose of coal by-product. 28 The amount of surface which may be utilized depends upon the “necessity therefore, by the custom of

22 Id. at 101.
23 Id. at 99.
24 Jenkins v. Depoyster, 186 S.W.2d 14, 15 (Ky. 1945).
25 Blue Diamond Coal Co. v. Press Eversole, 253 S.W.2d 580 (Ky. 1952).
26 Id. at 582.
28 Id.
the country, and by the construction put upon the contract by the parties themselves by a long acquiescence.”

According to the court in *Dewey v. Great Lakes Coal Co.*, “[i]t is absolutely necessary in opening and operating a mine that something be done with the waste or refuse. The custom of dumping it at or near the mouth of the mine is a custom so deeply imbedded in the bituminous coal fields of Pennsylvania that it would be safe in saying that it is a usage of the trade.”


A coal owner possesses an implied right to use the surface for mining operations. In instances where there has been a severance of the mineral estate and the deed gives the grantee the right to utilize the surface, such surface use must be for purposes reasonably necessary to extraction of the minerals. When the right to use the surface is not expressed within the grant, it must be demonstrated not only that the right is reasonably necessary for the extraction of the mineral, but also that the right can be exercised without any substantial burden to the surface owner.

§ 11.06. Use of Mining Voids—When Does the Right Terminate?

While the issue of use of mining voids for disposal purposes has rarely been addressed by the courts, the use of the voids as underground passages for the haulage or transportation of coal has been addressed on numerous occasions.

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29 Id.
30 Id.
33 *Buffalo Min. Co.*, 267 S.E.2d. at 725-26.
These decisions have generally held that the coal operator may utilize mined-out voids underlying the surface without expression of such right in the instrument of conveyance.

A critical question is: When does the right to use the mined-out voids terminate? Under what is commonly known as the “Pennsylvania” or “American Rule,” ownership of the mining voids (and, therefore, the right to use them) continues to rest in the coal owner, so long as the coal within the mine has not been exhausted or the mine abandoned. Under this rule, a mineral owner’s interest in the cavity from which minerals are mined is considered a determinable fee, which reverts to the surface owner, once the minerals have been exhausted or abandoned.

The Pennsylvania decision of *Lillibridge v. Lackawanna Coal Co.* is the landmark case on the issue of the coal owner’s right to use underground passageways created by the mining of coal for the transportation of coal from other properties and is cited by nearly every jurisdiction deciding this question. The instrument of conveyance in *Lillibridge* was a lease that granted “all merchantable coal” under the surface, “with the sole and exclusive right to mine and remove the same.” The lease also contained an habendum clause, providing the lessee the right to “have and to hold the coal in and under said land unto the said party of the second part, its successors or assignees, until the exhaustion thereof . . . .” The court construed the instrument to provide an absolute grant in fee simple of all the coal under the

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37 *Lillibridge*, 22 A. 1035.
38 *Lillibridge*, 22 A. at 1036.
39 *Id.*
surface of the tract. Additionally, the court found that the surface owner had no claim to the use of the mining voids. According to the court,

“[i]f, then, the coal in place is a pure corporeal hereditament, the title, in fee simple, to which passes to a purchaser by apt conveyance, there would be no more propriety in claiming a title in the grantor to the space it occupies than there would be in claiming a similar right in a vendor of the surface to the space developed by the vendee in digging the cellar and foundations of a house.”

Such mining voids are exclusively the property of the mineral owner and subject to “such use as an owner may desire of property belonging to himself.”

The rule espoused in *Lillibridge* was later modified in *Webber v. Vogel*, which held that the ownership of the mined out voids is subject to reversion upon the coal underlying the tract being exhausted or abandoned. In *Webber*, the court curtailed the broad language set forth in *Lillibridge* by restricting the term of the right to use the mined-out voids. According to the court in *Webber*, the owner of the coal estate does not possess a right to use the mining void in perpetuity. Ownership of the mining voids will revert to the owner of the surface once the contemplated mining term of the parties has expired. The court states:

[w]hile there exists by the deed to the grantee an estate in fee simple in the severed coal, and his right to the space mined out

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40 Id.
41 Id. at 1037.
42 Id.
43 Id.
45 Id. at 5.
46 Id.
47 Id.
will not be distinguished from that in which the coal remains unmined, that estate, except in very rare cases, has no badge of perpetuity. In nearly every case the instrument itself discloses the intention of the parties that the coal shall be mined; that is, that the subject of the grant shall soon be exhausted or consumed. It is severed from the under and over lying land for the purpose of turning it into money. It would not only be a perversion of the intention to merely use such an estate to reach other coal, but such use would be a continual menace to the stability of the surface. No owner of the upper land could tell when his estate would cease to be disturbed by workings underneath. It was intended to go no further in the case cited than to hold that, while the purchaser of the coal was in good faith mining out his coal, his right to the use of the space made vacant by his workings as they progressed could not be successfully obstructed by the owner of the surface; and not that by the purchase of the coal he obtained an undisputed and perpetual right of way under another’s land. The owner of the land above and below has a right to the reversion of the space occupied by the coal within a time contemplated by the parties when they sever that peculiar part of the land from its horizontal adjoiners.48

Under the *Lillibridge* and *Webber* cases, the coal owner continues to own the mining voids until the contemplated term of ownership is concluded. While the decisions establish that the use of the mined out voids is not perpetual, the decisions do not elaborate as to when the ownership interest reverts to the surface owner and instead require a determination of the term of ownership that was “contemplated by the parties.” This ambiguity was later resolved in *Westerman v. Pennsylvania Salt Mfg. Co.*49 Noting the general rule that “the owner of the coal also own[s] the chamber or space enclosing

48 Id.
49 *Westerman*, 103 A. 539.
it . . . so long as such ownership continue[s],” the court further elaborated that, when the instrument of conveyance does not set a limitation as to the time for removal or address the issue of underground passageways, the coal owner owns an estate in fee and is entitled to possession of the mining voids created by the removal of coal until such time as the coal underlying the tract is “exhausted or abandoned.”50

The Westerman decision provided further guidance. Unless the terms of the conveyance provide otherwise, a “temporary suspension of mining operations” will not result in divestiture of right to use the underground voids.51 So long as the “tract is in open workable condition [and] is being mined, the fact that there may be a temporary suspension of operations therein will not deprive the mine owner of the right to use [the mined out voids.]”52

The tract at issue in Westerman was part of a mine encompassing numerous other properties.53 All the coal within the tract had been mined except for 25 to 30 percent of the coal, which was left in pillars or ribs to support the surface while the remaining areas of the mine were being mined.54 Under these circumstances, the court found there was no reversion of the ownership interest in the mining voids.55 According to the court:

[t]he coal in the ribs was not forfeited because left for a time to support the surface. In fact, the chancellor properly finds there was no abandonment. Since the balance of the coal and the right to remove it belong to defendant, as well as the space made by first mining, the mere fact that the removal of the ribs has been temporarily deferred to facilitate the general mining operation will

50 Westerman at 540-41.
51 Westerman at 540.
52 Id.
53 Id. at 539.
54 Id.
55 Id. at 541.
not defeat defendant’s right to use such space for the transportation of other coal. Neither the coal nor the space reverts to plaintiff because of such temporary suspension of mining. The deed gives defendant the coal, without any restriction as to the time when it shall be mined; so there is nothing upon which to base any claim of reversion.56

The above cases represent the general rule in most jurisdictions as to the right of usage of the mined out voids. When read together, the cases indicate that, unless there is language within the deed or other implication to the contrary, the owner of the coal also owns the exclusive right to use the mined-out voids created by the removal of the coal until the exhaustion of the coal or permanent abandonment. The cases establish that the coal operator possesses a right to use the mining voids, at least for some duration of time.

§ 11.07. Adoption of American Rule by Eastern States.

The majority of states have followed the principals set forth by the Pennsylvania decisions with some modification.


Kentucky courts have held that “as to subterranean passages and openings made by the extraction of mineral by its owner, or lessee of the right to mine it, the owner or lessee has the right, in the absence of contract restrictions, to use such openings in the transportation of minerals taken from other adjoining or adjacent mining operations without infringing upon any right of the surface owner or committing any trespass to or on his property.”57 Moreover, Kentucky would not limit the use of the mining voids to any particular tracts of a mine, but states that the coal owner may use the mining voids for the benefit of adjoining tracts.58

56 Id. at 539.
57 Middleton v. Harlan-Wallins Coal Corp., 66 S.W.2d at 29-30 (Ky. 1933).
58 Id. at 30-31.

In a case involving the use of mined-out salt cavities, New York adopted the American rule by holding that the owner of salt deposits underlying the surface does not own the mining voids created by the extraction of the salt deposits, but has the exclusive right to use the voids until the salt deposits have been extinguished or abandoned. Under the International Salt decision, an operator is under no requirement to prosecute mining in any diligent manner. The court in International Salt further stated that the remaining minerals were not required to be “mineable” or “recoverable” minerals to prevent a reversion. So long as the mine as a whole contains unextracted minerals which are being produced in any area of the mine, there is no reversion to the owner of the surface.


Ohio courts have held that when there are no restrictions in a deed conveying coal, the mining voids remain a part of the property of the coal owner until the exhaustion of coal from the mine and the voids may be used for mining purposes provided that such use does not injure the surface. According to the court in Moore v. Indian Camp Coal Co.:

[from the nature and purposes of [coal] ownership such as we have described above, it follows that the mine owner has the right to use as he may choose, but without injury to the owner of the soil, the space left by excavation of the mineral, so long as it remains a mine; that is to say, until the mineral shall be practically exhausted. It results from the absolute proprietorship over the mineral in place, that the owner thereof has a like interest in the containing chamber

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59 International Salt Co. v. Geostow, 878 F.2d at 575-76 (2d Cir. 1989).
60 Id. at 576.
61 Id. at 575.
62 Id.
63 Moore v. Indian Camp Coal Co., 80 N.E. 6, 8 (Ohio 1907).
until the termination of the estate. *MacSwinney on Mines*, 9-11, 67-69. The phrase, ‘containing chamber,’ as used in the books, is simply a convenient expression for the limits or boundaries of the grant. The grant is an entirety and the estate thereby created is determinable as a whole upon the contingency of the exhaustion of the mine. It is, therefore, illogical and inconsistent, and would be impracticable and unjust to hold that, as fast as the mineral is taken out, the resulting empty space should revert to the owner of the upper strata. Such a narrow and technical interpretation of the grant would result in embarrassments to the mining industry which would be intolerable. The empty space is, therefore, not merely property which may be used as an incident to the removal of the mineral included in the grant, but, as suggested by the author cited above, he may use the space created by removal of mineral within the grant, as a way for the carriage of minerals from his adjoining lands, or, if he prefers to do so he may cut a passage through the minerals and use it for the carriage of minerals from his other lands. *MacSwinney on Mines*, 67, 68.64


Virginia case law, as it currently stands, presents a departure from the rule provided by Pennsylvania in *Lillibridge* and the other states which have adopted the Pennsylvania or American Rule.65 Recognizing that it was departing from every other state that had examined the question, the court in *Clayborn* stated as follows:

[w]hen a surface owner conveys the coal on his land, whether or not he specifies, as was done in this case, that the grantee shall have the right to mine and remove the same, he knows that such right must exist if the grantee is to get any benefit of his estate, and it makes no difference whether he expressly grants the right

64 Moore, 80 N.E. at 8.  
to mine and remove the coal (if only these general terms are used),
or leaves such right to be implied by law; but when nothing more
is said than that the coal is granted, or that the coal is granted
with the right to mine and remove it, nothing but the coal and the
right to remove it ought to be understood to pass by the deed. If
the coal owner expects more in connection with his easement for
removing the coal, he ought to stipulate for it . . .66

The *Clayborn* decision allows the coal operator in Virginia use of
the mining voids created beneath the surface of the tract described in the
conveyance and only for the removal of coal from that specific tract.


Initially, similar to the Pennsylvania line of cases, West Virginia courts
seemingly adopted the position that the mineral owner owns the mining
voids in perpetuity.67 However, the broad rights recognized by the *Robinson*
decision were later restricted in *Fisher v. West Virginia Coal & Transp. Co.*68
The *Fisher* decision added an additional element to prevent reversion of the
void spaces created by the extraction of coal.69 In *Fisher*, the court construed
a conveyance of coal along with “all necessary mining rights and privileges
necessary for the operation and removal of said coal and all subterranean
rights and ways necessary or convenient for the proper working and mining
of the coal under said land” to provide a lessee of the coal owner the right to
use the mining voids so long as the coal is “neither exhausted nor abandoned,
and mining is being prosecuted with due diligence.”70

66 *Clayborn*, 105 S.E. at 121-22.
67 E.g., *Robinson v. Wheeling Steel & Iron Co.*, 129 S.E. 311, 311 (W. Va. 1925)(citing
English rule providing for continued exclusive use of mining cavities).
69 *Fisher* at 635, 639.
70 *Id.* (Emphasis added).
§ 11.08. Application of Illinois’ Container Space Doctrine.

Illinois continues to follow the English Rule known as the Container Space Doctrine. Under this doctrine, the grant of coal is a grant of a corporeal estate and the coal owner retains full ownership of the space which was formerly occupied by coal after the coal has been extracted.\(^{71}\)

In Shobert v. Pittsburg Coal Co., a coal operator purchased a mined out void for the purpose of reaching its own coal reserves from an existing non-contiguous mine.\(^{72}\) The surface owner alleged that the original miner acquired only coal and the license to mine it and that, once the coal had been removed, the rights of the miner ceased to exist and that, therefore, the acquiring coal company was precluded from using areas which had been mined to transport coal from other lands.\(^{73}\) The court rejected this contention, instead holding that the coal company possessed the right to use the previously mined cavities underlying the surface for the transportation of coal mined under the property, as well as from other properties.\(^{74}\)

An additional Illinois case, Attebury v. Blair, a case often cited in tandem with Shobert, provides further support for the continuing ownership interest of the coal owner. In Attebury, the Illinois Supreme Court stated “\(\text{[w]}\)e see no reason why the grantors [who had reserved the coal] could not use the space where the coal was found in any way which they saw fit . . .”\(^{75}\)

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\(^{72}\) Schobert, 98 N.E. at 945.

\(^{73}\) Id.

\(^{74}\) Id.

\(^{75}\) Attebury, 91 N.E. at 475. See also, Tate v. United States Fuels Gas Co., 71 S.E.2d 65, 71 (W. Va. 1952), wherein, the Supreme Court of West Virginia discussed various other state decisions and made the following statement pertaining to the Attebury decision: The case of Attebury v. Blair, supra, seems to indicate without any qualification, that the owner of the minerals could use the space from which minerals had been removed in any way he saw fit.
Illinois’ continued adherence to the Container Space Doctrine was recently confirmed in *Continental Resources of Illinois*. In this case, the Illinois Appellate Court for the Fifth District employed the doctrine to determine that the ownership of coalbed methane from mined out voids remained vested in the owner of the coal estate decades after mining ceased. In doing so the court stated,

> [g]iven that Illinois also follows the container space doctrine, a doctrine which states that the holder of coal rights also holds the rights to the void after the coal is mined *Shobert v. Pittsburg Coal & Mining Co.*, 254 Ill. 474, 98 N.E. 945 (1912), coalbed methane gas found in the mine voids must therefore still be a part of the coal estate, subject to the rule of capture.

Illinois has not held that ownership or the right of use of the mining voids is subject to reversion. The decisions in *Schobert*, where the coal had been exhausted when used by the operator for other operations, and *Continental Resources of Illinois*, where the coal owner was held to control the space for coal bed methane many years after the mine closed, are completely inconsistent with reversion of the mine void to the surface owner. The holding in *Attebury v. Blair* states that the coal owner could use these mine voids in any way which they saw fit and that should include the disposal of coal by-products.

§ 11.09. Potential Limitation on the Use of Void Spaces for Operations Conducted on Other Properties.

Courts have reached contrasting decisions as to whether the right to use the underground cavities may benefit other tracts of land. Unlike decisions pertaining to the use of the surface for mining operations being conducted

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76 *Continental Resources*, 847 N.E.2d 897.
77 *Id.*
78 *Id.* at 902.
79 *Attebury* at 475.
on adjoining lands, courts have generally held that the owner of the fee in the minerals may, at least prior to the exhaustion of the subjacent minerals, use the mining voids in aid of adjacent or other mining operations.\textsuperscript{80}

However, some jurisdictions have limited the use of the underground voids to the tract which is the subject of the conveyance.\textsuperscript{81} In \textit{Clayborn}, for instance, the court explicitly rejected the rule permitting the use of the mining voids, instead holding that a deed of minerals in place does not grant the right to use the voids for transporting minerals from adjoining tracts.\textsuperscript{82}

The reason for the different set of rules as to use of the surface and use of the underground voids is most often stated or explained as a result of the different interests held by the owner. While an interest in coal (and the mined out voids) is corporeal, the implied right of way upon the surface of land, is incorporeal and can be used only for the purpose specified in the grant.\textsuperscript{83} Moreover, unlike the use of the surface for adjoining properties, the use of underground mining voids for the benefit of other properties does not create any additional burden to the surface owner.

\section*{Suggestions for Future Action.}

Although case law on sub-surface injection of coal slurry is only beginning to be formed, coal operators can take steps to insure that the right to dispose of coal by-product is preserved in future coal acquisitions. In addition, in the event a sub-surface slurry injection program is to be

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\textsuperscript{80} \textit{E.g.} Fisher v. West Virginia Coal & Transp. Co., 73 S.E.2d at 633 (W. Va. 1952); \textit{Harlan-Wallins Coal Corp.}, 66 S.W.2d at 31 (Ky. 1933); Goodson v. Comet Coal Co., 31 S.W.2d 293, 294-95 (Ark. 1930); Robinson v. Wheeling Steel & Iron Co., 129 S.E. at 311 (W. Va. 1925); \textit{Westerman}, 103 A. at 540-541; \textit{Shobert}, 98 N.E. at 945.
\textsuperscript{81} \textit{Clayborn} v. Camilla Red Ash Coal Co., 105 S.E. at 122 (limiting use of the property to the tract specifically described in the deed); Quality Coal v. Guthrie, 157 S.W. 2d 756, 759 (Ark. 1941)(approving the award of damages for the reasonable value of the use of passages underlying leased premises for transportation of coal mined from adjacent mines).
\textsuperscript{82} \textit{Clayborn}, 105 S.E. at 121-22.
\textsuperscript{83} \textit{Westerman}, 103 A. at 541.
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instituted under an existing grant or lease of coal, a coal operator would be well served to seek a clarification of the right of injection with the current surface owners.

§ 11.11. Summary.

In the future, it can be expected that the courts of the various states will further address the issue of the use of mining voids. In the absence of an express provision addressing subsurface disposal, it is likely that a court will look to precedent within the jurisdiction construing the incidental mining rights of a coal operator, in particular, the cases involving the use of mining voids for haulage and transportation.