

Surface Use and Damage Statutes:
**THE NEEDED BALANCE IN THE ONGOING BATTLE BETWEEN THE SURFACE
OWNER AND THE MINERAL OWNER**

By Ned Stratton

Table of Contents

I.	INTRODUCTION	2
A.	Introductory Scenario.....	3
II.	HISTORY OF THE SEVERED ESTATE.....	5
A.	Pre United States History: Origins of the Severed Estate	5
1.	The English Royal Mines.....	6
2.	Before the Royal Mines	6
B.	The History of the Severed Estate in the United States	7
1.	Pre Civil War	8
2.	Post Civil War.....	9
III.	THE ORIGINS OF THE COMMON LAW REGARDING SURFACE DAMAGE AND SURFACE USE.....	12
A.	English Contribution to the Common Law Regarding Surface Use and Damage	12
B.	Early U.S. Common Law Regarding Surface Use and damage.....	15
IV.	DEVELOPMENT OF AND CHANGES TO THE COMMON LAW	16
A.	The Dominant Estate.....	17
B.	The Right to Access and Use the Surface	18
1.	Access	18
2.	Use of Surface.....	19
C.	Obligations to Pay for Surface Damages	21
V.	THE EROSION OF THE COMMON LAW DOMINANCE OF THE MINERAL ESTATE.....	22
A.	Accommodation Doctrine.....	23
B.	State Surface Damage Statutes	25
1.	The Minimalists, Indiana, Kentucky, Illinois, and the Federal Government.	27
2.	North Dakota and its Progeny, South Dakota, Montana, Tennessee, and West Virginia.	29
3.	Oklahoma, Pennsylvania, and Alaska.....	32
4.	Wyoming, New Mexico, and Colorado.	34

5. Local City and County Ordinances	36
C. Revisiting the Introductory Scenario	37
D. Notable Deficiencies and Concerns with Surface Damage Statutes	38
1. Inadequate Bonds.....	38
2. Constitutional Issues	40
a. Takings.....	40
b. The Application of State Damage Statutes to Federal Severed Estates	41
3. Concerns About the Rising Costs of Energy and the Effect on the State’s Economy	42
4. Concerns About the Motivation Behind Surface Damage Statutes	43
VI. CONCLUSION	44

I. INTRODUCTION

An old man had a number of sons who often quarreled among themselves. Unable to heal their disputes, and close to death, the old man summoned his sons to his deathbed, and beckoned his servants fetch him a bundle of sticks. The bundle had the same number of sticks as the man had sons. He handed the whole bundle of sticks to each of his sons in turn, and ordered each son to break the bundle. None were strong enough to break the bundle of sticks. He then took the bundle and untied the lashings and separated the sticks. One by one, he handed each of his sons a single stick. He then ordered them all to break their single stick, and all easily broke their individual stick.¹

Over 2500 years after Aesop first used the bundle of sticks analogy to convey a message of strength in unity, Justice Cardozo is accredited with using this same analogy to illustrate the ownership of various interests and rights in property.² Just as “A house divided against itself

¹ Adapted from, A Bundle of Sticks, also known as The Father and His Sons, Aesop’s Fables, by Aesop, translated by G.F. Townsend.

² B. Cardozo, *Paradoxes of Legal Science* 129 (1928)

cannot stand”³ dividing up ownership in a single piece of property into many smaller bundles of sticks has created its fair share of problems. Dividing land ownership into a surface estate and mineral estate has resulted in many disputes regarding the rights of the mineral owner to use and damage the surface and the rights of the surface owner to compensation for damages or uses which interferes with his surface use.⁴ This paper will address the history of the severed estate, the development of the common law regarding surface use and damage, and compare that to the recent statutory solution to perceived inequity in the common law, frequently referred to as “surface damage statutes”.

A. Introductory Scenario

Imagine you own a small 180 acre farm. The land has been in your family for two or three generations, and you think you are the sole owner of the land. You grow primarily organic products, and are certified by the USDA’s National Organic Program (NOP). You have never heard of a severed estate and have no idea that someone else may own the minerals under your land without owning the surface. The whole idea doesn’t even make sense to you, because how could the mineral owner ever get at the minerals without owning the surface. Like many small farmers you are barely making ends meet and need every acre and your NOP certification to make the farm profitable. One fine day, just after planting or maybe even just before harvest, a big truck shows up on your land and starts tearing up a few acres of your farm to prepare an oil and gas well drilling area and a few more acres for a reserve pit, pipelines, and roads to access the site. You, of course, demand that they leave. They show you a lease signed by someone you have never heard of who claims ownership in the minerals, and they claim they have a right to be

³ Mark 3:25

⁴ These disputes date back to the 1600’s and one of the first was illustrated in the case of *The Earl of Cardigan v. Armitage*, 107 Eng. Rep. 356 (1823), and there have been literally thousands of cases on point since.

there. They may even show you a deed, signed many years ago by the predecessor to your great grandfather, giving some stranger and his progeny the rights to all oil, gas, and minerals under your land, along with rights of ingress and egress for exploration and removal of the minerals. They have, of course, chosen to drill in the middle of your prime organic crop, because some geological survey, or well witch, suggested that this was the most likely spot to hit oil or gas.

These facts are almost identical to the facts given by a farmer who called a Montana law firm where I was employed this past summer. What are the farmer's rights? What are the rights of the oil company? Who bears the burden for the lost crops and the possible loss of the farmers NOP certification? If the farmer convinces the oil company to drill on a few out of the way acres on the edge of the farm, who pays the substantial additional costs of directional drilling (drilling at an angle may result in having to drill 100's or even 1000's of additional feet in order to reach the desired depth in the desired location)? This paper will explore the answers to these questions, as well as how the answers to these questions varies depending on the whether the state follows the common law, the accommodation doctrine, or has adopted one of the various surface damage statutes.

This paper will focus on the common law and the surface damage statutes as they relate to surface use and damage and will only briefly mention a few ancillary issues at the end, while recognizing that there are many important related issues both created and addressed by the surface damage statutes.

Surface damage statutes are not a new issue, and in some form or another have been around for almost a hundred years.⁵ The current record breaking energy prices, continued push for America's energy independence, and recent passage of a new generation of surface damage

⁵ The federal government was the first to pass a form of a surface damage statute as part of the Homestead Acts, *see infra* note 48.

statutes in the past three years,⁶ makes now a good time to take a fresh look at surface damage statutes and their effect on mineral developers and surface owners. Even a fresh look into new laws requires a good look into the past. This paper will start with a look into the history of the severed estate, followed by a look into the common law regarding surface use and liability for surface damage (including relatively recent changes to the common law such as the accommodation doctrine), and finally the paper will take a closer look into the surface damage statutes and compare them to the common law, including a brief view of a few of the problems, unanswered questions, and concerns raised by the surface damage statutes.

II. HISTORY OF THE SEVERED ESTATE

The concept of the severed estate is by no means a new one. The concept that one person can own and work the surface, while another owns and works the mines far below, has likely been around since the beginning of mining. In fact, the severed estate has a rich and very long history; with roots dating back more than two and a half millennia.⁷

A. Pre United States History: Origins of the Severed Estate

Where exactly did this concept originate? Many have stated that the concept comes from the English.⁸ While it is evident that much of our common law came from the English, it is not true that the origins of the severed estate began there.⁹

⁶ Wyoming Statutes 30-5-401 through 30-5-410. “Wyoming Surface Owner Accommodation Act” (passed in 2005); New Mexico Statutes Annotated § 70-12-1. “The Surface Owners Protection Act” (passed in 2007); Colorado Revised Statutes Annotated § 34-60-127, (passed in 2007).

⁷ John C. Lacy, *Going With the Current: The Genesis of the Mineral Laws of the United States*, 41 RMMLF-INST 10 (1995)

⁸ A number of law review articles have accredited *The Case of Mines* as being the origin of the concept of the severed estate; see, e.g., Michelle Andrea Wenzel, *The Model Surface Use and Mineral Development Accommodation Act: Easy Easements For Mining Interests*, 42 Am. U. L. Rev. 607, 615 (1993)

1. The English Royal Mines

The first occurrence of the severed estate in English history dates back to King Edward III, in the late 1300's, when the King claimed ownership in the deposits of gold and silver under the land.¹⁰ The first dispute recorded on the subject was between the Earl of Northumberland and Queen Elizabeth in "The Case of Mines" from 1567.¹¹ This court stated that all silver and gold or any material containing even traces of gold and silver "belong to the King by prerogative, with liberty to dig, and lay the same upon the land of the subject, and carry it away from thence" and included "other such incidents thereto as are necessary to be used for the getting of the ore."¹² This prerogative existed in order for the king to meet the responsibility to provide coin and money.¹³

This concept became known as the Royal Mines and to some extent still exists today in England. One year after The Case of Mines, in 1568, Queen Elizabeth set up a company called The Mines Royal, which was the first of two mining monopoly companies established by the English Crown¹⁴. Today, The Crown Estate, an 11.3 billion Dollar company, still claims "rights to all naturally occurring gold and silver – the Mines Royal – belong to The Crown Estate."¹⁵

2. Before the Royal Mines

⁹ John C. Lacy, *Going With the Current: The Genesis of the Mineral Laws of the United States*, 41 RMMLF-INST 10 (1995)

¹⁰ *Queen Elizabeth v. The Earl of Northumberland; The Case of Mines*, 75 Eng. Rep. 472 (Exch. Div. 1567).

¹¹ *Id.* at 481.

¹² *Id.*

¹³ *Id.* at 477.

¹⁴ Or "The Society of Mines Royal," see D. G. Tucker, *The Seventeenth Century Wireworks at Whitebrook Monmouthshire, Historical Metallurgy* 7(1), (1973), 28-35; see also W. Rees, *Industry before the Industrial Revolution II* (1968).

¹⁵ See e.g. the Crown Estate corporate website at http://www.thecrownestate.co.uk/our_portfolio.htm.

The English were not the first to employ the concept that all minerals belonged to the government, nor were they the only major influence of early American mining laws and cases. Through Mexico, Texas, and California, the Spanish Law also has had a large influence on American Mining Laws.¹⁶ In the 1300's, by royal decree, the Spanish Crown claimed ownership of all minerals in Spain and her settlements abroad, and also set up a license system allowing others to locate and extract the minerals, while paying the crown a percentage of the proceeds or royalty.¹⁷

In fact the idea that the government or public could own the minerals, regardless of who owned the surface, dates back at least two millennia. There is evidence that mines were owned collectively by the citizens of Greece as early as 800 B.C.¹⁸ The English and the Spanish adopted the idea of royal ownership of minerals from an ancient Roman practice.¹⁹ For centuries the Roman Government claimed ownership in the minerals wherever they might be found in many parts of their vast empire.²⁰ As early as 265 B.C. the Roman Republic had a system which allowed individuals to mine their own lands, or Roman lands, in the form of a lease or license and pay a royalty on whatever minerals were extracted.²¹

B. The History of the Severed Estate in the United States

¹⁶ Not long after both the discovery of gold in California, and Texas joining the union, Congress passed the first set of mining laws in 1865 and 1862. The miners from these states had a strong influence on these laws; *see also* Gary D. Libecap, *Economic Variables and the Development of the Law: The Case of Western Mineral Rights*, 38 *J. Econ. Hist.* 338, 339 (1978), and Gary D. Libecap, *Government Support of Private Claims to Public Mineral: Western Mineral Rights*, 53 *Bus. Hist. Rev.* 364 (1979).

¹⁷, John C. Lacy, *Going With the Current: The Genesis of the Mineral Laws of the United States*, 41 *Rocky Mt. Min. L. Inst.* 10-1 (1995); John C. Lacy, *Overview of the Mining Codes of Mexico, Venezuela and Chile*, *Int'l Oil, Gas & Mining Dev. in Latin Am.* 5-1, 5-1 to 5-7 (Rocky Mt. Min. L. Fdn. 1994).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

1. Pre Civil War

There are very few cases or incidents regarding the severed mineral estate in early American history. However, after the industrial revolution, and as people and railroads started to span the country, the practice of reserving or buying minerals became more commonplace, and consequently so did the conflicts and cases.

Most of the early examples of mineral reservations stem from the English notion of the Royal Mine. In fact the English Crown tried to exercise the Royal Prerogative in the early American Colonies.²² The colonial charters of many of the New England Colonies contained a reservation of 1/5 of all silver and gold to the English Crown.²³ In addition, reservation of the minerals by the crown was common practice in Spain and many other European nations, so almost all the early settlers in America were familiar with this concept.²⁴ The First Continental Congress also passed an act reserving some minerals to the government (however, the second Congress abolished this act only a few years later).²⁵ Pennsylvania and New York also went through a very brief period of trying to claim all minerals to the state, but both abandoned this idea shortly after implementing it.²⁶

The common law in the U.S. started with the English notion that the owner of land owned all the space above and below the land “from the havens above to the center of the earth.”²⁷ The

²² Owen M. Lopez, *Upstairs/Downstairs: Conflicts Between Surface and Mineral Owners*, 26 Rocky Mtn. Min. L. Inst. 995, 996-97 (1980);

²³ *Id.*

²⁴ *Id.*, also see *Supra* note 17.

²⁵ See 28 Journals Of The Continental Congress 1774-1789, 378 (John C. Fitzpatrick ed., 1933) (provided for reservation to United States of "one third part of all gold, silver, lead and copper mines").

²⁶ Lopez, *supra* note 22, at 997, n. 8.

²⁷ *Winton v. Cornish*, 5 Ohio 477, 1832 WL 42 (Ohio 1832) (“land hath an indefinite extent upwards as well as downwards”).

concepts of livery of seisen were still very familiar to the people and to the courts of America.²⁸ Although the ceremony itself was no longer required, many courts found that taking possession was still an important part of transferring ownership, thus selling an interest in unknown and undiscovered minerals (where both delivery and possession were impossible) was not customary.²⁹

One of the first instances of selling land and reserving the minerals from the sale was done by federal and state governments, which began with a series of laws passed by Congress between 1807 and 1832.³⁰ These laws reserved lead and salt springs from the sale of all public lands.³¹ This practice was also abandoned after 1832.³² Texas, upon joining the Union in 1846, followed the Spanish custom and law that all minerals under the surface belonged to the government (the state returned all interest to the land owners and abandoned this practice as stated in the 1866 state constitution).³³

2. Post Civil War

It wasn't until the discovery of gold in California that the United States saw any real need to regulate the mining on federal lands. In 1866 congress passed one of the first mining acts regulating the mining on federally owned lands.³⁴ A few years later, in 1872, Congress passed its first major mining legislation, following the suggestions of the mining communities, who had developed a set of customs and practices derived from Mexico.³⁵ Parts of the General Mining

²⁸ *Chalker v. Chalker*, 1 Conn. 79, 1814 WL 15 (Conn. 1814), *Speed v. Buford*, 3 Bibb 57, 1813 WL 601 (Ky.App. 1813).

²⁹ *Id.*

³⁰ *See U.S. v. Gratiot*, 39 U.S. 526, 530 (U.S. 1840).

³¹ *Id.*

³² *Id.*

³³ Tex. Const. art. VII, § 39 (1866)

³⁴ *See Lacy, supra* note 17, at 22-23.

³⁵ *Id.*

Law of 1872 allowed for claim holders to lay claim to the minerals on federal lands, essentially creating a severed mineral estate, with the government owning the surface and the miners owning a claim in the minerals.³⁶

By the end of the Civil War it was well established in common law and in practice that the land could be severed into multiple estates, including but not limited to the surface estate and the mineral estate. One case, in the late 1800's, stated it this way; "it is unquestionable at common law the owner of the [land owner] might convey his interest in mineral beneath the surface without relinquishing his title to the surface."³⁷

After the Civil War, landmen, like carpetbaggers, entered the economically depressed south and started purchasing land owner's mineral rights for fractions of a dollar per acre.³⁸ The land owners, under severe economic stress and high pressure from the landmen, would sign over the mineral estate in what has become known as the broad form deed.³⁹ Industry and manufacturing were rapidly increasing, and there was a strong and growing demand for the minerals that some of these southern lands were rich in.⁴⁰ Some of these lands were so rich in coal that they were able to produce in excess of 10 thousand tons an acre.⁴¹ As one commentator stated, "In the summer of 1885 gentlemen arrived in the county-seat towns for the purpose of buying tracts of minerals, leaving the surface of the land in the ownership of the mountaineers who resided on it. The Eastern and Northern capitalists selected for this mission men of great

³⁶ *Id.*

³⁷ *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.*, 171 U.S. 55, 60, 18 S.Ct. 895, 897 (U.S. 1898).

³⁸ Harry M. Caudill, *Night Comes to the Cumberlands*, 61-72 (1987).

³⁹ *Id.* at 61 (The broad form deed was just as it sounds a deed that encompassed almost every possible use of the surface).

⁴⁰ Caudill at 75.

⁴¹ *Id.*

guile and charm. They were courteous, pleasant and wonderful storytellers.”⁴² In some counties, and entire areas in eastern Kentucky, the onslaught was so successful that by 1910, nearly 85 percent of the mineral rights had been relinquished.⁴³ These broad form deeds were so comprehensive that they left the owner with only token ownership of the surface (along with the duty to pay taxes) and vested in the mineral owner the right to use the surface for almost any purpose, including strip mining, and later cases have found these deeds to be valid and regularly enforced them.⁴⁴ In one case, which found that the broad form deed included the right to strip mine, the dissenting judge pointed out that "strip mining was neither heard of nor dreamed of in 1905 in Knott County ... about the only coal mined in those days was from the out-croppings in creek beds, where a small quantity was obtained by the use of a newfound tool, the coal pick."⁴⁵ Some of these broad form deeds were in excess of two pages long of dense legalese and difficult to read and understand.⁴⁶ Though the courts and the common law found these broad form deeds completely enforceable, including the right to destroy the surface without any compensation to the surface owner, states such as Kentucky have recently passed surface damage statutes which require compensation for surface damage, which the courts have found applies even in the broad form deed setting.⁴⁷

⁴² Caudill at 71.

⁴³ *Id* at 75.

⁴⁴ In *Buchanan v. Watson*, 290 S.W.2d 40 (Ky. 1956) (the court held squarely that under the broad form deed coal may be removed by strip mining without any obligation to pay damages except for those caused by oppressive, arbitrary, wanton, or malicious action).

⁴⁵ *Martin v. Kentucky Oak Min. Co.*, 429 S.W.2d 395, 401 (Ky. 1968).

⁴⁶ *Watson v. Kenlick Coal Co., Inc.*, 498 F.2d 1183, 1185 -1186 (C.A.Ky. 1974) (the common reservation or deed of minerals at the time was only one or two sentences in length, and as this court pointed out these two page deeds were very difficult for a lay person to read and understand).

⁴⁷ *Taylor v. Coal-Mac Inc.*, 864 S.W.2d 302 (Ky.App. 1992) (“broad form deed no longer gives the mineral estate owner complete control of the surface”).

By the beginning of the 20th century, not only was the private sale, transfer, or reservation of the mineral estate on the rise, but federal and state governments also started reserving minerals from the sale of public lands.⁴⁸ Through a series of coal, mineral, and Homestead Acts, which were passed by Congress between 1909 and 1920, the United States Government started reserving minerals from the sale or transfer of federal lands.⁴⁹ As a result of these acts the Federal Government quickly became the largest single owner of severed mineral rights in the United States.⁵⁰

As the number of severed estates grew, litigation, and the body of law surrounding the severed estate also expanded. Since the civil war there are hundreds, if not thousands of cases among the various states, creating a large and not always consistent body of common law governing the mineral owner's right to use the surface and obligation to pay for damages to the surface owner.

III. THE ORIGINS OF THE COMMON LAW REGARDING SURFACE DAMAGE AND SURFACE USE

A. English Contribution to the Common Law Regarding Surface Use and Damage

⁴⁸ For example of state reservation of minerals *see* MCA § 77-2-304 ("all coal, oil, oil shale, gas, phosphate, sodium, and other mineral deposits in state land, except sand, gravel, building stone, and brick clay, which were not reserved by the United States before July 1, 1927, are reserved to the state."); *Also See* 30 U.S.C. § 81 (Coal Lands Act of March 3, 1909); 30 U.S.C. § 83-85 (Coal Lands Act of June 22, 1910); 30 U.S.C. § 121-23 (Agricultural Entry Act of July 17, 1914); 1916, 43 U.S.C. § 291-301 (Stock-Raising Homestead Act of Dec. 29); 30 U.S.C. § 181-263 (Mineral Lands Leasing Act of Feb. 25, 1920).

⁴⁹ *Id.*

⁵⁰ The BLM, in 2007, reported that 700 Million Acres of land were under its management and control which constitutes 13% of the United States total acreage.
http://www.blm.gov/wo/st/en/info/About_BLM.2.html

Although the concept of owning minerals in the ground before they were discovered was an ancient concept, in England the Royal Mines were the exception and not the rule, and only applied to silver and gold, and not to iron, coal, or any other substance.⁵¹

The English common law held that the owner of the surface owned all that was below the surface to the center of the earth and all that was above the surface to the heavens.⁵² Because of the old English land rules of livery of seisin, except where a mine was already open, it was impossible to give away an interest in unknown minerals beneath the surface.⁵³ Severance however, was allowed and often done where the mine was already open, and as a result there are a number of early English cases involving disputes between the surface owner and the mineral owner (however, the facts of these cases are often not clear the basic essence of the cases can be determined).⁵⁴ These cases show that the split estate, and the resulting conflicts from surface use and damage existed in England as early as the 1600's.⁵⁵

⁵¹ *Queen Elizabeth v. The Earl of Northumberland; The Case of Mines*, 75 Eng. Rep. 472 (Exch. Div. 1567).

⁵² 2 William Blackstone, *Commentaries on the Laws of England*, at 18 (1765–1769) (“downwards, whatever is in a direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface”).

⁵³ Thomas F. Bergin & Paul G. Haskell, *Preface to Estates In Land and Future Interests* 11 (2d ed. 1984) (adopting the proposition that livery required the actual delivery of a piece of the property being transferred, normally a clump of dirt); see also *Speed v. Buford*, 6 Ky. 57, 59 (Ky. 1813) (describing the requirements of seisin); *Caldwell v. Fulton*, 31 Pa. 475, 483 (Pa. 1858) (discussing the difficulty of conceiving a physical interest in an unopened mine separate from ownership of the surface under English Common Law, because livery of seisin was inseparable from a conveyance of land, and livery could not be made of an unopened mine).

⁵⁴ *Wilkes v. Broadbent*, 95 Eng. Rep. 494 (1744); *Hodgson v. Field*, 103 Eng. Rep. 238 (1806); *The Earl of Cardigan v. Armitage*, 107 Eng. Rep. 356 (1823); *Harris v. Ryding*, 151 Eng. Rep. 27 (1839); *Dand v. Kingscote*, 151 Eng. Rep. 370 (1840).

⁵⁵ *The Earl of Cardigan v. Armitage*, 107 Eng. Rep. 356 (1823) (regarding the reservation of a coal mine made in 1649).

The first of these cases was, *The Earl of Cardigan v. Armitage*, involving the right of the mineral owner to use the surface in a way that interfered with the surface owner's use.⁵⁶ The surface owner brought an action against a coal miner who disrupted the surface owner's use by placing "rubbish" on the land.⁵⁷ The miner's defense was that his actions were the customary practice by miners at the time.⁵⁸ The court found the customary practice unreasonable, and even though the miner had the right to access and work his mine, he needed to do so without unreasonable interference with the surface tenant's use of the land.⁵⁹

In *The Earl of Cardigan v. Armitage*, regarding a reservation of a coal mine in 1649, the court found that a reservation of coal necessarily included the right to use the surface as needed "to get the coals, and to do all things necessary, to obtain the coal and convenient working of the coal."⁶⁰ However the court limited the right to use the surface to include only that which was "strictly necessary for the convenient working of the coals."⁶¹

In another case, *Harris v. Ryding*, the court found that the mineral right should be exercised "consistent with the enjoyment of the surface" and that the mineral owner did not have the right to destroy the surface.⁶² The court required the miner to make a fair compensation to the surface owner for damages done to the surface and the planted crops.⁶³ The court quoted a famous maxim that "he is to use his own property so as to not to injure his neighbor."⁶⁴

⁵⁶ *Wilkes v. Broadbent*, 95 Eng. Rep. 494 (1744).

⁵⁷ *Wilkes v. Broadbent*, 95 Eng. Rep. 494 (1744).

⁵⁸ *Id.*

⁵⁹ *Id.* at 495.

⁶⁰ *The Earl of Cardigan v. Armitage*, 107 Eng. Rep. 356 (1823).

⁶¹ *Id.*

⁶² *Harris v. Ryding*, 151 Eng. Rep. 27, 31 (1839).

⁶³ *Id.*

⁶⁴ *Id.* at 32.

Dand v. Kingscote involved the wording of a 1630 reservation of coal mine, where the language of the reservation lacked a clear right of access.⁶⁵ The court found that there was an implied right of access in every reservation of minerals and stated that the reservation of minerals “reserved all things that are dependent on that right and necessary for the obtaining it.”⁶⁶ The court found that this included the right to construct a railroad, dig ditches, build buildings, and build fences.⁶⁷ However, the court also found that some of the construction by the mineral developer was in excess of what was necessary for the extraction of the materials and the mineral developer was liable to the surface owner for any excessive use of the surface.⁶⁸

As can be seen from these cases, the right of the mineral owner to use as much of the surface as is necessary under the circumstances, with liability only stemming from excessive or negligent use, dates back to some of the earliest English cases on the subject.

B. Early U.S. Common Law Regarding Surface Use and damage

Two of the only cases regarding the rights of mineral owners prior to 1875 were the Texas case of *Cowan v. Hardeman*⁶⁹ in 1862 and the New York case of *Marvin v. Brewster Iron Mining*⁷⁰ in 1874. The Texas Court recognized that “it is a well established doctrine from the earliest days of the common law, that the right to the minerals thus reserved carries with it the right to enter, dig and carry them away, and all other such incidents thereto as are necessary to be used for getting and enjoying them.”⁷¹ The court cited to early English cases and to Spanish and

⁶⁵ *Dand v. Kingscote*, 151 Eng. Rep. 370 (1840).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Cowan v. Hardeman*, 26 Tex. 217, (Tex. 1862).

⁷⁰ *Marvin v. Brewster Iron Min. Co.*, 55 N.Y. 538 (1874).

⁷¹ *Cowan*, 26 Tex. at 217.

Mexican law as the precedent for this statement, substantiating that both countries played an important role in the formation of our common law governing the split estate.⁷²

The New York Court, in deciding if the surface owner was entitled to damages for the use of the surface by the mineral owner, stated that the historical test of how much surface the mineral owner was allowed to use for mineral extraction was whether it was "necessary to be done for the reasonable profitable enjoyment of the minerals."⁷³ This court also found that the right to mine and remove the minerals was implied where not expressly given in the grant, as a "necessary incident" to the enjoyment of the estate, stating that "It is an old rule, that, when anything is granted, all the means of attaining it, and all the fruits and effects of it are also granted."⁷⁴ This court also relied heavily on the early English cases as the precedent for its decision.⁷⁵

By the turn of the twentieth century it was clear that the severed estate was a permanent fixture in the American landscape. The common law from England had been adopted by a number of courts which gave the mineral owner a dominant, easement like, right to access his estate and limited liability for surface damage to excessive or negligent use.⁷⁶ As the number of cases and the types of issues the courts had to decide grew, the common law expanded and began to change from state to state.

IV. DEVELOPMENT OF AND CHANGES TO THE COMMON LAW

Although the common law developed somewhat differently in each state, by the 1950's there were four basic principles that were accepted by almost every court that dealt with surface

⁷² *Id.*

⁷³ *Marvin*, 55 N.Y.at 549-50.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *See Marvin v. Brewster Iron Min. Co.*, 55 N.Y. 538, 553 (1874) (compared the right of access to an easement of necessity).

damage and surface use cases. These common law rules will be discussed in turn and included the following: (1) the mineral estate is the dominant estate, (2) the mineral estate has the right to access minerals and use as much of the surface as reasonably necessary to extract and carry away the minerals, (3) the mineral owner does not have the right to destroy the surface unless that right was expressly granted in the conveyance, (4) the mineral owner was only liable to the surface owner for damages to growing crops and existing structures, but not for any other damages to the surface resulting from “reasonably necessary” surface activity.

A. The Dominant Estate

One of the first doctrines generally accepted at common law was that the mineral estate was the dominant estate.⁷⁷ The term dominant estate was borrowed from easement law by the early U.S. cases and referred to the dominant right of the mineral owner to access and use the property for the limited purpose defined in the grant.⁷⁸ Like the early case of *Chartiers Block Coal v. Mellon*, decided in 1893, almost all early cases uniformly recognized that the mineral estate was the dominant estate and the surface estate was the servient estate.⁷⁹ Even the Supreme Court when addressing this issue on federal lands found that treating the surface as the servient estate made sense, given the estates “physical location and relative values,” and recognized this as being good public policy.⁸⁰ One court stated that “coal, oil, gas, and iron are absolutely essential to our common comfort and prosperity. To place them beyond the reach of the public would be a great public wrong... the question we are considering becomes of a quasi public character. It is not to be treated as a mere contest between A. and B. over a little corner of

⁷⁷ *Chartiers Block Coal v. Mellon*, 25 Atl. 597 (S.Ct. Pa. 1893).

⁷⁸ *Marvin v. Brewster Iron Min. Co.*, 55 N.Y. 538, 553 (1874); *U.S. v. Stearns Co.*, 873 F.2d 134 (6th cir. 1984); *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488 (1927).

⁷⁹ *Id.*; *Chartiers Block Coal v. Mellon*, 25 Atl. 597 (S.Ct. Pa. 1893).

⁸⁰ *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 504 (1927).

earth.”⁸¹ Other courts have acknowledged that the dominance of the mineral estate puts our nation’s natural resources in the hands of those best able to develop them, and that the ”trifling inconveniences” of individual surface owners “must sometimes give way to the necessities of a great community.”⁸²

B. The Right to Access and Use the Surface

1. Access

By recognizing the mineral estate as the dominant estate the courts gave the mineral estate an unquestioned right to access the minerals. As one court noted “a grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved.”⁸³ This fundamental right of mineral ownership is one of the oldest and most accepted rights at common law, and even the 1567 “Case of Mines” and other early English cases recognized that the right to access is a fundamental right of mineral ownership.⁸⁴ Courts have often found that regardless of whether there is express language in the granting document there is an implied right to access the minerals.⁸⁵ However, some courts have found where no right of access was expressly included,

⁸¹ *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 297-298, 25 A. 597, 599 (Pa.1893)

⁸² *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 149, 6 A. 453, 459 (Pa.1886)

⁸³ *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302, 305 (1944).

⁸⁴ *Dand v. Kingscote*, 151 Eng. Rep. 370 (1840); *Queen Elizabeth v. The Earl of Northumberland; The Case of Mines*, 75 Eng. Rep. 472 (Exch. Div. 1567).

⁸⁵ *Armstrong v. Maryland Coal Co.*, 67 W.Va. 589, 69 S.E. 195, 203 (W.Va. 1910) (this case stated that “it is a general rule of law that, when anything is granted, all the means of attaining it and all the fruits and effects of it are also granted”; when uncontrolled by express words of restriction all the powers pass which the law considers to be incident to the grant for the full and necessary enjoyment of it. Consequently a grant or reservation of mines, gives the right to work them, to enter and to mine, unless the language of the grant itself provides otherwise or repels this construction. And this right is so inseparable from a grant of minerals, that not only is it necessarily an implied incident thereof, but it and its derived rights cannot be restrained or excluded by a special affirmative power to do other acts, or by a grant of other privileges

access is available based on an easement by necessity, and only necessary, and not “merely convenient” access will be permitted.⁸⁶ The prevailing principal is that a property interest in minerals includes a reasonable right of access while recognizing the surface owner’s use and interest in the property by avoiding unnecessary and excessive damage to the surface.⁸⁷

2. Use of Surface

The common law rights to access and use can be either broadened or restricted by express language in the deed or reservation.⁸⁸ Courts are inclined to enforce the express wording of the agreement, and where the wording is unclear to look to the intent of the parties.⁸⁹

Although the common law includes the right to access the minerals by any means necessary, the right to destroy the surface is not normally included and most courts have found that the mineral owner does not have a right to destroy the surface.⁹⁰ An early case on the subject summarized what later became the accepted rule on the destruction of the surface, stating that the mineral owner must “always respect the surface rights of support and [mineral ownership] will not, standing alone, permit the surface to be destroyed without some additional statutory or

necessary or convenient to the working of mines.”); *see also Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702; *Barker v. Mintz*, 73 Colo. 262, 215 P. 534 (1923).

⁸⁶ *Eastern Gas & Fuel Associates v. Kalp*, 37 Pa. D. & C.2d 466, 469 (1965) (“a mining right of necessity will be implied only when an absolute necessity or its equivalent is shown to exist in order to give effect to a grant or reservation”).

⁸⁷ *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 295, 25 A. 597, 598 (Pa. 1893) (“The mining of coal and other minerals is constantly developing new questions. Formerly a man who owned the surface owned it to the center of the earth. Now the surface of the land may be separated from the different strata underneath it, and there may be as many different owners as there are strata” each must have “due regard for the interest and rights” of all other interest owners).

⁸⁸ *Franklin v. Calliccoat*, 53 Ohio 240, 119 N.E.2d 688 (1954); *Rochez Bros., Inc. v. Duricka*, 374 Pa. 262, 97 A.2d 825 (1953).

⁸⁹ *United States v. 1,253.14 Acres of Land*, 455 F.2d 1177 (10th Cir. 1972).

⁹⁰ *Commonwealth v. Fisher*, 364 Pa. 422, 72 A.2d 568 (1950).

contract authority.”⁹¹ However, this court recognized that the granting or reservation of the minerals includes an easement to use the surface as is reasonably necessary to both extract the minerals, and transport them, including water access, shafts, excavation, roads, railroads, and even the construction and use of needed buildings if used solely for mining purposes.⁹² Many courts have found that there can be no implied right to destroy the surface, the express language of a particular severance deed must provide for or allow the destruction of the surface estate in clear and unequivocal terms.⁹³ However, some courts have found the right to be implicit in the reservation where surface destruction is the only method of extracting the minerals.⁹⁴

A few courts have found that there is a common law right to destroy the surface based on a number of different factors.⁹⁵ These factors including; the customs and practices at the time

⁹¹ *Ericson v. Michigan Land and Iron*, 16 N.W. 161, 163 (Michigan 1883) (“mere reservation of minerals...must always respect surface rights of support, and will not, standing alone, permit the surface to be destroyed without some additional statutory or contract authority, and that such statute or contract authority will be construed carefully to prevent the destruction of surface rights”); *Catron v. South Butte Mining Co.*, 181 F. 941 (9th Cir. 1910) (“When the surface of the land is owned by one, and the mineral beneath, with the right to extract the same, is owned by another, it is immaterial whether the two interests have been created by a conveyance of the surface with a reservation of the mineral, or by a grant of the mineral with a reservation of the surface. ... [the owner of the mineral right is bound to protect the surface,] unless the right to [destroy the surface] has been expressed in terms so plain as to admit of no doubt.”).

⁹² *Ericson*, 16 N.W. at 161-162.

⁹³ *Smith v. Moore*, 172 Colo. 440, 474 P.2d 794, 796 (1970).

⁹⁴ *MacDonnell v. Capital Co.*, 130 F.2d 311 (9th Cir.) (held that a reservation of the mineral estate includes, by implication, the right to remove the minerals by the usual or customary methods of mining even though the surface may be wholly destroyed as a result thereof); see also *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972) (the owner of the mineral estate has the implied right to damage or destroy the surface if the mineral owner's activities are reasonably necessary to effectuate the purposes of the mineral grant, having due regard for the rights of the owner of the surface estate); *Barker v. Mintz*, 73 Colo. 262, 215 P. 534 (1923) (“right to use the surface does not embrace the right to consume or destroy the same”); *Commonwealth v. Fisher*, 364 Pa. 422, 72 A.2d 568 (1950); *Continental Coal Co. v. Connellsville By-Product Coal Co.*, 104 W.Va. 44, 138 S.E. 737 (1927).

⁹⁵ *Stewart v. Chernicky*, 439 Pa. 43, 266 A.2d 259 (1970); *Chicago, Wilmington & Franklin Coal Co. v. Minier*, 40 F. Supp. 316 (E.D. Ill. 1941).

and in the local that the mineral rights were granted,⁹⁶ the amount paid for the mineral rights,⁹⁷ the location of the minerals in relation to the surface,⁹⁸ the available techniques for extraction of the granted minerals,⁹⁹ and the relative cost of each of these techniques and amount of damage caused by each.¹⁰⁰

C. Obligations to Pay for Surface Damages

In a number of early cases the courts stated that the mineral owner as the dominant estate has the right to use the surface in any manner reasonably necessary for the enjoyment of the minerals.¹⁰¹ Some courts added the statement that such surface use must be done with due regard for the rights of the surface owner.¹⁰² This “due regard” language in these early cases is not to be confused with the accommodation doctrine as discussed below, and it simply requires the mineral owner to take the surface owner’s uses into consideration by avoiding excessive and unnecessary uses or damage of the surface.¹⁰³ The end result of the common law was that unless the use of the surface was negligent or excessive, the mineral owner was only liable to the surface owner for damage to growing crops or improvements on the land.¹⁰⁴

⁹⁶ *Sinclair Prairie Oil Co. v. Perry*, 191 S.W.2d 484, 486 (Tex. Civ. App. 1945).

⁹⁷ *Martin v. Kentucky Oak Min. Co.*, 429 S.W.2d 395, 398 (Ky. 1968).

⁹⁸ *Acker v. Guinn*, 464 S.W.2d 348, 352-53 (Tex. 1971).

⁹⁹ *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622-23 (Tex. 1971).

¹⁰⁰ *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972).

¹⁰¹ *Cowan v. Hardeman*, 26 Tex. 217, (Tex. 1862); *Marvin v. Brewster Iron Min. Co.*, 55 N.Y. 538 (1874).

¹⁰² *Id*; see also *Wilkes v. Broadbent*, 95 Eng. Rep. 494 (1744)

¹⁰³ *Id*; *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 295, 25 A. 597, 598 (Pa. 1893).

¹⁰⁴ *Holbrook v. Continental Oil Co.*, 73 Wyo. 321, 337, 278 P.2d 798, 804 (Wyo.1955) (“In the absence of proof of negligent mining operations, . . . the surface owners, the plaintiffs, can recover only for damages to agricultural improvements or agricultural crops”); *Reno Livestock Corp. v. Sun Oil Co.*, 638 P.2d 147, 151 (Wyo., 1981) (recognizing that recovery was available for “damages for crops, tangible improvements, use of more of the surface than needed and negligence”).

The Supreme Court also recognized that the mineral developer of federal minerals had the right to use as much of the surface as was reasonably necessary for prospecting, mining, and removal of minerals, and that the surface owner could continue to use the surface as long as their use was compatible with that of the mineral owners.¹⁰⁵ This court also recognized that the mineral lessee only had the responsibility to pay for damages to crops and tangible improvements and unreasonable or negligent activity.¹⁰⁶

V. THE EROSION OF THE COMMON LAW DOMINANCE OF THE MINERAL ESTATE.

While most states today still hold to the common law doctrine of mineral estate dominance,¹⁰⁷ most of the states that have an appreciable quantity of minerals have started to chip away at the dominance of the mineral estate and the common law rules of liability.¹⁰⁸ These states have modified the common law by either judicial adoption of the accommodation doctrine, or by passing “surface damage statutes”.¹⁰⁹ Some of the legislatures have acknowledged that the purpose of these statutes is to put the two estates on equal footing, no longer recognizing the dominance of one estate over the other.¹¹⁰ A few recent court cases have recognized that the two estates are equal and need to work together and respect each other’s property rights, and one

¹⁰⁵ *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 504 (1927)

¹⁰⁶ *Id.*

¹⁰⁷ Mississippi is one state that still adheres to the common law. *See Chevron USA Inc. v. State*, 578 So. 2d 644, 665 (Miss. 1991); *EOG Resources, Inc. v. Turner*, 908 So. 2d 848 (Miss. Ct. App. 2005).

¹⁰⁸ *See infra* note 125 and 134 to see a list of states that have either accepted the accommodation doctrine or passed surface damage statutes.

¹⁰⁹ *Id.*

¹¹⁰ *Ranken Energy Corp. v. DKMT Co.*, 190 P.3d 1174, (Okla.Civ.App. Div. 3, 2008) (“The purpose of the Act was to balance the interests of the oil and gas industry and the agricultural industry.” “The passage of the surface damages act guarantees that the development of one industry is not undertaken at the expense of another.”)

court stated that “it cannot be said that the surface of the land constitutes a less vital resource to the State of Oklahoma than does the mineral wealth which underlies it.”¹¹¹

A. Accommodation Doctrine

In the 1960’s and 70’s, beginning with the *Getty Oil Co. v. Royal*, and *Getty Oil Co. v. Jones* the level of dominance of the mineral estate began to be called into question.¹¹² In the first *Getty Oil* case the surface owner built a fence around his property, including gates across the access roads used by Getty Oil to service their oil wells.¹¹³ The court found that while the gates did interfere with the use of Getty Oil, it did not “constitute an unreasonable interference”.¹¹⁴ The court inferred that there needed to be a balancing between allowing the surface owner to use the surface in the manner he sees fit and the mineral owners rights, as the dominant estate, to not be hindered in his reasonable use of the surface.¹¹⁵ The concept that the surface owner could interfere, as long as that interference was reasonable, was a new one, and went beyond the minimal consideration for surface owner’s use as required by the common law.¹¹⁶

The second *Getty Oil* case went one step further.¹¹⁷ This case involved a farmer Jones, who was precluded from using his existing irrigation system due to the height of the pumps used by Getty Oil.¹¹⁸ These pumps were in excess of twenty feet high and Jones showed that there were shorter pumps (which could be place in the ground) available to Getty Oil which would allow Getty Oil sufficient access to the minerals while allowing Jones to irrigate his farm

¹¹¹ *Davis Oil Company v. Cloud*, 766 P.2d 1347, 1351(Ok. 1986);

¹¹² *Getty Oil Co. v. Royal*, 422 S.W.2d 591 (Tex.Civ.App.1967); *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (S.Ct. Tex. 1971).

¹¹³ *Getty Oil Co. v. Royal*, 422 S.W.2d at 592.

¹¹⁴ *Id* at 593.

¹¹⁵ *Id*.

¹¹⁶ *Cowan v. Hardeman*, 26 Tex. 217, (Tex. 1862); *Marvin v. Brewster Iron Min. Co.*, 55 N.Y. 538 (1874).

¹¹⁷ *Getty Oil Co. v. Jones*, 470 S.W.2d at 620-621.

¹¹⁸ *Id* at 620-621.

lands.¹¹⁹ The court found that Getty Oil had an affirmative duty to accommodate Jones' surface use, even though the shorter pumps were more expensive to install and maintain.¹²⁰ The Getty Oil case did not require a balancing of interest, the court only required that the surface owner show that the use of the surface by the mineral developer interfered with a current use of the surface and that there were reasonable alternatives available to the mineral owner.¹²¹ The mineral owner could rebut by either showing that the alternatives were unreasonable under the circumstances or that the surface owner suffered no inconvenience.¹²²

One year later, Texas again affirmed the "accommodation doctrine" which required that mineral owners use available alternatives for accessing the minerals as long as three requirements were met: (1) there was an existing use of the surface, (2) that use would be precluded or impaired by the mineral owners use, (3) the mineral owner has reasonable available alternatives.¹²³

In a very recent decision the Texas court took the accommodation doctrine one step further, requiring a company to move its drill site some distance from their desired location in order to accommodate the surface owners existing use, even though this required them to use directional drilling techniques to reach the desired location, at a considerable extra cost to the oil company.¹²⁴

¹¹⁹ *Id.*

¹²⁰ *Id* at 622.

¹²¹ *Id* at 623.

¹²² *Id.*

¹²³ *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 812 (Tex. Jun 28, 1972) (this court found that transporting water to the site, as opposed to using the farmers existing water supply, was not a reasonable alternative).

¹²⁴ *Valence Operating Co. v. Texas Genco, LP.*, 255 S.W.3d 210 (Tex.App.-Waco 2008); See also *Valence Operating Co. v. Texas Genco, LP.*, 187 S.W.3d 354 (Tex.App.-Waco 2006).

The accommodation doctrine has been adopted by the judiciary of many other states including Arkansas, Utah, North Dakota, West Virginia, New Mexico, Alaska, Wyoming, and Colorado.¹²⁵ A few of these states have since passed surface damage statutes, which can offer greater protection than that offered by the accommodation doctrine.

The accommodation doctrine has a number of slight variations among the states. For example, in the *Diamond Shamrock Corp. v. Phillips* decision, Arkansas extended the accommodation doctrine from protecting only existing uses to protecting a surface owner's proposed surface uses,¹²⁶ and in *Gerrity Oil & Gas Corp. v. Magness* the Colorado court decided to place the burden on the mineral owner to prove the reasonableness of surface use instead of the surface owner.¹²⁷

B. State Surface Damage Statutes

Just a few years after the Texas court adopted the accommodation doctrine other states began to pass “surface damage statutes”.¹²⁸ North Dakota is often accredited as being the first to pass a surface damage statute, however, Indiana in 1951 was really the first state to pass a surface damage statute.¹²⁹ Even prior to the Indiana statute, the federal government had put language in the 1916 Homestead Act, which required mineral owners to compensate surface owners for damage caused directly to crops, improvements, and land.¹³⁰ Both the Indiana statute

¹²⁵ *Diamond Shamrock Corp. v. Phillips*, 511 S.W.2d 160, 163-64 (Ark. 1974); *Flying Diamond Corp. v. Rust*, 551 P.2d 509, 511 (Utah 1976); *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 134-35 (N.D.1979); *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 726 n.4 (W. Va. 1980); *Amoco Prod. Co. v. Carter Farms Co.*, 703 P.2d 894, 896-97 (N.M. 1985); *Norcken Corp. v. McGahan*, 823 P.2d 622, 627-28 (Alaska 1991); *Mingo Oil Producers v. Kamp Cattle Corp.*, 776 P.2d 736 (Wyo. 1989); *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 927 (Colo. 1997).

¹²⁶ *Diamond Shamrock Corp. v. Phillips*, 511 S.W.2d 160 (Ark. 1974)

¹²⁷ *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 927 (Colo. 1997)

¹²⁸ North Dakota Century Code § 38-11.1-01 to 10 was passed in 1978.

¹²⁹ Indiana Code Annotated § 32-23-7-8.

¹³⁰ Stock-Raising Homestead Act of Dec. 29, 1916, 43 U.S.C. § 291-301.

and the U.S. Act were hardly more than a codification of the generally recognized common law at the time, and offered far less protection to land owners than the subsequent accommodation doctrine.

So, North Dakota really was the first state to pass a surface damage statute with any teeth, which provided model legislation for a number of other states who followed suit. Before the North Dakota statute was passed, the common law in that state was that mineral owners must compensate the surface owner for damage to the land only when negligent or acting outside the scope of the mineral reservation.¹³¹ The North Dakota statute replaced the states common law requirement with one of strict liability for all damage caused to the surface estate.¹³² Since North Dakota passed the first surface damage statute, at least fifteen other states now have statutes in some form, including Indiana, Kentucky, Montana, West Virginia, Tennessee, Wyoming, South Dakota, Pennsylvania, Oklahoma, Illinois, Alaska, New Mexico, Colorado, Arkansas, and Texas.¹³³

These statutes offer the surface owner a wide range of protections, some have written large sections of code to address the problem while others have only a few paragraphs tucked away inside another provision.¹³⁴ For the sake of analysis, I have grouped the state statutes into

¹³¹ North Dakota law subjected mineral developers to at least a duty of reasonableness regarding their treatment of the surface estate, and made them liable to the surface owner for damages resulting from negligence. *See Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 134-35 (N.D.1979); *Feland v. Placid Oil Co.*, 171 N.W.2d 829, 834-35 (N.D.1969).

¹³² *Murphy v. Amoco Production Co.*, 729 F.2d 552, 557 (C.A.N.D. 1984).

¹³³ The Texas and Arkansas statutes are quite limited in scope and will not be discussed in this paper, the Texas statute only applies to public school owned land and residential subdivided lands while the Arkansas statute does not define the mineral owners liability but gives the surface owner a lien in mineral developers equipment as a means for collecting damages. Texas Natural Resources Code § 52.297, "Qualified Residential Subdivision Act, and § 53.155 "Compensation for Damages for Use of Surface"; Arkansas Code Annotated § 15-72-214 & 219.

¹³⁴ Alaska Administrative Code. 83.158. "Plan of Operations"; Alaska Statute 38 Public Land, Chapter 5, Alaska Land Act, Section 130 "Damages and Post of Bond"; Illinois Compiled

four groups, (1) the minimalists, who have done little more than codify the common law, (2) the group of states that modeled their statutes after North Dakota, (3) Oklahoma, Pennsylvania, and Alaska, and (4) the new comers, Wyoming, New Mexico, and Colorado, who have passed surface damage statutes within the past 3 years.

1. The Minimalists, Indiana, Kentucky, Illinois, and the Federal Government.

As noted above the Federal Government and Indiana were the first to address protections for the surface owner in statute.¹³⁵ Although the BLM through Onshore Order No. 1 and the Indiana code have both enhanced their requirements from their inception, they still represent a minimalistic approach to surface damage protection.

While these four statutes do have a number of differences, they are very similar with regards to mineral developer liability for surface damage.¹³⁶ These four statutes maintain that the mineral developer is only liable for damages to “growing crops” and damages to tangible improvements on the land.¹³⁷ They also hold the developer liable for unreasonable or negligent use of the surface.¹³⁸ As can be seen, these statutes offer the same minimal protection that the

Statutes. Chapter 765. Property. § 530. "Drilling Operations Act"; Montana Code Annotated . 82-10, Part 5. "Surface Owner Damage and Disruption Compensation"; North Dakota Century Code § 38-11.1-01 to 10. "Oil and Gas Production Damage Compensation"; Oklahoma Statutes § 52 4-318.1 to 318.9; Pennsylvania Statutes and Consolidated Statutes Annotated. Title 58. Oil and Gas. Chapter 11. Oil and Gas Act. Section. 601.401. "Appropriation of interest in real property"; South Dakota Statutes § 45-5A-1 to 11. "Compensation For Damages From Mining, Oil and Gas Development"; Tennessee Code Annotated . § 60-1-601 to 608; Texas Natural Resources Code. § 52.297 and 53.155. "Compensation for Damages for Use of Surface"; Wyoming Statutes 30-5-401 through 30-5-410. Wyoming Surface Owner Accommodation Act; New Mexico Statutes Annotated § 70-12-1. "The Surface Owners Protection Act"; Colorado Revised Statutes Annotated § 34-60-127. "Reasonable Accommodation" Act.

¹³⁵ Onshore order 1, 43 C.F.R. § 3160; Indiana Code Annotated § 32-23-7-8.

¹³⁶ Onshore order 1, 43 C.F.R. § 3160; Indiana Code Annotated § 32-23-7-6; Illinois Compiled Statutes. Chapter 765. Property. § 530/6. "Drilling Operations Act"; Kentucky Revised Statutes Annotated § 353.595(5).

¹³⁷ *Id.*

¹³⁸ *Id.*

common law offers. Except for Indiana, these statutes do afford the surface owner additional protections such as notice requirements and damage negotiations which were not available at common law.¹³⁹

The Indiana statute is silent as to notice.¹⁴⁰ Under the common law the dominant mineral estate had the right to access the surface without any notice to the surface owner. However, some courts have found an affirmative duty to give notice in the common law in certain situations.¹⁴¹ The Indiana statute is also one of the only state statutes that is silent about negotiation or dispute resolution requirements, and while the statute addresses damages, it limits them to actual damages and no punitive, and the code is silent on how to calculate the damages.¹⁴²

The Federal code, though only codifying the common law liabilities, encourages the mineral developer to reach a settlement agreement before they drill.¹⁴³ The developer must demonstrate that an attempt to reach an agreement with the surface owner was made in good faith before the BLM will authorize surface use.¹⁴⁴ If there was a good faith attempt to negotiate, but no agreement was reached, the developer is required to post a bond to cover any reasonable and foreseeable damages to crops, livestock, or surface improvements, along with another bond to ensure plugging and cleanup after the drill.¹⁴⁵

¹³⁹ Onshore order 1, 43 C.F.R. § 3160; Illinois Compiled Statutes. Chapter 765. Property. § 530/6. "Drilling Operations Act"; Kentucky Revised Statutes Annotated § 353.595(5).

¹⁴⁰ Indiana Code Annotated § 32-23-7-6

¹⁴¹ *Hamon v. Gardner*, 315 P.2d 669 (Okl. 1957) (court found a duty to give notice before entry where cattle were grazing openly on the land).

¹⁴² Indiana Code Annotated § 32-23-7-6

¹⁴³ Onshore order 1, 43 C.F.R. § 3160

¹⁴⁴ Onshore order 1, 43 C.F.R. § 3160

¹⁴⁵ Onshore order 1, 43 C.F.R. § 3160; 43 C.F.R. § 3114; 43 C.F.R. §3104.

Kentucky and Illinois have almost identical statutes which offer minimal liability for damages but offer some protections not afforded by the common law.¹⁴⁶ Both statutes provide for 10 day notice before entry to drill but no notice is required before entry for other purposes.¹⁴⁷ They also require the developer to offer to meet with and “discuss” their intended surface activities and allow input from the surface owner.¹⁴⁸ However, nothing in the statutes requires the developer to comply with the wishes of the surface owner. There is also a requirement to negotiate damages with the surface owner and to make the surface owner a reasonable offer for damages.¹⁴⁹ The statute has a built in incentive for the mineral developer’s to offer adequate or above adequate damages, because if a court later finds that the offer was not reasonable the surface owner may be entitled to additional compensation and attorney’s fees.¹⁵⁰

Not only do these states offer the minimum protection of the common law, none of these states have embraced the accommodation doctrine either, and the courts in these states have been reluctant to take any action which would limit the mineral owners rights under the common law.¹⁵¹

2. North Dakota and its Progeny, South Dakota, Montana, Tennessee, and West Virginia.

¹⁴⁶ Illinois Compiled Statutes. Chapter 765.530/6; Kentucky Revised Statutes Ann. § 353.595(5).

¹⁴⁷ Illinois Compiled Statutes. Chapter 765.530/4; Kentucky Revised Statutes Ann. § 353.595(3)(c)-(e).

¹⁴⁸ Illinois Compiled Statutes. Chapter 765.530/4, 5, & 6; Kentucky Revised Statutes Ann. § 353.595(3), (4), & (6).

¹⁴⁹ *Id.*

¹⁵⁰ Illinois Compiled Statutes. Chapter 765.530/6; Kentucky Revised Statutes Ann. § 353.595(5), & (6).

¹⁵¹ Before the accommodation doctrine came about in Texas, Kentucky courts had developed a due regard requirement that provided for minimal accommodation of the surface owner in the case of *Lindsey v. Wilson*, 332 S.W.2d 641 (Ky. 1960).

The North Dakota statute served as a model for Montana, South Dakota, Tennessee, and West Virginia.¹⁵² These statutes afford considerably more protection to the surface owner than the common law offered. Beyond liability for damages to growing crops and other agricultural production and damage to tangible improvements (the common law liabilities), these statutes make the mineral developer strictly liable for (1) the lost land value resulting from the mineral developers activities, (2) the lost use or access to the surface, and (3) the disruption or diminution in quality and quantity of the surface owners water supply.¹⁵³ Except for the Tennessee statute these statutes also require notice to be given prior to any surface activities.¹⁵⁴ All of these statutes require the mineral developer and surface owner to negotiate damages and if no agreement is reached the mineral owner must submit an offer which takes into consideration the entire time of operations.¹⁵⁵ The surface owner can either accept or reject the offer and if rejected he can pursue an action in court.¹⁵⁶

¹⁵² North Dakota Century Code § 38-11.1-01 to 10. "Oil and Gas Production Damage Compensation"; Montana Code Annotated . 82-10, Part 5. "Surface Owner Damage and Disruption Compensation"; South Dakota Statutes § 45-5A-1 to 11. "Compensation For Damages From Mining, Oil and Gas Development"; Tennessee Code Annotated . § 60-1-601 to 608; West Virginia Code Ann. § 22-7-1. "Oil and Gas Production Compensation".

¹⁵³ North Dakota Century Code § 38-11.1-04 & 06. (North Dakota includes liability for water supplies of any property owner within half a mile of the developers operations); Montana Code Annotated . 82-10-504 & 505; South Dakota Statutes § 45-5A-4 & 6; Tennessee Code Annotated . § 60-1-604 & 608; West Virginia Code Ann. § 22-7-3 & 4.

¹⁵⁴ North Dakota Century Code § 38-11.1-05; Montana Code Annotated . 82-10-503; South Dakota Statutes § 45-5A-5; West Virginia Code Ann. § 22C-9-7.

¹⁵⁵ North Dakota Century Code § 38-11.1-04; Montana Code Annotated . 82-10-504 & 507; South Dakota Statutes § 45-5A-4 & 8; Tennessee Code Annotated . § 60-1-605; West Virginia Code Ann. § 22-7-3(a)(1) & 7.

¹⁵⁶ North Dakota Century Code § 38-11.1-09. (also under this section, if the offer is rejected and a larger amount is awarded by the court the surface owner is entitled to court costs and attorney fees); Montana Code Annotated . 82-10-507 & 508; South Dakota Statutes § 45-5A-8 & 9; Tennessee Code Annotated . § 60-1-606 & 607. (This section also has arbitration as an option); West Virginia Code Ann. § 22-7-7. (This section outlines a system where 3 disinterested arbitrators can determine compensation amount).

All five of the states have included a statement of purpose in the statute.¹⁵⁷ The statement of purpose in the North and South Dakota statute is “to provide the maximum amount of constitutionally permissible protection to surface owners and other persons from the undesirable effects of development of minerals.”¹⁵⁸ Tennessee and West Virginia adopted Montana’s statement of purpose which is “to allow oil and gas development to coexist with and have an equal right to use the surface as the surface owner” essentially dismissing the idea that one estate dominates the other.¹⁵⁹ These states also recognized the desire to compensate the surface owner for damages to the extent constitutionally permissible and recognized the importance and desirability of developing oil and gas reserves to the state’s economy.¹⁶⁰

While these statutes do offer more protection than the common law offers it may still not put the surface owner on equal footing with the mineral developer. Montana has recently commissioned a study which found that its statute did not place mineral owners and surface owners on equal footing and that further protection is needed for the surface owner in order for the state to achieve the stated statutory purpose.¹⁶¹ This commission is drafting a bill with proposed changes which will be considered by the state legislature.¹⁶² Also, while these statutes expand strict liability for damages beyond the common law, none of these statutes purports to codify the accommodation doctrine or require the mineral developer to use alternative means

¹⁵⁷ North Dakota Century Code § 38-11.1-02; Montana Code Annotated . 82-10-501; South Dakota Statutes § 45-5A-1;

¹⁵⁸ North Dakota Century Code § 38-11.1-02; South Dakota Statutes § 45-5A-1.

¹⁵⁹ Montana Code Annotated . 82-10-501; Tennessee Code Annotated . § 60-1-602; West Virginia Code Ann. § 22-7-1.

¹⁶⁰ *Id.*

¹⁶¹ See House Bill 790 at

<http://leg.mt.gov/css/Publications/environmental/2007hb790/hb790tofcfin.asp> last visited on Jan. 12, 2009.

¹⁶² *Id.*

where available, and of these five states only the judiciary of North Dakota has expressly adopted the accommodation doctrine.¹⁶³

3. Oklahoma, Pennsylvania, and Alaska

Oklahoma, Pennsylvania, and Alaska have some similarities to North Dakota and its progeny, yet have enough differences that they deserve to be addressed separately. These three statutes make the mineral developer strictly liable for all damages to the surface estate.¹⁶⁴ While the Alaska and Oklahoma code are not entirely clear as to what is included in the “all damages to the surface” language, Pennsylvania is very clear and includes a long list of requirements including liability for any pollution or diminution in water supply.¹⁶⁵

In Alaska, damages must be calculated and paid before beginning any operations on the property.¹⁶⁶ The mineral owner is also required to submit a plan of operations and a proposal for rehabilitation of the surface to the licensing commission which also helps resolve disputes over damage payments.¹⁶⁷ If the lands are state owned, an agreement between the surface owner and mineral developer is required, and in the event an agreement cannot be reached a bond in the amount determined by the environmental department director must be posted.¹⁶⁸

¹⁶³ *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 134-35 (N.D.1979).

¹⁶⁴ Alaska Administrative Code. Title 11 § 83.158. "Plan of Operations"; Alaska Statute 38 Public Land, Chapter 5, Alaska Land Act, Section 130 "Damages and Post of Bond"; Oklahoma Statutes § 52 4-318.1 to 318.9; Pennsylvania Statutes and Consolidated Statutes Annotated. Title 58. Oil and Gas. Chapter 11. Oil and Gas Act. Section. 601.201. "Appropriation of interest in real property";

¹⁶⁵ Alaska Administrative Code. 11 § 83.158; Alaska Statute 38.5.130; Oklahoma Statutes § 52 4-318.1; Pennsylvania Statutes 58-11 § 601.206; Pennsylvania Code § 25.78.51 & 65.

¹⁶⁶ Alaska Administrative Code. 11 § 83.158; Alaska Statute 38.5.130.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

Oklahoma is similar to Alaska in that the damages must be calculated before the mineral developer can enter the land.¹⁶⁹ If no agreement can be reached the Mineral Developer must petition the court for an appointment of appraisers who will independently determine the proper amount for damages.¹⁷⁰ The surface owner and the mineral developer each pick one appraiser while a third appraiser is chosen in some arbitrary manner.¹⁷¹ Each side must pay their own appraiser and one half the costs of the third appraiser.¹⁷² In addition, a \$25,000 bond must be placed with the secretary of state before commencing any surface activity.¹⁷³ Failure to complete the process before drilling or keep the required bond may result in treble damages.¹⁷⁴

Pennsylvania is somewhat different. Instead of money damages it specifically requires the restoration of land and water to pre-activity condition.¹⁷⁵ Before the mineral Developer can commence activity an agreement for damages must be reached with the surface owner and if no agreement can be reached the developer is required to post a bond before entering the land.¹⁷⁶ For certain activities, such as natural gas storage, the process is very similar to the Oklahoma process. If the surface owner feels the bond will not be adequate to cover damages the surface owner can petition the court to appoint three disinterested landowners (not appraisers) from the county to assess damages and submit a value to the court.¹⁷⁷ There is a separate process for the use of the surface owner's water supply.¹⁷⁸

¹⁶⁹ Oklahoma Statutes § 52 4-318.3 & 5.

¹⁷⁰ Oklahoma Statutes § 52 4-318.5.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Oklahoma Statutes § 52 4-318.4.

¹⁷⁴ Oklahoma Statutes § 52 4-318.5 & 9.

¹⁷⁵ Pennsylvania Statutes 58-11 § 601.206 & 401; Pennsylvania Code § 25.78.51 & 65.

¹⁷⁶ Pennsylvania Statutes 58-11 § 601.201; Pennsylvania Code § 25.78.51.

¹⁷⁷ Pennsylvania Statutes 58-11 § 601.401;

¹⁷⁸ Pennsylvania Statutes 58-11 § 601.501;

None of these three state statutes includes a statement of purpose. Oklahoma and Pennsylvania have detailed notice requirements.¹⁷⁹ Alaska did not include a notice requirement, however the requirement to make damage payments before commencing operations would necessitate notice in some form. While these statutes offer more protection to the surface owner than the common law they are somewhat vague as to what the mineral developer is actually liable for. The most notable difference in these statutes from the others is Oklahoma's 3 appraiser system for calculating damages.

4. Wyoming, New Mexico, and Colorado.

As far as restrictions on access, Wyoming and New Mexico are by far the most restrictive statutes to date against the mineral developer and differ the most from the dominance of the mineral estate at common law.¹⁸⁰

In Wyoming, after a number of bills were introduced to the state legislature and defeated, the legislature finally passed the Surface Owner Accommodation law in 2005.¹⁸¹ Prior to the legislature passing the bill, land owners and environmental groups had gathered enough votes to place the bill on the 2006 ballot as an initiative.¹⁸²

The Wyoming bill has very strict notice and permission requirements.¹⁸³ Before the mineral developer can enter the land for testing, surveying, or even inspecting he must not only give notice to the land owner, but must attempt to obtain written consent from the landowner and attempt to negotiate a surface use agreement which addresses possible damages to the property

¹⁷⁹ Oklahoma Statutes § 52 4-318.5; Pennsylvania Statutes 58-11 § 601.201 & 202.

¹⁸⁰ Wyoming Statutes 30-5-401 through 30-5-410. "Wyoming Surface Owner Accommodation Act"; New Mexico Statutes Annotated § 70-12-1. "The Surface Owners Protection Act".

¹⁸¹ See <http://www.wyominglandowners.org/splitestates/index.php> notes 1, 2, and 3 last visited on Jan. 12, 2009.

¹⁸² *Id* at note 3.

¹⁸³ Wyoming Statutes 30-5-402.

and how they will be compensated.¹⁸⁴ These requirements are far in advance of any drilling on the property and could be before the mineral developer even knows if it is worth drilling. If they decide to commence drilling operations on the property a minimum 30 days notice is required, detailing the proposals of the mineral developer's intended operations.¹⁸⁵ Prior to commencement of operations the surface owner and developer are required to engage in good faith negotiations regarding surface use and activity, payment of damages, and restoration of the surface.¹⁸⁶ The Wyoming statute makes the mineral developer strictly liable for loss of production and income, loss of land value, and loss of value to improvements.¹⁸⁷

The New Mexico statute is similar in many ways to the Wyoming. Notice must be given before the commencement of any preliminary activities, and then again before any invasive activities.¹⁸⁸ The mineral developer is liable for all losses that the surface owner sustains as a result of the operations on the land, including lost production and income, depreciation of land resulting from operations, value of lost access and use, and loss of any value to improvements on the land.¹⁸⁹ In addition, the mineral developer is also required by the law to reclaim the surface to the original pre-operation condition.¹⁹⁰ Also, failure to comply with the code will subject the mineral developer to treble damages.¹⁹¹

The Colorado Surface Owner Protection Act is the newest addition to the surface damage statutes.¹⁹² It is different from all of the proceeding surface damage statutes. This statute is very

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Wyoming Statutes 30-5-402(e)

¹⁸⁷ Wyoming Statutes 30-5-405(a)

¹⁸⁸ New Mexico Statutes Annotated § 70-12-1.

¹⁸⁹ New Mexico Statutes Annotated § 70-12-5.

¹⁹⁰ New Mexico Statutes Annotated § 70-12-6.

¹⁹¹ *Id.*

¹⁹² Colorado Revised Statutes Annotated § 34-60-127. "Reasonable Accommodation Act".

short and does not include any provisions on notice, negotiation requirements, dispute resolution, or contain a laundry list of liabilities.¹⁹³ This statute purports to be no more than a codification of the common law doctrine including the accommodation doctrine which had been adopted in Colorado by the *Gerrity Oil and Gas Corp. v. Magness* decision in 1997.¹⁹⁴ The statute however is clearly an expansion from the prior accommodation doctrine. The statute requires the mineral developer to select “alternative locations for wells, roads, pipelines, or production facilities, or employing alternative means of operation, that prevent, reduce, or mitigate the impacts of the oil and gas operations on the surface, where such alternatives are technologically sound, economically practicable, and reasonably available to the operator.”¹⁹⁵ Also dissimilar from the common law, in a court action, after the surface owner shows interference with his uses this statute shifts the burden to the mineral developer to prove compliance with the statute and that other alternatives were not available.¹⁹⁶ According to one attorney a proper reading of this statute gives landowners the ability to require mineral developers to use expensive directional drilling techniques rather than interfere with surfaces use.¹⁹⁷ Even though this is a simple piece of legislation when compared to the other detailed surface damage statutes one environmental group praised this bill as “precedent-setting legislation that is one of the most powerful state laws in the nation in terms of protecting landowner’s rights and the environment.”¹⁹⁸

5. Local City and County Ordinances.

Although beyond the scope of this paper, it is worth noting that cities and counties are also passing ordinances which require permits to be obtained by mineral developers. These

¹⁹³ *Gerrity Oil and Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997).

¹⁹⁴ Colorado Revised Statutes Annotated § 34-60-127.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See <http://www.mineralpolicy.org/cosopa2.cfm> last visited on Jan. 12, 2009.

¹⁹⁸ *Id.*

ordinances often offer additional protections to the surface owners and place considerable restraints on the mineral developers. A notable example is a recent Santa Fe County, New Mexico ordinance which added further protection to farmers and residential water supplies and was able to stop all drilling in the county for a six month period while they decided what requirements to put in place.¹⁹⁹

C. Revisiting the Introductory Scenario

Now would be a good time to revisit the scenario presented in the introduction regarding the small organic farmer and see the different results between the common law, the accommodation doctrine, and surface damage statutes.

Under the common law the mineral developer would have complete rights of entry, without notice, and only have to compensate the farmer for damages to the growing crops and damage to improvements. If use was reasonable no compensation would be required for long term damage to the soil, crops, water, or for the loss in income that would result from loss of the NOP certification. This small amount of compensation would be helpful in the current year but because this farmer is barely able to make ends meet the surface activity could cause him to lose his farm in subsequent years.

Under the accommodation doctrine the mineral developer would be required to look for reasonable alternate means of extracting the oil without interfering with the farmer's current use. However if directional drilling from the edge of the property is cost prohibitive or simply not possible because of the distance from the desired location than the end result would be identical to the common law and there would be no requirement to compensate for anything beyond damages to growing crops and existing improvements. In this case, if there were not any

¹⁹⁹ Santa Fe County Ordinance No. 2007-14, dated November 27, 2007.

reasonable alternatives it is hard to see how the Colorado codification of the accommodation doctrine would provide any additional protection to the surface owner.

Under North Dakota and its progeny, Alaska, Oklahoma, Pennsylvania, Wyoming, or New Mexico the surface owner would have the right to compensation for the lost value to the land and the value of the lost access and use of his land for the entire duration of the mineral developer's activities. This would include the lost value of the crops in the current year and every subsequent year and would protect the surface owner from future potential harm to the soil and water supply. Also, under the majority of surface damage statutes the farmer would be given notice before the developers entered his land which would give him time to negotiate or to start an action in court seeking an injunction or some other remedy and potentially stall the mineral owner's access for some time.

D. Notable Deficiencies and Concerns with Surface Damage Statutes

While it is easy to see from the above scenario that there are many benefits to the surface damage statutes for the surface owners, there are still a number of issues that are created or are not adequately addressed by the statute, and there is also concern that these statutes will go too far or have already gone too far.

1. Inadequate Bonds.

The mineral owner is liable for damage to the surface. However, unlike the destruction of the surface from strip mining, or damage done to crops while preparing a drill site, some damages from mining may not be discovered for years after the mineral developer has discontinued operations. One notable example is the case of longwall mining.²⁰⁰ The effects of

²⁰⁰ Longwall mining is a process of extracting large portions of a coal seam at once leaving vast empty caverns far below the surface. See "The Effects of Subsidence Resulting From Underground Bituminous Coal Mining on Surface Structures and Features and on Water

longwall mining are often not visible on the surface for years, and sometimes not for decades, after the coal has been removed.²⁰¹ There is an area of southwestern Pennsylvania which has a very consistent and high producing coal seam approximately 500 feet below the surface that spans large 90 mile by 90 mile area.²⁰² Although longwall mining has been going on in that area for many years, the negative impacts are just beginning to manifest themselves.²⁰³ Foundations are cracking, wells and springs are drying up as they drain into the large empty spaces caused by the mining, and water supplies are being contaminated.²⁰⁴ Under the Pennsylvania surface damage statute, companies that mine coal underground are responsible for repairing or compensating for damage they cause to structures on the surface and to immediately provide temporary water and permanently replace water supplies lost or contaminated due to mining.²⁰⁵ However, this law does not completely solve the problem as it may be many years before the full negative effects of mining show up on the surface, and by then many of these mining companies may be as dry and deprecated as the wells and the homes that they ruined. Although most surface damage statutes have bond requirements (ranging from as high as \$25,000 and as low as \$1,000, and not even required in some states), if there is substantial damage to water supply, structures, or long term soil pollution, these amounts seem less than adequate.²⁰⁶

Resources: Second Act 54 Five-Year Report,” Pennsylvania Dept. of Environmental Protection (2005), and “Act 54 Report on Impacts of Underground Coal Mining,” Pennsylvania Dept. of Environmental Protection (1999), on the web at <http://www.dep.state.pa.us/dep/deputate/minres/BMR/act54/>.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* in the executive summary of the report, the results of the study indicated that around 24% of homeowners above the mining areas reported problems with their water supplies, and 14% had structural damage.

²⁰⁵ 52 P.S. § 1406.1

²⁰⁶ New Mexico Statutes Annotated § 70-12-6 (requires a \$25,000 bond); Onshore order 1, 43 C.F.R. § 3160; 43 C.F.R. § 3114; 43 C.F.R. §3104 (requires a \$1000 bond).

2. Constitutional Issues

There have been some constitutional concerns raised by the surface damage acts of the various states, including whether or not the statutes constitute a taking, and whether the state law applies to federally owned mineral interests managed by the BLM. The stated purpose of a number of the surface damage statutes was to give surface owners the constitutionally maximum allowable protection.²⁰⁷

a. Takings

One of the first cases the Supreme Court decided dealing with the first amendments “takings clause” involved a dispute between the mineral owner and the surface owner.²⁰⁸ This case involved a state law that prohibited mining that may cause subsidence of any habitation.²⁰⁹ The Court decided that the regulation that precluded Pennsylvania Coal from exercising its contractual and property right constituted a taking because it significantly diminished the property value without compensation.²¹⁰ Cases that followed the *Pennsylvania Coal* case have clarified that for a valid exercise of a states power to constitute a taking the statute must deprive the owner of “all economically beneficial and productive uses.”²¹¹

Although none of the current Surface Damage Statutes have been tested as takings at the Supreme Court level, a number of the statutes have been scrutinized and tested by federal or state courts. The Eighth Circuit, in finding the North Dakota statute to be constitutional, found that the property right that the mineral owners possessed was the right of entry or access, and that the

²⁰⁷ North Dakota Century Code § 38-11.1-02; South Dakota Statutes § 45-5A-1; Montana Code Annotated 82-10-501; Tennessee Code Annotated § 60-1-602; West Virginia Code Ann. § 22-7-1.

²⁰⁸ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ One example is *Lucas v. South Carolina coastal Council*, 505 U.S. 1003 (1992).

right not to compensate for damages to land value was likely not a property right at all.²¹² Also, the Oklahoma Supreme Court held their surface damage statute is constitutional.²¹³

Given that the states have an express desire to push the limit and give the maximum protection possible to the surface owner, the question that needs to be answered is how much is too much. The Wyoming and New Mexico statutes have substantial limitations on the mineral owner's access and liability provisions well in excess of the common law liability. These statutes may be approaching the line of what the Supreme Court would consider a taking.

b. The Application of State Damage Statutes to Federal Severed Estates

The Federal lands managed by the BLM comprise over 700 million acres, 70.3 million acres represent split estate lands where the federal government owns the minerals and not the surface.²¹⁴ The Federal Government has passed a set of rules dealing with damage to the surface estate.²¹⁵ Nearly 50% of the 70.3 million acres with federally owned severed minerals are located in North Dakota, South Dakota, Montana, and Wyoming, all of which have passed surface damage statutes which provide more protection than the federal government offers.²¹⁶

There is some debate between the parties as to the applicability of these statutes to the lessees of federally owned mineral estates. Some states have expressly stated that their statutes apply to all severed estates including those owned and leased by the federal government,²¹⁷ while

²¹² *Murphy v. Amoco Prod. Co.*, 729 F.2d 552 (8th Cir. 1984).

²¹³ *Davis Oil Co. v. Cloud*, 766 P.2d 1347, 1351-52 (1986 OK).

²¹⁴ Bureau of Land Management, Public Land Statistics, Tables 1.3 and 3.2 Mineral and Surface Acres Administered By the Bureau of Land Management, Fiscal Year 2007 And Patents Issued with Minerals Reserved to the United States, Through Fiscal Year 2007, located at http://www.blm.gov/public_land_statistics/pls07/pls3-2_07.pdf.

²¹⁵ Onshore order 1, 43 C.F.R. § 3814.

²¹⁶ North Dakota Century Code § 38-11.1-05; Montana Code Annotated . 82-10-503; South Dakota Statutes § 45-5A-5; Wyoming Statutes 30-5-402.

²¹⁷ Taken from an article posted on <http://www.wyominglandowners.org/splitestates/index.php>, *Oil and Gas Drilling on Split Estate lands*, n. 15, last visited on Nov. 20, 2008. Note 15 states

the BLM has stated that only their rules will govern federal mineral estates. The director of the BLM made the following comment about the Wyoming surface damage statute:

The recent Wyoming statute and the proposed regulations would impose additional financial requirements that would burden the federal mineral estate, e.g., liability for loss of production and income, liability for loss of land value and duplicative bonding requirements to both the United States and the Wyoming OGCC. The statute and regulations could also impose potential delays in approval of operations on federal leases. . . . In light of the legal concerns posed by application of [the Wyoming statute] we believe that the statute and regulations implementing the statute are limited in application to [the] state and private mineral estate.²¹⁸

Wyoming's Gov. Dave Freudenthal and Attorney General Pat Crank maintain that the state law does apply to private land over federally owned minerals, stating that "If the BLM wants to sue us, I think they should do so. I think we would ultimately be successful if they brought such a challenge."²¹⁹

No litigation has commenced to resolve this issue, and it is not clear which side of this debate the courts will come down on. Until then, at least in Wyoming, it appears that mineral developers on federal lands will have to comply with two sets of often duplicitous statutes.

3. Concerns About the Rising Costs of Energy and the Effect on the State's Economy

With the growing number of states that have adopted the surface damage statutes there has been some concern that these statutes will either drive energy producers from the state or drive up the cost of fuel. Data collected by the Department of Energy suggests that the average cost of an oil and gas well in 2006 was over 2 million dollars per well, with an average cost per

that "the 2005 Wyoming Surface Owner Accommodation Act applies to all surface lands, including those over federal minerals."

²¹⁸ Letter dated June 13, 2005, from Kathleen Clarke, Director, BLM to Don J. Likwartz, Wyoming Oil and Gas Supervisor.

²¹⁹ Associated Press, Wyoming, feds differ over law on split estates, Published on Thursday, June 23, 2005 in the Billings Gazette. See <http://billingsgazette.net/articles/2005/06/23/wyoming/export212612.txt>.

foot of just over \$400.00/foot and an average depth of approximately 5000 feet.²²⁰ Some groups have reported that the average payment to surface owners for surface damage is only between five and ten thousand dollars.²²¹ Given these numbers and that the average surface damage payout is less than one percent of the cost to drill it is hard to imagine that an increase in payment to landowners by even tens of thousands of dollars would put any damper on oil and gas drilling. Wyoming, with one of the most comprehensive surface damage statutes, has reported no decline in well permits being issued subsequent to passing the legislation.²²²

4. Concerns About the Motivation Behind Surface Damage Statutes

Some skeptics feel that environmental groups, not surface owners are the driving force behind the push for surface damage statutes. One individual stated it this way:

“[T]he split estate issue is about much more than surface damages. There is a strong movement among surface owners and environmental groups to limit, if not eliminate, drilling in areas where the surface owner or organization objects. **The surface damage legislation is often merely a vehicle to frustrate exploitation of the mineral estate.** Likewise, use of local governmental “zoning” is often utilized for the same purpose and, with some success, since local surface owners tend to have more political clout at the city / county level.”²²³

²²⁰ Numbers were taken or estimated based on data collected and published by the Department of Energy, Energy Information Administration, Annual Energy Review 2007, available at <http://www.eia.doe.gov/emeu/aer/>. Calculations were made using both the natural gas and petroleum well statistics.

²²¹ Taken from an article posted on <http://www.wyominglandowners.org/splitestates/index.php>, Titled Oil and Gas Drilling on Split Estate lands, n. 12, last visited on Nov. 20, 2008; *Also see* <http://www.earthworksaction.org/SOPLegislation.cfm#STATELAWCHART> last visited on Nov. 20, 2008.

²²² <http://www.wyominglandowners.org/splitestates/index.php>, Titled Oil and Gas Drilling on Split Estate lands, n. 9, last visited on Nov. 20, 2008.

²²³ Joe Garner, Landowners, Oil Firms Split on Drilling Bill, Rocky Mountain News, March 17, 2006, emphasis added.

This may be a valid concern as many environmental groups like the Sierra Club and Earthworks are strong supporters of surface damage statutes.²²⁴ However, it is clear from the statements of purpose in the statutes themselves that the states have the landowner protection and not some environmental group in mind.²²⁵

VI. CONCLUSION

With the ever increasing need for energy producing minerals, the huge disparity between the cost of drilling and the nominal token payment to the surface owners and the huge amounts of profits that these oil, gas, and coal companies are currently reaping, the disputes between the surface owner and the mineral owner have nowhere to go but up. As the recent headline and article from an oil and gas trade magazine pointed out “Split Estate Conflicts Grow Nationwide”²²⁶ and will likely continue to do so. It is clear that the purpose of the surface damage statutes was not to lessen litigation but to give mineral owners causes of actions in cases where they were not protected by the common law.

The next logical step for the surface damage statutes to take would be to combine the codification of the accommodation doctrine from Colorado with a protective statute like Wyoming’s or New Mexico’s. This combination along with an increase in the bonding requirements to fifty or a hundred thousand (in this writer’s opinion) would be the perfect step in equalizing the rights of the mineral and surface estates.

²²⁴ See Kerry McInturff, “The Dominant Mineral Estate: Erosion the Sierra Club Doesn’t Mind”, 2006; Oil & Gas Accountability Project at http://www.earthworksaction.org/oil_and_gas.cfm last visited on Nov. 20, 2008.

²²⁵ See *Supra* note 157 & 158.

²²⁶ Split Estate Conflicts Continue to Grow, *The American Oil and Gas Reporter*, July 2006 Issue.