Denver Law Review

Volume 50
Issue 3 *Symposium - Colorado Property Law*

Article 6

March 2021

Surface Damages from Strip Mining Under the Stock Raising Homestead Act

Thomas A. Hine

NOTE

SURFACE DAMAGES FROM STRIP MINING UNDER THE STOCK RAISING HOMESTEAD ACT

INTRODUCTION

THE United States government has responded to the growing demand for western coal[1] by leasing some of the coal retained under the various mineral reservation acts.[2] These leases raise questions as to the extent of the rights of the conveyed surface as against the rights of the reserved mineral estate. Surface owners who have been in possession for a long period of time may find it difficult to remember that when the land was granted the patent specifically reserved the minerals to the United States. This potential conflict will be aggravated if the coal lessee intends to strip mine the land and by doing so destroy the surface and deprive the surface owner of its use.

This note examines whether under the Stock Raising Homestead Act (SRHA) and similar legislation,[3] the surface owner's remedies are limited to crop and improvement damage plus the value of the land for grazing if strip mining is used, and if the remedies are not so limited, to determine what courses of action the surface owner might follow.

I. DAMAGES

Some 33 millions of acres[4] of public land were patented to entrymen under the SRHA. The United States reserved the mineral interest[5] in these lands and the entrymen took a fee simple interest in the surface. The SRHA provides that the

---

[1] Although the expense of transportation formerly impeded the development of these resources, the desirability of low-sulfur coal and the growing industrial needs of the West are now increasing the demand for western coal.

[2] Act of March 3, 1909, 30 U.S.C. § 81 (1970); Desert Lands Act, 30 U.S.C. § 83 (1970); Stock Raising Homestead Act, 43 U.S.C. §§ 291-301 (1970).

[3] Act of March 3, 1909, 30 U.S.C. § 81 (1970); Desert Lands Act, 30 U.S.C. § 83 (1970); Stock Raising Homestead Act, 43 U.S.C. §§ 291-301 (1970).

[4] P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 520 (1968).

[5] "All entries made and patents issued under the provisions of sections 291-301 of this title shall be subject to and contain a reservation to the United States of all coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same . . . ." 43 U.S.C. § 299 (1970).

mineral interest includes the right to prospect and the right to mine under the following terms:

> Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, . . . upon the execution of a good and sufficient bond . . . to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon . . . .[6]

The provision specifies that, in lieu of consent by the surface owner or previous agreement, the surface owner shall be compensated for damage to crops and improvements with the amount of damages to be determined by court adjudication.[7] Where both parties are attempting to determine and protect their interests, court adjudication would seem to be the more reasonable means of solution.

In enacting the SRHA, Congress was attempting to satisfy the demand for free land in the West and at the same time encourage exploration and exploitation of the nation's mineral resources.[8] The Act therefore attempts to balance the interests of the surface and mineral occupants of the land.[9] The technological changes which have occurred in the half century since the Act's passage have not escaped congressional notice. The Act of June 21, 1949, states that:

> [A]ny person who hereafter prospects for, mines, or removes by *strip or open pit mining methods,* any minerals from any land included in a stock raising or other homestead entry or patent, and who had been liable under such an *existing Act* [SRHA of 1916] only for damages caused thereby to the crops or improvements of the entryman or patentee, shall also be liable for

---

[6] 43 U.S.C. § 299 (1970).

[7] The terms of the mineral reservation damage provision of the Agricultural Entry Act of July 17, 1914, 30 U.S.C. § 121 (1970), are similar to those of the Stock Raising Homestead Act of 1916 and have been treated by the courts as identical. Bourdieu v. Seaboard Oil Co., 38 Cal. App. 2d 11, 100 P.2d 528 (1940); Holbrook v. Continental Oil Co., 278 P.2d 798 (Wyo. 1955). For the purpose of this note, no distinction is made and the term Stock Raising Homestead Act will be used to include the Agricultural Entry Act, 30 U.S.C. § 121 (1970).

[8] For a history of the development of American public land policy see P. GATES, *supra* note 4; for a discussion of the disposal of minerals and United States mineral reservations see 1 ROCKY MOUNTAIN MINERAL LAW INSTITUTE, AMERICAN LAW OF MINING tit. 3 (1960, Supp. 1972).

[9] For purposes of this note the lessee is treated as having the maximum rights which the government could convey after severance of the surface estate. While it is recognized that the lease issued by the Secretary of the Interior will usually be more restrictive, the purpose here is to determine the maximum rights of the parties.

> any damage that may be caused to *the value of the land for grazing* by such prospecting for, mining, or removal of minerals. Nothing in this section shall be considered to impair any vested right in existence on June 21, 1949.[10]

Under this Act, the damages to the surface are stated in terms of the reduction in the value of the land for grazing in addition to the damages to crops and improvements provided by the SRHA. Because grazing is one of the least valuable uses of land, the land may have a market value far higher than its value as grazing land. The owner who has improved his land by using it for agriculture or industry will find his damages limited to only a fraction of its actual market value.

Reading the two acts together, the damages recoverable by the surface owner for injury to his estate by the strip mining mineral owner seem to be limited to crop and improvement damage and the reduction of the value of the surface as grazing land.

II. Legislative Intent

Examining the severed estates in a different manner discloses another possibility for the homesteader. In examining the intent of Congress in enacting the SRHA, two questions arise: First, did the Congress intend to reserve the right to destroy the surface? Second, are the damages to the surface owner limited to crops and improvements? If both these questions are answered in the negative, then what is the effect of the 1949 Act?

A. *Reservation of the Right to Destroy*

At the time the land was patented, the title passed[11] and the entryman received a fee simple estate in the surface of the land subject to the mineral reservation of the United States. A patent issued for land which is part of the public domain transfers the legal title and generally divests the land department and the executive department of all authority and control over the land.[12] Whatever the owner's rights were at the time of patent, they were not thereafter subject to reduction without payment of compensation.[13] After patent, the

---

[10] 30 U.S.C. § 54 (1970) (emphasis added).

[11] Smelting Co. v. Kemp, 104 U.S. 636, 640 (1881); Frisbie v. Whitney, 76 U.S. 187, 192-97 (1869).

[12] Moore v. Robbins, 96 U.S. 530, 533 (1877); Putnam v. Ickes, 78 F.2d 223, 228, *cert. denied*, 296 U.S. 612 (1935).

[13] Shepley v. Cowan, 91 U.S. 330, 338 (1875); The Yosemite Valley Case [Hutchings v. Low], 82 U.S. (15 Wall.) 77, 86-88 (1872); United States v. Krause, 92 F. Supp. 756 (W.D. La. 1950); Ozark-Mahoning Co. v. State, 76 N.D. 464, 37 N.W.2d 488 (1949).

surface estate was no longer part of the public domain and the entryman's rights in it, as with other vested property rights, were subject to the laws of the state in which the land was located.[14]

The Supreme Court has said that:

> legislative grants are to receive such construction as will carry out the intent of Congress . . . To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together.[15]

At the time the SRHA was passed, strip mining was virtually unknown. The mechanical limitations on the ability to remove overburden made strip mining impractical in most places and therefore an infrequent practice. Thus, the Congress could not have envisioned the total destruction of the surface of the land and, therefore, made no provision for such a possibility. There is no express reservation of the right to destroy the surface contained in the mineral reservation of the SRHA patents, and since Congress was presumably unaware of the possibility, it is difficult to argue that such a reservation was implied.[16] If the right to destroy the surface was not withheld in the conveyance to the surface owner, that right could not later be taken from the homesteader without compensation.[17]

The words chosen by Congress in creating the reservation indicate that the destruction of the surface was not envisioned. The reservation expressly states that the lessee may enter upon and *occupy* so much of the land as is required for

---

[14] Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 517 (1839).

[15] Winona & St. Peter R.R. v. Barney, 113 U.S. 618, 625 (1885).

[16] The right to strip mine must be expressly stated in the lease, or the mineral lessee does not receive the right. Heidt v. Aughenbaugh Coal Co., 406 Pa. 188, 176 A.2d 400 (1962); Weaver v. Berwind-White Coal Co., 216 Pa. 195, 65 A. 545 (1907); Coleman v. Chadwick, 80 Pa. 81 (1875). The right of the surface to be free of strip mining like the right of the surface to subjacent support is considered an absolute right. Commonwealth v. Fisher, 364 Pa. 422, 72 A.2d 568 (1950). *See* 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 703 (1971, Supp. 1972).

Any argument that Congress reserved the right to destroy the surface raises the question of what was conveyed. In Farrell v. Sayers, 129 Colo. 368, 270 P.2d 190 (1954), the court held that where the entire surface of the land was sand and gravel, a grant of the minerals in the land could not be interpreted as including the sand and gravel because "it surely was not contemplated that the parties intended to nullify the grant without some direct specification in the reservation." *Id.* at 372, 270 P.2d at 192. *See* United States v. Isbell Constr. Co., GOWER FED. SERV. (Mining) 39-1971, 4 I.B.L.A. 205 (Dec. 30, 1971). *See also* State *ex rel.* State Highway Comm'n v. Trujillo, 82 N.M. 694, 487 P.2d 122 (1971), where a SRHA grant was held to exclude sand and gravel because its removal would make stockraising impossible.

[17] Evans Fuel Co. v. Leyda, 77 Colo. 356, 360, 236 P. 1023, 1025 (1925).

his mining operation.[18] Even given the reading most favorable to the grantor, the word *occupy* cannot normally be read to encompass the total destruction of the surface through strip mining.

B. *Limitation on Damages*

The SRHA contains no language expressly indicating that the *damages* are limited to crops and improvements. A lessee would be liable for negligent mining practices even if the damage were to property other than crops or improvements.[19] This is not to say that strip mining is negligent, but rather to indicate that the provisions are not exclusive and do not rule out the possibility of recovery for damages to property other than crops and improvements. Thus, it is arguable that damages resulting from the destruction of the land through strip mining are not excluded by the Act and should be governed by state law.

This expansion of damages beyond injury to crops and improvements is more in line with what the Congress intended, *i.e.*, protection of the surface owner.[20] Using traditional underground mining methods or surface oil extraction methods, the surface owner could be expected to suffer some damage to crops and improvements. Under common law the injury suffered by the surface owner as a result of the conduct of the mineral owner in reasonably removing the deposit was not compensable.[21] The law viewed the severance of the estates as implying the right of the mineral owner to remove the minerals; therefore, so long as his methods were reasonable, he was not liable for damage to the surface. If the SRHA had not included the damage provision relating to crops and improvements, the surface owner would not have been able to collect damages for such injury. The need to extend the rights of the surface owner beyond those recognized at common law results from the fact that in the ordinary severance of the mineral estate there is a bargaining in which the sur-

[18] 43 U.S.C. § 299 (1970). *Cf.* Note, *Construction of Deeds Granting the Right to Strip Mine*, 40 U. CIN. L. REV. 304, 315 (1971).

[19] Kinney Coastal Oil Co. v. Kieffer, 277 U.S. 488, 505 (1928).

[20] Bourdieu v. Seaboard Oil Co., 38 Cal. App. 2d 11, 17, 100 P.2d 528, 534 (1940).

[21] In the absence of an express provision in a mineral deed or lease, the grantee or lessee is not required to pay for damage to crops or improvements. He is liable only if he trespasses beyond the rights granted or negligently causes such damage. Rochner v. Austral Oil Exploration Co., 104 So. 2d 253 (La. App. 1958); Wilcox Oil Co. v. Lawson, 341 P.2d 591 (Okla. 1959); Meyer v. Cox, 252 S.W.2d 207 (Tex. Civ. App. 1952) (denial of rehearing).

face owner may either provide expressly for such damages or may increase the price of the mineral estate to compensate for possible damages. By including the damage provision in the Act, Congress gave the surface owner the protection he would have otherwise bargained and obtained for himself.[22] In short, these damage provisions did not limit the damages recoverable at common law, but rather they created new and expanded rights not recognized at common law.

C. *Effect of the Act of 1949*

The 1949 Act[23] provides that any lessee who had been liable only for damages caused to crops and improvements shall be liable for the damage caused to the value of the land for grazing. If the previously proposed reading is given to the mineral reservation contained in the SRHA, the additional protection afforded in the Act of 1949 is of little significance.[24] Since the lessee is liable not only for crop and improvement damage but for damage to the surface as well, the 1949 Act does not increase the compensable damages. The 1949 Act also states that it shall not be "considered to impair any vested right in existence on June 21, 1949." If the surface owner was granted, upon issue of patent, the right not to have his estate destroyed, then reducing the liability to the value as grazing land would be an impairment specifically rejected by the Act.[25]

III. JUDICIAL INTERPRETATION

Three cases have dealt with the damage provisions of United States mineral reservations: *Kinney Coastal Oil Co. v.*

---

[22] The argument may be made that the entryman did not pay much for the land because the minerals were reserved, and therefore damage to the surface was anticipated and was included in calculating the purchase price. The history of American land policy contradicts this position. The price of the land was nominal because it was the policy of the United States to make land available to settlers. Under the Homestead Act of 1862, ch. 75, 12 Stat. 392, the price of the land was nominal although no minerals were reserved. The purpose of the mineral reservation in the SRHA was to make available to settlers the surface of land known to be valuable for minerals, and thus obtain the benefit of production from the surface of those lands.

[23] 30 U.S.C. § 54 (1970).

[24] Virtually all of the lands patented under the SRHA had gone to patent before 1949. *See* P. GATES, *supra* note 4.

[25] The results suggested here, *i.e.*, that the entryman is entitled to compensation in the amount that the actual value of his land has been reduced, may also be obtained by construing the word "improvements" in the SRHA to mean the improved value of the land rather than the cost of the improvements themselves. By such construction, if the surface owner spent $10,000 for irrigation equipment on land worth $10,000 for grazing, and as a result the value of the land was increased to $50,000 then the improved value would be $50,000 rather than $10,000 for grazing value plus $10,000 as the cost of the irrigation equipment.

Kieffer;[26] *Bourdieu v. Seaboard Oil Co.*;[27] and *Holbrook v. Continental Oil Co.*[28] All three cases dealt with oil and gas leases and did not consider the question of permanent destruction of the surface.

Kinney was an action by the oil and gas lessee to enjoin the surface owner from creating a townsite on the lease area which was then in oil and gas production. The plaintiff alleged that construction of the townsite would impede the oil extraction operation and increase the harm caused by the operation. The question presented to the Supreme Court was whether an equitable remedy was appropriate. The *Kinney* Court decided that such an action was proper, and, discussing damages in dictum, said:

> The only compensation which he [the surface owner], rightfully may demand is, as the act of 1914 says, for "damages caused" by the mining operations. The sentence next preceding that in which these words occur makes it fairly plain that they refer to damage to "crops and improvements," and the title to the act, coupled with the reference to "crops" shows that "agricultural" improvements are the kind intended. *Certainly it is not intended to include improvements placed on the land, after mining operations are under way,* for purposes plainly incompatible with the right to proceed with those operations until the oil and gas are exhausted. It may well be that, if the operations are negligently conducted and damage is done thereby to the surface estate, there will be liability therefor.[29]

The idea that the damage to improvements is limited to agricultural improvements presents a direct conflict with the interpretation proposed in this note. In context, however, the Court's statement that the damages are limited to crops and agricultural improvements appears far less absolute than the following sentence: "Certainly it is not intended to include improvements placed on the land, after mining operations are underway . . . ."[30] This passage indicates that the Court was referring specifically to the acts of the defendant in making the improvements after mining had begun. If this rule were not applied, the surface owner could, by his own conduct, increase the damages recoverable from the mineral developer. Such actions are clearly distinguishable from good faith improvement of one's property. The limitation on the damages to crops and agricultural improvements appears

---

[26] 277 U.S. 488 (1928).
[27] 38 Cal. App. 2d 11, 100 P.2d 528 (1940).
[28] 278 P.2d 798 (Wyo. 1955).
[29] 277 U.S. at 505 (emphasis added).
[30] *Id.*

to have been intended to lend greater weight to disapproval of the defendant's activity, rather than to stand on its own.[31] If the limitation on damages to crops and improvements is taken as absolute, as was done by the court in *Holbrook,* then the Court contradicts itself in the last sentence of the quotation when it says that damages for negligence might be recoverable. The phrase "until the oil and gas are exhausted" makes it clear that the Court was considering a temporary use of the surface by the mineral lessee after which the reserved estate would be terminated, and the surface owner would have the use of the entire surface. The Court was not thinking in terms of the total destruction of the surface estate which might occur in a strip mining situation. As indicated above the final sentence of the passage shows that the Court did not rule out other types of damage.

In *Bourdieu,* the plaintiff alleged that the defendant had caused various gulches and ravines on the premises to be filled with oil and waste products from oil production both on and off the premises. The court found that:

> While congress intended, by these laws, to encourage the extraction of oil and gas from such lands and to permit the United States to receive royalties therefrom, *it also intended to protect the homesteader in his limited right to use the surface of the homestead.* To permit said acts of respondent . . . without granting appellant any recourse, would destroy the protection to the homesteader intended by the statutes.[32]

It is not clear whether the court was referring to the dumping of waste in general or whether its reference is only to the waste from oil produced off the premises. If the latter view is taken, then the case is important only for its clear recognition of congressional intent to protect the homesteader. If the disposal of waste produced on the premises is seen as damage beyond the scope of "reasonably incident to mining" then the court recognized compensable injury beyond damage to "crops and improvements."

The *Holbrook* case was an action for damages brought by the surface owner for injury caused by defendant's constructing houses, a tank battery, and reservoir on his land, and polluting streams and destroying natural grasses. The trial court

[31] In *Kinney,* the defendant received title to his land in October 1923, and in January 1924 platted the same 40 acres which were involved in the oil lease as a townsite. Out of 320 acres which he received, the defendant chose two 40-acre parcels to plat as townsites, and these corresponded exactly with the plaintiff's two 40-acre leases.

[32] Bourdieu v. Seaboard Oil Co., 38 Cal. App. 2d 11, 17, 100 P.2d 528, 534 (1940) (emphasis added).

found as a matter of fact that the houses, tank battery, and reservoir were reasonably incident to the oil operation and that no water had been polluted. The Wyoming Supreme Court found evidence in the record to support these findings[33] and went on to discuss liability under the SRHA. But since no damage to nonagricultural improvements was involved, the court was not faced with that question. The court in *Holbrook* based its strong language limiting damage to crops and agricultural improvements on the dictum of *Kinney* discussed *supra.*

Thus, the three cases which have dealt with the liability under the damage provision of the SRHA and similar provisions of other acts have not come to grips with the problem of permanent destruction of the surface. Although the attitude presented by *Kinney* and *Holbrook* is not sympathetic to the surface owner, neither of the cases decided the question of damages: *Kinney* was faced with a question of whether a mineral lessee could obtain equitable relief, and *Holbrook* had only to find supporting evidence to uphold the trial court's finding of fact. All three cases recognize that the statute does not deprive the surface owner of his common law right to recover for damage caused by negligent mining.[34] Although *Kinney* and *Bourdieu* explicitly mention that Congress intended to protect the homesteader's enjoyment of his estate, neither case defines the extent of that protection.

IV. Injunction

If the mineral owner does not have the right to strip mine and by doing so destroy the surface estate, may he be enjoined from such activity? In *United States v. Polino,*[35] the government found itself on the other side of the strip mining situation. In that case the defendant had conveyed land to the United States and reserved the mineral estate. The land was purchased for use as a forest, and the court found that under West Virginia law the mineral reservation did not include the right to make the land useless for the purpose for which the government obtained it. If the same reasoning were applied to the mineral reservation of the SRHA, it would appear that the surface owner could enjoin strip mining.

---

[33] Holbrook v. Continental Oil Co., 278 P.2d 798 (Wyo. 1955).

[34] Kinney Coastal Oil Co. v. Kieffer, 277 U.S. 488, 505 (1928); Bourdieu v. Seaboard Oil Co., 38 Cal. App. 2d 11, 17, 100 P.2d 528, 534 (1940); Holbrook v. Continental Oil Co., 278 P.2d 798, 804 (Wyo. 1955).

[35] 131 F. Supp. 772 (N.D.W. Va. 1955).

A mineral owner who does not own the right to destroy the surface is trespassing if he attempts to exercise that right. Under Colorado law "[t]aking or destroying real property is always regarded as irreparable injury,"[36] giving rise to an injunction. In such cases, the injury need not have occurred but must be probable or threatened.[37] In *Barker v. Mintz*,[38] however, the Colorado Supreme Court denied injunctive relief. In *Barker*, a seam of coal was so located that its removal could not be accomplished without the destruction of the surface. The trial court had granted an injunction and the supreme court in reversing said:

> Every case depends somewhat upon its own facts. And here it seems to us as inequitable to give a judgment against the defendant which destroys his property, as it would be to let him take out his coal without compensation to the plaintiff, and so destroy hers. Is her property more sacred then his? No injunction should be granted contrary to the "real justice of the case." . . . The land is wild and its present value, except for the coal, is only for pasturage, a very little of it for cultivation. The stripping destroys these values, but the fair and equitable way is so to treat the matter that each party will get the greatest amount of good with the least possible harm, and that is by allowing the defendant to take out his coal and pay the plaintiff for the damage he thereby does to her estate. He will then get the full value of his property and she will get the full value of hers.[39]

The statement that every case must be decided on its own facts raises the possibility that a *Barker*-type holding may be avoided by the use of several possible distinctions. In *Barker* the coal could not be removed without damage to the surface. A court could refuse to extend this idea to a case where underground mining is possible. In the *Barker* situation the mineral owner would lose his entire estate while in the latter situation the mineral owner would suffer reduced profits.

The injunction was refused on the basis of the equities involved, and therefore in a case where the land was used for something other than pasturage a court might distinguish the situation. If the value of the surface is greater than the value of the minerals an injunction should not be necessary because the damages would make mining unprofitable. Where, however, the values involved are not purely economic, *e.g.*, if several hundred homes would be destroyed with consequential dislocation of families, a court might find the equities less

[36] Kane v. Porter, 77 Colo. 257, 258, 235 P. 561 (1925).
[37] Rogers v. Nevada Canal Co., 60 Colo. 59, 151 P. 923 (1915).
[38] 73 Colo. 262, 215 P. 534 (1923).
[39] *Id.* at 266, 215 P. at 535.

balanced.

CONCLUSION

Under the SRHA the surface owner received a fee simple estate subject to the mineral reservation to the United States. The United States did not retain the right to destroy the surface, and therefore that right is not available to a lessee of the United States. If the surface of the land is destroyed by the lessee, the surface owner is entitled to damages in the amount of the reduction of the land's value.[40] In Colorado the right of the surface owner to obtain an injunction to prevent strip mining is not clear, and depends upon his ability to distinguish the facts of *Barker*.

Thomas A. Hine

[40] If a mineral lessee paid a bonus for the right to mine coal under the impression that he would have the right to strip mine, and the value of his right is materially reduced because of an increase in the amount of damages he must pay or because of greater expense in removing the coal by some other method, his remedy would be against the government on his contract. If the Department of Interior were under a similar impression when leasing, it would seem that mutual mistake would permit rescission.