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DUTY OF A URANIUM MINER TO SUPPORT THE SURFACE ESTATE

A in 1855 conveyed to B, reserving in himself and his successors in interest all rights to the mineral fee, including the privilege to mine, sell, explore, develop or otherwise enjoy any and all metals or minerals found on the land. A subsequently conveyed the mineral fee to C, and C to F the present owners in 1955.[1]

At the time of the original reservation by A many of the modern day minerals and methods of mining were virtually unknown. Uranium and the present mining method in vogue in Wyoming can reasonably be assumed to have been without contemplation by parties to deeds one hundred years ago; or prior to the time when its true value was known. Because of this, a problem now confronts the attorney in this state and others where the open cut method of mining is used, namely: what is the duty of a uranium miner to support or protect the surface estate? What are the general rules relating to the support and protection of land? Are they applicable to the uranium miner? And, how can the owner of the mineral fee and a surface owner be afforded an opportunity to enjoy their respective fees without substantial interference from others? The rule has been that the owner of a surface estate is entitled to the lateral and subjacent support of his land in its natural state. This rule was first asserted in *Harris v. Ryding*,[2] reaffirmed in *Humphries v. Bragden*[3] and is still followed in American cases today.[4] Lateral support is that support which land receives from adjoining land, or any support which may have been substituted for the natural condition of the land; whereas, subjacent support is that support which land receives from the earth beneath it, or support which has been substituted for the natural condition.[5] These two types of support have been historically classified as natural or proprietory rights incident to the ownership of the surface or dominant estate.

Chiefly, the liability of the mineral estate to furnish lateral and subjacent support has been predicated on two theories: (1) When a grantor severs the mineral fee from the surface, reserving the surface in himself, there is an "implied reservation" that only so much of the mineral or minerals may be removed as will leave a sufficient support for the surface estate.[6] (2) The other ground of liability is based on the rationale of the maxim "sic utero tuo ut alienum non laedus." A liberal interpretation of this means that a person should only use his property in such manner as not to injure others.[7]

1. Similar to the deed over which a controversy arose in Com. v. Fisher, 364 Pa. 422, 72 A.2d 568 (1950).
2. Harris v. Ryding, 5 M. and W. 60 (1839).
3. Humphries v. Bragden, 12 Q.B. 739 (Eng. 1850).
4. Mason v. Peabody Coal Company, 320 Ill. App. 350, 51 N.E.2d 285 (1943).
5. Burby, Real Property, c. V. (1943).
6. Coleman v. Chadwick, 80 Pa. 81 (1875).
7. Broom, A Selection of Legal Maxims (London, 1845).

This right of support is sometimes referred to, by text writers, as a third estate, with the possibility of such right being vested in a third person other than the owner of the mineral fee or surface owner; and, if such is the case, the owner of the surface estate may not bring an action for subsidence against the owner of the mineral fee.[8] Perhaps it is well to note that a right of action for subsidence is only acquired when the subsidence occurs,[9] not at the time of excavation, and likewise the Statute of Limitations will not begin to run until the actual occurrence of such subsidence.[10]

An extreme application of the rule which enforces absolute liability on the owner of the mineral fee for lateral and subjacent support is illustrated by *Nooran v. Pardee*.[11] Here, the court stated that the surface owner has the right to demand sufficient support, even, if to the end that it be necessary to leave every ton of coal untouched under his land. Continuing, the court stated the caveat that all the owner of the mineral receives, in the absence of a clear waiver of the right to support, is whatever he can obtain without injury to the surface in its natural state. On a similar rationale, it has been held that a reservation of all minerals with sufficient privilege to mine the same did not give the grantor the right to destroy the surface,[12] and, a mineral owner is liable for strip mining where the surface is damaged, even though an 1855 deed did grant the full, entire, and complete right to the minerals.[13] The foregoing reasoning has been the dominant tone of the cases in this area, however, jurisdictions which have taken issue to this approach have done so vigorously.[14]

The earliest denunciation of the holding in *Humphries v. Bragden*[15] was asserted in *Griffin v. Fairmont Coal Company*.[16] The ratio deciendi of the latter case was that a mineral owner engaged in tunnel mining operations, owned all that he had purchased and could develop the same without limitations from his grantors as to support, and there is no implied reservation as to a duty to support the surface owner.

Since the earlier minerals were conducive chiefly to tunnel or subterranean methods of mining, the law as to lateral and subjacent support, as well as other protection to be afforded the surface owner,[17] was applied in that context. Jurisdictions refused to relax the strict application of the Bragden rule[18] even though the mineral involved was of more value

8. Young v. Thompson, 272 Pa. 360, 116 Atl. 297 (1922).
9. 4 Rest. Torts, § 820, Comm. g. (1939).
10. Backhouse v. Bonomi, 9 H.L. Cas. 503 (1861).
11. Noonan v. Pardee, 200 Pa. 474, 50 Atl. 255, 55 A.L.R. 410, 86 Am. St. Rep. 722 (1901).
12. Campbell v. Campbell, 29 Tenn. App. 651, 199 S.W.2d 931 (1946).
13. Comm. v. Fisher, supra note 1.
14. Griffin v. Fairmont Coal Co., infra note 15.
15. Humphries v. Bragden, 12 Q.B. 739 (Eng. 1850).
16. Griffin v. Fairmont Coal Company, 59 W. Va. 480, 53 S.E. 24 (1905).
17. Noonan v. Pardee, supra note 11.
18. Humphries v. Bragden, supra note 4.

than the surface[19] or that the mineral was withdrawn according to the customary manner.[20] The earliest indication that the doctrine of subjacent and lateral support may not be applicable to the open cut method of mining, which is the prevalent manner of mining uranium in Wyoming today, was indicated in the decision of *Hendricks v. Spring Valley Min. and Irr. Company*.[21] The California court decided the doctrine of lateral support did not apply to adjoining owners of placer mining claims, for to apply such doctrine would defeat the purpose for which the claims were located. Technically, placer differs from that of the open cut method of mining, however, such difference is not so fundamental as to necessitate a change in the rule of law applied here, when transferred to an open cut or strip mining community. Thus, if this decision were to be followed by the Wyoming courts, the uranium miner in this state would owe no duty of lateral support to adjoining claim owner.[22]

Jurisdictions have been relatively silent as to the inapplicability of the doctrine of subjacent support to strip, open pit, and open cut methods of mining. Cases with facts adaptable to such a discussion have been before the courts frequently, but the grounds for the holdings in such cases were based on intent of parties at time of reservation,[23] negligence,[24] the balance of the equities,[25] and statutory liability.[26]

A decision directly on the point was rendered in *English v. Harris Clay Company*.[27] Here the owner of the surface rights attempted to recover damages from the owner of the mineral rights, sustained when the latter removed surface soil in mining for Kaolin. The court held that the custom of open pit mining, or mining by the removal of the top soil, for the recovery of Kaolin and similar minerals was in vogue in that locality; hence, the doctrine of subjacent support, since it pertained speci-

19. Moss v. Jourdan, 129 Miss. 598, 92 So. 689 (1922).
20. Coleman v. Chadwich, 80 Pa. 81, 21 Om. Rep. 93 (1875).
21. W. C. Hendricks v. Spring Valley Mining and Irrigation Company, 58 Cal. 190, 41 Am. Rep. 257 (1881).
22. The mineral fee owner causing the subsidence would be liable for the pecuniary amount of ore falling from the adjoining claim into his, unless such ore was worth less than the cost of mining it. See note 21.
23. United States v. Polina, 131 F.Supp. 772 (N.D. W.Va. 1955). Held: The owner of a reserved mineral interest could not strip mine for coal resulting in the destruction of surface estate deeded to the United States for forestry purposes, even though that was the customary method in that area because the parties could not have intended the owner of surface rights to be deprived thereof.
24. Colorado Fuel and Iron Corp. v. Salardina, 125 Colo. 516, 245 P.2d 461, 32 A.L.R.2d 1302 (1952). Held: It is incumbent upon the surface owner to establish by a preponderance of the evidence that the owner of the subjacent rights operated in a reckless, careless, or negligent manner to surface owner's damage before recovery can be obtained for structures erected on the surface.
25. Barker v. Mintz, 73 Colo. 1262, 215 Pac. 534 (1923). Held: The only practical method of mining the mineral was by strip and the surface was practically worthless, therefore an injunction was refused on the contingency that the mineral owner would compensate the surface owner for damages. Here the Defendant's loss would be incomparably greater than Plaintiff's damage.
26. Whiles v. Grand Junction Mining and Fuel Company, 86 Colo. 1418, 282 Pac. 260 (1929). Held: The mineral owner was enjoined from mining until a sufficient indemnity bond be given by him under the statute. (Colo. Comp. Laws 1921, § 3299) Colo. Rev. Stat. Ann. 92-24-6 (1953).
27. English v. Harris Clay Co., 225 N.C. 467, 35 S.E.2d 339 (1945).

fically to subterranean mining, was of doubtful application. It was also asserted that the defendant's duty was to use due care in recovering the mineral so as not to injure the surface any more than necessary. Supposedly for a surface owner to recover on the basis of such holding, it would be incumbent upon him to prove that the subjacent owner injured the surface more than necessary.

English Clay Company[28] modifies *Humphries v. Bragden*[29] and presents a new theory in this area of the law. From the indications in *Banks v. Tennessee Mineral Corporation*[30] and *Alabama Vermiculite Corporation v. Patterson*,[31] a relaxation of the doctrine of absolute liability, which has been imposed on the mineral estate for support of the surface estate regardless of the custom or the most approved methods of extracting such ore, could very well have commenced.

An adoption of the new theory in this and other jurisdictions would not per se prohibit the application of all equitable approaches, which to a degree are necessary if both surface and mineral owners are to be adequately protected. If, under the Harris Clay Company rule,[32] it is necessary for the mineral owner to destroy all the surface in the mining process, then the surface owner is to be compensated by the applicable rule of damages.[33] When such danger appears imminent, it appears that Section 57-905 of the Wyoming Compiled Statutes (1945), would apply. This statute gives the surface owner the right to demand satisfactory security from the miner and if the same is refused, the surface owner may enjoin the mining activity until the security is furnished. The Wyoming Court has never had an occasion to interpret this statute; however, it appears that when enacted complete destruction of the surface estate was not the interest of the legislature. A similar statute[34] has been construed by the Colorado court so as to allow the court to enjoin all further mining until a bond that will cover all damage to the surface rights caused by such mining is furnished by the mineral owner. If the intent of the legislature, which is to furnish protection for the surface owner against mining activities, is followed, such an interpretation would seem applicable in a jurisdiction where the total surface destruction is threatened.

A problem similar to the above mentioned arose in *United States v. Polino*.[35] Here the court did not mention the Harris Clay Company rule and based its holding on the intention of the parties. In this case the mineral owner strip mined coal which resulted in destruction of the surface

28. Ibid.
29. Humphries v. Bragden, supra note 4.
30. Banks v. Tennessee Mineral Corporation, 202 N.C. 408, 163 S.E. 108 (1932). Held: The doctrine of subjacent support was inapplicable to Feldspar mining.
31. Alabama Vermiculite Corporation v. Patterson, 130 F.Supp. 867 (W.D. S.C. 1955). English v. Harris Clay Company followed.
32. English v. Harris Clay Co., supra note 26.
33. See C. T. McCormick, Handbook on the Law of Damages, c. 20 and 21 (1935).
34. Colo. Rev. Stat. Ann. § 92-24-6 (1953).
35. United States v. Polino, 131 F.Supp. 772 (N.D. W.Va. 1955).

estate. The court held that the mineral owner knew when the surface was deeded to the United States for forestry purposes that the land would be of little or no use if the surface was destroyed, therefore the mineral owner did not acquire with the reservation the right to use the strip method of mining.

The Wyoming court has three prevailing rules from which to choose in resolving cases involving the duty of a uranium miner to furnish surface support: (1) The miner has an absolute liability to support the surface estate.[36] (2) Surface support depends on the intention of the parties at the time of the grant.[37] (3) The rule imposing absolute liability is inapplicable to strip and open cut mining.[38] The adoption of rule (1) or (2) would inflict a fatal blow to the progress of the uranium industry because the chief method of uranium mining in this area is the open cut by which it is necessary to destroy a certain portion of the surface estate. To apply the third rule would extend to the mineral owner the opportunity to make maximum use of his estate, once the surface owner is fully compensated for his loss. In this manner both parties are given full enjoyment of their property as far as practical, avoiding the possibility of one estate usurping the other.

This aggregate of decisions[39] is of prime significance to the uranium miner in Wyoming, for they afford him a forecast of what his duties are as to the surface estate if he is to avoid liability. Under these decisions the uranium miner's privileges and prohibitions are: (1) he must refrain from performing his operations in a reckless or wanton manner,[40] (2) the miner owes no duty to adjoining claim holders for lateral support,[41] (3) there is no liability for subsidence as to structures on the surface unless he is negligent,[42] (4) the uranium miner owes an absolute duty not to injure the surface more than necessary, (5) if a miner should happen to be negligent, his damages would be based upon the reduction in value of the land for its surface use,[43] including loss of profits to the surface owner. If demanded, the mineral owner must furnish a satisfactory security to the surface owner.[44]

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36. Noonan v. Pondee, supra note 11.
37. United States v. Polina, supra note 22.
38. English v. Harris Clay Company, supra note 26.
39. English v. Harris Clay Co., supra note 26, — Expresses the general tenor of the later cases which have adopted this approach.
40. Griffin v. Fairmont Coal Company, 59 W.Va. 480, 53 S.E. 24 (1905).
41. W. C. Hendricks v. Spring Valley Mining and Irrigation Company, 58 Cal. 190, 41 Am. Rep. 257 (1881).
42. Colorado Fuel and Iron Corporation v. Salardino, 125 Colo. 516, 245 P.2d 461, 32 A.L.R.2d 1302 (1952).
43. Kentucky West Virginia Gas Co. v. Crum, 258 Ky. 508, 80 S.W.2d 537 (1935).
44. Wyo. Comp. Stat. § 57-905 (1945).