Re-claiming Butte: The Doctrine of Subjacent Support

Bob J. McCarthy
University of Montana School of Law

Follow this and additional works at: https://scholarship.law.umt.edu/mlr

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.law.umt.edu/mlr/vol49/iss2/6

This Article is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.
RE-CLAIMING BUTTE: THE DOCTRINE OF SUBJACENT SUPPORT

Bob J. McCarthy*

Thousands of miles of mines honeycomb the granite rock beneath Butte, Montana. Butte's copper wired the nation; the Mining City's manganese hardened United States' armaments through two world wars. Copper mining took many lives, both deep within the earth and upon the surface. The mining of near-surface manganese ore deposits had its own special price: sunken ground and fractured housing, streets and sidewalks. This subsidence is the most widespread in Central Butte, the part of town located just south of the central business district above the workings of the Emma and Travona mines.5

* B.A., Carroll College, 1976; J.D., University of Montana School of Law, 1988. The author was the founding director of the Butte Community Union, 1982-86.

1. See generally C. MEYER, E. SHEA, C. GODDARD, JR., 2 Graton-Sales ORE DEPOSITS OF THE UNITED STATES, 1933-1967 at 1373 (1968). "The Richest Hill on Earth" has produced copper, manganese, silver, gold, lead, zinc and other ores. The rock in which all the veins occur is a dark basic granite, technically known as quartz-monzonite, which is part of a greater mass of granitic rock. Id. at 1375-76.


3. Butte manganese production during World War I freed the United States from dependence on foreign resources. See I. MARCOSSON, Anaconda 156 (1959). Fifty-nine percent of the total manganese ore produced in the United States in 1941 came from Butte, mostly from the Emma mine. U.S. BUREAU OF MINES, MINERALS YEARBOOK, 1941 at 1, 59 (1943). A widely published Northern Pacific Railroad advertisement in the mid-forties thus stated that capture or destruction of Butte by the enemy could have crippled the United States' war effort, for Butte's "miracle of manganese production . . . [was] a mainstay of America's armament industries." I. MARCOSSON, Anaconda 232.

4. By 1980, metal mining had the highest fatality of all industrial occupations, and the Butte mining district was the most deadly in the United States, reportedly ranking second in all the world only to South Africa. Shovers, The Perils of Working in the Butte Underground, MONTANA: THE MAGAZINE OF WESTERN HISTORY Spring, 1987, at 26-28 n.2 & 31 n.26. A recent study found Butte-Silver Bow lung cancer death rates to be nearly twice the national average, not just for miners, most of whom were male, but also for women. S. MEDVEC, MONTANA AIR POLLUTION STUDY I (June 1981).

The State valued each human life lost to cancer at $300,000. The Anaconda Company, however, disputed this valuation, proposing instead a "more reasonable value of $50,000." The Company argued that the State's figure was "too high for older workers who are not economically productive," and further, that "[s]ome of the people who will die from air pollution are unemployed and therefore . . . [of] no economic value." AIR QUALITY BUREAU, FINAL ENVIRONMENTAL IMPACT STATEMENT MONTANA AMBIENT AIR QUALITY STANDARDS 1, 43 (1980).

The Anaconda Company, which over the last century removed ore worth more than $20 billion from beneath Butte, has since closed, flooded, and sold the Butte mines. The shattering effects of the shutdown are most apparent in Central Butte, which is a microcosm of the worst effects of mining and now unemployment. Hostility toward the Anaconda Company still prevails in Central Butte, although other Montanans have shifted their resentment for current hardships from the Anaconda Company and Atlantic Richfield Corporation, its present owner, onto one of Butte’s newest “copper kings.” Residents of Central Butte re-

6. The Anaconda Company is the name used throughout this article, although at various times the company has changed its name—originally “Anaconda Gold & Silver Mining Company” to “Anaconda Mining Company” to “Anaconda Copper Mining Company” to “Amalgamated Copper Mining Company” (a holding company formed at the turn of the century), back to “Anaconda Copper Mining Company,” then to “The Anaconda Company,” and finally to “Anaconda Minerals” (now owned by Atlantic Richfield). The Anaconda Company became a subsidiary of Atlantic Richfield in 1977 after it was finally weakened by the Chilean expropriation of mines and the declining quality of Butte ore. BUTTE COMMUNITY UNION, PRESERVATION OF A NEIGHBORHOOD: A NEIGHBORHOOD PRESERVATION PLAN FOR THE CENTRAL BUTTE NEIGHBORHOOD, BUTTE, MONTANA 2 (1985) [hereinafter cited as PRESERVATION OF A NEIGHBORHOOD]; See also ANACONDA COPPER MINING COMPANY RECORDS (Montana Historical Society Archives) (discussion with archivist Ellie Arguimbau).

7. MONT. DEP’T OF COMMERCE, ECONOMIC CONDITIONS IN MONTANA, 1984 at 79 (1985) [hereinafter ECONOMIC CONDITIONS IN MONTANA].

8. See Last Butte Copper Mine is Closed by Low Prices, N.Y. Times, July 3, 1983, at 12, col. 1. The last of the underground mines and the Berkeley Pit, formerly one of the world’s largest open pit mines, have been abandoned by the Anaconda Company since 1983. After the company turned off its pumps, the mines began to fill with water. The Continental Pit in east Butte is the current source of copper and molybdenum for Montana Resources, Inc. The Alice Pit, just north of Butte and Walkerville, has not been mined for years but is part of the silver mining plans of the New Butte Mining Company. This company, owned by international investors, is currently working on the Lexington Tunnel, which will connect the Alice Pit with the Syndicate Pit in north Butte. Montana Standard, Feb. 25, 1988, at 2, col. 1.

The closed mines soon filled with water, despite an earlier warning issued in 1981 that “[i]f the Berkeley Pit is allowed to fill with water it could trigger earthquakes and cause underground tunnels under Butte to collapse.” Montana Dept. of State Lands, Final Environmental Impact Statement III-29 (Sept. 1981).

9. See Misery in the Minefields, NEWSWEEK, Dec. 6, 1982, at 115, col. 1. Unemployment in Central Butte was reported to be 29 percent in a 1985 survey. PRESERVATION OF A NEIGHBORHOOD, supra note 6, at 4. Butte mining employment has declined from a peak of 15,000 in 1942 (ECONOMIC CONDITIONS IN MONTANA, supra note 7, at 79) to a mere 300 jobs today (Montana Standard, Feb. 25, 1988, at 2, col. 1).

10. See Central Butte residents say company should foot bills, Montana Standard, Sept. 25, 1985, at 2, col. 1 (reporting the public comment on the Central Butte neighborhood plan).

11. After the owner of Montana Resources, Inc. purchased a segment of a popular running and biking trail in Seattle, The Seattle Times reported that Dennis Washington “is resented by many for what they see as his hard-heartedness in breaking unions”; he has threatened to close the mines if the unions return. In purchasing the mines from the Anaconda Company in 1985, Washington extracted state loans, local tax credits, and federal wage subsidies. Smith, Montana Mogul Raises Furor at Home, Too, Seattle Times, Feb. 15,
cently have taken some dramatic steps to restore their historic neighborhood which has been devastated by a century of mining. During 1985, the Butte Community Union (BCU), a low income citizens' organization based in Central Butte, produced a grassroots plan to guide these restoration efforts. Public officials responded to the persistent BCU demands for removal of toxic mine wastes and reinforcement of the protective bulkhead in a mine shaft over which children play, but state and local agencies have been skeptical of other aspects of the neighborhood's ten million dollar plan.

The ancient doctrine of "subjacent support," which generally holds the miner responsible for support of the surface, provides a

1988, at 1, col. 1.

12. "The BCU is an organization of people in Butte who lack economic and political power and who organize, educate and empower people to identify and satisfy their needs through altering power relationships to change an unfair system and give the poor a voice and assist all people who are able to seek and find suitable employment." Butte Community Union, Mission Statement (1988). Founded in 1982, BCU's concerns span utility rates, heat shutoffs, public assistance, housing, reclamation, health care, jobs and peace. BCU's sometimes confrontational tactics have included lobbying, demonstrations, self-help, and litigation. See, e.g., "Union" organizes for Butte, Montana Standard, Nov. 17, 1982, at 3, col. 1; Butte Community Union, 2 National Unemployed News, Oct. 1984, at 8, col. 1; Nun rallies low-income people to serve as their own Advocates, Great Falls Tribune, Aug. 5, 1985, at 7-A, col. 1; And justice for all, Montana Standard, Oct. 9, 1987, at 2, col. 1; see also Butte Community Union v. Lewis, Mont. 712 P.2d 1309 (1986) aff'd, Mont. 745 P.2d 1128 (1987) (holding certain legislative reductions in public assistance to be in violation of the Montana Constitution).

13. Butte's daily newspaper frequently reported BCU organizing activity in Central Butte. E.g., Tenant union forms for Silver Bow Homes, Montana Standard, Sept. 11, 1985, at 2, col. 1; Central Butte clean-up; kids face hazards by the dozen, Montana Standard, Sept. 4, 1985, at 2, col. 1; Central Butte project two-fold: Paint homes and create employment, Montana Standard, Aug. 9, 1985, at 3, col. 1; Housing Central to fix-up, Montana Standard, Sept. 21, 1985, at 2, col. 1.

14. Preservation of a Neighborhood, supra note 6, at 5-6. The planning process was directed by BCU, with technical assistance provided by Renewable Technologies, Inc.; additional assistance was provided by the Center for Community Change. The author of this article was the founding director of BCU, and helped to write the plan. Funding was provided by the Montana Historic Preservation Office, the Butte-Silver-Bow Urban Revitalization Agency, the Campaign for Human Development of the U.S. Catholic Conference, and the Abela Foundation. Id. (inside cover).

15. Id.; see also Emma Mine work propels Central Butte plan, Montana Standard, Sept. 20, 1985, at 2, col. 1 (estimating total costs of the plan's proposed projects at $9 million, here adjusted for inflation). This author was astounded to hear a local "community development" official once suggest the government should "bulldoze" the neighborhood. Comment by Tom Cash to BCU (Summer 1985). In 1984, the Montana Department of Commerce indicated that it would refuse to provide community development funds for Central Butte to rehabilitate housing because of the concern about continuing subsidence damages. Preservation of a Neighborhood, supra note 6, at 5, 11.

firm legal basis for the neighborhood's demand that the Anaconda Company pay to rebuild Central Butte. Moreover, United States courts increasingly have recognized the rights of surface owners. The United States Supreme Court dramatically illustrated its support for the rights of surface owners by upholding a Pennsylvania statute which made mining companies liable for subsidence damages regardless of liability waivers signed decades earlier by surface owners.

This article begins with an examination of the early relationship between the Anaconda Company and Butte, from early mining exploration to "the war of the copper kings." It then focuses more specifically on Central Butte, tracing the severance of mining rights from surface ownership, the development of near-surface manganese mines, and the resulting subsidence of the ground. The article then examines the evolution of the common-law doctrine of subjacent support, Montana case law and more recent federal case law. Lastly, after describing current efforts to document and remedy subsidence-related damages, the article discusses the statute of limitations and the legal obligations of the Anaconda Company.

I. CLAIMING THE RICHEST HILL ON EARTH

The California gold rush of 1848 spawned rapid developments in mining law. Initially, miners staked their claims according to state law derived from local customs, which had been transplanted from Wales and elsewhere by immigrant miners. In 1866, Congress formally sanctioned these local practices, declaring mineral lands of the public domain free and open to exploration and occupation and enjoyment of mining rights in lands of the public domain, §§ 818-23 (1914) [hereinafter cited as LINDLEY ON MINES].

17. See supra note 10.
21. The familiar phrase was popularized by C. GLASSCOCK, THE WAR OF THE COPPER KINGS; BUILDERS OF BUTTE AND WOLVES OF WALL STREET (1935).
23. See Hicks v. Bell, 3 Cal. 220, 27 (1853) (holding that the State has the sole right to regulate mining); see also Morton v. Salambo Copper Mining Co., 26 Cal. 528, 534 (1864) (holding that local mining customs control resolution of disputed mining rights).
occupation under local usage and custom. The Placer Act of 1870 made placer claims also subject to the 1866 Act and hence to local customs. The Mining Law of 1872, the main statutory provision governing hardrock mining today, consolidated and codified the 1866 and 1870 laws and provided miners with fee title to the land above the deposit. Montana codified these early mining laws in 1895.

Montana's promulgation of mining statutes followed the discovery of precious metals in Butte by thirty years. The discovery of gold in 1864 had precipitated a decade of feverish placer-mining. The discovery of silver in 1875 led to a renewed mining boom, with Butte becoming one of the nation's leading silver producers. By 1884, there were in Butte 300 operating mines, 4,000 posted mining claims, nine quartz mills and four smelters. Copper, found at deeper levels and requiring more expensive quartz mining techniques, became the dominant metal in the 1890s.

Of the thousands of miners who claimed Butte, three became dominant: William A. Clark, F. Augustus Heinze, and Marcus Daly. Colorful stories abound concerning their struggle for control of Butte's mineral wealth and of Montana's political power. Daly emerged victorious, casting his lot with Standard Oil to form the gigantic Amalgamated Copper Mining Company in 1899. Yet Heinze also prospered into the twentieth century, allegedly by stealing Anaconda's ore and bribing a district judge. Unable to stop Heinze in the courts, Anaconda resorted to political blackmail by shutting down all its operations to eliminate the jobs of a majority of Montana's workforce and thereby force a special legislative session. Governor Toole reluctantly called together the legislature, and it quickly approved a bill which would allow up to seven changes of venue when parties to a case alleged the prejudice

30. MALONE, supra note 20, at 32-33, 54.
31. Id. at 137.
32. See Finlen v. Heinze, 28 Mont. 548, 571-77, 73 P. 123, 128-30 (1903) (wherein the Montana Supreme Court recounted the sordid allegations of judicial misconduct and influence peddling). The court remanded the case to the same judge for retrial, subsequently upholding yet another ruling for Heinze. Finlen v. Heinze, 32 Mont. 354, 366, 80 P. 918, 919 (1905).
33. See MALONE, supra note 20, at 159-89; see also K. TOOLE, TWENTIETH CENTURY MONTANA, A STATE OF EXTREMES 99-122 (1972).
of a judge. This "fair trials" law eliminated Heinze's judicial advantage, and the Anaconda Company subsequently forced him to sell out. By 1910, Anaconda owned almost all of the Butte mines, and the consequent consolidation of political might ushered in an era of unprecedented repression.

II. THE UNDERMINING OF CENTRAL BUTTE

The dawn of the twentieth century saw ownership of the Butte mines increasingly severed from surface ownership. Individual landowners/miners commonly retained ownership of the ground that supported their homes, even as they sold their mineral rights to the few remaining mining companies. Deeds to mineral rights often expressly reserved the right to surface support. A typical deed read: "[p]rovided that in the exercise of such mining right the surface thereof shall not be disturbed or interfered with or in anywise damaged." Even those deeds that expressly waived the right to such surface support usually prohibited near-surface mining.

The mining under Central Butte began around 1880, which is when Silas F. King claimed both the mineral and surface rights to the "Emma Lode." By 1917, the Butte Copper and Zinc Com-

34. H. R. 2 and H. R. 3, Mont. Laws, 8th Leg., 2d Extraordinary Session (1903) amending MONT. CODE Civ. P. ch. IV, tit. IV, pt. II. Governor Toole proclaimed: "I have reason to believe that work will be forthwith resumed in all the suspended operations aforesaid if an extraordinary session of the legislature is called to consider such legislation." H. J., 8th Leg., 2d Extraordinary Session (1903) at 1. The bill was vigorously opposed by a small minority who charged it would allow the wealthy to tie up litigation so that "the rights of the poorer people of this state can never be litigated." Id. at 22. Governor Toole reluctantly signed the bill into law, noting that unlike an alternate proposal, it at least placed a limit (albeit an "unnecessarily large . . . extraordinary and experimental" one) on the number of judges who could be disqualified. Id. at 37. Unsuccessful resolutions included one to condemn the Anaconda Company's attempt "to absolutely dictate the legislation of the state" and another "to recommend the enactment of legislation . . . to divest the corporations of the power to inflict upon the state in the future a calamity" such as that caused by Anaconda's shutdown. Id. at 23.

35. MALONE, supra note 20, at 182, 186-87.

36. WORKS PROJECTS ADMINISTRATION, MINERAL RESOURCES SURVEY, DIRECTORY OF MONTANA MINING PROPERTIES 1, 102 (1940).

37. See generally A. GUTFELD, MONTANA'S AGONY YEARS OF WAR AND HYSTERIA, 1917-1921 (1979). In the following decade the Anaconda Company proceeded to smash "The Gibraltar of Unionism." Id. at 1, 10-11. Working conditions subsequently declined in the Butte mines, and this decline led to one of the nation's worst mining disasters. Id. at 14-16. Labor organizers in Butte fell victim to terrorists, and the United States Army occupied Butte under conditions of near-martial law for four years. Id. at 23-36, 79. These problems in Butte spawned what later became the National Sedition Act. Id. at 37-48.

38. See, e.g., Silver Bow County, DEED RECORD, Book 133, at 303, 305 (1917).

39. See Silver Bow County, DEED RECORD, Book 133, at 305 (1916).

40. See, e.g., Silver Bow County, DEED RECORD, Book 133, at 303 (1917).

41. See 1889 Mineral Survey No. 2585, Lot. No. 359, Helena Land District, Silver Bow
pany had acquired the mineral rights to the Emma Lode and most of its branches, which the Company then leased to the Anaconda Company with explicit protection of the surface support rights previously retained by surface owners. Yet the surface caved in as miners blasted and tunneled at ever-higher levels to meet a lucrative war-time demand for the Emma’s near-surface ore.

The subsidence associated with the Emma Mine differed from other subsidence in the Butte mining district because the Emma subsidence spread horizontally over the whole neighborhood. In contrast, the movement of surface ground was generally vertical, creating isolated depressions in the surface elsewhere in the Butte mining district. Damages caused by horizontal movement above the Emma Mine were much more extensive, ranging from broken gas, sewer and water lines, to “differential settlement” of structures.

Anaconda responded to claims for such damages by making payment and routinely negotiating a “release and easement” with central Butte surface owners. These “easements,” which waived all future rights regarding subjacent support, usually stated:

This settlement is made and this Release and Easement given as a result of a compromise between the parties of a claim heretofore asserted, and is not, and shall not be taken as, an admission of liability or responsibility on the part of the Butte Copper and Zinc Company and the Anaconda Copper Mining Company, or either of them, the compromise being entered into without admission of liability in order to settle the controversy.

III. THE DOCTRINE OF SUBJACENT SUPPORT

The English common law recognized deeds severing the min-

County Plat Book, Sec. 18, Township 3 N., Range 7 W (which documents the mining claim filed by Silas F. King).

42. See Operating Agreement of the Anaconda Company (July 6, 1917) (available in the Anaconda Copper Mining Company Records of the Montana Historical Society Archives). The Anaconda Company operated the Emma Mine under a lease for forty years, finally buying the mine outright in 1959, after permanently sealing it. Anaconda Firm Purchases Butte Copper & Zinc Co., Great Falls Tribune, Nov. 29, 1959, at 28, col. 6.

43. See ANACONDA COMPANY, ANNUAL REPORT 1, 7 (1917); ANACONDA COMPANY, ANNUAL REPORT 5 (1943) (available in the Anaconda Copper Mining Company Records of the Montana Historical Society Archives).

44. PRESERVATION OF A NEIGHBORHOOD, supra note 6, at 9. It is often difficult to pinpoint the cause of differential settlement, which in addition to subsidence may be caused by poorly built foundations, water-related problems or other factors. Many of the foundations in Central Butte are of particularly poor construction, consisting of wood, unreinforced masonry, or low grade concrete, often reaching barely below grade. Id. at 20.

45. Silver Bow County, Deed Record, Book 204, at 449 (September, 1947).
eral and surface estates, but held that the owner of the mineral estate had a duty to maintain the surface estate, a duty otherwise known as the doctrine of subjacent support. Absent such a deed or a reservation of mining rights by the sovereign, the mineral rights belonged to the owner of the surface estate. Those who colonized North America adhered to these legal principles. Thus, when the Continental Congress opened public lands to settlement under the Land Ordinance of 1785, the settlers acquired rights to both the mineral and surface estate, except for the one-third interest in all gold, silver, lead and copper reserved by Congress. The general United States policy of mineral reservations continued until the Lode Mining Act of 1866, although by mid-century Congress had begun to allow mineral rights to pass with the fee patents to certain lands. In Butte and throughout the country, homesteaders commonly sold their mineral rights to mining companies, and the prevalence of such sales necessitated a definitive statement of the legal rights of the respective parties. In response, jurisdictions throughout the United States uniformly adopted the doctrine of subjacent support, which has been de-

46. 1 LINDLEY ON MINES, supra note 16, § 9, at 18.
47. See, e.g., Catron v. South Butte Mining Co., 181 F. 941, 943 (9th Cir. 1910); see generally 3 LINDLEY ON MINES, supra note 16, § 818, at 2010-12.
48. 1 LINDLEY ON MINES, supra note 16, § 2, at 16. An early exception to this general rule was that gold and silver belonged to the sovereign, a practice stemming from the right of coinage, or perhaps even from earlier Roman times. Id. § 3, at 7-8.
49. In royal charters, under which the eastern United States was settled, the sovereign retained a fraction of the gold and silver ore mined. 1 LINDLEY ON MINES, supra note 16, § 31, at 62-63. Spain and then Mexico owned all the mines in the American Southwest. Id. § 13, at 27-33.
51. See Silver Bow Mining & Milling Co. v. Clark, 5 Mont. 378, 410, 5 P. 570, 573 (1885) (discussing the Act of July 26, 1866, ch. 262, 14 Stat. 251 (1866)).
53. Although it may be a misnomer to refer to surface estates and mineral estates, that is the common practice. The New Mexico Supreme Court has noted, however, that homesteaders would be entitled to no subsoil or groundwater on which to develop farms and ranches if indeed they possessed only the surface. The court reasoned that the so-called surface estate is in actuality the entire fee simple estate less only the mineral estate, not less the entire subsurface. New Mexico ex rel. State Highway Comm'n v. Trujillo, 82 N.M. 694, 487 P.2d 122, 125 (1971).
54. E.g., Peters v. Bellingham Coal Mines, 173 Wash. 123, 129, 21 P.2d 1024, 1026 (1933) (holding that "all who disturb such support are absolutely liable, regardless of their alleged rights in adjoining property or in the earth under the surface"); Smith v. Glen Alden Coal Co., 347 Pa. 290, 304, 32 A.2d 227, 234 (1943) (holding that the owner of the surface is entitled to absolute support, not as an easement or right depending on a supposed grant, but as a proprietary right at common law); Empire Star Mines Co. v. Butler, 62 Cal. App. 2d 466, 145 P.2d 49, 82 (1944) (holding that subjacent support is a common-law right.
scribed this way:

As a general rule, where the surface land is owned by a person other than the owner of the mineral rights, the latter must leave support sufficient to maintain the surface in its natural state, and it is no defense in an action to recover for an injury to the surface that the mining operations were conducted with due care and skill.56

In 1895, the Montana Legislature similarly acted to guarantee the right of subjacent support by passing the law still in effect today, which reads:

Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction, on using ordinary care and skill and taking reasonable precautions to sustain the land of the other and giving previous reasonable notice to the other of his intention to make such excavations.56

The Montana Supreme Court has recognized that this statute merely codifies the common-law doctrine of subjacent support,57 which creates in the owner of the mineral rights a duty to maintain the surface regardless of care used.58 This duty attaches whether the grantor conveys the surface with a reservation of the mineral estate, or grants the mineral estate with a reservation of the surface.59 The only exception to this duty, as stated by the Ninth Circuit Court of Appeals in a case that arose in Butte, is if the mineral estate owner has expressly reserved the right to destroy the surface “in terms so plain as to admit of no doubt.”60

Courts generally have held that a breach of the duty of subjacent support subjects the miner to liability for damages to buildings.61 Damages generally are measured by the diminution in the

58. See supra note 55, at 783.
59. Catron v. South Butte Mining Co., 181 F. 941, 943 (9th Cir. 1910).
60. Id. See also Williams v. Hay, 120 Pa. 485, 496, 14 A. 379, 382 (1888) (holding that terms stating miner “shall do as little damage to the surface as possible” does not waive the right to subjacent support); Peters, 173 Wash. at 132, 21 P.2d at 1026 (holding that language in a deed allowing removal of coal by methods “best calculated to prevent the sinking of the surface” does not waive the right to subjacent support).
61. E.g., Collins v. Gleason Coal Co., 140 Iowa 114, 122, 115 N.W. 497, 499 (1908)
value of the entire tract when the injury is permanent. If damages are merely temporary, the miner must compensate the surface owner only for the reasonable costs of restoring the surface and repairing the buildings. Some jurisdictions limit liability if the subsidence would not have occurred but for the additional weight of the buildings. The Montana Supreme Court has recognized this liability limitation, but has applied it only in a non-mining case, where a building wall collapsed after the adjoining lot was excavated. No court presented with a mining case, however, has ever held that the weight of structures contributed to the subsidence in such a manner as to entitle the surface owner to recover for only a part of the damage to the structures.

Montana courts have held that the surface owner has the burden of proving that particular mining activities caused the subsidence. For example, in Knipe v. Washoe Copper Co., the Montana Supreme Court held that the surface owner had failed to

(holding that the defendant was not prejudiced by testimony of the amount of damages, when such damages were based on the cost to move a house and to put a new foundation under it); Noonan v. Pardee, 200 Pa. 474, 487, 50 A. 255, 258 (1901) (holding that "if plaintiffs be entitled to recover, their measure of damages is the actual loss they have sustained to their land, including the building thereon, by reason of the 'cave-in'"); Peters, 173 Wash. at 129, 21 P.2d at 1025-26 (the assumption is that the same rule applies to buildings as to land, in accordance with the "ancient maxim that one should so use his own property as not to injure the rights of another"); see generally Annotation, Liability of Mine Operator for Damage to Surface Structure by Removal of Support, 32 A.L.R.2d 1309 (1953).

62. See, e.g., H.B. Jones Coal Co. v. Mays, 225 Ky. 365, 372, 8 S.W.2d 626, 629 (1928) (holding that "if the injury is proved to be permanent, the measure of damages will be the difference in the market value of his surface before and after the injury was inflicted"); Gatson v. Farber Fire Brick Co., 219 Mo. App. 558, 566, 282 S.W. 179, 181 (1925) (holding that damages were not excessive where five acres of farm had sunk and an additional two acres would probably sink); Brown v. Crozer Coal & Land Co., 144 W. Va. 296, 310, 107 S.E.2d 777, 786 (1959) (holding that surface owner with a right of subjacent support had an equal right to hold the land, property intact).

63. See, e.g., Mays, 225 Ky. at 372, 8 S.W.2d at 629 (holding that "it appears that the injury may be repaired with reasonable effort and expense, the measure of damages is the reasonable cost of the repairs"); North-East Coal Co. v. Hays, 244 Ky. 639, 643, 51 S.W.2d 960, 962 (1932) (holding that damages for temporary harm to pasture land equal the cost of repair); Richards v. Gundlach, 245 Ill. App. 264, 267 (1924) (holding that the proper measure of damages to buildings is the cost of restoration).

64. E.g., Colorado Fuel, 125 Colo. at 526, 245 P.2d at 466 (holding that when a building subsided with 100 people inside it, "in order to recover damages to a structure on the surface, it is incumbent on the surface owner to establish by a preponderance of the evidence that the owner of the subjacent rights operated in a reckless, careless, or negligent manner resulting in the surface owner's damage"); Empire Star Mines Co., 62 Cal. App. at 145 P.2d at 82 (holding that "the right is to support of the land in its natural state, without the added weight of a building upon it").

65. Neyman, 82 Mont. at 488-89, 267 P. at 810-11 (holding that the defendant's construction operations met statutory criteria of care and notice).

66. See Annotation, supra note 61, at 1311 n.6.

prove that mining and blasting by the defendant caused the surface damages. The court thus concluded that the damages, although caused by subsidence, were more likely attributable to mining operations commenced prior to the defendant's mining activities.\textsuperscript{68} Similarly, the Ninth Circuit Court of Appeals, in \textit{Butte Copper Mining and Zinc Co. v. Amerman},\textsuperscript{69} reversed a district court's directed verdict for the surface-owners, after finding that the defendant had raised a question of fact for the jury by offering evidence that the damaged buildings might have been built upon an insecure and unstable foundation.\textsuperscript{70} Much of the legal debate concerning the rights of surface owners, however, has involved not compensation of surface owners for damages caused by subsidence, but whether mining should even be allowed in certain areas. As early as 1922, a Pennsylvania statute prohibited mining of a severed mineral interest in order to prevent interference with surface structures.\textsuperscript{71} The United States Supreme Court, however, declared such a prohibition to be an unconstitutional taking of private property without compensation.\textsuperscript{72} Similarly, when large-scale strip mining of coal began in the 1970s, Montana also enacted legislation to require the surface owner's consent before a miner could enter upon the land for purposes of strip mining.\textsuperscript{73} This legislation also failed to pass constitutional muster. The Montana Supreme Court, in \textit{Western Energy Co. v. Genie Land Co.},\textsuperscript{74} thus reinstated the miner's common-law right to the necessary use of the surface, although the surface owner's right to subjacent support remained intact.\textsuperscript{75}

Yet, the predominant trend of this century has been toward an expanded recognition of surface owners' rights. Indeed, the Public Land Law Review Commission in 1970 recommended prohibition of mineral activity in residential areas and appropriate com-

\begin{itemize}
  \item \textsuperscript{68} Id. at 167-68, 95 P. at 131.
  \item \textsuperscript{69} 157 F.2d 457 (1946).
  \item \textsuperscript{70} Id. at 458 (witnesses testified that the structures were built upon an abandoned sewer gulch that had been filled in with garbage).
  \item \textsuperscript{71} 1921 Pa. Legis. Serv. 1198 (Purdon) (session laws).
  \item \textsuperscript{72} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).
  \item \textsuperscript{73} MONT. CODE ANN. § 82-4-224 (1987); See generally Comment, \textit{Montana's Statutory Protection of Surface Owners from Strip Mining and Resultant Problems of Mineral Deed Construction}, 37 MONT. L. REV. 347 (1976).
  \item \textsuperscript{74} \textendash; Mont. \textendash;, 737 P.2d 478 (1987).
  \item \textsuperscript{75} See Id. at \textendash;\textendash;\textendash;, 737 P.2d at 484. One commentator, however, has argued that no right of subjacent support exists, under mineral reservations statutes, if the mining operations are reasonably incident to the mining of the underlying mineral estate. See Twitty, \textit{Law of Subjacent Support and the Right to Totally Destroy Surface in Mining Operations}, 6 ROCKY Mtn. MIN. L. INST. 497, 519 (1961).
\end{itemize}
pensation for affected surface resources, values and uses.\textsuperscript{76} One commentator has stated: "Inexorably, the dominance of the mineral estate has been lessened, and occasionally even eliminated, while the surface owners' protection has been correspondingly enlarged."\textsuperscript{77}

A recent United States Supreme Court decision, which upheld the constitutionality of a modern Pennsylvania statute prohibiting removal of surface support and making mining companies liable for all subsidence-caused damages to the surface, is indicative of this trend.\textsuperscript{78} In \textit{Keystone Bituminous Coal Association v. DeBenedictis}, the United States Supreme Court upheld a Pennsylvania court's imposition of liability despite damage waivers signed by surface owners 70 years earlier. Justice Stevens' opinion stated that "the Commonwealth has a strong public interest in preventing this type of harm, the environmental effect of which transcends any private agreement between contracting parties."\textsuperscript{79} The Court's sympathy for surface owners' rights becomes all the more apparent when one considers that Pennsylvania property law uniquely regards the support estate as a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate.\textsuperscript{80} The Court indicated that a wealth of recent studies concerning the "devastating effects" of subsidence were persuasive to its decision:

Wherever [subsidence effects] extend, damage can occur to buildings, roads, pipelines, cables, streams, water impoundments, wells, and aquifers. Buildings can be cracked or tilted; roads can be lowered or cracked; streams, water impoundments, and aquifers can all be drained into the underground excavations. Oil and gas wells can be severed, causing their contents to migrate into underground mines, into aquifers, and even into residential basements. Sewage lines, gas lines, and water lines can all be severed, as can telephone and electric cables.\textsuperscript{81}

IV. A UNITED EFFORT TO PRESERVE CENTRAL BUTTE

The trend toward recognition of the rights of surface owners

\textsuperscript{77} LESHY, \textit{supra} note 18, at 245.
\textsuperscript{79} Id. at 1252.
\textsuperscript{80} Id. at 1250.
\textsuperscript{81} Id. at 1237 n.2 (citing Blazey & Strain, \textit{Deep Mine Subsidence—State Law and the Federal Response}, 1 E. MIN. L. FOUND. § 1.01(2), at 1-5 (1980)).
may yet portend some belated compensation for the Central Butte neighborhood and the 2,000 people living above the Emma Mine. Central Butte lies entirely within the Butte national historic landmark district. It “is an historically significant, largely intact, late nineteenth century working class neighborhood, with adjacent warehouse, railroad, and industrial areas.” The vast majority of its approximately 800 structures are of primary or contributing historical significance. Residents of that neighborhood have demonstrated a determination to dig up the past, in order to preserve it.

In 1985, Central Butte residents organized with BCU to preserve and rebuild Butte’s poorest, and most poorly housed, neighborhood. That organizing effort brought together seventy neighborhood residents with professional planners and organizers to produce a comprehensive neighborhood plan. Implementation of the neighborhood plan resulted “in the removal of some neighborhood hazards, creation of jobs, painting of houses, and establishing [of] a sense of empowerment.” Residents went from door to door gathering socioeconomic data, while architectural consultants “produced a collection of thirteen maps which detail[ed] the condition of buildings, sidewalks, alleys, street lighting, streets, and landscaping. . . . For almost every structure . . . the maps indicate[d] owner or renter occupancy, exterior building condition, type of building, existence of easements, and degree of historical significance.”

A building-by-building visual inspection and examination of deed records conducted by professional staff of Renewable Technologies, Inc. revealed extensive damages. Of 690 structures surveyed, over half were found to be in need of moderate to extensive rehabilitation, often due to damages caused by differential settle-

82. Preservation of a Neighborhood, supra note 6, at 1.
83. See Id. at 32-33.
84. Id. at 5-7.
86. Preservation of a Neighborhood, supra note 6 at 5-7, Appendix. There are about 1300 housing units in Central Butte, including 225 units at Silver Bow Homes, a low income public housing facility that apparently is unaffected by subsidence. In the remainder of the neighborhood, 45 percent of residents are homeowners and 55 percent renters. Over two-thirds are at an income level that is below half of the average for the county, and the percentage who are of a minority race is four times that of the county. Id. at 3-4, 16.
ment. Over 70 percent of the structures are not encumbered by easements waiving future liability for subsidence-related damages. More importantly, easements do not encumber 65 percent of those needing extensive structural rehabilitation.87 The architectural survey revealed that:

The worst structural problems due to differential settlement seem to have arisen when vertical ground movement has been accompanied by lateral ground movement . . . . This results in large cracks in the foundations, foundations seriously out of plumb, or large cracks near the top of the building, depending on the nature of the movement.88

The absence of reliable information on the current nature of subsidence remains a barrier to further implementation of the neighborhood plan. The plan calls for “[p]ublic access to all available information on subsidence, fair compensation to the neighborhood for the effects of subsidence, and public and private reinvestment.”89 Yet, residents of Central Butte cannot ascertain whether subsidence has stabilized, as indicated by conflicting testimony presented at a public hearing on the draft neighborhood plan.90 Private financial institutions and government agencies have been reluctant to make investments in Central Butte, citing an inability to prove that subsidence no longer poses a significant hazard.91 Moreover, the Anaconda Company, which has exclusive access to the relevant studies, apparently is itself uncertain of the existence of active subsidence. The Central Butte neighborhood plan notes:

The Anaconda Co. has studied the subsidence in the CBN extensively, but it has been unwilling to make its findings public. The subsidence reportedly was monitored throughout the area by means of recording the relative movements of benchmarks. While the Emma was being mined, the surface movement was quite pronounced, and it spread as the mining operation got deeper. However, the ground movement was never sudden, as in an earthquake, but gradual. When the Emma was closed in 1959, the magnitude of the subsidence diminished greatly, as recorded by the Anaconda Company’s monitoring program.92

Additionally, the only public engineering report on the Emma-Travona subsidence, which is an extrapolation of company studies,
states that subsidence all but ceased when mining stopped and that it continues now only at a negligible rate.93

V. THE MINING COMPANY'S DUTY TO MAINTAIN THE SURFACE

Although the Anaconda Company recently sold all its Butte mines, no mining activity continues beneath Central Butte. This may in fact be a critical development, given Montanans' long-time reluctance to challenge "The Company" for fear of retaliation,94 as now economic blackmail is no longer a potent threat.95 A mining company which condemns land necessary to the development of a mine must pay the landowner for the value of the surface estate.96 The Anaconda Company chose not to acquire surface estates in Central Butte through eminent domain actions, and the Company may not now avoid any payment for destruction of subjacent support by mining, effectively an inverse condemnation. The bill may finally be coming due for a century of unbridled plunder, since the law holds the operator of the mine liable for subsidence damages, regardless of whether or not the operator owns the mining property.97 The Anaconda Company and the Butte Copper and Zinc Company had, in fact, formalized that policy in a 1942 amendment to the Emma operating lease, which stated that Anaconda, the operator-lessee, alone would be liable for such damages.98 The Ana-

93. See Piper, supra note 5. The report's author was formerly a mining engineer for the Anaconda Company (discussion with D. Piper during 1985).
94. See generally Toole, supra note 33.
95. The Anaconda Company has not hesitated over the years to raise the spectre of a shutdown to enforce its political will. For example, during the 1972 Montana Constitutional Convention, the company issued such a threat through a self-described "emissary." Delegate Joyce said the company had informed him the mines would close unless the last six words of the following proposed provision were stricken: "All lands disturbed by the taking of natural resources shall be reclaimed to a beneficial and productive use." Mont. Const. Conv., Vol. V, at 1356-57. The offending words were deleted. Id. at 1361-63. See resulting provision MONT. CONST. art. IX, § 2.
96. See MONT. CONST. art III, § 14 (1889); State ex rel. Butte-Los Angeles Mining Co. v. District Court, 103 Mont. 30, 41, 60 P.2d 380, 385 (1936) (stating that mining is a public use and thus private property may be taken for mining under the right of eminent domain). See also, Kipp v. Davis-Daly Copper Co., 41 Mont. 509, 519, 110 P.2d 237, 241 (1910) (stating that eminent domain law evidences a policy to encourage mining).
97. Butte Copper & Zinc Co. v. Poague, 164 F.2d 201, 203 (9th Cir. 1947), cert. denied, 333 U.S. 843 (1948). The court held a lessor of mining property is liable for subsidence of the surface caused by mining operations of its lessee only in one of four circumstances, none of which it found: (1) the lessor controls the lessee's operations; (2) the lease expressly provides for operations that will cause surface subsidence; (3) the lessor knew or should have known when the lease was made that operations would cause subsidence; or (4) the lessor consented to or ratified negligent operations of the lessee. Id. at 203-04.
98. Letter from W. H. Hoover (Anaconda Co. Legal Dept.) to D. M. Kelly (Anaconda Co. vice-president) (March 16, 1942) (available in Montana Historical Society Archives, Anaconda Copper Mining Company Records).
conda Company's recent resale of the Emma Mine, which it purchased in 1959, therefore is unlikely to have shifted liability because the new owners have not operated the mine.

The Anaconda Company undoubtedly will argue that time has eroded whatever validity the neighborhood's claims may once have had since, as a general rule, the statute of limitations starts to run when the subsidence occurs. Most jurisdictions have held, however, that each subsidence is a new cause of action. Further, Montana law states "[w]hen waste, trespass, or injury is committed by reason of underground work upon any mining claim . . . the cause of action is not considered to have occurred until the discovery by the aggrieved party of the facts constituting such waste, trespass or injury." Additionally, a party who has concealed material facts may be estopped from asserting the statute of limitations.

Both the Montana Supreme Court and the U.S. Supreme Court have held that a continuous cause of action tolls the running of the statute of limitations until the stabilization of damages. For example, in Blasdel v. Montana Power Co., the court held that the statute of limitations was no bar to an action even though the claimant waited nineteen years to file a complaint for damages caused by the flooding of his farmland after the construction of Kerr Dam. Although Blasdel first complained of the flooding in 1941, the water table had fluctuated until 1960, the year the complaint was filed. In support of its holding the Montana Supreme Court quoted an earlier decision of the U.S. Supreme Court:

The source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous. And there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the [defendant] would not unnaturally postpone bringing a suit against the [defendant] for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck.

99. See generally, Annotation, Limitations of Actions: When does the Statute Begin to Run Against Actions Based on Removal of Lateral or Subjacent Support, 26 A.L.R. 1235 (1923).
100. See generally 3 LINDLEY ON MINES, supra note 16, § 823, at 2017.
104. Id. at 425-26, 640 P.2d at 894 (citing United States v. Dickinson, 331 U.S. 745, 749 (1947)).
VI. Conclusion

The Central Butte plan specifically calls for establishment of a “Mining Indemnity Trust Fund . . . to insure against future subsidence, finance rehabilitation of structures/public facilities damaged by subsidence, and related . . . expenses.” The Anaconda Company should join together with the BCU in seeking to create such a fund, in light of the company’s undeniable role in creating the conditions that have made it necessary. Additionally, the neighborhood desires Anaconda’s cooperation in rehabilitation efforts because of the considerable financial resources which will otherwise be required to litigate such a potentially complex matter. Moreover, litigation is not always the best way to foster cohesiveness, a sense of strength, and morale within the community.

The Central Butte plan documents the desirability and feasibility of rebuilding central Butte, including housing, parks, streets, sewers and sidewalks. Not coincidentally, this could involve significant economic development for those hardest hit by Butte’s crumbling economy. The doctrine of subjacent support provides that solid legal foundation which should encourage the Anaconda Company to financially support the rehabilitation of Central Butte.

105. PRESERVATION OF A NEIGHBORHOOD, supra note 6, at 12.
106. See, e.g., G. STERN, THE BUFFALO CREEK DISASTER (1976)(a narration about how the survivors of one of the worst disasters in coal mining history brought suit against the company and won).
107. See generally FOX, SOME RULES FOR COMMUNITY LAWYERS, CLEARINGHOUSE REV. 1 (May 1980); Wexler, Practicing Law for Poor People, 79 YALE L.J. 1049 (1970). Civil rights and labor lawyer Arthur Kinoy has written that the value of legal activity may be measured by “the impact . . . on the morale and understanding of the people involved in the struggle . . . [and how it helps] to develop a sense of strength, an ability to fight back.” A. KINOW, RIGHTS ON TRIAL 1, 57 (1986).