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Subjacent Support: A Right Afforded to Surface Estates Alone

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SUBJACENT SUPPORT: A RIGHT AFFORDED TO SURFACE ESTATES ALONE?

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I. INTRODUCTION

In West Virginia, as in every other jurisdiction in the Union, it is
axiomatic that an estate in fee can be severed into distinct and separate
horizontal estates. In West Virginia, as in other states where the econo-
my and population are so reliant on the coal industry, it is the separa-
tion of the surface estate, or fee, from the coal estate that first comes
to mind with respect to the separation of horizontal estates. It is the
rights, duties, obligations, and conflicts to which this particular sever-
ance gives rise that have been the subject of numerous decisions, arti-
cles, and treatises. However, of these two estates, the coal estate is
susceptible to even further horizontal division; that is, the various indi-
vidual coal seams may be severed from one another with respect to
ownership.

In western Monongalia County, West Virginia, for example, the
overlying, or superincumbent, Sewickley seam and the underlying, or
subjacent, Pittsburgh seam can be the subjects of different ownership. The rights, duties, obligations, and conflicts that this separation gives rise to, however, have been the topic of a more limited focus. The purpose of this Note is to focus upon an issue that has received limited attention in both case reporters as well as academic publications. This Note undertakes an analysis of West Virginia law with respect to whether the right to subjacent support that is enjoyed by surface estates is also enjoyed by superincumbent coal estates.

Just as mine-related subsidence results in cracked house foundations, diversion of streams, and sinkholes and troughs on the surface, it also results in the deformation of that subsurface strata which overlies the mined coal seam. As an article published in the West Virginia Law Review a few years back noted:

Longwall mine subsidence effects vary to some degree from mine to mine, depending on the topography and lithography, the thickness and depth of the coal, and the dimensions of the panels. The removal of the coal and collapse of the roof in the longwall mining process disturbs the overburden strata, which deform and fail . . .

The strata overlying the mining will experience different fracturing patterns depending on their depth, so that areas immediately above the coal seam will experience the most severe disruption but seams higher up may be less affected. These overburden strata are categorized, in ascending order, as the caved zone, the fractured zone, and the continuous deformation zone.

Also, in deciding whether to grant declaratory judgment and injunctive relief prohibiting longwall operations, the Supreme Court of Virginia stated:

As the longwall mining equipment advances through the coal seam, the temporary shoring is removed from the mined area. The first 50-75 feet of strata above the mined seam, the immediate roof, then "rubblizes" because of pressure from the strata above, and collapses into the excavated area. The next 50-75 feet of strata above the immediate roof, the intermediate roof, then fractures into large blocks, collapses on the immediate roof, and later reconsolidates under pressure from the main roof. The main roof begins 100 to 150 feet above the coal seam, and extends to the sur-

face. . . . The main roof flexes or "bows" during the process but does not fracture. Therefore, there are no fractures or cracks in the surface. However, there is uniform subsidence in the form of a swale above the excavated area, with a maximum depth of about three feet.  

While mine-related subsidence is not peculiar to longwall operations, as opposed to more traditional room and pillar operations, both of these excerpts demonstrate the effects that longwall mining has upon overlying, or superincumbent, strata. Both stand for the proposition that mine-related subsidence, a result of the removal of subjacent support, not only has the potential to render homes uninhabitable and cause other surface-related effects, it has the potential to render superincumbent coal seams unrecoverable.

Therefore, this Note specifically focuses upon (1) the present state of West Virginia case law with respect to the support rights upper strata coal seams enjoy vis-a-vis lower strata coal seams; and (2) whether superincumbent coal seams are afforded any protection under the aegis of the Surface Mining Control and Reclamation Act (SMCRA), 3 or its state counterpart, the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA). 4

II. SUBJACENT SUPPORT IN WEST VIRGINIA

A. Subjacent Support of the Surface

Since the early nineteenth century, courts have recognized a surface owner's absolute right to subjacent support; 5 West Virginia is no exception. 6 In West Virginia, it is axiomatic that the strata underlying

a surface tract can be severed into distinct and separate estates.\textsuperscript{7} \textit{Williams v. South Penn Oil Co.} notes:

The law recognizes horizontal divisions of land. The severance of the surface from the underlying strata may be created by either reservation or express grant, as if the mineral right is an independent interest. Thus one person may own the iron ore, another the coal, another the limestone, and another the petroleum, and another the surface.\textsuperscript{8}

Furthermore, not only may the coal be severed from the surface, but the individual seams of coal may be severed from one another.\textsuperscript{9}

In \textit{Griffin v. Fairmont Coal Co.},\textsuperscript{10} the Supreme Court of Appeals of West Virginia based its theory of subjacent support on the principle that separate horizontal estates can be created below the surface.\textsuperscript{11} Justice McWhorter commented that:

The reason given by the English courts for the rule under consideration is that there are two separate estates, one belonging to the owner of the mineral, and the other to the owner of the surface; that each has the right to use his own . . . but each must so use his property as not to interfere with the other. . . .\textsuperscript{12}

Similarly, Justice Cox, in a concurring opinion, concluded that the West Virginia doctrine of subjacent support is founded solely upon “the principle of law, ‘\textit{Sic utere tuo ut alienum non laedas}’\textsuperscript{13} a principle dependent upon the existence of at least two distinct estates.

\begin{flushleft}
8. \textit{Id.} at 216 (citing ANDERSON’S DICTIONARY OF LAW 677).
9. In Monongalia County, for example, a vast number of the coal severance deeds were conveyances of the Pittsburgh, Nine Foot, or River, coal seam only, and not a conveyance of all the coal underlying a surface tract. \textit{See}, e.g., Stamp v. Windsor Power House Coal Co., 177 S.E.2d 146, 147 (W. Va. 1970) (deed of severance conveyed “All the Pittsburgh Number Eight or River Vein of coal”).
11. \textit{Id.} at 27.
12. \textit{Id.}
13. \textit{Id.} at 34 (Cox, J., concurring). \textit{Sic utere tuo ut alienum non laedas} is defined as the “[c]ommon law maxim meaning that one should use his own property in such a manner as not to injure that of another.” BLACK’S LAW DICTIONARY 1380 (6th ed. 1990).
\end{flushleft}
Thus, West Virginia common law recognizes the right of subjacent support and provides that when the underlying coal is severed from the fee, the owner of the surface has an absolute right to have his estate maintained in its natural state.\textsuperscript{14} The coal owner has a duty to refrain from injuring the superincumbent surface estate in his use of the coal estate. In \textit{Winnings v. Wilpen Coal Co.},\textsuperscript{15} the Supreme Court of Appeals of West Virginia, in deciding a coal operator's obligation to support the overlying surface, found:

The well recognized and firmly established rule is that when a landowner has conveyed the minerals underlying the surface of his land, he retains the right to the support of the surface in its natural state unless it clearly appears, by express words or by necessary implication, that he has released, waived, or qualified his right to such support.\textsuperscript{16}

Although decided in 1950, the rule recognized in \textit{Winnings} remains the law of West Virginia and has been most recently applied in \textit{Smerdell v. Consolidation Coal Co.}.\textsuperscript{17}

In \textit{Smerdell}, the plaintiffs tested the rule recognized in \textit{Winnings} on two bases. First, whether a waiver of subjacent support by the plaintiffs' predecessors in title was void in light of the Surface Mining Control and Reclamation Act (SMCRA)\textsuperscript{18} and the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA).\textsuperscript{19} Second, whether Consolidation Coal Company's use of longwall operations had rendered the waiver "unenforceable by changed circumstances."\textsuperscript{20}

In response to the former contention, the court looked to the litigation that arose over the Secretary of the Interior's promulgation of regulations based on SMCRA,\textsuperscript{21} as well as a recent West Virginia de-
cision focused on the validity of a pre-SMCRA waiver.22 Synthesizing the two decisions, the court stated that it "must conclude that SMCRA and WVSCMRA have not rendered invalid the common law of West Virginia on waivers of the right to subjacent support."23 In response to the latter of the two challenges, the United States District Court for the Northern District of West Virginia stated that "the Court believes that the language of the 1905 deed is so clear and unambiguous that the owner of the surface could only have intended to waive the right to subjacent support whatever method of coal removal was employed."24

Thus the federal court, sitting in diversity and applying West Virginia law,25 found that support waivers executed prior to the enactment of the federal and state mining regulation Acts are valid and enforceable.26 Furthermore, the court concluded that longwall mining, in the face of an unambiguous waiver of subjacent support, does not render such a waiver unenforceable.27 Therefore, with respect to surface subsidence, Smerdell, together with Winnings and its progeny, establish that, in the absence of an express or implied waiver, the owner of the surface has an absolute right28 to have the surface maintained in its natural state, despite federal and state legislation and the mining technology employed.29

22. Id. at 1284 (finding authority in Russell v. Island Creek Coal Co., 389 S.E.2d 194 (W. Va. 1989)).
23. Id. at 1284.
24. Id. at 1285.
25. Smerdell is the decision of a federal district court sitting in diversity and applying West Virginia law; nonetheless, the decision is not binding precedent upon the judicial forums of West Virginia.
26. Smerdell, 806 F. Supp. at 1285. The impact of SMCRA and WVSCMRA upon West Virginia common law with respect to subjacent support is pursued in Section III.
27. Id. See also J. Thomas Lane, Fire in the Hole to Longwall Shears: Old Law Applied to New Technology & Other Longwall Mining Issues, 96 W. VA. L. REV. 577 (1994); Patrick C. McGinley, Does the Right to Mine Coal Under Lease or Deed Include the Right to Extract by Longwall Mining Methods?, 5 E. Min. L. INSTR. CH. 5 (1984).
B. Subjacent Support of Superincumbent Coal Strata

The Supreme Court of Appeals of West Virginia has recognized that the right to subjacent support extends to more than just the surface estate; such right extends its protection to all superincumbent estates.30 As Professor Robert T. Donley noted in his treatise on coal, oil, and gas law in the Virginias, "[t]he question of support as between upper and lower seams of coal has arisen in two cases[.]"31 Goodykoontz v. White Star Mining Co.32 and Continental Coal Co. v. Connellsville By-Product Coal Co.33 Both cases recognized that the right to subjacent support is not limited to the surface overlying a coal seam, but that the right is one that belongs to each estate superincumbent upon another.

30. See Lane, supra note 27, at 592 ("With respect to subsidence, the early cases established that the surface and upper strata owners have the absolute right to have their property supported, unless such right is waived, either expressly or by necessary implication in a severance deed or other instrument."); Samuel L. Douglas, Rights of Owners of Mineral Strata to Protection from Subsidence, E. Min. L. Found. Coal Mine Subsidence Special Institute, December 8, 1989. But cf. Culp v. Consol Pennsylvania Coal Co. (Culp III), 1989 WL 101553 (W.D. Pa. 1989). In Culp III, a Federal district court found that two Pennsylvania cases, George v. Commonwealth Dep't of Envtl. Resources, 517 A.2d 578 (Pa. Commw. Ct. 1986) and Culp v. Consol Pennsylvania Coal Co. (Culp II), 506 A.2d 985 (Pa. Commw. Ct. 1986), had interpreted the common law right to subjacent support as having been modified by the Pennsylvania legislature [by way of the Bituminous Mine Subsidence and Land Conservation Act] to exclude protection for subsurface strata and unimproved surface land. . . . These two cases indicate that, under Pennsylvania law, the support estate has as its purpose the protection of the surface and structures on the surface. The Subsidence act expresses a legislative intention that intervening strata are entitled to protection only insofar as such protection is necessary to prevent damage to surface and surface structures. Culp III 1989 WL 101553, at *7. This finding, based on footnote 5 of George, is an excessively broad reading of the two cases. These cases, both discussed below, merely found that the Pennsylvania Act did not protect subsurface coal seams from subsidence. In Pennsylvania, the right to subjacent support is recognized as a distinct estate in and of itself; such a conclusion, if it were not in error, would not appear able to withstand a constitutional challenge based upon deprivation of property.

32. 119 S.E. 862 (W. Va. 1923).
33. 138 S.E. 737 (W. Va. 1927).
In Goodykoontz, the court enjoined the defendant, White Star Mining Company, from further removing and pulling support pillars from a lower seam that would result in the subsidence of an upper seam.34 The plaintiffs leased the mining rights to two seams of coal underlying a Mingo County surface tract to White Star’s predecessors.35 Mining operations were initially commenced in the upper of the two seams, the Alma seam, and subsequently begun in the lower Pond Creek seam.36

Before the seam had been exhausted, the operations in the upper seam were discontinued.37 As mining in the lower Pond Creek seam progressed, White Star began pulling support pillars.38 As a result, the upper seam was deprived of support. The overburden of the upper seam began to subside and it began to experience water seepage.39 The plaintiffs, as lessors and thereby holders of a reversionary interest, sought an injunction requiring White Star to cease mining in the lower Pond Creek seam until it had exhausted the upper Alma seam.40 The court denied plaintiffs’ request to enjoin mining in the lower seam, but found that the upper seam was entitled to support as a superincumbent estate and enjoined the further removal of support.41

In Continental Coal Co. v. Connellsville By-Product Coal Co.,42 the facts were quite different. Cochran Coal & Coke Company owned 2,100 acres of Pittsburgh coal on Scotts Run in Monongalia County, West Virginia, together with a waiver of support for the overlying surface.43 Connellsville By-Product Coal Company, the defendant, leased the 2100 acres of Pittsburgh coal from Cochran.44 Continental Coal Company, the plaintiff, owned a tract of Sewickley coal overlying the leased Pittsburgh coal that it had acquired subsequent to Cochran’s

34. 119 S.E. at 865.
35. Id. at 863.
36. Id.
37. Id.
38. Id.
40. Id.
41. Id. at 865.
42. 138 S.E. 737 (W. Va. 1927).
43. Id. at 738.
44. Id.
acquisition of the Pittsburgh coal and the accompanying waiver.\textsuperscript{45} As Professor Donley notes, Continental “took with constructive, if not actual, notice of” Connellsville By-Product’s right to subside the Pittsburgh seam’s overburden.\textsuperscript{46}

Continental began operations in the overlying Sewickley seam prior to Cochran’s operations in the lower strata Pittsburgh seam. However, when mining finally did begin in the lower seam and support pillars were removed, the overlying Sewickley seam began to subside.\textsuperscript{47} Continental proffered an argument in equity, on the grounds that it had begun its operations in the superincumbent seam prior to those in the lower Pittsburgh seam.\textsuperscript{48} Thus, it argued that Connellsville By-Product’s right to remove subjacent support was subject to protecting Continental’s Sewickley mine until the coal had been recovered.\textsuperscript{49}

The Court quickly denounced this reasoning as being dependent upon a race between upper strata and lower strata coal seam owners to commence operations.\textsuperscript{50} The court found that Continental, as the purchaser of the Sewickley seam subsequent to the severance deed and waiver of support in respect to the Pittsburgh coal, stood in the same position as the purchaser of an overlying surface tract from under which the right to support had been waived.\textsuperscript{51} Thus, the court again recognized that the doctrine of subjacent support is a property right that, unless waived, extends to all superincumbent estates.\textsuperscript{52}

A review of Goodykoontz and Continental Coal Co. reveals that the support rights of the overlying coal strata are dependent upon two factors. The first factor examines which coal estate was severed first in time. If the superincumbent seam was the first to be severed from the fee, it cannot be deprived of its right to subjacent support unless such

\textsuperscript{45} Id. at 737-38.
\textsuperscript{46} DONLEY, supra note 31, § 150, at 213.
\textsuperscript{47} Continental Coal Co., 138 S.E. at 738.
\textsuperscript{48} Id. at 740.
\textsuperscript{49} Id.
\textsuperscript{50} Id. at 741.
\textsuperscript{51} Id.
\textsuperscript{52} Continental Coal Co., 138 S.E. at 741.
support is either expressly or implicitly waived. However, if the upper strata seam was not the first seam severed from the fee, the second factor comes into play. The second factor is the presence or absence of a support waiver; that is, did the owner of the fee waive his right to subjacent support for all overlying strata? If not, the overlying seam is entitled to support. If so, was the waiver specific and did it encompass matters within the contemplation of the parties at the time of its execution?

The Continental Coal Co. decision was resolved on the presence of a support waiver. Had Continental acquired the Sewickley seam prior to Cochran’s acquisition of the Pittsburgh seam and the appurtenant waiver of subjacent support, a subsequent waiver of support would have been ineffective against its claim to subjacent support. The subsequent severance of the Pittsburgh seam from the remainder of the fee could have waived support for the surface, but as the estate severed first in time, Continental’s Sewickley coal would have frustrated White Star’s ability to remove support. However, despite a waiver of sub-

53. A variation on this first in time severance could exist where the owner of the fee severs an upper strata coal seam, but for the benefit of the lower strata seams that he retains, reserves the right to remove support from that overlying strata severed from the fee.

54. It is often asked in surface mining and longwall mining cases whether the parties to the severance deed could have contemplated the effects of these new technologies. Did the parties at the time of execution foresee that the surface could be destroyed, rather than subsided, by waiver of support rights? See Lane, supra note 27, at 594-95. In a case for subsidence of an overlying coal seam, it could be maintained that the parties never contemplated that the coal seams overlying the subject seam would be rendered unrecoverable by a waiver of surface support. See also McGinley, supra note 27, at §5.04[5] n.18:

A person (surface owner, overlying coal seam owner/lessee, oil and gas rights owner/lessee, or public utility transmission line easement possessor) who is concerned about potential subsidence damage from longwall mining would be well advised to have a careful title search performed to determine whether there has, in fact, been a waiver of the absolute right to subjacent support. Even if, for example, the severance document granting the right to (longwall) mine a coal seam states that the coal may be removed without liability for surface damage caused by subsidence, would such waiver be effective as against the owner of an overlying coal seam threatened by longwall subsidence? In such cases must the severance language waive the right of subjacent support of overlying strata and/or coal seams as well as surface support?

Id.

55. Although beyond the scope of this Note, would the waiver of support by the owner of the remaining fee in such a situation be in violation and breach of a covenant of
Subjacent support, the author believes that this case, if tried today, might reach a wholly different outcome. In the concluding passages of the decision, the court stated:

In passing, it may be well to observe that, while governmental or public policy will not impair the obligation of a contract, nor take property under the police power without due process and adequate compensation, reasonable regulations concerning the manner of using the property for the public welfare may be and often are enforced. Conservation of gas, by requiring wells to be plugged when not in use or abandoned, regulations with respect to drilling wells through coal seams for the protection of the coal, penalties for excavating coal within [five] feet of the property line, are all familiar illustrations. We are not directed to any law or public policy which prohibits a landowner from selling subjacent support, although thereby his overlying minerals and surface may be damaged or destroyed.\(^56\)

Professor Donley notes that "[o]n first impression the result reached seems harsh and against the public interest, but on further reflection the reasoning of the court is unassailable. The owner of the lower seam has bought and paid for the right to let down the upper seam."\(^57\) Given the dicta of the court, the enactment of SMCRA\(^58\) and its state counterpart, WVSCMRA,\(^59\) the Energy Policy Act of 1992,\(^60\) West Virginia's coalbed methane act,\(^61\) and the consciousness that prevails with respect to conserving energy resources\(^62\) and the

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56. Continental Coal Co., 138 S.E. at 744 (citing Godfrey v. Weyanoke Coal & Coke Co., 97 S.E. 186 (W. Va. 1918)).
57. DONLEY, supra note 31, § 150, at 213.
62. In discussing the right to utilize longwall mining methods, McGinley notes: Several important public interests may exist with regard to longwall mining. For example, the use of longwall mining extractive methods may cause severe damage to overlying coal seams making subsequent extraction therefrom either difficult or impossible. Such an impact of longwall mining, when considered in the aggregate, could greatly reduce the quantity of coal now considered part of the United States reserve of fossil fuels. One might question whether it is in the public interest to use the longwall mining method to remove coal from one seam while destroying
environment in general, it seems highly plausible that were this decision put before the Supreme Court in 1995, as opposed to 1927, a different result would be inevitable. A modern court would not allow millions of tons of coal, millions more in revenues, countless jobs, both direct and indirect, and an opportunity to fill the public coffers with taxes to be rendered unrecoverable by a mere waiver of subjacent support procured and paid for nearly a century earlier.

Thus, in West Virginia, the doctrine of subjacent support is a property right based upon the Latin maxim “sic utere tuo ut alienum laedas” that extends its protection to both surface and subsurface estates alike. It is a right that is retained unless waived, either expressly or by necessary implication. However, where a waiver permits a conflict that could render other resources unrecoverable, a substantial policy argument exists for challenging the viability of the waiver.

III. IMPACT OF SMCRA & WVSCMRA

On August 3, 1977, Congress enacted the Surface Mining Control and Reclamation Act of 1977. In turn, the West Virginia Legislature enacted the West Virginia Surface Coal Mining and Reclamation Act. The issue is whether SMCRA and WVSCMRA impact the common law of West Virginia so as to expand, contract, or in any way modify a superincumbent coal seam owner’s absolute right to subjacent support. The answer to such a query is the subject of a two-pronged analysis. First, do either the federal or state Acts extend their aegis to protect subsurface mineral estates; and second, if such estates are within the protective embrace of the Acts, are common law waivers valid notwithstanding the Acts? Despite persuasive arguments to the contrary, the preponderance of the authority supports the conclusion that SMCRA and WVSCMRA do not impinge upon the common law doctrine of subjacent support with respect to overlying coal seams, and

or damaging large coal reserves found in overlying seams.


64. W. VA. CODE §§ 22-3-1 to -32 (1994).
Furthermore, waivers of subjacent support are viable weapons against the claims of superincumbent mineral owners.  

A. Are Subsurface Mineral Interests Protected

1. The SMCRA Does Not Afford Protection to Overlying Coal Strata

Included within the Acts' definition of surface mining operations are the "surface operations and surface impacts incident to an underground coal mine." Section 516 of SMCRA is the operative provision with respect to these surface impacts and the subsidence caused by underground mining operations. Section 516(b) provides:

Each permit issued under any approved State or Federal program pursuant to this Act and relating to underground coal mining shall require the operator to—

(1) adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of such surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner. Provided, That nothing in this subsection shall be construed to prohibit the standard method of room and pillar mining.

65. See Jeff A. Woods, The Continuing Viability of Subjacent Support & Subsidence Damage Waivers: Fact or Myth?, 14 E. Min. L. Found., ch. 10, § 10.07 (1993) ("[I]t does not appear that SMCRA as enacted, as interpreted through regulations promulgated thereunder, or as supplemented by the Energy Policy Act, is designed to, or is likely to have any impact on the effect and viability of subjacent support and damage waivers as they apply to owners of overlying, but underground, minerals."). Mr. Woods' work served as an excellent guide with respect to SMCRA.


68. Id.


70. Id.
Does this provision, contained in both the federal and state Acts, afford its protection not only to surface estates, but to subsurface estates as well? The authority points to the conclusion that the interests of subsurface, but superincumbent, estate owners are not afforded protection by SMCRA.

First, the plain language of Section 51671 itself supports the conclusion that subsurface estates are not encompassed by the federal Act. As a chapter in the publication of the Eastern Mineral Law Foundation’s fourteenth annual institute recognizes, the

SMCRA specifically requires the Secretary to promulgate rules directed toward the surface effects of underground coal mining operations. The operative provision, Section 516, is replete with references to “surface lands,” “surface disposal,” “lands affected,” “surface impacts,” “stability of land,” and other similar restrictions on surface effects; it makes no mention of underground effects. The federal subsidence control regulations likewise include protection of the surface lands.72

Similarly, the legislative history of SMCRA indicates that its protections are not afforded to those horizontal estates below the surface. The issue of whether SMCRA applies only to surface subsidence, or to both surface and mineral estate subsidence, “is not addressed directly in SMCRA’s legislative history. . . . The problem that [the House and Senate] reports mention as requiring treatment are all surface related problems. Nothing in the reports suggests any intent to protect or otherwise affect underground coal seams or other minerals.”73

Furthermore, the Office of Surface Mining Reclamation and Enforcement (OSM), the Department of the Interior agency charged with enforcing and administering SMCRA, has taken the position that the federal Act does not afford its protection to subsurface mineral estates.74 In issuing final rules on the informational requirements of sub-

72. Woods, supra note 65, at § 10.07 (emphasis in original).
73. Id.
subsidence control plans for underground mining operations, OSM stated that it was the position of the agency "that the subsidence control plan is properly directed only to the evaluation of the surface impacts of underground mines. Section 701(28) of the Act specifically defines underground mining activities regulated under the Act to include only the surface impacts incident to an underground coal mine." Thus, it is apparent that OSM's interpretation of SMCRA does not include superincumbent mineral estates within the realm of property interests protected from the effects of subsidence.

2. Pennsylvania's Counterpart Does Not Afford Protection to Overlying Coal Strata

This position of OSM was relied on in a case deciding whether the Pennsylvania counterpart to SMCRA granted protection to subsurface estate owners. Two recent Pennsylvania decisions have specifically addressed the issue of whether Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, which is substantially similar to SMCRA and WVSCMRA, affords its protection to subsurface estates. It is the only jurisdiction, as of yet, to address this issue.

In George v. Commonwealth Department of Environmental Resources, the plaintiff, George, owned a coal seam overlying the Pittsburgh seam that Consolidation Coal Company planned to longwall mine. George had challenged the issuance of a subsidence control permit based upon his interest in the overlying coal seam. The Penn-

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77. See Woods, supra note 65, at § 10.07.
78. PA. STAT. ANN. tit. 52, §§ 1406.1 to -21 (Supp. 1994).
83. George, 517 A.2d at 578.
84. Id.
sylvania Environmental Hearing Board (EHB) dismissed George’s challenge on the grounds that his interest in the superincumbent coal seam was outside the protection of the Pennsylvania Act.85

The Commonwealth Court upheld the EHB’s dismissal based on the court’s prior ruling in Culp v. Consol Pennsylvania Coal Co.86 The George court found that in “Culp v. Consol Pennsylvania Coal Co., we held that the legislature’s use of the term surface lands within the Act constituted a conscious choice specifically not to grant subsurface owners protection under the Act.”87 The court then found that “[i]nasmuch as the relevant federal regulations reveal no contrary intent, we find Culp to be controlling.”88 The federal regulations the court was speaking of were those promulgated by OSM, and OSM’s position that the federal regulations do not protect subsurface estates from subsidence.89

The George decision relied upon Culp v. Consol Pennsylvania Coal Co. (Culp II).90 Culp II was the product of reargument which resulted in the court vacating its original order.91 Culp v. Consol Pennsylvania Coal Co. (Culp I) was first decided on May 28, 1985.92 In Culp I, the plaintiff, Culp, appealed the issuance of a subsidence permit to Consol.93 Consol challenged Culp’s standing to appeal on the basis that the interest he sought to protect was an overlying coal seam and not an overlying surface estate.94 The EHB found that Culp had standing, but that the Act’s purpose was not to protect subsurface coal seams.95 The Culp I court agreed that Culp had standing, but dis-

85. Id.
87. George, 517 A.2d at 579 (citations omitted).
88. Id. at 578-79.
89. Id. at 578 n.4 (citing 48 Fed. Reg. 24,640).
90. 506 A.2d 985. As noted, supra note 30, there is also Culp III; however, Culp III was an action maintained in federal court rather than state court.
93. Id. at 1185.
94. Id.
95. Id.
agreed with the EHB decision in part, and found that the Act did protect Culp’s overlying mineral interest.\textsuperscript{96}

In October, 1985, the case was reargued before the court \textit{en banc} and \textit{Culp I} was vacated.\textsuperscript{97} In \textit{Culp II}, the court expressly stated that it was not deciding the issue of standing, but rather, whether Culp had “alleg[ed] an interest covered by the [Pennsylvania] Act which interest would mandate at least \textit{consideration} by the Department before it issued a subsidence permit to Consol.”\textsuperscript{98} After examining the purpose of the Act, the court found:

\begin{quote}
Pennsylvania has long recognized subsurface interests in land as being severable from surface ownership. Despite these long standing legal tenets of which the legislature may certainly be presumed to be aware, it has chosen not to specifically grant subsurface owners protection under this Act. Had the legislature wanted to provide protection for this category of owners it could have so stated. Instead, it repeatedly emphasizes that the Act protects \textit{surface} lands.\textsuperscript{99}
\end{quote}

Thus, the plain language, the legislative history, and the position taken by the agency charged with the administration and enforcement of the federal Act all provide that SMCRA does not afford protection to subsurface coal seams. Furthermore, the case law interpreting Pennsylvania’s counterpart to SMCRA, in conjunction with the federal viewpoint, definitively holds that protection for such estates is consciously absent from the Pennsylvania Act. However, where does West Virginia stand?

3. West Virginia’s Position

In West Virginia, the issue is unresolved. Under WVSCMRA, a substantial argument can be made for either side. A purpative analysis of the Act renders a decision in favor of protecting subsurface mineral estates under WVSCMRA; while a plain language and precedential analysis yields a contrary result.

\begin{itemize}
  \item 96. \textit{Id.} at 1185-86.
  \item 97. \textit{Culp II}, 506 A.2d at 985.
  \item 98. \textit{Id.} at 987 (emphasis in original).
  \item 99. \textit{Id.} at 988 (citations omitted) (emphasis in original).
\end{itemize}
SMCRA provides that "[n]o State law or regulation in effect on the date of enactment of this Act, or which may become effective thereafter, shall be superseded by any provision of this Act or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this Act." However, it is arguable that protecting subsurface coal seams from subsidence is not a provision inconsistent with SMCRA; it is a more expansive protection afforded by the state. The federal Act also provides that:

Any provision of any State law or regulation in effect upon the date of enactment of this Act, or which may become effective thereafter, which provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operation than do the provisions of this Act or any regulation issued pursuant thereto shall not be construed to be inconsistent with this Act.

The protection of subsurface mineral estates, in addition to surface lands, would be a state land use provision more stringent than the provisions of the federal Act. Thus, if WVSCMRA provided for their protection, it would not be inconsistent with the federal Act, but peculiar to the state Act. The issue is whether the West Virginia counterpart to SMCRA provides for the protection of subsurface coal seams.

In Culp II, the Pennsylvania court based its holding on a purpative analysis of the Pennsylvania Act. The Culp II court found that the purpose of Pennsylvania’s Bituminous Mine Subsidence and Land Conservation Act was to protect interests in surface lands and not subsurface estates. The court examined both the purpose underlying the Pennsylvania Act and the General Assembly’s policy declara-

102. 506 A.2d 985, 988.
103. PA. STAT. ANN. tit. 52, §§ 1406.1 to .21 (Supp. 1994).
104. 506 A.2d at 988.
The court found both sections of the Act replete with references to protecting surface land and the structures it supports. In contrast, West Virginia’s Surface Coal Mining and Reclamation Act appears to aspire toward the protection of both surface and subsurface estates. The West Virginia Legislature found “that unregulated surface coal mining operations may result in disturbances of surface and underground areas that burden and adversely affect commerce, public welfare and safety by destroying or diminishing the utility of land for commercial . . . purposes; . . . by damaging the property of citizens; [and] by creating hazards dangerous to life and property. . . .” Furthermore, the legislature declared the purpose of the Act to:

(2) Assure that the rights of surface and mineral owners and other persons with legal interest in the land or appurtenances to land are adequately protected from such operations;

(7) Assure the exercise of the full reach of state common law, statutory and constitutional powers for the protection of the public interest through effective control of surface-mining operations; and

(8) Assure that the coal production essential to the nation’s energy requirements and to the state’s economic and social well-being is provided.

The purposes underlying the West Virginia counterpart to SMCRA are not nearly as biased and pointed toward surface lands as are the purposes of the Pennsylvania Act. In fact, in only two instances in the West Virginia purpose declaration is the protection of surface lands expressly stated. In the first of these, West Virginia Code Section 22-3-2(b)(2), “the rights of surface and mineral owners” are both expressly noted as afforded protection by the Act. Furthermore, Sec-

107. 506 A.2d at 988.
110. W. VA. CODE § 22-3-2(b) (1994) (emphasis added).
tion 22-3-2(b)(7) provides for the "exercise of the full reach of state common law."\textsuperscript{113} It is well established that West Virginia law recognizes subjacent support as a property right belonging to all superincumbent strata.\textsuperscript{114} Therefore, a substantial argument can be proffered that WVSCMRA protects not only surface estates, but that the state Act is more comprehensive in its scope of protection than either the federal or Pennsylvania Acts, and protects subsurface interests as well.

However, like the federal Act,\textsuperscript{115} the plain language of the West Virginia Act's definition of surface mining operations,\textsuperscript{116} as well as the language of the section aimed at underground mine subsidence control,\textsuperscript{117} contradicts the results of a purpative examination of the Act.\textsuperscript{118} Nowhere in Section 22-3-14 is reference made to the protection of other mineral estates.\textsuperscript{119}

Thus, a conflict exists between a reading of the legislature's purposes for passing the Act into law, and the specific protections the Act affords. If the court were to utilize a purpative analysis similar to that in \textit{Culp II},\textsuperscript{120} it seems the court would have to find that superincumbent mineral estates are protected. However, if the court looked to the plain language of Section 22-3-14, the position taken by OSM, and persuasive Pennsylvania precedent, the opposite result would follow. Furthermore, West Virginia case law sheds little light on the issue.

\textsuperscript{113} W. VA. CODE § 22-3-2(b)(7) (1994).
\textsuperscript{114} See supra note 30. Section 22-3-2(b)(7) may also be read as recognizing that the Act is not meant to modify the common law of West Virginia in that it protects the support rights of overlying mineral estates, but neither is the Act meant or intended to extend its protection to such estates.
\textsuperscript{115} See supra note 66 and accompanying text.
\textsuperscript{116} W. VA. CODE § 22-3-3(u)(1) (1994).
\textsuperscript{117} W. VA. CODE § 22-3-14 (1994).
\textsuperscript{118} See supra note 71 (the language of the state and federal Acts is substantially identical).
\textsuperscript{119} W. VA. CODE § 22-3-14 (1994).
\textsuperscript{120} See supra note 99.
In *Canestraro v. Faerber*, the Supreme Court of Appeals of West Virginia found that state provisions inconsistent with SMCRA are superseded by the federal Act. However, the court was not presented with, nor did it address, a situation where the state provision was more stringent than federal law. Subsequently, in *Russell v. Island Creek Coal Company*, the court was again faced with the question as to whether a state provision was consistent with federal law.

In *Russell*, the court noted that:

[Under the primacy concept embodied in 30 U.S.C. §§ 1211, 1253 and 1255, the federal legislation allows states to adopt their own surface-mining reclamation statutes and regulations. In doing so, the state assumes primary jurisdiction. If a state chooses to become the primary regulator of surface mining, however, its laws must be at least as stringent as the federal law or the state risks federal intervention and loss of its status as the primary regulator.]

The court then went on to state that where an inconsistency between the state and federal provision was not facially apparent, the court has "relied on: the legislative intent of the state and federal statutes (protection of the public and the environment); state regulations; federal regulations promulgated by the Secretary of the Interior; and a group of federal court decisions interpreting the federal rules. . ." Thus, the court recognized the independence of WVSCMRA, within the parameters of the federal framework. Furthermore, the court noted its own willingness to look to federal law for guidance, OSM regulations and interpretations included.

In addition, in *Rose v. Oneida Coal Co.*, the court may have inadvertently given support to the argument against the protection of subsurface mineral interests under the West Virginia Act. In *Rose*, on

121. 374 S.E.2d 319 (W. Va. 1988).
122. Id. at 321.
124. Id. at 198.
125. Id. at 198-99 (citing *Canestraro*, 374 S.E.2d at 320).
126. Id. at 199.
127. Id.
the basis of the rule recognized in *Winnings v. Wilpen Coal Co.*, the court summarily dismissed the plaintiffs’ claim for subsidence damages. In dicta, the court stated that the plaintiffs may have a cause of action arising under the WVSCMRA; however, because the plaintiffs failed to argue such a claim at either the trial level or in their appeal, the court would refrain from rendering an opinion. The court wrote: “Although we believe that WVSCMRA has changed many of the old common law rules concerning the rights and remedies of surface owners *vis a vis* mineral owners, the dimensions of those changes are as yet uncertain.” This dicta may have prematurely foreclosed the rights of mineral owners *vis-a-vis* mineral owners. However, given the context of the facts surrounding the decision—surface subsidence—this comment may not be detrimental to the cause of mineral interests.

Whether West Virginia law will protect the interests of superincumbent mineral estate owners through the auspices of WVSCMRA will be determined by the analytical approach selected by the Supreme Court when the issue finally arrives before it. A purpative analysis such as that utilized in *Culp II* could render an opinion in which such interests are seen as protected under the Act. An approach seeking to maintain consistency and minimize disparities between the state and federal levels would rely on the plain language of Section 22-3-14, federal legislative history, the position of the federal agency responsible for enforcing SMCRA, and Pennsylvania case law. However, the court could acknowledge a purpative analysis, but find its results subordinated for the purpose of minimizing disparities between the two Acts and because of the absence of a specific provision within the West Virginia Act expressly protecting the interests of subsurface estate owners. Upon such a decision, West Virginia law would not extend itself so far beyond the federal scheme upon which it is patterned, but be in concurrence with the likes of *Culp II*, *George*, and OSM.

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129. 59 S.E.2d 655 (W. Va. 1950).
130. 375 S.E.2d at 816.
131. *Id.*
132. See *supra* note 99.
B. In West Virginia, Waivers Have Not Been Rendered Invalid

Second in this two-pronged analysis, on the assumption that West Virginia includes subsurface mineral interests under the protective aegis of WVSCMRA, is the issue of whether the Act renders subjacent support waivers invalid and unenforceable against the claims of superincumbent mineral estate owners. West Virginia has taken the position that, so long as waivers are specific and the matters waived were within the contemplation of the executing parties at the time, the waiver is valid, notwithstanding SMCRA and WVSCMRA.\textsuperscript{133} In \textit{Smerdell}, the United States District Court for the Northern District of West Virginia stated:

As the West Virginia Supreme Court of Appeals implicitly recognized in \textit{Russell v. Island Creek Coal Co.}, a pre-SMCRA waiver may validly extinguish rights afforded under SMCRA provided the "waiver was specific, knowing and, under the circumstances, clearly contemplated by the parties." Accordingly, the Court must conclude that SMCRA and WVSCMRA have not rendered invalid the common law of West Virginia on waivers of the right to subjacent support.\textsuperscript{134}

Substantially similar to \textit{Smerdell} is \textit{Giza v. Consolidation Coal Co.}\textsuperscript{135} An unpublished opinion, \textit{Giza} was summarized in one of the most recent publications of the Eastern Mineral Law Foundation:

\textit{Giza v. Consolidation Coal Co.} was substantially identical to \textit{Smerdell}, involving similar claims and the same issues. In an unpublished opinion rendered about four months before the \textit{Smerdell} opinion, Judge Stamp, District Judge for the Northern District of West Virginia, addressed the same SMCRA pre-emption issue as he later addressed in \textit{Smerdell}. He resolved it in the same fashion, concluding that contentions that "SMCRA and WVSCMRA have rendered the 1901 waivers void . . . must be reject-

\textsuperscript{133} See \textit{generally} Russell v. Island Creek Coal Co., 389 S.E.2d 194 (W. Va. 1989). For contradictory holdings in Illinois, see \textit{supra} note 29.

\textsuperscript{134} 806 F. Supp. 1278, 1284 (N.D.W. Va. 1992) (quoting Russell v. Island Creek Coal Co., 389 S.E.2d 194, 205 (W.Va. 1989)) (citations omitted). As noted, \textit{supra} note 25, \textit{Smerdell} is the decision of a federal district court sitting in diversity and applying West Virginia law; nonetheless, the decision is not binding precedent upon the judicial forums of West Virginia.

\textsuperscript{135} 972 F.2d 339 (4th Cir. 1992).
... The decision was appealed to the Fourth Circuit. In an unpublished opinion issued on August 11, 1992, the court affirmed Judge Stamp’s decision.136

Russell v. Island Creek Coal Co.137 was the West Virginia decision upon which Smerdell was based.138 In Russell, in the course of upholding the validity of a waiver of private water rights, the court reviewed its decision of Cogar v. Sommerville.139 The Russell decision commented that SMCRA had expanded West Virginia’s common law concerning support waivers in coal severance deeds. “The common-law test was restated in [Cogar v. Sommerville]: ‘A release ordinarily covers only such matters as may fairly be said to have been within the contemplation of the parties at the time of its execution.”140

However, the common law in respect to waivers was not expanded to a substantial degree. As the court commented in Cogar, “[in Winnings v. Wilpen Coal Company,] we held that a coal severance deed containing broad mining rights would not be construed to waive the right of subjacent support ‘unless [the surface owner’s] intention so to do clearly appears from express language or by necessary implication.”141 Furthermore, the Russell court “concluded that the old, broad form coal severance deeds that waived ‘all damages’ did not contain ‘the type of explicit waiver contemplated by and required by’ the WVSCMRA provisions regarding the waiver of subjacent support.”142 Thus, at most, it appears that the federal and state Acts served to heighten the specificity and explicitness that West Virginia common law requires of support waivers.143

136. Woods, supra note 65, § 10.06[1][c].
141. Cogar, 379 S.E.2d at 769.
143. The waiver upheld in Russell as specific, knowing, and contemplated provided that the coal operator was not liable to the surface owner for damages “to the springs and watercourses therein or thereon” in the process of mining operations. Russell, 389 S.E.2d at
IV. CONCLUSION

In sum, the right of subjacent support that is enjoyed by surface estates is also enjoyed by subsurface horizontal estates, unless waived, either expressly or by necessary implication. Whether the WVSCMRA protects subsurface interests or not, the subjacent support rights of overlying coal seams is determined by way of the following analysis. First, was the superincumbent coal seam severed first in time? If so, the right of subjacent support is intact and unwaived. Second, if the overlying seam was not severed first in time, did the earlier severance of the underlying seam waive the right to subjacent support for all overlying strata. If not, the right to subjacent support is maintained. If so, was the waiver specific and did it encompass matters within the contemplation of the parties at the time of its execution? In addition, can a substantial policy argument be waged against the waiver? The analysis is one of “first in time.”

As the search for new energy sources quickens and technology improves to the point where coal seams that were once uneconomical to mine become recoverable from a cost-benefit approach, the conflicts arising between the owners of overlying and underlying coal seams will become more frequent and more pertinent to the energy requirements of West Virginia and the nation.

Robert Louis Shuman*

196. In Smerdell, the waiver upheld by the federal district court provided that the coal operator could mine “without liability for any damage to the overlying strata, or to anything therein or thereon, in mining and removing said coal.” Smerdell, 806 F. Supp. at 1282. In contrast, in dicta in Cogar, Justice Miller suggested that a clause in a severance deed which “hereby waiv[ed] all damages arising therefrom or from the removal of all of said coal” would probably be insufficient to waive support rights. Cogar, 379 S.E.2d at 769.

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