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Jackson, Kelly, Holt & O'Farrell

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DRAFTING A CONTRACT MINING AGREEMENT—THE OWNER'S PERSPECTIVE

CHARLES Q. GAGE*

I. INTRODUCTION

The purpose of this Article is to provide a working guide to those in the coal industry (both the layman and counsel) for preparing a contract mining agreement. Heavy emphasis is placed on West Virginia law, primarily because the vast majority of the author's experience is in West Virginia. The Article should also be useful for those in other states; however, local law on specific issues should be carefully examined.

Throughout this Article, the party who has the right to mine coal from a tract of land will be referred to as the "owner." The party engaged to perform a service with respect to that land will be referred to as the "contractor" or "contract miner." A specimen Contract Mining Agreement is included in the Appendix and will be referred to throughout this article.¹

It is difficult to discuss any subject in the abstract, including the subject of contract mining, either from the owner's perspective or the contractor's perspective, because there are so many factors that may influence each party in negotiating a Contract Mining Agreement. In spite of these unknowns, this Article attempts to discuss various legal aspects of the contract mining relationship with special emphasis on the owner's perspective.

II. OBJECTIVES

This Article presupposes that both the owner and the contractor have independently determined to utilize a Contract Mining Agreement as opposed to some alternative structure. Contract mining is a method by which a party who has the right to mine coal from a particular tract of land (owner) engages another to perform a service on that land as an independent contractor (contractor).² In reaching the conclusion as to what services are to be provided by the contractor, both the owner and the contractor have many independent objectives, some of which are similar.

A. Objectives of the Owner

The owner's principal objectives are increased efficiency and lower costs.

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1 B.S., West Virginia University, 1967; J.D., West Virginia University, 1970; Partner, Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia 25301.

² The specimen Contract Mining Agreement was first prepared by the author for distribution at a Contract Mining Special Institute conducted by the Eastern Mineral Law Foundation on September 14, 1982. It has been revised somewhat since then. Many of the subjects included in this Article were also covered at that Special Institute. A copy of the papers distributed at the Special Institute is available from the Foundation Offices, West Virginia University College of Law, P.O. Box 6130, Morgantown, West Virginia 26506-6130.

² See infra text accompanying notes 69-74 (recitation of type of services frequently included).
With the transformation of the Appalachian coal industry in the 1960s and 1970s from small to large organizations, these larger organizations have in many instances begun to decentralize operations through the use of contract miners. This has occurred because the contract miner frequently consists of a small organization of workers who have labored together for a considerable period of time. The resultant efficiencies cannot be obtained when the makeup of the work unit (including supervisors) is frequently changing. Furthermore, a contract miner's operations are frequently directed by the principals involved—who have a direct interest in maximizing efficiencies with resultant economic benefits. In addition, the small organizational structure of many contract miners results in the ability of a contract miner to maintain a lower profile, resulting in fewer disruptions from outside sources. The result of all these factors, from the owner's standpoint, is maximization of coal recovery at a lower cost.

Other owner objectives include the reduction of risks attendant to any mining operation, many of which are discussed later in this article. Through the use of a contract miner, the owner is also able, in many instances, to reduce his capital investment by having the contract miner assume some of the responsibility for mine development costs, equipment purchases and maintenance of other inventories which the owner would otherwise be required to provide. Also, many contract miners already own the necessary coal mining equipment.

B. Objectives of the Contractor

Many of the contractor's objectives are the same as the owner's. The contractor's primary objective is obviously to maximize the price received for services performed by minimizing the cost of performing such services. In the process, the contractor has one principal objective—to deliver the owner's coal to a given point. This objective, once mining commences, should virtually eliminate the contractor's concerns about marketing because marketing is the owner's responsibility.

III. COMPARISON OF ALTERNATIVE STRUCTURES

A. Overview

The owner of the property in question must be aware of any title restrictions in the lands it intends to include in contract mining operations. If the owner owns such lands, absent some title restriction, the owner should be free to deal with the land as it pleases. However, if the owner holds the lands under lease, the lease may restrict the owner from assigning rights under the lease, subleasing, or engaging independent contractors to mine coal from lands covered by the lease. If the owner is restricted by its source of title, then engaging an independent contractor to mine the coal may be the owner's only choice. However, if the owner is not restricted, and if it does not
desire to mine the coal itself, then the owner could enter into a lease or sublease with a mine operator. This would further reduce its risks of liability to third parties and would obtain other desired objectives. However, as discussed above, some of the objectives of the owner may not be achieved by use of a lease or sublease.

It is important that the draftsman understand the distinctions between alternative structures because the label given to a particular document does not control. Instead, the rights, obligations and other provisions of the instrument, construed as a whole, determine the relationship between the parties.

B. Assignment or Lease

A coal lease presently transfers an estate in land and describes the nature of that estate. The distinction between an assignment and a sublease is succinctly stated as follows:

An assignment by a lessee is a transaction by which he transfers his entire interest in the demised premises or part thereof for the unexpired term of the original lease. A sublease is a grant by the lessee of an interest in the demised premises, less than his own interest, with the retention of a reversionary interest in the sublessor.

Accordingly, by an assignment, lease or sublease, the acquiring party obtains an interest in the premises. By way of contrast, a mining contract or license merely grants to an entity (the contractor) the right to perform some act or a series of acts on the land of another, without passing an estate in the land. It is a personal right and grants no estate in the land affected by it. "[T]he chief points of significance is (sic) distinguishing between a lease and a bare license are that a license (1) is revocable by the licensor; (2) is non-assignable by the licensee; (3) creates no estate in real property."  

A few cases dealing with the subject, as applied to coal, enunciate many well-defined rules for determining whether an instrument should be construed as creating a license privilege or a leasehold estate. The West Virginia Supreme Court of Appeals has implied that a lease would be created by provisions which grant: (1) an exclusive right to mine the coal; (2) a definite time within which to mine the coal; and (3) a right or estate in the coal. The Fourth Circuit found an agreement to be a lease, not a license, in a more re-

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3 See supra text accompanying note 2 (objectives).
4 For a discussion of coal leases, see The Coal Leasing Transaction, 4 COAL LAW AND REGULATION, § 81.01[1] (D. Vish & P. McGinley ed. 1983) [hereinafter cited as COAL LAW AND REGULATION]. "[A] mining lease vests the lessee with the right to exclusive possession of the estate and the right to profits derivable from the severance and sale of the coal." Id. at § 83.03[1].
5 3 AMERICAN LAW OF MINING, § 16.64 (1975). This distinction is recognized in Minor v. Pursglove Coal Mining Co., 111 W. Va. 28, 30-31, 161 S.E. 425, 426 (1931).
6 See 16 R.C.L. 549 (1917).
7 3 AMERICAN LAW OF MINING, § 16.17 (1975).
8 Kelly v. Rainelle Coal Co., 135 W. Va. 594, 607, 64 S.E.2d 606, 615 (1951), overruled on other
cent pronouncement. The court in Atomic Fuel relied principally on five elements contained in the agreement to find that a leasehold estate was created. The elements were: (1) the parties designated each other as lessor and lessee; (2) the operative phrase “hereby leases” was used; (3) a specific term and extensions were prescribed; (4) the lessor retained limited rights of entry for inspection; and (5) lessor granted to lessee all the mining, surface and timber rights held by it. Moreover, the court stated that the last circumstance was a conclusive indication that the lessee was given the exclusive right to the mining, surface and timber rights, and the lessee could have ejected anyone else from its enjoyment. A more recent West Virginia case indicates that an independent contractor does not own the coal in place or as removed.

In light of these decisions, if avoiding a lease is of concern to the negotiating parties, the Contract Mining Agreement should be drawn, to the extent possible, along the following lines: (1) avoid any terms of conveyance or demise; (2) avoid granting the contractor exclusive use and occupancy of the premises; (3) payment to the contractor should flow from the owner to the contractor, not from the purchaser of the coal. Title to the coal should at all times remain in the owner and the contractor should receive a “fee” for services rendered; and (4) the term of the Contract Mining Agreement should be as short as possible, given all other pertinent considerations.

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grounds, 301 S.E.2d 210 (W. Va. 1983).


10 Id. at 4-5.

11 Id. Many older cases recognize that to distinguish between a lease and license it is only necessary to determine whether by the instrument the grantee has acquired any estate in the land in respect of which he might bring a possessory action, such as ejectment. This is recognized in the case of Church v. Goshen Iron Co., 112 Va. 694, 695, 72 S.E. 685, 686 (1911), although the full implications of that case were not approved by the West Virginia court in Kelly v. Rainelle Coal Co., 135 W.Va. at 607, 64 S.E.2d at 615. In the Church case, the court quoted from several old treatises on the subject which are instructive. 112 Va. at 695, 72 S.E. at 686.

12 Johnson v. Junior Pocahontas Coal Co., 234 S.E.2d 309, 315 (W. Va. 1977). In this case, the contract miner was sued by adjoining land owners for injury to their property. The deed by which the adjoining property owners acquired title contained “exculpatory clauses” purporting to insulate the grantor from liability for injuries resulting from mining on the adjacent property, with whose lessee the contract miner was under contract. The court stated: The lessee has entered into an agreement whereby the defendant, ... as an independent contractor, agrees to strip mine certain seams of coal and to deliver the coal to lessee at a fixed production cost per ton. Under the strip mining agreement, [the defendant—contractor] owns and holds no estate or interest in the coal properties embraced in the lessee’s leasehold estate. The independent contractor [defendant] is obligated to furnish the equipment and workmen to remove the coal and deliver it to lessor (sic). The independent contractor does not own the coal in place or as removed.

*Id.* at 314-15. Because the defendant was an independent contractor, it was held not to be in privity of estate with the common grantor and hence incapable (as opposed to the lessee) of availing itself of the exculpatory clauses in plaintiff’s grant. However, there is no detailed analysis of the contract, and the defendant—contractor apparently did not assert the position that the contract might be construed as a lease-in-fact.
C. Partnership

A “mining partnership” can be created without any special contract, either oral or written. The mere coworking by joint owners to extract the mineral or cooperating in the working of the mine is sufficient to create the partnership.

Many states, including West Virginia, have adopted uniform acts regarding partnerships. Much has been written regarding mining partnerships, whose essential elements, whether express or implied, have been stated to be: “(1) a joint interest in the mineral present; (2) joint operation or control of the mine; [and] (3) an agreement to share in profits or losses.” Although a carefully drafted Contract Mining Agreement necessarily avoids the creation of a mining partnership, care should be taken to avoid the use of words or exercise of rights which may tend to support the creation of one. For example, the word “joint” as it relates to control and working or operating the mine should be avoided and obligations should be delegated to the contractor.

D. Joint Venture

Joint venturers have: (1) a common interest in the property to be exploited, (2) a mutual right to exercise control in some fashion in pursuing exploitation of the mineral, and (3) a share in the profits and losses. A joint venture has characteristics similar to a partnership, except that a joint venture is generally limited to a particular enterprise, whereas a partnership more commonly extends to enterprises of the same nature or character. It has been suggested that there are significant differences between a mining joint venture and a mining partnership; however, the distinctions for purposes of determining whether the relationship is that of independent contractor, as opposed to partner/venturer, do not appear to be significant.

IV. SELECTED LIABILITIES POTENTIALLY ARISING OUT OF THE INDEPENDENT CONTRACTOR RELATIONSHIP

A. Workers’ Compensation Fund Payments

There is no statutory authority in West Virginia for holding the owner liable for a contract miner’s unpaid Workers’ Compensation Fund premiums. Even though a contract miner may have failed to pay premiums to the West Virginia Workers’ Compensation Fund, the contractor’s employees are nonetheless covered by the West Virginia Workers’ Compensation Act.

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14 4 COAL LAW AND REGULATION, supra note 4, at § 83.06[2][3][b]; see also R. DONLEY, THE LAW OF COAL, OIL & GAS IN WEST VIRGINIA AND VIRGINIA, ch. XV (1951).
15 See 4 COAL LAW AND REGULATION, supra note 4, at § 83.06[2][3].
16 W. VA. CODE § 25-2-5 (1981) provides that no employee shall be denied benefits because of
However, in Kentucky, the rule would appear to be to the contrary. The owner can be held responsible for workmen's compensation claims by employees of a contract miner, where the contract miner fails to carry workmen's compensation insurance. Moreover, unlike a majority of states, West Virginia has no "contractor-under" statute, by which employees of a subcontractor are deemed to be employees of the general contractor for workers' compensation purposes.

B. Federal Black Lung and West Virginia Coal-Workers' Pneumoconiosis Fund Payments

There is no statutory authority in West Virginia for holding an owner liable for a contractor's unpaid payments to the West Virginia Coal-Workers' Pneumoconiosis Fund. If an employee of a contract miner were to file for federal black lung benefits, the Coal-Workers' Pneumoconiosis Fund could deny coverage if no premiums have been paid by the contractor. At that point, the Department of Labor would determine if there is another responsible operator. If the owner formerly operated the property, it could be deemed a responsible operator as to any miner it employed while operating the property.

As to any employees of a contractor who were not employees of the owner, the answer is not clear. A coal mine operator's liability for federal black lung benefits under Title IV of the The Coal Mine Health and Safety Act of 1969, is defined by regulations of the Secretary of Labor. Although there is no direct authority for transferring liability where there is merely a contract to mine coal, the language of the regulations appears to be sufficiently broad to at least arguably permit such a result. Because there still exists the possibility that an owner could be considered responsible for federal black lung liability incurred by its contract miner if the contract miner fails his employer's failure to pay back premiums to the fund as required by law. While back premiums can be assessed against a contract miner, W. Va. Code § 23-2-5, no legal authority exists for imposing this liability to the owner.

17 KY. REV. STAT. § 342.610 (1983); see also Upper Elkhorn Coal Co. v. Thornberry, 564 S.W.2d 842 (Ky. 1978).
18 See 1 C. A. LARSON, LARSON'S WORKMEN'S COMPENSATION LAW § 49.00-12 (1982).
22 20 C.F.R. § 725.490-93 (1983). The regulations are intentionally ambiguous and are designed to permit flexibility in identifying a private party to defend and, if necessary, pay a claim for benefits. They anticipate vicarious liability and specifically authorize the Department to ascribe liability to a parent corporation or a lessee for certain circumstances, where the subsidiary or lessee has failed to properly secure the payment of benefits to its employees. 20 C.F.R. § 725.491(b)(1) and (2) (1983).
to properly secure the payment of benefits, owners frequently insist upon provisions regarding such payments in the Contract Mining Agreement.\textsuperscript{23}

C. Tort Liability

Under the traditional common law rule, an owner is not responsible for the acts of its independent contractor. This general rule, however, presupposes that the contractor is an independent contractor and not an employee.

The independent contractor status depends upon the absence of control by the owner.\textsuperscript{24} However, in a given case, where liability of the owner is asserted, the issue is not the right of the owner to control the contractor in general, but its right to control the acts of the contractor which are alleged to have been the proximate cause of injury.\textsuperscript{25} Once the independent contractor status is determined, it appears clear that West Virginia follows the general rule of the Restatement (Second) of Torts, which states that employers of independent contractors are "not liable for physical harm caused to another by an act or omission of the contractor or his servants."\textsuperscript{26}

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\textsuperscript{23} See, e.g., Appendix, § 16.
\textsuperscript{24} In Turner v. Lewis, 282 S.W.2d 624, 625 (Ky. 1955), the court succinctly stated: We have held consistently that the right of control of the work, and the methods of its performance, are determinative on the question of whether one is a servant or an independent contractor. If the employer retains the right to control the work and the manner in which it is done, those doing the work are servants. On the other hand, if an employee has the right to control the manner of work and the right to determine the means by which results are accomplished, he is deemed an independent contractor and the employer is not responsible for his negligence. See also King v. Shelby Rural Elec. Coop. Corp., 502 S.W.2d 659 (Ky. 1973), cert. denied, 417 U.S. 932 (1974).
\textsuperscript{26} \textit{RESTATEMENT (SECOND) OF TORTS}, § 409 (1965); Peneschi v. National Steel Corp., 295 S.E.2d 1, 11 (W. Va. 1982).

The Peneschi decision is worthy of more complete discussion because it held that no liability attaches to an owner for the death or injury of an employee of an independent contractor on the basis that the work was abnormally dangerous. The issue was of particular concern because of a 1981 jury verdict in the Circuit Court of Kanawha County in the case of Asbury & Shelton v. Bethlehem Mines Corp., Civ. No. 79-680 (Cir. Ct. Kanawha Cty. April 7, 1981) (Judgment Order) where a jury found that Bethlehem was liable for the death and injury of employees of its contract miner. Although the case was not appealed to the West Virginia Supreme Court of Appeals, one of the instructions to the jury was that underground mining is an inherently dangerous activity. Thus, the jury was permitted to impute negligence of the contract miner to Bethlehem, the owner.

In Peneschi, the defendant, National Steel Corporation, hired Koppers Co., Inc. as an independent contractor to build a new coke facility on an undeveloped island on the Ohio River known as Brown's Island. Koppers and National met from time to time to design the project. In 1972, the plaintiff, an employee of Koppers, was injured when a coke oven battery exploded. At the time of the explosion, the battery was still under the control of Koppers, but employees of National had been assigned to Brown's Island to learn the operation of the battery. The plaintiff and his wife
In West Virginia, the opinion in Peneschi v. National Steel Corporation makes it clear that the independent contractor must, in fact, be independent. Such independence must appear not only from the language of the contract but also from the manner in which the owner handles the affairs with the contractor.

The Peneschi case does not hold that the owner is not liable for its own negligence. To the contrary, under an earlier West Virginia decision the owner is clearly liable for its own negligence.

D. Contractor's Employees' Liens for Wages and Fringe Benefits

Under West Virginia law, every laborer who performs any work for an incorporated company by virtue of a contract either directly with such company or with its general contractor, or with any subcontractor, "shall have a lien for the value of such work or labor upon all real estate and personal property of such company." This language encompasses the hourly rate of the contractor's employees' wages and gives such employees a lien on the

brought suit against National and two subcontractors of Koppers for negligence.

The trial court dismissed the two subcontractors of Koppers because there was no evidence of negligence on their part. The trial court also refused to permit the plaintiff to amend his complaint and pursue a "Mandolidis" type action against Koppers, because after five years the claim was barred by the statute of limitations. The case then went to the jury on the question of whether National was negligent in causing the explosion, the trial court having refused an instruction on strict liability. The jury returned a verdict for National.

The principal issue addressed by the West Virginia Supreme Court of Appeals was the extent to which National was liable to the plaintiff on a theory of strict liability because National was engaged in an abnormally dangerous undertaking. Pertinent holdings in the Peneschi case include the following:

(1) While an unrelated third party may recover against an independent contractor or the employer on a strict liability theory where a dangerous instrumentalities is involved, an employee of either the independent contractor or a subcontractor who is hired to work under hazardous circumstances is barred from recovery on a strict liability theory.

(2) An employer of an independent contractor cannot insulate himself from liability to third parties for the consequences of the use of abnormally dangerous instrumentalities by employing an independent contractor. However, this rule does not apply to employees of independent contractors where the contractor was expressly hired to work with or around an abnormally dangerous instrumentalities.

(3) Employers of contractors specifically hired to work with or around abnormally dangerous instrumentalities cannot be sued on a strict liability theory by the employees of the contractors. Such employees have assumed the risk of harm and are compensated for the dangers involved in their employment through salary and other benefits.

(4) Since National had no control whatsoever over the physical premises that were still under the management of Koppers, there was no foundation for a jury instruction concerning a safe place to work. The court noted that Koppers had been in the exclusive control of the premises from the time construction on the plant began.

27 295 S.E.2d 1 (W. Va. 1982).
owner's property. Its stated purpose is to protect the workmen who, by the fruits of their labor, benefit others.  

In West Virginia, the consequences of the decision in Farley v. Zapata Coal Corporation mean that the lienable "value of such work or labor" now includes: (1) all compensation, including accrued vacation pay; (2) compensation for unused sick leave days; (3) any other fringe benefits contracted to be paid, such as pension and benefit trust payments and sickness and accident benefits; and (4) liquidated damages incurred by the contractor for nonpayment of wages.

It is important to note that the Code does not require the laborer to give notice to the property owner, for the lien to attach. Perfection is achieved by filing a lien notice within ninety days of the date the last work was completed, with the clerk of the county commission of the county in which the labor was performed or where the property of the corporate owner is situate.

The impact of these provisions on the owner under West Virginia law may be minimized (although not eliminated) if the owner requires the contractor to post a bond to secure payment of wages to employees. The bond is sometimes required by West Virginia law. However, even though the contractor may not be required under this section to post a bond, the owner may still desire to require the contractor to post a "wage bond" to avoid the potential lien.

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20 Farley v. Zapata Coal Corp., 281 S.E.2d 238, 241 (W. Va. 1981). At issue in Zapata was whether the mechanic's lien statute encompassed only the hourly rate of the wages or also included other fringe benefits of the contractor's employees. The lower court held that W. Va. Code § 38-2-31 (1966) encompassed only the hourly rate of wages and nothing more. The Supreme Court of Appeals of West Virginia reversed and held that the mechanic's lien statute, W. Va. Code § 38-2-31 (1966), extended to all compensation contracted to be paid to employees for their services, including fringe benefits and vacation pay. As a separate issue in Zapata, the court further held that the employees of the contract miner were entitled to a claim for liquidated damages based on the West Virginia Wage Payment and Collection Act, W. Va. Code § 21-5-1 to -16 (1981). It provides that if an employee is laid off for any reason, the employer must pay the employee, no later than the next regular payday, wages earned at the time of the layoff. W. Va. Code § 21-5-4(e) (1981). If such employer fails in his duty, he is liable, in addition to wages due, for liquidated damages equal in amount to thirty days' wages. W. Va. Code § 21-5-4 (1981). The statute further provides that "Every employee shall have such lien and all other rights and remedies for the protection and enforcement of such salary or wages, as he would have been entitled to had he rendered service therefor in the manner as last employed . . . ." W. Va. Code § 21-5-4(e) (1981). The West Virginia Supreme Court of Appeals held in Zapata that the effect of W. Va. Code § 21-5-4(e) (1981) was "to create by operation of law a fictitious additional thirty days of employment and to grant the employee the same remedies and procedures for enforcing his lien for compensation for that fictitious thirty days that he would have had for the value of the work actually performed." The court further held that the Mechanic's Lien statute was properly used in aid of the enforcement of the lien for liquidated damages under W. Va. Code § 21-5-4(e) (1981).

E. Mechanic’s Liens Generally

As a leasehold or fee owner, the owner bears substantial risk that mechanic’s liens will be filed against its property by subcontractors, material suppliers or equipment lessors of its contract miner. In order for such materials and services to be lienable under applicable statutes, the work or materials must be provided pursuant to the construction, alteration, removal or repair of a building or structure or improvement appurtenant to a building or structure. The term “structure” may include roads and railroads and almost any other improvement to land. Therefore, supplies used in the development of a mine are clearly lienable.

F. Mine Health and Safety

The Federal Mine Safety and Health Act of 1977 is designed primarily to regulate the health and safety practices of a coal mine operator. The Act targets the operator because in theory and practice an operator exercises primary control over the property, facilities, employees and work methods. Therefore, the mine operator is in the best position to require compliance with mandatory health and safety standards.

The Act defines “operator” as “any owner, lessee, or other person who operates, controls or supervises a coal mine.” This definition includes an independent contractor performing services or construction at such mine. Moreover, under the Act’s enforcement provisions, the mine owner or independent contractor, or both, can be cited for health and safety violations, regardless of the circumstances or responsibility for the violations.

However, on July 1, 1980, MSHA abandoned its policy of citing only mine owners for violations of independent contractors. MSHA announced that it would proceed directly against independent contractors for their violations, even though it still reserved authority to cite a mine owner for every violation that occurs on mine property. Since 1980, and as recently as 1982, the Federal Mine Safety and Health Review Commission has continued to insist that MSHA proceed against independent contractors, in spite of MSHA’s reservation of the right to proceed against the mine owner.

40 The U.S. Department of Labor’s Mine Safety and Health Administration.
The history of enforcement sanctions imposed by MSHA against mine owners and independent contractors has been the subject of considerable commentary.\textsuperscript{44} Despite the current status, it is still deemed appropriate to address the responsibility of the contractor for health and safety in the Contract Mining Agreement itself.\textsuperscript{45}

In addition to the federal requirements, many states, including West Virginia, have health and safety requirements which must also be complied with by mine operators and independent contractors.\textsuperscript{46} Recognition of such statutes, and the allocation of responsibilities thereunder, should be addressed in the Contract Mining Agreement.\textsuperscript{47}

G. \textbf{Environmental Concerns}

Those associated with the coal industry are aware of the statutory and regulatory schemes controlling the environmental impact of coal mining. Both the owner and the contractor must be sensitive to such laws and regulations. The extent and nature of those environmental controls are beyond the scope of this article, but a recent work describes the statutory, regulatory and decisional law propositions and developments of both surface coal mining and the environmental impacts of coal mining.\textsuperscript{48} The Contract Mining Agreement should specifically allocate responsibility for compliance with such laws and regulations.\textsuperscript{49}

V. \textbf{TAX ASPECTS}

A. \textit{Availability of Depletion}

The Internal Revenue Code provides a "reasonable allowance for depletion" pursuant to the regulations promulgated by the Secretary or his delegate.\textsuperscript{50} Treasury regulations issued by the Secretary provide that annual depletion deductions are allowed only to the owner of an "economic interest" in mineral deposits.\textsuperscript{51} An economic interest is possessed in every case in which the taxpayer has acquired, by investment, any interest in the minerals in place, and secures, by any form of legal relationship, income derived from the

\textsuperscript{44} For a thorough discussion of MSHA enforcement against independent mining contractors, see \textit{Coal Law and Regulation}, supra note 4, at § 3. 13[3].

\textsuperscript{45} See, e.g., Appendix, ¶¶ 8, 14.

\textsuperscript{46} W. VA. Code §§ 22-1-1 to -35 (1981).

\textsuperscript{47} See, e.g., Appendix, ¶¶ 8, 14.

\textsuperscript{48} \textit{Coal Law and Regulation}, supra note 4, ch. 30-69; see also Mack, \textit{Environmental Permits for Coal Mining: A Practical Guide Through the Regulatory Maze}, 2 E. MIN. L. FOUND. ch. 7 (1981).

\textsuperscript{49} See, e.g., Appendix, ¶¶ 2, 4, 7 and 8.

\textsuperscript{50} I.R.C. § 611(a) (1976).

\textsuperscript{51} Treas. Reg. § 1.611-1(b) (1982).
extraction of the mineral to which he must look for a return of his capital. Whether a person possesses an economic interest in minerals in the tax sense has been the subject of extensive litigation and recent commentary.

An exhaustive analysis of the ability of the contractor to obtain depletion under the Internal Revenue Code is also beyond the scope of this Article. However, this author does not believe that enough of the test enunciated by controlling decisions can be met under a normal contract mining arrangement to entitle the contractor to depletion. In such a case, the owner would run the risk of having its lessor, if any, assert that where the contractor obtains an economic interest for depletion allowance purposes, the contractor is instead a sublessee, not an independent contractor, under applicable property law. Stated another way, tax laws and decisions and property laws and decisions do not necessarily coincide on the "economic interest" issue. Therefore, the owner's source of title and restrictions in dealing with the property must be considered. 

B. Reclamation Tax

All coal mine operators who produce coal in the United States are required to pay a "reclamation fee" pursuant to the Federal Surface Mining Control and Reclamation Act of 1977. "Congress intended the burden of fee payment to fall upon the person who stands to benefit directly from the sale, transfer, or use of the coal." Accordingly, the owner, not the contractor, is the taxpayer. Even though the Contract Mining Agreement may allocate the tax burden to the contractor, such allocation would not relieve the owner of the risk of nonperformance.

C. Black Lung Benefits Excise Tax

The producer of the coal sold is required to pay a Black Lung Benefits Excise Tax measured by each ton of coal produced in the United States and sold by such producer. Analysis of the pertinent regulations reveals that the

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12 Id.
15 See supra text accompanying notes 3-15 (comparison of alternative structures).
19 See, e.g., Appendix, ¶ 24.
owner, not the contractor, is primarily liable for the tax. Therefore, a contract provision allocating the tax burden to the contractor would not relieve the owner in the event of nonpayment.

D. Federal Employment Tax Liability

An owner's liability for federal employment taxes (both withholding and the employee's share of FICA) of its contractor can arise in one of two ways. First, I.R.C. section 3505(a) provides that if a lender, surety or other person pays wages directly to an employee, such lender, surety or other person is liable for federal employment taxes required to be deducted and withheld from such wages by such employer. Second, I.R.C. section 3505(b) applies to a lender, surety or other person who supplies funds to or for the account of an employer for the specific purpose of paying wages of the employees of such employer. If the fund supplier has actual notice or knowledge that such employer does not intend to or will not be able to make timely payments, such lender, surety or other person can become liable for such taxes under section 3505(b). Liability is limited, however, to twenty-five percent of the amount of money supplied.

Accordingly, the owner could be liable for withholding taxes and the employee's share of FICA taxes if it paid its contractor's employees directly or provided the funds to pay such employees with notice that the taxes will not be paid. Moreover, actual notice includes what should have been known using due diligence. It should be noted that there is no provision in the West Virginia Code comparable to I.R.C. section 3505.

E. West Virginia Business and Occupation Tax Payments

There is no statutory authority in the West Virginia Code for holding the owner liable for the business and occupation tax liability of its contractor.

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62 See, e.g., Appendix, ¶ 24.
65 There are two statutory provisions in West Virginia worth noting. W. Va. Code § 11-10-11(f) (Supp. 1983) requires a person subject to the tax who sells out his business or ceases doing business to file a final return. That section also provides that the successor in business of any such person shall withhold so much of the purchase money as will satisfy the taxes and penalties which may be due. That money must be held until the former owner produces a receipt from the tax commissioner evidencing payment of such taxes and penalty. Failure to comply with these provisions subjects the purchaser to personal liability for the payment of such taxes. Furthermore, W. Va. Code § 11-10-11(b) (Supp. 1983) applies to any West Virginia firm which is contracting with any nonresident person, firm or corporation engaged in business within the state. The West Virginia entity is required to withhold payment in sufficient amount, not to exceed six percent of the contract price, to cover the taxes assessed. The money is held until a certificate from the tax commissioner to the effect that such taxes have been paid or provided for is produced. Failure to withhold subjects a person to personal liability. Under that statute, if a contract miner is a nonresident corporation, the owner could be liable if it failed to withhold.
In a typical arrangement where a lessor leases coal reserves to a lessee and collects a royalty, the lessor will pay business and occupation tax on the royalty income in the rent and royalty category at the present rate of $1.15 per $100 of revenue. The lessee, as producer of the coal, will pay business and occupation tax based on the gross receipts from the sale of the coal at the rate of $3.85 per $100 of revenue. However, if such lessee should, in turn, engage a contractor to conduct actual mining operations, the contractor is required to pay business and occupation tax in the service category at the rate of $1.15 for each $100 of revenue. However, the fact that the contractor pays the additional business and occupation tax does not reduce any part of the amount of business and occupation tax required to be paid by the producer (owner). Thus, in West Virginia, the contract mining relationship results in an additional economic burden equal to $1.15 for each $100 of gross revenue paid to the contractor.

VI. THE CONTRACT MINING AGREEMENT

A. Recitals and Definitions

Recitals are not part of the agreement and should not purport to state any obligation of the parties. Recitals are, however, frequently utilized to establish the intent of the parties and to identify the subject matter of the agreement. Moreover, a recital is a convenient place to identify the lands to be covered by the agreement, the place of delivery of coal, and other pertinent background information.

B. General Undertakings

The scope of services to be performed by the contractor should be stated specifically, although they need not be enumerated in one specific portion of the agreement. Some general undertakings included in the Appendix to this article are discussed below.

1. General services to be performed

The provision regarding general services to be performed should be specific. It may include, without limitation, production of coal, engineering (either initial or ongoing or both), preparation of mining plans, maintenance of roads, transportation of coal and refuse, reclamation, construction and maintenance of draining structures and faceup for deep mines.

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69 See, e.g., Appendix, Recitals.
70 See, e.g., Appendix, ¶¶ 1, 3, 4 and 9.
2. Performance standards

The "performance standards" section should be concise and stated with clarity. It can include the obligation of the contractor to promptly commence and diligently prosecute operations in a careful, skillful and workmanlike manner in accordance with recognized modern methods and practices, and in strict compliance with all applicable laws. The "performance standards" section should be specifically discussed with the contractor, so that the contractor is fully informed as to what is expected.

3. Area of operations

The "area of operations" section should be defined and designated. The use of such areas by the contractor should be nonexclusive. Furthermore, attaching a map is frequently convenient.

4. Contractor's investigation

The Contract Mining Agreement should expressly state that the contractor has investigated the area of operations. Additionally, the contractor should acknowledge receipt of applicable documents evidencing mining rights (such as lease documents).

5. Permits

Applicable permits should be specifically addressed and responsibility for compliance with the permits should be spelled out.

6. Rate of delivery

A minimum rate of delivery is frequently included in the Contract Mining Agreement as an additional performance standard so that the contractor will know the specific rates of delivery expected.

C. Term

The term of the Contract Mining Agreement, from the owner's perspective, is influenced by many factors, including relevant business considerations, tax considerations and restrictive rights contained in title documents. Most frequently, the owner desires to maintain flexibility regarding production capacity because the particular contract miner may be only one of many.  

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1 See, e.g., Appendix, ¶ 7.
2 See, e.g., Appendix, Recitals and ¶ 21.
3 See, e.g., Appendix, Recitals, ¶¶ 25, 26.
4 See, e.g., Appendix, ¶¶ 2, 4 and 8.
5 See, e.g., Appendix, ¶ 11.
sources of production and in the event of market declines. Under these circumstances, the owner will frequently insist on a short term or early termination provision. Tax considerations and source of title have already been discussed elsewhere in this article.  

Short term or early termination provisions, at least in recent years, have been a source of concern from the owner's perspective. Under various legal theories, short term or early termination provisions are considered invalid. The invalidation of the term provision results in the contractor continuing to assert rights under the mining contract beyond the date of termination by the owner.

Historically, where no term is stated in a contract, the contract is terminable at will. However, in recent years this rule has become generally suspect with application of theories akin to the standards of unconscionability and good faith as contained in the Restatement (Second) of Contracts. Consequently, courts have consistently held that reasonable notice of termination should be available to either party in the absence of facts which give rise to repudiation or breach. It is reasonable to anticipate that a court in the absence of actual reasonable notice given before termination, would imply a term which is reasonable under the facts and circumstances of that particular case and given the type of commercial relationship which exists.

Therefore, the term of the Contract Mining Agreement may in large part be dependent upon the nature of the services to be performed by the contractor. If the relationship contemplates the establishment and conduct of an ongoing business relationship and the investment of money or labor by the contractor, the length of time necessary between notice and actual termination should be considerably longer.

A term is frequently stated in the Contract Mining Agreement to be for a period of at least one year, but reserving to either party the right to terminate upon giving advance written notice to the other party. Such notice is typically in the thirty to sixty day range.

D. Payment

The payment provisions are obviously of principal concern to both the owner and contractor, and can be as simple or as complex as the parties desire. The payments to the contractor, however, should compensate the con-

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76 See supra text accompanying notes 3-15, 50-68 (alternative structures and tax aspects).
80 A. CORBIN, 1 CORBIN ON CONTRACTS § 96 at 413 (1963).
81 See, e.g., Appendix, ¶ 19.
tractor for all services to be performed by the contractor pursuant to the Contract Mining Agreement.

The simplest payment provision would provide that the owner shall pay the contractor a fixed sum for each ton of raw or run-of-mine coal delivered to and accepted by the owner, as full compensation for all of the contractor's work performed under the agreement. This type of provision avoids any question about the quantity of the product delivered, plant efficiency, sampling and testing. However, one drawback is that when the owner pays on a raw or run-of-mine basis, care must be taken to make certain that the contractor delivers a product as free of extraneous material as possible.

A more complex payment provision could provide that the owner pay the contractor a fixed sum for each ton of "clean" coal, but then the Contract Mining Agreement should provide a mechanism to determine the weight of "clean" coal. A typical provision is included in the Appendix. This method of payment avoids the disadvantages of paying on a raw or run-of-mine basis.

Some Contract Mining Agreements also include provisions for price escalation, similar to provisions found in coal sales agreements. These provisions have been analyzed in several articles.

No matter what pricing provision is used, this author believes that payment provisions expressed in terms of percentage of sales price should be avoided in those instances where title problems can arise. This might avoid an argument by the lessor of the owner that the contractor has an economic interest in the coal.

Historically, owners who engage the services of contractors frequently find themselves in the position of having to advance sums to their contractors. Accordingly, from the owner's perspective, the Contract Mining Agreement should contain a provision permitting "offsets" in words to the effect that: "Owner shall at all times have the right to deduct from any payments or other sums due to Contractor any amounts due to Owner from Contractor." However, care should be exercised in utilizing such provisions.

Finally, tonnages upon which payments will be based must be determined accurately. Truck scales are the most commonly used method. The owner generally accepts initial responsibility for determining weights.

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82 See, e.g., Appendix, § 10(a), Alternate I.
83 Appendix, § 10(a), Alternate II.
85 For discussion of such title problems and the impact on the relationship of the parties, see supra text accompanying notes 3-12.
86 Appendix, § 10.
87 See supra p. 50-66 and accompanying text.
88 See, e.g., Appendix, § 12.
E. Compliance with Law, Indemnity, Insurance

The risks attendant to a contract mining relationship are summarized elsewhere in this article. However, the owner should insist upon contractual provisions which allocate such risks between the owner and contractor. Many such provisions are found in the Appendix.69

F. Default and Forfeiture

As in any contractual relationship, the owner desires to retain certain rights should the contractor not perform as agreed. Nonperformance of specific agreements, which gives the owner the right to declare the contractor in default and to forfeit the Contract Mining Agreement, is the subject of negotiation between the parties. However, in West Virginia after Bethlehem Steel Corp. v. Shonk Land Co.,90 it is clear that the broken covenant or condition relied upon for forfeiture must be found not only in the instrument by clear and definite expression, but also in the forfeiture clause.

The default clause included in the Appendix91 is a detailed summary of the obligations of the contractor. Failure to perform any obligation under the clause as written permits the owner, after notice, to terminate and forfeit the contractor's rights under the Contract Mining Agreement. Once again, if the owner's lands are leased, the period of notice to the contractor should be short enough to protect the owner. For example, if the contractor does not remedy a breach which gives rise to a forfeiture under the owner's title documents, the owner should have sufficient time to remedy such breach so that a breach by the contractor, not timely cured, will not result in a breach of the owner's lease. Suffice it to say that the title documents must be carefully examined. The owner must retain the unrestricted right to exercise its rights as deemed necessary or appropriate to protect its interests in the lands subject to the Contract Mining Agreement, at least insofar as the contractor is concerned.

G. Other Selected Provisions

The Contract Mining Agreement could specifically address the right (or lack thereof) of the contractor to assign or further subcontract its rights.92 The owner may also desire to consider a cross-default provision, whereby defaults under the Contract Mining Agreement, and under other agreements with the same contractor, will result in default under all such agreements.

69 See, e.g., Appendix, ¶ 14 (Independent Methods of Operation); ¶ 15 (Responsibility for Employees); ¶ 16 (Workers' Compensation, etc.); ¶ 17 (Indemnity; Insurance); ¶ 18 (Taxes).
91 Appendix, ¶ 20.
92 See, e.g., Appendix, ¶ 23.
The contractor should be required to keep records regarding its operations, to maintain confidentiality of its records, and to make such records accessible to the owner upon request. Moreover, where the lands are held under lease by the owner, the owner may desire to furnish a copy of the lease documents to the contractor. The owner may then require the contractor to conform its operations to all obligations under the lease documents.

Because the owner is desirous of insuring a continuous, steady supply of coal, if the operations of the contractor are interrupted, the continuance of such interruptions for a limited period of time could accelerate the owner's right of cancellation.

Other miscellaneous provisions could also be included.

VII. BANKRUPTCY OF CONTRACTOR

Coal bankruptcies are the subject of a recent article. The following is a summary of some basic principles which may affect the owner in dealing with the contractor.

The depressed coal market has led to numerous bankruptcy filings and many such filings include contract miners. Upon the filing of a bankruptcy petition, the debtor's rights, if any, under unexpired contracts become property of the bankruptcy estate. However, the Bankruptcy Code does not grant to a debtor greater rights and powers under an agreement than it had before the filing of bankruptcy. Accordingly, if the Contract Mining Agreement was validly terminated prior to the bankruptcy filing, the debtor's bankruptcy estate has no interest in the Contract Mining Agreement as of the date of bankruptcy.

The variety of problems arising out of the bankruptcy of the contractor should give the owner sufficient incentive throughout the course of the contract mining relationship to insist upon full and complete performance of the contractor's obligations. Once nonperformance occurs, the owner should exercise its rights under the Contract Mining Agreement.

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93 See, e.g., Appendix, ¶ 13.
94 See, e.g., Appendix, ¶ 26.
95 See, e.g., Appendix, ¶ 11.
96 See, e.g., Appendix, ¶¶ 27, 28, 29 and 30.
101 See, e.g., Appendix, ¶ 29.
VIII. CONCLUSION

Although the specimen Contract Mining Agreement emphasizes many aspects of the contract mining relationship from the owner's perspective, parties who negotiate and enter into a Contract Mining Agreement should not just sign the agreement and then file it away, never to refer to it again until a problem arises. In the author's experience, many of the controversies arising out of the contract mining relationship are the direct result of the failure of the parties to understand or appreciate their respective rights and duties under the various written agreements.
APPENDIX

SPECIMEN CONTRACT MINING AGREEMENT

NOTES:

1. This specimen should be used for reference only. Modifications will probably be required for each situation.
2. Some clauses or paragraphs may not be appropriate because of special facts or circumstances.
3. This specimen emphasizes West Virginia law. Changes will be necessary for use in other states.

THIS AGREEMENT, made and entered into as of the ___ day of _____, 198_, between __________________, herein sometimes called “Owner” and ______________, herein sometimes called “Contractor.”

RECITALS:

Owner has coal mining rights in certain lands in _______ County, West Virginia, which lands include a tract outlined in red on a map attached hereto as Exhibit A (hereinafter sometimes referred to as the “Premises”). Owner desires to have the coal in the _________ Seam in the Premises mined as herein set out. Contractor is fully informed regarding mining operations in the area of the Premises, is skilled and experienced in mining coal in the manner contemplated hereby and desires to mine such coal as an independent contractor for Owner and to deliver the same to ______________ (herein called “Point of Delivery”) as herein set out. Contractor has inspected and is familiar with the Premises and the Point of Delivery.

WITNESSETH:

That for and in consideration of the promises and agreements herein set out to be kept and performed by each of the parties, the parties agree as follows:

1. Services to be Performed. Contractor shall, under the terms and conditions herein set out, produce for Owner, by deep mining methods only, the mineable coal in the _________ Seam of coal located on and in the Premises. As used herein, the term “mineable coal” shall mean coal which, when reached in the course of Contractor’s mining operations, can be mined and removed by the use of modern mining machinery and prudent mining techniques. Contractor shall, at its sole expense, deliver all coal produced hereunder to the Point of Delivery.

2. Initial Permits and Bonds. Owner shall obtain, in its name, the initial permits and provide the bonding required to initiate mining activity; and Contractor shall be bound by the terms thereof, shall perform its work in accordance therewith, have full responsibility therefor, and except for the initial fees therefor, shall pay all the fees, fines and assessments related thereto.

3. Mine Face-up and Roads. Owner shall provide a face-up area suitable
for deep mine development and shall construct an access road graded and properly drained from the face-up area to the nearest practicable common road. Owner shall have the right to use such access road. Contractor shall maintain, at its sole expense, portal face-up and all roads used for transportation and delivery of coal hereunder, unless otherwise agreed by the parties, even though Owner may use such roads.

4. **Ponds and Drainage.** Owner shall construct necessary silt ponds for runoff as required to obtain necessary initial mining permits from the West Virginia Department of Natural Resources, and Contractor shall maintain, at its sole expense, such ponds and shall construct and maintain at its sole cost and expense additional silt ponds and other structures as may be required.

5. **Electric Power.** Owner shall cause electric power service to be made available to the mine site as may be required for Contractor's operations hereunder. The cost of all electrical power used by Contractor shall be paid for by it.

6. **Nonexclusive Rights.** It is understood that neither the designation by Owner of any particular place or area from which Contractor is to mine the coal hereunder nor the supplying of a plan of mining and projections for mining operations at such place or in such area shall imply or give rise to any exclusive right in Contractor to mine all of the coal at such place or in such area.

7. **Method of Operations.** Contractor will promptly commence and diligently prosecute its operations hereunder in a careful, skillful and workmanlike manner, in accordance with recognized modern methods and practices, in strict compliance with all applicable state and federal laws and regulations and permits, and so as to secure the greatest possible recovery of mineable coal.

8. **Permits in General.** Unless otherwise directed by Owner in writing or unless otherwise provided herein, Contractor shall secure all necessary permits, licenses, bonds and identification numbers for its operations hereunder, shall have full responsibility therefor, pay all fees in connection therewith and fulfill all obligations in relation thereto and shall provide Owner with copies of the same. Contractor shall file any necessary reports or other documents, whether mandatory or permissible, with the applicable governmental office(s) in order to properly establish and serve notice of Contractor's sole and exclusive responsibility for the health and safety of its employees and agents during the term of this agreement.

9. **Mining Plans.** It is understood that the Premises to be mined by Contractor hereunder may be adjacent to other areas which are presently being mined or will in the future be mined by other contractors or by Owner and as such the Premises may constitute only a portion of a total area of
operations. Therefore, in order to allow Owner overall coordination of operations on its lands, Owner will prepare mining plans and projections and review the same with Contractor prior to Contractor's commencing operations hereunder, and thereafter Contractor shall diligently follow the same in its operations hereunder. Owner shall have the right to enter and inspect Contractor's operations at all reasonable times to determine that Contractor is securing the greatest possible recovery of mineable coal. Owner shall at all times have the right to enter the Premises to mine coal from other seams and to exercise all rights it has in, on and to the Premises and other lands. Contractor promptly shall provide to Owner any consents, waivers or other documentation that may be requested by Owner or third parties to facilitate Owner's exercise of its rights on the Premises.

10. Payment. (a) [ALTERNATE I] Owner shall pay to Contractor as full compensation for Contractor's full performance of all work to be performed under this agreement and for Contractor's furnishing of all material, labor, equipment and other items required for the work performed under this agreement the sum of $___________ for each net ton of 2,000 pounds of coal delivered to and accepted by Owner. Such coal shall be as free of extraneous material as reasonably possible. Payments hereunder shall be made twice monthly within 10 days following the end of each "half" calendar month for all coal delivered to and accepted by Owner during the preceding "half" calendar month. Owner shall at all times have the right to deduct from any payments or other sums due to Contractor any amounts due to Owner from Contractor. [END ALTERNATE I]

(a) [ALTERNATE II] Owner shall pay to Contractor as full compensation for Contractor's full performance of all work to be performed under this agreement and for Contractor's furnishing of all material, labor, equipment and other items required for the work performed under this agreement the sum of $___________ for each net ton of 2,000 pounds of "clean coal" (as hereinafter defined) delivered to and accepted by Owner. Payments hereunder shall be made twice monthly within 10 days following the end of each "half" calendar month for all coal delivered to and accepted by Owner during the preceding "half" calendar month. Owner shall at all times have the right to deduct from any payments or other sums due to Contractor any amounts due to Owner from Contractor.

"Clean Coal" as used herein shall mean raw coal, determined as provided in paragraph 12, less the weight of reject material removed in Owner's tipple which reject is agreed to be equivalent to material that sinks at 1.50 specific gravity. The amount of rejects shall be determined by samples taken and analyzed by Owner at its expense at regular intervals. Such samples shall be taken before the coal is commingled with other coals. Owner shall be allowed to deduct an additional reject from the clean coal weight for plant inefficiency equal to ___% of the clean coal weight. Contractor shall have the right to have a representative present at any and all times to observe the
sampling and take check samples at the Owner's tipple; and Contractor may also analyze the coal either from its own samples or from samples taken by Owner. The results of the sampling and analyses by Owner shall be applied on a weighted average basis and shall be accepted for the purpose of arriving at clean coal weight; provided, however, that if Contractor should at any time question the correctness of either the sampling or the analyses made by Owner, it shall have the right to request that an independent commercial laboratory, mutually selected, sample and analyze the samples at Contractor's expense and for an agreed period of time, and the results shall be accepted by the parties hereto. [END ALTERNATE II]

(b) The amount per ton to be paid Contractor hereunder contains therein costs of reclamation and other work to be done by Contractor and all reclamation and other work necessary under applicable laws shall be done at Contractor's sole expense. It is recognized that Contractor's employees may have or claim a statutory lien against Owner for any unpaid wages or fringe benefits due them. Therefore, solely to protect Owner against such liens, it is agreed that the compensation due from time to time hereunder from Owner to Contractor shall not be paid until Contractor has paid its employees all money due them for work done in connection with the performance of Contractor hereunder; and if at any time Contractor is not able to satisfy Owner that Contractor's employees have been so paid, Owner may elect, but shall not be obligated, to pay the wages of any such employee directly to the employee and to deduct the amount so paid from the compensation due Contractor hereunder.

11. Minimum Production; Right to Refuse Delivery. Time, quality and quantity are the essence of this agreement, and Contractor agrees that by __________, 198__, it shall make deliveries hereunder at a minimum daily rate of __________ net tons of raw coal. Owner shall have the right at any time to refuse to accept delivery of coal hereunder whenever such coal is of such poor quality so as to render it unmarketable, or whenever, because of market conditions, it is unable to sell such coal at a reasonable profit to itself, or whenever it is unable to dispose of the same or to transport the same as a result of railroad car, truck or barge shortages, labor disputes, strikes, acts of God or any other conditions or events beyond its reasonable control.

12. Weights. Owner shall keep a record of the weight of the raw coal delivered by Contractor upon which payments are based. Such record shall be based upon truck scale weights, or such other weights that are used, as the case may be, and shall be deemed valid, conclusive and binding upon the parties hereto. Contractor shall at all reasonable times have the right to inspect the records of Owner relating to the tonnage of raw coal delivered to Owner by Contractor.

13. Records. Contractor shall keep for a minimum period of three years
accurate records reflecting all aspects of its operations hereunder. Owner shall have the right and privilege, at all times, to enter upon, examine and survey Contractor's operations and inspect, examine and verify all books, accounts, statements, maps and plans of Contractor for the purpose of ascertaining the coal taken from the Premises and to verify any other aspect of Contractor's operations as the same may relate to any provisions of this agreement.

14. Independent Methods of Operation. Contractor shall perform the work required by this agreement according to its own manner and methods not inconsistent with the provisions hereof, and without direction or control by Owner except as may be necessary for Owner to protect its property or insure conformity with mining plans and projections. Nothing herein shall be deemed to create a partnership between the parties hereto, to convey to either party, by operation of law or otherwise, any interest in, right to or ownership of, any property of the other party, or to constitute Contractor as an agent of Owner for any purpose, it being understood that Contractor is an independent contractor. Contractor at its expense shall provide, repair, replace and maintain everything necessary to perform its operations hereunder, including without limitation, all tools, supplies, material and equipment and shall use recognized modern mining methods and practices, employ capable management, expend reasonable and necessary funds for proper health and safety measures, development, reclamation, drainage and pollution control and take all other actions necessary to enable it to achieve maximum recovery of coal and to deliver the same to Owner as herein set forth.

15. Responsibility for Employees. Contractor, solely and exclusively, shall employ, direct, supervise, discharge and fix the compensation and working conditions and practices of its employees, shall be solely responsible for their payment and shall comply with all laws pertaining to payment of employees including without limitation the provisions of W. Va. Code § 21-5-1, et seq., and provide Owner either a copy of the bond posted as required by W. Va. Code § 21-5-14 or assurance that posting of such bond is not required. It is understood that Contractor is a signatory to a general wage agreement with the United Mine Workers of America ("UMWA"), that Contractor's coal mining labor shall be confined to United Mine Workers contract miners and that Contractor shall fully comply with all provisions of such labor agreement. Owner shall make all payments for the account of Contractor required to be made to the UMWA Health and Retirement Funds as provided under the National Bituminous Coal Wage Agreement of 1981 or similar funds provided for under subsequent labor agreements for the work performed hereunder with the cost of the tonnage base royalty and the cost of the hourly base payments to be borne by Contractor. Contractor shall provide Owner with a monthly statement of actual man-hours worked by Contractor's union employees in the performance of the work under this agreement. Computa-
tion of such hourly base payments will be made by Owner based on the hours worked as furnished by the Contractor, and the amount of the tonnage base royalty and the hourly base royalty shall be withheld from compensation due the Contractor for work performed under this agreement.

Contractor, solely and exclusively, shall be responsible for, and, at its sole cost and expense, shall pay for and maintain any and all private and group life, accidental death and dismemberment, health, sickness and accident insurance which may be required for its employees; and with regard thereto shall indemnify and save harmless Owner from any and all claims and liability.

Contractor, solely and exclusively, shall be responsible for, and shall exercise complete control of its employees in all matters, disputes or grievances arising out of or in any way connected with Contractor's operations.

16. Workers' Compensation, etc. Contractor shall become and remain a subscriber to the Workers' Compensation Fund of West Virginia or otherwise provide workers' compensation coverage for its employees, shall maintain insurance for, or otherwise guarantee, the payment of federal black lung benefits to its employees in accordance with applicable laws and shall conduct its operations in full compliance with the Fair Labor Standards Act, the Walsh-Healy Act and all other applicable state and federal laws and regulations and shall certify to Owner on a monthly basis compliance therewith in connection with all coal produced hereunder.

17. Indemnity; Insurance. Contractor covenants and agrees to indemnify and save harmless Owner against claims or liability growing out of or by reason of any act or failure to act of Contractor or its agents or employees in connection with any of its or their operations hereunder. Furthermore, Contractor also covenants and agrees to indemnify and save harmless Owner from any liability which may be sought to be imposed relative to the work to be performed hereunder pursuant to the provisions of any law or regulation or permit relating to operations contemplated hereunder. These covenants of indemnity shall survive cancellation, termination or expiration of this agreement.

Contractor agrees to carry insurance which will include coverage for any civil action arising under W. Va. Code § 23-4-2 and to carry liability insurance which will include without limitation coverage for the liability assumed in the immediately preceding paragraph, with an insurance company licensed to do business in West Virginia and acceptable to Owner, with minimum general liability bodily injury limits of $__________ per person, $__________ for each occurrence and minimum motor vehicle liability bodily injury limits of $__________ per person, and $__________ for each occurrence, and minimum property damage limits of $______ for each occurrence, with Owner and its lessor as named insureds, or with such other minimum limits as Owner may
require from time to time. Such insurance shall not be deemed a limitation on any liability of Contractor provided for in this agreement but shall be additional security therefor. Contractor shall provide Owner with a copy of the policies of insurance required under this agreement and written assurance of the insurance company or companies that Owner will be advised in writing not less than 10 days prior to any cancellation of any such insurance. If at any time Contractor shall allow such insurance to lapse, Owner may, at its option, terminate this agreement forthwith.

18. Taxes. Owner shall pay any West Virginia business and occupation tax and severance tax imposed on it on account of coal produced hereunder and sold by it. Contractor shall pay all other taxes which may be imposed or assessed against it on its operations hereunder or upon its equipment or improvements placed upon the Premises by it. If Contractor fails to pay any tax assessment or levy of any kind which it is obligated to pay hereunder, Owner may, at its option, pay said assessment or levy, and recover the amount of said payment by deducting from any sums owed to that date or to be owed in the future to Contractor for work performed hereunder.

19. Term. The initial term of this agreement shall be a period of one year, beginning on the day and year first above written, and if not sooner terminated the term of this agreement shall thereafter be automatically extended for successive periods of one year each until terminated as hereafter set forth. This agreement shall automatically terminate upon termination of Owner's mining rights in the Premises for any reason whatsoever.

This agreement shall automatically terminate at such time as Contractor shall have mined and removed from the Premises all the mineable coal in the seam(s) hereinafter specified and shall have fully complied with all applicable laws and permits upon completion of mining; provided, that either Owner or Contractor shall have the right to terminate this agreement at any time during the initial term of this agreement or any extension thereof by giving 60 days written notice of intention to terminate to the other party, in which event this agreement shall terminate at the expiration of a period of 60 days after the giving of such written notice of termination; provided, however, that upon termination prior to the time all the mineable coal has been mined and removed, unless Owner otherwise elects, Contractor shall leave the Premises in such condition that mining by another may begin immediately and shall do all things requested by Owner, if such request be made, to permit immediate mining by another, including but not limited to the transfer or assignment to Owner or its designee of applicable permits; provided further that if Owner elects not to have mining by another begin, Contractor shall fully comply with all applicable laws and permits following such termination.

If this agreement is terminated pursuant to the provisions of the preceding subparagraph of this paragraph 19, or of paragraph 20, prior to mining by
Contractor of all mineable coal in the Premises to be mined hereunder, Owner shall have the exclusive right and option, but not the obligation, for a period of 30 days after notice of termination to purchase from Contractor at the fair market value thereof (exclusive of installation and as determined from the average of two independent appraisals) the fixed (not mobile) equipment and structures owned and used by Contractor in the carrying out of its operations hereunder.

20. **Default.** If Contractor shall fail: to promptly commence and diligently prosecute its operations hereunder in a careful, skillful and workmanlike manner; to conduct its operations hereunder in strict compliance with all applicable state and federal laws and regulations and permits; to, where required, secure all necessary permits, licenses and identification numbers and pay all fees in connection therewith and fulfill all obligations in relation thereto or provide Owner with copies of the same; to file necessary reports or other documents with applicable governmental offices to establish and serve notice of Contractor's sole and exclusive responsibility for the health and safety of its employees and agents; to diligently follow mining plans and projections; to permit Owner access to the Premises; to provide Owner any consent, waivers or other documentation that may be requested by Owner or third parties; to make deliveries of coal at the minimum rates specified herein; to keep accurate records respecting all aspects of its operations hereunder; to permit Owner to examine and survey Contractor's operations and examine its books, accounts, statements and maps and plans; to furnish all tools, supplies, material and equipment, or use recognized modern mining methods and practices, or employ capable management, or expend reasonable and necessary funds for proper health and safety measures, development, reclamation, drainage and pollution control; to employ, direct, supervise, discharge and fix the compensation and working conditions and practices of its employees; to pay employees; to pay for and maintain all private and group life, accidental death and dismemberment, health, sickness and accident insurance which may be required for its employees; to exercise complete control of its employees in all matters, disputes or grievances arising out of or in any way connected with its operations hereunder; to become and remain a subscriber to the Workers' Compensation Fund of West Virginia or otherwise provide workers' compensation coverage for its employees, or maintain insurance for, or otherwise guarantee the payment of federal black lung benefits for its employees in accordance with applicable laws, or conduct its operations in full compliance with all applicable state and federal laws and regulations, or to certify to Owner compliance therewith; to carry liability insurance as required hereunder; to provide Owner with a certificate of insurance as required hereunder; to pay all taxes imposed or assessed against it; or to otherwise comply with any of the terms or provisions of this agreement, and if Contractor shall remain in default or violation of any such terms or conditions for 10 days after receiving written notice thereof from Owner,
or if Contractor is adjudicated a bankrupt, whether in involuntary or voluntary proceedings, or if any receiver, trustee, assignee or other person or persons be appointed by any Court to take charge of Contractor’s assets, then this agreement and all of the rights of Contractor hereunder shall, at the election of Owner, terminate and be forfeited, provided that if Contractor shall be compelled to suspend delivery of coal, as provided herein, by reason of fire, flood, acts of God, labor disputes, strikes or other conditions beyond its control, then Owner’s right to forthwith terminate for such default shall be abated for the period of such condition or 30 days, whichever is less.

21. Use of Surface. During the term of this agreement, but not thereafter, Contractor may use the surface of the Premises for construction and maintenance of roads, warehouses and other buildings and structures necessary or convenient in the carrying out of its operations hereunder. Such use by Contractor shall be nonexclusive and shall not unreasonably interfere with Owner’s use of the surface of its lands. At the termination of this agreement, all such rights of Contractor shall terminate, provided, however, that subject to the provisions of paragraph 19 of this agreement, Contractor may remove any buildings and structures placed by it upon the Premises within 30 days after such termination. Any such buildings and structures not removed by Contractor within such 30 days shall revert to and become the property of Owner. If so requested by Owner, Contractor shall within 30 days after termination hereof remove any and all structures and debris from the Premises.

22. Depletion. The coal produced hereunder shall at all times remain the property of Owner and Contractor has no economic interest in, legal or beneficial, or any title to, the coal produced hereunder, whether in place or as produced hereunder; and Owner shall have the full right of percentage depletion or other depletion with respect thereto for income tax purposes.

23. Agreement Not Assignable. Contractor shall not have the right to transfer or assign, by operation of law or otherwise, all or any part of its benefits or burdens hereunder without the prior written consent thereto of Owner, nor shall Contractor assign any monies due to it hereunder without the written consent of Owner. Any violation of this covenant shall authorize an immediate forfeiture and cancellation of this agreement.

24. Payment of Fees. Owner shall pay the reclamation fee for coal produced hereunder if such fee is required to be paid by it under § 402 of the Surface Mining Control and Reclamation Act of 1977 and any tax which may be imposed for black lung benefits under § 2 of the Black Lung Benefits Revenue Act of 1977.

25. Investigation of Premises. Contractor accepts the Premises hereinafter described in their existing condition and acknowledges that Contractor
has made an investigation to determine existing conditions, limitation of the areas involved, equipment necessary to conduct and complete operations, laws affecting performance hereunder, Owner's knowledge of prior mining, location of old works and latent dangers and dangerous conditions. **OWNER MAKES NO IMPLIED OR EXPRESS WARRANTY OR REPRESENTATION CONCERNING THE EXISTENCE, QUANTITY, QUALITY, MINEABILITY OR MERCHANTABILITY OF THE COAL SEAM WITHIN THE PREMISES, TITLE THERETO OR OTHERWISE AND CONTRACTOR COVENANTS AND AGREES THAT NO REPRESENTATIONS, STATEMENTS OR WARRANTIES, EXPRESS OR IMPLIED, HAVE BEEN MADE BY OR ON BEHALF OF OWNER REGARDING THE PREMISES, THEIR CONDITION, THE USE OR OCCUPATION THAT MAY BE MADE THEREOF OR THE INCOME THEREFROM.** Owner shall in no event assume or be liable for any loss incurred by Contractor under this agreement. Owner does not assume any responsibility or liability for the present or future condition of the Premises and Owner shall not be liable to Contractor for any damage to or destruction of the Premises or Contractor's property or the property of any other person due to fires, floods, or any other accident or natural catastrophe which occurs on or within the Premises.

26. **Receipt of Lease.** Contractor acknowledges receipt of a copy of the coal mining lease ("Lease") dated __________, ______, under which Owner is the lessee of the Premises; has read and examined the Lease; and hereby agrees that all work to be performed by Contractor under this agreement shall be in conformance with this agreement and all the terms, conditions and obligations of the Lease. The rights and privileges of Contractor hereunder are and shall be construed as limited to such rights and privileges only as Owner possesses and has the lawful right to contract. Contractor agrees to assume, in performing under this agreement, the obligations and conditions under the Lease relating to mine operations in the same manner as if the Contractor were the lessee under the Lease, except that Owner shall make all payments to its lessor as required by the Lease. Notwithstanding additional requirements contained herein, all statements, notices, maps or other similar documents required to be furnished by Owner to its lessor under the Lease shall be furnished by Contractor to Owner in connection with Contractor's operations under this agreement and all such documents shall in turn be furnished by Owner to its lessor. Contractor shall indemnify and save harmless Owner against all liability arising out of the nonperformance by Contractor of any of the terms, conditions, covenants and requirements of the Lease.

27. **Notices.** All notices, payments, reports, consents and other communications between the parties shall be in writing to the parties at their respective following addresses:
28. Waiver. A waiver by Owner of any default or breach hereunder shall not be deemed to be a waiver of any subsequent default or breach, nor shall any delay in asserting a right hereunder be deemed a waiver of such right. The failure of Owner to insist in any one of the provisions of this agreement or to take advantage of any of its rights hereunder, shall not be construed as a waiver of any such provisions or the relinquishment of any such rights, but the same shall continue and remain in full force and effect. All remedies afforded under this agreement shall be taken and construed as cumulated and in addition to every other remedy provided by law.

29. Entire Agreement. This agreement contains the entire agreement between the parties hereto, and no officer or representative of either party shall have the authority to subsequently change the same orally, and any subsequent change in this agreement shall not be valid unless the same shall be in writing and duly executed by each of the parties hereto.

30. Headings. Paragraph headings are used herein for convenience of reference only and shall not affect the construction of any provision hereof.

WITNESS the following signatures:

By ________________________________
Its ________________________________

By ________________________________
Its ________________________________