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SUBSIDENCE REGULATION

The rights and incidents of property have ancient roots; comparatively recent among them has been the law of correlative rights between owners of surface and subsurface estates. The mineral or subsurface estate in many respects has evolved as the dominant interest while the surface has been relegated a servient position. In an industrially emerging nation the exploitation of mineral wealth to further national aims was considered a result preferable to maintaining an unspoiled surface. The result of such policy, reflected by the legal concepts that have emerged from it, seems to place surface owners in an unfavorable position. The purpose of this comment is to lay a foundation of common law principles of correlative rights, discuss the inequities that have resulted from them, and explore remedial legislation particularly in the area of the recording statutes. Consideration of the problems inherent in the law as it has evolved will uncover a need for legislation in Wyoming.

Property law recognizes three estates in land: the surface estate, the mineral estate and a "third estate"¹ which is the right of support. This right to support, based on natural law, is the right the surface enjoys to remain in its natural state undisturbed by manmade forces from without.² Lateral support is required on the horizontal plane from surrounding land and subjacent support is required on the vertical plane from the underlying strata. The right of support (on both planes) exists at its inception with the surface owner.³ But since it is one of the rights of ownership it is severable from the surface and is alienable as are other property rights. Hence the right to support may be retained by the surface owner or be passed to the owner of the mineral estate.⁴

The right to subjacent support extends not merely to the surface owner, but to every estate on the vertical plane.⁵ Every strata owes a duty of support to all overlying strata and enjoys a right to be supported by the underlying strata. The right

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1. 6A AMERICAN LAW OF PROPERTY § 28.36 (A. J. Casner ed. 1952).
2. Colorado Fuel & Iron Corp. v. Salardino, 115 Colo. 516, 245 P.2d 461 (1952).
3. *Id.*, note 1.
4. Simpson v. Langholf, 133 Colo. 208, 293 P.2d 302 (1956).
5. Marquette Cement Mining Co. v. Oglesby Coal Co., 253 F. 107 (Ill. 1918).

to support is absolute, so negligence of the owner is of no importance.⁶ Any subsidence is actionable and the adjacent estate owner causing it must respond in damages.

As the extraction of minerals by underground mining became a major industry it was soon recognized that the existence of an absolute duty to support the surface could hamper the extraction process. As a result it became a common practice of the mineral estate holders or mining operators to bargain for and obtain the "third estate". Thus the miner could purchase the surface owner's right to support and insulate himself from future liability for surface subsidence caused by his mining operations. Since he owned the right to support he could be negligent or even deliberately cause subsidence of the surface with complete immunity. The courts traditionally enforced an express transfer of the right to support⁷ and were also willing to recognize an implied transfer if it was the clearly ascertainable intent of the parties to make such a transfer.⁸ In determining the intent of the parties the prevalent mining practice in the industry was considered particularly if it was practiced in the community at the time of the devise. If the mining practice so dictated and such intent could be attributed to the parties, subsidence was permitted without liability. For instance, when the primary and most economical method of mining sulfur was shown to be by leeching which caused surface subsidence, the right to support could be implied as being transferred with the minerals.⁹ Likewise if strip mining existed as a practical method of coal extraction and that method was in the contemplation of the parties or even recognized as a distinct possibility, a mineral estate owner could destroy the surface in the process of mining coal.¹⁰

A corollary to the doctrine of subjacent support, is the concept of access through the surface by the mineral estate

6. *Id.*

7. *Diamond Coal Co. v. Neace*, 337 S.W.2d 725 (Ky. 1960).

8. *Union Producing Co. v. Pittman*, 245 Miss. 427, 146 So.2d 553 (1962).

9. *Kenny v. Texas Gulf Sulfer Co.*, 351 S.W.2d 612 (Tex. 1961).

10. *Griffen v. Fairmont Coal Co.*, 59 W. Va. 480, 53 S.E. 24 (1905). Some states hold that strip mining is surface destruction and does not qualify as a reasonable use. They disallow stripping unless that right was expressly granted, *see Smith v. Moore*, Colo. —, 474 P.2d 794 (1970). It is significant to note that in the Smith case mining operations had been underground in the area for 40 years.

holder. Implicit in the conveyance of a mineral interest is a right of access to the minerals.¹¹ This common sense approach to mineral severance has resulted in an implied license of surface use. The mineral estate is considered the dominant estate in the land and the owner can make use of as much of the surface as is reasonably required to work his subsurface interest. A requirement of balancing thus emerges as a requisite to deciding between the competing interests of the surface and mineral estates.

As a means of protecting his rights incident to ownership the dominant mineral owner has been able to obtain an injunction against the servient surface owner to enjoin a use of the surface which would prevent access to the mineral estate.¹² The possible ramifications of this special protection of the mineral owner are staggering. If strip mining was contemplated the rights of the surface owner to satisfy his own desires in utilizing his land could be substantially eliminated by the protection afforded the mineral estate. This situation seriously hinders a subsequent purchaser who has notice of a separate mineral estate. He has, in effect, constructive knowledge of an anticipated destructive use (strip mining) which will be protected by the courts.¹³ Yet the purchaser has no practical method of appraising himself through public records or personal observation of what he is held constructively to know.

The elimination of inequities such as these and the overall balancing of competing interests is a significant portion of a government's overall regulatory responsibility. One Wyoming statute makes an attempt of sorts at protecting the surface owner.¹⁴ The statute provides that a surface owner may demand security from a mineral developer and may get an injunction to halt mining operations until such security is provided. This statute assumes no surrender of support rights by the surface owner. The statute has not been inter-

11. *Pyramid Coal Co. v. Pratt*, 229 Ind. 648, 99 N.E.2d 427 (1951).

12. *Harris v. Chas. Pfizer & Co.*, 385 F.2d 766 (8th Cir. 1967).

13. WYO. STAT. § 34-21 (1957).

14. WYO. STAT. § 30-19 (1957).

preted in Wyoming,¹⁵ but Colorado has a statute of identical wording¹⁶ which has been applied in several cases. While legislation of this sort is ostensibly for the protection of surface owners the Colorado decisions indicate that it may be used to hamper a surface owner in obtaining equitable relief in the form of an injunction proscribing continued mining which results in subsidence.¹⁷ In interpreting the statute the courts could find a legislative intent of encouraging mineral development but requiring the mining industry to pay its own way through damages. So construed the statute would require the surface owner to give up his right to an undisturbed surface and his recompense would be merely the damages resulting therefrom. If the surface owner had expressly or impliedly transferred his right to support he would not even be entitled to recover for the damage done. Since the surface owner still retains support rights (the situation envisioned here) requiring him to submit to damages for disturbance to the surface amounts to the same thing as a forced sale of the "third estate" when conduct clearly evidence no desire to make the sale. It deprives the surface owner of his right to bargain for a good price for a separate and fully alienable estate in land.

Wyoming has both a Grantor-Grantee Index and a Tract Index system of deed recordation.¹⁸ This is, of course, laudible in that it provides a prospective purchaser with a good system of title examination. He can appraise himself of the status of the land he expects to purchase and he has an opportunity to discover the things he is constructively presumed to know

15. For a Wyoming case not resting on the statute but illustrating the preference of the damage remedy over injunctive relief *see*, *Sussex Land & Live Stock Co. v. Midwest Refining Co.*, 294 F. 597 (Wyo. 1923). The court held that an injunction should be denied and that damages were adequate when oil from the subsurface seeped up and polluted a stream.

16. *COLO. REV. STAT.* § 92-24-6 (1963).

17. Consider the language in *Whiles v. Grand Junction Mining & Fuel Co.*, 86 Colo. 418, 282 P. 260-262 (1929). The court said:

We are thus committed to the doctrine that, although the surface owner is not obligated to ask for a bond, nevertheless if, as in the case at hand, a bond is offered by the owner of the mineral in a sufficient amount to protect the surface owner, the court may, in the reasonable exercise of its discretion, permit further mining operations by requiring a bond that will, as in this case, cover all damages that the surface owner may suffer.

The court went on to announce its interpretation of the legislative intent of the act. It said, "Certainly our Legislature passed this statute for a bond to save the surface owner harmless and to permit the owner of the minerals to utilize his property."

18. *WYO. STAT.* §§ 18-124, 125 and 130 (1957).

by the terms of the recording statutes. Notice of conditions existing on surface properties is not difficult as it is a product of a simple inspection of the property involved. The problem of notice is not as easily dismissed in dealing with subsurface estates. A previous conveyance of a mineral estate is notice to a purchaser and is easily identified by title examination. Whether or not the right to support has been conveyed is a more difficult problem. The existence of a separate mineral estate may be sufficient to put a purchaser on inquiry notice of a transfer of the "third estate" embraced in the mineral conveyance.¹⁹ Some words of transfer of mineral interests unequivocally pass the rights to support to the mineral owner, some retain it in the surface owner and some are so ambiguous to require court interpretation. It is the latter case that is of particular interest to a prospective purchaser. If the issue has not been litigated he may be entirely uncertain as to whether he can expect the courts to protect his rights to an undisturbed surface.

Another notice problem inherent in a purchase of only the surface in Wyoming is the extent of prior subsurface extractions. A purchaser can determine that a separate mineral estate exists and may know that the subsurface has been mined, but he cannot tell from the public records how extensively the land is undermined, at what depth, or what manner of support was left in the mine. This situation leaves a purchaser in a tenuous position. He has little information upon which to base a conclusion as to whether the surface may subside. This situation may cause a great deal of uncertainty in land development.

Another area of potential uncertainty is the future of surface land which has been conveyed separately from the minerals. A surface owner may be subject to complete ruin of the surface by strip mining without compensation if the right to surface support has been previously conveyed. He may be enjoined from uses of the surface that interfere with the mineral estate. Even if he has the right of support he may be required to watch the surface destroyed by strip mining and find the courts reluctant to enjoin the mining operator,

19. WYO. STAT. § 34-21 (1957).

but merely willing to award damages which may not be sufficient and are always difficult to measure.

Recognizing the uncertainties and inequities of the common law the Pennsylvania Legislature in 1921 passed a law to protect surface owners from subsidence resulting from extensive underground coal mining throughout some areas of the state.²⁰ The act was declared unconstitutional because it was an overstepping of police power in that it resulted in an uncompensated taking of property from the mineral owners.²¹ The legislature enacted a similar bill applicable to bituminous coal in 1966²² which has not yet been challenged as unconstitutional although it does require that some coal be left in place to support the surface in certain instances. The act protects public buildings, non-commercial structures used by the public (e.g. churches), dwelling houses and cemeteries.²³ Structures covered by the act and erected prior to it are given blanket protection from any future subsidence.²⁴ Structures erected after the act are afforded an opportunity to purchase support from the mineral owner and procedures are outlined to settle disputes when the structure owner and the owner of the subsurface are unable to agree to an acceptable price for the right to support.²⁵

The statute makes provision for notice to subsequent purchasers by requiring a map or plan of the mining operation showing the extent of past and anticipated workings to be filed with the Department of Mines and Mineral Industries and with the recorder of deeds in each county.²⁶ The Secretary of Mines and Mineral Industries can require a bond for mining applicants who are not financially responsible.²⁷ After the effective date of the act all grantors of surface estates (in certain coal producing areas) must certify whether the structures on the land are entitled to support.²⁸ No provision

20. PA. STAT. ANN. tit. 52 §§ 661-71 (1954) (Kohler Act).

21. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

22. PA. STAT. ANN. tit. 52 §§ 1406.1 to .19 and 1407-1410 (1966).

23. *Id.*, § 1406.4.

24. *Id.*

25. *Id.*, § 1406.15.

26. *Id.*, § 1406.5.

27. *Id.*, § 1406.6.

28. *Id.*, § 1406.14.

is made in the statute for subsidence caused when underground fires consume supporting walls and pillars after mining operations have been discontinued. The common law would provide no relief for subsidence where the surface owner has no right to support. Judicial interpretation of Pennsylvania's statute might impose liability on the mine operator upon a showing of negligence and causation, but the statute does not directly address the problem. Anthracite mining is dealt with less extensively in another section²⁹ of the mining statutes and open pit mining is covered separately in the reclamation laws.³⁰

The Pennsylvania Legislature has enumerated several statements of policy upon which the act is based.³¹ They relate to the public good, protection of the health, welfare, and safety of the citizens of the state and declare that the preservation of the surface is in the public interest. This is apparently to save the statute from the judicial execution suffered by the previous subsidence act. The statute also contains a severability clause³² as added protection from the courts. Research has uncovered no cases directly attacking the constitutionality of the statute, however there has been some litigation about the validity of a tax on the minerals not removable because of the subsidence statutes.³³

The Pennsylvania legislation cures some of the ills that besedge surface owners and may be a precursor of more protective laws. It reflects a growing public policy of maintaining our lands intact; a result that was probably inevitable in a state where cities such as Scranton were being eroded by extensive subsidence. The laws brought about in Pennsylvania by public displeasure with a hazardous situation can serve as a guide for action before a similar situation develops in Wyoming.

Vast areas of Wyoming have subsurface mineral deposits and the mining industry is currently engaged in extraction of

29. *Id.*, §§ 661-672.10.

30. *Id.*, §§ 1396.1 to .21.

31. *Id.*, § 1406.3.

32. *Id.*, § 1406.19.

33. Note, *Some Problems of the 1966 Pennsylvania Bituminous Mine Subsidence Act* 30 U. PITT. L. REV. 391 (1968) is a student comment about Pennsylvania's mineral tax as applied to coal not removable because of the subsidence laws.

coal, soda ash, uranium and trona in diverse locations throughout the state. The potentials of mineral development are great but the possibilities of surface disruption are equally great. Wilderness areas, game preserves, fishing and hunting areas, national parks and forests, ranch and farming lands, and areas of natural scenic beauty and interest are also state assets of substantial value. These areas depend to a large extent, if not entirely, upon an unspoiled surface. The tourist and recreation industry has great possibilities in Wyoming but it may be hampered if considerable sections of land on the route to or surrounding areas of intense tourist use are left to subside or are marred by spoil piles and open pit mines. Mineral interests must be weighed against the aesthetic, recreational and agricultural value of natural surface land and the two competing factors must somehow be brought into balance without destroying either. Since the common law has failed to provide a balance that is acceptable to both factions the task seems to be one for the legislature.³⁴

The Wyoming legislature has recognized that a problem exists in the extraction of minerals from state soil. This is evidenced by the Open Cut Land Reclamation legislation enacted in 1969³⁵ and by a house bill introduced in the 1971 bi-annual session of the legislature.³⁶ While the act is not as comprehensive as those of other mining states and does not require that mined land be completely reclaimed it does reflect public concern at the growing exploitation of surface lands in the production of minerals. A logical step for Wyoming on the path towards unspoiled surface lands would be legislation aimed at preventing economically wasteful subsidence.

A statute similar to the Pennsylvania Bituminous Mine Subsidence and Conservation Act³⁷ would be in the public interest of Wyoming. It would serve to mellow some of the common law doctrines favoring the dominant mineral estate and would provide a practical means of protection for purchasers of surface land by establishing accurate records

34. For a discussion of the factors that provide a favorable environment for mineral interests see, Ely, *Policy Considerations in the Development of Mineral Laws*, 3 NATURAL RESOURCES LAW 281 (1970).

35. WYO. STAT. §§ 30.96-1 to -13 (1957).

36. H.B. 407, Wyoming Legislature, 41st Sess. (1971).

37. PA. STAT. ANN. tit. 52 §§ 1406.1 to .19 (1966).

and maps in each county. It would provide a prospective purchaser with the means of obtaining actual notice of the condition of the subsurface of the land and give protection from subsidence to structures of public importance both present and future. Most important it would be evidence that the people of the state are not willing to exploit the mineral wealth at the expense of surface uses.

The Pennsylvania statute discussed here only attempts to regulate subsidence resulting from the mining of bituminous coals but its overall purpose makes it adaptable to most underground mining. It is a model worthy of note and should be considered for Wyoming. Enactment of a statute similar to Pennsylvania's coupled with strip mining legislation which has already been started would serve as a significant advance in preserving the state's natural topography.

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