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Between a Rock and a Hard Place: Surface Mining on the Severed Estate - A Legislative Proposal

BETWEEN A ROCK AND A HARD PLACE: SURFACE MINING ON THE SEVERED ESTATE– A LEGISLATIVE PROPOSAL

INTRODUCTION

The House of Representatives, on 10 June 1975, failed to override a presidential veto[1] of the Surface Mining Control and Reclamation Act of 1975.[2] Only seven months earlier, in December of 1974, President Ford had pocket-vetoed[3] an almost identical bill, the Surface Mining Control and Reclamation Act of 1974,[4] which was the first comprehensive federal attempt to regulate coal surface-mining operations.[5] Controversy surrounding these bills focused upon protecting the owner of a severed surface estate from the harsh effects of surface mining initiated by the subsurface owner or tenant.[6]

During recent years, as surface-mining operations have proliferated,[7]

1. 11 WEEKLY COMP. OF PRES. DOC. 535 (1975).

2. 121 CONG. REC. 90, H.5205 (daily ed. June 10, 1975). The bill, H.R. 25, 94th Cong., 1st Sess. (1974) is quoted at 121 CONG. REC. 70, S.7423-44 (daily ed. May 5, 1975).

3. *See* note 44 *infra.*

4. *See* notes 40-44 *infra* & accompanying text.

5. Despite these failures, the area is not totally devoid of legislation. On July 31, 1975, the Senate voted to implement limited measures regulating surface mining of federally-owned coal. 121 CONG. REC. 125, S.14573 (daily ed. July 31, 1975).

6. The surface mining debate is an outgrowth of the practice of estate severance, which results in separate ownership of the surface and subsurface estates. The pattern of estate severance is frighteningly familiar: surface owner *A*, usually as a result of a conveyance by a prior owner, has been alienated from any interest in the subsurface, now owned by *B*. If *B*, at some future date, desires to remove the underlying minerals through surface mining, the estate of *A* will be adversely affected, and in many instances, totally destroyed as a result.

7. In 1969, 38% of the nation's coal was mined by surface operations. By 1972, this percentage had increased to 52%. Hechler, *Should The Federal Government Assume a Direct Role in the Regulation of Surface Mining in the Coal States?*, 53 CONG. DIG. 140 (1974).

Surface mining operations have increased in part because of a growing demand for low cost sources of coal in the face of depleted petroleum based energy supplies. Cost differences between deep mining and surface mining is explained in part by the smaller number of men needed for the latter. P. AVERITT, STRIPPING COAL RESOURCES OF THE UNITED STATES 2 (1970). *See* Binder, *A Novel Approach to Reasonable Regulation of Strip Mining*, 34 U. PITT. L. REV. 339, 342 (1973). Moreover, technological advancements in behemoth mining equipment have enabled operators to strip increasingly deeper and thereby recover a larger portion of seam. Binder, *supra* at 341, *citing* COAL AGE, July, 1969, at 43. Further, surface mining has a much higher efficiency level than deep mining, recovering up to 90% of the mineral, as opposed to 50% recovery by the deep

and as the merits of the technique have become a fertile source of debate,[8] the need for regulation of the surface mining industry has become increasingly apparent.[9] No doubt remains that surface mining is more efficient than deep mining in terms of the amount of available coal that can be extracted for profitable use;[10] it is cheaper to produce and sell.[11]

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mines. Brooks, *Strip Mining Reclamation and Economic Analysis*, 6 NAT. RES. J. 13, 17 n.15 (1966). A final factor in the emerging dominance of surface mining has been the implementation of the 1969 Federal Coal Mine Health and Safety Act, which necessitated the installation of costly safety equipment in deep mines. 30 U.S.C. §§ 801-960 (1970). For a discussion of the effect of the law on the economics of deep mining, see Comment, *The 1969 Coal Mine Health and Safety Act: A Survey of Mine Safety Legislation in Pennsylvania*, 31 U. PITT. L. REV. 665 (1970).

8. *See generally* Spore, *The Economic Problem of Coal Surface Mining*, 2 ENVIRONMENTAL AFFAIRS 685 (1973); Morton, *Strip Mining Reform—Some Political and Economic Ideas*, 2 ENVIRONMENTAL AFFAIRS 294 (1972); Howard, *A Measurement of the External Diseconomies Associated with Bituminous Coal Surface Mining, Eastern Kentucky, 1962-1967*, 11 NAT. RES. J. 76 (1971); Brooks, *supra* note 7, at 13.

Some critics of surface mining maintain that in replacing deep mining operations it leaves many without jobs, thereby creating "people pollution." *See*, Miernyk, *Coal and the Appalachian Economy*, 76 W. VA. L. REV. 281 (1974). Undoubtedly, surface mining results in a greater output per man than deep mining operations. *See* note 7 *supra*. For example, in 1969 surface mining accounted for nearly one-half of the coal mined in Pennsylvania, yet strip mining companies employed only 4,132 persons as compared to 18,689 working in the deep mines. Binder *supra* note 7 at 342 n.21, *citing* COMMONWEALTH OF PENNSYLVANIA DIVISION OF MINES AND MINERALS, 1969 ANNUAL REPORT 107 (1970). *See generally* H. CAUDILL, NIGHT COMES TO THE CUMBERLANDS (1962).

9. The concern over lack of regulation stems from several considerations. First, coal has a much higher waste-mineral ratio (12-1) than that of the metallic minerals. Brooks, *supra* note 7, at 16. Second, coal surface mining is a short term operation that leaves long term scars: "An undisputed Interior Department study concludes that heavy reliance on [strippable] Western coal to meet U.S. energy goals will deplete that resource by 1995." NEWSWEEK, Aug. 8, 1974, at 53. Third, coal is highly combustible, and huge piles of coal slag continue to burn decades after spontaneous fires begin. In 1964, 220 fires were burning in underground seams and about 500 more in nearby waste piles. Brooks, *supra* note 7, at 16, *citing* U.S. DEPT. OF THE INTERIOR, ANNUAL REPORT OF THE SECRETARY FOR THE FISCAL YEAR 344 (1964). Fourth, the emanation of pyritic minerals, aluminum, manganese, calcium, arsenic, and copper from surface mine sites has played a substantial role in the pollution of an estimated 10,500 miles of streams in Appalachia alone. Binder, *supra* note 7, at 343 *citing* U.S. DEPT. OF THE INTERIOR, ENVIRONMENTAL REPORT, RIVER OF LIFE WATER: THE ENVIRONMENTAL CHALLENGE 55 (1970). For an example of the destructive effects of surface mining, see TIME, Sept. 22, 1975, at 46 (residential section of Butte, Montana destroyed by continued surface mining; population has decreased from 80,000 to 24,000).

10. *See* note 7 *supra*.

11. *See* Binder, *supra* note 7, at 341-43. *See also* Memorandum from Director, Bureau of Mines, Department of the Interior to Assistant Secretary for Energy and Minerals, Department of the Interior, Oct. 2, 1973, *quoted in*, 119 CONG. REC. 150, S.18898 (daily ed. Oct. 9, 1973).

There are, however, serious external diseconomies associated with surface-mining operations: land which has been stripped, absent an effective reclamation scheme, has a lower market and utility value than similarly situated land which has been deep mined.[12] In addition, familial disruptions associated with surface mining are far more acute than the social problems attending deep-mining operations.[13] Therefore, although surface mining might be more economical from the viewpoint of private industry, its overall cost-benefit advantage in terms of the public interest is questionable.[14]

This Note will examine the legislative history of the Surface Mining Control and Reclamation Acts of 1974 and 1975, analyze the various concerns expressed during the drafting of these bills, and offer a compromise proposal which seeks to balance the interests of owners of surface estates against the competing interests of lessees or owners of underlying mineral estates.

Surface Mining on the Severed Estate: Judicial Treatment of the Conflict of Interests

In formulating an equation balancing the relative merits of surface mining with deep mining, the concept of "property" is an integral factor to be considered. The term "property" has "never been given a precise or universal definition;" [15] the scope of the concept must be governed by the context in which it is used.[16] In the zoning context (which is analogous to the conflict between the relative rights of the surface and subsurface owners as it involves the conflicting rights of adjacent landowners), the Supreme Court of Texas stated that:

> Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. *The substantial value of*

12. There are exceptions to this statement. For instance, the surface mine operator may enhance the value of agricultural land by altering its topography thereby making it easier to irrigate. *See* note 59 *infra*.

13. *See* 120 Cong. Rec. 107, H.6719 (daily ed. July 18, 1974) (remarks of Rep. Hechler).

14. *See generally* Hardesty, *Coal and the Energy Crisis*, 76 W. Va. L. Rev. 257 (1974); Pearson, *Coal's New Values and Our National Priorities*, 76 W. Va. L. Rev. 277 (1974).

15. Kokoszka v. Belford, 94 S. Ct. 2431, 2433 (1974).

16. *Id. See generally* Donaldson, *Regulation of Conduct in Relation to Land—The Need to Purge Natural Law Constraints from the Fourteenth Amendment*, 16 Wm. & Mary L. Rev. 187 (1974).

> *property lies in its use.* If the right of use be denied, the value of the property is annihilated, and ownership is rendered a barren right.[17]

This definition, which emphasizes the fact that unrestricted use of land is a valuable property right, crystallizes the conflict of interests created by surface mining upon a severed estate; often, such operations are the only economical method of mining and yet the collateral effects of the technique result in restriction, and sometimes complete destruction, of the surface estate. Resolution of the conflict requires a preliminary inquiry into the nature of the severed estate and an examination of judicial treatment of these conflicting interests.

Severance of mineral and surface estates occurs in four distinct ways: first, where the surface owner effects the severance by executing a mining lease; second, where the surface owner acquires the surface estate subject to a pre-existing privately-held mineral reservation; third, where the surface owner acquires the surface estate subject to a reservation of minerals by the federal or a state government; fourth, where the surface estate is subject to an agricultural lease antedating the mineral lease.[18] The degree of protection afforded the surface owner varies widely according to the manner in which his estate was severed from the underlying interest.

Whether the land involved is acquired by a federal patent or a private purchase, in the absence of a pertinent federal statute, actions for damages to the surface estate are maintainable under the provisions of state law.[19] Therefore, the rights of the surface owner under any of the first three situations outlined above are identical, provided the situs of the land is intrastate. Quite obviously, however, the relative rights of surface owners in any of these three situations may vary drastically among the states.

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17. Spann v. City of Dallas, 111 Tex. 350, 355, 235 S.W. 513, 514-15 (1921) (emphasis supplied).

The rule that property rights are to be equated with property use must be qualified by the caveat that states may, within their police power, restrict property use. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Mugler v. Kansas, 123 U.S. 623, 668-69 (1887).

18. Brimmer, *The Rancher's Subservient Surface Estate,* 5 LAND & WATER L. REV. 49, 51 (1970).

19. *E.g.,* COLO. REV. STAT. 92-24-6 (1963) (requiring miner to provide security for surface owner); GA. CODE ANN. § 83-204 (1970); PA. STAT. ANN. tit. 52, § 1407 (1966) (showing of negligence required).

Several cases deciding the respective rights of surface and mineral estate owners propound this general rule: the mineral owner or lessee is free at all times to enter upon and make reasonable use of the surface for the purpose of extracting the underlying minerals, the only qualification being "due regard" for the rights of the surface owner.[20] Under this standard the mineral owner or lessee will not be liable for damages to the surface unless he is negligent in his mining operations, or uses more land than is reasonably necessary for the extraction of his minerals.[21]

This rule purports to provide a negligence standard of protection for surface owners. However, in defining "reasonable use," many courts have expressed a pro-mining bias that to surface owners is far less than reasonable. Courts have variously held that it is reasonable for the mineral lessee to: select the place and mode of drilling without regard to the wishes of the surface lessor;[22] locate, build, and improve roads across the surface;[23] dig slush pits;[24] construct signs publicizing his mineral rights;[25] erect storage tanks and buildings;[26] destroy trees in order to clear drilling sites.[27] The mineral lessee may also obtain equitable relief to enjoin the lessor from using the surface in any manner inconsistent with continued mining operations.[28]

The courts have also declared that if the mineral interest is acquired prior to the surface owner's interest, then it is the dominant estate.[29] Under such circumstances mine operators have not been held monetarily liable for damages incurred by the surface owner, in the absence of negligence or unreasonable use.[30] At least one jurisdiction has gone so

20. Lindsey v. Wilson, 332 S.W.2d 641, 642 (Ky. Ct. App. 1960); Miller v. Crown Central Petroleum Corp., 309 S.W.2d 876 (Tex. Civ. App. 1958).

21. Lindsey v. Wilson, 332 S.W. 2d 641, 642 (Ky. Ct. App. 1960).

22. Gulf Oil Corp. v. Walton, 317 S.W. 2d 260, 263-64 (Tex. Civ. App. 1958).

23. *Id.* at 263.

24. Powell Briscoe, Inc. v. Peters, 269 P.2d 787, 790 (Okla. 1954).

25. Conway v. Skelly Oil Co., 54 F.2d 11 (10th Cir. 1931).

26. Le Croy v. Barney, 12 F.2d 363, 366 (8th Cir. 1926).

27. *Id.*

28. Kinnez–Coastal Oil Co. v. Kieffer, 277 U.S. 488, 505-06 (1928). *See also* Eternal Cemetery Corp. v. Tammen, 324 S.W.2d 562, 565 (Tex. Civ. App. 1959) (operation of cemetery enjoined).

29. Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex. 1972); Warren Petroleum Corp. v. Martin, 153 Tex. 565, 271 S.W.2d 410 (1954). Where the agricultural lease antedates the mineral lease some courts have held the surface estate dominant. Republic Natural Gas Co. v. Melson, 274 P.2d 543 (Okla. 1954). *See also* Mikel Drilling Co. v. Dunkin, 318 P.2d 435 (Okla. 1957).

30. Getty Oil Co. v. Jones, 470 S.W.2d 618, 623 (Tex. 1971).

far as to sanction complete destruction of the surface if minerals may not otherwise be extracted.[31]

In confronting the question whether surface mining constitutes a reasonable use of the surface where the deed or patent creating the mineral estate is silent or ambiguous on the subject, courts follow the general rule of construction that the intent of the parties to the document at the time of the conveyance is controlling.[32] Generally, courts have been reluctant to imply a right to surface mine if surface mining methodology was unknown at the time of the conveyance.[33] Opinions recognize that it would be unreasonable to infer that the surface owner would consent to total destruction of his estate, a result often accompanying surface mining;[34] the right to *use* the surface to extract coal does not imply a right to *destroy* the surface.[35] Courts have looked also to the particular wording of a mineral deed, and have held that where it is phrased in "language peculiarly applicable to underground mining" [36] or exhibits a clear intention on the part of the surface owner to continue agricultural use of the land,[37] the rights in the mineral estate do not include the right to stripmine.

As to cases in which parties are aware of the strip-mining technique but fail to make reference to it in pertinent documents, some courts have concluded that such inaction indicates an intent to permit the opera-

31. MacDonnell v. Capital Co., 130 F.2d 311 (9th Cir. 1942); Trklja v. Keys, — Cal. —, 49 Cal. App. 2d 211, 121 P.2d 54, 55 (1942); Yuba Inv. Co. v. Yuba Consol. Gold Fields, 184 Cal. 469, — Cal. App. —, 194 P. 19, 25 (1920). The majority rule, however, is to the contrary. Smith v. Moore, 172 Colo. 440, 474 P.2d 794, 795-96 (1970) (reservations in a deed are to be strictly construed; therefore, absent clear and express terms to the contrary, the right to destroy the surface will not be implied unless circumstances surrounding the reservation suggest the destructive practice was contemplated). *See also* Stewart v. Chernicky, 439 Pa. 43, 266 A.2d 259, 263 (1970).

32. Magnolia Petroleum Co. v. Thompson, 106 F.2d 217 (8th Cir. 1939); Stewart v. Chernicky, 439 Pa. 43, 266 A.2d 259 (1970). *See* 3 A. CASNER, AMERICAN LAW OF PROPERTY § 12.89 (1952, Supp. 1962).

33. *See, e.g.*, United States v. Polino, 131 F. Supp. 772 (N.D. W.Va. 1955); Smith v. Moore, 172 Colo. 440, 474 P.2d 794 (1970); Wilkes-Barre Township School Dist. v. Corgan, 403 Pa. 383, 170 A.2d 97 (1961); Carson v. Missouri Pac. R.R., 212 Ark. 963, 209 S.W.2d 97 (1948). *See generally*, Comment, *The Common Law Rights to Subjacent Support and Surface Preservation*, 38 Mo. L. REV. 234 (1973).

34. *See, e.g.*, Merrill v. Mfrs. Light & Heat Co., 409 Pa. 68, 185 A.2d 573, 579 (1962).

35. Barker v. Mintz, 73 Colo. 262, —, 215 P. 534, 535 (1923). *See* note 17 *supra* & accompanying text.

36. Stewart v. Chernicky, 439 Pa. 43, 50, 266 A.2d 259, 264 (1970). *See also* Commonwealth v. Fitzmartin, 376 Pa. 390, 102 A.2d 893 (1954) (dissenting opinion); Virginia-Pittsburgh Coal Co. v. Strong, 129 W. Va. 832, 42 S.E.2d 46 (1947).

37. Franklin v. Callicoat, 53 Ohio Op. 240, —, 119 N.E.2d 688, 694 (C.P. 1954).

tion.[38] Support for these holdings lies in the well-accepted rule of construction that ambiguities in deeds are to be resolved strictly against the grantor.[39]

The contrary conclusion, however, comports more with reality, given the usually dominant bargaining position of the party seeking the subsurface estate. This factor, in conjunction with recognition that strip mining often destroys the utility and beauty of the surface estate, should make courts reluctant, in construing ambiguous deeds, to imply a right that so clearly jeopardizes the interests of one of the parties. Where conditions make strip mining the only feasible method of extraction, and it is not provided for in the deed, courts should refrain from inferring the right, and allow instead the parties to renegotiate the document.

From the foregoing, the need for uniform regulation of surface-mining operations, affecting both federally-owned and privately-owned coal, is evident. Before proposing a model to create such uniformity, examination will be undertaken of previous attempts to do so.

The Surface Mining Control and Reclamation Act of 1974: Cracking Down on the Strippers

The attempt of the 93d Congress to enact legislation protecting the rights of the surface owner was fraught with controversy. The protective provisions of the Senate bill, S. 425,[40] and the House version, H.R. 11,500,[41] stood in sharp opposition to each other. It was not until December 5, 1974, when the Senate Conference Report on the Surface Mining and Control Act of 1974[42] was sent to the House,[43] nearly two years after the introduction of the Senate bill, that a compromise finally was achieved. Following the pocket veto of the bill by President Ford,[44]

38. *See, e.g.*, Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395 (Ky. Ct. App. 1968); Croley v. Round Mountain Coal Co., 374 S.W.2d 852 (Ky. Ct. App. 1964); Buchanan v. Watson, 290 S.W.2d 40 (Ky. Ct. App. 1956).

39. *See, e.g.*, Buchanan v. Watson, 290 S.W.2d 40, 43 (Ky. Ct. App. 1956); McIntire v. Marian Coal Co., 190 Ky. 342, 345-46, 227 S.W. 298, 299 (Ct. App. 1921); Wilkes-Barre Township School Dist. v. Corgan, 403 Pa. 383, 386-87, 170 A.2d 97, 98-99 (1961).

40. S. 425, 93d Cong., 1st Sess. (1973), *quoted at* 119 Cong. Rec. 9, S.836-50 (daily ed. Jan. 18, 1973).

41. H.R. 11,500, 93d Cong., 1st Sess. (1973), *summarized at* 119 Cong. Rec. 176, H.10105 (daily ed. Nov. 15, 1973).

42. H.R. Rep. No. 1522, 93d Cong., 2d Sess. 81-82 (1974), *quoted at* 120 Cong. Rec. 169, H.11321-46 (daily ed. Dec. 5, 1974) (the provision protecting surface owners is quoted at H.11341-42).

43. 120 Cong. Rec. 169, H.11321 (daily ed. Dec. 5, 1974).

44. The Surface Mining Control and Reclamation Act of 1974, as passed by both the

when the 94th Congress convened in January, 1975, the bill was immediately re-introduced in both houses.[45] By March 18, 1975, both the Senate and the House had passed the Surface Mining Control and Reclamation Act of 1975;[46] it was vetoed by the President.[47] Because the 1975 version contained provisions for the protection of the owners of surface estates which were identical to the compromise provisions which had been developed in the preceding session, a discussion of the attempted federal regulation of this area must focus initially on the debates in the 93d Congress.

The Senate Bill and the Mansfield Amendment

One of the primary purposes of the proposed regulation of surface mining contained in S. 425,[48] the first Senate bill, was the protection of "the rights of persons with a legal interest in land affected by coal surface mining operations." [49] The bill provided that where the mineral and surface rights to land are separately owned, coal surface mining could not be conducted without *either* the express written consent of the surface owner *or* the posting of a bond compensating the surface owner for all damages he might incur as a result of mining operations.[50] This "either/or" requirement would have applied to mineral estates owned by the federal government and to estates owned by private parties; currently, the requirement exclusively applies to mineral estates owned by the federal government.[51]

House and the Senate, was sent to the President for his signature on December 18, 1974. The President did not act on the bill before the end of the congressional session 12 days later. The bill, therefore, was pocket vetoed on the last day of the session, December 30, 1974.

45. H.R. 25, 94th Cong., 1st Sess. (1975), *introduced at* 121 CONG. REC. 1, H.131 (daily ed. Jan. 14, 1975); S. 7, 94th Cong., 1st Sess. (1975), *introduced at* 121 CONG. REC. 2, S.29 (daily ed. Jan. 15, 1975) (text summarized at S.75).

46. 121 CONG. REC. 40, S.3780 (daily ed. Mar. 12, 1975) (passed Senate, text quoted at S.3730-50); *Id.* at H.1908 (passed House).

47. *See* note 1 *supra.*

48. *See* note 40 *supra.*

49. 119 CONG. REC. 149, S.18755 (daily ed. Oct. 8, 1973).

50. *Id.* at S.18760-61 (extract from S. REP. No. 402, 93d Cong., 1st Sess. (1973). The bond-for-damages requirement was framed in response to judicial decisions which construed certain general deeds to mineral estates, known as "broad form deeds", as to granting the implied right to surface mine. S. REP. No. 402, 93d Cong., 1st Sess. at —— (1973).

51. 119 CONG. REC. 149, S.18760-61 (daily ed. Oct. 8, 1973) (extract from S. REP. No. 402, 93d Cong., 1st Sess. (1973)). *See, e.g.*, Stock Raising Homestead Act, 43 U.S.C. § 299 (1970). *See also* 43 C.F.R. § 3504 (1974); Mall, *Federal Mineral Reservations*, 10 LAND & WATER L. REV. 1 (1974).

An amendment to the bill offered by Senator Mansfield drastically expanded the degree of protection available to the owners of surface estates overlying federally-owned coal. In substitution for the "either/or" rule the amendment provided that:

> All coal deposits, title to which is in the United States, in lands with respect to which the United States is not the surface owner thereof are hereby withdrawn from all forms of surface mining operations and open pit mining, except surface operations incident to an underground coal mine.[52]

The proposal finds support in the logic that since the federal government enticed many property owners westward by the promise of land grants, it should protect these landowners from the devastating effects of surface mining. Enactment of the proposal also would have had the collateral benefit of providing more jobs for miners. Opposition to the proposal, however, was overwhelming.

Industry spokesmen criticized the amendment for irretrievably barring from extraction the enormous deposits of federally-owned western coal.[53] This argument, however, is specious for the simple reason that it is unreasonable to assume that the proposal would be used to preclude the surface mining of federal coal in perpetuity. Indeed, the amendment was framed with the specific idea of creating a federal "coal reserve" to be extracted at some later date when conditions so required.[54]

52. 119 CONG. REC. 149, S.18770 (daily ed. Oct. 8, 1973). *See generally id.* at S.18768-78; 121 CONG. REC. 39, S.3686 (daily ed. Mar. 11, 1975).

53. 6 NAT. J. REP. 137, 141 (1974).

The proposal drew sharp criticism as being counterproductive to the national goal of achieving energy independence by the 1980's. The acreage which would have been affected by the Mansfield amendment is enormous. In eastern Montana alone, there are 3.1 million acres of strippable coal, of which 1.7 million acres are owned by the federal government. *Id.* However, the surface rights to 88% of this land are owned by farmers and ranchers. The Department of the Interior estimated that roughly 14.2 billion tons of coal would be sealed off as a consequence of the amendment; the National Coal Association placed the figure closer to 37.5 billion tons, the equivalent of 17 million barrels of oil per day for 30 years at the present rate of consumption. BARRONS, Feb. 18, 1974 at 9.

Spokesmen for the Department of the Interior contended that since the underground mining of Western coal is economically impracticable, the amendment, in effect, would preclude the exploitation of nearly 42.85 million acres of coal. It was argued that this factor, coupled with the high cost of deep mined coal, would raise the price of coal in general. 119 CONG. REC. 150, S.18897 (daily ed. Oct. 9, 1973). Senator Mansfield countered (without citing authority, however) that "the overwhelming majority" of federally reserved coal is unstrippable. *Id.* No. 149, S.18770 (daily ed. Oct. 8, 1973).

54. 119 CONG. REC. 149, S.18,771 (daily ed. Oct. 8, 1973) (remarks of Senator Metcalf).

Other criticisms of the amendment are less amenable to rebuttal. The proposal was intended to be prospective in its application in that it would not affect surface mining operations which were developed before the date on which the Act would have become effective.[55] Environmentalists feared that this result could have initiated a "coal rush" as mining companies hastily undertook surface-mining operations before the bill became law. Also, the amendment, literally applied, would prohibit the surface mining by federally-owned coal companies which lease coal rights and also hold fee simple title to the surface estate. This result would be contrary to the stated purpose of the section, which was to protect surface owners who might be unwilling to surrender their rights to the coal interests.

It was also contended, by the Department of Interior, that since surface mining was the only economical method to extract coal in particular areas, the Mansfield amendment would deprive the nation of coal reserves which otherwise would be available.[56] The Department further criticized the amendment as an encumbrance upon the systematic development of coal reserves already restricted by the complex patterns of land ownership which are typical in the West. It was argued that the amendment would force unrealistic coal mining patterns which would impede sound, orderly reclamation of stripped lands.[57]

Additionally, because the amendment would have foreclosed from surface mining all federally-owned coal, mining companies would have been forced to increase their exploitation of private coal. This would, of course, have exacerbated the already difficult situation of the surface owner whose land overlay private coal, as mine operators, through a variety of means, sought to gain access to that coal.[58]

It is neither surprising nor catastrophic that the Mansfield amendment met with so much opposition. Its broad, unyielding prohibition epitomized what industry spokesmen have decried as "environmental overkill." In fact, it seemed to please no one: the industry lamented the loss of coal; environmentalists complained of the proposal's limited

55. *Id.* at S.18,773.

56. Memorandum from Chief, Division of Upland Materials, Department of the Interior to Director, Bureau of Mines, Department of the Interior, *quoted in* 119 CONG. REC. 150, S.18897 at 18898 (daily ed. Oct. 9, 1973).

57. *Id.*

58. One rancher recently received a letter from a representative of Westmoreland Coal Company, explaining that if he did not abandon his ranch, "this company will be forced to seek condemnation of your land in order to allow us to remove the mineral." Interview with James Leachman in Manassas, Virginia, Nov. 23, 1974.

applicability; and some surface owners despaired the loss of the opportunity to sell their land to strip miners.[59]

In short, the Mansfield amendment was too rigid and too absolute in its prohibition to receive wide acceptance in the present political and economic climate. Although the amendment did gain the approval of a majority of the Senate, it is not surprising that when the conferees finally achieved a compromise on December 4, 1974,[60] and again in 1975,[61] terminology reminiscent of the amendment was conspicuously absent.

The House of Representatives

House efforts were directed more specifically than the Senate's at a reconciliation of the rights of property owners who own land above federally reserved coal relative to those whose land overlies privately owned coal.

The House bill as reported out of committee contained a measure authored by Representative Melcher, of Montana, which provided that regardless of subsurface ownership, where title to the surface is held in fee by someone other than the subsurface owner, the written consent or waiver of the surface owner would be required before surface mining operations could be undertaken.[62] A bond posted by the subsurface owner could not be substituted for the landowner's consent, as per the "either/or" rule. Because few surface owners could be expected to sacrifice their land without a guarantee of compensation, a mine operator would be compelled to purchase the surface estate for whatever price the owner might demand. Only in cases where the federal government owned the subsurface, and the surface estate was held pursuant to a lease or permit, was the "either/or" rule to be applicable.[63]

Such a delimitation of the "either/or" rule resulted from several criticisms of the standard. It was argued that requiring the mine operator

59. Ironically, although the amendment was designed to protect surface owners whose land overlay federal coal, not all land owners welcomed the measure. Some regard surface mining, properly conducted, as beneficial to the land, by reshaping its topography for increased agricultural productivity and grazing utility. Christian Science Monitor, Jan. 16, 1974 at 1.

60. H.R. REP. No. 1522, 93d Cong., 2d Sess. (1974).

61. During its consideration of the Surface Mining Control and Reclamation Act of 1975, the Senate rejected by a vote of 56-39 an attempt to revive the Mansfield provision. 121 CONG. REC. 39, S.3686 (daily ed. Mar. 11, 1975).

62. H.R. 11500, 93d Cong., 2d Sess. § 710(a) (1974), *quoted at* 120 CONG. REC. 111, H.7174 (daily ed. July 25, 1974).

63. *Id.* § 710(c).

to merely post bond covering damages to crops and improvements was tantamount to granting the operator "truncated eminent domain power" over the private property of another person.[64] The bond would not assure the preservation of a life style nor the unique topography of the land, nor would it always prevent an extended disruption of the livelihood of the rancher or farmer affected. It was contended that to permit miners to enter a surface estate without regard for the wishes of its owner abrogated the rights guaranteed to the surface owner even under common law.[65] As a result, under the House bill, the "either/or" rule was to remain applicable only where objections to the scope of its protection were meaningless, that is, where current possession of the surface estate was on a temporary basis, and where the federal government's reservation of the mineral estate gave it immediate authority to control the manner of extraction.

Response to the Melcher provision was as divided as it had been to the Mansfield amendment. Because few land owners could be expected to consent gratuitously to the surface mining of their estate, and under the provision, a bond for damages would be legally insufficient as a grant of authority to surface mine, coal companies would be forced to purchase surface estates in order to be able to surface mine legally. The proposal was criticized as permitting the surface owner to take undue advantage of the subsurface owner, as the former often would be able to sell his title to the surface at an exhorbitant price.[66] On the other hand, critics concerned with preserving the topography of unspoiled land maintained that the proposal did not protect the environment because subsurface owners would indeed pay outrageous sums for acquisition of land ripe for surface mining.[67] Nevertheless, attempts to remove or weaken the provision were unsuccessful[68] and it was passed by a majority of the

64. 120 CONG. REC. 111, H.7126 (daily ed. July 25, 1974) (remarks of Rep. Eckhardt).

65. *Id.* at H.7128-29.

66. *Id.* at H.7127. Ironically, the proposal permitted the surface owner who acquired land at a low price due to a severed interest, to take advantage of such severance in selling his title. *See id.* at H.7125. Moreover, the proposal was described as "unfair" to coal companies owning leases which permitted the mining of federal coal, because they would be required to pay twice for the right to mine: first, for the federal lease, and second, to acquire the surface estate. *Id.* at H.7127.

67. "It [the Melcher proposal] will make millionaires out of the ranchers but it is doubtful that it is going to do much for the environment." *Id.* at H.7127 (remarks of Rep. Udall).

68. *Id.* at H.7125-32. The House defeated a proposal which would have: (1), continued the "either/or" rule as to federally owned coal, and (2), imposed no restrictions on the mining of privately held coal. *Id.* at H.7125 and 7131.

House as section 710 of the Surface Mining Control and Reclamation Act of 1974.[69]

The Melcher proposal offered greater flexibility than the Mansfield amendment by adjusting the competing interests of the surface owner and subsurface owner or lessee. First, it provided a scheme whereby these interests could mutually agree to surface mining of the severed estate. Second, it established uniform rights for surface owners regardless of the ownership of the underlying mineral estate. The only major weakness of the proposal was its failure to limit the sum that a landowner could demand for the right to acquire his surface estate. In the final analysis, though, the provision suggested the basic framework of the compromise which was to follow.

The Compromise: Accommodating the Strippers

The compromise reached by the House and Senate conferees on December 4, 1974, applied the "either/or" criteria to land overlying privately owned coal and applied the Melcher proposal exclusively to land overlying federally owned coal. As to application of the Melcher proposal, the only serious objection was satisfied by curtailing the amount of the "windfall" which the surface owner could exact from the mine operator.[70] When Congress set to work redrafting the Surface Mining Control and Reclamation Act in 1975, this provision was retained verbatim, both houses rebuffing all attempts to alter or remove it.[71]

This compromise, however, was inadequate simply because it accorded surface owners varying rights depending upon the ownership of the subsurface estate. Moreover, the measure was too simplistic: it failed to account for the labyrinth of problems inherent in establishing the rights of each individual estate owner, and it did not allow mining decisions to be based upon the characteristics of a given tract of land. Without this element of flexibility, the effectiveness and acceptability of the provision was minimal.

The foregoing discussion illustrates the difficulty of balancing the respective rights of the owners of severed mineral and surface estates. It must be remembered that:

69. H.R. 11,500, 93d Cong., 2d Sess. § 710 (1974), *quoted at* 120 CONG. REC. 111, H.7174 (daily ed. July 25, 1974).

70. H.R. REP. No. 93-1522, 93d Cong., 2d Sess. at 81-82 (1974).

71. H.R. 25, 94th Cong., 1st Sess. (1974), *quoted at* 121 CONG. REC. 70, S.7423-44 (daily ed. May 5, 1975).

> Too often . . . regulations take the form of sweeping prohibitions and blanket indictments . . . simply because no one has taken the time to study the problem in depth and work out a reasonable compromise between the needs of the environment and the rights of the individuals.[72]

In reaching a proper balance between environmental needs and personal rights, political, social, and economic realities must be taken into account. Uniform application of the laws to all severed estates regardless of ownership, fair compensation to the separate estate owners, and maximum coal recovery at minimal environmental costs are ideals well worth a struggle to achieve.

A Modest Proposal

The proposal which follows is designed to establish balanced protection for the rights of both surface and subsurface estate owners and lessees. It is intended to serve as the core of a comprehensive, national surface mining control and reclamation act.

Protection of the Surface Owner

(a) In those instances in which the surface owner holds title to the land in fee simple, whether by deed or patent, and is not the owner of the mineral estate proposed to be mined by surface coal mining operations, the owner of the mineral estate shall not undertake to remove the coal except by underground mining, *unless* a reasonable percentage of the coal cannot be removed by underground mining methods, in which case surface mining of the coal may be permitted if it is consistent with the local or national interest.

(b) In those instances in which the surface owner holds the land by lease or permit from the federal government, and is not the owner of the mineral estate proposed to be mined by surface coal mining operations, the owner of the mineral estate shall not undertake to remove the coal by surface mining operations until the expiration of the lease or permit. The mineral estate owner shall have first preference in acquiring the surface rights at a price not to exceed the fair market value or fair rental value of the land plus the fair market value of improvements and fixtures, unless the interest of

72. F. Bosselman, The Taking Issue 327 (1973). [hereinafter cited as *Bosselman*]

the surface owner is shown to be paramount, or in other proper circumstances.

(c) Subsection (a) of this section shall not be applicable to lands where
(1) the surface estate owner also leases the subsurface from the federal government or a private individual, or
(2) the coal estate is privately owned and the right to surface mine the mineral has been expressly granted to the mineral owner by the owner of the surface estate or his predecessor in interest.

(d) Except as provided under subdivision (c)(1), in those instances where the surface owner holds the land in fee simple and the mineral estate is owned by the federal government and
(1) the government has previously leased the mineral rights to a third party,
(2) the lease limits the removal of the mineral to surface mining,
(3) such mining has not commenced as of the effective date of this Act, and
(4) such mining would not be precluded under subdivision (a), the Secretary of the Interior shall amend such leases to allow the underground mining of the coal, making such adjustments in the terms of the lease as are necessary to assure the operator a reasonable return on his investment.

(e) On those severed estates where surface mining operations are permitted pursuant to subsection (a), the surface-mine operator shall pay to the surface owner the fair market value of the land, to be based upon appraisals by three appraisers. One such appraiser shall be appointed by the Secretary of the Interior, one by the surface owner and the third shall be appointed jointly by these two appraisers. The surface owner also may be paid a bonus, not to exceed $100 per acre, plus such costs as are reasonably necessary to aid in the relocation of the surface owner. In addition, upon completion of the surface-mining operations and reclamation by the operator, the former surface owner shall have the first option of purchasing the surface estate, the price of which shall be the fair market value paid by the subsurface owner in the first instance, minus costs for irreparable damages occasioned by the surface mining operations, unless justice requires otherwise.

(f) For purposes of this section, the term "surface coal mining opera-

tion" does not include activity incident to underground mining for coal.

(g) All determinations under this section shall be made by a 3 member administrative panel to be called the Surface Coal Mining Advisory and Review Council. One member of the Council shall be appointed by the Administrator of the Environmental Protection Agency, one by the Director of the Bureau of Land Management of the Department of the Interior, and one by the Governor of the state in which the land sought to be mined is located. In the event the land is interstate, the third member shall be appointed by the Secretary of the Interior.

Explanation of and Comment Upon the Proposal

Subsection (a) of this proposal provides that regardless of subsurface ownership, if surface mining operations have not commenced on a particular parcel of land as of the date of enactment of the measure, surface mining techniques, with one exception, may not be employed to remove coal from the land. Under the exception, surface mining may be utilized if a reasonable amount of the coal cannot be recovered by underground mining. In determining what constitutes a "reasonable amount," the specially created administrative agency may consider such variables as the local or national interest, the amount of coal recoverable by deep mining relative to the amount recoverable by surface mining, potential damage to the surface estate, the economic welfare of the surface owner, and losses the mine operator would incur as a consequence of denying him the right to surface mine a particular tract.[73] The agency should balance the value of, and need for, the coal against the detriment to the surface owner and the surrounding environs. Thus, if a coal seam lay beneath an area upon which townhouses were being constructed or beneath a prosperous dairy farm, the value of the surface owner's interest would probably outweigh that of the mineral owner. Alternatively, if the surface were barren or undeveloped, the mineral owner's rights might be held paramount.[74]

73. As each case would present its own unique combination of variables, the agency's decisionmaking process would not necessarily follow standardized lines. Hence, potential for abuse of discretion would be considerable. Judicial review of the decision for such abuse would therefore present a viable alternative for the losing party. *See* note 75 *infra* & 5 U.S.C. § 706 (1970).

74. Although the utility or quality of the surface is a relevant factor, this should not of itself determine whether a coal company has the right to strip mine; considerations

The advantages of subsection (a) over the congressional proposals lie in its flexibility and uniformity of application. Of major significance is the fact that subsection (a) eliminates the right of a surface owner to preclude absolutely the surface mining of coal beneath his property. The decision whether a tract may be surface mined would be made by the agency only after hearing arguments from all interested parties.[75] It should be noted, however, that the subsection creates a presumption against surface mining and casts the burden of rebuttal upon those with an interest in the subsurface.

The ban on surface mining imposed by subsection (a) is prospective in effect; it does not apply to surface mining operations commenced prior to adoption of the proposal. Nor does it apply to mineral estates leased or owned by the surface owner. Such an application would, rather than protect the surface owner, impose upon him an unjustifiable burden and possibly raise constitutional objections.[76]

Pursuant to subsection (b), the mineral estate owner has, upon expiration of the overlying surface owner's lease or permit from the federal government, a right of first refusal to lease or purchase the surface rights from the government. Exercise of this right, however, is contingent upon a finding by the agency that a continuation of the original lease is not necessary given the circumstances of the particular case.[77] In agency decisions to be made under subsection (b), the presumption which inured to the benefit of the surface owner under subsection (a) shifts to the proprietor of the subsurface estate. If the subsurface owner's rights are held paramount, the operator will be allowed to surface mine the mineral as a matter of right, provided that all other requirements of the Act have been met.

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of energy needs and the proprietary interests of the coal companies should also be considered. *Cf.* New Charter Coal Co. v. McKee, 411 Pa. 307, 191 A.2d 830 (1963).

75. These hearings, of course, and all other business of the agency, must be conducted under the terms of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (1970), as amended, Pub. L. No. 93-579, § 1, 88 Stat. 1896 (1974).

76. *See* notes 79-89 *infra* & accompanying text.

77. The finding would be made on the basis of the same inquiries as those outlined at notes 73-74 *supra* & accompanying text, with one important difference: under subsection (a), the surface owner is entitled to a prima facie presumption in his favor. In deciding what is the most advantageous use of the surface under subsection (b), however, the presumption is that the land would be more properly used incident to a surface coal mining operation. Such factors as the good faith of the surface owner and his knowledge of the estate severance would also play a role in the agency's ultimate decision.

Subsection (d) responds to the complaint voiced by Mr. Carl Bagge,[78] of the National Coal Association, that to prohibit the surface mining of federal coal where the lease permits only such mining would result in costly delays while new leases were negotiated. This subsection serves to amend automatically all such leases to permit deep mining, thus avoiding the inconvenience and delay of negotiation. The terms of the amended lease are to be adjusted to insure a reasonable margin of profit to the operator, who is free to reject the offer. In such a case, the interest reverts to the United States, which can then offer the mineral estate by lease to another party.

Subsection (e) affords protection to those surface owners whose land is surface mined pursuant to subsection (a). Like the Melcher proposal, it applies to federally owned and privately owned coal estates, and compels the subsurface owner to purchase the interest of the surface owner before surface-mining operations begin. However, as in the compromise measure, the purchase price which may be demanded by the surface owner is limited to the fair market value of his estate, plus relocation fees and a nominal bonus. The provision also allows the former surface owner, upon the completion of mining operations, the option of repurchasing the land at the price he received for it, less damages resulting from the operation. Of course, if pursuant to an agreement between the surface owner and strip mine operator, the land is improved during reclamation, the former might be compelled to pay for the resultant benefits.

Certain aspects of the measure are open to criticism. Although not an immutable prohibition, the proposed ban on surface mining may present constitutional problems; industry spokesmen have stated that "anything not having to do with reclamation is prohibitory" [79] and violative of the "taking clause" of the fifth amendment of the United States Constitution.[80] That amendment states that private property cannot be taken by the federal government for public use "without just compensation." [81] Additionally, Senator Fannin of Arizona has stated that any attempt by the federal government to ban surface mining of even federally owned coal "would be changing property rights without providing adequate compensation in accordance with the Constitution." [82] Even a partial

78. BARRONS, Feb. 18, 1974, at 17.

79. 6 NAT. J. REP. 137, 140 (1974) (specifically referring to the Mansfield Amendment).

80. U.S. CONST. amend. V.

81. *Id.*

82. 119 CONG. REC. 149, S.18770 (daily ed. Oct. 8, 1973).

ban on surface mining such as proposed above, is likely, therefore, to face a constitutional challenge in the courts shortly after its enactment. Where the fundamental right of property is concerned, however, it is proper that final disposition of constitutional propriety be resolved in the courts. All questions presented by the "taking clause" relative to implementation of the above proposal are hence beyond the scope of this Note.[83] A survey of constitutional law relating to the fifth amendment clause in question suggests that the proposed statute would withstand a constitutional attack.

Court decisions construing the "taking clause" generally have distinguished a taking of private property for public use, which involves the right of eminent domain and requires compensation, from a regulation which resolves a conflict between private societal elements, which involves the exercise of the police power.[84] Regulation of surface mining, even where the surface estate is federally owned, essentially involves the latter. In assessing the validity of a regulation promulgated under the police power, even a substantial diminution of the affected property apparently is insufficient to condemn the regulation as an unconstitutional taking.[85] The Supreme Court, in *Goldblatt v. Town of Hempstead*,[86] held that an otherwise valid exercise of the police power would not be unconstitutional merely because it deprived the property of its most beneficial use, as long as the property retained some value for the purpose for which it was acquired.[87] Regulations otherwise valid, however, have been struck down where "severe private detriment has not been offset by widely shared public benefits but instead inured chiefly to the advantage of a narrowly defined but specifically identifiable class of private beneficiaries." [88]

The test then is twofold: is the taking for a public use, or does it merely resolve conflicts between private segments of society? If the

83. *See Bosselman, supra* note 72; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); VanAlstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. CAL. L. REV. 1 (1971).

84. For a definition of this clause see Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). *See also* Sax, *Takings and the Police Power, supra* note 83 at 150-55.

85. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (80% diminution upheld); Mugler v. Kansas, 123 U.S. 623 (1887) (substantial diminution upheld). *See also* United States v. Central Eureka Mining Co., 357 U.S. 155 (1958).

86. 369 U.S. 590 (1963).

87. *Id.* at 592.

88. Van Alstyne, *supra* note 82 at 20.

latter, is there an overriding public benefit to be derived from enjoining the property owner from using his land in a particular manner? The above proposal clearly satisfies the first element of the test, since it aims at resolving the conflicting private interests of the individual surface owner and the individual mineral estate owner. The second element is also satisfied, for the agency, in resolving private conflicts, is to rest its disposition, to a substantial degree, upon which determination better serves the local community or national interest.[89]

The proposal cannot be attacked as confiscatory because the subsurface owner is not totally barred from all reasonable use of his estate. Subsection (a) does not preclude him absolutely from using his estate for the purpose for which it was acquired, that is, the extraction of coal. He is limited only as to how he may remove the coal; if surface mining is the only reasonable method of extraction, and is consistent with the public interest, it will be allowed. In addition, subsection (a) does not apply to lands already being surface mined, nor does it prevent a company holding a surface mining lease from the federal government from conducting deep-mining operations. Coal rich land, therefore, is in no way rendered valueless for mining purposes.

Another criticism of this proposal is that it may circumscribe unduly the power of the state with regard to the regulation of mining on lands which are not federally owned. This criticism applies as well to any comprehensive federal attempt to regulate property rights which were formerly determined in large part by the common law of the states. The regulation of mining, apart from health and safety regulation, heretofore has been within the exclusive purview of state law. The enunciated purpose of the two unsuccessful federal bills, however, indicates a congressional intent to preempt state law in this area. The Report of the Committee on Interior and Insular Affairs on the 1974 Senate bill noted that the measure was designed to bring a degree of uniformity to state regulation of surface mining, including the protection of the rights of

89. As noted by one commentator:

> "(L)aws governing the production of coal will weigh the social value of the coal produced against the costs incurred by unrestricted production. As the need for coal increases, the position of the coal producers will improve in relation to other conflicting property users. At some point, it may be determined that the losses incurred by mining coal under the present technology are in the public interest. . . . The point is that these issues should be resolved on their own merits as questions of benefit optimization policy, rather than as elements of the constitutional law of property rights."

Sax, *Takings, Private Property and Public Rights, supra* note 83 at 180.

persons with a legal interest in land affected by surface mining.[90] Senator Henry Jackson, principal sponsor of the bill, elaborated: "We are trying . . . to do something about improving the environment as it relates to land itself in connection with strip mining which, heretofore, has not been properly managed by the States." [91] That the bill was framed in a national rather than a local context cannot be disputed.[92]

The proposal herein presented, however, preserves some measure of state control over property rights. Subsection (c)(2) provides that the ban on strip mining operations would be inapplicable to conveyances between private parties where the right to surface mine has been clearly granted by the surface owner to the proprietor or lessee of the mineral estate. It would be only where the purported surface mining grant is ambiguous, or in cases where the conveyance was executed before surface mining technology had permeated the industry that the prohibition would issue. These terms are consistent with the majority of state judicial interpretations of such conveyances.[93] Hence, the measure may be regarded as complementing majority state policy in this area, while fostering a socially, if not politically, desirable objective.

Conclusion

Federal regulation of surface mining on the severed estate is necessary to bring uniformity to an area of the law fraught with disharmony and inequity. In balancing the conflicting interests of the surface owner and the subsurface owner or lessee the common law has not taken cognizance of all factors incident to a proper resolution. Such factors, which may be scrutinized by the Congress, include socioeconomic and environmental considerations. Thus far, however, congressional attempts to deal effectively with this area have failed, perhaps due to the inflexibility of proposed legislation. It is submitted that the measure proffered in this Note is a viable, flexible alternative ripe for renewed congressional action.

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90. 119 Cong. Rec. 149, S.18756 (daily ed. Oct. 8, 1973).

91. *Id.* at 150, S.18877 (daily ed. Oct. 9, 1973).

92. The scope of the bill was set forth by Senator Metcalf:

> "During the course of the hearings [on S.425] we heard from witnesses from all over the United States who told us about the divided rights, the subsurface and surface rights. It is not only a Western problem; it is a problem in Pennsylvania, it is a problem in the Southern states, it is a problem in California. And we [the Senate] considered it . . . as a national problem."

Id. at S.18868.

93. *See* notes 22-39 *supra* & accompanying text.