CHAPTER 9

Waivers Under SMCRA: Assuring Parity Between Estates

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§ 9.01. Introduction.

In response to concern about the adverse effects of surface mining, Congress passed, and President Carter signed, the federal Surface Mining Control and Reclamation Act of 1977 (hereinafter SMCRA or Act) imposing broad-based conditions on surface mining operations including absolute prohibitions from mining in certain situations. Much of SMCRA reflects congressional intent to regulate current and future strip mining operations to "protect society and the environment from the adverse effects of surface coal mining operations." In so doing, Congress established protections for surface estate owners that, at times, may extend beyond traditional property rights afforded those owners under state law.

This Chapter will discuss the historical struggle for legal superiority between the interests of surface and mineral owners and SMCRA's impact in shifting rights in favor of the surface estate. It focuses on (1) surface owner rights created by SMCRA's limitation on surface mining activities within 300 feet of an occupied dwelling without the occupant's waiver or consent, (2) SMCRA's water replacement requirement, and (3) SMCRA's requirement that the surface owner's consent to surface mining be obtained where the surface and mineral estates were severed prior to the issuing of a permit to mine. In these three instances, Congress significantly altered the relationship between surface and mineral owners based on specific findings that:

[M]any surface mining operations result in disturbances of surface areas that burden and adversely affect...
commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities . . ..

Congress clearly intended to protect the rights of the surface estate owner in enacting SMCRA. One of the express purposes of the Act is to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from [surface mining] operations." The net effect of SMCRA is to shift the state law superiority of the mineral estate to the surface estate owner, at least in some instances.

§ 9.02. Common Law Rights Prior To SMCRA.

[1]--Historical View of Severed Estates.

English common law recognized mineral rights as property interests capable of separation or severance from the surface estate. Accordingly, real estate values in energy producing regions have always depended on speculative mineral interests that have often been subject to special rules apart from those applying to ordinary land ownership. Having acquired mineral rights to real estate, individuals often withhold those rights from subsequent sale for speculative value.

As a general principle, courts historically viewed the mineral estate as dominant, constituting a servitude over the surface estate. The character of the property rights acquired by the mineral owner are defined by the specific language of the document and by applicable law interpreting the meaning of the severance agreement.

Under early common law, the mineral estate owner usually was deemed to hold free and uninhibited use of the surface estate to the extent reasonably necessary to explore and develop the minerals for production under any general severance. In severing the two estates, the mineral owner usually acquired the right to do all things "necessary or incidental" to its operations. Historically, courts took the position that the party reserving the minerals would not have intended to create a mineral right without providing the tangible access to develop that right. While this rule of law seemed harsh, it was not absolute. Courts tempered the rule by holding the mineral interest owner liable to the surface owner for negligence, or acts of willful or wanton conduct in certain circumstances. More recent decisions have applied a balancing test and required the mineral interest owner to exercise its right "reasonably" and with "due regard" for the rights of the surface estate owner. Under traditional common law, this meant that the mineral interest owner held an implied right of "reasonable" entry upon the surface subject to its grant or reservation. In addition, the courts required the mineral estate owner to act with "due regard" toward the rights of the surface estate owner when exercising this right, or face liability for surface damages resulting from mining operations.

[2]--Common Law Establishing the Relative Rights to Use the Surface.

The various mining states have adopted the common law establishing dominance of the mineral owner to varying degrees. Of the four states in which common law was surveyed for this Chapter, Kentucky, West Virginia, Pennsylvania, and Virginia, the case law in Kentucky most clearly reflects the dominance of the mineral estate.
In Kentucky, severance of estates has historically occurred through widespread use of "broad form" mineral deeds.\(^{(16)}\) A broad form deed contains a very long, detailed description of the rights the mineral owner receives and usually contains a provision granting the mineral owner surface rights "necessary and convenient" for the full and free exercise and enjoyment of the mineral estate. The broad form deed also typically contains an express waiver of liability for damage the mineral owner may cause to the surface estate in conducting mining operations. The surface interest retained is generally limited only to those surface rights as are consistent with the mineral rights conveyed.\(^{(17)}\)

In the 1956 decision of *Buchanan v. Watson*,\(^{(18)}\) the Kentucky Supreme Court examined the waiver of damage provision in a Kentucky broad form deed. The court held that when a mineral estate was created by a broad form deed containing a waiver of damage provision, the mineral owner is liable only for damages to the surface from its arbitrary, wanton, or malicious behavior.\(^{(19)}\) The court said:

> [T]he rule [that no damages are assessed when the surface is damaged by modern mining methods] has become so firmly established that it is a rule of property law governing the rights under many mineral deeds covering much acreage in Eastern Kentucky. To disturb this rule now would create great confusion and much hardship. . . . It is especially desirable that the law of property rights should remain stable after it has been settled.\(^{(20)}\)

The *Buchanan* court also held that the mineral deed granted the right to remove "all" the minerals and thus authorized surface mining (in addition to less destructive underground mining prevalent when most estates were severed) even though the parties to the original severance/conveyance could not have contemplated mining by the surface mining method. In support of this position, the court said that "[t]o deny the right to remove it by the only feasible process is to defeat the principal purpose of the deed."\(^{(21)}\)

Later Kentucky decisions sustained the principles outlined in *Buchanan*.\(^{(22)}\) In *Peabody Coal Co. v. Pasco*,\(^{(23)}\) the federal appellate court applied Kentucky law in the course of an extensive review of Kentucky cases and found that a common denominator among the typical Kentucky broad form mineral deeds was that each gave the mineral owner extensive rights. These rights included the right to use the surface in any manner deemed necessary or convenient or the right to remove any and all minerals on or under the land. The court also found that in these cases the parties to the deed had intended that the mineral owner's right to use the surface to remove minerals would be superior to any competing right of the surface owner.\(^{(24)}\) The court conceded that, ordinarily, an instrument severing the mineral and surface estates creates two separate and distinct estates in land but found that Kentucky courts had determined that Kentucky broad form deeds granted such overwhelming mining rights that the mineral owner, in fact, had the right to destroy the surface.\(^{(25)}\)

Environmental groups and surface owners in Kentucky were not pleased with the *Buchanan* decision. They argued in subsequent cases that its position was harsh and created hardship and uncertainty. Nevertheless, in 1968, the Kentucky court, in *Martin v. Kentucky Oak Mining Co.*\(^{(26)}\) affirmed the *Buchanan* decision, holding that a broad form deed containing a waiver of damage provision grants the mineral owner the right to use later-developed mining methods, including surface mining, without incurring liability to the surface owner for damages.\(^{(27)}\) The *Martin* court affirmatively upheld *Buchanan*, stating that "the mineral owner [under a broad form deed] bought and paid for the right to destroy the surface in a good faith exercise of the right to remove the minerals."\(^{(28)}\) The *Martin* court also followed *Peabody Coal Co. v. Pasco*,\(^{(29)}\) holding that the parties to a broad form deed intended the mineral owner's right to use the surface to be superior to
that of the surface estate.

In Watson v. Kenlick Coal Co., Inc., the federal appellate court rejected the surface owner's argument that the Buchanan decision resulted in an unconstitutional taking of private property under the Fifth and Fourteenth Amendments to the United States Constitution.

In 1974, the Kentucky General Assembly passed a statute requiring a mineral owner to secure the written consent of the surface owner before Kentucky could issue a surface mining permit. However, the Kentucky Supreme Court, in Department for Natural Resources & Environmental Protection v. No. 8 Ltd. of Virginia, held the statute unconstitutional as an invalid exercise of the state's police power. The court found the legislature's likely motivation for passing the statute was to change "the relative legal rights and economic bargaining positions of many private parties under their contracts rather than achiev[ing] any public purpose." Equally important to the mineral owner, the court found that the statute was not an environmental conservation measure because it did not prohibit surface mining, or regulate its attendant problems. Rather, the statute merely granted the surface owner the discretion to veto or permit the mineral owner's exercise of his right to mine.

The Kentucky General Assembly replied to the No. 8 Ltd. decision in 1984 by enacting the Mineral Deed Act. That statute created a presumption that the mineral owner's rights under a broad form severance deed included authority to mine only by those mining methods which could have been contemplated at the time of mineral severance. The General Assembly thereby diffused the mineral owner's superior position.

Once again the Kentucky court, in Akers v. Baldwin, ruled in favor of the mineral owner by invalidating the Mineral Deed Act. The court found that the Mineral Deed Act was an unconstitutional violation of the separation of powers and an unconstitutional impairment of the obligation of contracts.

The Akers court revisited Buchanan, reaffirming that mineral owners may employ any method of mining so long as they do not conduct mining operations in an oppressive, arbitrary, wanton, or malicious manner. However, the Akers court found that the mineral owner was liable for damages to the surface owner under the waiver of damage provision in a broad form deed when using later-developed mining methods not expressly mentioned in the deed nor in common use when the parties executed the deed.

But the court weakened the effect of its decision by expressly excluding all conveyances under Kentucky broad form deeds, as well as leases and mining operations under broad form deeds, executed between the date of the Buchanan decision (May 4, 1956) and the date of the Akers decision (July 2, 1987). After Akers, the dominance of the mineral estate in Kentucky (i.e., the mineral owner's right to surface mine) remained intact.

In 1988, Kentucky's voters altered common law by approving a broad form deed amendment to the Kentucky Constitution (Amendment). The Amendment, following almost verbatim the language of the Mineral Deed Act, creates a constitutional presumption that the intention of the parties to a broad form severance deed was that the mineral estate owner could extract coal only by methods commonly known to be in use in Kentucky in the affected area at the time the parties executed the instrument.

The constitutionality of Kentucky's Broad Form Deed Amendment was recently before Judge Siler, Chief Judge for the United States District Court, Eastern District of Kentucky, in United States v. Stearns Coal and Lumber Co. Judge Siler chose not to address the issue directly. He concluded that the severance deed in question "indicates that the parties intend the plaintiff's surface rights to be superior to the defendant's
Because of this finding, the court limited its discussion of the constitutionality of Kentucky's Amendment "under the specific facts before this Court." The court held that the defendant never had a right to surface mine the property because of the language in the severance deed. So, the court held, under these facts, the Amendment does not violate the Contracts Clause of the federal Constitution. The court also concluded that the severance deed gave the defendant no property right to surface mine. Therefore, the court held that the Amendment did not violate the Takings Clause. Similarly, the court held that the defendant was not denied Equal Protection since it never had the right under the severance deed to surface mine in the first place.

The district court went through the motion of examining the constitutionality of the Amendment contrary to the Sixth Circuit's hope that the Amendment's constitutionality "may be finally dispositive of this protracted litigation." This leaves for another day a more revealing constitutional analysis of the Amendment.

In addition to general considerations regarding the use of the surface estate, the common law addressed the relative rights of parties when water contamination or diminution occurred at the mine site, or on the surface, or underneath adjoining property. Historically in Kentucky, the mineral estate's superior right to conduct surface mining operations included the right to interfere with the surface estate owner's or adjoining landowner's water supplies. The mine operator's liability rested in nuisance or negligence.

In *United Fuel Gas Co. v. Sawyers*, a plaintiff landowner sued an oil and gas company which had drilled a gas well on an adjoining property for contaminating the landowner's water well. The Kentucky court viewed the resulting contamination or diminution as a reasonable use of the company's land, and denied liability absent a finding of negligence. The court held that:

The basis of liability for injury to property by pollution of subterranean waters from oil, gas, salt water or like substances from wells must be either negligence or nuisance. . . . Kentucky law is in accord with the "American Rule," that in the absence of negligence there is no liability if there was a legitimate and reasonable use. . . . Mining operations, being a reasonable use of land, do not, in general, make one carrying on such operations liable because percolating waters are intercepted or drawn away so as to destroy or injure springs or wells belonging to the owner of the surface or adjoining lands.

In *Elkhorn Coal Corp. v. Yonts*, the Kentucky court confirmed that "the basis of liability for injury to a [landowner's water well] is either negligence or nuisance." Following traditional common law, the court held that "[t]he question of negligence in such a case must be viewed in terms of the rights granted the owner of the minerals and those reserved to the owner of the surface." In *Elkhorn Coal Corp. v. Johnson*, the court held that the right to mine coal could not, of itself, be classified as arbitrary, wanton, or malicious conduct for purposes of enabling the surface estate owner to recover for damages to his water well caused by the mining operations.

[b]--West Virginia.

West Virginia law has also long recognized the ability to sever the surface estate from the mineral estate. As an incident to mineral ownership, West Virginia courts also recognize the right to use the surface of the land in a manner and with those means as may be fairly necessary for the enjoyment of the mineral estate.

In attempting to balance the inherently conflicting interests of the surface and mineral owner, West Virginia
courts have been reluctant to conclude that the right to use the surface to extract minerals carries with it the right to destroy the surface by strip mining, except where the right to strip mine is expressly granted.\(^{(57)}\)

In contrast to the Kentucky decisions, West Virginia courts were more protective of the rights of the surface owner, even before the enactment of state and federal legislation. For example, West Virginia courts have uniformly upheld the right of the surface estate owner to prevent strip and auger mining if not expressly allowed in the severance deed or other agreement.\(^{(58)}\) West Virginia courts have relied on the intent of the parties to the severance deed to decide which mining methods were authorized. If strip mining was not common practice in the locale at the time of the severance, courts assumed that the parties did not intend to allow that type of mining.\(^{(59)}\)

In *West Virginia-Pittsburgh Coal Co. v. Strong*,\(^{(60)}\) the court construed a 1904 severance deed granting the mineral owner the right to "mine, dig, excavate, and remove all said coal, and to remove and convey from, upon, under, and through said land . . . and waiving all claims for injury or damage done by such mining and removal of coal aforesaid and use of such privileges."\(^{(61)}\) Even with this broad grant of mining rights and waiver of damages, the court found the parties intended to preserve the surface of the entire tract subject to use by the mineral owner in mining the coal by the methods accepted as common practice at the date of severance. As strip mining was not common practice in the location in 1904, the court concluded that the severance deed did not grant the right to strip mine. The court reasoned that "if the owner of the surface has a proprietary right to subjacent support, he has at least an equal right to hold intact the thing to be supported (the surface) in the absence of a clearly expressed intention to the contrary."\(^{(62)}\)

The West Virginia court again examined this issue in *Oresta v. Romano Bros., Inc.*\(^{(63)}\) Here, an 1885 severance deed reserved all the coal and other minerals:

with the right and privilege of full and free ingress or egress in, on, beneath, and over said lands for the purpose of mining, excavating, shipping, and removing said coal and other minerals with all necessary and proper rights-of-way, roadways, and all, and every privilege necessary to the full and perfect enjoyment of the rights and privileges herein reserved.\(^{(64)}\)

The court again looked to the intention of the parties at the date of the severance. As strip mining was not a mining method commonly practiced in West Virginia in 1885, the court concluded that the parties could not have intended to allow strip mining.\(^{(65)}\) The reservation of mining rights here was without a waiver of damages. In view of the distinction between injury to the surface by underground mining and destruction of the surface through strip mining, the court reasoned that mining rights created at severance are intended to limit, regulate, and govern mining operations and not enlarge them so as to permit strip mining operations.\(^{(66)}\) Thus, the court held that the mining rights of the defendants under the reservation in the 1885 severance deed prohibited surface mining operations.

The West Virginia Supreme Court again used a surface owner's absolute right of support as a rationale to construe a severance deed against the right to remove minerals by surface mining in *Brown v. Crozer Coal & Land Co.*\(^{(67)}\) The severance deed granted the mineral owner "the right to remove the minerals by the most approved method and . . . reserved necessary and useful rights."\(^{(68)}\) The West Virginia court held, however, that the deeds must be interpreted in light of common usage at the time of execution. As the deeds were executed around 1900 and auger mining was not used and accepted as a common practice in West Virginia at that time, the court held that the deed did not permit auger mining.\(^{(69)}\)

The court found that the owners of the surface had the right to subjacent support. Further, citing *West
Virginia-Pittsburgh Coal Co., the court reasoned that, if the owner of the surface has the right to subjacent support, it has at least an equal right to hold the surface intact in the absence of a clearly expressed intention to the contrary.\(^{(70)}\)

While West Virginia courts have disallowed strip mining when there was ambiguity in the severance document, they have uniformly upheld the right of the mineral owner to surface mine where that right is expressly stated.\(^{(71)}\) For example, in *Stamp v. Windsor Power House Coal Co.*,\(^{(72)}\) the severance deed granted the mineral owner all of the coal underlying a tract of 135 acres:

> together with all the rights and privileges necessary and useful in the mining and removal of said coal, including the right of mining the same with or without leaving any support for the overlying strata, and without liability for any injury which may result to such overlying strata or the surface, or to water courses or roads or ways by reason of mining and removal of said coal\(^{(73)}\)

The court found that an express grant of the power to remove "all" the coal without any obligation to support the surface was sufficient to allow mining without liability for subsidence. The court recognized that the doctrine of express waiver of subjacent support was firmly established as the rule of property in West Virginia.\(^{(74)}\)

West Virginia courts have also been more willing to endow the mineral owner with more rights when destruction of the surface estate is not involved. In *Buffalo Mining Co. v. Martin*,\(^{(75)}\) the court construed an 1890 mineral severance deed containing comprehensive language concerning surface use, which included the right to lay "telephone and telegraph lines" and a general grant of "all proper and reasonable rights and privileges for ventilating and draining the mines." A dispute arose between the surface owner and the mineral owner as to whether the deed impliedly permitted the construction of an electric transmission line on the surface to facilitate the ventilation of the coal mine. The surface owner contended that a power line was not within the rights granted to the mineral owner in the 1890 deed. The court recognized that there had been a severance of the mineral estate with the deed providing the mineral grantee with the right to use the surface for purposes reasonably necessary to the extraction of minerals.\(^{(76)}\) The court noted that installing the power lines would effect no widespread destruction of the surface and found this to be a reasonable use within the context of the language of the severance deed.\(^{(77)}\) Thus, the court found implied use rights in favor of the mineral owner that were reasonably necessary for mining, but that would not unduly burden the surface estate.

[c]--Pennsylvania.

The Pennsylvania law similarly allows the parties to sever the mineral estate from the surface estate. In fact, Pennsylvania recognizes three estates in land. One person may own the coal; another, the surface; and the third, the right of support.\(^{(78)}\) The right to support in Pennsylvania is sometimes referred to as the third estate.\(^{(79)}\) It is also clearly established that, in the absence of an express or implied waiver, the mineral owner takes the estate subject to the burden of supporting the superincumbent estate\(^{(80)}\)

However, Pennsylvania courts have not clearly defined the rights of the owners of these various estates with respect to surface mining. Kentucky courts have exhibited a tendency to rule in favor of the mineral owner, most often construing severance deeds to confer liberal mining rights including the right to strip mine. West Virginia courts have demonstrated the opposite tendency in upholding the right of the surface owner to prevent strip and auger mining unless the severance deed expressly allows these mining methods. Pennsylvania decisions, however, demonstrate no discernable trend or enunciated principles on which to rely.\(^{(81)}\)
In one of Pennsylvania's first decisions in this area, *Commonwealth v. Fisher*,(82) the court squarely faced the issue of delineating the respective rights of the mineral owner and the surface owner. In this case, an 1855 severance deed granted the mineral owner the right to "excavate any and every kind of ore, mineral, metal, or coal and to dig, excavate, or penetrate any part of the said premises."(83) Based on the language of this severance deed, the court allowed the mineral owner to extract the coal by the surface mining method.(84) The court appeared to base its decision not only upon language of the severance deed, but also upon the character and use of the land. The court observed that "[i]t is mountain land which has been timbered over; it is held by the Commonwealth as a game habitat; it contains no buildings, railroad lines, public highways, or improvements of any kind."(85)

Unlike other courts that have sought to discern the intent of the parties at the time of severance, the *Fisher* court focused on improvements in the technology of mining. These improvements were something that the original parties could not have foreseen. The court observed that "[t]he language used indicates no intention to deny the use of such improved processes as science may discover or mechanical ingenuity invent . . .."(86)

Although the court recognized that strip mining was not used in 1855, and that strip mining by power shovels was a subsequent development, it stated that "there is no rule of law which would preclude defendant, having the right to mine the coal, from using methods for that purpose made possible by modern machinery and inventions."(87) The court also construed the language of the severance deed to have waived the surface owner's absolute right of support so that the right to strip mine was not inconsistent with the right of support.(88)

In *Mount Carmel R. Co. v. M.A. Hanna Co.*, (89) the court again found a severance deed to grant the mineral owner the right to extract coal by the strip mining method. A railroad had acquired a right of way over the surface in 1891 for a term of five hundred years.(90) The document granting the right of way expressly reserved the mineral rights under the right of way "with the full and free right of digging for, mining, and taking away the same, at any time or times, or in any manner, or by any method of mining, . . . and without any compensation therefor or liability of any kind or nature whatever."(91) The express reservation of the right to extract the minerals "in any manner or by any method of mining" satisfied the court that the parties intended to allow strip mining. Again the court seemed to find that strip mining was simply an improvement upon previous methods of mining practiced in this locale for centuries. Interestingly, the court did not view its allowance of strip mining as an implication or enlargement of the rights of the mineral owner. Because strip mining was a "manner" of mining, the court viewed the deed language as creating an express and unequivocal right leaving nothing to implication.(92)

The seemingly hospitable nature of the court towards mineral owners in Pennsylvania began to change in 1953, with the court's decision in *Rochez Brothers, Inc. v. Duricka*. (93) The mineral owner had reserved the right to:

mine and carry away all of said coal, and with all the mining rights and privileges necessary or convenient to such mining and removal . . . and without being required to provide for the support of the overlying strata, and without liability for injury to the said surface or to anything therein or thereon.(94)

The court, in disallowing strip mining, expressed a rationale which appears at odds with its earlier decisions. The court held that the waiver of liability for damages to the surface and the lack of an obligation to support overlying strata reflected an intent to allow underground mining. The court stated these waivers would be meaningless if strip mining was contemplated, as this process encompasses tearing away the overlying
Further reflecting the parties' intent to allow only underground mining is the fact that the conveyance or severance deed also granted the right to drain and ventilate the mining operation. The court noted that ventilating is exclusively a feature of underground or shaft mining. (96)

These two factors had not been addressed by the court in Commonwealth v. Fisher (97) or in Mount Carmel R. Co. v. M.A. Hanna Co. (98) In fact, in both of those decisions the court had allowed strip mining, relying on language dealing with underground mining rights, waiver of damages, and waiver of support. The Rochez court distinguished Fisher by noting that, in Fisher, the severance deed expressly used the word "excavate" which is consistent with strip mining. The court also placed reliance upon the fact that the land at issue in Fisher was mountain land on which there were no buildings, rail lines, public highways, or other improvements. In the Rochez case, on the other hand, the land was agricultural land containing rich soil ideally fit for farming. (99)

Two years later the court decided Commonwealth v. Fitzmartin, (100) in which it permitted strip mining under a mineral reservation of "all the coal, oil, natural gas, and other minerals, in and under the surface of said land . . . without any liability whatsoever for damages to said lands." (101) The court distinguished Rochez by noting that the Rochez opinion "was based in large part upon a very important factor which was present in that case and is absent here, namely, the land in the Rochez case was rich agricultural land." (102) As late as 1962, the Pennsylvania court was still interpreting severance deeds to find the implied right to allow strip mining. (103)

In Wilkes-Barre Township School District v. Corgan, (104) the court more severely limited its interpretation of mineral rights and examined factors that courts in other states have used to deny strip mining. The court attempted to discern the intention of the parties at the time they executed the severance deed. Since strip mining operations did not exist when the parties executed the severance deed in 1893, the court held that strip mining was not within the contemplation of those parties. However, the court still looked to the use of the land at issue and distinguished the Fisher case on the basis of the rocky and hilly terrain there involved. (105)

In the decisions that followed, Pennsylvania courts became, not only more reluctant to allow strip mining, but also changed the factors by which they evaluated this issue. In New Charter Coal Co. v. McKee, (106) the court noted that for some time it was apparently thought that our decision in Rochez Brothers, Inc. v. Duricka was authority for the proposition that the use to which the surface was being put at the time of the grant automatically foreclosed the right to strip mine if that usage was of a valuable nature. It is now established that that was not the ratio decidendi of Rochez; Rochez was decided simply on the grounds that the wording of the mining powers did not support an interpretation, other than that of giving the right to strip mine. (107)

Finally, the court in Stewart v. Chernicky, (108) announced a new standard of reviewing the rights of mineral owners and surface owners when it stated that:

this Court recognizes that "strip mining is an accepted manner or method of coal mining, which, with the use of modern huge and efficient machinery, has become progressively more in vogue." And this Court does not wish to interfere with its use or hinder its economic viability. Yet we cannot help but realize "that in view of the surface violence, destruction and disfiguration which inevitably attend strip or open mining, . . . no land owner would lightly or casually grant strip mining rights, nor would any purchaser of land treat lightly any reservation of mining rights which would permit the grantor or his assignee to come upon his
land and turn it into a battleground with strip mining." Therefore, "the burden rests upon him who seeks to assert the right to destroy or injure the surface" to show some positive indication that the parties to the deed agreed to authorize practices which may result in these consequences.\(^{109}\)

Therefore, it appears that the Pennsylvania court has come full circle from the early 1950's, when it easily implied surface mining rights for the mineral owner, to the 1970's when it placed a heavy burden on the mineral owner to establish clearly that the parties to the original severance deed had intended to allow surface mining operations.

\[d]-Virginia.

Like the other states, Virginia law recognizes that parties may sever the minerals in place from the remainder of the land by express conveyance, reservation, or exception.\(^{110}\) Virginia courts also recognize that two estates remain.\(^{111}\) Virginia characterized the relationship between surface and mineral estates in *Ventro v. Clinchfield Coal Co.*,\(^{112}\) holding that:

\[
\text{[W]here such separation has taken place the owner of the surface of the land and the owner of the minerals under it are neither joint tenants nor tenants in common. They are not the owners of undivided interests in the same subject, but are the owners of distinct subjects of entirely different natures.}^{113}
\]

Virginia courts recognized the distinct nature of the two estates upon severance and held that title to the freehold of one estate cannot be acquired by adverse possession of the other estate.\(^{114}\) Likewise, purchase of the outstanding title by one estate cannot be said to enure to the benefit of the other.\(^{115}\)

Although Virginia courts recognize the distinct and separate nature of these estates, they have had difficulty defining the rights and duties of the owners of each estate. In fact, Virginia courts have often turned to sister states for guidance to resolve these competing interests.

By analyzing the specific language of severance instruments and by applying appropriate law to interpret these instruments, Virginia courts have demonstrated an intent to guard and protect the surface estate, without completely destroying the value of the severed mineral estate. In contrast with Kentucky law, Virginia courts have refused to grant the mineral estate wholesale dominance over the surface estate.

One of the earliest and, perhaps, the leading Virginia case on the construction of mineral deeds is *Stonegap Colliery Co. v. Hamilton*.\(^{116}\) Here, the plaintiff brought a trespass action to recover for damage allegedly resulting from the removal of coal under the plaintiff's land without leaving sufficient support to prevent surface subsidence.\(^{117}\) The deed at issue reserved "all the coal in, under, and upon said tract of land, and the right and privileges of the said parties . . . to enter upon said tract of land and excavate and mine, prepare for market, and remove said coal with all the usual mining privileges."\(^{118}\)

In construing the rights of the surface and mineral owners, the court held that owning rights to mine coal does not deprive the surface of support unless the right to remove support is created by clear and unequivocal language.\(^{119}\) According to the court, when mineral rights are severed from surface rights it is contemplated that the surface is to be used and the owner of mineral rights assents to that use.\(^{120}\) The court said:

Unquestionably, the dominant intent of the deed and the purpose for which it was executed is that the grantee shall have the surface, with the right to use and enjoyment *modo et forma*, while the grantor still owned the coal, with the right to mine and market it; but, in the enjoyment of their respective rights, each
was to regard the right of the other, as the maxim of the law "sic utere tuo ut alienum non laedas" applies. (121)

*Stonegap Colliery* expressed two important principles to guide future Virginia courts in resolving controversies between surface and mineral owners. The court permitted a holder of mineral rights to injure the surface only so far as was authorized by deed. (122) The court also prohibited mining operations which needlessly render the surface useless. (123)

In *Yukon Pocahontas Coal Co. v. Ratliff*, (124) the Virginia Supreme Court held that a conveyance of a mineral estate, with the right to erect "structures" and "devices," did not allow a coal company to construct, among other things, miners' houses, hotels, hospitals, and gardens. (125) In rendering its opinion, the *Yukon* court applied general rules of construction to the deed and measured the rights of the parties by the four corners of that deed. (126) In reviewing applicable rules of construction, the court cited *Williams v. Gibson* (127) in which an Alabama court described incidental rights of mineral holders as follows:

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, as 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 of modern invention. (128)

Although the court appeared to recognize a broad right of the mineral estate to occupy and use the surface estate, it refused to construe the deed based on the facts. According to the court, the "structures" and "devices" contemplated by the deed were limited to those that pertained strictly to mining operations. Moreover, the necessity for erection and installation of any "structures" and "devices" was a question of fact for the court to determine from the evidence. (129) On the facts presented, the court reasoned that the deed did not contemplate the proposed houses, hotels, and hospitals and, in doing so, recognized only a limited right of mineral owners to occupy and use the surface. (130)

In Virginia, the *Oakwood Smokeless Coal Corp. v. Meadows* (131) case establishes the principles under which one may examine the scope of incidental rights of a severed mineral estate with regard to water rights. The plaintiff in *Oakwood Smokeless* sued a coal company for damages for pollution of spring water caused by drainage from the company's mine. (132) The trial court held for the plaintiff, and the coal company appealed. After analyzing the deed under which the parties claimed title, the Virginia Supreme Court reversed and dismissed the plaintiff's action. (133)

In its decision, the court cited *Williams v. Gibson* (134) for the proposition that the severed mineral estate holds certain incidental rights to use the surface estate. (135) The court also cited *Pennsylvania Coal Co. v. Sanderson*, (136) describing it as a leading Pennsylvania case on the subject, for the proposition that:

The right to mine coal is not a nuisance in itself. It is, as we have said, a right incident to the ownership of coal property; and when exercised in the ordinary manner, and with due care, the owner cannot be held for permitting the natural flow of mine water over his land, into the water-course, by means of which the natural drainage of the country is effected. . . . The discharge of this acidulated water is practically a condition upon which the ordinary use and enjoyment of coal lands depends. The discharge of the water is practically part and parcel of the process of mining; and, as it can only be effected through natural channels,
The denial of this right must inevitably produce results of a most serious character to this, the leading industrial interest of the state. The defendants were engaged in a perfectly lawful business, in which they had made large expenditures, and in which the interests of the entire community were concerned. They were at liberty to carry on that business in the ordinary way, and were not, while doing so, accountable for consequences which they could not control. (137)

The court in *Oakwood Smokeless* found that when the defendant coal company's predecessors were given the right to mine coal, they were also given mining privileges necessary to enjoy the mineral right fully. (138) The court reasoned that, even though the mineral deed was silent as to polluting a spring on an adjacent tract with water from the mine, the mineral owner was not liable. Instead, the court recognized that the deed impliedly granted drainage rights. According to the court, "the right to mine coal without the right to drain the mine is no right at all." (139) The court emphasized, however, that incidental and implicit rights included only those necessary for the enjoyment of the right to mine and thereby limited the scope of its opinion.

In *J.M. Mullins v. Beatrice Pocahontas Co.*, (140) the Fourth Circuit examined the incidental severance rights of the mineral estate under Virginia law. The plaintiffs sued a coal mining and processing company alleging that coal dust from the company's processing plant contaminated the air. (141) The district court had entered summary judgment against all of the property owners who derived title to their land from deeds that conferred mineral rights on the coal company. (142) The court of appeals reversed, finding that the deeds did not empower the coal company to process coal by methods which unreasonably impaired the use of the surface. The court noted that under *Oakwood Smokeless Coal Corp.*, a coal company would not be liable for dust reasonably necessary for ordinary coal processing activities even absent an express right to deposit dust in the deed. (143) However, the court concluded that the opinion in *Oakwood Smokeless* did not recognize a right to burden the surface with dust that is not the product of ordinary operations or which could be controlled by the coal operator. (144)

The *Mullins* court examined a deed provision waiving damages from air pollution and dust, but held that the deed did not permit the company to deposit more dust on the surface than was normal in the ordinary processing of coal. Five years after *Mullins*, the Supreme Court of Virginia severely limited rights of the mineral estate by finding that a mineral holder could not strip mine absent specific authorization in the deed or otherwise without the surface owner's consent. In *Phipps v. Leftwich*, (145) the surface owner contested a 1902 deed conveying mineral rights. (146) The deed provided that the mineral owners could enter upon the land "and use and operate the same and the surface thereof free from further costs or damages in all or any manner" deemed "necessary or convenient." (147) The court applied Virginia rules of construction, examining the plain language of the deed as well as the intent of the parties to the deed. (148)

The *Phipps* court found that since strip mining was unknown at the time the parties had executed the deed and that the only common method of mining in the area at that time had been underground mining, surface mining was not within the contemplation of the parties. Therefore, the broad language of the deed permitted only underground mining. (149)

In support of its decision, the court cited to two early Virginia cases that restricted the rights of the mineral estate. (150) The Supreme Court of Virginia also retreated from its previous approval of language from *Williams v. Gibson* (151) describing broad incidental rights of the mineral estate and granting the mineral estate those rights reflective of the progress of society and modern invention. (152) The court stated that its approval of such language was inaccurate and rejected a broad reading of the rights incidental to a mineral estate. (153) According to the court, the mineral holders could:
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.\(^{(154)}\)

Without question, \textit{Phipps} and the cases before it reject the position that the holder of the mineral estate possesses the absolute right to use, damage, or destroy as much of the surface as is necessary to remove the minerals. In states like Virginia, where courts have been more protective of the surface estate, the effect of SMCRA on the relative positions of the surface and mineral holder has been less widely felt.

§ 9.03. Legislative History and Public Policy of SMCRA.

[1]--Background.

By the mid 1970's, the future of the coal industry appeared bright,\(^{(155)}\) given the desire to decrease the United States' dependence on imported oil and the unpopularity of nuclear technology. While, in the past, coal had "contributed significantly to the industrial and economic growth of the United States,"\(^{(156)}\) Congress believed that "the environment and social costs of coal extraction [had also] been enormous."\(^{(157)}\) Congress characterized these costs as having left "mutilated mountain sides . . . treacherously unstable,"\(^{(158)}\) with "crippling mark[s] upon the very communities which labored most to produce [America's coal]."\(^{(159)}\)

Aware that thirty-eight states regulated coal mining, Congress felt the states were reluctant "to impose stringent controls on its own industry" and, because of that, "serious abuses continue[d]."\(^{(160)}\) Even so, a major impediment to enacting comprehensive national legislation to curb these abuses was the failure of the American political process to act.

[2]--Legislative Action.

Congress had, in fact, introduced federal coal mining legislation many years before finally passing SMCRA in 1977. In 1940, for example, Rep. Everett McKinley Dirksen (R. Ill.) introduced a bill requiring operators to post performance bonds and to fill in strip mining excavations "as may be necessary to make the contour of the land approximately the same as before the mining operation was begun."\(^{(161)}\) Between 1949 and 1970, Congress introduced an additional forty-four bills and conducted several hearings, but took no substantive legislative action.\(^{(162)}\)

The first serious effort to draft a comprehensive legislative scheme for regulating the surface effects of surface and underground mining came in 1971, during the first session of the 92nd Congress. Approximately thirty-six bills were introduced to phase out or regulate surface coal mining.

One bill called for a ban on all surface coal mining in the United States within six months of the enactment date.\(^{(163)}\) The basic markup bill, H.R. 6482, that year came from Rep. Wayne Hays (D. Ohio). The House adopted H.R. 6482 on October 11, 1972,\(^{(164)}\) but Congress as a whole failed to pass any surface mining legislation that session, as the Senate failed to consider on the floor either the House Bill or its own version of the legislation, S. 630.

The two legislative bodies seem to have varying differences of opinion as to what direction the legislation should take. In 1973, the Senate merged the permitting prohibitions found in subsection 522(e)\(^{(165)}\) with the unsuitability designation process.\(^{(166)}\) The two concepts were separate in the prior House version.
During the 93rd Congress, the House and Senate debated the differences between H.R. 11500 and S. 425, with respect to surface owner protection. Debate over this impasse delayed the conclusion of the Conference from October into December, making the legislation vulnerable to defeat. Although the House and Senate Interior Committees stressed to Congress the significance of surface mining legislation in the 93rd Congress, it was not until late in the session, on December 16, 1974, that S. 425 reached final passage. President Ford, nevertheless, pocket vetoed the "Surface Mining Control and Reclamation Act of 1974" on December 30, 1974, despite the fact that it had passed in the Senate by a vote of 82 to 8. A third attempt to pass surface mining legislation during the 94th Congress failed when President Ford vetoed the "Surface Mining Control and Reclamation Act of 1975" (H.R. 25) on May 20, 1975. The House moved to override that veto, but failed by a vote of 278 to 143, just three votes short of the two-thirds needed.

With a new Presidential administration, Congress immediately reintroduced new bills on February 7 and March 1-3, 1977. H.R. 2 and S. 7 largely repeated the provisions of the legislation that President Ford had vetoed the previous year. On April 2, 1977, the House Committee recommended passage of H.R.2, providing, in part, for "recognition of rights of surface mine owners and off-site water users . . . and designation of areas unsuitable for surface coal mining." The bill passed in both houses and went to the conferees. After the conferees adopted a compromise the members reported the bill out of conference on July 12, 1977. President Carter signed the Surface Mining Control and Reclamation Act of 1977 on August 3, 1977. The first comprehensive federal statute to regulate the surface impacts of coal mining on a national scale was a reality. That was the easy part.


[1]--Overview.

Congress drafted SMCRA to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations" and to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations."

A fundamental premise of the Act is that surface coal mining is a temporary use of land. The principal objective since the earliest legislative proposals has been to "regulate" the adverse effects of surface mining rather than prohibit mining altogether. However, there are provisions of SMCRA that constitute outright bans on surface coal mining and, in other instances, Congress has authorized a third party to determine whether or not surface mining can occur. These provisions are of three types: (1) permitting requirements creating buffer zones around structures or features, (2) water damage mitigation provisions, and (3) surface owner consent requirements. The following is a discussion of three relevant provisions under SMCRA which may alter the common law relationship between surface and mineral owners in fundamental ways.

[2]--Buffer Zones.

[a]--Federal Requirements.
Section 522 of SMCRA defines standards and procedures for designating certain lands as unsuitable for surface coal mining. While, for the most part, it delegated the responsibility for these determinations to state regulatory agencies (or the federal Office of Surface Mining if a state has not assumed "primacy"), Congress specifically declared certain lands statutorily unsuitable under Section 522(e). There are, however, certain limitations on these designations.

Section 522(e)(5) provides that, after August 3, 1977, and subject to "valid existing rights," no surface coal mining operations except those that exist on August 3, 1977, shall be permitted "[w]ithin three hundred feet from any occupied dwelling, unless waived by the owner thereof." Section 522(e) also prohibits: (1) mining within certain federal areas such as national parks, various wilderness systems, and national forests; and (2) mining within specified distances of certain facilities, such as within 100 feet of cemeteries or the rights-of-way for public roads. These latter provisions, relating to parks and roads, do not specifically authorize a third party to waive the surface mining prohibition.

The federal regulations that followed the statute provide that:

- Subject to valid existing rights no surface coal mining operations shall be conducted after August 3, 1977, unless those operations existed on the date of enactment... within 300 feet, measured horizontally, of any occupied dwelling, except when... the owner thereof has provided a written waiver consenting to surface coal mining operations closer than 300 feet; or... the part of the mining operation which is within 300 feet of the dwelling is a haul road or access road which connect with an existing public road on the side of the public road opposite the dwelling.

Section 522 also contains separate "grandfather" clauses exempting certain activities from the Section 522(e) prohibitions. These are mining operations in existence on August 3, 1977, and operations subject to "valid existing rights." Section 522(e) specifically states that the prohibitions against mining are subject to "valid existing rights" (VER). Despite the fact that VER constitutes an express exception to the prohibitions against mining within the designated areas, absent a waiver, Congress failed to define the term in SMCRA. Moreover, the United States Department of the Interior, Office of Surface Mining, Reclamation and Enforcement (OSM) has failed to promulgate a judicially acceptable regulatory definition of VER despite several attempts. Failure to promulgate an acceptable definition of VER is particularly troublesome in view of the importance of this phrase in the determination of private property rights. What is clear, however, is that the VER limitation grafts a portion of the common law balance between the surface and mineral owner onto SMCRA.

The phrase VER did not magically appear for the first time in Section 522(e) of SMCRA. The phrase was first developed and used in situations involving the acquisition of private interests in federal public lands. In fact, dozens of federal statutes involving public lands contained VER language prior to the enactment of SMCRA.

SMCRA's legislative history indicates an intent to recognize previous state court interpretations of VER. According to the Act's legislative history, the VER exception "is intended to make clear that the prohibition of strip mining on the national forests is subject to previous state court interpretation of valid existing rights." Commentators have also suggested that concerns regarding violations of the Fifth Amendment resulted in the SMCRA's inclusion of the VER exception to SMCRA's 522(e) prohibitions. Thus, Congress included the VER exception to avoid an unconstitutional taking of private property.
Despite the fact that the legislative history of Section 522(e) provides some guidance, OSM has had tremendous difficulty formulating a definition of VER that would pass judicial scrutiny. A number of "tests" defining VER have been proposed by OSM. OSM has used or considered and discarded requirements of "all permits," "takings," and "good faith all permits" in an attempt to divine congressional intent regarding VER. The United States District Court for the District of Columbia struck down two of these definitions. OSM proposed and then withdrew its third standard for further consideration.(195)

Fortunately, OSM has recently undertaken a concerted effort to define VER. In April of 1990, OSM, in cooperation with the University of Kentucky Mineral Law Center, the American Bar Association's Natural Resources, Energy, and its Environmental Law Section's Coal Committee, sponsored a VER symposium.(196) The goal of the symposium was to gather a wide range of views in the development of the OSM's VER rulemaking proceeding. Moreover, after years of formulation and debate, OSM has finally submitted its long awaited rule on VER to the Office of Management and Budget for review prior to publication in the Federal Register.(197) The issuance of a final rule, however, will certainly be delayed pending expected debate and comments from the general public, industry, and environmental groups.(198)

[b]--State Requirements.

State regulations under OSM approved plans follow the federal guidelines and establish buffer zones around particular features. OSM has granted primacy to each of the four states examined for this Chapter: Kentucky,(199) West Virginia,(200) Pennsylvania,(201) and Virginia.(202) These state laws establish the buffer zone criteria applicable within their boundaries.

[i]--Kentucky.

Kentucky's surface mining statutes contain provisions against surface coal mining within certain areas, including prohibitions against conducting surface mining operations within specified distances of public roads,(203) occupied dwellings (unless waived by the owner thereof), public buildings, schools, churches, communities, institutional buildings, cemeteries,(204) and public parks.(205) The Natural Resources and Environmental Protection Cabinet of Kentucky promulgated regulations implementing Kentucky's statutory buffer zone requirements.(206)

In Smith v. Natural Resources & Environmental Protection Cabinet,(207) a Kentucky court addressed the issue of whether the non-occupant/co-owner of a dwelling may execute a valid waiver for purposes of granting the mineral owner the right to surface mine within 300 feet of an occupied dwelling. The court held that the "waiver required by [the statute] is obviously intended to protect the person(s) who will be most affected by the surface mining."(208) The court concluded that the waiver in this instance from the non-occupant would not guarantee that protection. To hold otherwise, the court said, "would gut the protection of [the statute]."(209) The court held that to be valid, a waiver must be obtained from the occupying co-owner.

[ii]--West Virginia.

The limitation on surface mining within 100 feet of a public right-of-way or 300 feet from any occupied dwelling is codified in WVSMCRA.(210) The West Virginia courts have narrowly construed the exceptions to the buffer zone criteria. The courts first interpreted the statute in 1988 in Cogar v. Faerber.(211) Residents near a coal operator's surface mine objected to modifications of the surface mining permit which, if allowed, would have allowed mining within 100 feet of a public road and 300 feet of occupied
dwellings. The operator contended that he had valid existing rights as of August 3, 1977 to the area in question, which, if proven, would give rise to an exception to the buffer zone prohibition. The court found that the first purpose of the surface mining statute was to expand the surface mining regulatory program to protect the public and the environment from the adverse effects of surface mining operations. This reasoning required the court to construe the statute narrowly.\(^{(213)}\)

The court held that the operator did not have valid existing rights because the requested permit was not immediately adjacent to an ongoing mining operation which existed as of August 3, 1977 and a mineral lease alone was an insufficient legal and financial commitment to the operation prior to that date.\(^{(214)}\)

Shortly after the *Faerber* decision, the West Virginia court addressed the issue of whether the surface owner may waive the mining prohibitions and designations of areas unsuitable for mining contained in WVSMCRA and the sufficiency of those waivers. In *Cogar v. Sommerville*,\(^{(215)}\) area residents near a proposed surface mine site (some of the same parties involved in *Faerber*) sought to prevent the operator from mining within 300 feet of an occupied dwelling. The operator contended that the residents had waived their right to prevent mining within 300 feet of an occupied dwelling as a result of broad form waivers of surface damage and subsidence support in old deeds severing the minerals from the surface.\(^{(216)}\) The West Virginia statute expressly provides that the 300 feet prohibition may be waived by the owner of the dwelling.\(^{(217)}\) However, no other court had previously interpreted the meaning of "waiver" in that statute. In interpreting the statute, the court consulted SMCRA and OSM's regulations. The analogous federal regulation establishes procedures for an applicant to follow in obtaining a permit to mine less than 300 feet from an occupied building based upon a waiver.\(^{(218)}\) To prevail, the permit applicant must submit a written waiver by lease, deed, or other conveyance establishing that the owner had the legal right to deny mining and knowingly waived that right. The federal regulations also require that the surface owner knowingly waive and specify the distance from the occupied dwelling where mining operations may take place. The court concluded that the waivers contained in the severance deeds at issue were not sufficient and lacked the required specificity contemplated and required by WVSMCRA.\(^{(219)}\)

As additional authority, the West Virginia court pointed to common law decisions holding that natural property rights may not be waived except by express language or by necessary implication,\(^{(220)}\) and that a release or waiver of liability covers only those items that are within the ordinary contemplation of the parties.\(^{(221)}\) Interestingly, the court also noted that its decision was consistent with common law mining cases holding that courts must construe a severance deed in the light of the conditions and reasonable expectations of the parties at the time it is made.\(^{(222)}\)

By requiring the mineral owner to prove that it has both a knowing waiver and one that specifies the distance from the occupied dwelling where mining operations may take place, the court has practically required the operator to obtain a new consent, at a price, from the present surface owner.

[iii]--Pennsylvania.

Pennsylvania has also created buffer zones around certain areas. Its statute provides that, subject to valid existing rights, no surface mining operations except those which existed on August 3, 1977 shall be permitted within one hundred feet of the outside right of way of any public road or within three hundred feet from any occupied dwelling unless waived by the owner of the dwelling.\(^{(223)}\)

The only reported Pennsylvania decision construing this statute, *Willowbrook Mining Co. v. Department of Environmental Resources*,\(^{(224)}\) denied that the statute constituted an unconstitutional taking under the Fifth and Fourteeth Amendments to the United States Constitution. In upholding the statute the court said that:
The statutory prohibition against mining within three hundred feet of an occupied dwelling . . . does not permit the government either entry or occupation of any part of an individual's property. It merely "adjusts the benefits and burdens of economic life" by protecting the welfare of dwelling occupants against the hazards and inconveniences of surface mining.\(^{(225)}\)

The Pennsylvania court noted that both federal and Pennsylvania statutes prohibit mining, subject to VER, within 300 feet of an occupied dwelling absent a waiver by the dwelling owner.\(^{(226)}\) The court also noted that Section 522(e) of SMCRA does not define the term VER, and that OSM had been unsuccessful in promulgating a definition of that phrase.\(^{(227)}\) The court also recognized that in 1982, after OSM promulgated the "all permits" test for defining VER under SMCRA, Pennsylvania also promulgated state regulations which embodied the "all permits" test.\(^{(228)}\)

After noting OSM and Pennsylvania's attempts to define VER, the court determined the definition of VER it would apply in Willowbrook.\(^{(229)}\) Contrary to the operator's assertions, the court found the federal "takings" test to be invalid as it had been remanded to the Secretary of the Department of Interior by the U.S. District Court for the District of Columbia.\(^{(230)}\) Likewise, the court rejected application of Pennsylvania's "all permits" test as it was improperly promulgated under state law.\(^{(231)}\) The court found that Pennsylvania law required the Department to define VER pursuant to those regulations promulgated under Section 522(e) of SMCRA. Accordingly, the court applied the 1979 federal "all permits" test, a test which the operator conceded it could not satisfy.\(^{(232)}\)

Pennsylvania imposed another limitation on surface mining operations within one hundred feet of a right of way or public highway or within three hundred feet of any occupied dwelling.\(^{(233)}\) The Secretary may grant operators variances from the distance requirements where he is satisfied that special circumstances warrant the exception and that the interest of the public and of landowners affected by the variance will be adequately protected.

The buffer zones in this latter provision are not expressly subject to valid existing rights. This provision has been interpreted to mean that a statutory buffer zone of 100 feet is to be applied with reference to property or geographic lines, i.e. right of way of public highway, cemeteries, or banks of streams, whereas the restriction of 300 feet is to be applied with reference to structures, i.e., occupied dwellings, public buildings, schools, parks, or community or institutional buildings.\(^{(234)}\)

The Pennsylvania courts have not addressed the surface owner's ability to waive these statutory buffer zones nor what type of waiver might be sufficient.

**[iv]--Virginia.**

Following SMCRA, VSMCRA also established, subject to valid existing rights, prohibitions against surface coal mining within certain areas, including prohibitions against ruining such activities within certain specified distances of public roads, occupied dwellings (unless waived by the owner thereof), public buildings, schools, churches, communities, institutional buildings, public parks and cemeteries.\(^{(235)}\) To implement these "buffer zone" requirements, the Virginia Department of Mines, Minerals & Energy promulgated regulations specifying restrictions within those specified areas.\(^{(236)}\)

Although one of the significant legal challenges to SMCRA was originated in a Virginia federal district court,\(^{(237)}\) there appear to be no cases in which Virginia state courts have interpreted the buffer zone requirements found in the VSMCRA. The Federal District Court for the Western District of Virginia has,
however, recently had the opportunity to construe post-SMCRA Virginia law as to the rights of owners of severed surface and mineral estates and the requirements for valid waivers between the parties. These cases continue to demonstrate that under Virginia law, the surface estate is not subservient to the severed mineral estate. In *Ball v. Island Creek Coal Co.*, surface owners brought an action against a coal mining company for damages allegedly caused by the company's underground mining activities. The coal company had acquired mineral rights to the property through 1907 deeds, which provided that the grantee had "the right to remove all the coal and other minerals, oil and gas, as herein granted without leaving any support for the overlying strata, and without any liability for damage which may result from the breaking of such strata." In 1985, the coal company began using the longwall method of underground mining on the severed mineral estate.

The surface owners alleged that the longwall method of mining caused severe vibrations, shocks, subsidence, and the release of methane gas, resulting in damage to their property. The coal company moved for summary judgment claiming that the surface owners' right to subjacent support and claims for damages were waived by their predecessors in title.

The court, after reviewing early Virginia decisions, determined that Virginia courts would give effect to a surface owner's waiver of the right to subjacent support if the waiver is clear and unequivocal. Subsequently, the court concluded that a valid waiver of subjacent support existed since the deed stated that the mineral owners could remove minerals "without leaving any support for the overlying strata." The court held that such language was "clear and unequivocal," and entitled the coal company to remove the coal without incurring liability for damages.

The court likewise dismissed the surface owners' contention that the coal company was not entitled to use longwall mining because the parties to the original severance deed could not have contemplated the use. The court determined that:

[W]here a deed clearly waives the surface owner's right to subjacent support in regard to underground coal mining, Virginia law would allow the use of longwall mining or any other underground mining technique by the mineral owner, even if such technique was not specifically contemplated by the parties to the deed at the time of its execution. The court has already concluded that the plaintiffs have waived their right to subjacent support; consequently, the court concludes that the defendant is not prohibited from using the longwall method of mining.

The court distinguished *Phipps v. Leftwich*, which held that the mineral owner could conduct strip mining operations when the parties had contemplated only underground mining without the consent of the surface owners. The court reasoned that while underground mining leaves the surface in a useable state, strip mining destroys the surface. Accordingly, the court permitted modern techniques of underground mining, including longwall mining, but reaffirmed early Virginia cases concluding parties to a deed must have contemplated strip mining before it would be permitted absent the consent of the present surface owners.

Shortly after the *Ball* decision, the same court again addressed a surface owner's claim for damages resulting from the loss of subjacent and lateral support. In *Breeding v. Koch Carbon, Inc.*, the owners of a surface estate brought an action against the owner of the mineral rights alleging that underground mining caused the loss of subjacent and lateral support resulting in damage to their property, including damage to a house and the loss of a spring. The defendant coal company argued that the surface owners were not entitled to damages for injury to improvements on the surface absent a showing of negligence. After reviewing the *Restatement*, English law, and the opinions of American courts, the court held that:
If one withdraws subjacent support from the land of another and subsidence results, if the subsidence would have occurred even in the absence of any artificial additions to the land, then he is strictly liable not only for the harm to the land caused by the subsidence, but also for any harm to the artificial additions on the land that results from the subsidence.\(^{(251)}\)

The court further placed the burden upon the defendant coal company to demonstrate that subsidence would not have occurred in the absence of structural improvements.\(^{(252)}\)

Significantly, the *Breeding* court also addressed the surface owners' claim that the loss of subjacent and lateral support resulted in loss of a spring.\(^{(253)}\) Although the court did not address the water restoration requirements in VSMCRA,\(^{(254)}\) it rejected the coal company's assertion that liability for water loss required the plaintiff to prove that the mineral owner was negligent or reckless in using that water.\(^{(255)}\) The court stressed that, if a mineral rights owner causes loss of percolating water by removing subjacent support, that owner is strictly liable for the loss under Virginia law.\(^{(256)}\)

Although the court decided *Ball* and *Breeding* under Virginia common law rather than the VSMCRA, it abided by the spirit of the VSMCRA in rendering the decisions in both cases. The court protected the rights held by the surface estate without damaging the economic viability of the mineral estate. In both cases, however, the court demonstrated a reluctance to allow dominance of the mineral estate at the expense of the surface estate.

[c]-Applicability of Buffer Zone Requirements to Underground Mining Operations.

An interesting issue was raised in *In re Permanent Surface Mining Regulation Litigation*\(^{(257)}\) as to whether or not the SMCRA buffer zones prohibit surface impacts of underground mining within the specified protected areas in Sections 1272(e)(4) and (5).\(^{(258)}\) Plaintiff citizen and environmental groups challenged the Act complaining that the SMCRA regulations at issue clearly and explicitly prohibit surface impacts from underground operations in these areas. They claimed that SMCRA's broad definition of "surface coal mining operations" mandated that protection. For example, SMCRA specifically includes in that definition "surface impacts incident to an underground coal mine."\(^{(259)}\)

The regulations in place at the time of the decision followed the Act and extended the prohibitions to surface operations and surface impacts incident to underground coal mining.\(^{(260)}\) The court summarily affirmed those regulations, while noting that "the Secretary has committed himself to a new rule-making with respect to the impact of §§ 522(e)(4), (e)(5) . . . on underground mining."\(^{(261)}\)

In 1988, OSM proposed a radical reinterpretation of SMCRA to apply the Section 522(e) prohibitions to the potential effects of subsidence, which would cause dramatic losses to the nation's recoverable coal reserve base.\(^{(262)}\)

Legal scholars in the coal industry believe that the only discernable basis for this proposal "appears to be bringing subsidence within the phrase `surface impacts incident to an underground coal mine' under SMCRA's definition"\(^{(263)}\) of surface coal mining operations.\(^{(264)}\) However, the phrase "surface impacts" is modified by the introductory phrase "activities conducted on the surface of lands." It is also modified by Section 516,\(^{(265)}\) a requirement that does not prohibit subsidence, but rather requires the technological and
economically feasible control of subsidence. Moreover, these scholars argue that applying Section 522(e) to subsidence would "render meaningless the permissive authority in Section 516(c) to suspend mining beneath towns and communities." (266)

It would appear inconsistent for Congress to have anticipated mining beneath towns and cities, but to completely prohibit mining under individual structures that mine operators encounter in these same areas. At this writing, no proposal exists to dramatically change the historic interpretation of section 522(e) to apply to underground mining activities. (267)

[3]-Water Rights and Replacement under SMCRA.

Mining operations, whether surface or underground, may create or contribute to problems with on- and off-site private water supplies. Mining operations may also affect commercial, industrial, or municipal water resources in the area. The two basic adverse influences are contamination and diminution.

Coal mining may produce acid mine drainage, which can affect surface and underground water supplies. Acid mine drainage results when pyrites and other acid producing materials associated with coal seams come in contact with water and air. The acid produced by this mixing mobilizes iron, magnesium, aluminum, and other minerals, altering the characteristics of the water it contacts and sometimes rendering it unsuitable for drinking, farming, or irrigation. (268)

Mining operations may also diminish nearby water supplies permanently or temporarily. This occurs when mining operations alter the depth of the water supplying aquifer, or create a core of depression that extends to or below nearby wells. (269)

[a]-Federal Requirements Regarding Water Supply

Impairment.

SMCRA Section 717, recognizing the actual and potential damage to water supplies from the influence of nearby mining operations, modified the common law of water rights relative to surface coal mining operations. It states:

(a) Nothing in this Act shall be construed as affecting in any way the right of any person to enforce or protect, under applicable law, his interest in water resources affected by a surface coal mining operation.

(b) The operator of a surface coal mine shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic agricultural, individual, or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution, or interruption proximately resulting from such surface coal mine operation. (270)

SMCRA creates a mandatory obligation on the part of surface coal mine operators to "replace" water supplies adversely affected by their mining operations. A violation of SMCRA Section 717 occurs only if the mine operator fails to replace the affected water supply. The statute imposes strict liability for failure to replace a water supply; liability does not depend on the negligent or intentional character of an operator's actions. The statute does not impose other sanctions for impairment of the supply. However, SMCRA does not alter any cause of action the owner of an affected water supply may otherwise have under applicable state or federal law. (271)

[b]-State Requirements Regarding Water Supply
Impairment.

Each of the states under study have provisions parallel to the Section 717 requirement that an operator replace certain water supplies that surface mining operations have contaminated, diminished, or interrupted.

[i]--Kentucky.

Kentucky's administrative regulations also impose a requirement that a permittee replace certain water supplies that surface mining operations have contaminated, diminished, or interrupted.\(^{(272)}\)

[ii]--West Virginia.

West Virginia provides that an operator must replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution, or interruption proximately caused by the surface mining operation, unless waived by the owner.\(^{(273)}\)

West Virginia first recognized a cause of action under this provision in Rose v. Oneida Coal Co., Inc.\(^{(274)}\) There, a surface owner alleged that the owner of the minerals underlying his land had willfully, negligently, and wantonly caused his water supply to disappear and his land to subside. The applicable severance deed provided a waiver "for any injury to said land, or to anything therein or thereon, by reason of the mining and removal of said coal therefrom, and the coal from neighboring lands, without being required to provide for the overlying strata or surface."\(^{(275)}\) The lower court granted summary judgment in the favor of the mineral owner.

On appeal, the West Virginia Supreme Court noted that West Virginia had long upheld waivers for damage from subsidence.\(^{(276)}\) The court noted, however, that appellants may, in fact, have a cause of action with regard to their subsided land under WVSMCRA. The supreme court declined to address what effect that waiver might have on the water replacement obligations imposed by WVSMCRA since the appellants had not plead nor argued for remedies under the water replacement statute in the circuit court. In commenting on the effect of the WVSMCRA on the common law, the court observed "although we believe that the WVSMCRA has changed many of the old common law rules concerning the rights and remedies of surface owners vis a vis mineral owners, the dimensions of those changes are as yet uncertain."\(^{(277)}\)

One year later, the court had another opportunity to address the West Virginia water replacement statute. In Russell v. Island Creek Coal Co.,\(^{(278)}\) the court dealt with the issue of whether the surface owners had waived their statutory right pursuant to this provision of WVSMCRA to require that their water source be replaced by a surface mining operator who allegedly had contaminated the water supply. Subsequent to the severance deed, the mineral owner had obtained from the surface owner the express right to:

strip the said surface, subsurface and other strata overlying all of said coal . . . all without liability by the grantee, its successors or assigns, for damages arising out of the exercise of such rights to the surface or subsurface or anything therein or thereon or to the springs and water courses therein or thereon\(^{(279)}\)

The spring allegedly contaminated was located on land adjacent to the severed tract. The adjoining surface owners demanded that the water supply be replaced pursuant to WVSMCRA.

The West Virginia water replacement statute is identical to its federal counterpart except that the federal statute does not provide for a waiver.\(^{(280)}\) This difference did not, in the court's view, render the West
Virginia water replacement statute facially inconsistent with the federal requirement. The federal statute simply does not address waivers.\(^{(281)}\) In interpreting the statute, the court turned for guidance to the litigation surrounding the implementing of the federal rules.

The Secretary of the Interior reinterpreted the federal regulation promulgated under SMCRA\(^{(282)}\) as being deferential to state common law in *National Wildlife Federation v. Hodel*.\(^{(283)}\) The Secretary's view specifically interpreted this statute as "not requiring the replacement of water supplies to the extent a surface coal mine operator consumes or legitimately uses the water supply under a senior water right determined under applicable state law."\(^{(284)}\) On appeal, the D. C. Circuit upheld the Secretary's interpretation, observing that the federal statute "creates an additional remedy against illegitimate water uses, but does not deprive anyone, including mine operators, of whatever rights to the use of water they had previously."\(^{(285)}\)

According to the West Virginia Supreme Court, the D.C. Circuit found that the federal regulation regarding waivers of private water rights (and subsequent litigation regarding the regulation) revealed a lack of federal intent to place more exacting measures than those already enforced through state law.\(^{(286)}\) In West Virginia, the common law provides that the granting deed governs the character of the water rights.\(^{(287)}\) Therefore, the West Virginia court held that the West Virginia water replacement statute was consistent with both the federal statute and West Virginia common law regarding private water rights. The court in *Russell* said:

If the owner knowingly waived the requirement that the water supply be replaced, a private cause of action seeking money damages and equitable relief because of a violation of West Virginia Code Section 22A-3-24(b) may not be maintained by the owner the loss of the water supply.\(^{(288)}\)

The court affirmed the motion for summary judgment because there was no factual question regarding the rights the operator acquired, and both parties were fully aware of the type of mining which would occur.

[iii]--Pennsylvania.

Pennsylvania obligates the operator of a surface mine to restore the recharge capacity of waters in the area affected by surface mining to approximate pre-mining conditions.\(^{(289)}\) Pennsylvania also requires the Secretary to place all funds he receives from license fees, permit fees, forfeiture of bonds and from fines under certain sections of the Clean Streams Law in a State Treasurer fund. Pennsylvania uses this fund to revegetate, reclaim and replace water supply sources affected by surface mining operations if an operator fails to comply with the permit application requirement regarding the restoration of recharge capacity.\(^{(290)}\)

The Pennsylvania courts have not addressed the issue of whether the surface owner may waive the statutory rights to water replacement. Additionally, the tenor of the reported Pennsylvania decisions under the Clean Streams Law and the Surface Mining Conservation & Reclamation Act give no indication of whether waiver of these rights might be a possibility.

Recent decisions under the Clean Streams Law in Pennsylvania have made clear, however, that liability for water contamination or replacement will be assigned without any finding of fault on the part of the operator.\(^{(291)}\) A Pennsylvania court, in *Thompson & Phillips Clay Co. v. Department of Environmental Resources*,\(^{(292)}\) recently held that the origin of the polluted water is irrelevant to the issue of liability. The operator contended that it was not responsible for acid mine drainage flowing from its mine because the acid mine drainage was flowing, due to the forces of gravity, from an abandoned mine uphill from the operator's mine. The court disagreed and held that liability attaches if the operator's site is a point from which the acid mine drainage discharges into the waters of the Commonwealth. The court cited legislative history emphasizing the overriding public interest in controlling acid mine drainage, which is considered to be a
major cause of stream pollution in Pennsylvania.

[iv]--Virginia.

The Virginia General Assembly adopted a statute requiring replacement of water supply:

Replacement of water supply: The operator of any coal surface mining operation shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution, or interruption proximately resulting from such coal surface mine operation.\(^{(293)}\)

[c]--Applicability of Water Replacement Obligations to Underground Mining Operations.

The extent to which SMCRA's water replacement obligations imposes duties on underground coal operations that impact the surface is not clear. The Federal District Court for the District of Columbia, in *In re Permanent Surface Mining Regulation Litigation*,\(^{(294)}\) and D.C. Circuit, in *National Wildlife Federation v. Hodel*,\(^{(295)}\) both concluded that the Section 717(b) water replacement requirement does not apply to underground coal mine operators. The D.C. Circuit held that SMCRA "contemplates, at least for some purposes, that surface coal mines will be treated differently from underground coal mines, even though the latter have some surface effects."\(^{(296)}\)

Congress also consciously distinguished between requirements applicable to surface mines and underground mines by choosing not to impose the water replacement requirement on underground operators. Senate Bill S. 7 detailed performance standards for "surface mining" operations and included a water replacement requirement in Section 415(b)(10)(E). However, Congress omitted the water replacement requirement in the parallel provisions for "underground mining" operations found at Section 416(b)(9).\(^{(297)}\)

Based upon the specific language in the statute and the legislative history of the Act, the court in *National Wildlife Federation v. Hodel* concluded that Congress "deliberately chose to apply some environmental safeguards to one and not the other; and that water replacement is a provision it explicitly required only of surface mine operators."\(^{(298)}\)

[d]--Waivers of Water Replacement Obligations.

Section 717 is silent as to the ability of the surface owner to waive the water replacement requirement. However, in the preamble to the final 1979 SMCRA permanent program regulations, OSM stated that SMCRA requires replacement of the water supply in all instances. OSM believes that a landowner cannot waive replacement since a waiver would not provide adequate protection for present lessees or for future owners of the property involved.\(^{(299)}\)

[4]--Surface Owner Consent.

Congress has taken special precaution under the Act to protect the owner of a severed surface estate. The permitting agency will not issue a permit to strip mine where the minerals have been severed, unless an applicant submits one of the following:

(1) The written consent of the surface owner to the extraction of coal by surface mining methods;
A conveyance that expressly grants or reserves the right to extract the coal by surface mining methods; or

If the conveyance does not expressly grant the right to extract coal by surface mining methods, the surface subsurface legal relationship shall be determined in accordance with state law: PROVIDED, That nothing in this Act shall be construed to authorize the regulatory authority to adjudicate property rights disputes.

SMCRA also requires that "the area proposed to be mined is not included within an area designated unsuitable for surface coal mining pursuant to section 522." State parallels to SMCRA similarly require surface owner consent or proof of the right to mine by surface methods. SMCRA's surface owner consent waiver provisions have generated very little post-SMCRA litigation. However, analyzing actual and potential litigation under Kentucky's Broad Form Deed Amendment is a good forecast of what may come.

Kentucky. Kentucky's surface mining statutes and regulations, like their federal counterpart, include requirements that applicants for surface mining permits demonstrate a legal right to mine and right of entry. The Natural Resources and Environmental Protection Cabinet also promulgated regulations requiring an applicant to submit right of entry and right to mine by surface methods prior to the issuance of a surface mining permit.

West Virginia. The WVSMCRA follows the federal counterpart and includes a provision requiring an applicant for surface mining permits to demonstrate its authority to extract minerals by the surface mining method. West Virginia courts have not interpreted this particular section of the permit application statute.

Pennsylvania. In applying for a surface mining permit, Pennsylvania also requires that the operator submit the written consent of the landowner to both the surface operations and the entry by the Commonwealth and its agents prior, during, and for a period of five years after the surface mining operation is completed.

Pennsylvania courts have interpreted this statute to mean that surface mining operations under leases in existence on the date that Pennsylvania first enacted its Bituminous Coal Surface Mine Act and Anthracite Coal Surface Mine Act do not require the written consent of the landowner to enter the affected land within five years after the operation.

To date, no Pennsylvania court has discussed the question of what might happen if the surface operator had the express authority to strip mine but has not obtained a separate written consent from the surface owner. In *Clearfield Bank & Trust Co. v. Shaeffer* the court expressly left this question open. It had to interpret a deed between the operator and the surface owner to determine whether the operator had the authority to strip mine the land without the consent of the surface owner. The deed expressly reserved the mineral owner's right to strip mine the area overlying the minerals without liability for damages to the surface, surface improvements, or the water "thereon, therein, or thereunder." As there were no limitations on the right to extract minerals, the court held that the operator had the right to strip mine and, by clear implication, the right to go on the land and explore for coal. Additionally, the court found that, since the surface owner agreed that the operator could open the surface and remove the coal by strip mining without liability for damages to the surface or to water systems, the surface owner had expressly agreed to waive the right to surface support. The court made clear that the decision left open the issue of whether a surface mining permit would issue based on the consent in the deed or whether an additional consent
would be required. The court observed that:

The issue of whether [the operator] needs the [surface owner's] permission to go on the land does not fall within the definition of surface mining operations, which are under the Department of Environmental Resources' jurisdiction. Furthermore, this judgment will not fix or prejudice the party's obligations under SMCRA concerning the operation of the strip mine. Thus, appellant's contention that the trial court's judgment effectively wipes out any protections SMCRA affords the owner of surface rights is without merit. . . [T]he trial court did not decide nor prejudice the Department of Environmental Resources' future decision whether to license [the operators] mining operation, nor did it prejudice the outcome of any of the dozens of disputes which might arise between the regulatory agency and the operators of the strip mine, which are indeed issues committed to the exclusive jurisdiction of the Department of Environmental Resources.\(^{311}\)

***Virginia.*** Virginia also enacted a regulatory provision requiring certain right of entry information before the issuance of a surface mining permit.\(^{312}\)

[5]-Repairs to Surface Structures Caused by Subsidence

**Under National Wildlife Federation v. Lujan.**\(^ {313}\)

Since 1979, when the Secretary of the Interior published permanent program regulations under SMCRA, the coal industry and environmentalist groups have challenged the regulations on numerous grounds.\(^ {314}\) The most recent challenge to the Secretary's permanent regulations was addressed by the district court in *National Wildlife Federation v. Lujan*.\(^ {315}\) Litigants asked the court to review the Secretary's regulations on subsidence as being inconsistent with SMCRA. The Secretary's regulations promulgated under Section 516(b)(1) of SMCRA require the surface mining operator to correct material damage to structures only to the extent state law so requires.\(^ {316}\)

The plaintiff, National Wildlife Federation, challenged these regulations on the basis that they were contrary to SMCRA and arbitrary.\(^ {317}\) The challengers objected to the fact that the operator's obligations to correct damage subsidence caused to structures was limited to any obligations state law imposed. As discussed above, many states uphold waivers of damages that might result from coal operations in the severance deed or in other documents. Therefore, state law may impose no legal liability on the operator for any damage caused to structures by subsidence.

When the Secretary of the Interior first issued regulations on subsidence control in 1979, the regulations required an underground coal operator to correct material damage from subsidence both to surface land or structures.\(^ {318}\) In revising the regulations on subsidence control, the Secretary made a distinction between damage to structures and damage to land itself. The Secretary required the mine operator to repair all subsidence causing material damage to land but only required the operator to repair damage to structures or facilities as required under state law.

The Secretary defended the change to the regulation on the grounds that SMCRA was not intended to create additional property rights and that SMCRA itself did not specifically require restoration of structures damaged by subsidence.\(^ {319}\) Additionally, the Secretary proposed that no environmental or public interest exists in protecting a building or structure where its owner has conveyed away or waived a right to subjacent support. In the Secretary's view, other regulations protect public buildings and facilities from subsidence and these regulations provide sufficient protection.\(^ {320}\)
The district court, however, determined that the Secretary's regulation on subsidence was inconsistent with the provisions of SMCRA. The court specifically found that two of SMCRA's purposes required a nationwide program to protect society and the environment from adverse effects of surface coal mining operations and to assure that the rights of surface landowners and other persons with a legal interest in land are fully protected from those operations. Therefore, the district court believed that Congress was not solely concerned with the environment and protection of the land, but also intended to prevent the harm to society and the property of individuals that coal operations sometimes cause. Congress specifically required underground operators to adopt measures consistent with known technology in order to prevent subsidence and maintain the value and reasonably foreseeable use of such surface lands.

The district court held that the requirement to maintain the value and reasonably foreseeable use of the surface lands was not limited to the extent provided by state law. The court concluded that damage to structures and facilities causes damage to the land since the value of land is tied to the value of the structures upon it. For all the above reasons, the court found that the regulations promulgated by the Secretary would not amply protect public interests that subsidence caused. Therefore, the court found the Secretary's rules were contrary to SMCRA and remanded the rule to OSM to strike its reference to state law.

The district court's decision was overturned by the District of Columbia Circuit on March 22, 1991. The circuit court found that SMCRA does not require the operator to repair or compensate for subsidence damage to structures, and that OSM rules may allow state law to govern compensation issues.

§ 9.05. SMCRA Prohibitions: Unconstitutional "Takings" Issues with SMCRA Prohibitions.

[1]--Takings Generally.

The Fifth Amendment of the United States Constitution provides, in pertinent part, that: "[N]or shall private property be taken for public use, without just compensation." That prohibition applies to the states through the Fourteenth Amendment, as well as to the federal government. Courts must evaluate any government action that interferes with private property rights in light of this express federal constitutional directive. It appears that both the General Assembly and Pennsylvania courts treat the word "taken" in its literal sense, i.e., a physical appropriation of property by the state. Accordingly, a taking pursuant to eminent domain under Pennsylvania law should not be mistaken for the state's exercise of its police power to protect the health, safety, morals, and welfare of the public.

The first step in a "takings" analysis is to determine whether or not the right denied is a property right. If that question is answered affirmatively, the next step is to consider whether the prohibition furthers a valid public purpose. If that question is answered negatively, the prohibition fails. If the governmental action amounts to taking private property for a public use, the government must compensate the property owner or refrain from action. Finally, courts must analyze this destruction of a property right to determine if it is the type of infringement on property that is constitutionally impermissible.

An argument can be made that the true purpose of the surface owner consent and other prohibitions of SMCRA is not to protect the health, safety, and welfare of the surface estate owners or to conserve land or other natural resources, but rather to alter the existing rights between the two estate owners.

This argument is as follows. Under SMCRA, the surface owner can, at any time and, for a price, unilaterally authorize the mineral owner to conduct surface mining operations.

Mineral owners may reasonably state, as has been argued in regard to Kentucky's broad form deed
Any conservation objective can be thwarted by the unilateral action of private individuals, since the Amendment does not forbid or regulate mining which causes surface damage. It merely places in the hands of the surface owner the option to permit (for a price) or not permit such mining. There is no real relationship between the presumption against the use of after-developed mining methods and the conservation claims in the Amendment's preamble. The surface owner can decide to authorize the use of modern mining techniques even if the use of such methods would actually impede the attainment of the state's alleged goals of promoting the conservation and full use of all the state's natural resources. Thus the Amendment is not a land use regulation and it does not facilitate conservation . . . nor is the Amendment an exercise of the state's police power to protect the public health and welfare. It permits private parties to consent to the use of modern mining methods to extract coal.\(^{(329)}\)

If the real purpose of SMCRA is to place in the hands of third parties the authority by waiver or consent to grant or deny surface mining operations, it is not a valid public one.

There is good support for the proposition that the waivable buffer zones, water replacement, and surface owner consent provisions impair an established property right worthy of constitutional protection.\(^{(330)}\)

Therefore, for the purpose of this Chapter one key constitutional question is whether Congress' real intent in enacting these provisions falls within the government's power to legislate for the health, safety, and welfare of its citizens, i.e., for a valid public purpose.

[2]--Case interpretations of the SMCRA Takings Issue.

Historically, a number of principles have developed from takings cases under other state statutes. In *Pennsylvania Coal Co. v. Mahon*,\(^{(331)}\) the United States Supreme Court found Pennsylvania's Kohler Act constituted an impermissible "taking" of the mineral owner's "rights of property and contract." The Kohler Act prohibited the mining of anthracite coal on severed estates if the mining would cause the subsidence of any structure used for human habitation.\(^{(332)}\)

The Supreme Court held that, while the Kohler Act balanced the private interests of the mineral estate against the private economic interests of the surface estate, the Act primarily served private interests and not the interests of the public's health or safety.\(^{(333)}\) The Court based this conclusion on the fact that the Kohler Act made it commercially impracticable to mine certain coal,\(^{(334)}\) and that the public interest was not sufficient to warrant such an extensive destruction of the mineral owner's property rights.\(^{(335)}\) One who owns an interest in only the subsurface coal would seem to stand in precisely the same position as the complaining surface owner in *Pennsylvania Coal*.\(^{(336)}\) Some believe that should the Supreme Court follow *Pennsylvania Coal*, the relevant takings inquiry would be brief and the mineral owner's chances of success excellent. However, courts have not literally applied *Pennsylvania Coal*, but instead have used a tripartite test of: (1) diminution in value; (2) character of the taking; and (3) impact on reasonable investment backed expectations.\(^{(337)}\)

The Supreme Court addressed similar issues in *Keystone Bituminous Coal Association v. De Benedictis*,\(^{(338)}\) in assessing the constitutionality of Pennsylvania's Subsidence Act. The Court upheld the Act because, unlike the Kohler Act, it did not exempt mining operations that caused subsidence merely because it was the mineral estate owner who was conducting mining operations.

The Court also found that a valid public purpose existed since the Subsidence Act only allowed the mineral owner to remove fifty percent of the coal beneath the protected structure.\(^{(339)}\) The *Keystone* court
distinguished this Act from the Kohler Act, which made it commercially impracticable to mine any coal in the proscribed locations.

SMCRA's prohibitions requiring waivers have common elements of law identified in the *Keystone* and *Pennsylvania Coal* cases. In each case, the statutes were enacted solely for the benefit of private parties, i.e., the surface owner. One could argue that the SMCRA prohibitions addressed in this Chapter lack a valid public purpose since they more closely resemble the unconstitutional Kohler Act by prohibiting certain mining operations in specific locations.

Litigants raised similar constitutional issues not long after Congress enacted SMCRA. In *Hodel v. Virginia Surface Mining & Reclamation Association*, and in *Hodel v. Indiana*, the U.S. Supreme Court heard arguments alleging that Section 522(e) effects an unconstitutional taking because it expressly prohibits mining in certain locations and clearly prevents a person from mining his own land. In both cases, the district courts held that Section 522(e) violated the Just Compensation Clause of the Fifth Amendment.

The Supreme Court avoided addressing this constitutional challenge directly by holding that both lower court rulings suffered from "a fatal deficiency: neither appellees nor the court identified any property in which appellees have an interest that has allegedly been taken by operation of the act." The Court concluded that the parties presented no concrete controversy concerning either the application of the Act to particular surface mining operations, or its effect on specific parcels of land. Thus, the only constitutional question before the Court was whether the "mere enactment" of SMCRA constitutes a taking. In both cases, the Court concluded that SMCRA, on its face, did not deprive the appellees of economically viable use of their property.

The Court in *Virginia Surface Mining*, however, expressly stated that it might entertain such a challenge under the right procedural conditions. The Court said:

There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting . . . a waiver from the surface mining restrictions in Section 522(e). If appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions.

Subsequent cases following *Hodel v. Virginia Surface Mining & Reclamation Association* and *Hodel v. Indiana* have held that some form of exhaustion of administrative remedies must occur before this constitutional issue will be ripe for review.

At least one case, however, has held that exhaustion is not necessary. In *Ginn v. Consolidation Coal Co.*, an action arose as a result of defendant's blasting operations at one of its mines allegedly causing damage to plaintiff's property. Plaintiff contended that defendant's blasting activity was responsible for throwing stones and other debris onto plaintiff's property, resulting in structural damage to plaintiff's dwelling. The relevant issue before the court was whether plaintiff's failure to exhaust administrative remedies available to him precluded him from filing the action.

The Illinois court addressed the exhaustion issue stating that it was not "persuaded that [plaintiff] was required to seek relief through an administrative agency before seeking relief under common law since plaintiff was not seeking review of an administrative action." Even though there was no administrative determination by which "plaintiff has been `aggrieved,'" the court held:
Indeed, the language found in subsection 1270(3) suggests that no exhaustion of administrative remedies is necessitated by the Surface Mining Act and that the institution of administrative proceedings is not a condition precedent to proceeding in the State courts in an action for damages.\(^{(351)}\)

The holding in *Ginn*, while disfavoring exhaustion, is limited in scope to remedies under common law for damages. In *Ginn*, plaintiff sought to recover damages under Illinois' common law remedy for damages resulting from blasting operations, rather than under applicable SMCRA provisions.

**[a]-Valid Public Purpose.**

While no case has been dispositive, prior SMCRA cases indicate the direction federal courts might take in considering a challenge to SMCRA as an unconstitutional taking. The following cases are offered as a comparison of alternative views a court might adopt in determining whether SMCRA is fatally flawed and lacks a valid public purpose, as applied to specific property interest.

The U.S. Supreme Court held, in *Pennsylvania Coal Co. v. Mahon*,\(^{(352)}\) that a state statute prohibiting mining related subsidence effected a taking because it destroyed a mineral owner's property rights.\(^{(353)}\) However, in *Goldblatt v. Town of Hempstead*,\(^{(354)}\) the Court's analysis raised some doubt as to the proper application of *Pennsylvania Coal*. In *Goldblatt*, the Court apparently balanced the public interest in regulation against the private property interest involved, characterizing even a burdensome interference as noncompensable if based on a sufficiently important public interest. The Court upheld a zoning ordinance prohibiting excavation below the water line, even though the ordinance effectively shut down a sand and gravel quarry that had been operating for thirty-one years. The court said that a regulation is not a taking if it appears that "the interests of the public . . .require such interference; and that the means are reasonably necessary for the accomplishment of the purpose, and are not unduly oppressive upon individuals."\(^{(355)}\)

In *Kaiser Aetna v. United States*,\(^{(356)}\) the Court entertained similar issues. There the court considered not only the public interest in taking certain property, but also "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action."\(^{(357)}\) The *Kaiser Aetna* approach seems to place greater emphasis on individual property interests than does the balancing approach in *Goldblatt*.

Yet, the *Goldblatt* court also relied on *Andrus v. Allard*,\(^{(358)}\) which demonstrated even less concern for the individual property owner. In *Andrus* the court said that "[a]t least where an owner possesses a full `bundle' of property rights, the destruction of one `strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."\(^{(359)}\) The *Andrus* court found that the ability of the mine owners to convert their land to alternative uses precludes a taking.\(^{(360)}\) The Court also stated:

It is, to be sure, undeniable that regulations here prevent the most profitable use of appellee's property. Again, however, this is not dispositive. When we review regulations, a reduction in the value of property is not necessarily equated with a taking . . . loss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to test a takings claim.\(^{(361)}\)

The mineral owner's bundle of property interests was taken. If a court were faced with facts in which SMCRA's prohibitions effectively ban surface mining completely, the court might find the entire bundle of property interests was impaired as no other alternative use exists for a mineral estate owner. Denying the mineral estate owner that strand may amount to destroying the entire bundle of rights, and thus result in a taking.
[b]-Just Compensation.

Even if a court finds a valid public purpose exists, the government must still justly compensate for any taking. In Penn Central Transportation Co. v. City of New York, the Court held that the owners of Grand Central Terminal were not entitled to compensation, even though the New York City Landmarks Preservation Law prevented them from erecting a multi-story office building above the terminal. The Court based its decision on the fact that the law applied equally to all New York citizens and that it burdened the owners of the terminal no more than other property owners in New York. The Court also found that the impact of the regulations did not prohibit the owners from the benefit of property ownership, in that the beneficial uses of the terminal remained.

In applying this "beneficial uses" analysis to mineral estate owners, courts in the future will inquire whether per se prohibitions of surface mining operations will leave mineral owners with any viable economic alternatives for their property. In practice, whether or not mineral estate owner may exercise their right to conduct surface mining operations will often rest on whether they have obtained valid consents or waiver from the surface estate owners.

The practical effect of SMCRA's surface mining prohibitions may be somewhat different from the New York City Landmark Preservation regulations. There, the Court considered that the New York property owners could continue their existing lucrative business operation of the terminal. Mineral estate owners seeking to conduct surface operations and forced to obtain a waiver from the surface owner or forego mining on that property altogether may stand a better chance of prevailing under a takings challenge.

Pennsylvania courts have considered the constitutionality of the buffer zone requirements under Pennsylvania's surface mining statute. In Willowbrook Mining Co. v. Pennsylvania, the Pennsylvania Environmental Hearing Board ("EHB") denied Willowbrook's request for variance from the statutory restriction to mine within the 300 feet buffer zone from an occupied dwelling without the occupant's consent. Willowbrook argued that the Pennsylvania EHB should have applied OSM's amended definition of valid existing rights, which required a constitutional takings analysis. The Pennsylvania court disagreed, but said it could not "avoid considering whether the application of the statutory prohibition of mining within 300 feet of a dwelling constituted a taking of Willowbrook's property."

The state court found that Pennsylvania's Surface Mining Act is "an exercise of state police power, that 'inherent power of the body politic to enact and enforce laws for the promotion of the general welfare.'" Admitting that "the propriety of the exercise of the police power is a particularly difficult legal question with which the courts have long wrestled," the court held:

To justify the state in thus interposing its authority in behalf of the public, it must appear - first that the interests of the public generally, as distinguished from those of a particular class require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Willowbrook argued that the statute was unduly oppressive upon individuals and was, therefore, an unconstitutional taking.

The Pennsylvania court addressed Willowbrook's argument considering the factors the Supreme Court raised in Penn Central. The first relevant factor the Pennsylvania court considered was "economic impact," and the second factor was the "character of the challenged government action." The court found that because Willowbrook failed to introduce any evidence of its property values, it failed the first Penn Central
The court also found that the 300 foot prohibition simply "adjust[ed] the benefits and burdens of economic life to promote the common good"(376) and was, therefore, not oppressive.

Litigants raised similar issues before the D.C. Circuit, in National Wildlife Federation v. Hodel,(377) including whether OSM's continually-created valid existing right regulation was reasonable. There, the court said: "Although [the legislative history] does not answer the specific question before us, it does suggest that Congress did not intend to infringe on valid property rights or effect takings through Section 522(e)."(378)

However, in Western Energy Co. v. Genie Land Co.,(379) the Supreme Court of Montana reversed a lower court ruling that denied Western's request to enjoin the Montana Department of State Lands. The Department had denied the right to a surface mining permit without the mineral owner or waiver from the surface estate owner.

Montana's Owner Consent or Waiver Statute stated:

In those instances in which the surface owner is not the owner of the mineral estate proposed to be mined by strip-mining operations, the application for a permit shall include the written consent or a waiver by the owner or owners of the surface land.(380)

The Montana court held that Western had a property interest in its leased mineral estate.(381) The Montana court held that "the holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnations by the United States."(382) The Montana court also held that the government must reasonably adapt police power regulation to its purpose and "must injure or impair property rights only to the extent reasonably necessary to preserve public welfare."(383) Finally, citing a 1894 Supreme Court case,(384) the court held that "[t]he statute must serve a public, rather than a private interest and the means chosen to advance the interest must be reasonable."(385)

Under this analysis, the "Means/End Test," the Montana Supreme Court concluded that Montana's Owner Consent Statute was a denial of just compensation by placing an unreasonable burden on the mineral owners.(386) The court concluded by stating that: "The statute does not bear the requisite `substantial relation to the public health, safety, morals, or general welfare . . . nor does it address reclamation, conservation, or any other policy goal.'"(387) The court likened this case to Pennsylvania v. Mahon(388) finding that the Montana "Owner Consent Statute permits a similar occurrence by effectively depriving Western of the right to mine its coal."(389)

The Western court distinguished Keystone's "bundle of rights" analysis stating that "[u]nder Montana laws . . . Western's entire bundle of rights consists of its right to all the minerals beneath certain sections of land. . . . Consequently, the court's determination in Keystone, that merely one strand of petitioner's rights had been taken, is inapplicable here."(390)

Finally, the Western court considered the imposition of the mineral estate owner's rights under a valid public purpose type analysis. It found that "the adjustment of rights and responsibilities of the contracting parties is not based on reasonable conditions and is not of a character appropriate to the public purpose."(391)

§ 9.06. Conclusion.

With the enactment of SMCRA, Congress altered the legal status of the mineral and surface estate owner. In some states, this was simply a codification of existing law. In others, such as Kentucky, it amounted to a
much more radical shift in power between the two estates.

Nevertheless, Congress expressed through SMCRA the desire to protect surface features for aesthetic and environmental reasons. This was particularly true in reference to the requirement that the surface owner waive or consent to mining operations within 300 feet of an occupied dwelling, that the mining operator replace water supplies damaged by mining operations, and that mining operators have valid consent or authority to conduct surface mining operations. Prior deeds granting the mineral owner general authority under common law no longer provide an unqualified right to conduct surface mining, in view of the surface owner protection SMCRA provides.

1. *The authors are particularly indebted to David A. Smart, and to Lesly A.R. Davis and Jennifer L. Sapp for their assistance in this matter.


3. 2. 30 U.S.C. § 1202(a).

4. 3. Because of the marked differences in surface mining issues and operations in the eastern and western regions of the United States, this Chapter focuses only on surface mining operations east of the Mississippi River, with specific reference to the law in Kentucky, Pennsylvania, Virginia, and West Virginia.

5. 4. 30 U.S.C. § 1272(e)(5).


7. 6. 30 U.S.C. § 1260(b)(6)(A) and (C).

8. 7. 30 U.S.C. § 1201(c).


10. 1. At common law it was understood that the sovereign retained title to all "royal mines," i.e., those lands that contained precious metals. See generally 1 C. Lindley, A Treatise on American Law Relating to Mines § 3-32 (3d ed. 1914) (hereinafter Mines). The concept of sovereign ownership of mineral rights continued under the original land grants to the colonies, reserving to the Crown a certain percentage of all gold and silver produced from the subject property. By contrast in the United States, early land acts provided for outright sale of the entire estate in public lands with no reservation. Because the United States derived little profit from the sale of land and because of pressure from Congress, the Homestead Act of 1862 provided for outright transfer of designated lands to settlers without payment. However, any transfers of land under the Homestead Act had to be without the minerals. Also, in 1862, some federal railroad grants contained reservations excepting all minerals but coal and iron. The land acts and railroad acts after 1862 clearly established a policy of reserving mineral rights to the United States government whenever public lands were transferred to private ownership. This practice is commonly followed today by government and private individuals alike.


12. 3. Lindsey v. Wilson, 332 S.W.2d 641 (Ky. 1960).


15. 6. Jenkins v. Depoyster, 186 S.W.2d 14 (Ky. 1945); Adkins v. United Fuel Gas Co., 61 S.E.2d 633 (W. Va. 1950); Restatement of Property § 476 comment g illustration 6 (1944).

16. 7. For an excellent discussion and in-depth analysis of Kentucky's Broad Form Deed Amendment, and one on which the authors
have relied, see Bratt & Greenwell, "Kentucky's Broad Form Deed Amendment: Constitutional Considerations," 5 J. Min. L. & Pol'y 9 (1989-90).

17. 8. Akers v. Baldwin, 736 S.W.2d 294, 298 (Ky. 1987). The typical Kentucky broad form deed, also known as a "long form," a "Mayo form," or a "Northern form," provides, in essence, that "all" the coal and minerals are being granted "together with the right to enter upon said lands, use and operate the same and surface thereof . . . in any and every manner that may be deemed necessary or convenient for mining . . . and in the use of said land and surface thereof . . . Grantee . . . shall be free from . . . liability or claim of damages . . ." Annotation, Grant, Reservation, or Lease of Minerals and Mining Rights as Including, Without Expressly so Providing, the Right to Remove the Minerals by Surface Mining, 70 A.L.R.3d 383 § 2[a] n.31 (1976).

18. 9. 290 S.W.2d 40 (Ky. 1956).

19. 10. Id. at 43.

20. 11. Id. at 43-44.

21. 12. Id. at 42.

22. 13. For example, in Blue Diamond Coal Co. v. Neace, 337 S.W.2d 725 (Ky. 1960), the court extended the Buchanan rationale by permitting the mineral owner under a broad form deed with a waiver of damage provision to use auger mining to remove its coal. In Kodak Coal Co. v. Smith, 338 S.W.2d 699 (Ky. 1960), the court permitted a mineral owner to mine using auger methods even though a less destructive method was available. In Bevander Coal Co. v. Matney, 320 S.W.2d 301 (Ky. 1959), the court reaffirmed that a waiver of damage provision in a mineral deed precluded the surface owner from obtaining damages unless the mining method was oppressive, arbitrary, wanton, or malicious.


24. 15. Id. at 1133.

25. 16. See id. at 1131-33.

26. 17. 429 S.W.2d 395 (Ky. 1968).

27. 18. Id. at 399

28. 19. Id.

29. 20. 452 F.2d 1126 (6th Cir. 1971).

30. 21. Martin, 429 S.W.2d at 397-399.


32. 23. Id. at 1184 and 1190-1191. U.S. Const. amends. V, XIV.


34. 25. 528 S.W.2d 684 (Ky. 1975).

35. 26. Id. at 687.

36. 27. Id. at 686-87.

38. 29. 736 S.W.2d 294, 310 (Ky. 1987).
39. 30. *Id.* at 310. See *Department for Natural Resources & Envt'l Protection v. No. 8 Ltd. of Virginia*, 528 S.W.2d 684 (Ky. 1975); *Ky. Const.* §§ 27, 28, and 109.
40. 31. *Akers*, 736 S.W.2d at 305.
41. 32. *Id.* at 307.
42. 33. *Ky. Const.* § 19(2).
44. 35. *Id.* at 3; *see also* *United States v. Stearns Coal & Lumber Co.*, 595 F. Supp. 808, 812 (E.D. Ky. 1984), *aff'd*, 816 F.2d 279 (6th Cir. 1987), *cert denied*, 484 U.S. 953.
47. 38. *See United Fuel Gas Co. v. Sawyers*, 259 S.W.2d 466 (Ky. 1953); *Elkhorn Coal Corp. v. Yonts*, 262 S.W.2d 384 (Ky. 1953); and *Elkhorn Coal Corp. v. Johnson*, 263 S.W.2d 124 (Ky. 1953).
48. 39. 259 S.W.2d 466 (Ky. 1953).
49. 40. *Id.* at 467 and 468; *see also* *36 Am. Jur.2d Mines and Minerals*, § 193.
50. 41. 262 S.W.2d 384 (Ky. 1953).
51. 42. *Id.* at 385.
52. 43. *Id.*
53. 44. 263 S.W.2d 124 (Ky. 1953).
54. 45. *Id.* at 125.
59. 50. *Id.* at 786.
60. 51. 42 S.E.2d 46 (W. Va. 1947).
61. 52. *Id.* at 48.
62. 53. *Id.* at 50. *See also* *United States v. Polino*, 131 F. Supp. 772 (N.D. W. Va. 1955), where the court considered intended surface uses as a factor in its decision that surface mining was not permissible.
63. 54. 73 S.E.2d 622 (W. Va. 1952).
64. 55. Id. at 625.
65. 56. Id. at 627.
66. 57. Id. at 629.
68. 59. Id. at 786.
69. 60. Id.
70. 61. Id.
72. 63. 177 S.E.2d 146 (W. Va. 1970).
73. 64. Id. at 147.
74. 65. Id. at 149.
75. 66. 267 S.E.2d 721 (W. Va. 1980).
76. 67. Id. at 723.
77. 68. Id. at 724.
79. 70. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
81. 72. In fact, it has been noted that "Pennsylvania cases have occasioned much confusion and have resulted in divided decisions by the Pennsylvania Supreme Court. The court apparently cannot agree upon the application of stated principles to factual situations which, if not identical, are practically indistinguishable." Donley, "Some Observations on the Law of the Strip Mining of Coal," 11 Rocky Mt. Min. L. Inst. 123, 139-140 (1966).
82. 73. 72 A.2d 568 (Pa. 1950).
83. 74. Id. at 569
84. 75. Id.
85. 76. Id.
86. 77. Id. at 570 (quoting Richardson v. Clements, 89 Pa. 503, 506 (Pa. 1879)).
87. 78. Id. Subsequently, the Pennsylvania court, in Stewart v. Chernicky, 266 A.2d 259 (Pa. 1970), limited the implication of Fisher that strip mining should be viewed as merely an improved process of mining and that the grant of the right to mine by deep
mining would include mining by such an improved process.

88. 79. Id.

89. 80. 89 A.2d 508 (Pa. 1952)

90. 81. Id. at 509.

91. 82. Id. at 510-511.

92. 83. Id. at 513.

93. 84. 97 A.2d 825 (Pa. 1953).

94. 85. Id. at 825.

95. 86. Id. at 826.

96. 87. Id.

97. 88. 72 A.2d 568 (Pa. 1950).

98. 89. 89 A.2d 508 (Pa. 1952).

99. 90. 47 A.2d at 827.

100. 91. 102 A.2d 893 (Pa. 1954).

101. 92. Id. at 894.

102. 93. Id. at 898.


105. 96. Id. at 100.


107. 98. Id. at 834 (citations omitted). See also Merrill v. Manufacturers Light & Heat Co., 185 A.2d 573 (Pa. 1962).


109. 100. Id. at 263 (citations omitted).


111. 102. Ventro v. Clinchfield Coal Corp., 103 S.E.2d 254 (Va. 1958) (suit against surface owner of land to quiet and remove cloud from company's title to coal and other mineral rights) (citing Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 54 S.E. 593 (Va. 1906) (action in ejectment to recover land)).

112. 103. 103 S.E.2d 254 (Va. 1958).
113. 104. *Id.* at 260.
114. 105. *Id.*
115. 106. *Id.*

116. 107. 89 S.E. 305 (Va. 1916).
117. 108. *Id.* at 307.
118. 109. *Id.* at 308.
119. 110. *Id.* at 309.

120. 111. *Id.*

121. 112. *Id.* at 311. "Sic utere tuo ut alienum non laedas" is defined as using one's own property in such a manner as not to injure that of another. *Black's Law Dictionary* 1238 (5th ed. 1979).

123. 114. *Id.*

124. 115. 24 S.E.2d 559 (Va. 1943).
125. 116. *Id.* at 562.
126. 117. *Id.*

127. 118. 4 So. 350 (Ala. 1888).

129. 120. *Id.* at 564.
130. 121. *Id.* at 562.

131. 122. 34 S.E.2d 392 (Va. 1945).
132. 123. *Id.* at 393.
133. 124. *Id.* at 397.
134. 125. *Id.* at 395.

135. 126. Williams v. Gibson, 4 So. 350, 353-54 (Ala. 1888); *see also Yukon*, 24 S.E.2d at 563, 564.

137. 128. *Oakwood Smokeless*, 34 S.E.2d 392 at 395. *But see* Commonwealth v. Barnes & Tucker Co., 319 A.2d 871 (Pa. 1974) which overturned *Sanderson*. The Supreme Court of Pennsylvania stated that the finding in *Sanderson* should be strictly limited to private nuisance actions.
129. Id. at 396

130. Id.

131. 432 F.2d 314 (4th Cir. 1970) and 489 F.2d 260 (4th Cir. 1974).

132. Id. at 315.

133. Id.

134. Id. at 319.

135. Id.


137. Id. at 537.

138. Id. at 539.

139. Id.

140. Id. at 540.

141. In Stonegap Colliery Co., 89 S.E. 305 (Va. 1916), and in Clayborn v. Camilla Red Ash Coal Co., 105 S.E. 117 (Va. 1920), the court held contrary to the then majority rule that a grant of coal with a right to mine and remove that coal includes only those specified rights and anything more must be stipulated to in the instrument.

142. 4 So. 350 (Ala. 1888).

143. Phipps, 222 S.E.2d at 541.

144. Id.

145. Id.


147. 2. Id.

148. 3. Id.

149. 4. Id.

150. 5. Id. at 596.

151. 6. Id.


153. 8. 1971 Senate Interior Committee Print at 5-7.


19. Id.


32. 13. 30 C.F.R. §§ 761.11(e)(1) and (2) (1990).

33. 14. 30 U.S.C. § 1272(e). The "existing operations" exemption has been uncontroversial, yet it is a potentially important unsuitability exemption.

34. 15. Id.

190. 17. Id. at 483.

191. 18. Id. at 485.


193. 20. Id. at 487.

194. 21. Id. at 487, 488.

195. 22. Id. at 488.


198. 25. Id. at 3

199. 26. On May 18, 1982, the United States Secretary of the Interior, pursuant to his authority under SMCRA, granted the Commonwealth of Kentucky conditional approval of its surface mining program. Upon obtaining conditional approval of its program, Kentucky achieved "primacy" or primary jurisdiction to regulate coal mining within its boundaries. The Natural Resources and Environmental Protection Cabinet regulates coal mining operations in Kentucky. Chapter 350 of the Ky. Rev. Stat. contains Kentucky's statutory authority and directives relating to SMCRA. Chapter 224 is the enabling statute for the Natural Resources and Environmental Protection Cabinet and contains general procedural requirements relating to rulemaking and hearings.

200. 27. In 1981, West Virginia established its own regulatory program analogous to SMCRA (W. Va. Code §§ 22A-3-1 to 22A-3-40) in order to assume primary jurisdiction over the regulation of surface mining and coal operations within the state.

The West Virginia Department of Energy regulates surface mining operations in West Virginia under provisions of WVSMCRA and pursuant to a cooperative agreement with the Secretary of the United States Department of the Interior under SMCRA.


Subject to valid existing rights, no surface coal mining operations except those which existed on or before August 4, 1977, shall be permitted within one hundred (100) feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join the right-of-way line. The cabinet shall permit the roads to be relocated or the area affected to lie within one hundred (100) feet of the road if, after public notice and opportunity for public hearing in the locality, a written finding is made that the interest of the public and the affected land owner will be protected, and shall not approve the application for a permit where the surface coal mining operation will adversely affect a wild river established pursuant to KRS Chapter 146, a state park or place listed on the national register of historic places unless adequate screening and other measures as approved by the cabinet are incorporated into the permit application.
Subject to valid existing rights, no surface coal mining operations except those which existed on or before August 4, 1977 shall be permitted within three hundred (300) feet from any occupied dwelling unless waived by the owner, nor within three hundred (300) feet of any public building, school, church, community, or institutional building, public park or within one hundred (100) feet of a cemetery. The cabinet shall not issue a permit if it finds that the operation will constitute a hazard to or do physical damage to a dwelling house, public building, school, church, cemetery, commercial or institutional building, public road, stream, lake, or other public property.


Subject to valid existing rights, no surface coal mining operations except those which existed on August 4, 1977, shall be permitted on any privately owned lands within the boundaries of units of the national park system, the national wildlife refuge systems, the national system of trails, the national wilderness preservation system, the wild and scenic river system, including study rivers designated under Section 5(a) of the Wild and Scenic Rivers Act and national recreational areas designated by act of Congress.

206. 33. 405 Ky. Admin. Regs. 24:040 provides:

Section 2. Permit Application Review.

Except for operations which existed on August 3, 1977, unless the required approvals or waivers have been obtained, upon receipt of a complete and accurate application for a surface coal mining and reclamation operation permit, and subject to valid existing rights, the cabinet shall review the application and deny the permit if it determines that the lands on which the proposed operation would be conducted include: (1) Lands within the boundaries of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under Section 5(a) of the Wild and Scenic Rivers Act (16 USC 1276(a)) or study rivers or study river corridors as established in any guidelines pursuant to that Act, and the National Recreation Areas designated by Act of Congress; (2) Lands within 300 feet, measured horizontally, of any public park, public building, school, church, community or institutional building; or (3) Lands within 100 feet, measured horizontally, of a cemetery; except that cemeteries may be relocated if authorized by applicable state law or regulations; (4) Lands where mining will adversely affect any publicly-owned park or any places included on the National Register of Historic Places unless jointly approved by the cabinet and the federal, state, or local agency with jurisdiction over the park or place as set forth in paragraphs (a) and (b) of this subsection . . . (5) Lands within 300 feet, measured horizontally, from any occupied dwelling, unless the owner of the dwelling has provided a written waiver consenting to surface coal mining operations closer than 300 feet. (a) The applicant shall submit with the permit application a written waiver by lease, deed, or other conveyance from the owner of the dwelling, clarifying that the owner and signator had the legal right to deny mining and knowingly waived that right. The waiver shall act as consent to the operation within a closer distance of the dwelling specified in the waiver. Valid waivers obtained prior to August 3, 1977 shall be valid for the purposes of this paragraph. Waivers obtained from previous owners shall remain effective for subsequent owners who had actual or constructive knowledge of the existing waiver when the dwelling was purchased. A subsequent owner shall be deemed to have constructive knowledge if the waiver has been properly filed in public property records pursuant to state law or if the mining has proceeded to within the 300-foot limit prior to the date of purchase; (b) The waiver shall be knowingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver. In this case, a copy of the lease or deed shall be included with the permit application; and (c) This subsection shall not apply when the part of the mining operation which is within 300 feet of the dwelling is a haul road or access road which connects with an existing public road on the side of the public road opposite the dwelling. (6) Lands within 100 feet, measured horizontally, of the outside right-of-way line of any public road (except where mine access roads or haulage roads join the right-of-way). The cabinet may allow areas within 100 feet to be affected or may allow the public road to be closed or relocated, provided that, the cabinet shall: (a) Require the applicant to obtain any necessary approval of the governmental authority with jurisdiction over the public road; (b) Provide opportunity for a public hearing in the locality of the proposed mining operations for the purpose of determining whether the interests of the public and affected landowners will be protected; (c) Publish notice in a newspaper of largest bona fide circulation according to the definition in KRS 424.110 to 424.120 in the county of the affected area at least two (2) weeks before the public hearing; and (d) Make a written finding within thirty (30) days after the hearing or after any public comment period ends if no hearing is held, on the basis of information received at the public hearing as to whether the interests of the public and affected landowners will be protected. No mining shall be allowed within 100 feet of the outside right-of-way line of a road nor may a road be relocated or closed unless the cabinet determines that the interests of the public and affected landowners will be protected. (7) Federal lands within the boundaries of any national forest, unless specifically approved by the Secretary of the Interior.
After [August 3, 1977] and subject to valid existing rights, no surface mining operations, except those which existed on that date, shall be permitted: . . . (3) within 100 feet of the outside right-of-way line on any public road, except where mine access roads or haulage roads join such right-of-way line, and except that the Commissioner may permit the roads to be relocated or the area affected to lie within 100 feet of the road if, after public notice and an opportunity for a public hearing in the locality, the Commissioner makes a written finding that the interests of the public and the landowners affected thereby will be protected; (4) within 300 feet from any occupied dwelling, unless waived by the owner thereof, or within 300 feet of any public building, school, church, community or institutional building, public park, or within 100 feet of a cemetery; . . ."

Subject to valid existing rights as they are defined under Section 522 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201, et seq, no surface mining operations except those which existed on August 3, 1977 shall be permitted: . . . (4) within one hundred feet of the outside right of way line of any public road, except where mine access roads or haulage roads join such right of way line and except that the Department may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or (5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, or within three hundred feet of any public building, school, church, community, nor institutional building, public park or within one hundred feet of a cemetery.
On July 31, 1982, the Pennsylvania Environmental Quality Board promulgated regulations governing surface coal mining; those regulations defined "valid existing rights" as

[i] Except for haul roads, those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorizes the applicant to produce minerals by a surface mining operation; and provided further that the person proposing to conduct surface mining operations on such lands holds all current State and Federal permits necessary to conduct such operations on those lands and either held those permits on August 3, 1977, or had made by that date a complete application for the permits, variances and approvals, required by the Department.


From the effective date of this Act, as amended hereby, no operator shall conduct surface mining operations (other than borrow pits for highway construction purposes) within one hundred feet of the outside line of the right of way of any public highway or within three hundred feet of any occupied dwelling, unless released by the owner thereof, nor within three hundred feet of any public building, public park, school, church, community or institutional building or within one hundred feet of any cemetery.


On and after March 20, 1979, and subject to valid existing rights, no coal surface mining operations, except those which were existing on August 3, 1977, shall be permitted: . . . 3. Within 100 feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the Director may permit such roads to be relocated or the area affected to lie within 100 feet of such road, if after public notice and opportunity for hearing in the locality, a written finding is made that the interests of the public and landowners affected thereby will be protected; or 4. Within 300 feet from any occupied dwelling, unless waived by the owner thereof, nor within 300 feet of any public building, school, church, community, or institutional building, public park, or within 100 feet of a cemetery.

Areas Where Mining is Prohibited or Limited. Subject to valid existing rights, no surface coal mining operations shall be conducted after August 3, 1977, unless those operations existed on the date of enactment: (a) On any lands within the boundaries of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers Systems including, for study rivers designated under Section 5(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1275(a)), a corridor extending at least one-quarter mile from each bank for the length of the segment being studied, and National Recreation Areas designated by Act of Congress; (b) On any Federal lands within the boundaries of any national forest; provided, however, that surface coal mining operations may be permitted on such lands, if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with surface coal mining operations; and surface operations and impacts are incident to an underground coal mine; (c)
On any lands where mining will adversely affect any publicly owned park or any place included in the National Register of Historic Places, unless approved jointly by the Division and the Federal, State, or local agency with jurisdiction over the park or place; (d) Within 100 feet, measured horizontally on the outside right-of-way line of any public road, except – (1) Where mine access roads or haulage roads join such right-of-way line; or (2) Where the Division or the appropriate public road authority, pursuant to being designated as the responsible agency by the Director, allows the public road to be relocated, closed, or the area affected to be within 100 feet of such road, after – (i) Public notice and opportunity for a public hearing in accordance with § 480-03-19.761.12(d); and (ii) Making a written finding that the interests of the affected public and landowners will be protected; (e) Within 300 feet, measured horizontally, of any occupied dwelling, except when – (1) The owner of the dwelling has provided a written waiver consent to surface coal mining operations closer than 300 feet; or (2) The part of the mining operation which is within 300 feet of the dwelling is a haul road or access road which connects with an existing public road on the side of the public road opposite the dwelling; (f) Within 300 feet measured horizontally of any public building, school, church, community or institutional building or public park; or (g) Within 100 feet measured horizontally of a cemetery; (h) There will be no surface coal mining, permitting, licensing or exploration of Federal Lands in the National Park System, National Wildlife Refuge System, National System of Trails, National Wilderness Preservation System, Wild and Scenic Rivers System, or National Recreation Areas, unless called for by Acts of Congress.


239. 66. Id. at 1371.

240. 67. In longwall mining

two widely spaced tunnels are driven into the seam from the main haulage tunnel and are linked by a fourth tunnel. The fourth tunnel may be near the main haulage tunnel (the advancing long wall method) or may be at the ends of widely spaced tunnels (the retreating longwall method). Coal is removed by widening the fourth tunnel. Bell, 722 F. Supp. at 1371 (citing 4 Encyclopedia Britannica, Coal Mining 774 (1974)).


242. 69. Id. at 1372.

243. 70. Id.

244. 71. Id. at 1374.

245. 72. 222 S.E.2d 536 (Va. 1976).

246. 73. Ball, 722 F. Supp. at 1373.

247. 74. Id.


249. 76. Id. at 646.

250. 77. Id.

251. 78. Id. at 648.

252. 79. Id. at 650.

253. 80. Id. at 649.

Breeding, 726 F. Supp. at 649.

Id. See also Clinchfield Coal Corp. v. Compton, 139 S.E. 308 (Va. 1927) (dicta to effect that, if water was cut off by removal of subjacent support, coal company is liable).


30 U.S.C. §§ 1272(e)(4) and (5).

§ 1291(28)(A).

§ 1266.

405 Ky. Admin. Regs. 16:060 § 8 provides:
Any permittee shall replace the water supply of an owner of interest in real property who obtains all or part of his or her supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source, where the water supply has been adversely impacted by contamination, diminution, or interruption, proximately resulting from the surface mining activities. Baseline geologic and hydrologic information required in 405 KAR 8:030, Sections 12 through 16 shall be used to determine the extent of the impact of mining upon groundwater and surface water.


275. 102. Id. at 815.

276. 103. Id. at 816.

277. 104. Id.


279. 106. Id. at 196.

280. 107. Id. at 201.

281. 108. Id.


284. 111. Id. at 756.

285. 112. Id. at 757.

286. 113. Russell, 389 S.E.2d at 201.

287. 114. The court had held previously, in Stamp v. Windsor Power House Coal Co., 177 S.E.2d 146 (W. Va. 1970), that a coal severance deed authorizing the grantee to mine without leaving subjacent support and containing a specific waiver for liability for damages to water courses barred an action for damages to the surface.

288. 115. Russell, 389 S.E.2d at 204. This case leaves unresolved the effect of a waiver of water replacement rights on those who did not waive and on adjoining landowner's water supplies.


293. 120. Va. Code Ann. § 45.1-258.

295. 122. 839 F.2d 694, 753-54 (D.C. Cir. 1988).

296. 123. Id. at 753. See, e.g., SMCRA § 516(d) (Accommodating distinct differences between surface and underground coal mining); 30 U.S.C. § 1276(2).

297. 124. See S. Rep. No. 128 at 25, 29. The Senate report stated:

Certain of the environmental protection standards for surface mining operations also apply to underground mines. In this section [§ 416], the Secretary is required to incorporate in his regulations the following key provisions [omitting the water replacement requirements] concerning the control of surface effects from underground mining.


300. 127. 30 U.S.C. § 1260 (b)(6)(A) - (C).


303. 130. 405 Ky. Admin. Regs. 8:030 § 4 provides:

Right of Entry and Right to Surface Mine.

(1) Each application shall contain a description of the documents upon which the applicant bases his or her legal right to enter and begin surface mining activities in the permit area and whether that right is the subject of pending litigation. The description shall identify those documents by type and date of execution, identify the specific lands to which the document pertains, and explain the legal rights claimed by the applicant.

(2) Where the private mineral estate to be mined has been severed from the private surface estate, the application shall also provide for lands within the permit area, a copy of the document of conveyance that grants or reserves the right to extract the coal by surface mining methods.

304. 131. W. Va. Code § 22A-3-18(b) provides:

No permit or significant revision of a permit may be approved unless the applicant affirmatively demonstrates and the Commissioner finds in writing on the basis of the information set forth in the application or from information otherwise available which shall be documented in the approval and made available to the applicant that: . . . (5) [i]n cases where the private mineral estate has been severed from the private surface estate, the applicant has submitted: (A) the written consent of the surface owner to the extraction of coal by surface mining; or (B) a conveyance that expressly grants or reserves the right to extract the coal by surface mining; or (C) if the conveyance does not expressly grant the right to extract coal by surface mining, the surface–subsurface legal relationship shall be determined in accordance with applicable law: Provided, that nothing in this article shall be construed to authorize the Commissioner to adjudicate property rights disputes.

305. 132. Other provisions of this statute have been dealt with by the West Virginia courts. See Zirkle v. Faerber, 350 S.E.2d 3 (W. Va. 1986); Burns v. Dials, 378 S.E.2d 665 (W. Va. 1989); and Ooten v. Faerber, 383 S.E.2d 774 (W. Va. 1989).

Except for permit applications based on leases in existence on January 1, 1964, before Bituminous coal surface mines, or leases in existence on January 1, 1972, or anthracite coal surface mining operations and all non-coal surface mining operations, the application for a permit shall include, upon a form prepared and furnished by the Department, a written consent of the landowner to entry upon any land to be affected by the operation, by the operator and by the Commonwealth and any of its authorized agents prior to the initiation of surface mining operations, during surface mining operations and for a period of five years after the operation is completed or abandoned for the purpose of reclamation, planting and inspection or for the construction of any pollution abatement facilities as may be deemed necessary by the Department for the purposes of this Act.


309. 136. Id.

310. 137. Id. at 457.

311. 138. Id. at 456-57.

312. 139. Va. Reg. § 480-03-19.778.15 provides:

(a) An application shall contain a description of the documents upon which the applicant bases his legal right to enter and begin surface coal mining and reclamation operations in the permit area and shall state whether that right is the subject of pending litigation. The description shall identify the documents by type and date of execution, identify the specific lands to which the document pertains, and explain the legal rights claimed by the applicant.

(b) Where the private mineral estate to be mined has been severed from the private surface estate, an applicant shall also submit (1) A copy of the written consent of the surface owner for the extraction of coal by surface mining methods; or (2) A copy of the conveyance that expressly grants or reserves the right to extract coal by surface mining methods; or (3) If the conveyance does not expressly grant the right to extract the coal by surface mining methods, documentation that under applicable State law, the applicant has the legal authority to extract the coal by those methods.

(c) Nothing in this Section shall be construed to provide the Division with the authority to adjudicate property rights disputes.

313. 140. 928 F.2d 453 (D.C. Cir. 1991).


316. 143. 30 C.F.R. § 817.121(c)(2) (1988) states: (c) the operator shall --

(1) correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses which it was capable of supporting before subsidence; and

(2) to the extent required under applicable provisions of state law, either correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensate the owner of such structures or facilities in the full amount of the diminution in value resulting from the subsidence.


320. 147. 30 C.F.R. § 817.121(d).


323. 1. U.S. Const. amend. V.

324. 2. Chicago, Burlington, & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).

325. 3. Note, however, that an aggrieved surface mining operator who believes that denying him a permit constitutes an impermissible taking under one of the provisions of SMCRA would, however, "do well to forgo vindication of his rights under Pennsylvania law and pursue his remedy under the Fourteenth Amendment." Anderson, "A Fifth Amendment Taking Clause Analysis of Pennsylvania's Surface Mining Conservation and Reclamation Act," 86 Dick. L. Rev. 691 (1982).

326. 4. But see Commonwealth v. Plymouth Coal Co., 232 Pa. 141 (1911), aff'd, 232 U.S. 531 (1914) (As long as the state is engaging in a legitimate exercise of its police power, it may render the property worthless.).


328. 6. Id. at 34.

329. 7. Id. at 39.

330. 8. Id.

331. 9. 260 U.S. 393, 413-14 (1922).

332. 10. Id. at 412-13.

333. 11. Id.

334. 12. Id. at 414.

335. 13. Id.

336. 14. Id.


339. 17. Id. at 477.


342. 20. Virginia Surface Mining, 452 U.S. at 294; Indiana, 452 U.S. at 334 - 35.

344. 22. Virginia Surface Mining, 452 U.S. at 294; Indiana, 452 U.S. at 334 - 35.

345. 23. Virginia Surface Mining, 452 U.S. at 295.

346. 24. Virginia Surface Mining, 452 U.S. at 297; Indiana, 452 U.S. at 337.


348. 26. See Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985), on remand, 779 F.2d 50 ("Those [constitutional] factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."); Ramex Mining Corp. v. Watt, 753 F.2d 521, 524 (6th Cir. 1985), cert. denied, 474 U.S. 900 ("Until an administrative disposition is made of this question we will not know the nature of the restraint imposed by the government on plaintiff's mining operations."); Meridian Land & Mineral Co. v. Hodel, 843 F.2d 340, 343 (9th Cir. 1988) ("Appellees must first apply for a surface mining permit or for an agency determination."); Burlington N. R. Co. v. U.S., 752 F.2d 627 (Fed. Cir. 1985) (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n (taking claim premature because appellant "has not exhausted its administrative remedies by seeking a permit to conduct surface coal mining in Custer National Forest."); and Ainsley v. U.S., 8 Cl. Ct. 394 (1985) ("Plaintiff should initially seek an agency determination . . . and that, the court could not decide the `taking' issue without knowing the reaction of the Secretaries to a specific plan.").


350. 28. Id. at 796.

351. 29. Id.

352. 30. 260 U.S. 393 (1922).

353. 31. Id. at 412-14.

354. 32. 369 U.S. 590 (1962).

355. 33. Id. at 595.

356. 34. 444 U.S. 164 (1979).

357. 35. Id. at 175.


359. 37. Id. at 65-66.

360. 38. Id. at 66.

361. 39. Id.


364. 42. Id. at 138.

365. 43. Id. at 136-38. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) (Courts have long recognized that land-
use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not den[y] an owner economically viable use of its land.


368. 46. 499 A.2d 2 (Pa. 1985).

369. 47. 30 C.F.R. § 761.5.

370. 48. Willowbrook, 499 A.2d at 5.

371. 49. Id.

372. 50. Id.

373. 51. Id.


375. 53. Willowbrook, 499 A.2d at 5-6.

376. 54. Id. at 6.

377. 55. 839 F.2d 694 (D.C. Cir. 1988).

378. 56. Id. at 750.

379. 57. 737 P.2d 478 (Mont. 1987).


381. 59. 737 P.2d 478 (Mont. 1987).

382. 60. Id.

383. 61. Id. at 481.


385. 63. 737 P.2d at 481.

386. 64. Id. at 483.

387. 65. Id. at 484 (citation omitted).

388. 66. 260 U.S. 393 (1922).

389. 67. Id. at 482.

390. 68. Id. at 483.
69. *Id.* at 484. For support of this finding the court relied upon the Kentucky Court of Appeals decision in *Department for Natural Resources & Envt'l Protection v. No. 8 Ltd. of Virginia*, 528 S.W.2d 684 (Ky. 1975).