Chapter 5

A Mineral Owner’s Implied Rights to Use Surface Property Owned by Others

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Synopsis

§ 5.01. Introduction..................................................................................204
§ 5.02. Illinois Implied Rights.................................................................205
§ 5.03. Indiana Implied Rights...............................................................210
§ 5.04. Kentucky Implied Rights............................................................213
§ 5.05. New York Implied Rights............................................................220
§ 5.06. Ohio Implied Rights.................................................................223
§ 5.07. Pennsylvania Implied Rights.......................................................226
§ 5.08. Virginia Implied Rights.............................................................231
§ 5.09. West Virginia Implied Rights......................................................233
§ 5.10. Use of the Surface by the Mineral Owner Must Be “Necessary”..................................................................................238
§ 5.11. “Necessary” Means Reasonable Use, Taking into Account Competing Uses ...........................................................239

[1] — Trends in Court Rulings .....................................................240
[2] — No Implied Right to Subside the Surface.................................240
[4] — Implied Right to Employ New Methods and Technology...............244
[5] — Surface Cannot Be Servient to Other Mineral Estates...............246
§ 5.12. Practical Tips .............................................................................248
§ 5.13. Conclusion....................................................................................249

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§ 5.01. Introduction.

Coal, oil, natural gas and other minerals located beneath the surface of land owned by others cannot be exploited by the mineral owner without the ability to make some use of the overlying surface, and the mineral owner may need to use other property rights to produce the mineral (e.g., a natural gas operator may need to drill through a workable coal seam to reach the natural gas). In the case of a deep mine, portals must be located and built, and shafts for ventilation must be installed as mining advances. Once mined, the mineral must be transported, first through underground tunnels and then on the surface, to locations where it is prepared for market and then shipped in some manner to customers. Waste from mining generated both above and below the surface must be disposed of. Oil and gas operations require well drilling pads on the surface property for the well drilling rigs. Oil and gas operations also require waste water ponds or holding tanks to receive waste water that gathers in the well bore. Ponds and holding tanks may also be necessary to receive waste fluids after hydraulic fracturing of underground strata. The oil or gas producer must lay pipeline on the surface to transport the oil or gas to market, and it may also be necessary for the oil or gas producer to locate a compressor on the surface to facilitate transportation.

Also, in today’s world, access may be required to engage in other activities which were unanticipated at the time title to the mineral was originally reserved or granted in a severance instrument. For example, as a condition of a mineral owner’s ability to extract the coal, gas, oil or other mineral conveyed, such mineral owner may need to have access to the overlying surface to obtain pre-mining or pre-drilling monitoring data (e.g., data on water quality and quantity from the water sources and waterways located on the surface property). In addition, the mineral owner may require surface access after mining to repair subsidence damage to certain structures or features on the surface or after drilling to clean up any spills on the surface.

Despite this state of affairs, persons who have acquired or reserved title to minerals have not always included language in the severance instrument expressly setting forth any right to make use of the overlying surface. In the rare case, the instrument may say nothing at all about mining or drilling.
rights, simply stating that the mineral is being granted or reserved. In most instances, perhaps in recognition that it is not feasible at the time of severance to anticipate each and every possible need for the future surface use of another’s land, the severance instrument grants, or reserves, mining or drilling rights using broad, general language.

Furthermore, even explicit, long-form instruments cannot anticipate all of the uses of the surface that the mineral owner may require in the future. For example, a long-form mineral severance deed cannot anticipate technological advances that lead to new methods of mineral extraction. Therefore, a mineral owner’s reliance upon implied rights can also arise in the context of explicit, long-form mineral deeds and leases.

As a result, disputes have arisen (and will continue to arise) over the extent to which a mineral owner can access and make use of another party’s surface lands over the minerals. Over many years, courts have addressed these disputes by recognizing that, absent express language in a mineral deed or lease, the mineral owner must have certain rights to the surface in order to explore for, access, produce and transport the minerals. These common law rights are generally referred to as “implied rights.”

This chapter will discuss “implied rights” in Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia and West Virginia. Each one of these states recognizes implied rights to one degree or another. Furthermore, the general principle of implied rights is applied to coal, gas, oil and other minerals.

§ 5.02. Illinois Implied Rights.

Two early Illinois Supreme Court cases recognize that the coal owner or lessee has implied rights to use the surface for coal production, and virtually all later implied rights cases rely upon one or both of these two early decisions. The earlier of the two cases, Ewing v. Sandoval Coal and Mining Co., 110 Ill. 290 (1884); Threlkeld v. Inglett, 289 Ill. 90 (1919).
Mining Co.,\(^3\) involved reformation of a deed description. The lower court ordered the reformation of the deed language and also decided that the coal company had the right to enter and use the surface property for mining purposes. On appeal, the Illinois Supreme Court held that it was not error to make the latter finding even if the issue had not been pleaded and prayed for because the coal owner possessed the implied right to access and use the surface property regardless of the pleading. The Illinois Supreme Court explained:

The right to mine coal on the land was conveyed by the deed, and the right to go upon the land and dig for coal passed as an incident to the conveyance. We do not think it was necessary for complainant’s bill to contain a special prayer for a decree authorizing him to go upon the land. That followed as a matter of course.\(^4\)

Therefore, by the late 1800s, Illinois recognized that coal owners possessed the right to use the surface property, absent express language in the coal severance deed, as an incident to the conveyance of the coal.

The most frequently cited case in Illinois on implied rights is Threlkeld v. Inglett ("Threlkeld").\(^5\) In the Threlkeld case, the appellants sought specific performance of option agreements to purchase the “coal, oil and gas” underlying certain properties. The appellants were trying to bundle a large, contiguous parcel of coal rights to sell to a coal company, but a coal company operating in the area dealt directly with “different owners of lands, telling them that the options given to the appellants were not worth anything and not valid, and promising to protect the owners against any claim of the appellants.”\(^6\) The appellee landowners argued that the appellants’ options were invalid because, \textit{inter alia}, they included a provision that the acquirer retained the right to purchase surface property, as needed to produce the minerals. Since the right of purchase had no end date, the appellees argued

\(^{3}\) Ewing, 110 Ill. 290 (1884).
\(^{4}\) Id. at 293.
\(^{5}\) Threlkeld v. Inglett, 289 Ill. 90 (1919).
\(^{6}\) Id. at 92.
that this provision was a violation of the rule against perpetuities, which violation invalidated the option agreements. The court disagreed, arguing that the mineral owner always has the right to use the surface property, regardless of whether the mineral grant includes an explicit grant to use the surface. In making this finding, the court stated:

The conveyance was to be of the coal, oil, and gas under the land, with the right to mine and remove the same, and, when anything is granted, all the means to attain it and all the fruits and effects of it are granted also, and pass, together with the grant of the thing itself, without any words to that effect . . . . Where a grant is made for a valuable consideration it is presumed that the grantor intended to convey and the grantee expected to receive the full benefit of it, and therefore, the grantor not only conveyed the thing specifically described, but all other things, so far as it was within his power to pass them, which were necessary to the enjoyment of the thing granted. The deed, when made, would not only pass the coal, oil, and gas, with the right to mine and remove the same, but also the right to enter upon and use so much of the surface of the land as might be necessary to the enjoyment of the property and rights conveyed . . . .

Therefore, while the Threlkeld case did not directly involve the exercise of implied rights, the court nonetheless articulated the general rule in Illinois that a mineral owner has the implied right to access and use surface property owned by another party.

Although the Threlkeld case involved options for coal, oil and gas, and generally stated that surface rights were available to the owner of such rights, later Illinois cases involving oil and gas rights specifically determined that the rights to the oil and gas also include the implied right to enter onto the surface and use the surface to explore for and capture the oil and gas. One

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7 Id. at 96-97. The Threlkeld case remains good law in Illinois. See, e.g., Arclar Co. v. Gates, 17 F. Supp. 2d 818 (S.D. Ill. 1998).
early Illinois oil and gas case is the case of Chicago, Wilmington & Franklin Coal Co v. Herr. ("Herr"),\(^8\) which clarified that implied rights specifically apply to oil and gas rights in Illinois. In the Herr case, the coal, oil and gas were severed by deed, and the deed included “the right to take and use so much of the surface of said lands as the grantee might deem necessary or convenient” for a laundry list of structures and activities.\(^9\) Several years later, the grantor’s successor leased the oil and gas rights to the defendants who then assigned the rights to a production company. The plaintiffs held the deed for the “coal, oil and gas,” so they filed the action “to enjoin the defendants from interfering with plaintiffs’ development and to cancel the lease” to defendants “and its subsequent assignment” to the oil/gas production company.\(^10\)

One of the issues that the Herr case specifically discussed was the distinction between hard minerals, such as coal, and fugacious or migratory minerals, such as natural gas and oil, and the impact of this distinction under the law applicable to real property rights. The Herr case states that oil and natural gas must be viewed differently than hard minerals because hard minerals stay in place whereas oil and gas do not. The court reasoned that title to something that does not stay in place and has not yet been reduced to possession is not attained until that thing is reduced to possession; consequently, and unlike coal rights, oil and gas rights do not represent title to the minerals that is distinct from the surrounding land. Instead, oil and gas rights represent the exclusive right to explore for and reduce to possession the oil and gas, which rights include the right to enter the surface and use it for oil or gas exploration and production. The court explains in Herr:

In Illinois, oil and gas are treated as minerals having certain peculiar attributes not common to those which have a fixed, permanent situs. Because of their character and the possibility of their escape, they

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9 Id. at 312.
10 Id. at 313.
are held not capable of distinct ownership in place. Unlike solid minerals, they can not be the subject of ownership distinct from the soil before taken from the ground. Thus a grant of the oil and gas is ‘a grant, not of the oil that is in the ground, but to such part thereof as the grantee may find * * * (and) The right to go upon the land and occupy it for the purpose of prospecting (and removing oil), if of unlimited duration, is a freehold interest. ‘Title to oil and gas as such vests in the grantee only when he takes it from the land. . . . But the unlimited right to occupy the premises for the purpose of producing oil and gas confers upon the grantee a present vested right, . . . : the right to operate on the premises, to enter at all times for the purpose of drilling, operating, and erecting and maintaining all right to operate on the premises, to enter at all times for the purpose of drilling, operating, and erecting and maintaining all necessary structures.11

The Herr case clarifies that while oil and gas rights are inherently different from rights to hard minerals because of their fugacious and migratory nature, the oil and gas rights nonetheless give the owner or lessee the implied rights necessary to use the surface to produce the oil and gas.

The Herr case further clarifies that while the deed or lease to oil and gas is not title to the mineral, the owner or lessee of the oil and gas rights still possesses implied rights to use the surface in the same manner as the owner or lessee of hard minerals. The court stated that the plaintiffs had the right to enter the property and produce the oil and gas, stating:

It matters little whether we consider the deed as one conveying expressly the right to utilize the surface in exploring for and producing oil and gas or whether we look upon it as a grant to such right by implication. If for any reason the express grant is insufficient in law to convey all things necessary to its full enjoyment, the law

11 Id. (citations omitted).
implies a grant of all such necessary elements. When a deed conveys coal, oil and gas with the right to mine and remove them, all the means to attain the purpose of the conveyance to secure realization of its fruits are granted also.\(^{12}\)

The case expressly states that implied rights apply to oil and gas production in the same manner as implied rights apply to coal, even though oil and gas are migratory substances that are not capable of distinct ownership in place.\(^{13}\)

§ 5.03. **Indiana Implied Rights.**

The case of *Ingle v. Bottoms* (“*Ingle*”)\(^{14}\) was the first case in Indiana to address a coal owner’s implied rights. In *Ingle*, the coal lessee filed an injunction against the surface owner to construct a switch track to the coal mine. The leases granted the lessee the right to enter “upon the lands * * * for the purpose of mining coal and of conducting and operating to any extent he may deem advisable, but not to hold possession of said land for any other purpose, except one acre, more or less, for operating said mines, and for dwellings.”\(^{15}\) In ruling for the coal lessee, the court stated: “It is well settled that, when anything is granted, whatever is necessary or essential to the enjoyment of the grant is also granted.”\(^{16}\) The court went on to say that, if the coal lessee needed more than one acre for the switch track, the

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12 Id. at 313-314. The court goes on to quote from *Threlkeld, supra*, in support of its findings.
13 See also *Jilek v. Chicago, Wilmington & Franklin Coal Co.*, 382 Ill. 241 (1943) (“A mineral deed executed by the owner of the fee carries not only title to solid minerals, but also to what is necessary to acquire title to or possession of fluid or fugacious minerals, that is, the right to enter, explore and reduce the same to possession. . . .” Id. at 248); and *Benefiel v. Pure Oil Co.*, 322 Ill. App. 5 (4th Dist. 1944) (“. . . the lessee, under an oil and gas lease, has the right to possession of so much of the surface of the land as is reasonably necessary to enable such lessee to perform the obligations imposed upon him by the lease.” Id. at 6.).
15 Id. at 162.
16 Id. at 162-163.
one acre limitation would be deemed to be inapplicable because, otherwise, the limitation would effectively “destroy the lease.” Therefore, the court found that the coal lessee’s implied rights could be used to overcome express language in a lease that would have restricted that coal lessee’s necessary activity on the surface property.

Several later cases in Indiana considered the issue of whether surface mining for coal was reasonably necessary and, thus, whether surface mining is a right impliedly running with “all the coal” granted by deed or lease. In *Drake v. Durreger* ("Drake"), the court applied the principles from the *Ingle* case and consequently treated as a question of fact the issue of whether surface mining could be implied. The appellate court in *Drake* affirmed the trial court’s judgment for the surface owner, determining that the facts did not support a finding that the coal operator had an implied right to strip mine the property.

The case of *Consolidation Coal Co. v. Mutchman* ("Mutchman I") took an approach similar to that in *Ingle* and *Drake* in that the coal owner’s implied right to strip mine the property was treated as a question of fact. The court remanded the case with the instructions that the introduction of extrinsic evidence should be permitted to aid in the construction of the coal deeds. On remand, the trial court entered a judgment for the coal lessees, finding that the coal severance deeds included title to the portion of the coal which could only be recovered by strip mining. The landowners appealed, and the case went to the appellate court for a second review in *Mutchman v. Consolidation Coal Co.* ("Mutchman II").

In *Mutchman II*, the appellate court affirmed the trial court’s ruling for the coal lessees finding support for the trial court’s findings and conclusions that the grantor’s conveyance of title to “all of the coal” included the surface

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17 *Id.* at 163.  
19 *Id.* at 89.  
21 *Id.* at 1083.  
coal despite deed language providing for damages to crops for drilling for coal and for additional payment for rights of ingress and egress for coal purposes. The evidence presented on remand supported the trial court’s ruling that the language “all the coal” included the surface coal in the deed, which language was deemed by the earlier rulings to be ambiguous. Therefore, an implied right to strip mine was recognized in *Mutchman II*.

In 2010, this issue of the implied right to strip mine in Indiana was considered by the Seventh Circuit in the case of *American Land Holdings of Ind., LLC v. Jobe* (“Jobe”).\(^\text{23}\) In *Jobe*, plaintiff coal owners brought an action against the surface owners for, among other things, a declaration that the plaintiffs had the right to strip mine. The district court held, among other things, that the terms of the severance deed limited the plaintiffs to underground mining. The district court took the same approach as the *Mutchman I* and *Mutchman II* cases by considering extrinsic evidence. The court stated:

> Of course, the fact that surface mining was not contemplated by the parties does not, by itself, compel a finding that the Plaintiffs have no right to surface mining. *See, e.g., Creasey v. Pyramid Coal Corp.*, 116 Ind.App. 124, 61 N.E.2d 477 (1945) (holding that grant was broad enough to include the construction of electric transmission lines for coal mining operation, even though use of electricity for coal mining was unknown at time of conveyance). However, in this case the Court determines that the Severance Deed, when read as a whole, indicates that the term “all coal” was not intended to include the coal removable only by destroying the surface.\(^\text{24}\)

The district court determined that the plaintiffs did not have the implied right to conduct surface mining, and the Seventh Circuit affirmed. The

\(^{23}\) American Land Holdings of Ind., LLC v. Jobe, 604 F.3d 451 (7th Circ. 2010).

Seventh Circuit agreed that the coal deed granting “all the coals,” together with the right to mine and remove the coals, was ambiguous. The Seventh Circuit also found that the district court did not clearly err in ruling that the deed’s grant of the right to mine “all the coals” was intended to be limited to underground mining.25

The above series of cases in Indiana have considered the issue of whether a coal owner possesses the implied right to strip mine coal where the severance deed grants “all of the coal” or “all the coals.” In these Indiana cases, the courts have determined that this issue is a question of fact that may be considered in the light of extrinsic evidence. Therefore, there is no standard ruling on whether a coal owner may possess an implied right to strip mine coal as this is a question of fact to be answered on a case-by-case basis.

In 1951, Indiana codified implied rights for oil and gas operators based upon the common law at the time.26 Among other things, this statute specifically states that the oil/gas owner may enter the surface property, even absent express words in a deed or lease, for “[e]xploring, prospecting, testing, surveying, or otherwise investigating the land to determine the potential of the land for oil or gas production . . .” and also for drilling “a well or test well . . . .”27 Therefore, the implied rights applicable to oil and gas rights have been codified in Indiana.

§ 5.04. Kentucky Implied Rights.

An early Kentucky case recognizing a mineral owner’s implied rights is Imperial Elkhorn Coal Company v. Webb (“Webb”).28 In Webb, the coal company sought to restrain the construction of a store on the surface property above the coal. In denying the requested relief, the court stated:

25 The Seventh Circuit devotes a significant amount of its opinion to the conclusion that at the time of the 1903 severance deed at issue in the case, strip mining was not contemplated by the parties. The Mutchman I and Mutchman II cases were distinguished because the coal severance deeds in those cases were executed in 1922, when strip mining was contemplated by the parties. American Land Holdings of Ind., LLC v. Jobe, 604 F.3d 451 (7th Cir. 2010).
26 See Indiana Code §§ 32-23-7-1, et seq.
27 Indiana Code § 32-23-7-6.
28 Imperial Elkhorn Coal Co. v. Webb, 225 S.W. 1077 (Ky. 1920).
The coal company does not own the surface of the land, and cannot use or occupy it except in a reasonably necessary way in mining and removing the mineral granted by the deed under which it claims;*** but the mining company must not take or appropriate to its use the surface of the lands unnecessarily to the injury or annoyance of the owner of the surface.29

While the court denied the coal company’s requested relief, the court did recognize the implied rights associated with the coal company’s coal ownership.

Several cases following the Webb case outlined various rights which were deemed to be implicitly granted to the mineral owner. Kentucky’s high court held that a mineral owner has a right to use subterranean passages and openings, made in extracting minerals, in transporting and removing mineral from adjoining or adjacent mining operations without infringing upon any right of the surface owner or committing any trespass.30 Additionally, Kentucky law recognizes that, generally, “the owner of minerals in place has the implied right to a reasonable use of the surface of the land . . . for dumping materials or refuse from the mine.”31 Furthermore, in regard to use of the surface of a property, “[t]hose engaged in mining operations have the right to use practical facilities in carrying on their business, whether they be tipples, blacksmith shops, dynamos, transmission lines or barns for housing mules, . . . or other essential structures used for practical mining purposes.”32 Kentucky courts have found this right to practical facilities on the surface to include, by implication, a coal operator’s right to construct an electric transmission line to its mine.33 Therefore, Kentucky courts have

29 Id. at 1078.
30 See Middleton v. Harlan-Wallins Coal Corp., 66 S.W.2d 30, 31 (Ky. 1933).
31 Wright v. Carrollton Gravel & Sand Co., 242 S.W.2d 751, 752 (Ky. 1951).
32 General Refractories Co. v. Swetman, 197 S.W.2d 769, 770 (Ky. 1946).
33 See Trivette v. Consol. Coal Co., 177 S.W.2d 868, 870 (Ky. 1944). See also Flannery v. Util. Elkhorn Coal Co., 138 S.W.2d 988, 991 (Ky. 1940)(a provision in mineral deed
ruled upon several different, specific uses of the surface, the rights to which
were deemed to impliedly run with the coal ownership.\textsuperscript{34}

A mineral owner’s implied rights to use and occupy the surface are not
without limitation. On several occasions, Kentucky courts have found that a
mineral owner’s activities constitute an excessive or unauthorized use of the
surface estate. Generally, a mineral owner or lessee cannot use the surface
to produce minerals from other properties unless that right is specifically
granted to it within the conveyance instrument.\textsuperscript{35} Thus, while a mineral
operator may employ the surface estate to produce, market or clean the
mineral produced from underneath such surface parcel, Kentucky courts
have held that, absent express language in the conveyance instrument to the
contrary, the mineral owner may not use the surface estate for the purposes
of producing, marketing and cleaning mineral from adjoining or adjacent
lands.\textsuperscript{36} Furthermore, absent language to the contrary, a mineral estate owner
may not dump refuse, created from another operation not located on the
surface estate, upon said surface.\textsuperscript{37} Additionally, Kentucky’s high court has
found that the construction of housing for miners working the mineral on
properties other than the instant surface would impose an excessive burden
on the surface estate.\textsuperscript{38}

While the previous discussion generally has covered the rights implied
at law to mineral owners in the protection of their estate, it is apparent

\textsuperscript{34} As a side note, the rights of the mineral owner to use the surface are not “eroded or
whittled away” by a subsequent subdivision of the surface. Rice v. Stapleton, 502 S.W.2d
522, 523 (Ky. 1973).
\textsuperscript{35} See Hi Hat Elkhorn Coal Co. v. Kelly, 205 F. Supp. 764, 766 (E.D. Ky. 1962); see also
Wiser Oil v. Conley, 346 S.W.2d 718 (Ky. 1960).
\textsuperscript{36} See, e.g., Marlowe v. Marcum, 171 S.W.2d 997, 998 (Ky. 1943); Moore v. Lackey Mining
Co., 284 S.W. 415 (Ky. 1926).
\textsuperscript{37} See Pike-Floyd Coal Co. v. Nunnery, 24 S.W.2d 614, 615-616 (Ky. 1929).
\textsuperscript{38} Collins v. Lackey Mining Co., 292 S.W. 1091, 1092 (Ky. 1927).
upon review that some mineral deeds prevalent in Kentucky give mineral owners such broad rights that the mineral owners find themselves with future “easement-granting” power in relation to the surface. Kentucky courts have long grappled with the interpretation of “broad form” or “Northern” deeds which sever the mineral estate from the surface estate. These deeds are defined by the following characteristics: (1) the deed has a long description of the granted rights (as opposed to a grant of only “necessary and convenient” mining rights or no mining rights); (2) the deed generally conveys all of the minerals under the surface, but may list only certain specific substances; (3) the deed conveys –specifically to the grantee – surface rights the grantee deems necessary or convenient for the full and free exercise and enjoyment of the minerals conveyed; (4) the deed contains an express waiver of liability for damages arising from the grantee’s use of the surface in obtaining the minerals; and (5) the deed reserves to the grantor only such surface rights as may be consistent with the mineral rights conveyed.39

In early decisions, it was generally held that the mineral owner was “the judge of the necessity or convenience and the owner of the surface will not be heard to complain unless the lessee exercises the power granted under the lease, oppressively, arbitrarily or maliciously.”40 This interpretation allowed the mineral grantee to use the entire surface, even including the surface owner’s home, so long as its conduct was not oppressive, arbitrary, or malicious.41 In most cases, the court did not provide for an award of damages to the injured surface owner.42

In interpreting “broad form” deeds, Kentucky courts have focused not only on the wide range of rights delineated within the grant, but also on the unlimited nature of the “easement-granting” power afforded the mineral owners.43

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40 Flannery v. Utilities Elk Horn Coal Co., 138 S.W.2d 988, 990 (Ky. 1940). See also Treadway v. Wilson, 192 S.W.2d 949, 950 (Ky. 1946) (“Clearly the defendant (mineral owner) has the paramount right to the use of the surface in the prosecution of its business . . . .”).
41 Akers, 736 S.W.2d at 299.
42 Id. But see McIntire v. Marian Coal Co., 227 S.W. 298 (Ky. 1921).
owner to the surface. As mentioned above, Kentucky courts consistently have recognized that, at its base, the mineral grantee under a broad form deed has the exclusive right to “use of the surface of a tract of land in the prosecution of its business for any purpose of necessity and convenience.”\footnote{Pike-Floyd Coal Co. v. Nunnery, 24 S.W.2d 614, 615 (Ky. 1929).} However, Kentucky courts also have focused upon the language commonly found within a “broad form” deed granting the mineral owner “exclusive right of ways” for such structures as railroads, pipelines, tramroads, haul roads, telephone and telegraph lines, and “other ways”.\footnote{See, e.g., Columbia Gas Transmission Corp. v. Consol of Ky., Inc., 15 S.W.3d 727, 728-729 (citing Harry Caudill, \textit{Their Be the Power: The Moguls of Eastern Kentucky} (U. of Ill. Press 1983); Carolyn Clay Turner and Carolyn Hay Traum, \textit{John C.C. Mayo Cumberland Capitalist} (Pikeville College Press 1983).} In interpreting this “exclusive rights of way” language in a “broad form” deed, the Kentucky Supreme Court, in \textit{Elk Horn Coal Corp. v. Kentucky-West Virginia Gas Co.} (“Elk Horn”),\footnote{Elk Horn Coal Corp. v. Kentucky-West Virginia Gas Co., 317 S.W.2d 472 (Ky. 1957).} found that the language “did not purport to convey an easement, but rather ownership of the surface as concerned future grants of easements . . . [i]he grantee did not receive a mere easement, but the easement granting power.”\footnote{\textit{Id.} at 475.} Thus, the mineral grantee, based upon the language of the “broad form” deed, would control the surface estate in regards to all grants of future easements upon and across the surface, and “would have complete ownership of the surface as concerns right of way uses.”\footnote{See Columbia Gas Transmission Corp., 15 S.W.3d at 730 (quoting \textit{Elk Horn}, 317 S.W.2d at 475-476).}

The Kentucky Supreme Court relied on the \textit{Elk Horn} decision regarding the ownership of “easement granting” power to recognize additional rights of the mineral owner under a broad form deed. In \textit{Hazard Coal Corp. v. Knight} (“Hazard Coal”),\footnote{Hazard Coal Corp. v. Knight, 325 S.W.3d 290 (Ky. 2010).} the mineral owners used a coal haul road to haul coal mined from other, non-adjacent mineral tracts. The “broad form”
deed in *Hazard Coal* conveyed to the mineral owner “exclusive rights-of-way” for any and all ways. The court held that, as in *Elk Horn*, the mineral owners actually held full “easement-granting” power, which was tantamount to “complete ownership of the surface as concerns right-of-way use.” As such, the mineral owners were within their rights under the deed to convey to themselves an easement across the surface for transporting coal mined from other tracts.

While, over the years, Kentucky law consistently has recognized the wide spectrum of rights granted to a mineral owner pursuant to a “broad form” deed, the judicial and legislative arms of Kentucky have shifted positions in regards to what uses of the surface were contemplated under these deeds. This issue was thrust to the forefront with the advent of strip mining.

In Kentucky, judicial rulings recognized an implied right to strip mine; however, the legislature and then the citizenry acted to prohibit any implied right to strip mine. The case of *Buchanan v. Watson* resulted in the finding that the broad form severance deed implied the right to strip mine, and, later, the case of *Kodak Coal Co. v. Smith* recognized an implied right to auger mining under a broad form deed. Many years later, in 1984, the Kentucky General Assembly enacted Kentucky Revised Statute (KRS) section 381.940, which limited the methods of mining available under broad form deeds to “only . . . the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed . . . .” This law effectively prevented all strip mining. A few years later, the Kentucky Supreme Court found KRS section 381.940 to be unconstitutional in the 1987 decision of *Akers v. Baldwin* (“Akers”). Subsequent to the court’s ruling in *Akers*, the citizens of Kentucky ratified Section 19(2) of the Kentucky Constitution, which was essentially identical to KRS section 381.940. Section 19(2) of the Kentucky Constitution was

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49 *Id.* at 300-301.
50 *Buchanan v. Watson*, 290 S.W.2d 40 (Ky. 1956).
53 *Akers*, 736 S.W.2d at 308-309.
54 *Id.* at 298.
found to be constitutional by the Kentucky Supreme Court in the case of *Ward v. Harding* ("Ward").\(^{55}\) Also, *Ward* held that broad form deeds would no longer be construed to imply the right to strip mine. Four years later, the Kentucky Court of Appeals was asked to determine whether Section 19(2) of the Kentucky Constitution prohibited the use of modern techniques of underground mining, such as longwall mining. In *Karst-Robbins Coal Co. v. Arch of Kentucky, Inc.*,\(^{56}\) the court held that this section was only intended and should only apply to prohibit strip mining operations. Therefore, after many years of litigation and legislation, Kentucky will not imply a coal owner’s right to strip mine.

Kentucky’s common law has long recognized the interplay between the rights of the mineral owner and the rights of the surface owner in the same real property and, in discussing the same, has stated that “the owners [of the surface and the mineral estates] must have due regard for each other and should exercise that degree of care and use which a just consideration for the rights of the other demands.”\(^{57}\) The degree of care required is measured by “the ordinary and common convenience and use under like or similar conditions.”\(^{58}\) This interplay of rights is known as the “correlative rights” doctrine.

Under the “correlative rights” doctrine, the surface owner has a reciprocal obligation to not employ his estate in a manner which interferes “with the legitimate and reasonable activities and operations of the lessee or mineral owner.”\(^{59}\) Thus, in many instances, the “correlative rights” doctrine has been applied to protect the mineral estate’s interests from unjust interference by

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\(^{55}\) *Ward v. Harding*, 860 S.W.2d 280 (Ky. 1993).

\(^{56}\) *Karst-Robbins Coal Co. v. Arch of Kentucky, Inc.*, 964 S.W.2d 419 (Ky. App. 1997).

\(^{57}\) *Jenkins v. Depoyster*, 186 S.W.2d 14, 15 (Ky. 1945).

\(^{58}\) Id. See also *Columbia Gas Transmission Corp. v. Limited Corp.*, 951 F.2d 110, 113 (6th Cir. 1991); *Higdon v. Kentucky Gas Transmission Corp.*, 448 S.W.2d 655 (Ky. 1969); *Horky v. Kentucky Util. Co.*, 336 S.W.2d 588 (Ky. 1960); *Blue Diamond Coal Co. v. Press Eversole*, 253 S.W.2d 580, 581-582 (Ky. 1952).

\(^{59}\) *Lindsey v. Wilson*, 332 S.W.2d 641, 642 (Ky. 1960)(citing Horseshoe Coal Co. v. Fields, 268 S.W. 1078 (Ky. 1925); *Jenkins v. Depoyster*, 186 S.W.2d 14 (Ky. 1945); and *Blue Diamond Coal Co. v. Press Eversole*, 253 S.W.2d 580 (Ky. 1952)).
the servient estate surface owner.\textsuperscript{60} Also, the “correlative rights” doctrine has been employed to determine the respective rights, under Kentucky law, of owners of separate mineral estates.\textsuperscript{61}

Kentucky also recognizes that implied rights run with oil and gas rights; however, unlike the rights to solid minerals such as coal, Kentucky does not recognize that oil and gas rights represent title to the oil and gas. In Kentucky, oil and gas are not owned in a way similar to solid minerals because oil and gas are fugitive (fugacious and migratory) resources. Instead, “ownership is limited to possessing an exclusive legal right to explore and, if oil or gas is found, to reduce that substance to possession and ownership.”\textsuperscript{62} Thus, while the owner of the oil and gas estate holds no legal title to the minerals in place, ownership of these fugitive resources gives the owner the exclusive right to not only explore for oil and gas and reduce the oil and gas to possession, but also to exclude others from attempting to capture these resources on the premises.\textsuperscript{63} Recognizing this “rule of capture,” the United States District Court for the Western District of Kentucky, in a matter of first impression under Kentucky law, recently held that the gas estate owner, to the exclusion of the coal estate owner, had the right to capture and reduce to possess coal bed methane gas both within and outside of the coal strata.\textsuperscript{64}

§ 5.05. New York Implied Rights.

The case of *Marvin v. Brewster Iron Mining Co.*\textsuperscript{65} is one of the oldest implied rights cases in the United States, and it has been cited by courts in

\begin{itemize}
  \item \textsuperscript{60} See, e.g., Tenneco, Inc. v. May, 377 F. Supp. 941 (E.D. Ky. 1974) (servient estate holder’s construction of paved roadway over portions of mineral estate being employed for underground pipeline constituted an unreasonable interference in mineral estate); Lindsey v. Wilson, 332 S.W.2d 641 (Ky. 1960) (surface owner liable for damages caused when his logging operations unreasonably interfered and damaged the pipelines of gas lessee).
  \item \textsuperscript{61} Columbia Gas Transmission Corp. v. Limited Corp., 759 F. Supp. 343 (E.D. Ky. 1990), affirmed 951 F.2d 110 (6th Cir. 1991).
  \item \textsuperscript{62} Rice Bros. Mineral Corp. v. Talbott, 717 S.W.2d 515, 516-517 (Ky. App. 1986) (internal citations omitted).
  \item \textsuperscript{63} See Sellars v. Ohio Valley Trust Co., 248 S.W.2d 897, 900 (Ky. 1952).
  \item \textsuperscript{64} See Michael F. Geiger, LLC v. U.S., 456 F. Supp. 2d 885, 888-890 (W.D. Ky. 2006).
  \item \textsuperscript{65} Marvin v. Brewster Iron Mining Co., 55 N.Y. 538 (1874).
\end{itemize}
many states in support of implied rights. In this case, the mineral owner’s operations resulted in subsidence, deposits of ore and rubble on the surface, construction of buildings, blasting day and night, and the continuous operation of a steam engine, among other things. This was an extreme case of the mineral owner imposing upon the rights of the surface estate. The Appellate Court embarked upon an encyclopedic review of prior case law stretching back to old English cases and reviewed the various holdings of those cases in light of the facts of the case then before the court. The court found that the right to work a mine “carries with it the right to penetrate to the minerals through the surface of the land conveyed, for the purpose of digging them out and removing them.”66 Included in this implied right to break through the surface is the right to penetrate “in [the] manner as is most advantageous to the owner of the right to mine, so that the surface is not wholly destroyed.”67 The exercise of this implied right is subject to the restriction that “what [the mineral owner] does [must be] necessary for him to do for the reasonable use and enjoyment of his property in the minerals.”68

In addition, a mineral estate in a tract of land “carries with it the right to such access over the surface that may be reasonably necessary to carry on mining activities.”69 This implied right to access over the surface is not lost by a subsequent conveyance of a portion of the surface estate.70 Furthermore,

66 Id. at 550.
67 Id.
68 Id.
70 See Allen, 247 A.D.2d at 692-693 (holding that a subsequent conveyance of a portion of the surface of a large tract wherein mineral rights have been previously conveyed “cannot limit or restrict the use to be made of the surface of the subsequently conveyed portion”). See also Schleuter v. Shawnee Operating Co., 141 Misc. 2d 1000, 535 N.Y.S.2d 867 (Sup. Ct., Erie County 1988).
the mineral interest owner not only has the right “to enter upon the premises and make proper excavations” but also to “build proper structures for the necessary purposes of mining.”71

It is also well settled that an owner of mineral rights in New York has an implied right to “keep pace with the progress of invention and ingenuity, so far as is necessary to a profitable working of his property in competition with rivals.”72 In view of this implied right, the mineral owner “may adopt new and improved methods, which are usually availed of in the same business, when the use of them is necessary to him.”73

On the other hand, the implied rights of the mineral owner, as restricted by the rule of necessity, do not ordinarily extend to “the use of the surface for the lengthened keeping of his ore.”74 Implied rights likewise do not ordinarily extend to the use of the surface for “the long-continued deposit of the rubbish from the mine, or for the erection of buildings for the storage of materials, the housing of animals or the use of artisans.”75

For oil and gas rights in New York, the case of Miles v. Home Gas Co.76 is instructive. In this case, the holder of the natural gas rights sought to use the depleted strata for natural gas storage. In denying the use of the property for storage, the court stated: “While a grant of production rights will include the right to conduct all operations necessary to extract those minerals, such a grant alone cannot be construed to include the right to store gas piped in from foreign fields.”77 Therefore, while the court did find that implied rights may be available to the owner and operator of the natural gas rights, the court also decided that implied rights cannot be used to make the surface estate servient to other mineral estates.

72  Marvin v. Brewster Iron Mining Co., 55 N.Y. at 551.
73  Id.
74  Id., at 553.
75  Id.
77  Id. at 1043.
Ohio Implied Rights.

Ohio appellate courts have recognized the well-settled law on implied mining rights in Ohio as developed by the Ohio Supreme Court:

We begin by noting that under Ohio law, it is possible for the total interest in real property to be divided in such a way that the surface estate is severed from the mineral estate. See, generally, Quarto Mining Co. v. Litman (1975), 42 Ohio St. 2d 73, 326 N.E.2d 676; Gill v. Fletcher (1906), 74 Ohio St. 295, 302, 78 N.E. 433; Pure Oil Co. v. Kindall (1927), 116 Ohio St. 188, 201-202, 156 N.E. 119. When a deed grants or reserves the minerals, but does not specifically mention the grant or retention of the right to explore for and extract the minerals, such a right is implied. Quarto Mining, 42 Ohio St. 2d at 83.

Thus, the mineral owner’s implied right to use the surface is well recognized in Ohio.

A frequently cited Ohio decision on implied mining rights is the Ohio Supreme Court’s decision in Quarto Mining Co. v. Litman (“Quarto Mining”). In the Quarto Mining case, the coal operator sought to use the surface owner’s property to run a coal conveyor over the property. The coal deed stated that the coal owner could use the surface property to transport coal from other lands, and the deed included an option to purchase the surface for purposes necessary to the coal operations. As in the Thelkeld v. Inglett case in Illinois, supra, the plaintiff sought specific performance of the option, and the defendant claimed that the option was invalid because it violated the rule against perpetuities. The Supreme Court of Ohio agreed

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79 Quarto Mining Co. v. Litman, 326 N.E.2d 676 (Ohio 1975).
with the rationale of *Thelkeld v. Inglett* and other cases. In rendering its decision, the court states:

> The mining of a deposit inevitably requires some use of the surface for the sinking of shafts, rights of way for removal of the minerals, and other such uses dependent upon the type of mining operation. Unless the language of the conveyance by which the minerals are acquired repels such construction, a severed mineral estate is considered to include those rights to use of the surface as are reasonably necessary for the proper working of the mine and the obtaining of the minerals.\(^80\)

The court reasoned that the mineral owner’s implied right is based on “a practical attempt to insure that both he, and the surface owner, can enjoy their respective estates” and the principle “to mutually accommodate the owner of the mineral estate and the owner of the surface estate in the enjoyment of their separate properties.”\(^81\) Therefore, the court in *Quarto Mining* determined that the right of a mineral owner to use the surface is a right that always runs with the mineral, and the mineral and the surface are mutually dominant and servient.

The implied right of the mineral owner to use the surface estate to obtain the minerals, however, is not an unqualified or unlimited right. For example, the implied right to use the surface estate to obtain minerals does not include the right to strip mine.\(^82\) In the case of *Skivolocki v. East Ohio Gas Co.*, the Ohio Supreme Court held that an option to purchase surface property did not give an unqualified right to use the surface including the right to strip mine.\(^83\)

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\(^{80}\) *Id.*, at 83.

\(^{81}\) *Id.*, at 84-85.

\(^{82}\) *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St. 2d 244 (1974).

\(^{83}\) *Id.*, at 247, fn. 1; *see also*, Graham v. Drydock Coal Co., 76 Ohio St. 3d 311 (1996); Pleasant Valley Beagle Club, Inc. v. Glen-Gery Corp., 1973 Ohio App. LEXIS 2001 (Ohio App. 7th Dist. 1973).
Similarly, although there is an implied right of necessity to use the surface estate to explore, drill, and carry away minerals underneath the surface estate, such rights are limited as to what may be “necessary for the complete enjoyment of the different estates conveyed.” The question then becomes what is considered a “necessary” use of the surface.

In the case of Chartiers Oil Co. v. Curtiss ("Chartiers Oil"), the court sought to describe the rights of a mineral estate owner to use the surface estate to explore and drill for oil and gas where the court found an implied right to use the surface estate because there was no express deed reservation or grant. In particular, the court permitted the following:

It follows that the [mineral estate owner] has the right to drill for oil and gas upon the lands of the [surface estate owner] described in the petition, together with such right of ingress and egress upon the surface of said lands as may be necessary for that purpose, and that the court has power to enforce such right in the manner sought to be done in this action. It would also have the right to a reasonable use of the surface on which to place derricks and other necessary machinery for drilling its wells.

However, the court limited the mineral owner’s rights to use the surface estate, including the storage of oil and gas and the number of wells. Therefore, the Chartiers Oil case clarifies that the mineral owner may exercise its implied rights only to the extent that such exercise is necessary.

In Fowler v. Delaplain, the Ohio Supreme Court construed a lease agreement providing: “the exclusive right to mine for and produce petroleum and natural gas from and the possession of so much of 430 acres of land . . . as may be necessary therefor.” The Ohio Supreme Court reasoned that the following uses of the surface estate are “necessary” for mining and

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84 Chartiers Oil Co. v. Curtiss, 1911 Ohio Misc. LEXIS 241, at *5 (emphasis added).
85 Id., 1911 Ohio Misc. LEXIS 241.
86 Id., at *9.
87 Id.
88 Fowler v. Delaplain, 79 Ohio St. 279 (1909).
producing oil and gas: “stationing and operating machinery, tanks, pipes, and the like, with the right of passage to and from the same.”

In *J.R. Operating Co. v. Lindsay*, the appellate court affirmed the judgment that an oil company had a right of access onto the landowners’ surface estate to obtain its minerals beneath the surface estate, but also affirmed the lower court’s limitations as to the company’s access road, including limitations on the location and size of the road. The appellate court reasoned that such limitations were “narrowly tailored to protect [the landowners] from any unreasonable intrusion.”

Ohio courts recognize that the surface owner holds a right of support, unless it is expressly conveyed to the coal owner. In Ohio, an “owner of the land has the right to subjacent support, and any conveyance or waiver of this right must clearly appear in the instrument conveying the estate.” Therefore, Ohio courts will not imply a right to fully extract the coal.


In Pennsylvania, the early case of *Chartiers Block Coal Co. v. Mellon* ("Chartiers Block"), determined implied rights for both coal and oil/gas rights. In the *Chartiers Block* case, the surface owner granted the coal, along with the full right of removal, and later discovered that oil and gas lay beneath the coal. The surface owner then granted oil and gas leases, and the lessees sought to drill through the coal seam to get at the oil and gas. The coal company sought an injunction, but was refused one. The court stated:

As against the owner of the surface . . . purchasers [of the mineral estate] . . . have the right, without any express words of grant for that purpose, to go upon the surface to open a way by shaft, or drift, or

89  *Id.*, at 289.
90  *J.R. Operating Co. v. Lindsay*, 1997 Ohio App. LEXIS 2999 (Ohio App. 7th Dist. 1997).
91  *Id.*, at *6.
92  *Quarto Mining*, 42 Ohio St. 2d at 83-84 (citing Ohio Collieries Co. v. Cocke (1923), 107 Ohio St. 238, 140 N. E. 356).
well, to his underlying estate, and to occupy so much of the surface beyond the limits of his shaft, drift, or well, as might be necessary to operate his estate, and to remove the product thereof.94

The court clarified that the minerals could be owned by different parties, with each party possessing the right to enter the property and dig or drill down to the minerals in order to produce them. The court also clarified that the oil and gas lessee had the implied right to drill through the coal to get to the oil and gas.

In a later case, the Pennsylvania Supreme Court affirmed that the rights of a coal owner to make use of the overlying surface are not necessarily limited to those specifically stated in the coal severance instrument. This general principle was summarized by the Pennsylvania Supreme Court in *Baker v. Pittsburg C. & W.R. Co.*:95

[T]he principle that “one who has the exclusive right to mine coal upon a tract of land has the right of possession even as against the owner of the soil so far as it is necessary to carry on his mining operations” is laid down in *Turner v. Reynolds*, 23 Pa. 199. See also *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286.

The general rule is stated in 2 Lindley on Mines, sec. 813, where it is said: “A grant of minerals implies the right to win them from the underlying soil. The use of some portion of the surface is necessary for the proper enjoyment of this right. To reach the minerals the miner must pass from the surface downward; to do this he has a right of way of necessity. He may sink through such land from the surface to the mines, in order to reach and work them.” And in *Sugdon on Mines and Mining*, sec. 1008, it is said: “An express grant of all the minerals and mining rights in a tract of land is by natural implication the grant also of the right to open and work the...
mines, and to occupy for those purposes as much of the surface as
may be reasonably necessary.”

Also, in Friedline v. Hoffman, the court stated: “[w]here a vendor of
the surface reserves the coal, with no stipulation as to the mining thereof,
he will be entitled to such use of the surface as is necessary to make his
reservation effective (cite omitted).” In a more recent case, McMillen v.
Rochester & Pittsburgh Coal Co., the court relied on this general rule
stating: “It is, therefore, clearly apparent that defendant company had
the implied right under the deed to the coal to sink a shaft on plaintiffs’
land where ever it became reasonably necessary for the operation of the
mine. This right is inseparable from the right to mine the coal.” Most
recently, this general common law principle was cited with approval by the
Pennsylvania Supreme Court (albeit in the oil and gas context) in Belden
& Blake Corporation v. Commonwealth of Pennsylvania, Department of
Conservation & Natural Resources, where the court stated:

We find partial summary judgment in [plaintiff’s] favor was
warranted. Beldon & Blake has the right to enter the surface
property to access what it owns. . . .“One who has the exclusive
right to mine coal upon a tract of land has the right of possession
even as against the owner of the soil, as far as it is necessary to
carry on mining operations.” Turner v. Reynolds, 23 Pa. 199, 106
(Pa. 1854).

Therefore, there are numerous cases in Pennsylvania that hold that a
mineral owner has the implied right to use the surface property for mineral
operations.

96 Id. at 1015-1016.
98 Id., at 846.
100 Id., at 379.
101 Belden & Blake Corp. v. Commonwealth of Pa., Dep’t of Conservation & Natural Res.,
969 A.2d. 528, 532 (2007).
As in other states, these implied rights are not unlimited. First, a right to make use of another surface will be “implied” only if such use is actually necessary: “[A] mining right . . . will be implied only when an absolute necessity or its equivalent is shown to exist in order to give effect to a grant or reservation of underlying coal, so that it may feasibly be mined and removed, and not merely upon a showing or claim of convenience (cites omitted).”

Whether a use of another surface is “necessary” (and thus can be implied) “may be determined by reference to what is customary, and is a question of fact.” Thus, in the case of Eastern Gas & Fuel Associates v. Kalp, and even though the coal operator had a right to remove all the coal beneath the surface “[t]ogether . . . with all mining rights and privileges necessary and convenient to such mining and carrying away of the same . . .,” the court declined to imply a right to install a 2,000 foot high tension electric transmission line and transformer on the surface because it was not shown to be “necessary” to mine and remove the coal beneath the surface.

Second, as a general rule, implied rights are limited to a right to use the overlying surface only to mine the coal beneath that area and not “other coal,” or coal on adjoining lands. Thus, there is no implied right to haul coal mined from beneath Parcel A across the surface of Parcel B. An important exception to this principle is that there does exist an “implied right” to transport coal mined from Parcel A underground through workings mined beneath Parcel B:

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It is generally held that a grantee of coal in place, with license to mine and remove it, in the absence of express stipulation, may, at any time before the coal is all removed, [e.g., pillars remain in place to support openings and mains] use the passage opened for its removal for the transportation of coal from . . . adjoining lands.\textsuperscript{107}

Third, even if “necessary” an implied use of another’s surface must be exercised with “due regard to the owner of the surface, and its exercise will be restrained within proper limits by a court of equity, if this becomes necessary.”\textsuperscript{108}

Pennsylvania courts have also considered the issue of whether to recognize an implied right to employ new mining methods and equipment. In the case of \textit{Culp v. Consol Pennsylvania Coal Company},\textsuperscript{109} the court held that a deed which conveyed “all the coal” and the right to mine it “without leaving support,” and which pre-dated the prevalent use of longwall mining, should be interpreted to allow for the use of longwall mining. The court stated: “The right to work the mine involves the right. . . to use such means and processes in mining and removing (minerals) as may be necessary in the light of modern improvements in the arts and sciences.”\textsuperscript{110} Therefore, Pennsylvania courts will recognize an implied right to employ new mining methods and equipment.

§ 5.08.  Virginia Implied Rights.

A discussion of implied mining rights in Virginia begins in Alabama. On several occasions, the Supreme Court of Virginia has quoted with approval the following passage from an Alabama case, *Williams v. Gibson*:\(^{111}\)

These incidental rights of the miner, which are appurtenant to the grant of the mineral rights, are to be gauged by the necessities of the particular case, and, therefore, vary with changed conditions and circumstances. He may occupy so much of the surface, adopt such machinery and modes of mining, and establish such auxiliary appliances and instrumentalities as are ordinarily used in such business, and may be reasonably necessary for the profitable and beneficial enjoyment of his property. But he is not limited, as we have already said, to such appliances as were in existence when the grant was made, but may keep pace with the progress of society and modern invention.\(^ {112}\)

This passage has been repeatedly used by Virginia courts as the starting point for their analyses of implied rights.

Although the Supreme Court of Virginia has approved the above statement, it has also limited its application in several important respects. In *Stonegap Colliery Co. v. Hamilton*,\(^{113}\) the court held that a reservation of “all the coal” and the right to mine it did not include a right to remove subjacent support. “It is hardly to be supposed,” said the court, “that either the grantor or the grantee . . . for a moment contemplated the reservation . . . would enable the grantor to totally destroy the subject matter of the conveyance, or at least render it largely useless.”\(^ {114}\) Therefore, the right to

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113  *Stonegap Colliery Co. v. Hamilton*, 89 S.E. 305 (Va. 1916).
114  *Id.* at 311.
fully extract coal (and leave no support) is not recognized as an implied right under Virginia common law.

This interpretation of mining rights continued in Clayborn v. Camilla Red Ash Co.\textsuperscript{115} where the Supreme Court of Virginia held that a coal owner did not have the right to haul coal from other lands through entries underlying plaintiff’s surface property.\textsuperscript{116} Based on Stonegap Colliery and Clayborn, the Supreme Court of Virginia has also held that a broad form mineral deed does not authorize strip mining.\textsuperscript{117}

By contrast, the Supreme Court of Virginia has held that a mine owner may drain polluting waters onto the surface. “Drainage,” the court said, “is fundamentally inherent where a mine owner is given the right to ‘all other usual mining privileges necessary for the full enjoyment of the premises hereby granted.’”\textsuperscript{118} Likewise, in Large v. Clinchfield Coal Co.,\textsuperscript{119} the court ruled that subsidence alone, without appreciable damage to the surface, is not a violation of the surface owner’s right to subjacent support.

More recently, in Levisa Coal Co. v. Consolidation Coal Co.,\textsuperscript{120} the court relied on Clayborn to hold that a lessee did not have an implied right to deposit wastewater from other lands on the lessor’s property. “We can discern no practical distinction between supporting adjoining mining operations by using tunnels and shafts to transport coal, as in Clayborn, and the storing of wastewater from such operations in the voids, tunnels and shafts of an unrelated mine, as in this case.”\textsuperscript{121}

The Court of Appeals for the Fourth Circuit has attempted to harmonize the Virginia cases by introducing a reasonable use rule.\textsuperscript{122} Under this rule,

\textsuperscript{116} Id. at 121-22. But see Va. Code § 55-154.2 (creating a presumption that owner of minerals owns the underground entries).
\textsuperscript{117} Phipps v. Leftwich, 222 S.E.2d 536 (Va. 1976).
\textsuperscript{118} Oakwood Smokeless Coal Corp., 34 S.E.2d at 397.
\textsuperscript{119} Large v. Clinchfield Coal Co., 387 S.E.2d 783, 786 (Va. 1990).
\textsuperscript{120} Levisa Coal Co. v. Consol. Coal Co., 662 S.E.2d 44 (Va. 2008).
\textsuperscript{121} Id. at 52.
\textsuperscript{122} Mullins v. Beatrice Pocahontas Co., 432 F.2d 314 (4th Cir. 1970).
a mine operator can do what is “reasonably necessary” to mine the coal, but he cannot burden the surface estate with damages that the operator can “reasonably control.” The court acknowledged that this rule creates “an issue of fact to be determined by the evidence.”

§ 5.09.  **West Virginia Implied Rights.**

Under long-standing West Virginia law, “[t]he owner of the mineral underlying land possesses, as incident to this ownership, the right to use the surface in such manner and with such means as would be fairly necessary for the enjoyment of the mineral estate.” Ownership of a mineral estate implies “the right to enter upon and use the superjacent surface by such manner and means as is fairly reasonable and necessary to reach and remove the minerals.” “When anything is granted, all the means of obtaining it, and all the fruits or effects of it are also granted.” This general legal framework was clearly summarized by the Fourth Circuit Court of Appeals in *Justice v. Pennzoil Co.* In *Justice*, the court noted that the issue of whether there has been unreasonable use of the surface by the mineral owner is a question of fact.

However, the implied rights associated with the right to use the surface to access subsurface minerals are not unlimited. “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 the extraction of the minerals.” When what is sought is enforcement of implied mining rights, “it must be demonstrated not only

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123 *Id.* at 319.
124 *Id.*
125 Squires v. Lafferty, 121 S.E. 90 (W. Va. 1924).
129 *Id.*, at 1341-42 (citing Adkins v. United Fuel Gas Co., 61 S.E.2d 633, 635-36 (W. Va. 1950)).
130 Buffalo Mining Co. v. Martin, 267 S.E.2d 721 (W. Va. 1980).
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.”\(^\text{131}\) Some examples of generally recognized implied rights include the right to transport mining equipment onto the surface, conduct test drilling, construct a coal tipple or other necessary structures for the extraction of the minerals, and to mine the minerals “in the usual method that was known and accepted as common practice” in the county at the time the mineral rights were granted.\(^\text{132}\)

“[I]mplicit mining rights are not excluded by the grant or reservation of supplemental rights which would not be implied.”\(^\text{133}\) Courts do, however, use the extent of any express surface rights granted or reserved as part of its substantial burden analysis. When “the severance deed contains broad rights for utilization of the surface in connection with underground mining activities and these broad rights are coupled with a number of specific surface uses, courts will be inclined to imply compatible surface uses that are necessary to the underground mining activity.”\(^\text{134}\) Similarly, any limitations imposed upon express rights will also be imposed on implied rights.\(^\text{135}\)

In the case of \textit{Buffalo Mining Co. v. Martin},\(^\text{136}\) the surface owners sought to construe the language of an 1890 coal severance deed as barring the mineral owners from constructing an electric power line over their property.\(^\text{137}\) The court found, however, that constructing an electric power line was an implied right.\(^\text{138}\) The court noted that the grant included “a number of express surface rights, including the compatible use of telephone and telegraph lines,” as well as a “general grant of ‘all proper and reasonable

\begin{itemize}
\item \(^\text{131}\) \textit{Id.}
\item \(^\text{133}\) \textit{Cole}, 150 F. Supp. at 815.
\item \(^\text{134}\) \textit{Buffalo Mining Co.}, 267 S.E.2d at 725.
\item \(^\text{135}\) \textit{Cole}, 150 F. Supp. 808.
\item \(^\text{136}\) \textit{Buffalo Mining Co.} at 721.
\item \(^\text{137}\) \textit{Id.} at 725.
\item \(^\text{138}\) \textit{Id.}
\end{itemize}
rights and privileges for ventilating and draining the mines and wells.”139 As the surface owners had failed to raise the issues of undue burden and unreasonable use of the surface at the trial court level, these issues were not before the state Supreme Court.140

Consistent with the treatment of other minerals, included in the rights implied in a severance of coal is “the right to enter upon and use the superjacent surface by such manner and means as is fairly reasonable and necessary to reach and remove the minerals.”141 Due to these surface rights vested in the coal rights holder, a surface owner may not “cause unnecessary injury” to the coal rights holder in the exercise of its surface rights.142

An important issue that the West Virginia Supreme Court of Appeals has addressed is whether the owner of the coal estate has an implied right to transport coal from other lands over the surface or through underground passageways. The court will not imply the right to use the surface to transport coal from other tracts unless such use does not materially prolong or increase the burden upon the surface estate.143 The reason for this is that a coal rights holder “has an implied right, by reason of necessity, to mine its own coal under a given tract, but with respect to coal from other tracts, there is no such necessity and therefore there are no such implied rights.”144 In the circumstance where a mineral rights holder owns all of the minerals between “a stratum near the top of the surface and the center of the earth,” as opposed to just the coal, it may use the space created by removal of the coal to transport coal from other adjoining tracts.145 In circumstances where only the coal estate is owned, the court has opined that an implied right exists to use the underground passageways created in coal mining to transport coal from other adjoining parcels, but only as long as the coal underlying the

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139 Id.
140 Id. at 726.
141 Phillips, 458 S.E.2d at 332.
142 See McKell v. Collins Colliery Co., 33 S.E. 765 (W. Va. 1899).
144 Cole, 150 F. Supp. at 817 (applying Chafin).
burdened parcel is not exhausted or abandoned and the mining continues with due diligence.\textsuperscript{146}

In *Phillips v. Fox*,\textsuperscript{147} the Supreme Court of Appeals of West Virginia, continuing an earlier path of precedent, set out when an implied right to strip mine may arise. The court held:

The grant of a right to surface mine may be express or implied. The right to surface mine will only be implied if it is demonstrated that, at the time the deed was executed, surface mining was a known and accepted common practice in the locality where the land is located; that it is reasonably necessary for the extraction of the mineral; and that it may be exercised without any substantial burden to the surface owner.\textsuperscript{148}

Therefore, when the mineral estate is conveyed away by the fee simple owner, the right to engage in surface mining will only be implied when all three of the above elements are met.

In *Brown v. Crozer Coal & Land Co.* ("Brown"),\textsuperscript{149} the court has also applied reasoning similar to *Phillips* to hold that an old coal severance deed did not imply the use of the auger method of mining coal.\textsuperscript{150} The court held in *Brown* that because the severance deed was executed in 1900 and auger mining was not a common and accepted practice of mining in Wyoming County at that time, the coal rights holder did not have the right to engage in auger mining.\textsuperscript{151}

Further, the court has held that a surface owner retains the right to support of the surface in its natural state, but that right may be released or waived by the surface owner.\textsuperscript{152} Accordingly, to the extent that this absolute right

\begin{itemize}
    \item \textsuperscript{147} Phillips, 458 S.E. 2d at 327.
    \item \textsuperscript{148} Id.
    \item \textsuperscript{149} Brown v. Crozer Coal & Land Co., 107 S.E.2d 777 (W. Va. 1959).
    \item \textsuperscript{150} Id.
    \item \textsuperscript{151} Id. at 786-87.
    \item \textsuperscript{152} Schultz v. Consol. Coal Co., 475 S.E.2d 467, 476 (W. Va. 1996).
\end{itemize}
of support has not been waived, a mineral rights holder may not engage in longwall mining if doing so will disturb the surface.\(^{153}\)

Consistent with the treatment of other minerals, included in the rights implied in a severance of natural gas are the rights to use the surface “as would be fairly necessary for the enjoyment of the mineral estate.”\(^{154}\) “[A] grant of the right to explore and operate for oil and gas carries with it an implied right to use as much of the surface as is reasonably necessary to an exercise of such right.”\(^{155}\) Among these rights are the implied rights to build a road in order to transport drilling equipment onto the land, to run pipes across the surface, and to dig drainage pits.\(^{156}\) Also, drilling rights imply the right to retain and release salt water on the premises.\(^{157}\) However, the Supreme Court of Appeals of West Virginia has held that the right to extract gas does not include the right to use the underground space vacated by the extraction of the gas for other purposes.\(^{158}\)

In construing the implied rights of a mineral rights holder in the context of an oil and gas lease, the court will look to whether the practice sought to be implied was a common practice in the area of the parcel at the time the lease was executed.\(^{159}\) With respect to methane gas, West Virginia does not appear to distinguish between coalbed methane and coal mine methane in determining the rights of the parties.\(^{160}\) “In the absence of specific language to the contrary or other indicia of the parties’ intent, an oil and gas lease does

\(^{153}\) Id. at 476. But see, Griffin v. Fairmont Coal Co., 53 S.E. 24 (W. Va. 1905)(holding that a conveyance of “all” coal necessarily includes the right to subside the surface).

\(^{154}\) Adkins, 61 S.E.2d 633; See also, Buffalo Mining Co., 267 S.E.2d at 726, n.4 (“[The West Virginia Supreme Court of Appeals does] not, nor do other courts, make a distinction between the extent of the right to surface use under coal severance deeds and oil and gas or other mineral severances.”).


\(^{156}\) Id. at 636.


\(^{158}\) Tate v. United Fuel Gas Co., 71 S.E.2d 65, 71 (W. Va. 1952).


\(^{160}\) Id. at 142.
not give the oil and gas lessee the right to drill into the lessor’s coal seams to produce coalbed methane gas.”

§ 5.10. **Use of the Surface by the Mineral Owner Must Be “Necessary.”**

The states in this chapter identify the legal standard for allowing the mineral owner to use the surface property as being whether the surface use is “necessary” for mineral exploration, production and/or transportation. In the Illinois case of *Threlkeld v. Inglett, supra*, the court states: “. . . the grantor not only conveyed the thing specifically described, but all other things, so far as it was within his power to pass them, which were necessary to the enjoyment of the thing granted.”

In Indiana, the court stated in *Ingle v. Bottoms, supra*: “It is well settled that, when anything is granted, whatever is necessary or essential to the enjoyment of the grant is also granted. . . . The question of how much of the surface is reasonably necessary for the proper operation of the mine is a question of fact, and not of law.”

Kentucky case law states that “where a man grants a thing, he grants with it everything necessary to its enjoyment . . . .” It is well established in New York that a grant or reservation of mineral rights “will include [by implication] the right to conduct all operations necessary to extract those minerals.”

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161 *Id.*
162 *Threlkeld*, 289 Ill. at 96-97 (emphasis supplied). *See also* Jilek v. Chicago, Wilmington & Franklin Coal Co., 382 Ill. 241 (1943)(“A mineral deed executed by the owner of the fee carries not only title to solid minerals, but also to what is necessary to acquire title to or possession of fluid or fugacious minerals . . . .” 382 Ill. at 248)(emphasis supplied).
164 *Himler Coal Co. v. Kirk*, 266 S.W. 355, 356 (Ky. 1924)(emphasis supplied).
enjoyment of the different estates conveyed.”  

In Pennsylvania, “a mining right . . . will be implied only when an absolute necessity or its equivalent is shown to exist in order to give effect to a grant or reservation of underlying coal, so that it may feasibly be mined and removed, and not merely upon a showing or claim of convenience (cites omitted).” Furthermore, in Pennsylvania, whether a use of surface is necessary (and thus can be implied) “is a question of fact.” In Virginia, the Court of Appeals has decided that a mine operator can do what is “reasonably necessary” to mine the coal, but the mine operator cannot burden the surface estate with damages that the operator can “reasonably control.” The Virginia Court of Appeals acknowledged that this rule creates “an issue of fact to be determined by the evidence.” West Virginia case law states that the mineral owner possesses “the right to use the surface in such manner and with such means as would be fairly necessary for the enjoyment of the mineral estate.” In summary, the legal standard that is applied in Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia and West Virginia to determine the implied right of the mineral owner to use the surface property is whether the surface use is “necessary,” and this inquiry is a question of fact.

§ 5.11. “Necessary” Means Reasonable Use, Taking Into Account Competing Uses.

Although the courts state in their opinions that the legal standard for a mineral owner’s use of the surface is whether the use is “necessary,” the

166 Chartiers Oil Co., 1911 Ohio Misc. LEXIS 241, at *5 (emphasis supplied). See also Quarto Mining Co. v. Litman (1975), 326 N.E.2d 676, 684 (“a severed mineral estate is considered to include those rights to use of the surface as are reasonably necessary for the proper working of the mine and the obtaining of the minerals.”)(emphasis supplied).
170 Id.
171 Squires v. Lafferty, 121 S.E. 90 (W. Va. 1924)(emphasis supplied).
analysis appears to be more of a “reasonableness” standard, taking into account the surface owner’s and the mineral owner’s competing uses of the surface. Alternatively stated, the courts view the relationship between the mineral owner and the surface owner as mutually dominant and servient. Therefore, the surface owner cannot unduly interfere with the mineral owner’s use of the surface, and the mineral owner cannot unduly interfere with the surface owner’s use of the surface. Alternatively stated, courts balance the mineral owner’s and the surface owner’s respective needs to use the surface, taking into account the necessity of the surface use by the mineral owner, provided, that if the mineral owner’s use of the surface effectively precludes the surface owner’s use of the surface or destroys the surface, the implied right to such use by the mineral owner most likely will not be recognized.


Since an implied right is determined by a factual investigation of what is “necessary,” it is also instructive to look at trends in rulings on implied rights. As a general proposition, state courts will not recognize an implied right to subside the surface property. Also, state courts generally hold that the surface property above one mineral holding cannot be used to explore for, produce and/or transport minerals underlying other surface property; however, some state courts have held that the use of subterranean passages under one property can be used to benefit other properties. Furthermore, some state courts hold that the right to strip mine a parcel of property cannot be implied; however, other state courts state that strip mining may or may not be implied, depending upon the facts of the case. Another area where courts from state-to-state issue fairly uniform rulings on a given “implied right” is the mineral owner’s implied right to employ new technology and methodologies, provided, that some states have specifically banned certain methodologies.


Courts in Illinois, Kentucky, Ohio, Pennsylvania, Virginia and West Virginia will not imply the right to subside the surface. The typical analysis
is that the surface owner is entitled to hold the property in its natural state, and in order for the mineral owner to subside the surface, the surface owner must explicitly waive the right of “support.” If the right of support is not explicitly waived, courts in these states will not find an implied right to remove support from the surface property.

In Illinois, the legal presumption is that the owner of the mineral estate will extract the minerals without damaging the surface:

The law requires the owner of the mineral estate to extract minerals without damaging the surface, and unless there is a specific exemption of liability, the owner of the surface can recover for damages caused by sinking or subsidence caused by mining. Wilms v. Jess, 94 Ill. 464 (1980). . . Lloyd v. Catlin Coal Co., 210 Ill. 460 . . .

Therefore, if there is no explicit waiver of support, the mineral owner cannot subside the surface property and such right will not be implied.

Kentucky similarly recognizes a right of support of the surface, which right cannot be superseded by an implied right. As explained by Kentucky’s high court in Himler Coal Co. v. Kirk, supra:

[Coal company’s] reservation of the minerals in the conveyance to [surface owner] necessarily reserved to it and its grantees the right to dig through the surface of the minerals, to mine them in such a way and in such quantities as not to destroy the support of the surface, to bring these minerals to the surface, and to transport them over the surface from the opening to the market.

In Ohio, an “owner of the land has the right to subjacent support, and any conveyance or waiver of this right must clearly appear in the instrument conveying the estate.”

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172 Jilek, 382 Ill. at 252.
173 Himler Coal Co., 266 S.W. at 356.
174 See Quarto Mining, 42 Ohio St. 2d at 83-84 (citing Ohio Collieries Co. v. Cocke, 107 Ohio St. 238, 140 N. E. 356 (1923)).
In Pennsylvania, the support estate is considered to be a separate and distinct estate in land, thus, the conveyance of the support estate to the mineral owner must be express and therefore cannot be implied. In Pennsylvania, there are three separate estates in real estate: (1) the mineral estate (which includes the coal, gas and oil); (2) the surface estate; and (3) the support estate.\footnote{See Smith v. Glen Alden Coal Co., 32 A.2d 227, 234-235 (Pa. 1943), and cases cited therein.} If the coal owner owns the support estate, the coal owner has the right to fully extract the coal and, thus, subside the surface property. Conversely, where the surface owner also owns the support estate, the coal owner is required to leave coal in place so that the surface estate is not affected by subsidence. Therefore, if the coal owner in Pennsylvania does not hold the support estate pursuant to a specific grant, the coal owner’s right to subside the surface will not be implied.

The Virginia Supreme Court held in \textit{Stonegap Colliery Co. v. Hamilton}, \textit{supra}, that a reservation of “all the coal” and the right to mine it did not include a right to remove subjacent support.\footnote{\textit{Stonegap Colliery Co.}, 89 S.E. at 311.} “It is hardly to be supposed,” said the court, “that either the grantor or the grantee . . . for a moment contemplated the reservation . . . would enable the grantor to totally destroy the subject matter of the conveyance, or at least render it largely useless.”\footnote{\textit{Id.}}

The West Virginia Supreme Court of Appeals has held that a surface owner retains the right to support of the surface in its natural state, but that right may be released or waived by the surface owner.\footnote{Schultz v. Consol. Coal Co., 475 S.E.2d 467, 476 (W. Va. 1996).} Accordingly, to the extent that this absolute right of support has not been waived, a mineral rights holder may not engage in longwall mining if doing so will disturb the surface.\footnote{\textit{Id.} at 476. \textit{But see} Griffin v. Fairmont Coal Co., 53 S.E. 24 (W. Va. 1905)(holding that a conveyance of “all” coal necessarily includes the right to subside the surface).}
[3] — **Implied Right to Strip Mine: States Are Split.**

On the issue of strip mining, some state courts have held that strip mining cannot be implied, whereas other state courts hold that this is a question of fact. In Kentucky, Section 19(2) of the Kentucky Constitution provides that the interpretation of surface rights granted in mineral severance deeds must be made with reference to the methods of mining prevalent at the time the severance deed was executed. So far, its effect has only limited a mineral owner’s ability to strip mine, or, as stated in *Karst-Robbins Coal Co., Inc. v. Arch of Kentucky, Inc., supra*, “Section 19 (2) [of the Kentucky Constitution] was intended and should be applied . . . only to prohibit strip mining operations conducted pursuant to broad form deeds in the absence of the surface owner’s consent.”

Thus, as a general rule, a mineral owner’s right to strip mine will not be implied in Kentucky. In Ohio, courts have held that the implied right to use the surface estate does not include the right to strip mine. In Virginia, the case of *Phipps v. Leftwich, supra*, provides that broad form mineral deed does not authorize surface mining. The court in *Phipps* stated:

> Appellants may, of course, take advantage of developments in the operation of underground mines which modern technology may make available. Improvements in mining machinery, power, lighting, ventilation, transportation, and safety facilities may be utilized. A change, however, from underground mining, which leaves the surface substantially usable by the owner of the freehold, to surface mining, which destroys what was reserved by the grantor, is not permissible.

Therefore, in Ohio, Kentucky and Virginia, a mineral owner cannot imply the right to strip mine.

In contrast, courts in Indiana and West Virginia have categorically avoided holding that strip mining cannot be an implied right. Instead, courts

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180 *Karst-Robbins Coal Co.*, 964 S.W.2d at 425.
182 *Phipps v. Leftwich*, 222 S.E.2d at 541.
in Indiana and West Virginia have determined that where a deed is deemed to be ambiguous on the right to strip mine (e.g., the right to strip mine is not explicitly granted, yet the deed conveys “all coal”), the court will treat the issue as a question of fact. In Indiana, a series of cases have addressed this issue, culminating in the recent Seventh Circuit ruling of *American Land Holdings v. Jobe*, *supra*. The Seventh Circuit devotes a significant amount of its opinion to the conclusion that at the time of the 1903 severance deed at issue in the case, strip mining was not contemplated by the parties and thereby distinguished the case from certain prior cases which involved 1922 severance deeds at which time strip mining methods were contemplated by the parties. In West Virginia, the Supreme Court of Appeals of West Virginia set out when an implied right to strip mine may arise in the case of *Phillips v. Fox*, *supra*. The court held:

The grant of a right to surface mine may be express or implied. The right to surface mine will only be implied if it is demonstrated that, at the time the deed was executed, surface mining was a known and accepted common practice in the locality where the land is located; that it is reasonably necessary for the extraction of the mineral; and that it may be exercised without any substantial burden to the surface owner.\(^{183}\)

In West Virginia, when the mineral estate is conveyed away by the fee simple owner, the right to engage in surface mining will only be implied when all three of the above elements are met. Therefore, both Indiana and West Virginia will review the facts to determine whether a right to strip mine may be implied from a mineral deed or lease.


Another area where “implied rights” come into play is where the mineral owner desires to employ new mining and drilling methods and

\(^{183}\) *Phillips*, 458 S.E.2d at 328.
technology. Courts generally recognize that, over time, humankind will invent new devices and methods for mineral exploration, production and/or transportation that were not (and perhaps could not) be anticipated when the deed or lease was drafted. In this context, courts have recognized that a mineral owner’s right to use a new device or method to explore for, produce and/or transport minerals may be “implied.” In Indiana, courts are open to the proposition that the mineral owner can employ new technology and methods.\footnote{See Consol. Coal Co., 565 N.E.2d at 1083 (“Observing the principle of statutory construction which extends legislation to new things a species of which has already been dealt with by legislation, this court affirmed the trial court’s conclusion of law that the deed conveyed the express and implied right to make whatever use of the surface overlying the coal as was reasonably necessary in removing the coal from beneath the land.”).} It is also well settled that an owner of mineral rights in New York has an implied right to “keep pace with the progress of invention and ingenuity, so far as is necessary to a profitable working of his property in competition with rivals.”\footnote{Marvin, 55 N.Y. at 551.} In view of this implied right, the mineral owner “may adopt new and improved methods, which are usually availed of in the same business, when the use of them is necessary to him.”\footnote{Id.} In Pennsylvania, courts are open to recognizing that a mineral owner may use new technology and methods.\footnote{See Culp v. Consol Pennsylvania Coal Co., 1989 U.S. Dist. LEXIS 8193*28 (W.D.Pa. 1989)(“The right to work the mine involves the right . . to use such means and processes in mining and removing (minerals) as may be necessary in the light of modern improvements in the arts and sciences.”). See also Oberly v. H.C. Frick Coke Co., 262 Pa. 83, 104 A. 864 (1918).} Therefore, some state courts will recognize a mineral owner’s “implied right” to employ new technologies and methods for mineral exploration, production and transportation, provided, that the use of such new technology or method does not unduly burden the surface owner’s rights.

However, in Kentucky, a series of rulings on this issue led the Kentucky legislature to enact a statute (KRS section 381.940) providing in essence...
that the coal owner or operator could use only the method of coal extraction commonly known to be in use in Kentucky in the area affected at the time the deed or lease was executed. A few years after the statute was enacted, the Kentucky Supreme Court ruled that the statute was unconstitutional.\textsuperscript{188} Thereafter, the citizens of Kentucky ratified Section 19(2) of the Kentucky Constitution, which is essentially identical to KRS section 381.940. As stated above, so far in Kentucky, this Constitutional amendment has barred strip mining only.

\textbf{[5] — Surface Cannot Be Servient to Other Mineral Estates.}

Another trend of implied rights cases generally hold that the surface property above one mineral holding cannot be used to explore for, produce and/or transport minerals from other property. Kentucky courts have recognized that all rights granted by a mineral lease or deed are to be exercised solely in the mining and removal of the minerals from the premises described in and granted by the lease or deed.\textsuperscript{189} Similarly, in Pennsylvania, all implied mining rights are limited to a right to use the overlying surface only to mine the coal beneath that area and not “other coal,” or coal on adjoining lands.\textsuperscript{190} Therefore, as a general rule, the right to use surface property to benefit other mineral estates will not be implied and instead must be expressly stated in the mineral instrument.

However, some state courts have explicitly held that a mineral owner has an implied right to use subterranean passages and openings under one surface parcel to benefit mineral interests associated with other surface

\textsuperscript{188} See Akers v. Baldwin, 736 S.W.2d 294, 309-310 (Ky. 1987).

\textsuperscript{189} See, e.g., Marlowe, 171 S.W.2d at 998 (Ky. 1943)(“The mining privileges and rights contained in the lease or deed refer to coal to be produced from the land covered by the instrument and no other.”).

\textsuperscript{190} See Webber v. Vogel, 159 Pa. 235, 28 A. 226 (1893); Farrar v. Pittsburg & Eastern Coal Co., 1905 Pa. Super. LEXIS 184 (1905); and Shawville Coal Co. v. Menard, 421 A.2d 1099, 1104, n. 4 (Pa. Super. 1980)(“Any additional use of the surface beyond that needed to mine the coal under the land itself imposes an encumbrance that will not be implied unless explicitly made a part of the agreement between the parties.”).
parcels. Kentucky’s high court has held that a mineral owner has a right to use subterranean passages and openings, made in extracting minerals, in transporting and removing mineral from adjoining or adjacent mining operations without infringing upon any right of the surface owner or committing any trespass to his property. Pennsylvania also recognizes an “implied right” to transport coal mined from Parcel A underground through tunnels beneath Parcel B.

The common theme in all of these cases is that the courts will examine the mineral owner’s use or proposed use of the surface in comparison to the surface owner’s use of the surface, taking into account each party’s reasonable expectation of use and enjoyment of their property interest. If the mineral owner’s use or proposed use of the surface is “necessary” and “reasonable,” a court most likely will hold that the use is a right that is appurtenant to the mineral ownership, even if the deed does not expressly grant such a right. This is the essence of implied rights.

As mentioned above, the case law on whether a mineral owner has an implied right to engage in a particular activity is a question of whether such activity is “necessary,” which is a question of fact. When evaluating whether an activity is necessary, a judge will look into the reasonableness of that activity. The case law clearly shows that one of the ways the judges determine the “reasonableness” of the coal operator’s use of the surface is to look at how the mineral owner, lessee or operator relates to the surface owners.

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191 See Middleton v. Harlan-Wallins Coal Corp., 66 S.W.2d 30, 31 (Ky. 1933).
192 Westerman v. Pennsylvania Salt Manufacturing Co., 103 A. 539, 541 (Pa. 1918), the court states: “It is generally held that a grantee of coal in place, with license to mine and remove it, in the absence of express stipulation, may, at any time before the coal is all removed, [e.g., pillars remain in place to support openings and mains] use the passage opened for its removal for the transportation of coal from . . . adjoining lands.” See also, G.K. Lillibridge v. Lackawanna Coal Co., 22 A. 1035 (Pa. 1891); Webber v. Vogel, 42 A. 4, 1988 (Pa. 1899); and Kormuth v. United States Steel Co., 108 A.2d 907 (Pa. 1954).
§ 5.12. **Practical Tips.**

Some practical tips on how to establish that the mineral owner is acting reasonably in relation to the surface owner include communicating with the surface owners so that they understand the scope of activities and the route of ingress and egress, and working with the surface owners to determine the preferred access route and solicit advice on things like gate tending (*i.e.*, whether to leave it open or close it when the coal operator is on the property); erecting fencing around facilities to keep livestock away from surface activities; avoiding the property during hunting season; and leaving facilities in place after the surface activities have been completed (*e.g.*, leaving a roadway in place for the surface owner’s use). Ideally, the coal operator will enter into a written agreement that outlines the “dos and don’ts” of the coal operator’s use of the surface.

If the coal operator does enter into a written agreement with the surface owner regarding the use of the surface property, the coal operator must avoid waiving or appearing to waive its implied (and other) rights to the surface. For example, a surface use agreement may include the following provision:

This Agreement shall be viewed as a clarification, and not as a limitation, of CoalCo’s property rights. Landowner understands and agrees that CoalCo possesses certain rights to use the Premises for purposes associated with CoalCo’s coal mining activities, including rights granted by the coal severance deed and rights deemed by Pennsylvania courts to impliedly run with the right to mine the coal. This Agreement shall not be construed as limiting, and CoalCo hereby reserves, any and all rights to use the Premises as conferred by deed, statute or common law.

This provision may preserve the mineral owner’s implied rights whereas entering into a defined surface use agreement may be deemed to be a waiver of implied rights.

Tendering a small “inconvenience payment” helps promote good relations with the surface owner; however, the mineral owner must be careful about two things when offering payment for rights they already possess: (1) it is best to offer a standard amount for a given activity (*e.g.*, $500 for drilling an exploratory core hole) and not to vary from this standard amount; and (2)
avoid characterizing the payment as compensation for “damages” or “injury,” unless the surface owner takes full responsibility for the tax treatment of the payment and holds the coal operator harmless from the consequences of treating the payment as compensation for damages.

§ 5.13. Conclusion.

This chapter has provided a survey of case law in Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia and West Virginia on a mineral owners’ “implied rights” to use the surface estate (and, in certain instances, other mineral estates) to explore for, recover and transport minerals. This survey has revealed that the mineral owner’s use of the surface must be “necessary,” which is a question of fact. In practice, the courts look at whether the mineral owner’s use of the surface is reasonable, taking into account the competing uses for the surface and the mutual dominance and servitude of each estate in relation to the other estate. In Kentucky, for example, this concept is referred to as “correlative rights.” While there are numerous court cases addressing specific uses of the surface, there are certain trends in the court rulings, and these trends help promote an understanding of implied rights. Courts generally will not imply a right to subside the surface because the right of support is generally presumed to be held by the surface owner (i.e., the right of support must be explicitly granted to the mineral owner). States are split on whether to imply a right to strip mine, with some states categorically prohibiting any implied right to strip mine and with other states holding that the implied right to strip mine is a question of fact to be determined on a case-by-case basis. Courts generally recognize an implied right to employ new mining and drilling methods and technology (that were not contemplated when the deed or lease was executed). Also, courts generally will not allow the surface to be servient to other mineral estates. While courts generally recognize that a mineral owner or lessee has an implied right to use the surface to explore for, produce and transport the minerals underlying the surface, the issue of whether the mineral owner or lessee may use the surface for a particular purpose is a matter of inquiry into whether such surface use is necessary, taking into account the competing uses of the surface by the mineral owner and the surface owner.