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THE SURFACE OWNER'S ESTATE BECOMES DOMINANT: WYOMING'S SURFACE OWNER CONSENT STATUTE

In 1973, as part of the Wyoming Environmental Quality Act, Wyoming passed a surface owner consent law.¹

1. WYO. STAT. § 35-11-406(b) (x-xii) (1977), as amended (1978).

(b) The application shall include a mining plan and reclamation plan dealing with the extent to which the mining operation will disturb, change or deface the lands to be affected, the proposed future use or uses and the plan whereby the operator will reclaim the affected land to the proposed future use or uses. The mining plan and reclamation plan shall be consistent with the objectives and purposes of this act and of the rules and regulations promulgated. The mining plan and reclamation plan shall include the following:

(x) For a surface mining operation granted a new permit after July 1, 1973, and prior to March 1, 1975, except for an operation legally operating under the 1969 Open Cut [Land] Reclamation Act, an instrument of consent from the surface owner, if different from the mineral owner, to the mining plan and reclamation plan. If consent cannot be obtained as to either or both, the applicant may request a hearing before the environment quality council. The council shall issue an order in lieu of consent if it finds:

- A. That the mining plan and the reclamation plan have been submitted to the surface owner for approval;
- B. That the mining plan and the reclamation plan is detailed so as to illustrate the full proposed surface use including proposed routes of egress and ingress;
- C. That the use does not substantially prohibit the operations of the surface owner;
- D. The proposed plan reclaims the surface to its approved future use, in segments if circumstances permit, as soon as feasibly possible;

(xi) For an application filed after March 1, 1975, an instrument of consent from the resident or agricultural landowner, if different from the owner of the mineral estate, granting the applicant permission to enter and commence surface mining operation, and also written approval of the applicant's mining plan and reclamation plan. As used in this paragraph "resident or agricultural landowner" means a natural person or persons who, or a corporation of which the majority stockholder or stockholders:

- A. Hold legal or equitable title to the land surface directly or through stockholdings, such title having been acquired prior to January 1, 1970, or having been acquired through descent, inheritance or by gift or conveyance from a member of the immediate family of such owner; and
- B. Have their principal place of residence on the land, or personally conduct farming or ranching operations upon a farm or ranch unit to be affected by the surface mining operation, or receive directly a significant portion of their

This law requires applicants for mining permits after March 1, 1975, to have the written consent of the surface landowner, if the landowner owned the land before January 1, 1970, before the state will issue the applicant a mining permit.² If the surface landowner is not a resident or agricultural landowner or acquired his title after January 1, 1970, the mining permit applicant can receive a permit without the surface owner's consent if he meets the criteria set forth in Section 35-11-406(b) (xii) of the Wyoming Statutes.

Wyoming's surface owner consent law has the practical effect of reversing the legal position of the surface owner and the mineral estate owner. Before the statute was passed the mineral estate had always been held to be the dominant estate while the surface estate was considered the servient estate.³ Now the surface owner, at least those who owned their land before January 1, 1970, is in the dominant bargaining position. According to this statute, no mining can be done on such lands without the surface owner's consent; therefore, mining permit applicants have no choice but to meet the demands of the surface owner.

1. Continued—

- income from such farming or ranching operations..
- (xii) For any application filed after March 1, 1975, including any lands privately owned but not covered by the provisions of subdivision (b) (xi) of this section an instrument of consent from the surface landowner, if different from the owner of the mineral estate, to the mining plan and reclamation plan. If consent cannot be obtained as to the mining plan or reclamation plan or both, the applicant may request a hearing before the environmental quality council. The council shall issue an order in lieu of consent if it finds:
- A. That the mining plan and the reclamation plan have been submitted to the surface owner for approval;
 - B. That the mining plan and the reclamation plan is detailed so as to illustrate the full proposed surface use including proposed routes of egress and ingress;
 - C. That the use does not substantially prohibit the operations of the surface owner;
 - D. The proposed plan reclaims the surface to its approved future use, in segments if circumstances permit, as soon as feasibly possible.

2. WYO. STAT. § 35-11-406(b)(xi) (1977, as amended 1978).

3. *Kinney Coastal Oil Co. v. Kieffer*, 278 U.S. 488, 504 (1928).

This comment will discuss the constitutionality of Wyoming's surface owner consent law in three areas. The first is whether Wyoming's statute is an unconstitutional taking without compensation of the dominant position of the mineral estate holder. The second theory will be that the federal government has preempted the area of mineral lands regulation and therefore Wyoming's statute is void. The third theory is that Wyoming's statute is unconstitutional because it denies equal protection of the law under the fourteenth amendment to the U.S. Constitution. This comment will deal primarily with the reservations of mineral rights under lands the federal government disposed of to private interests. It will not deal with reservations of mineral estates by private parties.

The Wyoming Surface Owner Consent Statute

Wyoming's surface owner consent law makes no distinction between federal, private or state owned mineral estates and surface estates.⁴ Section 35-11-406(b) (xi) of the Wyoming Statutes defines "surface owner" very narrowly. The surface owner must be both a resident or agricultural landowner and have owned the land since January 1, 1970.⁵ Under this section the surface owner's consent is absolutely required.⁶ Section 35-11-406(b) (xii) of the Wyoming Statutes on the other hand includes all surface owners. However, this section provides fewer protections for the surface estate owner. Under this section if the mining applicant cannot obtain surface owner consent, the applicant may request a hearing before the environmental quality council.⁷ The council shall then issue an order in lieu of consent if it finds:

- (A) That the mining plan and the reclamation plan have been submitted to the surface owner for approval;
- (B) That the mining plan and the reclamation plan is detailed so as to illustrate the full pro-

4. WYO. STAT. §§ 35-11-103(e) (xi) (1977), 35-11-401(a), 35-11-405(a) (1977).

5. WYO. STAT. § 35-11-406(b) (xi) (1977, as amended 1978).

6. *Id.*

7. WYO. STAT. § 35-11-406(b) (xii) (1977, as amended 1978).

- posed surface use including proposed routes of egress and ingress;
- (C) That the use does not substantially prohibit the operations of the surface owner; and
- (D) That the proposed plan reclaims the surface to its approved future use, in segments if circumstances permit, as soon as feasibly possible.⁸

Therefore, under Section 35-11-406(b) (xii) of the Wyoming Statutes the only real protection for the surface owner is subpart (C) above. This leaves the mineral estate owner in the dominant position when it comes to bargaining. However, subpart (xii) (c) is a significant increase in the protection of the surface owner. Prior to this statute, Wyoming case law⁹ and Federal statutes¹⁰ had held that "In the absence of proof of negligent mining operations . . . the surface owners . . . can recover only for damages to agricultural improvement or agricultural crops."¹¹ Thus subpart (C) above at least signifies that no lawful operation of the surface owner can be destroyed without compensation by the holder of the mining permit.

The Effect of the Surface Owner Consent Statute

In Wyoming, prior to passage of the surface owner consent statute, the rule concerning federally reserved minerals was that, "Where . . . the United States reserves the mineral estate, together with the right to prospect for, mine, and remove the same in a grant of the surface estate, there is a servitude laid on the surface estate for the benefit of the mineral estate."¹² Approximately twelve percent of the State of Wyoming was affected by this rule.¹³ In the entire United States, "as of 1972, surface patents with minerals reserved to the United States had been issued under the

8. *Id.*

9. *Holbrook v. Continental Oil Co.*, 278 P.2d 798 (Wyo., 1955).

10. Stock-Raising Homestead Act of Dec. 29, 1916, 43 U.S.C. §§ 291-301 (1970); Agriculture Entry Act of July 17, 1914, 30 U.S.C. §§ 121-123 (1970); Coal Lands Act of June 22, 1910, 30 U.S.C. §§ 83-85 (1970).

11. *Holbrook v. Continental Oil Co.*, *supra*, Note 9, at 804.

12. *Transwestern Pipeline Co. v. Kerr-McGee Corp.*, 492 F.2d 878, 882, 883 (10th Cir. 1974).

various surface entry acts affecting 62, 872, 663 acres of land."¹⁴ The federal rule essentially paralleled the common law rule:

The owner of a severed mineral estate has long been characterized as 'dominant' in relation to the owner of the surface estate. The general rule today, with certain exceptions is as follows:

The [mineral] owner has the right to mine even though the grant or reservation contains no express mining clause. The right to mine . . . is incident to the ownership thereof; he has the right to use the surface in a manner fairly necessary to the enjoyment of the mineral estate. When a thing is granted, all the means to obtain it and all the fruits and effects of it are also granted.¹⁵

While the mineral estate owner can use whatever means are reasonable and necessary to extract the minerals, he must show due regard for the rights of the surface owner.¹⁶ As a result of the conflicting rules there has developed an "Uncertainty over rights to use or destroy the surface [which] has caused conflict between more and more mineral and surface owners, fomenting litigation and discouraging the full development of either mineral or surface estates."¹⁷ The federal law has the same uncertainty; "No cases have been found which directly decide whether a reservation of coal under the 1909 or 1910 Acts or of all minerals under the 1916 Act entitles the United States or its lessees to mine coal by surface mining methods."¹⁸ One observer noted that,

The legal staffs of most of the coal development companies must also feel an uncertainty about the rights of the surface owner to block surface mining. Acting on their counsel, many energy companies . . . have purchased ranch lands in fee, leases author-

14. *Id.*

15. Dycus, *Legislative Clarification of the Correlative Rights of Surface and Mineral Owners*, 33 VAND. L. REV. 871, 872 (May, 1980).

16. *Id.* at 871.

17. *Id.*

18. Haughey and Gallinger, *Legislative Protection of the Surface Owner in the Surface Mining of Coal Reserved by the United States*, 22 ROCKY MTN.

MINN. J. ENV. 145, 149 (1976).

izing surface mining and options to lease or purchase. . . ."¹⁹

Thus while the mineral estate owner appeared to be in a dominant position before the surface owner consent law, as a practical matter the "mineral owners . . . often opted for the expediency of paying the surface owner for his cooperation."²⁰ The Wyoming surface owner consent law may not have had that much practical effect, except that the mineral owner who is determined to press his advantage is no longer able to do so. Moreover, the statute puts the surface owner in the driver's seat. So, whereas before the mineral estate owner could press his advantage to the detriment of the surface owner, now the reverse is true. Perhaps that is as it should be since, of the two, the mineral developer is usually in the better position to purchase the rights of the other.

Constitutionality Under Traditional Law

a) The Unconstitutional Taking of Private Property Without Just Compensation Theory.

Under the traditional tests for determining whether the use of the police power by the state to take private property was constitutional, the Wyoming surface owner consent law would probably have been unconstitutional. The traditional rules were that the exercise of the police power is presumed to be constitutionally valid and the presumption of reasonableness is with the State.²¹ Further it was held that every regulation necessarily speaks as a prohibition and such a characterization does not determine whether or not an ordinance is constitutional.²² However, the traditional test also stated that "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking."²³ Thus, in the case of surface owner consent laws the courts need not find that the State

19. *Id.* at 150.

20. Mall, *supra* note 13, at 1.

21. See Goldblatt v. Town of Hempstead, 369 U.S. 590, 596 (1962).

22. *Id.* at 592.

23. United States v. General Motors, 323 U.S. 373, 378 (1945).

has taken the rights of the mineral estate but they need merely find that the State has caused the mineral estate owner to be deprived of his rights. The only factor left to determine under the traditional test would be whether or not the dominant position of the mineral estate is a property right. The U.S. Supreme Court held that, when a mining claim is perfected it is a grant of exclusive possession by the United States.²⁴ Just compensation must be paid to take it away. The Court has also held that,

One fact for consideration in determining [the] limits [of the police power] is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.²⁵

This latter statement came in *Pennsylvania Coal Co. v. Mahon* where a Pennsylvania statute had given surface owners the right to subjacent support even if the severing of the mineral estate had expressly taken this right away. The Court went on to hold in that case that, "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."²⁶ And, further, "So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights. . . ."²⁷ Thus it appears that following this same traditional thinking the Wyoming surface owner consent law would be held to be unconstitutional.

b) Federal Preemption of the Regulation of Mineral Lands Prior to 1977.

The theory of federal preemption is based on the Supremacy Clause²⁸ of the federal constitution. The traditional

24. *Wilbur v. United States*, 280 U.S. 306 (1930).

25. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

26. *Id.* at 414.

27. *Id.* at 416.

28. U.S. Const. art. 6, § 2.

tests are first whether the area covered is in its nature national or a field which the States have traditionally occupied.²⁹ If the subject is in its nature national, it may properly be of such a nature as to require exclusive legislation by Congress.³⁰ If, however, it is a field which the States have traditionally occupied:

we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute.³¹

If the proposition that, "The control of public lands is vested exclusively with Congress"³² is accepted, the discussion should end and the State surface owner consent statute would be ruled unconstitutional. However, it can be argued that the surface estate is privately owned and the control of this land is a field that has traditionally been occupied by the States. Furthermore, "None of the (federal) acts specifically authorized surface mining or clearly expressed an intent that the surface might be destroyed by the mining operator."³³ Thus it appears that the States may be able to legislate in this area.

However, not everyone accepts this theory:

Certainly federal laws governing reserved minerals

29. *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973).

30. *Id.* at 625.

31. *Id.* at 633, quoting from *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

32. *Transwestern Pipeline Co. v. Kerr McGee Corp.*, *supra* note 12, at 882.

33. *Haughey and Gallinger*, *supra* note 18, at 153.

have preemptive capability. Both the means and the end of the legislative scheme lie within the parameters of legitimate federal concern. The subject matter is federal land and the regulation of it is entrusted to Congress. The purpose of the regulation is federal whether one perceives the laws as concerning simply the disposition of federal land or, more broadly, as furthering interstate commerce.

There is little room for debate whether the state laws conflict with the federal legislation. The surface entry acts contain relatively explicit provisions for mineral entries. None of those provisions allows the surface owner to deny access. . . . The entire thrust of the surface entry acts is to provide a means for access to these public minerals which is not subject to denial.⁸⁴

Another, somewhat milder, theory accepts that there can be some State legislation in the area of mining reserved minerals but still feels States may not be able to legislate in this whole area:

It . . . appears accepted that the police power of a state extends over the public domain at least where no recognizable harm to a federal interest is present. On this basis, much of the existing state legislation which deals with reclamation of surface-mined lands would appear constitutionally supportable. It does not follow, however, that the 'veto' provisions of these enactments are sustainable on the same ground.⁸⁵

Therefore, it seems that prior to 1977, Wyoming's surface owner consent statute might have been held to be unconstitutional under the preemption doctrine.

c) Surface Owner Consent as a Violation of Equal Protection.

The traditional equal protection test is first to determine if the statute classifies into different groups,⁸⁶ and

84. Mall, *supra* note 13, at 51-52.

85. Haughey and Gallinger, *supra* note 18, at 190-191.

86. Railway Express Agency v. New York, 336 U.S. 106 (1949).

then to determine if there is a reasonable and legitimate state interest, which is met by the statute.³⁷ The obvious classification by the Wyoming Surface Owner Consent law is into surface estate owners and mineral estate owners. Once the classification is established the court must determine the level of scrutiny to be used in determining whether the classification is acceptable. To determine the level of scrutiny the court looks for a suspect class or a fundamental interest.³⁸ Obviously, in this case there is no suspect class or fundamental interest so the court would then try to determine if there is a reasonable and legitimate state interest. To determine what the purposes of the statute are the U.S. Supreme Court has ruled that a court may look at the purposes as stated by the legislative body which passed the statute.³⁹

The purposes of the Wyoming Environmental Quality Act⁴⁰ are enumerated in Section 35-11-102 of the Wyoming Statutes. This section⁴¹ states that the purposes of the act are to allow the state to (a) combat pollution, (b) preserve the environment of Wyoming, (c) plan the development, use, reclamation, preservation and enhancement of the resources of the state, (d) preserve and exercise the rights and responsibilities of the state, and (e) retain control over its environment and to secure cooperation with other governments in carrying out these objectives.⁴² It has been held that,

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it,

37. *Id.*

38. *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978).

39. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

40. Wyo. STAT. § 35-11-101 *et. seq.* (1977).

41. Wyo. STAT. § 35-11-102 (1977).

but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.⁴³

Looked at very simply the Wyoming surface owner consent statute might be considered constitutional. However, based on the above quotation the only purposes in the Wyoming Statute which can withstand any level of scrutiny are those designed to protect the public health and safety. Since Wyoming's statute neither prohibits mining completely on this land nor achieves the purposes stated in Section 35-11-102 of the Wyoming Statute, even the public health and safety purposes can not withstand constitutional scrutiny.

Wyoming will deny the mining permit if the applicant does not receive surface owner consent.⁴⁴ Providing for surface owner consent, however, does not promote any of the purposes stated in Section 35-11-102 of the Wyoming Statutes. To place a private individual in a better bargaining position does not protect the public health and safety. In fact, "the consent of the surface owner bears no rational relationship to environmental conservation . . . [its] primary purpose and effect . . . is to change the relative legal rights and economic bargaining positions of many private parties . . . rather than to achieve any public purpose."⁴⁵ Besides not fulfilling the purpose set out by Wyoming statute the surface owner consent statute doesn't protect the public; "[a] source of damage to . . . [private property] is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public."⁴⁶ Therefore, it seems clear that Wyoming's surface owner consent law generally is unconstitutional in that it does not protect a public interest nor does it achieve the results the legislature supposedly intended for the Environmental Quality Act.

43. Goldblatt v. Town of Hempstead, *supra* note 21, at 593.

44. WYO. STAT. § 35-11-406(b) (xi) (1977, as amended 1978).

45. Haughey and Gallinger, *supra* note 18, at 178, quoting from Mugler v. Kansas, 123 U.S. 623, 668-69 (1887).

46. Pennsylvania Coal Co. v. Mahon, *supra* note 25, at 413.

Changes In The Taking Theory

As noted earlier, this author felt that the Wyoming surface owner consent was unconstitutional under traditional concepts of taking of private property without compensation by the government. However, in the last few years the United States Supreme Court seems to have made a significant change from the traditional interpretation of takings under this doctrine. The Court held that, "this Court quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."⁴⁷ In the same case the Court made it clear that the standard of review had changed; "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests."⁴⁸ From this it appears clear that the Court will now view constitutional challenges based on uncompensated taking in a manner very deferential to the states. It seems that the state will need only show that the regulation is reasonable. The Court reinforced this new theory when it held that, "the denial of one traditional property right does not always amount to a taking. At 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."⁴⁹ The Court in that case went on to say that, "It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review regulation a reduction in the value of the property is not necessarily equated with a taking."⁵⁰ The new theory undoubtedly would find the Wyoming Surface

47. Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

48. *Id.* at 125.

49. Andrus v. Allard, 444 U.S. 51, 65 (1979).

50. *Id.* at 66.

Owner Consent law constitutional when the final element is added:

A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.⁵¹

The new deferential attitude of the Court towards state regulation should certainly lead to a finding that the Wyoming surface owner consent statute is constitutional. The statute merely affects one "strand" of the mineral owner's bundle of property rights,⁵² the cost of obtaining access, and while this takes away the most profitable use of the mineral estate owner's property, there is no physical invasion of the mineral estate owner's property by the government. The Wyoming Legislature has merely acted in this case to shift "the benefits and the burdens of economic life" by making the surface owner's estate the dominant estate.

Federal Preemption After 1977

As a result of new federal statutes and regulations and as a result of a change in the way the United States Supreme Court looks at preemption, the Wyoming surface owner consent law would probably be held to be constitutional. In 1977 the federal government passed the Surface Mining Control and Reclamation Act.⁵³ Section 1253 of the chapter grants, "Each State . . . which wishes to assume exclusive jurisdic-

51. Penn. Cent. Transp. Co. v. N.Y.C.. *supra* note 47, at 124 (citation omitted).

52. The exception to this statement is the landowner who refuses to sell under any circumstances. This is, obviously, a destruction of the mineral estate owner's whole "bundle" of property rights. Because of the Court's deferential scrutiny in the taking area such a possibility should not affect the decision on constitutionality.

53. 30 U.S.C. § 1253 (Supp. I 1979).

(a) Each State in which there are or may be conducted surface coal mining operations on non-Federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, except as provided in sections 1271 and 1273 of this title and subchapter IV of this chapter, shall submit to the Secretary, by the end of the eighteenth month period beginning on August 3, 1977, a State program which demonstrates that such State has the capability of carrying out the provisions of this chapter.

tion over the regulation of surface coal mining and reclamation operations . . . shall submit to the Secretary . . . a State program which demonstrates that such State has the capability of carrying out the provisions of this chapter."⁵⁴ Wyoming's program was accepted and became effective February 1, 1977.⁵⁵ The cooperative agreement provides in Article IV (B) (1) (a)⁵⁶ that "an operator on Federal lands must submit a single application, which . . . must include the following information:

1. The information required by, or necessary for the State Regulatory Authority and the Secretary to make a determination of compliance with:
 - (a) Wyoming State Statutes sections 35-11-406(a), (b) (i) - (ix) and (xiii) - (xviii) and (c).⁵⁷

This rather noticeably skips Wyoming's surface owner consent provisions and could be interpreted to mean that the federal government did not approve of surface owner consent as a requirement in submitting a mining application. However, Article IV(B)(4) requires that, "If the State Regulatory Authority requires the operator to submit additional information, the operator shall submit the information."⁵⁸ Thus, it appears the State can impose additional requirements, especially when it is recalled that Title 30, Section 1253 of the United States Code states that states with cooperative agreements would assume "exclusive jurisdiction" over surface coal mining. Furthermore, the federal government passed a surface owner consent statute in 1977.⁵⁹ This statute states that, "The Secretary shall not

54. *Id.*

55. 30 C.F.R. § 211.77 (1977).

56. *Id.*

57. *Id.*

58. *Id.*

59. 30 U.S.C. § 1304 (Supp. I 1979).

(a) The provisions of this section shall apply where coal owned by the United States under land the surface rights to which are owned by a surface owner as defined in this section is to be mined by methods other than underground mining techniques.

(c) The Secretary shall not enter into any lease of Federal coal deposits until the surface owner has given written consent to enter and commence surface mining operations and the Secretary has

enter into any lease of Federal coal deposits until the surface owner has given written consent."⁶⁰ This statute includes a broad definition of "surface owner."⁶¹ A surface owner is one who holds title to the land surface, lives on the land or conducts farming or ranching operations on the land or receives a significant portion of his income from such farming or ranching operations, and has met the above conditions for at least three years.⁶² Accordingly it does not appear that Wyoming's surface owner consent law conflicts with the federal law, at least as to coal mining. Therefore, the Wyoming Statute would not be preempted as far as surface coal mining.⁶³ But under the traditional preemption theory Wyoming's law still could be preempted based on the pervasive scheme of the federal regulation. However, there seems to have been a shift in the method used by the United States Supreme Court to determine preemption by the federal government.

"In 1973, just as the federal presumption had acquired the veneer of doctrinal permanence, the Court abruptly began to change direction. In a series of decisions . . . the

59. Continued—

obtained evidence of such consent. Valid written consent given by any surface owner prior to August 3, 1977, shall be deemed sufficient for the purposes of complying with this section.

- (e) For the purpose of this section the term "surface owner" means the natural person or persons (or corporation, the majority stock of which is held by a person or persons who meet the other requirements of this section) who—
1. hold legal or equitable title to the land surface;
 2. have their principal place of residence on the land; or personally conduct farming or ranching operations upon a farm or ranch unit to be affected by surface coal mining operations; or receive directly a significant portion of their income, if any, from such farming or ranching operations; and
 3. have met the conditions of paragraphs (1) and (2) for a period of at least three years prior to the granting of the consent.

In computing the three-year period the Secretary may include periods during which title was owned by a relative of such person by blood or marriage during which period such relative would have met the requirements of this subsection.

60. *Id.*

61. 30 U.S.C. § 1304(e) (Supp. I, 1979).

62. *Id.*

63. It can be argued that the federal statute on surface coal mining grants, by analogy, the same rights to the states in regulating the surface mining of other leaseable minerals. However, locatable minerals such as uranium, which can be also surface mined, are probably not includible even by analogy. The discussion which follows in the text seems to me to be applicable to both lease and locatable minerals, and thus the determination of constitutionality should not be affected by the different manner in which the right to mine is obtained.

Court once again incorporated a solicitude of state interests into its preemption inquiry."⁶⁴ Following *Silver v. New York Stock Exchange*,⁶⁵ the Court said "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted."⁶⁶ In another case from the same period the Court held that: "Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one."⁶⁷ This latter statement seems especially appropriate since Wyoming and the federal government have made a cooperative agreement whereby Wyoming is to have exclusive control in the area of surface coal mining permits. Finally the Court held that, "State or local legislation, to be preempted, must be absolutely and totally contradictory and repugnant."⁶⁸ There doesn't appear to be any construction of the Wyoming surface owner consent statute and of federal law which would make the Wyoming statute "absolutely and totally contradictory and repugnant."⁶⁹ Under the Court's apparently new interpretation of federal preemption the Wyoming surface owner consent statute is clearly constitutional.

Equal Protection

Of the three constitutional doctrines examined in this comment, the equal protection doctrine is the one which puts the Wyoming surface owner consent law in the greatest danger. Using this doctrine a Kentucky court in 1975 found Kentucky's surface owner consent law unconstitutional.⁷⁰

64. Note, *The Preemption Doctrine: Shifting Perspectives On Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 639 (1975).

65. *Silver v. New York stock exch.*, 373 U.S. 341 (1963).

66. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973).

67. *New York State Dept. of Soc. Serv. v. Dublino*, 413 U.S. 405, 421 (1973).

68. *Goldstein v. California*, 412 U.S. 546, 553 (1973), quoting from Hamilton, *The Federalist*, No. 32.

69. *Id.* The exception to this broad statement is Section 35-11-406(b)(xi) of the Wyoming Statutes which requires ownership in the family prior to January 1, 1970. This provision contradicts the federal statute which only requires ownership for three years prior to the lease. Thus this section of the Wyoming Statutes appears to be unconstitutional. It is recommended that this section be amended to remove such an arbitrary cut-off date and a set time limit be substituted. There appears no reasonable purpose behind a permanent cut-off date of January 1, 1970.

70. *Department for Natural Resources and Environmental Protection v. No. 8 Limited of Va.*, 528 S.W.2d 684 (Ky. 1975).

That court held that the Kentucky law did "no more than delegate to an individual . . . a veto over the use of land. . . ." ⁷¹ It went on to hold that the surface owner consent statute, "delegates to countless private individuals who own interests in surface estates from which the mineral has been severed the right to undo whatever environmental conservation purpose the legislation may have by granting their consent, for a consideration, to surface mining on their land. It is beyond cavil that the primary purpose and effect of [the statute] is to change the relative legal rights and economic bargaining positions of many private parties . . . rather than achieve any public purpose." ⁷² This is the equal protection argument which might prevail unless we add in the fact that Kentucky is not a state which has the extensive federal public lands found in western states, such as Wyoming. In the Kentucky case the severance of the mineral estate from the surface estate occurred by private deed, ⁷³ whereas in the west the severance has primarily occurred as a result of reservation of the mineral estate by the federal government. ⁷⁴ The federal government then leases the mineral estate to a private developer. It seems clear that equal protection doesn't enter into such a transaction, so that the federal government is free to set any lawful requirements it sees fit in its granting of a lease. Thus as far as federal coal is concerned it appears that Wyoming's surface owner consent law is not unconstitutional as being a violation of traditional equal protection.

CONCLUSION

The Wyoming surface owner consent statute is constitutional, at least as to the "taking" doctrine, federal preemption and equal protection. The effect of this statute is that in Wyoming the surface estate has become dominant over the mineral estate. Before this statute the mineral estate owner could make any reasonable use of the sur-

71. *Id.* at 686.

72. *Id.* at 686-87.

73. *Id.*

74. This comment deals only with mineral estates reserved by the United States later leased to private parties.

face owner's estate necessary to obtain the minerals, with or without any bargaining with the surface owner. However, as a practical matter, the mineral estate owner normally tried to obtain the surface owner's estate so as to avoid any conflicts.

Now, the surface estate owner is in a position where he doesn't have to rely on the goodwill or fear of the mineral estate owner. If the mineral estate is truly valuable, then its owner is certainly in a position to buy out the surface estate owner. If the mineral estate is not valuable enough to make it economically worthwhile to buy out the surface estate owner, then the mining of such an estate should not be allowed to interfere with the superior use of the land by the surface owner.

If the above conclusions are accepted, then it appears that Wyoming's surface owner consent statute is an equitable and reasonable solution to the inevitable conflict between the separate estates in land.

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