

## 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)<sup>(2)</sup> 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."<sup>(3)</sup> 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.<sup>(4)</sup> 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,<sup>(5)</sup> (2) SMCRA's water replacement requirement,<sup>(6)</sup> 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.<sup>(7)</sup>

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 . . .<sup>(8)</sup>

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."<sup>(9)</sup> 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.<sup>(10)</sup> Having acquired mineral rights to real estate, individuals often withhold those rights from subsequent sale for speculative value.<sup>(11)</sup>

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.<sup>(12)</sup> 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.<sup>(13)</sup> 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.<sup>(14)</sup> 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.<sup>(15)</sup> 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.