Montana's Statutory Protection of Surface Owners from Strip Mining and Resultant Problems of Mineral Deed Construction

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I. INTRODUCTION

With the advent of the energy crisis in this country, increased attention has been given to the development of our great coal reserves. Although substantial deposits of coal were found in the east and midwest, the bulk of the undeveloped coal reserves of the United States lie in the western states. In many of these states the coal lies so near the surface that strip mining is the most economical, and often the only practical method of extracting it.

Montana is one of those western states with large coal deposits, many of which are recoverable by strip mining. But strip-mining poses difficult problems in those states where it is employed. Because it disrupts normal surface activities by causing the temporary dislocation, and sometimes, permanent destruction of the surface, strip mining has engendered bitter disputes between mineral and surface owners in those instances where the minerals have been severed from the remainder of the fee. Difficult questions have arisen from these disputes: Must the surface owner surrender, or allow injury to, his surface estate in order to permit the mineral owner to strip mine his minerals? Or is the mineral owner to be denied the right to strip mine (which may be the only possible or


2. A survey by the Montana Bureau of Mines and Geology (uncompleted as of 1974) estimated 42 billion tons of coal in the 62 Montana deposits surveyed, excluding 6 billion tons located on two Indian reservations. COAL DEPOSITS IN MONTANA, Montana Department of Intergovernmental Relations, March 14, 1974, p. 3. Of these, 30 billion tons are estimated to be recoverable by strip mining. Strippable coal is defined as a seam, having a maximum thickness of 6 feet and overlain by 150 feet or less of overburden. COAL DEVELOPMENT IN EASTERN MONTANA, supra note 1 at 8.

3. “Surface” is used here in the sense of the topsoil, other minerals and vegetation which exist naturally and overlay the coal deposit.

4. Such severance may be effected by a mineral reservation in a conveyance of the fee, by a surface deed, by a mineral deed from a non-public owner, or by a patent from the federal, state or local government. 3 AM. LAW OF MINING § 15.13, at 144.
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[54x596]economical method to recover the minerals) in order to protect the surface owner? Or is there a middle ground?

These questions assume added importance in Montana as the quantity of coal strip mined, and the area of land disturbed, increases. While the common law viewed mineral development to be for the common good and accorded the mineral estate dominance over the surface, the recent trend has been toward greater protection of the surface estate. This shift appears to be the result of heightened public concern about the environment, and also as a result of the image of mineral developers, usually large coal or oil companies, as greedy exploiters unconcerned about the effect of their operations on the surrounding land and on the people who live there. Montana recently joined this trend by enacting statutes which give surface owners greater protection against destruction of their land by strip mining operations.

This comment will discuss the new statutes and analyze their potential impact in Montana. Possible constitutional defects of the statutes and potential avenues of avoidance of the constitutional questions will also be explored. In this connection, a discussion of

5. The following tables indicate the projected increases in coal production and the resultant disturbance of land surface. They were taken from the MONTANA ENERGY POLICY STUDY, Environmental Quality Council Final Report (Revised Edition), June 1, 1975, pp. 119-120.

Montana Coal Production Projections (Mil Tons/Yr)

<table>
<thead>
<tr>
<th>Year</th>
<th>NGPRP Intermediate</th>
<th>MEAC</th>
<th>Proj. Indep. (Accelerated)</th>
<th>NGPRP (Extensive)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>20</td>
<td>20.8</td>
<td>-------</td>
<td>20</td>
</tr>
<tr>
<td>1980</td>
<td>41</td>
<td>50.8</td>
<td>57</td>
<td>64</td>
</tr>
<tr>
<td>1985</td>
<td>75</td>
<td>------</td>
<td>96.3</td>
<td>153</td>
</tr>
<tr>
<td>2000</td>
<td>133</td>
<td>------</td>
<td>-------</td>
<td>393</td>
</tr>
</tbody>
</table>


Coal Production and Land Disturbed by Strip Mining

<table>
<thead>
<tr>
<th>68-73</th>
<th>74</th>
<th>75</th>
<th>76</th>
<th>77</th>
<th>78</th>
<th>79</th>
<th>80</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tons/Yr</td>
<td>---</td>
<td>14.4</td>
<td>20.8</td>
<td>28.6</td>
<td>42.3</td>
<td>49.8</td>
<td>52.2</td>
</tr>
<tr>
<td>Acres/Yr</td>
<td>---</td>
<td>288</td>
<td>416</td>
<td>522</td>
<td>846</td>
<td>996</td>
<td>1044</td>
</tr>
<tr>
<td>Cum (acres)</td>
<td>690</td>
<td>978</td>
<td>1394</td>
<td>1966</td>
<td>2812</td>
<td>3808</td>
<td>4852</td>
</tr>
<tr>
<td>Cum (mil)</td>
<td>1.1</td>
<td>1.5</td>
<td>2.2</td>
<td>3.1</td>
<td>4.4</td>
<td>6.0</td>
<td>7.6</td>
</tr>
</tbody>
</table>

6. James Haughey echoed this view in his paper, Severance of the Minerals and the Severity of the Attendant Problems, appearing in WESTERN COAL DEVELOPMENT, Institute of the Rocky Mountain Mineral Law Foundation (March 1, 1973), at 4-1, where he stated: "A new land ethic is developing which exhibits an increased concern for the rights of the surface owner and a growing animosity toward the mineral developer—now often viewed as an exploiter, a despoiler of nature, greedy for profit."
construction problems of severance instruments will be presented, with particular reference to whether such instruments grant the right to strip mine coal to the mineral owner. It is hoped that this discussion will present guidelines for the resolution of similar problems of construction in Montana, should they arise.

II. THE TRADITIONAL RELATION OF THE SURFACE AND MINERAL ESTATES

The common law of mining traditionally regarded the mineral estate as dominant and the surface estate as servient in those instances where the severance instrument or lease of the minerals did not expressly establish the right of the respective estates. The dominance of the mineral estate was reflected in the general rule that absent an express provision in the instrument of severance to the contrary, the mineral owner or lessee had the right to enter upon and use the surface for exploration, recovery, and development of the minerals, as was reasonably necessary. This followed from the presumption that the grantor intended to convey, and the grantee intended to receive, the full benefit of the mineral estate, and "therefore the grantor not only conveyed the thing specifically described, but all other rights and privileges necessary to the enjoyment of the thing granted." The basic test of the extent of the mineral owner's right to use the surface was, thus, what was reasonably necessary to recover the minerals, which involved consideration of the custom or usage of the business or industry and of the standards of the prudent operator. Any use of the surface by the mineral owner or lessee which was unreasonable or unnecessary entitled the surface owner to damages for any resultant injury. The mineral owner or lessee was (of course) also liable in damages for any negligent use of the surface.

The rights of the surface owner could generally be labeled as those of "peaceful coexistence" — he had the right "to use the surface for all other purposes not inconsistent with or interfering

8. 1 WILLIAMS & MEYERS, OIL AND GAS LAW § 218, at 186.30; Healy, supra note 7 at 92.
9. Healy, supra note 7 at 92. This presumption is recited in REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947] § 49-114: "One who grants a thing is presumed to grant also whatever is essential to its use."
10. Healy, supra note 7 at 92.
11. Thompson, supra note 1 at 102.
12. Id.
13. This was the term used in Moses, Peaceful Coexistence Between Lessor and Leesee Under an Oil and Gas Lease, 38 Tul. L. Rev. 341 (1964).
with the mineral owner's use." Thus, the surface owner could not refuse the mineral owner or lessee reasonable access and use of the surface without being liable for damages. In those instances where use of the entire surface area was necessary to the recovery of the minerals, the surface owner was left with no rights under the theory of mineral dominance.

Many states also accorded the surface owner the right of subjacent support — "the right of the surface estate to the support which it would require in its natural condition from the underlying estate." In such states, although the mineral owner may have had the right to use so much of the surface as was reasonably necessary to extract his minerals, he was also subject to the concomitant obligation to preserve sufficient subjacent support to maintain the surface in its natural condition. Any subsidence of the surface due to mining operation was compensable in damages to the surface owner.

It should be noted that although these mining principles, with the exception of the doctrine of subjacent support, were generally formulated in the field of oil and gas, they have nevertheless been applied to coal mining law where not theoretically inconsistent.

III. MONTANA'S NEW STATUTORY PROTECTION OF SURFACE OWNERS

Montana recently joined a growing number of states in enacting legislation to protect, and perhaps enhance, the rights of surface owners against mineral owners who seek to recover the minerals by strip mining.

A. Eminent Domain

One of the areas of change is eminent domain. Before amendment in 1973, § 93-9902 of the Revised Codes of Montana provided that the power of eminent domain could be exercised for public uses, one of which was defined to be the mining of minerals located beneath or upon the surface of property where title to the surface was held by another. This allowed owners of mineral rights to employ the state police power to condemn the surface of land owned by one who refused to consent to strip mining.

The 1973 amendment to § 93-9902 added the provision that:

14. Healy, supra note 1 at 92.
16. 3 AM. LAW OF MINING § 15.20, at 179.
The use of the surface for strip mining or open pit mining of coal (i.e., any mining method or process in which the strata or overburden is removed or displaced in order to extract the coal) is not a public use and eminent domain may not be exercised for this purpose.\(^9\)

The proviso eliminates the availability of eminent domain to the mineral owner who seeks to condemn a separately-owned surface estate for purposes of strip mining coal.\(^{20}\) The public policy considerations behind the proviso set forth in § 93-9902.1,\(^{21}\) evidence the growing concern and regard for the surface owner in the rush to develop Montana’s coal resources.

### B. Surface Protection in the Development of Coal

A statute enacted by the 1975 Montana legislature extends substantial, and unique, protection to the surface owner. R.C.M. § 50-1039.1 provides:

> 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

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20. It should be noted, however, that the power of eminent domain is eliminated only as to the strip mining of coal, and not other minerals. This is evident not only from the express provisions of § 93-9902, but also from §§ 50-813 and 50-816, relating to the use of eminent domain for open pit mining.

21. R.C.M. 1947, § 93-9902.1, which reads:

> Policy on surface mining or open pit mining of coal. For the following reasons the state’s power of eminent domain may not be exercised to mine and extract coal owned by the plaintiff located beneath the surface of property where the title to the surface is vested in others:

1. Because of the large reserves of and the renewed interest in coal in eastern Montana, coal development is potentially more destructive to land and watercourses and underground aquifers and potentially more extensive geographically than the foreseeable development of other ores, metals, or minerals, and affecting large areas of land and large numbers of people;

2. That in many areas of Montana set forth in (a) hereinabove, the title to the surface is vested in an owner other than the mineral owner, and that the surface owner is putting that surface to a productive use, and it is the public policy of the state to encourage and foster such productive use by such owner, and that to permit the mineral owner to condemn the surface owner is to deprive the surface owner of the right to use his property in a productive manner as he determines, and is also contrary to public policy as set forth in paragraph four (4) herein below;

3. The magnitude of the potential coal development in eastern Montana will subject landowners to undue harassment by excessive use of eminent domain;

4. That it is the public policy of the state to encourage and foster diversity of land ownership and that the surface mining of coal and control of large areas of land by the surface coal mining industry would not foster public policy and further the public interest.
land, except that nothing in this section applies when the mineral estate is owned by the federal government in fee or in trust for an Indian tribe.\textsuperscript{22}

Thus, before a strip mining permit\textsuperscript{23} can be obtained, the mineral developer must secure the authorization of the surface owner. The “written consent” required by the statute is defined as a written statement upon a form approved by the Department of Lands “demonstrating that such owner consents to entry of an operator for the purpose of conducting strip mining operations and that such consent is given only to such strip mining and reclamation operations which fully comply with the terms and requirements of this chapter.”\textsuperscript{24} Waiver is defined to be “any document which demonstrates the clear intention to release rights in the surface estate for the purpose of permitting the extraction of subsurface minerals by strip mining methods.”\textsuperscript{25} The ramifications of this definition will be discussed later in connection with possible constitutional problems of § 50-1039.1.

The application of § 50-1039.1 is not, however, as broad as it appears to be. The section is narrowly limited in regard to the minerals to which it applies and the persons it is designed to protect. Since the word “mineral” is defined in the Act to mean coal or uranium, the section applies only to the strip mining of those two substances.\textsuperscript{26} Likewise, “surface owner” is narrowly defined for purposes of the Act as a person who holds legal or equitable title to the surface and:

\begin{itemize}
  \item whose principal place of residence is on the land; or
  \item who personally conducts farming or ranching operations upon a farm or ranch unit to be directly affected by strip mining operations; or
  \item who receives directly a significant portion of his income, if any, from such farming or ranching operation. . . .\textsuperscript{27}
\end{itemize}

Surface owner consent is also required under the provisions of the Landowner Notification Act.\textsuperscript{28} That Act applies to “all prospectors for minerals, miners, or other persons contemplating

\begin{itemize}
  \item R.C.M. 1947, § 50-1039.1. It should be noted that § 710 of S. 425, which was passed by the 93rd U.S. Congress, but vetoed by President Ford, employs language identical to that of the Montana statute. That bill has been reintroduced into the 94th Congress as H.R. 25.
  \item R.C.M. 1947, § 50-1039. Such a permit is required only by an ‘operator’, which is defined as a person engaged in strip or underground mining who removes or intends to remove more than ten thousand cubic yards of mineral or overburden.
  \item R.C.M. 1947, § 50-1036(23).
  \item R.C.M. 1947, § 50-1036(25).
  \item R.C.M. 1947, § 50-1036(1).
  \item R.C.M. 1947, § 50-1036(24)(a) and (b). The definition also includes the state of Montana where the state owns the surface. R.C.M. 1947, § 50-1036(7).
  \item R.C.M. 1947, Title 50, Chapter 13.
\end{itemize}
surface disturbance by mechanical equipment other than hand tools on lands within the state of Montana. . .”29 Section 50-1303 of the Act requires such persons, if they do not own the surface, to give written notice of the plan of work and operations to the surface owner and any owner of a possessory right in the land before the land may be disturbed in any manner.30 Additionally, specific written approval of the proposed work or operations must be obtained from the surface owner of private land before the commencement of work.31

The application of the Notification Act appears to be broader in scope than that of § 50-1039.1. Because there is no narrowing definition of ‘mineral’, the Act applies to all minerals and to all methods of recovering those minerals which involve surface disturbance by mechanical equipment,32 including prospecting operations. It also appears to apply to all lands within the state, whether owned by the local, state or federal government, or by private individuals. There are, however, some limits to its application. It does not apply to discovery pits on federal lands, “when excavated entirely by hand methods with hand tools.”33 Nor do its provisions apply where operations on the land “are performed in accordance with the terms of a prospecting permit34 or a lease covering any mineral interest in said land or other valid agreements authorizing such operations which are in full force and effect.”35 The “other valid agreements” language would appear to include a strip or underground mining permit, since consent of the surface owner, where the mineral has been severed from the fee, is required before such a permit may be issued.36

At this point, it must be noted that several of the exemptions from the Landowner Notification Act seem inconsistent with its avowed purpose. The comment to the title section of the Act states that it is:

An act requiring prospectors, miners, or other persons in this state to advise the owner of the land surface in advance of any operations which will disturb the surface of such land and obtain authorization to operate thereon.37

34. The prospecting permit is dealt with in § 50-1041.
In light of that purpose, why does the Act exempt a prospecting permit from its scope when such a permit does not in itself require notification of the surface owner? Furthermore, the § 50-1305 exemption of a mineral lease from the coverage of the Act appears unfounded in view of the fact that the owner of full mineral rights to a tract of land is not exempted from coverage. Why should a mineral owner be bound to give notice to the owner of the surface when, if he had leased his mineral interest, his lessee would not be required to do so? Such a result seems illogical.

C. Affect of Statutes on the Common Law

Sections 50-1039.1 and 50-1303 clearly abolish the common law theory of dominance accorded to the mineral estate, replacing it with statutory dominance of the surface estate in those situations involving strip mining. The mineral owner contemplating strip mining is no longer entitled to use as much of the surface as is reasonably necessary for that purpose, but may pursue such mining only to the extent that, and in the manner to which, the surface owner consents. And the mineral owner has lost the privilege of compelling that consent by means of eminent domain.

D. Practical Effects of Statutes

The most obvious practical effect of these statutes, which shift the balance of power from the mineral to the surface owner, will be to decrease the value of mineral estates and rights. In effect, the statutes give the private surface owner a veto power over the strip mining of minerals, whether they are owned privately or by the state. A coal company or other developer will probably not pay as great a price for coal rights in the future when it knows that for those rights to have any value, it will also have to negotiate with the surface owner to purchase the surface rights to strip the coal.

A concomitant effect to the decrease in value of the mineral estate may be the increase in value of those surface estates which were formerly subject to destruction by strip mining. However, there may be little real impact in this area since farmers and ranchers are not likely to immediately sell their land merely to cash in on the appreciated value.

A possible effect on the coal mining industry in Montana may be an increase in development costs for the recovery of the coal. Not only will the companies have to purchase the coal, but they must now also purchase the surface rights in those instances where the
coal is recoverable only by strip mining. However, this effect may be illusory since the coal companies might have been required to pay damages for surface destruction even if the law had not been amended, although there have been no Montana cases on this point. Therefore, any conclusion that development costs will be increased is mere speculation.

Another possible effect on the coal industry may be the frustration of large strip mine projects or decreased efficiency in their operation. In those instances where large strippable coal deposits underlie surface estates of numerous owners, the coal companies may be unable to acquire all surface rights necessary to mine the entire deposit. Recognizing the fact that there are certain individuals, particularly Montana’s independent ranchers, who will refuse to sell at any price, the coal companies may be forced to mine around such recalcitrant surface owners with resulting inefficiency of recovery and possible increased costs. If a large number of surface owners refuse to sell, the project may be defeated entirely. As this discussion indicates, planning for development and prediction of development costs will be greatly complicated by these statutes. Thus, the coal developer would be well advised to give serious consideration to these new pitfalls before initiating a development project.

A final obvious effect is the beneficial result the statutes will have in protecting the integrity and natural beauty of the land surface in this state. Also, the landowner, in those cases to which the laws apply, will be protected in his beneficial use of the land he owns. He need no longer worry about being unwillingly displaced from the land he owns or about having his lifestyle altered or destroyed. These are certainly important considerations when weighing the overall merits of the statutes.

E. Constitutional Problems

Some question may arise regarding the constitutionality of § 50-1039.1 — specifically, whether the section results in a taking of property without due process of law in violation of the Fifth Amendment to the United States Constitution and of § 17 of Article II of the 1972 Montana Constitution. The question arises from the fact that the section prohibits strip mining of coal or uranium without the written consent, or waiver, by the surface owner. However, the term “waiver” is not specifically defined. The definition given by the Act is “any document which demonstrates the clear intention to release rights in the surface estate for the purpose of permitting
the extraction of subsurface minerals by strip mining methods." The question thus becomes whether the definition of "waiver" includes both express and implied grants in severance instruments of the right to strip mine coal or uranium. If it does not, § 50-1039.1 would be an unconstitutional taking of those rights without compensation or due process of law.

Judicial construction will be required to determine the precise meaning of the term "waiver". Although the language of the statutory definition requiring a "clear intention to release rights in the surface" could be strictly construed to include only express grants, a broader construction including implied grants will be required to avoid any constitutional infirmity. Thus, one may cautiously suggest and predict that the Montana supreme court, in light of the general judicial policy of construing a statute so as to render it constitutional, may hold that the definition of waiver includes both express and implied grants of strip mining rights in severance instruments.

Assuming that the court does so hold, the next question becomes how to determine whether strip mining rights are impliedly granted. Because of the broad meaning which must be given to the term "waiver" in order to assure the constitutionality of § 50-1039.1, the court must be careful to limit the instances where strip mining rights will be implied in a severance instrument, in order to avoid emasculating the provisions of that statute and thereby frustrating the clear intent of the legislature. If stripping rights are broadly implied in ambiguous severance instruments, the 'waiver' provision of the statute would cover nearly all instances of mineral severance and provide little real protection for surface owners.

IV. CONSTRUCTION OF SEVERANCE INSTRUMENTS

A. What Minerals Were Severed?

In construing a severance instrument, the court must first determine what minerals were severed. In the context of this comment, the specific question of concern is whether the severance included coal. Of course, there is no problem of construction when the instrument enumerates or specifically identifies those minerals to which it applies. Ambiguity and the resultant need for judicial construction arise in those cases where the instrument broadly refers to "minerals" or, particularly in the western States, to "oil, gas, and other minerals." The question is then: To what does the term "minerals" refer?

To illustrate the complexity of this interpretive problem, one need only look to the thoughts of the West Virginia supreme court in *Rock House Fork Land Co. v. Raleigh Brick and Tile Co.*:

It would seem that this word minerals has no definite and certain meaning which can be attributed to it in all cases. Its strict scientific definition would include all inorganic matter, but it cannot be said that in granting the minerals in a tract of land the term is used in any such broad comprehensive sense, for if such were the case a grant of the minerals would be a grant of the entire estate. ¹⁰

This question has arisen in, and has been decided by, the courts of several states. Only one case has dealt with the question in regard to coal, ⁴¹ while others have dealt with such minerals as gypsum, bauxite, limestone, sand and gravel, granite, clay, uranium, and iron ore. However, all of the cases serve to illustrate the approaches which various courts have taken to the question and the guidelines which they have employed in its resolution.

The basic principle upon which all of these cases are premised is that in construing the instrument effect must be given to the intention of the parties. However, the cases vary as to how that intention is to be found. One group of cases has employed the *ejusdem generis* rule, which provides that where general words follow an enumeration of words with a particular and specific meaning, the general words are to be construed as applying to things of the same general kind or class as those specifically mentioned. ⁴² The Oklahoma courts have been the leading proponents of the use of this interpretive tool. ⁴³

Other courts, however, have rejected the rule, and at least one has adhered solely to the scientific definition of minerals in resolving the issue. In *New Mexico and Arizona Land Co. v. Elleins*, ⁴⁴ a federal court applying New Mexico law faced the question of whether a reservation in a deed of “all oil, gas and minerals” in-

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⁴¹. [*That case is Besing v. Ohio Valley Coal Co., Inc., of Ky.*, 293 N.E.2d 510 (Ind. 1973), in which the issue was whether a mineral deed granting an undivided one-half interest in all “oil, gas and other minerals” under a tract of land in Indiana included coal. The court, after admitting parol evidence of the circumstances surrounding the instrument at the time of its execution, concluded that the parties had no intent to include coal and that the term ‘minerals’ included “only such other minerals as are produced as a component or constituent of oil and gas from a drilled oil or gas well.” 293 N.E.2d 510, 513.]
⁴². *BLACK'S LAW DICTIONARY.*
cluded uranium. In holding that it did, the court found that uranium and thorium were minerals within the scientific, geological, and practical meaning of the term, and that extrinsic evidence was not admissible to show the circumstances of the execution of the deeds or of the intention of the parties.

In those cases where extrinsic evidence of the intention of the parties has been admitted, an important factor has been what type of mining was contemplated by the deed or reservation. In this context, cases from Arkansas, Illinois, and Louisiana have reached similar conclusions on roughly equivalent facts. In *Carson v. Missouri Pacific Railroad Co.*, the Arkansas supreme court faced the issue of whether a reservation in a deed of “all coal and mineral deposits” included bauxite, which was generally mined by open pit. The court noted that if such a construction was given to the reservation, the mineral owner could have entered the land to strip mine the bauxite the very day after the sale of the surface to Carson and thereby have destroyed the value of the land for farming or other purposes. The court found that such a construction would be extremely unreasonable, and therefore held that bauxite was not in the contemplation of the parties at the time of the contract and thus was not included in the reservation of “minerals.” The Louisiana supreme court in *Holloway Gravel Co., Inc. v. McKowen* reached a similar result in regard to sand and gravel. The case of *Kinder v. LaSalle County Carbon Coal Co.* involved a mineral deed granting the coal under a tract of land, together with a quitclaim of “the oil and minerals, of every description” underlying the land, and raised the question of whether the “minerals” included limestone lying near the surface and recoverable only by strip mining. The Illinois supreme court held that the quitclaim clause of the deed could not “reasonably be construed to embrace minerals other than such as could be removed by mining operations underground, which would not destroy the surface for agricultural purposes.” The decision was based on the court’s conclusion that:

In our minds it would be unreasonable to say his [the grantor’s] intention was to reserve only the agricultural surface above the

45. *Id.* at 771.
46. *Id.* at 773.
47. *Carson v. Mo. Pac. R. Co.*, 212 Ark. 963, 209 S.W.2d 97 (1948); *Kinder v. LaSalle County Carbon Coal Co.*, 310 Ill. 126, 141 N.E. 537 (1923); *Holloway Gravel Co., Inc. v. McKowen*, *supra* note 43.
49. *Id.* at 99.
51. *Kinder v. LaSalle County Carbon Coal Co.*, *supra* note 47 at 538.
52. *Id.* at 540.
limestone and convey to the grantee the limestone, with the right to remove it, and thereby destroy all he had reserved.\textsuperscript{53}

Perhaps the most instructive, as well as the most recent case in this area is the Texas case of \textit{Acker v. Guinn}.\textsuperscript{54} A declaratory judgment action, the case centered on a 1941 deal purporting to convey "an undivided one-half interest in and to all of the oil, gas and other minerals" in and under a tract of land in Cherokee County.\textsuperscript{55} At issue was whether the mineral deed also conveyed iron ore underlying the tract which could be mined only by the open pit or strip mining method.\textsuperscript{56} In considering the question, the Texas supreme court cited with approval an approach suggested by Professor Kuntz:

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. The manner of enjoyment of the mineral estate is through the extraction of valuable substances, and the enjoyment of the surface is through retention of such substances as are necessary for the use of the surface, and these respective modes of enjoyment must be considered in arriving at the proper subject matter for each estate.\textsuperscript{57}

Working from this perspective, the court held that the mineral deed did not include iron ore recoverable only by strip mining, stating:

The parties to a mineral lease or deed usually think of the mineral estate as including valuable substances that are removed from the ground by means of wells or mine shafts. This estate is dominant, of course, and its owner is entitled to make reasonable use of the surface for the production of his minerals. It is not ordinarily contemplated, however, that the utility of the surface for agricultural or grazing purposes will be destroyed or substantially impaired. Unless the contrary intention is affirmatively and fairly expressed, therefore, 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.\textsuperscript{58}

Thus, it appears that in Texas the determination of what substances

\textsuperscript{53} Id.
\textsuperscript{54} Acker v. Guinn, 464 S.W.2d 348 (Tex. Sup. Ct. 1971).
\textsuperscript{55} Id. at 349.
\textsuperscript{56} Id. at 351.
\textsuperscript{57} Id. at 352, citing Kuntz, \textit{The Law Relating to Oil and Gas in Wyoming}, 3 Wyo. L. J. 107, 112 (1949).
\textsuperscript{58} Id. at 352.
are encompassed by the term "mineral" hinges upon the single factor of whether that substance is recoverable by strip mining. If it is so recoverable, it will not be included in a deed or reservation of the "minerals" unless there is a clearly expressed intention to include it, which presumably requires specification.

Even if extrinsic evidence is held inadmissible, the method of mining appearing in the deed or reservation may be determinative of what minerals were intended to be included. For example, in *Armstrong v. Lake Champlain Granite Co.*, which involved the determination of whether "all the mineral and ore" included granite, a New York court found that "the words 'minerals and ores', in the grant of 1871, standing alone, would include the granite upon the premises." However, the court also noted that those words did not stand alone, but had to be read in conjunction with the mining rights granted by the instrument, which included "sufficient land to erect suitable buildings for machinery and other buildings necessary and usual in mining and raising ores." Reading the two provisions together, the court concluded:

We think the reasonable construction of the grant limits the rights of the grantee to minerals obtained by underground working, and as granite is not so obtained, it did not pass under the conveyance of 1871.

A similar result was reached by the same approach in *Rock House Fork Land Co. v. Raleigh Brick and Tile Co.*

Thus, the usual methods which courts employ to determine what substances are includable in a severance of the "minerals" are: (1) the *ejusdem generis* rule of construction, (2) a strict definition of the term "minerals", and (3) a consideration of the type of mining rights which were granted or which would be necessary to recover the substance sought to be included or excluded. Some courts have even applied the rule of construing an instrument most harshly against the one who prepared it. These principles and guidelines, however, are not answers in themselves but are merely aids in determining the intention of the parties lying behind an ambiguous instrument of severance.

61. *Id.*
62. *Id.*
B. Is Strip Mining Permissible?

Assuming that coal is included in the severance, the issue then becomes one of whether the coal may be strip mined. The severance instrument may expressly grant such rights, but where it does not the courts again must look to the instrument and perhaps to the circumstances surrounding its execution to determine if the parties intended such rights to pass. In attempting to discover the intent of the parties various rules of construction and interpretation are used, some of which will be discussed in an effort to suggest guidelines for the construction of ambiguous severance instruments in Montana.

1. Subjacent Support

An important element in the process of construction in those states which recognize it is the doctrine of subjacent support, which “relates to the right of the surface estate to the support which it would require in its natural condition from the underlying estate.” Unless there has been a waiver, the surface estate is entitled to subjacent support and “cannot be destroyed by stripping, quarrying or open pit mining.” Although never used as the sole basis for the refusal of a court to find a right to strip mine, the subjacent support doctrine does serve as a foreceful rationale for such a holding.

Perhaps the strongest argument based on this doctrine was made in West Virginia-Pittsburgh Coal Company v. Strong, involving a suit to declare the rights of the surface and mineral owners under a grant of all the coal under a tract of land in West Virginia. The court, in holding that the grant did not include the right to strip mine the coal, said:

Certainly if the owner of the surface has a proprietary right to subjacent support, he has at least an equal right to hold intact the thing to be supported, i.e., the surface, in the absence of a clearly expressed intention to the contrary.

The subjacent support doctrine has also been relied upon in cases in Colorado, Ohio, and Pennsylvania, where it is recognized as a

65. Twitty, supra note 15 at 497; accord, 3 AM. LAW OF MINING § 15.20, at 179.
67. Id. at 498.
69. Id. at 50.
third estate in land.\(^{72}\)

Although there is no Montana supreme court case on this issue, a Ninth Circuit case, arising in Montana, has upheld a surface owner's right to subjacent support. That case, *Catron v. South Butte Mining Company*, concerned the validity of a district court decree granting the surface owner the right of subjacent support and requiring the owner of the minerals to conduct its mining operations so as not to injure the surface.\(^{73}\) In upholding the lower court decree, the Ninth Circuit Court stated: "We are not convinced that the trial court erred in holding that the grantors therein were not absolved from the obligation to support the surface."\(^{74}\)

It should be noted that there are some authorities, and at least one court, that feel that the subjacent support doctrine, which arose in the context of underground mining, is inapplicable to situations involving strip mining. That view is based on the premise that it is meaningless to talk in terms of supporting the supereincumbent soil when strip mining by definition requires its removal. As one commentator noted:

[T]he idea of subjacent support presupposes that there are to remain in existence strata overlying the coal which can be supported either by leaving pillars of coal or artificial substitutes for them. Why talk of *supporting* overlying strata which will be nonexistent if they are removed by stripping operations?\(^{75}\)

And as the Supreme Court of Ohio added in *Skivolocki v. East Ohio Gas Company*, commenting on the subjacent support doctrine:

Time-honored rules of law, meant to insure the mutual enjoyment of severed mineral and surface estate, 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.\(^{76}\)

Thus, while some courts have relied on the doctrine in determining the issue of strip mining rights, its relevance to the issue may be doubtful.

2. The 'Use' Clause

"The use clause is a phrase within the reservation specifying

\(^{72}\) See, Commonwealth v. Fisher, 364 Pa. 42, 72 A.2d 568, 571 (1950). However, in both these cases, although the Supreme Court of Pennsylvania recognized the doctrine of subjacent support, it held that strip mining was permissible.

\(^{73}\) *Catron v. South Butte Mining Co.*, 181 F. 941, 943 (9th Cir. 1910).

\(^{74}\) Id. at 944.


\(^{76}\) *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374, 377 (1974).
the rights of the mineral owner as to his use of the surface for removal of his minerals." It generally provides for the right of a mineral owner to use as much of the surface as is reasonably necessary to recover his minerals. While courts have generally construed use clauses broadly where underground or shaft mining was concerned and where oil and gas were the subjects of the grant or reservation, they have also generally held the use clause to be incompatible with strip mining on the ground that the right to use does not include the right to destroy.

The leading case for the proposition that the right to use the surface does not include the right to destroy is Barker v. Mintz, in which a deed to a tract of land in Colorado reserved to the grantor all oil, coal and other minerals therein with the right to use as much of the land "as may be convenient or necessary" to remove the minerals. Barker, who ultimately obtained the mineral rights and sought to strip mine the coal, argued that strip mining was the only practicable way to mine the coal and that the word "use" in the reservation of the minerals encompassed stripping. The Colorado supreme court, however, rejected that interpretation, stating that "use" could not mean destroy and holding that therefore there was no right to strip mine. Similar holdings were reached in the cases of West Virginia-Pittsburgh Coal Company v. Strong and Skivolocki v. East Ohio Gas Company. The court in Skivolocki went even farther than the court in Barker, stating in a footnote:

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 estates.

Where language in the use clause is peculiarly applicable to underground mining, it is usually held to preclude strip mining. For

78. An example of a use clause may be found in the case of Barker v. Mintz, supra note 70 at 534, which involved a deed of a tract of land in Colorado, reserving to the grantor all the "oil, coal and other minerals" together with:
   The right of ingress, agress and regress upon said land to prospect for, mine and remove any and all such oil, coal or other minerals; and the right to use so much of said land as may be convenient or necessary for the right of way to and from such prospect places or mines and for the convenient and proper operation of such . . .
mines. . .
79. Id.
80. Id. at 535.
81. Id.
82. Strong, supra note 68 at 50.
83. Skivolocki, supra note 76 at 378.
84. Id. at 377, n. 1.
example, in *Rochez Brothers Inc. v. Duricka*, a reservation of coal contained “all the mining rights and privileges necessary or convenient to such mining and removal, draining and ventilating of the same. . .”85 The Pennsylvania supreme court found that “ventilating is a feature of *underground* or *shaft mining*” and that the parties had no intention of granting strip mining rights.86 In *Skivolocki v. East Ohio Gas Company*, a deed conveying coal and the right “to construct and maintain all necessary air shafts” was held to be limited to underground mining because the deed was “couched in language peculiarly applicable to deep mining.”87

3. *Reasonable versus Unreasonable Interpretation*

Since ambiguous deeds are by nature capable of more than one interpretation, that interpretation which is more reasonable in light of the circumstances of the parties at the time of contracting is to be preferred over other interpretations which are unfair or unreasonable, as more closely approximating the actual intent of the parties. While the actual intent of the parties can rarely, if ever, be exactly determined, the rule of reasonable construction insures a close approximation of that intent in most cases. Perhaps the Supreme Court of Pennsylvania best stated this proposition:

Where the language of a contract is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred.88

Such construction becomes important in two contexts: (1) where allowing strip mining would render the surface grant a nullity, and (2) where to preclude strip mining, which is the only method of recovering the minerals, would render the mineral grant a nullity. The essential issue thus becomes a balancing of the rights and interests of the parties to reach a reasonable result, which it is presumed the parties intended.

In the first case, the goal is to preserve the interest of the surface owner in maintaining the land intact by denying strip mining rights if the coal or other mineral can be mined by other means.

86. *Id.* at 826.
87. *Skivolocki*, *supra* note 76 at 378.
Thus, in *Franklin v. Callicoat* the Ohio supreme court denied strip mining rights to the mineral owner, stating:

Certainly, it would be inequitable and unjust for a court to hold that the owner of the surface received by his warranty deed only a right to reside upon the premises until such time as the plaintiff [mineral owner] desired to come in with the necessary equipment, and remove the buildings, fences, [and] tear up the entire surface of the farm. 89

Rather, the mineral owner was limited to mining methods which would not interfere with the agricultural uses of the land. 90

Similarly, in *Benton v. United States Manganese Corporation*, the Supreme Court of Arkansas upheld the mineral owner’s right to strip mine, but only upon payment of damages to the surface owner for injury to his estate. 91 To deny any right of the surface owner to damages for the complete destruction of the surface, the court said, would have rendered the conveyance of the surface “a mere nullity.” 92

In the second context mentioned above, the situation is reversed, and the mineral owner’s estate will be worthless if the right to strip mine is not implied as to those minerals recoverable only by that method. Such a situation usually arises in the context of a grant of all the coal or other mineral obtainable only by strip mining, so that a denial of strip mining rights will render the language of the grant or reservation meaningless. Also, the land involved is generally unproductive or unimproved, having little value in comparison to the minerals underlying it. 93

Illustrative of this situation is *Buchanan v. Watson*, which involved a “broad form deed” granting all the coal underlying a tract of timbered land in Kentucky. 94

The only feasible and economical way to mine the coal was by the strip or auger method, although the deed did not expressly include or exclude these methods. 95 The court found that the principal purpose of the deed was to enable the grantee to remove the coal and that “to deny the right to remove it by the only feasible process [would be] to defeat the principal purpose of the deed.” 96 Thus, the

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89. *Franklin v. Callicoat*, supra note 71 at 694.
90. *Id.*
92. *Id.* at 842.
93. The relative value of the surface and mineral estates is an important factor which is discussed in the text, infra note 102-109.
95. *Id.* at 42.
96. *Id.* at 42-43. This was the argument made in a strong dissent to *West Virginia-Pittsburgh Coal Co. v. Strong*, supra note 68 at 54-56.

Published by The Scholarly Forum @ Montana Law, 1976
court held that since the mineral owner had the right to remove all the coal, "the particular method contemplated by the parties (in the absence of language prohibiting other methods) [did] not preclude him from utilizing the only feasible process of extracting the coal." 97

The courts of Pennsylvania have also employed this principle in several cases involving undeveloped mountain land in that state. In Commonwealth v. Fisher the mineral owner, under an 1855 deed granting him all the coal under a mountainous tract of land with the right to "dig, excavate or penetrate any part of the said premises", sought to strip mine the coal. 98 The court noted that the coal was recoverable in no other manner, and held that the mineral owner could strip mine even though that method had not been anticipated by the original parties to the deed. 99 The court went on to say that since the land was unimproved and mountainous, any damage to the surface would be temporary because of the mineral owner's duty to reclaim the land under the Pennsylvania reclamation law then in effect. 100 Of similar effect is Commonwealth v. Fitzmartin, which involved a reservation of all the coal underlying a mountain tract, which could be removed only by strip mining. 101 In construing the reservation as including the right to strip mine, the court concluded:

Unless, therefore, the words 'all the coal . . . in . . . the surface of the land . . .' refer to and reserve the right to strip mine the coal, they would be meaningless, because the coal on the surface cannot . . . be removed by deep mining. 102

4. Relative Value of Mineral and Surface Estates

As the preceding discussion indicates, courts are more likely to construe severance instruments to include strip mining rights where the surface is unimproved, undeveloped, and relatively worthless in comparison to the minerals beneath it, than where the land is rich farm land or has been developed or improved. 103 The Pennsylvania

97. Id.
99. Id.
100. Id.
102. Id. at 897. It should be noted, however, that in Rochez Bros. Inc. v. Duricka, supra note 85 at 827-828, the Pennsylvania supreme court refused to construe a right to strip mine in favor of an owner of minerals underlying rich farmland.
103. Twitty, supra note 15 at 505-506 thinks such a construction serves public policy: Certainly, it is more likely that the parties intended the surface could be stripped by mining where the severance deed granted a surface of mountainous country than where the severance deed granted a surface estate of rich agricultural land. . . . Other things being equal, it is proper for a court to favor a construction that best serves the public interest.

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decisions are prime examples of that tendency — the Fisher and Fitzmartin decisions granted strip mining rights where the surface was undeveloped, mountainous country, while in Rochez Brothers the court denied such rights where farm land was involved. The Kentucky court similarly allowed strip mining in Buchanan v. Watson where unimproved, timbered land was involved, saying that "the value of the land lay under the surface, not on it." Strip mining rights were also upheld in Martin v. Kentucky Oak Mining Company in which a large percentage of the land was hilly and of no productive value.

Perhaps the most illustrative case in this area is Barker v. Mintz, discussed previously. Although the Colorado supreme court refused to construe a mineral reservation to include strip mining rights, the court ultimately allowed the land to be strip mined, upon payment of damages to the surface owner, stating:

The land is wild, and its present value, except for the coal, is only for pasturage, a very little of it for cultivation. The stripping destroys these values, but the fair and equitable way is to so treat the matter that each party will get the greatest amount of good with the least amount of harm, and that is by allowing the defendant to take out his coal and pay the plaintiff for the damages he thereby does to her estate. He will then get the full value of his property and she will get the full value of hers.

Thus, the relative value of the surface and mineral estates is a key element in finding a right to strip mine or, if not, in allowing strip mining upon the payment of damages to the surface owner.

5. Circumstances at Time of Severance

Another key factor, upon which many cases have turned, is the consideration of circumstances existing at the time the severance instrument was executed, particularly the methods of mining employed in the surrounding area. Such evidence is admissible because "the intent sought to be reached by the court is that of the parties at the time the deed was executed." Of special importance is
whether strip mining was commonly used in the vicinity, so that the parties might have contemplated its use in the removal of the severed minerals. If strip mining was not in common use, it is extremely unlikely, in the absence of other factors, that a court would allow strip mining as being within the contemplation of the parties.

*West Virginia-Pittsburgh Coal Company v. Strong* emphasizes this general rule. In denying a right to strip mine, the court limited the mineral owner to the right to mine his coal "by the usual method at that time [1904] known and accepted as common practice in Brooke County." The court felt that this did not include strip mining and that:

To now contend that in 1904 the practice of strip mining was known in this state to the extent that it was necessarily within the implied contemplation of the parties to a private contract, we believe to be untenable.112

Conversely, where strip mining was in common use and was known to the parties at the time of execution, the court may imply a right to strip mine as having been within the contemplation of the parties. For example, the Maryland supreme court in the case of *Department of Forests and Parks v. George's Creek Coal and Land Company* held that the parties to a deed reserving the minerals to the grantor had no intention of excluding the right to strip mine because strip mining "was a widely known and well understood method of recovering coal" at the time of the deed.113

6. **Construction of Ambiguous Deed Against the Grantor**

A final factor, which is of limited importance, is the rule that an ambiguous deed should be construed most harshly against the grantor.114 Although widely recognized as a rule of construction, it

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R.C.M. 1947, § 13-702:

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.

R.C.M. 1947, § 13-713 also provides:

A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates.

111. Strong, supra note 68 at 49.
114. This rule is expressed in R.C.M. 1947, § 13-720:

In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. . . .

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is generally applied only as a last resort or in conjunction with other more determinative factors. Thus, the rule was cited in the Pennsylvania Wilkes-Barre case in conjunction with other factors, all leading to the conclusion that strip mining was not intended. The limits of the rule were expressed in Stewart v. Chernicky, where the Pennsylvania court rejected application of the rule in light of other factors of greater strength, stating that while the rule was a good aid for interpretation, it should not be so liberally applied as to make a contract the parties did not intend. Thus, while the rule serves as an interpretive aid in the absence of other aids, it should not be applied to the exclusion of other more determinative factors.

7. **Overview**

Rules of construction such as those discussed above serve as useful aids in the search for the intent of the parties to an ambiguous deed or mineral reservation. Although no single factor may *per se* be determinative of the proper construction, a combination of factors may provide insight into what the parties actually intended. Of the factors discussed, perhaps the most important are the circumstances existing at the time of execution of the instrument, and the balancing of the rights of the parties to reach a reasonable result.

The question of which combination of factors will lead to a particular result must largely be left to individual courts and judges, working within the framework of the legal precepts of their jurisdictions. However, at least one commentator has offered an opinion on the question, concluding:

> It is submitted that if there is a combination of the two factors: (1) that at the time of the severance deed stripping was a known and accepted practice in that vicinity; and (2) if the coal, whether granted or excepted, cannot be removed in any other manner — it should be held that stripping is authorized.

Such a conclusion seems both fair and logical when viewed in the context of the preceding discussion.

**Conclusion**

The recent enactment of statutes in Montana protecting surface owners from strip mining is an important step forward by this state in meeting the challenge of orderly development of its coal resources. While the statutes may pose some difficulties for mineral

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117. Donley, *supra* note 75 at 149-150.
developers, they provide important protection for landowners who might otherwise be caught up in the wholesale destruction of their land by strip mining.

However, some constitutional hurdles must be overcome before the future of § 50-1039.1, which requires surface owner consent prior to issuance of a strip mining permit, will be secure. Those persons or entities having the right to strip mine coal by virtue of an express or implied grant in a severance instrument may challenge the statute as an unconstitutional deprivation of property without due process of law. To avoid this challenge the Montana supreme court must be prepared to broadly construe the waiver provision of the statute to include such rights. Failure by the court to so construe the statute will result not only in its demise but also in the frustration of the legislative intent to protect Montana surface owners and provide for the orderly development of the state's coal.

While a broad construction of the waiver provision of § 50-1039.1 is necessary to prevent its unconstitutionality, the court must also be aware of the need to narrowly limit the implication of coal strip mining rights in severance instruments in order to avoid emasculation of that statute. That interpretation problem involves the dual question of (1) whether coal was granted and (2) whether strip mining rights were granted. From the discussion of authorities on the first point, one may conclude that coal should not be included in a grant or reservation of the "minerals" where the only feasible method of recovery is strip mining, "unless an intention to give the mineral owner the right to destroy the surface is clearly expressed or necessarily implied." 118 Regarding the second point, one may conclude that strip mining rights should not be implied from a severance instrument unless strip mining was a known and accepted method at the time of the severance and the minerals can be removed in no other manner. Thus, if the Montana supreme court reaches conclusions similar to those of the authorities discussed, grants of coal strip mining rights will be implied within narrow limits in future cases, thereby ensuring the vitality of § 50-1039.1.

118. Haughey, supra note 6 at 4-8.