

Chapter 5

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

Richard T. Miller¹
Alpha Natural Resources, Inc.
Linthicum Heights, Maryland

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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.² The earlier of the two cases, *Ewing v. Sandoval Coal and*

² See *Ewing v. Sandoval Coal and Mining Co.*, 110 Ill. 290 (1884); *Threlkeld v. Inglett*, 289 Ill. 90 (1919).