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Millions of acres of land in this country are owned by persons who do not hold title to the underlying minerals. Because the mineral owner usually cannot extract the minerals without occupying or destroying some part of the surface, the rule has developed that he can use whatever means are "reasonable and necessary" for that purpose, with "due regard" for the rights of the surface owner. In the absence of any express agreement, the parties to a mineral deed or lease are deemed to have intended the creation of an easement in the mineral owner.

Until recently, this state of the law probably reflected the expectations of both mineral and surface owners in most cases. With the development of new and more destructive mining technologies, however, and the widening search for new sources of raw materials, especially for energy, the scope of the mineral owner's easement has been increasingly questioned. Uncertainty over rights to use or destroy the surface has caused conflict between more and more mineral and surface owners, fomenting litigation and discouraging the full development of either mineral or surface estates.

A number of recent court decisions have severely limited the mineral owner's rights to use destructive mining techniques, and legislation in several states now requires the explicit consent of the surface owner to destroy the surface. Yet none of these decisions or statutes deals comprehensively with the extraction of all minerals or with all mining processes. In a large number of cases neither the surface owner nor the mineral owner can make a reliable estimate of the value or usefulness of his estate.

This Article examines the development of the judge-made doctrine of the dominant mineral owner, then considers the various legislative efforts to restrict or clarify the application of that doctrine. With this background it then proposes a new, more comprehensive statutory solution, which requires a clear expression of

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understanding about the effect of any mining activity upon the surface of the land. Constitutional implications of the different statutory schemes are identified and briefly discussed at the end of the Article.

I. THE DOMINANT MINERAL OWNER

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.[1]

Without any explicit agreement between the surface and mineral owners, the mere fact of ownership of the minerals is said to carry with it the right to use so much of the surface as is necessary to recover the minerals; that right is implied by law.[2]

The doctrine found its origins and terminology in the common-law easement of necessity.[3] The ownership of property is, of course, a nullity without the means to use and enjoy it.[4] "For practical purposes," Justice Holmes said, "the right to coal consists in the right to mine it."[5] The characterization of the mineral owner as "dominant" therefore reflects the natural expectations of the parties that some portion of the surface may have to be used to recover

1. *See* Squires v. Lafferty, 95 W.Va. 307, 309, 121 S.E. 90, 91 (1924).

2. The "dominant mineral owner" doctrine and its development are described in 1 E. KUNTZ, OIL AND GAS § 3.2 (1962); 3 C. LINDLEY, MINES § 813 (1914); 4 W. SUMMERS, OIL AND GAS § 652 (Flittie ed. 1975); 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW §§ 218 to 218.14 (1978); Brimmer, *The Rancher's Subservient Estate*, 5 LAND AND WATER L. REV. 49 (1970); Cassin, *Land Uses Permitted an Oil and Gas Lessee*, 37 TEX. L. REV. 889 (1959); Davis, *Selected Problems Regarding Lessee's Rights and Obligations to the Surface Owner*, 8 ROCKY MTN. MIN. L. INST. 315 (1963); Ferguson, *Severed Surface and Mineral Estates—Right to Use, Damage or Destroy the Surface to Recover Minerals*, 19 ROCKY MTN. MIN. L. INST. 411 (1974); Gray, *A New Appraisal of the Rights of Lessees Under Oil and Gas Leases to Use and Occupy the Surface*, 20 ROCKY MTN. MIN. L. INST. 227 (1975); Lambert, *Surface Rights of the Oil and Gas Lessee*, 11 OKLA. L. REV. 373 (1958); Patton, *Recent Changes in the Correlative Rights of Surface and Mineral Owners*, 18 ROCKY MTN. MIN. L. INST. 19 (1973); Comment, *The Common Law Rights to Subjacent Support and Surface Preservation*, 38 MO. L. REV. 234 (1973); Note, *Construction of Deeds Granting the Right to Strip Mine*, 40 U. CIN. L. REV. 304 (1971); Annot., 70 A.L.R.3d 383 (1976).

3. 3 C. LINDLEY, MINES § 813 (1914); 3 R. POWELL, REAL PROPERTY ¶ 410 (1979); 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 218.2 (1978); RESTATEMENT OF PROPERTY § 513, comment b, Illustration 1 (1944).

4. *See* Simonton, *Ways By Necessity*, 25 COLUM. L. REV. 571 (1925).

5. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

the minerals.

So long as the pick and shovel remained the prevalent means of mining, the doctrine of the dominant mineral owner probably functioned with some measure of fairness. When the surface and mineral estates were severed, the parties usually could form expectations based upon personal experience with the need to use the surface to recover the minerals, and with the physical effects of mining upon the land. As recently as the middle of this century both parties probably knew what was involved, for example, in the operation of a deep coal mine or a stone quarry, and were thus prepared to bargain knowledgeably about their respective rights.

At its outset, at least, the dominance doctrine seems to have operated as a shorthand way of conveyancing—a procedure adopted for the convenience of both parties to avoid long technical descriptions in deeds. Within reasonable limits, it also afforded the mineral owner some flexibility in his operations. Since both parties had reason to know the consequences of their reliance on the dominance doctrine, the doctrine may be likened to the incorporation of custom into dealings between merchants. The doctrine developed, in other words, precisely because both parties understood what was involved. The parties, of course, did not have to rely on this legal implication to describe their relationship. It was common more than a hundred years ago, as it is today, for the rights of mineral owners to be spelled out in elaborate detail in a deed or lease.[6] Many of the largest mineral owners adopted printed form deeds which included such language.[7]

The dominance doctrine took on new meaning, however, with the coming of the Industrial Revolution. During that period of rapid economic growth and social change the availability of raw materials was perceived as an urgent public necessity, justifying the sacrifice of the land. An 1893 Pennsylvania Supreme Court opinion suggests, with some emotion, that by restricting access to the minerals

6. For example, Mahon's predecessor in title acquired his home by such a form deed from the coal company in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 130 (1973). For a modern example, see CONTINENTAL OIL COMPANY, LANDMAN'S LEGAL HANDBOOK: A PRACTICAL GUIDE IN LEASING FOR OIL AND GAS 121 (1957). Note, however, that such explicit language may put the mineral purchaser at a competitive disadvantage.

7. The infamous "broad form" deeds used in Eastern Kentucky around the turn of the century contained extensive language purporting to save the mineral owner from any claim for damages. Schneider, *Strip Mining in Kentucky,* 59 KY. L.J. 652, 653-57 (1971); Note, *Broad-Form Deed—Obstacle to Peaceful Coexistence Between Mineral and Surface Owners,* 60 KY. L.J. 742 (1972); Note, *Kentucky's Experience with the Broad-Form Deed,* 63 KY. L.J. 107 (1975).

> the public might be debarred the use of the hidden treasures which the great laboratory of nature has provided for man's use in the bowels of the earth. Some of them, at least, are necessary to his comfort. Coal, oil, gas, and iron are absolutely essential to our common comfort and prosperity. To place them beyond the reach of the public would be a great public wrong . . . . [T]he question we are considering becomes of a *quasi* public character. It is not to be treated as a mere contest between A. and B. over a little corner of earth.[8]

If the desire to protect rights of private property ownership played a prominent role in judicial decisions of the day, a belief in the need for economic expansion and industrial growth was even stronger. Thus, the courts have sometimes expanded the rights of mineral owners by characterizing almost any mining technique as "necessary" and therefore permissible.[9]

Since the Second World War, the development of very large earthmoving equipment and other advances in mining technology have permitted the profitable recovery of many mineral deposits which previously would have been left undisturbed. Increasing demand for all kinds of raw materials, changing patterns of consumption, and the discovery of new materials, like uranium, have also encouraged the wider use of destructive mining techniques.

Thus, while the intent and the need of the parties formed the basis for implying an easement in favor of the mineral owner,[10] the application of these two criteria has caused the courts considerable difficulty. Conflicting concerns based in the public interest have increased this problem. As Professor Powell points out:

> [W]hether easements by necessity are believed to be products of public policy or to be the embodiments of inferences as to the intent of the parties, they should be establishable by proof that they are necessary to the reasonable utilization of the claiming dominant parcel. Only so can the public interest in land utilization be safeguarded. Only so can the probable intent of the parties be effectuated.[11]

Almost before the courts fully articulated the dominance doctrine, they began to modify it in a number of ways.

In many cases the courts faced an irreconcilable inconsistency in the notion that a person would pay valuable consideration for

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8. Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 297-98, 25 A. 597, 599 (1893).

9. "To encourage the development of the great natural resources of a country trifling inconveniences to particular persons must sometimes give way to the necessities of a great community." Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 149, 6 A. 453, 459 (1886). The same sentiment is echoed today. The ongoing "energy crisis" and the economic recession of the late seventies have placed a renewed emphasis on economic development at the expense of the land and other values.

10. Wilkes-Barre Township School Dist. v. Corgan, 403 Pa. 383, 386, 170 A.2d 97, 98 (1961).

11. 3 R. POWELL, REAL PROPERTY ¶ 410 (1979).

the surface estate and perhaps make improvements on it, with the knowledge that it could be arbitrarily destroyed by the mineral owner. It would be "extremely unreasonable," the Arkansas Supreme Court noted in *Carson v. Missouri Pacific Railroad*,[12] to conclude that "the railroad would have had the right (assuming that bauxite was to be removed by the open pit method), the day after Carson paid for his farm home, to enter upon it and utterly destroy its value without liability . . . ."[13] Such an extreme result, in the absence of a clear understanding between the parties, would amount to a finding that the surface owner had no estate except by the sufferance of the mineral owner. Instead, one should assume that each party intended to be left with some valuable right.[14] The usual rule is that a reservation as extensive as a grant is void for repugnancy;[15] the same is true of a grant that encompasses all that is purported to be reserved.[16] When the rights of the mineral owner are so broad that they are equivalent to ownership of the surface, they are inconsistent with the existence of a separate estate in the surface.[17] It is unlikely that the parties would fail to mention a matter of such gravity as the destruction of the surface estate, if they intended to permit that destruction. It seems more likely that they did not think of this problem at all.[18]

The separate dignity of the surface estate is also recognized in those cases establishing the surface owner's right to subjacent support.[19] The rule is that deep mining must be conducted so as not to

12. 212 Ark. 963, 209 S.W.2d 97 (1948).

13. *Id.* at 967, 209 S.W.2d at 99.

14. *See* Commerce Union Bank v. Kinkade, 540 S.W.2d 861, 868-69 (Ky. 1976) (Stephenson, J., concurring); Skivolocki v. East Ohio Gas Co., 38 Ohio St. 2d 244, 313 N.E.2d 374 (1974); Wilkes-Barre Township School Dist. v. Corgan, 403 Pa. 383, 170 A.2d 97 (1961); Mellor v. Conklin Limestone Co., 99 R.I. 84, 205 A.2d 831 (1964). "When a general grant or reservation is made of all minerals without qualifying language, it should be reasonably assumed that the parties intended to sever the entire mineral estate from the surface estate, leaving the owner of each with definite incidents of ownership enjoyable in distinctly different manners." Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 WYO. L.J. 107, 112 (1949), *quoted with approval in* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971).

15. Carson v. Missouri Pac. R.R., 212 Ark. 963, 209 S.W.2d 97 (1948); Foster v. Runk, 109 Pa. 291, 2 A. 25 (1885); Dorrell v. Collins, Cro. Eliz. 6 (1582).

16. Acker v. Guinn, 464 S.W.2d 348, 349 (Tex. 1971).

17. "To construe the 'right to use' as including the right to strip mine would be to pervert the basic purpose of a principle designed to *mutually* accommodate the owner of the mineral estate and the owner of the surface estate in the enjoyment of their separate properties." Skivolocki v. East Ohio Gas Co., 38 Ohio St. 2d 244, 313 N.E.2d 374, 377 n.1 (1974). In Benton v. U.S. Manganese Corp., 229 Ark. 181, 313 S.W.2d 839 (1958), it was held that even where tho right to strip mine was clear and the surface owner purchased with full knowledge, the mineral owner had to pay damages for complete destruction of the surface, since to hold otberwise would make the conveyance a nullity.

18. Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 WYO. L.J. 107, 112 (1949).

19. Harris v. Ryding, 151 Eng. Rep. 27 (Ex. 1839); W. LANE & J. ROBERTS, THE PRINCI-

cause the overlying surface or adjoining lands to subside or cave in.[20] The right of support is absolute.[21] Although the surface owner may explicitly waive the right, it has been held that general language in a mineral deed granting broad rights to use the surface[22] or waiving damages will not constitute a full waiver of this right.[23]

In general, when the parties have an explicit and unequivocal agreement concerning their respective rights to use the surface, that agreement will be given effect, absent fraud or other vitiating circumstances.[24] When, however, the instrument severing the mineral and surface estates is silent or its terms are ambiguous, the courts have employed a wonderful variety of tactics to try to "discover" what the parties intended.[25] For example, a substantial body of case law has developed to define the term "minerals" in an instrument of conveyance.[26] More particularly, the question has arisen whether the grant or reservation of one kind of mineral, or simply "minerals," includes the right to conduct surface mining for a substance not specifically named.[27] The widespread use of standard form deeds and leases has been a fertile source of litigation in

PLES OF SUBSIDENCE AND THE LAW OF SUPPORT IN RELATION TO COLLIERY UNDERTAKING (1929). Like the other limitations of the dominance doctrine, the subjacent support rule was a response to widespread abuse. It had its origins in the ccmmon-law right of lateral support. *See* 5 R. POWELL, REAL PROPERTY ¶¶ 699-703 (1979).

20. Humphries v. Brodgen, 116 Eng. Rep. 1048 (Q.B. 1850); Montgomery, *The Development of the Right of Subjacent Support and the "Third Estate" in Pennsylvania,* 25 TEMP. L.Q. 1 (1951); Twitty, *Law of Subjacent Support and the Right to Totally Destroy Surface in Mining Operations,* 6 ROCKY MTN. MIN. L. INST. 497 (1961); Comment, *The Common Law Rights to Subjacent Support and Surface Preservation,* 38 MO. L. REV. 234 (1973).

21. Smith v. Glen Alden Coal Co., 347 Pa. 290, 32 A.2d 227 (1943). *Contra,* Colorado Fuel & Iron Corp. v. Salardino, 115 Colo. 516, 245 P.2d 461 (1952).

22. Williams v. Hay, 120 Pa. 485, 14 A. 379 (1888).

23. Dignan v. Altoona Coal and Coke Co., 222 Pa. 390, 71 A. 845 (1909). "The significance of subjacent support as a means of analysis lies in the fact that all jurisdictions except Kentucky which have upheld the right of subjacent support have also refused the right to strip mine." Note, *Alternative Approaches to Analyzing the Intent of the Parties Upon Severance of Mineral and Surface Estates in Iowa,* 60 IOWA L. REV. 1365, 1378 (1975).

24. Tokas v. J.J. Arnold Co., 122 W. Va. 613, 11 S.E.2d 759 (1940).

25. Ferguson, *Severed Surface and Mineral Estates—Right to Use, Damage or Destroy the Surface to Recover Minerals,* 19 ROCKY MTN. MIN. L. INST. 411 (1974); Comment, *The Common Law Rights to Subjacent Support and Surface Preservation,* 38 MO. L. REV. 234 (1973); Note, *Construction of Deeds Granting the Right to Strip Mine,* 40 U. CINN. L. REV. 304 (1971).

26. Emery, *What Surface is Mineral and What Mineral is Surface,* 12 OKLA. L. REV. 499 (1959); Ingraham, *The Meaning of "Minerals" in Grants and Reservations,* 30 ROCKY MTN. MIN. L. REV. 343 (1948). *See* 1 E. KUNTZ, OIL AND GAS § 13.3 (1962); 1A W. SUMMERS, OIL AND GAS § 135 (1975); 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 219 (1970). "We are inclined to believe that in most of these cases of unnamed minerals which later become very valuable, the subsequent controversy decides which party will be enriched by a substance which took no part in the intention or bargaining of the parties to the instrument of conveyance." Reed v. Wylie, 554 S.W.2d 169, 171 (Tex. 1977).

this area.

In many cases, the important question, however, is not the ownership of a particular mineral substance or the mining process to be employed, but the condition of the land after mining. Indeed, some courts have gone to great lengths to couch their decisions in terms of ownership of the minerals when their plain purpose was to avoid the destruction of the surface estate.[28] Thus in *Acker v. Guinn* the Texas Supreme Court stated, "Unless the contrary intention is affirmatively and fairly expressed, . . . a grant or reservation of 'minerals' or 'mineral rights' should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate."[29] This approach, of course, raises the possibility that ownership of a particular mineral deposit will be dependent upon the "mineral" owner's ability to recover it without destroying the surface.[30] Ownership of particular minerals has also been resolved in favor of the surface owner when the mineral was clearly not the primary concern of the parties,[31] or when the substance had not yet been discovered or was not known to exist locally.[32] Scientific or technical definitions of the term "mineral" have been utilized.[33] The courts have also relied upon various common rules of construction, for example, the doctrine of *ejusdem generis*.[34]

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27. Annot., 1 A.L.R.2d 787 (1948).

28. Thomas v. Markham & Brown, Inc., 353 F. Supp. 498 (E.D. Ark. 1973); Carson v. Missouri Pac. R.R., 212 Ark. 963, 209 S.W.2d 97 (1948); Kinder v. LaSalle County Carbon Coal Co., 310 Ill. 126, 141 N.E. 537 (1923); Acker v. Guinn, 464 S.W.2d 348 (Tex. 1971).

29. 464 S.W.2d 348, 352 (Tex. 1971). "[The] character of the mining rights granted has been held to determine the limit of the substance granted . . . ." Rock House Fork Land Co. v. Raleigh Brick & Tile Co., 83 W. Va. 20, 24, 97 S.E. 684, 685 (1918). In the recent case of Reed v. Wylie, 554 S.W.2d 169 (Tex. 1977), the Texas Supreme Court stated empbatically that *Acker v. Guinn*, like *Reed v. Wylie*, was concerned solely with *ownership* of the minerals. Yet in the earlier case, the court declared that "It is not ordinarily contemplated . . . that the utility of the surface for agricultural or grazing purposes will be destroyed or substantially impaired." 464 S.W.2d at 352.

30. Patton, *Recent Changes in the Correlative Rights of Surface and Mineral Owners*, 18 ROCKY MTN. MIN. L. INST. 19 (1973). Thus the development of a new nondestructive mining technology might cause the ownership of a deposit to shift from surface owner to mineral owner. According to Reed v. Wylie, 554 S.W.2d 169 (Tex. 1977), a mineral substance is owned by the surface owner if he can show that, *as of the date of the instrument being construed*, the removal of the mineral would necessarily have consumed or depleted the surface. *Id.* at 172. *See* Note, *Beneath the Surface-Destruction Test: The Dialectic of Intention and Policy*, 56 TEX. L. REV. 99 (1977).

31. Panhandle Coop. Royalty Co. v. Cunningham, 495 P.2d 108 (Okla. 1971) (oil and gas).

32. Carson v. Missouri Pac. R.R., 212 Ark. 963, 209 S.W.2d 97 (1948)(bauxite).

33. New Mexico and Arizona Land Co. v. Elkins, 137 F. Supp. 767 (D.N.M. 1956) (uranium and thorium). *Contra*, Heinatz v. Allen, 147 Tex. 514, 217 S.W.2d 995 (1949).

34. *E.g.*, Bumpus v. United States, 325 F.2d 264 (10th Cir. 1963); Besing v. Ohio Val-

Many cases have relied upon other language in the deed or lease to determine what the parties intended, applying the general rule that the instrument as a whole must support the construction asserted.[35] For example, the grant of mining rights normally associated with deep mining has been held not to permit surface mining.[36] When the parties' agreement concentrated on the recovery of one substance[37] or when it plainly contemplated some continuing use of the surface,[38] such indications have been controlling. On the other hand, the destruction of the surface has sometimes been permitted when the deed or lease gave the mineral owner very broad rights to "dig, excavate or penetrate" any part or all of the land[39] or when the surface owner waived any right of payment of damages for injury to the surface.[40] A variety of other aids to constructon have been employed, for example, strict construction against the grantor,[41] or resolution of ambiguities against the draftsman of the instrument.[42]

A number of cases have attempted to ascertain intent by referring to circumstances surrounding the execution of the instrument of severance.[43] Thus, when the mineral to be mined had not been discovered[44] or was not known to exist locally,[45] or when surface mining was not commonly used at the time of the execution,[46] de-

ley Coal Co., 155 Ind. App. 527, 293 N.E.2d 510 (1973); Wulf v. Shultz, 211 Kan. 724, 508 P.2d 896 (1973).

35. Panhandle Coop. Royalty Co. v. Cunningham, 495 P.2d 108, 113 (Okla. 1971); New Charter Coal Co. v. McKee, 411 Pa. 307, 191 A.2d 830, 835 (1963).

36. Franklin v. Callicoat, 53 Ohio Op. 240, 119 N.E.2d 688 (C.P. 1954); Rochez Bros., Inc. v. Duricka, 374 Pa. 262, 97 A.2d 825 (1953).

37. New Charter Coal Co. v. McKee, 411 Pa. 307, 191 A.2d 830 (1963); Wilkes-Barre Township School Dist. v. Corgan, 403 Pa. 383, 170 A.2d 97 (1961).

38. Stewart v. Chernicky, 439 Pa. 43, 266 A.2d 259 (1970); Rochez Bros., Inc. v. Duricka, 374 Pa. 262, 97 A.2d 825 (1953); Oresta v. Romano Bros., Inc., 137 W. Va. 633, 73 S.E.2d 622 (1952); Rock House Fork Land Co. v. Raleigh Brick & Tile Co., 83 W. Va. 20, 97 S.E. 684 (1918).

39. Commonwealth v. Fisher, 364 Pa. 422, 72 A.2d 568 (1950).

40. Buchanan v. Watson, 290 S.W.2d 40, 43 (Ky. 1956); Commonwealth v. Fitzmartin, 376 Pa. 390, 102 A.2d 893 (1954).

41. Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395 (Ky. Ct. App. 1968).

42. New Charter Coal Co. v. McKee, 411 Pa. 307, 191 A.2d 830 (1963); Zeppa v. Houston Oil Co., 113 S.W.2d 612 (Tex. Civ. App. 1938).

43. Stewart v. Chernicky, 439 Pa. 43, 266 A.2d 259 (1970); Oresta v. Romano Bros., Inc., 137 W. Va. 633, 73 S.E.2d 622 (1952).

44. Missouri Pac. R.R. v. Strohacker, 202 Ark. 645, 152 S.W.2d 557 (1941).

45. Mining Corp. v. International Paper Co., 324 F. Supp. 705, 711 (W.D. Ark. 1971); Carson v. Missouri Pac. R.R., 212 Ark. 963, 209 S.W.2d 97 (1948).

46. Smith v. Moore, 172 Colo. 440, 474 P.2d 794 (1970); English v. Harris Clay Co., 255 N.C. 467, 35 S.E.2d 329 (1945); Phipps v. Leftwich, 216 Va. 706, 222 S.E.2d 536 (1976). However, the court in Merrill v. Manufacturers Light and Heat Co., 409 Pa. 68, 185 A.2d 573 (1962), found that the use of strip mining in the neighborhood showed that the parties could

struction of the surface has not been permitted. The utility or quality of the land to be mined has also been a factor in determining the parties' intent.[47] The fact that the land was intensively cultivated[48] or was earmarked for forests or for recreational use[49] has been held to show an intent to preserve the surface in a useful condition. Conversely, surface mining has been permitted on land that was characterized by the court as rough and barren or unproductive.[50] In any event, the instrument must be given a reasonable meaning. In the leading Pennsylvania case of *Wilkes-Barre Township School District v. Corgan,* the standard of interpretation applied was "the meaning that would be attached by a reasonably intelligent person, *acquainted with all operative usages, and knowing all the circumstances prior to and contemporaneous with the making of the contract.*"[51]

The most important limitation of the dominance doctrine is that the mineral owner may do whatever is "reasonable and necessary" for the extraction of his minerals,[52] with "due regard" for the surface owner's rights.[53] Although this rule has often provided a justification for expansion of the mineral owner's rights,[54] it is, in essence, a recognition that the surface owner has some definite and

not have intended that process if they did not mention it. *Contra,* Department of Forests & Parks v. George's Creek Coal & Land Co., 250 Md. 125, 242 A.2d 165 (1968).

47. Barker v. Mintz, 73 Colo. 262, 215 P. 534 (1923); New Charter Coal Co. v. McKee, 411 Pa. 307, 191 A.2d 830 (1963).

48. Franklin v. Callicoat, 53 Ohio Op. 240, 119 N.E.2d 688 (1954).

49. United States v. Polino, 131 F. Supp. 772 (N.D. W. Va. 1955). *Contra,* Department of Forests & Parks v. George's Creek Coal & Land Co., 250 Md. 125, 242 A.2d 165 (1968).

50. Barker v. Mintz, 73 Colo. 262, 215 P. 534 (1923); Commonwealth v. Fitzmartin, 376 Pa. 390, 102 A.2d 893 (1954).

51. 403 Pa. 383, 388, 170 A.2d 97, 99 (1961).

52. Jilek v. Chicago, W. & F. Coal Co., 382 Ill. 241, 47 N.E.2d 96 (1943); Guffey v. Stroud, 16 S.W.2d 527 (Tex. Comm. App. 1929); Squires v. Lafferty, 95 W. Va. 307, 121 S.E. 90 (1924); *see* 3 C. LINDLEY, MINES § 813 (1914).

53. 3 C. LINDLEY, MINES § 814 (1914). He must, for example, use no more of the surface than necessary to extract the minerals (the amount may vary widely). Stradley v. Magnolia Petroleum Co., 155 S.W.2d 649, 651 (Tex. Civ. App. 1941). In some jurisdictions he must take steps to protect the remainder of the surface owner's property from injury. *E.g.,* Mullins v. Beatrice Pocahontas Co., 432 F.2d 314 (4th Cir. 1970), applying Virginia law, held that mere ownership of minerals did not permit the use of a process which unnecessarily spread coal dust over the entire surface estate, rendering it useless. *See* Sunray DX Oil Co. v. Thurman, 238 Ark. 789, 384 S.W.2d 482 (1964); Magnolia Petroleum Co. v. Norvell, 205 Okla. 588, 240 P.2d 80 (1952).

54. The Texas Supreme Court, embracing the so-called "wood and water" doctrine, recently held that an oil well operator may mine ground water to conduct a water flood secondary recovery operation, although such use severely diminishes the usefulness of the surface for irrigated farming. It reached this result in spite of the fact that water was readily available off the premises. Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex. 1972). *See also* MacDonnell v. Capital Corp., 130 F.2d 311 (9th Cir. 1942); Trklja v. Keys, 49 Cal. App. 2d 211, 121 P.2d 54 (1942).

enduring rights in the surface of the land. The definitions of the terms "reasonable" and "necessary", however, are far from settled. "Reasonable" is variously characterized as meaning convenient,[55] profitable,[56] or in accordance with industry practices.[57] Courts have interpreted it to permit the use of part or all of the surface estate[58] or to permit the use of the surface only temporarily.[59] The reasonableness of a particular mining activity may also depend upon the mineral owner's ability or willingness to reclaim the land after mining.[60]

The "reasonable and necessary" qualification, like the subjacent support rule, developed in response to patently unjust results from the strict application of the dominance doctrine. Nevertheless, it became a part of the law before the introduction of large scale surface mining for coal, uranium, oil shale, or other materials. During its formative period, therefore, the courts were concerned with limiting, rather than preventing, mining. It was rarely necessary to decide whether the entire surface should be destroyed. This fact, perhaps as much as any other, helps explain the difficulty in applying the rule to present-day situations.

Even today, however, minerals often can be recovered without substantially interfering with the rights of the surface owner. Underground mining of coal is accomplished over great distances without breaking the surface. Directional drilling for oil and gas is commonplace. The development of new mining technologies also offers great promise. For example, the use of *in situ* gasification of coal[61] and chemical leaching of uranium[62] could offer viable and ec-

55. "[The mineral owner] cannot claim as an incident that which is simply convenient; he can only have, as to the surface, that which is necessary, bnt that which is necessary he may have in a convenient way." 3 C. LINDLEY, *supra* note 2, at § 813. *But see* Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956).

56. Guffey v. Stroud, 16 S.W.2d 527 (Tex. Comm. App. 1929).

57. In Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971), one oil operator's placement of his pumping units in "basements" to permit the surface owner's use of overhead sprinkler irrigation made the refusal of a neighboring operator to do so unreasonable. *But see* Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex. 1972); Oakwood Smokeless Coal Corp. v. Meadows, 184 Va. 168, 34 S.E.2d 392 (1945).

58. Stradley v. Magnolia Petroleum Co., 155 S.W.2d 649 (Tex. Civ. App. 1941).

59. Lanahan v. Myers, 389 P.2d 92 (Okla. 1963).

60. Smith v. Schuster, 66 So. 2d 430 (La. App. 1953); Olson v. Dillerud, 226 N.W.2d 363 (N.D. 1975). *Contra*, Arnold H. Bruner & Co. v. McCauley, 319 S.W.2d 763 (Tex. Civ. App. 1958). Concerning the duty to restore, see Davis, *supra* note 2, at 349; Lambert, *supra* note 2, at 379.

61. With *in situ* gasification, the controlled "burning" of coal in the ground results in the generation of product gases which may be drawn off and transperted by pipeline for use like natural gas. Apparently the only disturbance to the surface is the drilling of a series of holes to ignite the coal and extract the gas. Under some conditions limited subsidence could

onomic alternatives to surface mining. A few cases suggest that the mineral owner must use the least destructive alternative process, even if it is more costly.[63]

The recovery of some materials, of course, requires the destruction of the surface,[64] either because the materials are themselves part of the surface of the land,[65] or because the only known commercial processes have that effect.[66] Some materials may be located so close to the surface or may be so thick that deep mining would be impossible or would result in subsidence.[67] In these cases, if it is not possible to restore the surface to some useful condition after mining is completed, it may be reasonable to require the mineral owner to wait for the development of a nondestructive mining process, especially when the minerals were purchased long before a particular destructive process came into wide use.[68]

In recent years a clear trend toward abandonment of the dominance doctrine altogether has emerged, at least as applied to mining operations that result in the total destruction of the surface. According to the Ohio Supreme Court:

> Time-honored rules of law, meant to insure the mutual enjoyment of severed mineral and surface estates, cannot be blindly applied to resolve a question involving the right to strip mine. This is true, not because those rules lack present vitality, but because they are dependent upon presumptions wholly irrelevant to strip mining.[69]

Leading cases in most of the important coal mining states, except

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occur, but it is controllable; pollution of ground water could also be a problem. The process has been used successfully in the Soviet Union for more than 30 years, and is now being tested in this country by Texas Utilities, Inc. and others. ARTHUR D. LITTLE, INC., A CURRENT APPRAISAL OF UNDERGROUND COAL GASIFICATION (1972).

62. Root, *Legal Aspects of Mining by the In-Situ Leaching Method,* 22 ROCKY MTN. MIN. L. INST. 349 (1976). A pilot project in South Texas is described in Koshetz, *Niagara Mohawk Seeks Uranium,* N.Y. Times, Jan. 17, 1976, at 35, col. 4. Ground water pollution could be a serious problem with this process.

63. Gulf Pipe Line Co. v. Pawnee-Tulsa Petroleum Co., 34 Okla. 775, 127 P. 252 (1912); Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971). *But see* Blue Diamond Coal Co. v. Neace, 337 S.W.2d 725 (Ky. 1960); Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956).

64. *See generally* Annot., 1 A.L.R.2d 787 (1948).

65. *E.g.,* Acker v. Guinn, 464 S.W.2d 348 (Tex. 1971) (iron ore).

66. For example, the only commercially known method of producing sulphur in the Gulf Coast region is the Frasch process, which invariably results in subsidence of the surface. Kenney v. Texas Gulf Sulphur Co., 351 S.W.2d 612 (Tex. Civ. App. 1961).

67. Banks v. Tennessee Mineral Prods. Co., 202 N.C. 408, 163 S.E. 108 (1932) (feldspar).

68. *See, e.g.,* Binder, *A Novel Approach to Reasonable Regulation of Strip Mining,* 34 U. PITT. L. REV. 339 (1973); McGinley, *Prohibition of Surface Mining in West Virginia,* 78 W. VA. L. REV. 445, 472 (1976).

69. Skivolocki v. East Ohio Gas Co., 38 Ohio St. 2d 244, 248, 313 N.E.2d 374, 377 (1974). *See also* Stewart v. Chernicky, 439 Pa. 43, 266 A.2d 259 (1970).

perhaps Kentucky, have now held flatly that the right to destroy the surface will not be found in the absence of a clearly expressed intent to the contrary.[70] Thus the Pennsylvania Supreme Court held in *Stewart v. Chernicky*: " '[T]he 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."[71] The Colorado Supreme Court similarly held that "the rule of construction of a reservation of the minerals in a deed of conveyance is not to imply a right to injure or destroy the surface unless the right to do so is made clear and expressed in terms so plain as to admit no doubt."[72] The Ohio Supreme Court has declared that "the right to strip mine is not incident to ownership of a mineral estate."[73] Finally, a few cases seem to have adopted a general presumption against destructive mining practices. Citing adverse effects on people and communities, the loss of productive lands, the destruction of local tax cases, and the existence of nondestructive alternatives, these decisions seem to directly refute the prodevelopment views of the courts in earlier days.[74]

Although there is an apparent trend in the decisions in favor of the surface owner, one cannot confidently formulate any general rule at this time. Unless the right to use the surface is explicitly described, neither the surface owner nor the mineral owner may make any reliable estimate of the value or usefulness of his estate. In most cases there is simply no way of predicting how much land

70. Smith v. Moore, 172 Colo. 440, 474 P.2d 794 (1970); Barker v. Mintz, 73 Colo. 262, 215 P. 534 (1923); Skivolocki v. East Ohio Gas Co., 38 Ohio St. 2d 244, 313 N.E.2d 374 (1974); Franklin v. Callicoat, 53 Ohio Op. 240,119 N.E.2d 688 (1954); Stewart v. Chernicky, 439 Pa. 43, 266 A.2d 259 (1970); Wilkes-Barre Township School Dist. v. Corgan, 403 Pa. 383, 170 A.2d 97 (1961); Campbell v. Campbell, 29 Tenn. App. 651, 199 S.W.2d 931 (1946); Phipps v. Leftwich, 216 Va. 706, 222 S.E.2d 536 (1976); West Virginia-Pittsburgh Coal Co. v. Strong, 129 W. Va. 832, 42 S.E.2d 46 (1947). *Contra,* MacDonnell v. Capital Co., 130 F.2d 311 (9th Cir. 1942). Kentucky has, however, moved far in that direction with the recent case of Commerce Union Bank v. Kinkade, 540 S.W.2d 861 (Ky. 1976), wherein it was decided that strip mining would not be permitted in the absence of language "so extensive as to subordinate the rights of the surface estate to the demands of the mineral estate." "There must," the court said, "be a definite enlargement of specified mining rights in the instrument creating those rights before an owner may conduct mining operations contrary to the rights usually implied in a mineral grant." *Id.* at 863-64.

71. 439 Pa. 43, 50, 266 A.2d 259, 263 (1970) (citing Merrill v. Manufacturers Light & Heat Co., 409 Pa. 68, 185 A.2d 573 (1962)).

72. Smith v. Moore, 172 Colo. 440, 443, 474 P.2d 794, 795 (1970); Evans Fuel Co. v. Leyda, 77 Colo. 356, 236 P. 1023 (1925); Barker v. Mintz, 73 Colo. 262, 215 P. 534 (1923).

73. Skivolocki v. East Ohio Gas Co., 38 Ohio St. 2d 244, 251, 313 N.E.2d 374, 378 (1974).

74. *E.g.,* Franklin v. Callicoat, 53 Ohio Op. 240, 119 N.E.2d 688 (1951); Wilkes-Barre Township School Dist. v. Corgan, 403 Pa. 383, 170 A.2d 97 (1961).

the mine operator may occupy, how long he may use it, what the condition of the land will be after mining, or the effect of available alternatives. For example, even in a jurisdiction that has held that the right to strip mine coal must be expressly granted or reserved, the same rule may not apply to the mining of another substance, or to the use of another process. Decisions about whether to permit a particular mining activity often will be made on a case-by-case basis, depending upon the courts' interpretation of particular deed language,[75] or upon the facts in a particular case (for example, whether a particular process was in general use at the time the minerals were severed from the surface).[76]

This uncertainty in the law has prevented many landowners from using their property fully and efficiently because of fear that their handiwork would be suddenly destroyed by the mineral owner. Owners and investors are understandably reluctant to make substantial improvements to the surface under these conditions. The planting of an orchard on such land or the construction of a residential subdivision is simply out of the question.[77] By the same token, mineral owners may be loathe to make the large capital investments necessary to develop their properties until their rights are clarified.[78] The present uncertainty also fails to encourage the preservation of the land as a valuable natural resource in its own right. The surface owner has little incentive to employ conservation

75. [There is no] form of grant which may be generally said to reflect the norm of the industry. Realizing the potential fact that no two grants of mining rights may be identical, it is necessary that a proper construction of such rights be confined to a deed-to-deed interpretation of clauses in a mineral deed which grant or modify mining rights. Commerce Union Bank v. Kinkade, 540 S.W.2d 861, 863-64 (Ky. 1976).

76. Reed v. Wylie, 554 S.W.2d 169 (1977). "Furthermore, we are not convinced that a rule of law which leaves questions of reasonable use of the surface, in each instance where mineral substances at or near the surface are to be produced, will lead to more certainty and less litigation." *Id.* at 171.

77. The court in Quarto Mining Co. v. Litman, 42 Ohio St. 2d 73, 326 N.E.2d 676 (1975), found that an option in the mineral owner to purchase portions of the surface for deep mining did not violate the Rule Against Perpetuities, even though it was unlimited as to time, and even thongh "an effective ceiling price is imposed on the property, above which no one may, with safety, purchase the property . . . . Development and improvement of the property may thereby be severely retarded, for the existence of the option threatens the developer with loss of the profit from his efforts if the option is exercised." *Id.* at 77, 326 N.E.2d at 680. The court reasoned that the option merely restates the mineral owner's implied right to use the surface, a right which is vested for purposes of the Rule. But it suggested that an option to strip mine would violate the Rule, because such a right is not normally an incident of the mineral owner's estate. *Accord,* West Virginia-Pittsburgh Coal Co. v. Strong, 129 W. Va. 832, 42 S.E.2d 46 (1947). The distinction between the two cases is a bit slippery.

78. Polston, *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles,* 7 LAND AND WATER L. REV. 73 (1972).

practices in the use of his property, especially when substantial capital investment would be required.

Comprehensive land use planning by government or by private owners is, under the circumstances, impossible. It is likely, therefore, that much of the land will not be put to its highest and best use. Planning for the orderly development of mineral resources is also exceedingly difficult. When much of the land is held in divided ownership, the economic health and security of communities, even entire regions, may be compromised. Commercial development of such lands is, as a practical matter, impossible.[79] Opportunities for new jobs and industrial growth are lost, and needed augmentation of local tax bases must be foregone.

A recent planning study in one region of Eastern Kentucky demonstrates these harmful effects:

> [F]rom 50 to 75 percent of all the area's land either has . . . separate ownership or the owners of both are interested primarily in extraction of subsurface minerals . . . . A result of this situation has been the reluctance of people to invest in nonmineral production development. . . . As matters now stand, the decisions regarding the area's economic and social future development rest almost totally with the owners of the area's subsurface rights.[80]

According to the study, the divided ownership of land will affect even land not directly subject to mining. It is well known that the widespread destruction of land by surface mining can have a depressing effect upon every aspect of life in an area.[81] Although it is less well documented it is equally apparent that the mere threat of such destruction may have a similar effect.

Application of the dominance doctrine has often resulted in hardship and injustice for individual landowners.[82] The surface owner frequently finds himself at a disadvantage in bargaining with the representative of a large mining company or public utility about the use of the surface. Few have the experience or technical sophistication to understand what is involved in a modern mining operation, or to guess at the mineral purchaser's long-range plans.

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79. Carpenter, *Severed Minerals as a Deterrent to Land Development*, 51 DENVER L.J. 1 (1974).

80. Land Use Plan for Kentucky River Area Development District (HUD Project No. CPA-KY-04-35-1000) 1, 2 (1973).

81. Brooks, *Strip Mine Reclamation and Economic Activity*, 6 NAT. RESOURCES J. 13 (1966); Cardi, *Strip Mining and the 1971 West Virginia Surface Mining and Reclamation Act*, 75 W. VA. L. REV. 319 (1973); Howard, *A Measurement of the External Diseconomies Associated with Bituminous Coal Surface Mining, Eastern Kentucky 1962-67*, 11 NAT. RESOURCES J. 76 (1971); Spore, *The Economic Problem of Coal Surface Mining*, 2 ENVT'L AFF. 685 (1973).

82. The plight of the people of Eastern Kentucky is described in H. CAUDILL, NIGHT COMES TO THE CUMBERLANDS (1963).

Fewer still have any accurate information about the nature or situation of the minerals beneath their land.[83] Even when there was an initial meeting of the minds, the doctrine has subsequently been invoked to permit mining operations that, because of advances in mining technology or changing economic conditions, could never have been anticipated by the parties.[84]

Last, but not least important, this state of affairs tends to confirm a growing sense of mistrust of our legal system in the minds of many landowners. Because they do not know the law and cannot afford to litigate their rights, the dominance doctrine has become symbolic of an unequal and unjust distribution of power and wealth in this country.[85]

II. Existing Legislation

It is not surprising that a number of state legislatures and the Congress have directly addressed various aspects of the conflict between surface and mineral owners. Moreover, several states have passed statutes that are concerned principally with other matters, but that may influence the resolution of this conflict in individual cases. It is helpful to think of these enactments as falling into several categories:

A. Consent statutes: various laws which directly and purposefully define or modify the legal relationship between surface and mineral owners;
B. Mining reclamation laws: designed to regulate destructive mining activities and to require restoration of mined lands to some useful condition;
C. Protective statutes: intended to prevent mining activities which would injure particular parcels of land or valuable improvements;
D. Broad land use regulations and zoning ordinances: based on the doctrine of nuisance and upon a desire to plan for the orderly development of land resources; and
E. Other legislative efforts.

Although a number of statutes deal exclusively with mining on state[86] or federally owned[87] lands, most are not so restricted.

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83. Brooks, *supra* note 81, at 22 n.41.

84. See the discussion in Wilkes-Barre Township School Dist. v. Corgan, 403 Pa. 383, 170 A.2d 97 (1961), involving an attempt to strip mine for coal under an 1893 deed. Compare the result in Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395 (Ky. 1968). What surface owner today could anticipate the effects of a process like nuclear mining upon the land? Howell, *Project Gasbuggy—Legal Problems,* 14 Rocky Mtn. Min. L. Inst. 439, 446-48 (1968).

85. H. Caudill, *supra* note 82.

86. *See* Fleck, Geraud, Martz & Verity, *Oil and Gas Leasing Laws of the Rocky Mountain States,* 7 Rocky Mtn. Min. L. Inst. 353 (1962).

87. Haughey & Gallinger, *Legislative Protection of the Surface Owner in the Surface Mining of Coal Reserved by the United States,* 22 Rocky Mtn. Min. L. Inst. 145 (1976);

A. Consent Statutes

Several states have enacted statutes that require, or seem to require, the consent of the surface owner to conduct surface mining. In all but one instance, this consent is a precondition for issuance of a mining permit under the state's reclamation law. In lieu of consent, some other states provide for compensation of the surface owner injured by mining. By intervening in the relationship between surface and mineral owners, each of these statutes either restates or modifies the common-law dominance doctrine. Although they vary widely in approach, these statutes seem to have in common the purpose of promoting fairness and understanding between the parties.

A number of the statutes simply require a demonstration of the mineral owner's "right" to use the surface. The West Virginia statute is typical: "The application for a surface-mining permit shall contain . . . the source of the operator's legal right to enter and conduct operations on the land to be covered by the permit."[88] This kind of requirement actually provides no clarification of either party's rights. When the right to use the surface is not explicitly stated, the regulatory agency must rely on its own interpretation of the common-law dominance doctrine to describe the relationship between the parties.[89]

Mall, *Federal Mineral Reservations,* 10 LAND AND WATER L. REV. 1 (1975); Comment, *Protection for Surface Owners of Federally Reserved Mineral Lands,* 2 U.C.L.A.—ALAS. L. REV. 171 (1973).

88. W. VA. CODE ANN. § 20-6-8 (1978). Similarly, ALA. CODE tit. 9, §§ 16-5(2), 16-36(8) (1975); COLO. REV. STAT. § 34-32-112(1)(d) (Supp. 1978); ILL. ANN. STAT.ch. 93, § 205(a) (Smith-Hurd Supp. 1979); MO. ANN. STAT. §§ 444.550(1)(2), 444.772(1) (Vernon Supp. 1980); MONT. CODE ANN. § 82-4-222 (1979); N.M. STAT. ANN. § 69-25A-10(B)(1) (1978); OHIO REV. CODE ANN. §§ 1513.07(A)(5), 1514.02(A)(5) (Page Supp. 1979); TEX. NAT. RES. CODE ANN. tit. 4, § 131.133(6) (Vernon 1978).

89. The Federal Surface Mining Control and Reclamation Act of 1977 avoided the issue by the following remarkable political compromise:

> No permit . . . shall be approved unless . . .
> (6) in cases where the private mineral estate has been severed from the private surface estate, the applicant has submitted to the regulatory authority—
> (A) the written consent of the surface owner to the extraction of coal by surface mining methods; or
> (B) a conveyance that expressly grants or reserves the right to extract the coal by surface mining methods; or
> (C) 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 chapter shall be construed to authorize the regulatory authority to adjudicate property rights disputes.

30 U.S.C.A. § 1260(b) (1979). A provision requiring surface owner consent was one of the most inflammatory in the strip mining bill passed by the House in 1974, H.R. 11500, 93d Cong., 1st Sess. § 610(a) (1973). A joint conference committee labored over the House lan-

States which require the surface owner's consent to reclaim the land after mining have taken a somewhat different approach. According to the Maryland statute:

> [T]he application for a permit shall include, on a form furnished by the bureau, the written consent of the landowner for the operator or the state or any of its authorized agents, to enter on any land affected by the operator within a period of five years after the operation is completed or abandoned, for the purpose of backfilling, planting, reclamation, and inspection.[90]

Although this is not exactly the same as requiring proof of consent to surface mine, it may have the same effect, since the surface owner's refusal to consent would presumably prevent the issuance of a permit.[91]

A Tennessee statute is more straightforward. Before surface mining for coal is commenced, the applicant for a permit must submit:

> Evidence of the operator's legal right to surface mine the minerals on the land affected by the permit. If the surface estate has been severed from the mineral estate, such evidence may be provided by either, (a) a deed, lease, or other document which severs the mineral rights and expressly permits the removal of minerals by surface mining or a certified extract of the appropriate provisions of such documents; or (b) a deed, lease or conveyance which severs the mineral rights without specific provisions for surface mining and an accompanying affidavit by the current surface estate owner agreeing to the removal of such minerals by surface mining.[92]

At least in the case of surface mining for coal, the owner of the surface estate must have expressly agreed in writing to the destruction of the surface. A Montana statute is similar:

> 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 lands involved to enter and commence strip-mining operations on such land . . . .[93]

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guage for more than ten weeks before finally rejecting it. This delay helped make it possible for President Ford to pocket veto the measure. *See* Dunlap, *An Analysis of the Legislative History of the Surface Mining Control and Reclamation Act of 1975*, 21 ROCKY MTN. MIN. L. INST. 11 (1975).

90. MD. NAT. RES. CODE ANN. §§ 7-505(g), 7-6A-07(d) (1974 and Supp. 1979) (coal and noncoal mining, respectively). Similarly, ARK. STAT. ANN. § 52-922(a) (Supp. 1979); IND. CODE ANN. § 13-4-6-5(6) (Burns 1973); MO. ANN. STAT. § 444.550(1)(5) (Vernon Supp. 1980); PA. STAT. ANN. tit. 52, § 1396.4(a)(2)(I) (Purdon Supp. 1979-1980); S.D. COMPILED LAWS ANN. § 45-6A-7(8) (Supp. 1979).

91. It is not at all clear under these statutes or the ones following whether the surface owner's consent would be binding on subsequent *bona fide* purchasers of the surface interest, if it were not recorded in the deed records.

92. TENN. CODE ANN. § 58-1544(a)(6)(B) (Supp. 1979).

93. MONT. CODE ANN. § 82-4-224 (1979). A 1974 Kentucky statute provided as follows:

Presumably the terms "owner" and "current surface estate owner" will be interpreted broadly enough to allow the consent of any surface owner during his tenure of ownership. Otherwise, a surface owner could force the mineral owner to pay twice for the right to strip mine the same land.[94]

Another Montana act provides that: "All prospectors for minerals, miners, or other persons contemplating surface disturbance by mechanical equipment other than hand tools . . . must first obtain from the surface owner of private land specific written approval of the proposed work or operations."[95] In Wyoming the applicant for a coal mining permit must submit "an instrument of consent from the surface landowner, if different from the owner of the mineral estate, to the mining plan and reclamation plan."[96] These two statutes also may be broader than necessary. The sur-

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> Each application shall also be accompanied by a statement of consent to have strip mining conducted upon the area of land described in the application for a permit. The statement of consent shall be signed by each holder of a freehold interest in such land. Each signature shall be notarized. No permit shall be issued if the application therefor is not accompanied by the statement of consent.

KY. REV. STAT. § 350-060(8) (Supp. 1978). That statute enjoyed a very short career, however, before being struck down in the case of Department of Natural Resources v. No. 8 Limited, 528 S.W.2d 684 (Ky. 1975); *see* note 197 *infra*. A surface owner protection provision of the new federal surface mining law prohibits leasing of federally owned coal until the surface owner (as that term is narrowly defined) has given "written consent to enter and commence surface mining operations." 30 U.S.C.A. § 1304(c) (1979). *See also* N.D. CENT. CODE § 38-18-06 (Supp. 1979) (where a mineral lease between surface owner and mineral developer may be substituted for the required statement of consent).

94. For a possible constitutional objection to such a construction, see text accompanying note 199, *infra*.

95. MONT. CODE ANN. §§ 82-2-302, 303(2) (1979). Both Montana statutes are discussed in Roberts & Stone, *Recent Developments in Montana Natural Resources Law*, 38 MONT. L. REV. 169 (1977); Comment, *Montana's Statutory Protection of Surface Owners from Strip Mining and Resultant Problems of Mineral Deed Construction*, 37 MONT. L. REV. 347 (1976).

96. WYO. STAT. ANN. § 35-11-406(b)(xii) (Supp. 1979). However, the statute also provides that:

> 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 . . . .

Id. We are not told what sort of mining activity will so "substantially prohibit" the surface owner's operations that a permit application will be denied (although it is difficult to imagine any strip mining process which would not come within the usual meaning of those words). If the surface belongs to a resident or agricultural landowner (as those terms are narrowly defined), consent must be obtained in every case. *Id.*. at § 35-11-406(b)(xi).

face owner should have no interest in the details of the mining operation, except as it affects the physical extent and duration of surface interference and the condition of the land after mining is completed.[97] Both statutes require, in effect, that the operator complete his planning before purchasing the mineral interest. Otherwise he will have to negotiate with the surface owner twice. By contrast, a Kansas statute is concerned only with the condition of the land after mining is completed. It requires oil and gas well operators "to leave the land, as nearly as practicable, in the same condition [as it was originally] . . . unless the owner of said land and the abandoning party have entered into a contract providing otherwise."[98]

As early as 1874 Colorado enacted legislation requiring payment of money damages as compensation to surface owners whose land was injured by mining:

> When the right to mine is in any case separate from the ownership or right of occupancy to the surface, the owner or rightful occupant of the surface may demand satisfactory security from the miner, and if it is refused, he may enjoin such miner from working until such security is given.[99]

A number of states and the federal government have followed the Colorado example by requiring mine operators to post a bond or provide security for damages if the consent of the surface owner cannot be obtained.[100] In Wyoming the mineral owner must furnish a bond in all cases unless it is expressly waived by the surface owner.[101] These provisions, however, may satisfy neither party. On the one hand, they may impose a cost upon the mineral owner that was not bargained for. On the other hand, the payment of money damages may not fairly compensate the surface owner who has reasonable, but conflicting, expectations concerning the use of his

97. The Montana statute provides for notice to be given to the surface owner "which will sufficiently disclose the plan of work and operations, including contemplated measures for the protection and restoration of the land and waters, to enable [the surface owner] to evaluate the extent of disturbance contemplated and the effectiveness and sufficiency of the protection and restoration measures planned." MONT. CODE ANN. § 82-2-303 (1979).

98. KAN. STAT. ANN. § 55-132a (1976).

99. Laws of 1874, p. 1888, § 12 (currently codified as COLO. REV. STAT. § 34-48-106 (1973)).

100. 43 U.S.C. § 299 (1976) (part of the Stock-Raising Homestead Act of 1916); N.D. CENT. CODE § 38-18-06(5) (Supp. 1979); N.M. STAT. ANN. § 69-9-1 to -10 (1978); PA. STAT. ANN. tit. 52 § 1406.15 (Purdon Supp. 1979-1980). Prescribed lease forms for state lands may require security for surface damages. The Idaho practice is described in Fleck, Geraud, Martz & Verity, *Oil and Gas Leasing Laws of the Rocky Mountain States*, 7 ROCKY MTN. MIN. L. INST. 353, 378-79 (1962).

101. WYO. STAT. ANN. § 35-11-416 (Supp. 1979).

property.[102]

The effect of these statutes is to confer upon the mineral owner a private right of eminent domain,[103] even though mining by private parties has not generally been considered a public use.[104] If the parties cannot agree upon the amount of compensation, a regulatory authority[105] or a court[106] may determine the amount. Unfortunately, none of these statutes definitively states how the interest taken should be valued.[107] In most cases it is not clear, for example, whether the mineral owner must pay for lost profits or imputed rents, for interference with a highly specialized use by the surface owner, or for destruction of improvements made after the surface and minerals were separated.[108] The willingness or ability of the

102. In Barker v. Mintz, 73 Colo. 262, 215 P. 534 (1923), the mineral owner complained that the Colorado statute created new rights for the surface owner. The surface owner countered that, far from expanding his rights, the statute deprived him of his remedy in the case of imminent danger or irreparable injury.

103. 1 C. LINDLEY, MINES § 252-264 (1914); Comment, *Subsidence Regulation*, 6 LAND AND WATER L. REV. 543, 546 (1971).

104. 2A NICHOLS' LAW OF EMINENT DOMAIN § 7.624 (rev. 3d ed. 1979); Ferguson, *Severed Surface and Mineral Estates—Right to Use, Damage or Destroy the Surface to Recover Minerals*, 19 ROCKY MTN. MIN. L. INST. 411, 430-33 (1974). *But see* Highland Boy Gold Mining Co. v. Strickley, 28 Utah 215, 78 P. 296, *aff'd*, 200 U.S. 527 (1904). The Idaho Constitution declares the use of lands for mining and related activities to be a public use, IDAHO CONST. art. 1, § 14. *See also* OKLA. CONST. art. 2, § 23 ("No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for . . . mining . . . purposes, in such manner as may be prescribed by law,") *applied in* Lyons v. McKay, 313 P.2d 527, 529 (Okla. 1957). A New Mexico law provides for unitization of small tracts (two acres or less) by owners of larger mineral interests for uranium mining, but it does not describe the mineral owner's right to use the surface. N.M. STAT. ANN. § 69-9 (1978).

105. *E.g.*, WYO. STAT. ANN. § 35-11-416(a) (1977).

106. *E.g.*, 30 U.S.C. § 1305 (1979).

107. If the proper measure is the market value of the surface, should that value be diminished because of the mineral owner's right to destroy it? To the extent that compensation is based on the value of the surface, the result may be a foregone conclusion. A payment of $500 per acre for grazing land may be an almost inconsequential part of the cost of recovering, say, 7000 tons per acre of coal worth $15 per ton.

108. The Wyoming Statute provides the most guidance. The mineral owner must furnish a bond

> in an amount sufficient to secure the payment for any damages to the surface estate, to the crops and forage, or to the tangible improvements of the surface owner. This amount shall be determined by the administrator and shall be commensurate with the reasonable value of the surrounding land, and the effect of the overall operation of the landowner. This bond is in addition to the performance bond required for reclamation by this act. As damage is determined it shall be paid. Financial loss resulting from disruption of the surface owner's operation shall be considered as part of the damage.

WYO. STAT. ANN. § 35-11-416(a) (1977). Under the federal Surface Mining Control and Reclamation Act of 1977, the lessee of federal lands overlying federally owned coal must be compensated for damages to crops or to tangible improvements. For this purpose the mine operator must furnish a bond prior to the commencement of mining. 30 U.S.C.A. § 1305 (1979).

mineral owner to restore the land after mining apparently is given no consideration. The compensation statutes may temper the unfairness arising from a strict application of the dominance doctrine, but it is unlikely that they will satisfy the reasonable, if unstated, expectations of either party.

B. Reclamation Laws

Most states with extensive surface mining have now adopted some regulations for those activities. Although these laws are primarily desigued to protect the public interest in preservation of land as a vital, permanent, natural resource, they may also afford some protection to surface owners by limiting the destructiveness of the mining process. They may even give the surface owner some opportunity to protect himself. For example, statutes usually require that notice of a permit application be given to a surface owner, who is then entitled to intervene in the permit granting process.[109] The surface owner may be able to force strict compliance with the regulations or to influence the agency's decisions about monitoring and reclamation requirements, the amount of a performance bond, the withdrawal of certain lands from mining, or the selection of a postmining land use. He may also directly challenge the mineral owner's legal right to use a destructive mining process. If a permit is granted he may monitor the mine operator's performance to ensure strict conformity with permit conditions.[110] The results of the surface owner's efforts in a given case are, of course, quite unpredictable. Furthermore, they may bear no resemblance to what the parties originally intended.

C. Protective Statutes

Several states and the federal government have incorporated selective controls into their mining reclamation laws, providing for the "withdrawal" of specified lands from surface mining.[111] The

109. *E.g.*, MONT. CODE ANN. §§ 82-2-301 to -306 (1979); TEX. NAT. RES. CODE ANN. tit. 4, §§ 131.047, 131.159-.163, 165 (Vernon Supp. 1980).

110. MONT. CODE ANN. § 82-4-252 (1979) provides for citizen suits to compel compliance. *See also* Surface Mining Control and Reclamaton Act of 1977, 30 U.S.C.A. § 1270 (1979).

111. 30 U.S.C.A. §§ 1272, 1281 (1979); ARK. STAT. ANN. § 52-960 (Supp. 1979); COLO. REV. STAT. § 34-32-115(4) (Supp. 1978); KY. REV. STAT. § 350.085 (Supp. 1978); MD. NAT. RES. CODE ANN. § 7-505.1 (Supp. 1979); MONT. CODE ANN. § 82-4-227 (1979); N.M. STAT. ANN. § 69-25A-26 (1978); N.D. CENT. CODE § 38-14.1-05, -07 (Supp. 1979); OHIO REV. CODE ANN. § 1513.02(B) (Page Supp. 1979); S.D. COMPILED LAWS ANN. § 45-6A-9.1 (Supp. 1979); TEX. NAT. RES. CODE ANN. tit. 4, § 131.035 (Vernon 1978); VA. CODE § 45.1-252 (Supp. 1979); W. VA. CODE ANN. § 20-6-11 (1978); WYO. STAT. ANN. § 35-11-425 (Supp. 1979). *See also,*

Wyoming law, for example, provides that the regulatory agency shall deny a permit to surface mine if "[t]he proposed mining operation would irreparably harm, destroy, or materially impair any area that has been designated . . . [as] having particular historical, archaeological, wildlife, surface geological, botanical or scenic value."[112] Other statutes provide protection for unusually productive lands[113] or lands that cannot be restored after mining.[114]

Another type of protective statute is designed to prevent injury to surface improvements.[115] A provision of the Tennessee law is typical:

> If the commissioner finds that any part of the operation would constitute a hazard to a dwelling house, public building, school, church, cemetery, commercial or institutional building, public road, stream, lake, reservoir, water wells, officially designated scenic areas or other private or public property, the commissioner shall delete such part of the land from the area for which the permit is granted.[116]

Others place less discretion in the regulatory agency. For example, in Wyoming a permit will not be granted if "[t]he affected land lies within three hundred (300) feet of any existing occupied dwelling, home, public building, school, church, community or institutional building, park or cemetery, unless the landowner's consent has been obtained."[117] Consent by the owner of the improvements will presumably permit mining in all jurisdictions.

The Supreme Court struck down a similar Pennsylvania statute[118] in *Pennsylvania Coal Co. v. Mahon.*[119] It prohibited mining that might cause damage from subsidence to, for example, a dwell-

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McGinley, *Prohibition of Surface Mining in West Virginia,* 78 W. VA. L. REV. 445 (1976). The withdrawal provision of the Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272 (1979), was ruled unconstitutional as a taking of private property without due process in Virginia Surface Mining and Reclamation Assoc. v. Andrus, No. 78-0244B (W.D. Va. Jan. 3, 1980).

112. WYO. STAT. ANN. § 35-11-406 (h)(iv) (Supp. 1979).

113. *E.g,* MONT. CODE ANN. §§ 82-4-227(2)(a) and (5) (1979).

114. *E.g.,* W. VA. CODE ANN. § 20-6-11 (1978).

115. ALA. CODE tit. 9, § 16-46 (1975); COLO. REV. STAT. § 34-32-1154(d) (Supp. 1978); KY. REV. STAT. § 350.085 (3) (Supp. 1978); MO. ANN. STAT. § 444.610.1 (5) (Vernon Supp. 1980); MONT. CODE ANN. § 82-4-227(7) (1979); N.M. STAT. ANN. §§ 69-25A-26(3), (4) (1978); N.D. CENT. CODE § 38-14.1-07(5) (Supp. 1979); OHIO REV. CODE ANN. § 1513.02(B) (Page Supp. 1979); PA. STAT. ANN. tit. 52, §§ 1396.4b(c), 1406.4 (Supp. 1978); S.D. COMPILED LAWS ANN. § 45-6A-9.1(2) (Supp. 1979-1980); TENN. CODE ANN. § 58-1544(g) (Supp. 1979); TEX. NAT. RES. CODE ANN. tit. 4, § 131.038(6) (Vernon 1978); VA. CODE § 45.1-252(D)(4)(Supp. 1979); W. VA. CODE ANN. § 20-6-11 (1978); WYO. STAT. ANN. § 35-11-406(h)(viii) (Supp. 1979).

116. TENN. CODE ANN. § 58-1544(g) (Supp. 1979).

117. WYO. STAT. ANN. § 35-11-406(h)(viii) (Supp. 1979).

118. PA. STAT. ANN. tit. 52, §§ 661 to 671 (Purdon 1966), commonly known as the Kohler Act.

119. 260 U.S. 393 (1922).

ing house. The fact that none of the present state statutes has suffered the same fate as the Pennsylvania act[120] suggests a movement toward the position expressed by Justice Brandeis in his dissent in that case, namely, that the nuisance character of the destructive mining process warrants the intervention of the state, in the public interest, to protect a threatened private interest.[121]

These statutes are plainly designed to protect important public values, yet they also reflect the view that the construction of valuable improvements is inconsistent with an implied grant to another of the right to destroy those improvements. However, like the consent and reclamation statutes mentioned earlier and the land use regnlations which follow, none of the protective statutes covers all kinds of destructive mining practices or all minerals. They also fail to offer protection to valuable improvements not specifically described in the statutes.

D. Land Use Regulations

Local zoning ordinances have been used for a number of years to restrict mining.[122] Because zoning takes place at the lowest levels of government, the individual landowner may have a greater opportunity to influence decision making than he would at the state or federal level. The effect of local zoning cannot extend beyond the political boundaries of the enacting government, however, and zoning may be less stable than other kinds of laws.[123] A few states have now adopted comprehensive state-wide land use laws that require permits for any activities that could have a major environmental

120. Fifteen years after *Mahon*, the Pennsylvania legislature passed an almost identical law, PA. STAT. ANN. tit. 52, §§ 1407 to 1410d (Purdon 1966), which was tested, but not conclusively, in Klein v. Republic Steel Corp., 435 F.2d 762 (3d Cir. 1970). In the case of William E. Russell Coal Co. v. Board of County Comm'rs, 270 P.2d 772 (Colo. 1954), the mineral owner was given a condemnation award for coal lying adjacent to and beneath a public highway, the court relying on *Mahon*.

121. "The restriction here in queston is merely the prohibition of a noxious use . . . . The State merely prevents the owner from making a use which interferes with paramount rights of the public." 260 U.S. at 417. See the discussion in Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 48-50 (1964). Applicaton of the principle seems to go beyond mere locational preferences of the type expressed in Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("pig in the parlor"). For a discussion of the taking question, see text accompanying notes 210-29 *infra*.

122. Goldblatt v. Hempstead, 369 U.S. 590 (1962); Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962); Crawford, *Zoning Law and Extractive Industry—The Michigan Experience*, 51 N.D. L. Rev. 341 (1974); Note *Local Zoning of Strip Mining*, 57 KY. L.J. 738 (1969).

123. A state miming reclamaton law may require the licensing agency to take into account local zoning or land use plans. *E.g.*, OHIO REV. CODE ANN. § 1514.02(A)(9)(b)(Page 1978).

impact[124] or that provide for designation of certain areas as closed to destructive mining processes.[125] While zoning and land use laws may afford some protection to individual owners, they are neither uniform nor predictable in their application, and they cannot reflect the correlative rights of surface and mineral owners.[126]

E. Other Legislative Efforts

Several states have enacted "marketability" statutes, providing that after some specified period of nonuse a severed mineral interest will be rejoined with the surface interest.[127] These acts are intended to promote the orderly and progressive development of both surface and mineral resources by removing the threat of destruction of the surface after a reasonable time has elapsed, and by freeing the minerals for exploitation by someone else.[128]

A recent Tennessee statute adopted the presumption, recognized in many judicial decisions, that the parties to a mineral deed or lease intended to permit only those mining processes in general use when the conveyance was made:

> In any instrument heretofore or hereafter executed purporting to sever the surface and mineral estates which does not describe the manner or method of mineral extraction in express and specific terms, it shall be presumed that the intention of the parties to the instrument was that the minerals be extracted only in the principal manner and method of mineral extraction prevailing in Tennessee at the time the instrument was executed. This section is not intended to exclude evidence that would otherwise be admissible to show the intentions of the parties. The provisions of this section shall only apply to mineral estates in coal.[129]

The relationship between this statute and the Tennessee consent statute[130] is not clear; presumably strip mining for coal could never

124. *E.g.*, ME. REV. STAT. tit. 38, §§ 481-489 (1978 & Supp. 1979); VT. STAT. ANN. tit. 10 §§ 6001-6089 (1973 & Supp. 1979).

125. *E.g.*, FLA. STAT. ANN. §§ 380.012 to .12 (1974 & Supp. 1979) (defining "areas of critical concern") (declared unconstitutional in part in Cross Key Waterways v. Askew, 371 S.2d 913 (Fla. 1979)); ME. REV. STAT. ANN. tit. 12, §§ 681-689 (1974 & Supp. 1979); W. VA. CODE §§ 20-6A-1, -2 (1978 & Supp. 1979).

126. For other weaknesses in this approach, see Bosselman, *The Control of Surface Mining: An Exercise in Creative Federalism*, 9 NAT. RESOURCES J. 137, 154-60 (1969); Carpenter, *Severed Minerals as a Deterrent to Land Development*, 51 DENVER L.J. 1, 16-20 (1974).

127. *E.g.*, ILL. REV. STAT. ch. 30, §§ 197-198 (Smith-Hurd Supp. 1979); LA. CIV. CODE ANN. art. 753, 3546 (West 1953 & Supp. 1979); VA. CODE ANN. § 55-154 (Supp. 1979).

128. Polston, *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles*, 7 LAND & WATER L. REV. 73 (1972); Note, *Severed Mineral Interests, A Problem Without A Solution?*, 46 N.D. L. REV. 451 (1970).

129. TENN. CODE ANN. § 64-511 (Supp. 1979).

130. TENN. CODE ANN. § 58-1544(a)(6)(B) (Supp. 1979). *See* text accompanying note 92 *supra*.

be conducted without the express consent of the surface owner, so the presumption raised by the statute would be irrelevant in the case of strip mining (though it could apply, for example, to *in situ* gasification). Furthermore, it may be difficult for a court to establish the exact date on which a particular mining technique became prevalent in Tennessee. Until these questions are answered, the rights of surface and mineral owners will remain in doubt.

North Dakota has enacted a statute requiring the express description of the mineral conveyed:

> No conveyance of mineral rights or royalties separate from the surface rights in real property in this state, excluding leases, shall he construed to grant or convey to the grantee thereof any interest in and to any gravel, coal, clay or uranium unless the intent to convey such interest is specifically and separately set forth in the instrument of the conveyance.
> No lease of mineral rights in this state shall be construed as passing any interest to any minerals except those minerals specifically included and set forth by name in the lease . . . . The use of the words "all other minerals" or similar words of an all-inclusive nature in any lease shall not be construed as leasing any minerals except those minerals specifically named in the lease and their compounds and byproducts.[131]

Other states have adopted legislative definitions of various mineral substances.[132] Although these statutes are apparently preoccupied with the question of ownership, they may also effect a restriction of destructive mining processes. These statutes seem to make it impossible to transfer all of the minerals beneath a tract of land without enumeration of the substances included. On some occasions, however, the precise intent of the parties may be to sever the surface from anything and everything beneath it. So long as the par-

131. N.D. CENT. CODE § 47-10-24 (1978). The predictable result of this requirement has been the modificaton of standard lease forms in North Dakota to cover "oil, gas, sulphur, coal, peat, lignite, uranium and without restriction to such enumerated minerals, all other minerals whether similar or dissimilar to those particularly specified herein." 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 219, at 254 n.3 (1978). It is not entirely clear whether "conveyance" includes a lease, or whether reservations are to be treated the same as conveyances. Another North Dakota statute provided that in order to be effective a "reservation" of an interest in coal must contain an accurate description of the nature, length, width, and thickness of the deposit. 1911 N.D. Sess. Laws, ch. 304 (repealed by 1979 N.D. Sess. Laws, ch. 187, § 108). It was struck down in the case of Christman v. Emineth, 212 N.W.2d 543 (N.D. 1973), on the grounds that it created a classification based upon method of acquisition, in violation of the equal protection guarantee of the fourteenth amendment. *See* Fleck, *Severed Mineral Interests*, 51 N.D. L. REV. 369 (1974); Hagen, *North Dakota's Surface Mining and Reclamation Law—Will Our Wealth Make Us Poor?*, 50 N.D. L. REV. 437 (1974).

132. For example, the Arizona statute provides that " 'Oil and gas' and 'oil or gas' includes oil, gas, other hydrocarbon substances, and helium or other substances of a gaseous nature." ARIZ. REV. STAT. ANN. § 27-551(5) (1976). Similar enactments in other states are discussed in Fleck, Geraud, Martz & Verity, *Oil and Gas Leasing Laws of the Rocky Mountain States*, 7 ROCKY MTN. MIN. L. INST. 353 (1962).

ties clearly understand what is conveyed or reserved and what the effect of the removal of the minerals will be on the surface, there is no reason not to uphold the transaction.

A Pennsylvania statute provides that if there has been a prior severance of coal or of the right of surface support, recorded or unrecorded, or if there is a contemporaneous severance, any instrument conveying an interest in the surface estate must contain a recitation that:

> This document (may not) (does not) sell, convey, transfer, include or insure the title to the coal and right of support underneath the surface land described or referred to herein, and the owner or owners of such coal may have the complete legal right to remove all of such coal and, in that connection, damage may result to the surface of the land and any house, building or other structure on or in such land.[133]

A seller who fails to include the prescribed language is liable to the purchaser for any resulting damages.[134] A companion provision provides similar protection for some improvements.[135] Of course, the seller's assurance will not in any way affect the mineral owner's right to use or destroy the surface, and recourse against the seller may not adequately compensate an aggrieved purchaser. The primary value of the required notice, to the extent it is given, will be to provide a warning that the right of support may be in doubt.

III. A Proposal For New Legislation

A. The Model Act

It is now evident that the strict application of the dominance doctrine is not warranted, either in terms of the parties' expectations or because of any compelling public policy. Judicial attempts to modify the doctrine have resulted in widespread confusion and hardship, and legislative efforts to clarify the relationship between

133. Pa. Stat. Ann. tit. 52, § 1551(a)(1)-(2) (Purdon 1966).

134. *Id.* § 1552.

135. Pa. Stat. Ann. tit. 52, §§ 1406.14 -.16 (Purdon Supp. 1979). This statute seems to leave the vitality of the Pennsylvania rule of subjacent support somewhat in doubt. It describes a procedure for the surface owner to "acquire" protection from subsidence, providing further: "Any owner of surface land without the right of surface support who shall not take advantage of the provisions of this section shall have no recourse under law for any damage caused by subsidence resulting from coal mining oporations." *Id.*, § 1406.15(c). If the surface owner still enjoys an absolute right of subjacent support, the statute would have no applicability unless the right of support is expressly negatived. But does the statute contemplate that such a clear expression of understanding between the parties be disregarded? If so, the surface owner is effectively given a private right of eminent domain; this scheme seems to be modeled on the English Mines Act of 1923, 13 & 14 Geo. 5 c. 20, § 8. A variation of this approach is suggested in Carpenter, *Severed Minerals as a Deterrent to Land Development*, 51 Denver L.J. 1, 28-29 (1974).

surface and mineral owners have been neither comprehensive nor entirely evenhanded in application. The purpose of the Model Surface Rights Clarification Act, set out below, is to quantify and clarify the operation of the "dominant mineral owner" doctrine. By precisely describing the conditions under which a severed mineral owner may conduct operations that substantially impair the use and enjoyment of the surface, the Act provides clear guidance where the dominance doctrine is only suggestive. The Model Act is siguificantly different from any existing legislation, both in breadth of coverage and in its tactical approach. Prior legislative efforts to resolve the problems mentioned here have been largely piecemeal, focusing on selected minerals or mining procedures or on narrow aspects of the parties' relationship. For the most part, they represent topical political responses to the most abusive practices of the mining industries. By concentrating instead on the condition of the land after mining is completed, the Model Act is able to deal comprehensively with all mining activities and all mineral substances. Questions of ownership may thus be resolved separately. Because the emphasis is on the result, rather than on the mining process, the original expectations of both parties are more likely to be met.

Unlike the compensation statutes or the broader reclamation laws, the rights described by the Act are prophylactic in nature, rather than remedial. Those rights are set forth with relative precision and are not dependent on future events or circumstances that cannot be ascertained by reference to the public records. In this way fair and open dealing between the parties is encouraged and the public's broader interest in the security and stability of titles to land will be protected.

MODEL SURFACE RIGHTS CLARIFICATION ACT

I. TITLE

This Act shall be known and may be cited as the "Surface Rights Clarification Act."

II. FINDINGS

The Legislature finds that—

A. The full and beneficial use of the lands of this State, and the security of ownership of such lands and improvements thereto, are in the interest of all the people of this State;

B. The economic well-being of the State is dependent upon the conservation and efficient utilization of all of the natural resources of the State, including the land;

C. Many landowners in this State do not own part or all of the mineral estates beneath their lands, and the number of instances where surface and mineral rights are held by different persons is increasing;

D. In many instances it is not possible for the owner of a mineral estate to secure the possession and enjoyment of the minerals without using and occupying the surface estate or some portion thereof, or without causing some injury to such surface estate, thus interfering with the lawful activities of the owner of the surface estate;

E. In some instances activities of the owner of the surface estate may interfere with the owner of the mineral estate in his lawful efforts to possess and enjoy the minerals;

F. The failure of surface and mineral owners to explicitly agree upon the mineral owners' rights to use and occupy or injure the surface estate and to be free from interference by the owner of the surface estate, has resulted in widespread confusion, conflict and uncertainty in the law concerning such rights;

G. Because of this uncertainty either surface or mineral owners, or both, may be deprived without their consent of the full use and enjoyment of their respective estates;

H. This uncertainty in the law has resulted in individual hardship and injustice, has restricted the alienability of the land, has promoted litigation, has discouraged the full, efficient and orderly use and improvement of the land, has impeded the growth of agriculture and the development of new industry and has generally depressed the economy of the State;

I. The continuation of such uncertainty represents a real and present threat to the health, safety and general welfare of the people of this State.

III. PURPOSES

The purposes of this Act are—

A. To facilitate and require the demonstration of a clear understanding between the owners of surface and mineral estates in land concerning their respective rights to use and occupy or injure the surface of the land;

B. To protect the security of titles to land and improvements thereto;

C. To promote the free alienability of land;

D. To prevent hardship and injustice to surface or mineral owners arising from uncertainty in the law;

E. To promote the conservation and the full and efficient use of all of the natural resources of the State, including the land, the making of improvements to the land, the growth of agriculture, the development of new industry and the general well-being of the State and its people.

IV. CONSENT

A. No person who is not the owner of the land or the surface of the land in fee shall conduct any mining operation upon or beneath such land, if there is a reasonable likelihood that the effect of such operation would be to substantially interfere, now or at any time in the future, with a surface owner's present or future use of the land, unless such person shall first have obtained the express written consent of the surface owner.

B. For the purpose of this Act, a mining operation shall be deemed to substantially interfere with the surface owner's use only if—

1. Such operation affects or occupies an area of land larger than ten acres out of any larger contiguous tract of land belonging to the same surface owner; or
2. Such operation affects or occupies more than one-fourth of the area of any contiguous tract of land belonging to the same surface owner; or
3. As a result of such operation the land affected could not be put to the same use that it had before mining was commenced; or
4. The surface owner is deprived of the use of any part of his land for longer than ten years; or
5. Such operation results in the injury or destruction of any residence dwelling, public or commercial building, school, church, cemetery, railroad, public roadway, or other substantial improvement to the surface of the land.

C. The burden shall be upon the person asserting a right to conduct mining operations to show that no substantial interference with the surface owner's use would be reasonably likely to result from the proposed mining operation.

D. The term "person," as used herein, shall mean any corporation, partnership, sole proprietorship or other business association, agent, government agency, trust, estate, foundation, voluntary organization, or natural person or persons.

E. The term "surface owner" shall mean all persons from

time to time owning any vested or possessory interest, legal or equitable, including a leasehold interest or security interest, in the surface of the land.

F. The term "mining operation" shall mean any activity which is in any way related to the removal of any substance that forms part of the surface or that lies beneath the surface of the earth, or to the exploration for such substances.

V. FORM AND CONTENT OF CONSENT

A. The required consent shall be in writing and shall be sworn to and signed by the current surface owner or by any previous surface owner at the time he was the surface owner. Such consent may be incorporated into and be made a part of an instrument conveying or reserving an interest in the land or the mineral estate described; but if the surface owner is the grantee in such an instrument, only the signature of the mineral owner need appear on the instrument. Such consent shall be notarized and shall in all other respects be in a form and meet the requirements for documents to be recorded in the deed records.

B. The consent shall—

1. Describe fully the land to be affected by the mining operation;

2. Specify the approximate beginning date and length of time during which the surface owner will be prevented by such mining operation from using and occupying the land affected;

3. Describe the physical condition after mining is completed, and after any reclamation which is required or promised to be carried out, of each area of land affected by such mining operation.

C. The mere waiver by the surface owner of damages for injury to the surface estate will not satisfy the requirements for description specified in this paragraph.

VI. NOTICE TO THIRD PARTIES: RECORDATION

The required consent shall not be deemed to constitute notice to or be binding upon persons without actual notice, unless it is recorded in the deed records of the county or counties in which the affected land is situated.

VII. PROSPECTIVE AND RETROSPECTIVE EFFECT

The consent specified in this Act shall be required whether the instrument under which any person asserts a right to mine is

dated earlier or later in time than the effective date of this Act. It shall be required for the expansion of existing operations to previously unaffected lands.

VIII. PRESERVATION OF EXISTING RIGHTS

Nothing herein shall be deemed to permit the use, occupation or injury to the surface of the land by mining operations where such use, occupation or injury would not be permitted without reference to this Act.

IX. SEVERABILITY

If any word or provision of this Act or the application thereof to any person or circumstance is found to be invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

B. Commentary on the Model Act

Findings and Purposes. While in many jurisdictions it is not customary to describe the legislative purpose in such a long preamble,[136] such an explanation may furnish the only tangible evidence of the lawmakers' intent, outside of the operative provisions of the statute itself.[137] Although that evidence may not be binding upon a court construing or interpreting the statute, it nonetheless raises a strong presumption that the purpose stated was the controlling,[138] if not the exclusive one.[139]

136. The language of the purpose clause in the Tennessee Surface Owner Protection Act of 1977 Tenn. Pub. Acts, ch. 164, § 1, is almost identical, having been adapted from an earlier proposal by the author. J. Dycus, Mining Law: A Statutory Proposal for Clarification of Rights to Use or Destroy the Surface of the Land (1976) (unpublished) (copy on file with the *Vanderbilt Law Review*).

137. Unlike the federal practice, in most states neither committee hearings nor floor debates are recorded. For an argument that the purpose of a well-drafted statute should be obvious from its terms, see R. DICKERSON, LEGISLATIVE DRAFTING 107 (1954).

138. Johnson v. Southern Pacific Co., 196 U.S. 1 (1904). Such evidence of legislative purpose might have made it more difficult for the Kentucky Court of Appeals to strike down that state's consent statute in Department for Nat. Resources & Environmental Protection v. No. 8 Ltd., 528 S.W.2d 684 (Ky. 1975); *see* note 190 *infra.*

139. The purpose clause of the North Dakota Surface Owner Protection Act provides:

> [I]t is necessary to exercise the police power of the state as described in this chapter to protect the public welfare of North Dakota which is largely dependent on agriculture, and to protect the economic well-being of individuals engaged in agricultural production. This finding recognizes that the people of North Dakota desire to retain a strong agricultural economy . . . .

N.D. CENT. CODE § 38-18-02(1) (Supp. 1979). Professor Beck suggests that one important purpose of the consent laws is to protect the agricultural enterprise. Beck, *Surface Owner Consent Laws: The Agricultural Enterprise Versus Surface Mining for Coal,* 1977 S. ILL.

The Requirement of Consent. The central theme of the Model Act is that, except under certain clearly defined circumstances, the parties to a deed or lease that severs an interest in minerals from the surface estate should have a clearly expressed understanding about the rights of the mineral owner to use or injure the surface.[140] The parties should demonstrate their understanding and make it known to third parties by putting it in writing and making it a part of the public record. When there is no written understanding, the statute precisely limits and describes the surface and mineral owners' rights.

The Model Act applies to all mining processes that are likely to substantially interfere with the surface owner's use of the land.[141] The ownership of a particular mineral deposit properly becomes an issue to be decided separately. The recovery of all minerals is covered, whether surface or subterranean, migratory or stationary, liquid or solid, organic or inorganic. Coal, uranium, phosphates, talc, limestone, sand, gravel, graphite, boartes, vermiculite, shale, granite, sulphur, salt, oil, and even water would be included. The term "substance" is used to indicate the widest possible variety of materials that might be recovered from the earth.[142]

Similarly, the statute applies to any activity related to mining that has an effect on the surface. In addition to the actual penetration of the surface of the earth, the definition encompasses the construction of roads and other facilities, the storage of spoil, the use of water or other materials from the surface or the destruction of surface improvements. The exploration for minerals is also included. Thus, the statute is broad enough to cover any activity of the mineral owner which has the effect of interfering with the normal activities of the surface owner or impairing the usefulness of the surface estate.[143]

It is not necessary that the mining operation be the immediate and direct cause of the destruction.[144] Thus, deep mining for coal would be covered if it were conducted in a way that could cause subsidence of the surface or pollution of ground water supplies at some time in the future. It is not necessary

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U.L.J. 303. They certainly will have that effect to some degree, by increasing the cost of production for mineral owners who lack such consent, thus discouraging mining.

140. Model Act, § IV. A..
141. *Id.* § IV. F..
142. *Id.*
143. *Id.*
144. *Id.*

that the destruction be certain to occur. The reasonable likelihood of destruction will bring the mining operation within section IV. A of the Act. There is now enough experience with most mining processes to be able to predict their effect. When such experience is lacking, for example with *in situ* gasification of coal, it seems only fair to require the mineral owner to bear any risk associated with his venture, by requiring him to bargain for and obtain the surface owner's consent.

The statute will apply only when someone other than the mineral owner has a substantial interest in the surface of the land. As the term "surface owner" is defined,[145] written consent would have to be obtained from, among others, the owner of a fee simple interest, a vested remainderman, or a tenant. If two or more persons fit the definition, then all would have to agree. It should not matter whether the interest claimed is recorded or not; even the consent of an adverse possessor with an unmatured right would be required.

The surface owner must consent if the mining operation might "substantially interfere" with his or her use.[146] This requirement is actually a statutory definition of the term "reasonable and necessary." It is clearly not the purpose of the Act to prevent the recovery of the minerals in every case in which the surface and mineral owners fail to enter into an express agreement. The parties are understood to have contemplated that each should have the full use and enjoyment of his property. Similarly, the conditions described in the Act[147] represent limits beyond which the parties cannot reasonably be thought to have silently consented.

With the exception of very small surface tracts, the statute permits a mining operation to affect up to ten acres of land without the separate consent of the surface owner.[148] That area is probably large enough (even with some allowance for access roads and some supporting facilities) to permit the operation of almost any deep mine if tailings are put back in the ground and processing takes place elsewhere. Two or three acres is enough for any but the deepest oil wells.[149] It is not known yet how much of the surface will be occupied for *in situ* gasification or

145. *Id.* § IV. E..
146. *Id.* § IV. A..
147. *Id.* § IV. B..
148. *Id.* § IV. B. 1.. The Colorado Mined Land Reclamation Act provides relaxed standards for issuance of a permit to mine tracts of less than ten acres. COLO. REV. STAT. §§ 34-32-110 and -111 (Supp. 1978).

chemical leaching operations, but the total required is apparently small. The limitation of ten aggregate acres out of any larger tract is designed to prevent "checkerboarding" or opening of the surface at several separated locations.

The smallest landowners are protected by a requirement that the disturbance of more than one-quarter of the surface estate would require the owner's consent, even if the area represented by that fraction is less than ten acres.[150] It seems reasonable to demand tangible proof of such an owner's agreement to an activity which would effectively displace him from his land. While the figure of one-fourth could perhaps be set higher or lower, it probably reflects the reasonable expectations of the surface owners in a large number of cases.

The consent of the surface owner is required if the affected surface area cannot be restored to its original condition, or if the mineral owner is unwilling to restore it.[151] This limitation complements the various regulatory statutes that require reclamation of mined lands. Once again the necessity for use of the surface by the mineral owner is recognized as temporary; the permanent destruction of any portion of the surface is fundamentally inconsistent with the right of the surface owner to use and enjoy his estate in perpetuity.

If the surface owner has any expectation that the land will be mined, he must assume that the mining will continue for a long enough time to permit the extraction of all the minerals. Again, however, there are reasonable limits to such expectations. Since the mining process at a single site may extend over several lifetimes, and since the mineral owner often has the ability to adjust the rate of recovery, a clear understanding should be required if occupancy of the surface could extend over a term so long that it would be equivalent to ownership. A period of ten years is suggested as the greatest length of time that any owner would, without some explicit agreement, expect to be displaced from his land.[152]

The surface and mineral owners are also required to agree expressly to the destruction of valuable permanent improve-

149. For example, an ordinance of the City of Los Angeles permits drill sites not exceeding two acres. Los Angeles, Cal. Ordinance 112, 524, *described in* 4 H. WILLIAMS, OIL AND GAS LAW § 697.10, at 556 (1979).

150. Model Act, § IV. B. 2..

151. *Id.* § IV. B. 3.. Several states now have statutes requiring restoration of an oil and gas drilling site, *e.g.*, KAN. STAT. ANN. § 55-132a (1976).

152. Model Act, § IV. B. 4..

ments to the surface.[153] It is not reasonable to suppose that the surface owner would have assented to their destruction without comment. It should not matter that the improvements protected were constructed after the severance of the surface and mineral estates. As a reflection of the reasonable expectations of the parties, the construction and maintenance of such improvements is simply inconsistent with the notion that they could be immediately and arbitrarily destroyed by the mineral owner.

It is important to note that the limitations just described operate as alteruatives. In other words, the mineral owner must obtain the surface owner's consent if any one of the limitations is exceeded. The Model Act will not, of course, eliminate all problems of proof. When disputes arise over the possibility that an operation would "substantially interfere," fairness requires that the burden of proof be placed upon the mineral owner, since he controls the choice of mining methods and, hence, the extent of interference.[154]

Form and Content of the Consent. The current surface owner or any previous surface owner during his tenure of ownership may furnish the required consent. The mineral owner, therefore, can be sure that once he has obtained a proper consent he will not be forced to negotiate again with a new surface owner. The parties must memorialize their agreement in a written statement that can be recorded in the public deed records.[155] The agreement must be notarized and otherwise conform to the requirements for such documents. No less pomp and circumstance should attend the conveyance of a right to use or destroy the surface of the land than the transfer of any other interest in real property. The Act may thus be characterized as a variation of the Statute of Frauds.

The surface owner's signature must appear on the document describing the parties' correlative rights, unless those rights are adequately described in the conveyance that severs the mineral and surface estates and transfers the surface rights to the surface owner. It is probably fair to infer consent from his or her acceptance of the conveyance in which the conditions are plainly stated. Although both parties to a mineral lease commonly affix their signatures to show their assent to covenants in the lease, the grantee of an interest in real property

153. *Id.* § IV. A., B. 5..
154. *Id.* § IV. C..
155. *Id.* § V. A..

rarely signs the granting instrument.[156]

No special words or phrases are prescribed. The only requirement is to clearly describe the result of the mining operation. Because the surface owner is concerned with the condition of the land after mining, and only incidentally with any particular mining process, it is not necessary to mention the process. Thus the mineral owner is free under the Act to take advantage of advances in mining technology or changes in market conditions. The consent must, however, contain an exact description of the land affected by the mining.[157] Only in this way can the surface owner identify an area of the surface where he may make improvements without risk of their destruction. If the mineral owner is uncertain about the most desirable location for his operation, the burden of such uncertainty is properly borne by the party best able to resolve it by the selection of a particular mining technique or by an engineering decision to conduct the operation at one or another location.[158] Similarly, the parties must agree on the length of time that the surface owner will be displaced from his land.[159]

The condition of the land after mining must be described in the consent.[160] The description may be in negative terms, for example, that the land will have no commercial value or usefulness. An explicit description is necessary to ensure that the parties were aware of and bargained for the consequences of their agreement. A mere waiver of damages for injury to the surface estate gives the surface owner no reason to suspect the nature or extent of such injury, and thus will not constitute compliance with the statute.[161]

Notice to Third Parties and Recordation. If the parties to the instrument of severance have an express, but unrecorded, agreement concerning the use or destruction of the surface, the law in many jurisdictions presently requires others who may be concerned with the land to guess at the content of that understanding. This doubt is resolved by requiring the consent prescribed by the Act to be placed in the public record.[162] Purchas-

156. *E.g.*, Frensley v. White, 208 Okla. 209, 254 P.2d 982 (1953); Fleming v. Cohen, 186 Mass. 323, 71 N.E. 563 (1904). None of the enacted statutes makes this exception.

157. Model Act, § V. B. 1..

158. The general common law rule is, however, that unless he acts arbitrarily, the mineral owner may select a site without regard for the convenience of the surface owner. Reading & Bates Offshore Drilling Co. v. Jergensen, 453 S.W.2d 853 (Tex. Civ. App. 1970).

159. Model Act § V. B. 2..

160. *Id.* § V. B. 3..

161. *Id.* § V. C..

162. *Id.* § VI.

ers and lenders may confidently invest in the land with the knowledge that their investments will not be unexpectedly lost through the activities of the mineral owner.

Prospective and Retrospective Application. In general, statutes are presumed to operate prospectively unless a contrary intent is clearly stated or unless the inference is strong that the change in policy embodied by the statute is applicable to prior as well as to subsequent cases.[163] The Model Act has as its purposes the promotion of fairness between parties and the advancement of a broad public interest in clarifying their respective rights. These concerns clearly are present with respect to earlier as well as later transactions. Moreover, these concerns exist currently for vast areas of land now held in divided ownership. The retrospective operation of the Act is therefore clearly stated.[164]

IV. CONSTITUTIONAL ISSUES

The constitutional questions raised by existing legislation and by the Model Act are not unfamiliar. They are present to some degree in every effort by a state to regulate dealings between private parties. A comprehensive discussion of these issues, however, is beyond the scope of this Article. The following is rather an attempt to highlight the issues, and to provide a framework for their analysis and possible solutions.

A. Retroactivity

The United States Constitution contains no explicit prohibition of retrospective legislation,[165] and although courts have commonly regarded such enactments with suspicion,[166] they have interpreted neither the contract clause nor the due process clause of the fourteenth amendment to prohibit such enactments.[167] The Model

163. H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 649 (tent. ed. 1958).

164. Model Act § VII.

165. League v. Texas, 184 U.S. 156 (1902). However, the constitutions of some states specifically forbid retroactive enactments.

166. Wilkinson v. Leland, 27 U.S. (2 Pet.) 627 (1829), suggests that retrospective legislation "is an exercise of power, which is so summary a nature, . . . that a [l]egislature invested with the power can scarcely be too cautious or too abstemious in the exertion of it." *Id.* at 656. Consider Justice Stewart's concurring opinion in Hughes v. Washington, 389 U.S. 290 (1967), that a *judicial decision* having retroactive effect has been described as a taking without due process of law where it constituted "a sudden change in state law unpredictable in terms of relevant precedents." *Id.* at 296.

167. United States Trust Co. v. New Jersey, 431 U.S. 1, 17 (1977). The due process

Act plainly defines the rights of parties to deeds and leases in existence on the date of enactment, as well as those arising in the future. It is, therefore, expressly retrospective as well as prospective.[168] Enacted legislation in several states apparently also operates retrospectively. The Tennessee statute, for example, requires written consent from the current surface estate owner if such consent was not obtained earlier.[169]

It is arguable that the consent requirement offends the constitutional prohibition of *ex post facto* laws. This provision, however, has been held to apply only to criminal statutes[170] or to civil acts that are essentially penal in their operation.[171] Of the various acts under consideration, only the Montana Landowner Notification Act[172] imposes any penalty for failure to obtain the required consent, other than denial of a surface mining permit.[173]

B. Contract

Article I, § 10 of the United States Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." Even in the absence of any express agreement between the parties, it is arguable that the common-law dominance doctrine gives rise to rights which are contractual in nature and which are protected by this provision.[174] The dominance doctrine, however, does not apply to any current understanding between the parties, or to any continuing obligation of performance by either party.[175] It does result in an implied easement of necessity, created

clause of the fourteenth amendment generally does not prohibit retrospective civil legislation, unless the consequences are particularly "harsh and oppressive." *Id.* at n.13; Welch v. Henry, 305 U.S. 134, 147 (1938).

168. Model Act, § VII. In the absence of such provision, statutes are ordinarily construed as being prospective only in their application. Greene v. United States, 376 U.S. 149 (1964).

169. TENN. CODE ANN. § 58-1544(a)(6)(B) (1978).

170. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

171. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138-39 (1810).

172. MONT. REV. CODES ANN. §§ 50-1301 to -06 (Cum. Supp. 1977).

173. Each one does, however, impose penalties for mining without a permit. The Model Act avoids even this sanction by making the consent requirement self-enforcing by the parties involved. The applicability of the *ex post facto* rule is discussed in Haughey & Gallinger, *Legislative Protection of the Surface Owner in the Surface Mining of Coal Reserved by the United States*, 22 ROCKY MTN. MIN. L. INST. 145 (1976).

174. The scope of such rights will, of course, depend upon limitations of the dominance doctrine itself by decisions within a given jurisdiction. "[T]he laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 550 (1866).

175. There is, to be sure, an obligation on the part of the mineral owner not to unreasonably interfere with the surface owner's use of his estate, and on the part of the surface

by operation of law, which is occasioned solely by the physical relationship of the parties.[176] The respective rights of the parties to use the land are dependent on their respective property rights, not on any obligation separate and apart from the land.[177] Because the consent statutes govern property rather than contractual interests, the contract clause should have no application.[178]

If, however, the relationship is characterized as a contractual one the constitutional protection will extend only to an agreement "by which perfect rights, certain, definite, fixed private rights of property, are vested."[179] The mineral owner's implied right to use the surface, whether or not augmented by the kind of general language found in the broad-form deeds, hardly fits that description. It is difficult to imagine a right less certain or definite than that described by the "reasonable and necessary" rule.

In applying the contract clause the Supreme Court has made mutuality of understanding the central issue: "The term 'contract' is used in the Constitution in its ordinary sense, as signifying the agreement of two minds . . . to do, or not to do, certain acts. Mutual assent to its terms is of its very essence."[180] The benefit protected by the Constitution is one that is "bargained for."[181] Yet it is precisely the absence of a clear and demonstrable mutual understanding that gives rise to the problems addressed by the consent statutes. In the recent case of *Allied Structural Steel Co. v. Spannaus*,[182] the Court struck down a state act which imposed a "completely unexpected liability" upon one of the contracting parties, severely disrupting his contractual expectations. But we cannot be sure that a mineral owner has any expectation to use one or an-

owner not to interfere with the mineral owner in the exercise of his rights. However, these undertakings are like obligations of any property owner to use his property in a way that will not unreasonably interfere with the use and enjoyment of his neighbors' properties; they are inherent in the ownership of property.

176. Professor Powell suggests that fictional implications of "intent" to grant or reserve a way of necessity are genuinely rooted in considerations of public policy to prevent land from remaining unusable. 3 R. POWELL, *supra* note 3.

177. *Cf.*, Connecticut Mut. Life Ins. Co. v. Cushman, 108 U.S. 51, 64-65 (1883) (rights under a mortgage, protected by the contract clause, are distinguished from rights connected with the purchase of land, which are not).

178. Clement Nat'l Bank v. Vermont, 231 U.S. 120 (1913); North Missouri R.R. v. Maguire, 87 U.S. (20 Wall.) 46 (1873). On the other hand, contract rights, if they exist, are a form of property for constitutional purposes. United States Trust Co. v. New Jersey, 431 U.S. 1, 19 (1977).

179. Butler v. Pennsylvania, 51 U.S. (10 How.) 402, 416 (1850). *See also* Ochiltree v. Iowa R.R. Co., 88 U.S. (21 Wall.) 249, 252 (1875).

180. Louisiana v. Mayor and Adm'rs of New Orleans, 109 U.S. 285, 288 (1883). *See* Garrison v. City of New York, 88 U.S. (21 Wall.) 196, 203 (1874).

181. United States Trust Co. v. New Jersey, 431 U.S. 1, 18 (1977).

182. 438 U.S. 234 (1978).

other mining method unless he or she clearly expresses this point. Nor can the mineral owner be said to have relied upon any ability to use a particular method.[183] When a particular method is clearly stated, of course, so that a meeting of the minds can be shown, the Model Act does not apply.[184]

It is well settled that an act of the legislature may, as an exercise of the police power, have the effect of altering or even negating the terms of a contract.[185] It may, for example, properly require the agreement to be in writing.[186] It may, impose a limitation on the

183. The element of reliance, or the lack thereof, was vital to the decision in City of El Paso v. Simmons, 379 U.S. 497 (1965). "We do not believe that it can seriously be contended that the buyer was substantially induced to enter into these contracts on the basis of [a particular expectation]." *Id.* at 514. It can hardly be contended that a mineral owner expected to engage in a destructive mining practice, when he failed to express such a fundamental infringement upon the surface owner's rights. This is especially true if the mining technique in question was not in use when the surface and mineral estates were separated.

184. The Act, however, could affect parties who do have a clear and unequivocal, though unwritten, understanding. It might also apply to a relationship in which there really is a fair disagreement about what was intended. The Kentucky Court of Appeals invoked the contract clause to strike down that commonwealth's statute requiring the surface owner's consent to strip mine. Department for Natural Resources & Environmental Protection v. No. 8 Ltd., 528 S.W.2d 684 (Ky. 1975). The court found that the language of the "broad-form" deed under which the mineral owner claimed its interest, granting broad surface rights and waiving damages, constituted a contract between the owners, and that the consent requirement impermissibly impaired the resulting obligation. The deed of severence in that case, dated 1907, conveyed "the right to enter upon said lands, use and operate the same and surface thereof in any and every manner that may be necessary or convenient for mining. The grantee, its successors and assigns, was released from liability or claim of damages." Each of the grantors signed with an "X." The contract issue was also raised, but not expressly resolved, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), in which the right of subjacent support was expressly reserved to the mineral owner. In a similar case, the Tennessee statutes, *see* text accompanying notes 92 and 129 *supra*, have recently been found not to violate the contract clause:

> [T]he Tennessee Surface Owner Protection Act of 1977 is a legislative codification of a basic principle of contract law; namely, that the intention of the parties to an instrument shall prevail. The Act creates an orderly and reasonable procedure for determining the intention of the parties where it is not clearly shown on the face of the deed.

Doochin v. Rackley, No. 7410 (Ch. Tenn., filed Dec. 14, 1979) (notice of appeal has been given in this case). The Kansas court has taken another tack in holding that a statute requiring reclamation of oil and gas well sites did not affect an earlier lease contract between mineral and surface owner. KAN. STAT. ANN. § 55-132(a) (1976). Rather, the court said, it is a valid act of the legislature in the public interest which affects "the abandonment and quitting of the lease by the lessee." Decker v. Jones, 194 Kan. 146, 148, 398 P.2d 325, 327 (1965).

185. "The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977). *See also* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); City of El Paso v. Simmons, 379 U.S. 497 (1965); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Stephenson v. Binford, 287 U.S. 251 (1932); Manigault v. Springs, 199 U.S. 473 (1905).

186. Stitt v. Huidekopers, 84 U.S. (17 Wall.) 384 (1873); Clarke v. Russel, 3 U.S. (3 Dall.) 415 (1799).

time available for performance.[187] Or it may require the observance of certain formalities, such as recordation.[188] The legislative power must, however, be exercised upon reasonable conditions, and the resulting legislation must be of a character appropriate to the public purpose justifying its adoption.[189] The impairment of a contract between mineral and surface owner may be constitutional if it is "reasonable and necessary to serve an important public purpose."[190] Requiring total clarity in describing the parties' rights is reasonable in light of the surrounding circumstances.[191] Growing shortages of energy (and various mineral raw materials) and increasing pressure for the use of destructive mining methods have created an emergency which warrants drastic legislative action.[192]

C. *Equal Protection*

Like almost every piece of social or economic legislation, the application of the consent statutes will affect different persons differently.[193] To fall under the proscription of the equal protection clause, however, a statute must create a classification wherein persons similarly circumstanced are treated discriminatorily.[194] Although the consent requirements may seem to favor surface owners as a class over mineral owners, or to favor mineral owners who also

187. Phalen v. Virginia, 49 U.S. (8 How.) 163 (1850). The Model Act requires consent if the surface owner will be deprived of any part of his estate for longer than ten years. Model Act § IV B. 4..

188. Vance v. Vance, 108 U.S. 514 (1883); Jackson v. Lamphire, 28 U.S. (3 Pet.) 280 (1830). The Model Act requires the consent to be in recordable form, and to be recorded if it is to be binding on third parties. Model Act, §§ IV, V, VI.

189. United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

190. United States Trust Co. v. New Jersey, 431 U.S. 1, 25 (1977). In Department for Natural Resources & Environmental Protection v. No. 8 Ltd., 528 S.W.2d 684 (Ky. 1975), the court misread legislative history when it found the primary purpose of the Kentucky consent statute to be environmental conservation (it appeared as part of a broader regulatory scheme to regulate strip mining of coal). Because it was ineffective as an environmental conservation measure, in the court's view, it did not achieve any public purpose and thus impermissibly interfered with private obligations. *Id.* at 686-87.

191. *See* text accompanying notes 77-85 *supra.*

192. *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 30-31 (1977). The Court in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 249 (1978), suggests that the existence of a great emergency, though not prerequisite, may help to justify the legislature's action in the public interest.

193. Perfect equality is not required. Stebbins v. Riley, 268 U.S. 137 (1925). "Legislation designed to promote the general welfare commonly burdens some more than others. The owners of the brickyard in *Hadacheck,* of the cedar trees in *Miller v. Schoene,* and of the gravel and sand mine in *Goldblatt v. Hempstead,* were uniquely burdened hy the legislation sustained in those cases." Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 133 (1978).

194. Barbier v. Connolly, 113 U.S. 27, 30-32 (1885).

hold title to the surface estate, they create no inherent advantage in one form of ownership as compared with another. All owners have generally the same rights and remedies concerning the use of their properties, just as all are subject to certain rights of their neighbors and to the power of the state to enact reasonable regulations with respect thereto.[195]

The Constitution does not prevent a state from distinguishing, selecting, and classifying objects of legislation, provided that its classification is reasonable, and not arbitrary.[196] Such a classification must rest upon some ground of difference which has a fair and substantial relation to the legislative purpose.[197] Each of the statutes discussed in this Article is intended to alleviate problems resulting from uncertainty about the correlative rights of surface and mineral owners. If the statutes place a greater burden on the mineral owner, it is because he is in the better position to effect a solution by eliminating the uncertainty. He alone can anticipate the need to employ a particular mining process and the extent of possible interference with the surface owner's use. It is appropriate, therefore, to require him to achieve and document an understanding with the surface owner concerning their respective rights, in accordance with his needs.[198]

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195. In Northern Illinois Coal Corp. v. Medill, 397 Ill. 98, 72 N.E.2d 844 (1947), the Illinois Supreme Court struck down that state's surface mining permit law, on the grounds that it wrongfully restricted coal mining, while the equally destructive extraction of other minerals went unregulated. *Accord,* Sigety v. State Board of Health, 157 Mont. 48, 482 P.2d 574 (1971). The same argument has not prevailed in other cases. *See, e.g.*, Maryland Coal & Realty Co. v. Bureau of Mines of State, 193 Md. 627, 69 A.2d 471 (1949); Dufour v. Maize, 358 Pa. 309, 56 A.2d 675 (1948). Note that, unlike the statutes in the various states which regulate mining of only one or a limited number of minerals, the Model Act would discriminate between owners ouly on the basis of the destructive potential of their activities. In this sense, the analogy of the Model Act to the zoning laws is a close one.

196. Flemming v. Nestor, 363 U.S. 603 (1960); Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283 (1898); Gulf, C. & S.F. Ry. Co. v. Ellis, 165 U.S. 150 (1897).

197. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Reed v. Reed, 404 U.S. 71 (1971); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). In Christman v. Emineth, 212 N.W.2d 543 (N.D. 1973), the court struck down as unconstitutionally arbitrary and discriminatory a statute which required a full description of coal deposits *reserved* to grantors, but did not require such a description of coal deposits *conveyed*. Such a distinction was found to have no reasonable basis in the achievement of the avowed legislative purpose (in this case to aid tax assessors in valuing coal deposits). *Id.* at 552. *See* Fleck, *Severed Mineral Interests,* 51 N.D.L. REV. 369 (1974). Requiring the surface owner's consent may not, of course, be a perfect solution. Yet the existence of other possible solutions, or of a more nearly comprehensive solution, will not necessarily invalidate a particular statute. Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970); South Carolina v. Katzenbach, 383 U.S. 301 (1966). The social and economic issues involved are many and complex, and no single answer could be expected to resolve all of them.

198. The mere fact that compliance by the mineral owner may in some instances be cumbersome or dilatory or expensive will not necessarily render the requirement invalid. *See* Barbier v. Connolly, 113 U.S. 27, 32 (1885).

Statutes that require the consent of the "current" surface owner or that provide for compensation in lieu of the consent may be perceived as vulnerable to attack under the equal protection clause. They seem to discriminate between a mineral owner who has the consent of the current surface owner, and a mineral owner who obtained the same consent from the current surface owner's predecessor in title. If the mineral owner has reached a clear understanding with a previous surface owner, the purposes of the consent statute will not be furthered by requiring him to pay a second time for the privilege of using a destructive mining process. If, on the other hand, the term "current surface owner" is interpreted to allow the consent of any surface owner during his tenure of ownership, the policies underlying the statutes would be satisfied and the equal protection complaint would be avoided. Given the courts' preference for constitutional rather than unconstitutional constructions, the latter interpretation should be favored. The Model Act contains clear language admitting the consent of the current surface owner's predecessor in title.[199]

D. Taking or Regulation

Whether there is a taking in the constitutional sense depends upon whether the application of a statute adversely affects some interest in property. The question is complicated by the fact that there are two distinctly different, yet related, kinds of interest which may be so affected—the ownership of the minerals and the easement implied by the dominance doctrine. In the absence of an express agreement between surface and mineral owner, the latter's right of access to the minerals cannot be greater than that described by the implied easement. Recent decisions[200] have so restricted the scope of that easement that a consent statute might not limit its enjoyment in any way. Since the statute will not affect the mineral owner's interest in the mineral deposit itself and since it may not further restrict the scope of the easement, a property interest would not be adversely affected and there would, therefore, be no taking. It is most likely, however, that the courts will simply lump these two kinds of interests together in deciding whether the mineral "rights" have been wrongfully taken.[201]

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199. Model Act § V. A..

200. *See* text accompanying notes 69-74 *supra.*

201. None of these statutes, except perhaps the compensation provisions, *see* text accompanying notes 99-102 *supra*, seems to restrict the rights of any *surface* owner. It may be fairly asked whether the compensation statutes really provide "just compensation," or whether a taking thereunder is for a public purpose. By permitting the mineral owner to

A state can, of course, exercise its police power to regulate the use of property for the purpose of protecting the public health, safety, morals, or general welfare, even though such regulation has the effect of diminishing the value of the property regulated.[202] In *Pennsylvania Coal Co. v. Mahon,*[203] Justice Holmes remarked that "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law."[204] Whether a regulation should be characterized as a taking, requiring payment of compensation, depends, according to Justice Holmes, upon the extent of diminution in value compared with the benefit resulting to the public from the regulation.[205] That determination depends, in turn, upon the facts in each case. Although Justice Holmes' oft-quoted balancing test does not appear to have been widely followed in the Supreme Court[206] either before or after *Mahon,* no other reliable guide has been developed.[207] In the recent case of *Penn Central Transportation Co. v. City of New York,*[208] the Court admits that it "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."[209] Yet one can draw some tentative conclusions about the validity of the consent statutes.

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appropriate directly from the surface owner, these laws may stretch even the considerable limits of Berman v. Parker, 348 U.S. 26 (1954). Only under the Pennsylvania notice statute, PA. STAT. ANN. tit. 52 § 1406.15 (Purdon 1979 Supp.), is compensation provided for the mineral owner. *See* note 135 *supra.*

202. If a statute can be characterized as a valid exercise of the police power, it will overcome any objections of taking of property without due process. Powell v. Pennsylvania, 127 U.S. 678 (1888); Mugler v. Kansas, 123 U.S. 623 (1887); License Cases, 46 U.S. (5 How.) 504 (1847); Commonwealtb v. Alger, 61 Mass. (7 Cush.) 53 (1851). When such a regulation is founded upon the common-law doctrine of nuisance, it has been characterized by Professor Haar as a "nontaking" of the properties surrounding the property regulated. Lectures by Professor Haar, Harvard Law School (1975). Similarly, the consent statute may represent a "nontaking" of the surface owner's property.

203. 260 U.S. 393 (1922).

204. *Id.* at 413.

205. "When [the diminution in value] . . . 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." *Id.* at 413. Professor Michelman restates the proposal in economic terms in *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165, 1214 (1967).

206. An excellent survey of the taking cases in the Supreme Court may be found in F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE 114-235 (1973).

207. "Despite the intensive efforts of commentators and judges," observes Professor Sax, "our ability to distinguish satisfactorily between 'takings' . . . and exercises of the police power . . . has advanced only slightly since the Supreme Court began to struggle with the problem some eighty years ago." Sax, Takings, Private Property and Public Rights, 81 YALE L.J. 149, 149 (1971).

208. 438 U.S. 104 (1978).

209. *Id.* at 124.

The mere fact that a regulation may deprive a property owner of the most valuable use of his estate, for instance, will not necessarily result in a compensable taking.[210] The mineral owner cannot be heard to complain if he is compelled by a statute to resort to, for example, shaft and pillar mining, *in situ* gasification, or leaching to recover minerals, when strip mining would be more profitable, as long as the restriction is necessary to effect a substantial public purpose. It is also unlikely that the mineral owner has a protected right in any particular mining process, provided that process is not the only one by which he may "use" his property.[211] A strict reading of the dominance doctrine does not require that result. Because the mineral owner must act with "due regard" for the rights of the surface owner,[212] the existence of alternative methods of extraction may make the use of a particular process unreasonable, hence not a "property interest" for these purposes.[213]

The question of whether a mineral owner is guaranteed a profit from his property was addressed by Justice Holmes in *Mahon*: "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[214] The *Penn Central* court interprets this language to mean that an otherwise valid statute may constitute a taking if it unduly frustrates "distinct invest-

210. *Id.* at 130. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Powell v. Pennsylvania, 127 U.S. 678 (1888); Mugler v. Kansas, 123 U.S. 623 (1887); Johnson v. United States, 479 F.2d 1383 (Ct. Cl. 1973).

211. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

212. *See* note 53 *supra*.

213. 438 U.S. at 126-27 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962)). In Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 530, 20 Cal. Rptr. 638, 647, 370 P.2d 342, 351 (1962), the court observed that the owner prevented from continuing his gravel pit operation could use his property for "stabling horses, cattle feeding and grazing, chicken raising, dog kennels, fish hatcheries, golf courses, certain types of horticulture, and recreation."

214. 260 U.S. at 414. While a number of state courts have adopted this test, *e.g.*, Vernon Park Realty v. City of Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954); Arverne Bay Const. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938), it has not been followed in the Supreme Court. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Powell v. Pennsylvania, 127 U.S. 678 (1888); Mugler v. Kansas, 123 U.S. 623 (1887). The subjective nature of such a test may raise problems of fairness, as well as difficult administrative questions. For example, who is to decide what is profitable, and on what grounds? Should the decision to permit destruction of the surface be based upon the fluctuating price of a mineral or the availability of a more or less costly mining technology? What of the mine operator's capital strength or operating efficiency?

ment-backed expectations."[215] Of course, if the "investment-backed expectation" is the implied right to totally destroy the surface estate, or even to substantially interfere with the surface owner's use, that expectation may not be warranted and may not be protected.[216] The point is clearly made in *Penn Central*: "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had *believed* was available for development is quite simply untenable."[217]

Moreover, it appears that a consent statute can validly deprive the mineral owner of the total use of his property without compensation as long as the deprivation represents a proper exercise of the police power.[218] In his dissent in the *Mahon* case, Justice Brandeis suggested that "[r]estriction upon use does not become inappropriate as a means merely because it deprives the owner of the only use to which the property can then be profitably put."[219] The later holdings in *Miller v. Schoene*[220] and *Goldblatt v. Town of Hempstead*[221] clearly support this view.

All of the statutes discussed in this Article have the broad public purposes[222] of promoting fairness in dealings between surface

215. 438 U.S. at 124.

216. There was no suggestion in *Mahon* that the Pennsylvania statute absolutely prevented removal of the mineral owner's coal. But its removal was made "commercially impracticable" (would not result in profit) because of the requirement to protect the surface estate from subsidence. It seems fair to ask whether the coal company's "expectation" of recovering all the coal at a profit was warranted, in view of Pennsylvania's long recognition of a common-law right of subjacent support. *See* notes 20-23 *supra* and accompanying text.

217. 438 U.S. at 130 (emphasis added).

218. *See* Powell v. Pennsylvania, 127 U.S. 678 (1888); Mugler v. Kansas, 123 U.S. 623 (1887). *But see* Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971), suggesting that "any governmental regulation that makes a private right essentially worthless is a taking of property for which compensation must be paid." *Id.* at 152.

219. 260 U.S. at 418.

220. 276 U.S. 272 (1928). The case involved a Virginia statute which required the destruction of one landowner's cedar trees to prevent the infection of a neighboring apple orchard with a plant disease called cedar rust. The Court, relying on the *Hadacheck* case, stated, "Where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." *Id.* at 279-80.

221. 369 U.S. 590 (1962).

222. The purposes described in the Model Act, § III, are all matters in which the public has a strong and legitimate interest. *See* City of El Paso v. Simmons, 379 U.S. 497 (1964); Treigle v. Acme Homestead Ass'n, 297 U.S. 189 (1936); Nebbia v. New York, 291 U.S. 502, 525-30 (1934). The possibility that a statute would incidentally benefit some individual landowners while others are burdened will not cause it to fail, in view of the predominantly public character of its purpose. Pennsylvania Coal Co. v. Mahon, 260 U.S.. 393, 417-18 (1922) (Brandeis, J., dissenting). Furthermore, "a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what mea-

and mineral owners,[223] removing uncertainty in the law, reducing litigation, facilitating planning, stabilizing economic relationships, and encouraging the most efficient use of land.[224] All of these concerns are legitimate objects for legislative action. Furthermore, the requirement of an explicit agreement (or some lesser requirement, such as compensation) has a "real and substantial relation to the object sought to be attained,"[225] and seems reasonably adapted to the accomplishment of these purposes, without being arbitrary or oppressive.[226]

The reasonableness of the consent requirement may be tested in part by the gravity of the harm it seeks to avoid. Even if it fails to accomplish all of its objectives,[227] or frustrates the reasonable expectations of some well-meaning mineral owners,[228] it can hardly be thought of as arbitrary or oppressive. Indeed, large mineral purchasers have for many years voluntarily employed practices pursuant to which they would be in substantial compliance with the terms of the Model Act and many of the state statutes. More important, as we have seen, the courts which have squarely faced this problem have been increasingly reluctant to give the mineral owner *carte blanche,* in the absence of a clear understanding, to use the surface.

V. CONCLUSION

The Model Act is intended to promote stability, predictability, and fairness in the relations between surface and mineral owners.

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sures are necessary for the protection of such intereste." Lawton v. Steele, 152 U.S. 133, 136 (1894). *See* Berman v. Parker, 348 U.S. 26 (1954); Bacon v. Walker, 204 U.S. 311 (1907); Chicago B. & Q. Ry. v. Drainage Comm'rs, 200 U.S. 561, 592 (1906).

223. The prevention of fraud, deceit, cheating, and imposition has long been regarded as a legitimate concern of the legislature. Powell v. Pennsylvania, 127 U.S. 678 (1888); Kuhl Motor Co. v. Ford Motor Co., 270 Wis. 488, 71 N.W.2d 420 (1955). The regulation of a particular business may be justified because its very nature encourages fraud by those engaged in it. State v. Memorial Gardens Dev. Corp., 143 W. Va. 182, 191, 101 S.E.2d 425, 430 (1957). If surface mining does not exactly fit that description, certainly confusion about the law and inequality in bargaining power have encouraged some to take unfair advantage.

224. *See* text accompanying notes 77-85 *supra.*

225. Nebbia v. New York, 291 U.S. 502, 525 (1934). The problems addressed by these statutes are directly attributable to the failure of surface and mineral owners to clearly and completely state their intentions concerning the use of the surface.

226. Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 197 (1935). *See also* Indiana v. Brand, 303 U.S. 95 (1938); Lawton v. Steele, 152 U.S. 133, 137 (1894). *See* notes 189-92 *supra* and accompanying text.

227. Mathematical precision is not possible, but neither is it required. Jefferson v. Hackney, 406 U.S. 535 (1972).

228. The benefits to the public generally from resolution of uncertainty in the law make any such burden justifiable. East New York Savings Bank v. Hahn, 326 U.S. 230, 235 (1945); Barbier v. Connolly, 113 U.S. 27 (1885).

It is no panacea, however. Neither the Model Act nor any of the enacted statutes will totally eliminate uncertainty or avoid fraud and overreaching. Yet the Model Act represents a significant advance. Its enactment would almost surely result in improved understanding, greater satisfaction of justifiable expectations, and a fuller and more efficient use of all of our natural resources.