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Chapter 11

Water Replacement Under Federal and State Statutes: You Break, You Buy It!

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§ 11.01. Introduction.

Mineral extraction activities, especially mining, can have severe impacts on groundwater resources and private water supplies. Initially, the common law rules developed to deal with these impacts were much less protective of the subterranean water than were those rules developed to deal with surface waters. The lack of knowledge and inability to predict or determine groundwater movement or behavior drove these initial decisions. While landowners could recover compensation for the damage to the water resources and in certain circumstances even enjoin the activity causing the damage, the common law did not require replacement of the water supply.

Beginning with the Surface Mining Control and Reclamation Act of 1977,[2] the federal government and several states have passed statutes requiring replacement of water supplies damaged or contaminated by mineral

2 Pub. L. No. 95-87 (1977), 20 U.S.C. § 1201, *et seq.*

extraction activities. This chapter will provide an overview of many of those statutes, discussing their requirements and limitations.

The first part of this chapter will discuss how the courts have traditionally defined groundwater and the common law rules developed to deal with impacts on or to groundwater and water supplies. Next, the chapter discusses the evolution of the water replacement provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA)[3] and the state laws enacted in accordance with SMCRA. After that we will discuss other replacement provisions in state statutes covering other mining and oil and gas operations. Finally, the chapter will discuss some other statutory remedies that do not necessarily require replacement, but can mandate an agency or operator to take action or provide monetary damages as an adjunct to replacement.

§ 11.02. Nature and Treatment of Groundwater.

Since the adoption of English common law by the United States, a delicate and unsettled relationship has existed between a landowner's right to use and enjoy his property, while not unreasonably interfering with adjoining property.[4] The courts' treatment of underground or subterranean waters is one leg of this delicate balancing act. Traditionally, the cases have divided subterranean waters into two principal categories:[5] waters that flow in well-defined and ascertainable channels or courses[6] and waters which ooze, filter, seep, or percolate through the earth, or which flow in undefined, unascertainable or unknown channels, generally referred to as "percolating waters."[7] Underground waters that flow in well-defined, ascertainable courses or channels are governed by the rules of law governing riparian surface streams.[8]

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3 P.L. 95-87 (1977), 20 U.S.C. § 1201, *et seq.*

4 *See generally*, Maxwell P. Barrett, "The Theory of Nuisance as an Impediment to Mining Operations," *E. Min. L. Inst.* ch. 14 (1993).

5 *See* C & W Coal Corp. v. Salyer, 104 S.E.2d 50 (Va. 1958); Clinchfield Coal Corp. v. Compton, 139 S.E. 308, (Va. 1927).

6 Finley v. Teeter Stone, Inc., 248 A.2d 106, 109 (Md. 1968).

7 *Compton*, 139 S.E. at 311.

8 Sycamore Coal Co. v. Stanley, 166 S.W.2d 293, 294 (Ky. 1942).