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Coal Leasing Practices and Surface Owner Protection Acts

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NORTH DAKOTA COAL LEASING PRACTICES AND SURFACE OWNER PROTECTION ACTS

by

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Several laws dealing with agriculture and the development of North Dakota's coal resources were passed in the 1975 legislative session. The two laws discussed in this report became effective on April 9, 1975, and are intended to help protect the agricultural base of the North Dakota economy. Although enacted as a reaction to strip mining, the laws apply to any method of removing the coal from the land.

The "Coal Leasing Practices Act" concerns terms to be included in coal leases; it applies to all agreements for coal mining executed[2/] after April 9, 1975. It does not apply to leases in effect at the time the act was passed.

The "Surface Owner Protection Act" is primarily concerned with protecting the surface owner who does not own the coal beneath his land, but it has some effect on all mining operations where the mine operator does not own the surface. This law may alter the legal relationships of parties to agreements made before it was passed.

An important point should be made at the start: these laws do not attempt to solve all of the problems that can arise between the landowner and the coal developer. Each landowner's situation is a little different from all others and unique problems will arise. The landowner is urged to consult with a competent attorney before signing any agreement to lease coal or to allow mining to be conducted on his land.

The wording of a lease or agreement may have legal effects not apparent to the layman. For example, a provision providing for reimbursement for damages to growing crops does not generally cover pastureland, but it does cover hayland.

The absence of a term in a lease may have significance. For example, an agreement to allow exploration for coal, without any limiting language, may allow the mineral developer to go anywhere at any time. A two and one-half ton truck crossing good bottom hayland when the ground is wet or a drilling rig taking core samples in the middle of a wheat field during harvest can substantially interfere with a farming operation. Even if payment is made, it may be inadequate. Delays and inconvenience can be avoided by adding a clause in the lease limiting the time and place of exploration.

The new laws deal with some problems of this nature, but not all of them. Any forseeable difficulties should be dealt with when negotiating the lease or agreement to allow mining.

I. THE COAL LEASING PRACTICES ACT

This law does four things: (1) it provides for cancellation of a coal lease under certain circumstances; (2) it sets a maximum term of years for the duration of a coal lease; (3) it protects the lessor[3/] against hidden advance royalty clauses; and (4) it provides against waiver of these rights.

A. Cancellation of the Lease

The act provides two circumstances for canceling a lease: first within 15 business days of its execution by the lessor; second in the event of *bona fide*[4/] failure of title.

1. Either party may cancel a coal lease within 15 business days following its execution by the lessor. The cancellation notice must meet four requirements to be effective: (1) it must be in writing; (2) it must be mailed before midnight of the

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2/ "Execution" means the finalizing or perfecting of something. In connection with the transfer of an interest in land it usually refers to the signing and delivery of a deed, or to the signing of a lease or the agreement.

3/ "Lessor" and "lessee" are terms commonly used to refer to the two parties to a lease. The lessor is the owner of the land who is leasing it for use to someone else, and the lessee is the person who receives the use of the land pursuant to their lease agreement.

4/ Bona fide means honestly and in good faith, without fraud or collusion.

fifteenth business day[5] after execution; (3) it must be mailed by registered mail,[6] return receipt requested; and (4) it must express intent of the mailing party not to be bound by the lease. The law does not provide for any changes from this form: and any variations, such as hand delivery of the notice or failing to send it return receipt requested, may result in the cancellation being ineffective.

The requirement of written notice is a must. Any attempt to cancel the lease by telephone or orally would not be recognized by a court in the event of a lawsuit by the other party to enforce the agreement. Other provisions need interpretation, however.

The act provides that either party may cancel the lease, but does not make provision for multiple party agreements. For example, if three people own undivided shares in the coal under a tract of land and they lease it to three other people who intend to develop the coal together, can one lessee back out or must all three join together to back out?

If he can back out alone, how much and what kind of notice must he give to the other parties to the agreement? Must he notify all three lessees, or only one? Must the notice to all lessees be in writing or just notice to one? Must he notify his co-owners? Similar questions could be asked of cancellation by one of the lessees. The act does not deal with any of these problems. The best advice to follow would be to give notice of the intended cancellation to all other parties concerned on both sides.

The problem of one co-owner canceling without the consent of the other co-owners is difficult. The cancellation may or may not be effective. If it is effective, the canceling party may be liable to his co-owners for damages. One party to a multiple party agreement who wishes to cancel a coal lease should consult an attorney to determine the possible consequences in light of the circumstances surrounding the particular agreement.

2. The act states that certain instruments or documents can provide for what is in effect a right to cancel when there is a *bona fide* failure of title. The implication is that if these instruments or documents do not so provide, there is to be no right to cancel for a *bona fide* failure of title. While it can be argued that the act allows either party to a lease to cancel when there is a *bona fide* failure of title, it appears the legislature had in mind only allowing the lessee to cancel.

A failure of title occurs when a third party has a better claim to the coal than the lessor has. If the lessor attempts to lease coal rights which he does not own, it is obvious that the lessee would want to be able to back out, and the lessee had that right under the law before this act was passed. But, since a lease is a contract, the lessee might also want to be able to hold the lessor liable to the lessee for breach of contract. Depending on the circumstances, the damages could be substantial. Furthermore, if the lessee has made payments to the lessor before the failure of title is discovered, the lessee may have difficulty getting the money back.

What instruments or documents are involved? When the lessee makes payment to the lessor, he need not give cash if the lessor will accept a draft, promissory note, or other commercial paper. The paper then constitutes evidence of a debt and the lessor can convert the paper into cash by selling it to a bank or similar institution or by presenting it to the lessee when it is due. The act provides that if a sight draft or other negotiable or nonnegotiable instrument is given as payment for a coal lease, such draft or instrument may authorize "the first party" to refuse to honor the draft or instrument if there is a failure of title. With reference to such a draft or instrument there ought not to be any question but that the first party, and perhaps only party, referred to is the lessee. If the draft or instrument authorizes the lessee to refuse to honor that instrument in the event of failure of title, the lessee need not be concerned with attempting to get back money paid for an invalid lease.

The act further provides that a trust or escrow agreement involving a coal lease may authorize "the first party" to reject the lease in the event of a failure of title. Whereas in the preceding situation where we were dealing with a sight draft or other similar instrument, there was no question that the

[5] While this act does not define business day, it is defined elsewhere in North Dakota laws to include all days except holidays. Holidays are every Sunday plus January 1st, the third Monday in February, Good Friday, the last Monday in May, July 4th, the first Monday in September, November 11th, the fourth Thursday in November, December 25th, and every day appointed by the President or the Governor as a holiday. If a January 1st, July 4th, November 11th, or December 25th fall on a Sunday, the following Monday is a holiday, and if they fall on Saturday, the preceding Friday is a holiday.

[6] While the act specifies registered mail, another provision of North Dakota law apart from this act provides that wherever the term "registered mail" is used in the laws, it will include certified mail. Both certified and registered mail require the party receiving the mail to sign for it, and the Post Office retains the receipt unless the sender requests its return. However, registered and certified mail differ in cost and handling, with registered mail being more expensive and handled separately from regular mail.

first party was the lessee, here there is a question as to whether the first party referred to is the lessor or the lessee. There are situations in which technically the lessor could be the first party to a trust or escrow agreement. However, since the apparent intent of the legislature in this section was simply to protect the lessee, an ambiguity exists; and it is not certain what interpretation a court will give to the language should the matter come before it for decision.

B. Limitation on the Duration of the Lease

Mineral leases frequently have both a primary term expressed in years and a secondary term which continues after the primary term as long as certain events take place. This act restricts both the primary and the secondary term.

The act limits the term of the mineral lease to a primary term of 20 years if the land subject to the lease is not subject to mining operations or is not subject to a mining permit at the end of that 20 years. The primary term is the time a lease is in force whether or not mining operations are carried on. This limit applies only to leases made after the act became law and, therefore, does not apply to any agreement made before April 9, 1975. The act apparently would not void a lease containing a primary term in excess of 20 years, but would simply cut it off when it reaches 20 years if the land is not then subject to mining operations or subject to a mining permit. Thus, a lease with a specified primary term of 25 years would be valid for 20 years, not 25.

The law does allow a lease to remain in effect beyond 20 years if mining operations[7] take place on the land or a mining permit is obtained within the primary term, but only as long as coal is regularly mined on the land or it is subject to the permit. This will have the effect of banning from use in new leases extension provisions contained in some current agreements. The following example is taken from a coal lease used by a large mining company and is a typical clause that could no longer be used without modification:

> **TERM . . . This lease shall remain in force for a term of twenty (20) years from the date hereof and for so long thereafter as mining operations are being conducted by the Lessee on the leased premises or on other lands located within fifteen (15) miles of any part of the leased premises. If this lease would otherwise terminate at the end of said twenty (20) years under the provisions of the preceding sentence Lessee may at its option pay to Lessor the sum provided for in paragraph 7 and this Lease shall continue in full force and effect on the same terms and conditions contained herein for an additional term of twenty (20) years and so long thereafter as mining operations are being conducted by Lessee on the leased premises or on lands located within 15 miles of any part of the leased premises.**

This clause would allow, for example, the term to continue if mining operations were taking place within 15 miles of the leased land. The new act requires the operations to be on the leased land itself. Furthermore, the "mining operations" referred to in this clause might allow the mine operator to use the premises to deposit waste, to store equipment, to maintain buildings, to run power lines, or to maintain roads or railways in connection with the operation of a mine not on the leased premises and without ever mining coal from the leased premises. Thus, under the example clause, the land could be tied up for years beyond the 20 specified in the lease without the landowner receiving any royalty payments. The new statute would prevent a lease from operating in this manner. While using the same phrase, "mining operations," the new law limits the extension to "so long . . . as coal is regularly mined" from the leased land or a mining permit exists. It prevents the mine operator from using the land beyond the primary term as a parking lot for machinery or dump ground for waste when there is no coal being regularly mined from the leased land or no mining permit.

"Regularly mined" is not defined by the law, so it is not clear what type or size of operation is necessary to extend the primary term of the lease. The law does not say continuously, so presumably some interruption could take place without terminating the lease. It is customary for mineral leases to provide that mining operations will be deemed in progress even though no work is actually being carried on if the work stoppage is caused by forces beyond the control of the lessee, such as fire, strike, flood, or governmental action. The effect of the new law on such provisions is not clear.

The act also provides that a lease may extend beyond 20 years if it is subject to a valid mining permit.[8] A mineral developer must obtain a mining

[7] According to the law, a mining operation is any activity the purpose of which is to discover coal under, or to remove coal from, the land in question.

[8] The requirements for obtaining a valid permit are set out in North Dakota State University Extension Bulletin No. 22, Legal Aspects of Coal Leasing and Sales, and Strip Mine Reclamation in North Dakota (Fargo: NDSU Extension Service). There have been some modifications to the law since that bulletin was published, but the important aspect here is that the permit does not place an affirmative duty upon the lessee to mine the coal and provides for year-to-year renewal for any acreage that has not been mined.

permit from the Public Service Commission before coal mining can be conducted. The primary term of a permit is three years. Thus a lessee could obtain a permit in the twentieth year and hold the land for at least the three-year term of the permit and perhaps longer with renewals. A mining permit may be renewed for up to five years on a year-to-year basis.

The effect of the act on an option clause, such as the one quoted in the lease above giving the lessee the option to renew for a second 20-year term by paying a certain sum, is ambiguous. The act specifically says that the limitation set forth in the act "shall not prohibit agreements for extensions or renewals of the primary term." This may mean that options will be valid as an agreement for an extension, or it may mean that an agreement for renewal or extension is valid but only if it is made after the primary term has expired or when it is about to expire. It is, however, difficult to see what is accomplished by the law limiting the term to 20 years if in the same lease it will recognize an option clause allowing the lessee to extend the term for another 20 years on its own motion.

C. Protection Against Hidden Advance Royalty Clauses

Payment to the landowner for a coal lease is usually in one or more of four forms: (1) a bonus for entering into the lease; (2) rent for the use of the surface; (3) royalties based on the actual coal mined; and (4) damages for harm done to the surface and chattels of the landowner. The advance royalty clause is a provision in a lease that allows the lessee to deduct previous payments for bonus rent, or damages from royalty payments due when production actually begins.

> **For example, John O. leases 100 acres to Company Q for a bonus of $10 per acre for the first year and $1 per acre per year rent thereafter and 10 cents per ton royalty for coal actually produced—the lease to run for 20 years. No mining is done the first 15 years and Company Q pays John his bonus and rent, for a total of $2,400. In the sixteenth year the 100 acres are mined and produce 175,000 tons of coal. The royalty due is $17,500.**

But, if the lease contains an advance royalty clause, the amount of previous bonus and rent payments is deducted and John receives $15,100. The new law does not prohibit such a clause, but requires two things: first, that it be specially explained to the lessor before he executes the lease, and second, that it be specifically acknowledged by him. The acknowledgment must be printed on the lease form in print larger than any other print on the document and it must refer the lessor to the provision in the lease that contains the advance royalty clause. The following example of an acceptable acknowledgment is set out in the statute:

> **THE LESSOR HEREBY ACKNOWLEDGES THAT HE IS AWARE OF SECTION________OF THIS LEASE RELATING TO ADVANCE ROYALTIES.**

It appears to be the intent of the act that the lessor's signature to the lease itself is not sufficient. There has to be a separate signature to an acknowledgment of this sort.

D. Provision Against Waiver of Rights

The act also provides that the terms of a coal lease governed by this act cannot be waived by either party to the coal lease, and makes inoperative any clause in a lease which attempts to do away with the requirements set forth in this law. For example, if a lease contained a clause that neither party could cancel the lease, that clause would not prevent either party from canceling the lease within 15 days as provided in the act.

II. SURFACE OWNER PROTECTION ACT

The right to mine coal without owning the surface of the land is usually acquired in one of two ways—by acquiring separate ownership of the coal (severed mineral interest) or by obtaining a lease. Ownership of the coal (mineral estate) carries with it the right to enter upon the surface land and to remove the coal by any reasonable means. In North Dakota this may include strip mining, depending on an interpretation of the document that separated ownership of the coal from ownership of the surface. The rights of a coal developer under a coal lease are determined by the wording of the lease. Most coal leases in North Dakota contain a clause expressly allowing the coal developer to strip mine.

The purpose of the "Surface Owner Protection Act" is to provide economic protection for farmers and ranchers who own the surface under which coal[9] is to be mined. While the primary interest of the legislature was to protect those farmers and ranchers who never owned the coal, it appears that the act applies to both severed coal and coal being developed pursuant to a lease, but the protections offered in each situation differ. The protection is provided by requiring the coal developer to give notice and obtain permission from the surface

9/ Although the Act uses the term "minerals," "minerals" is defined to mean coal.

owner before the Public Service Commission (PSC) may issue a permit[10/] to mine coal and by declaring the cost of reclamation to be entirely the obligation of the coal developer. However, if the surface owner does not consent, the act provides for court action by the coal developer to get consent from the court. In the process, the court will determine damages to be awarded the surface owner.

A. Requirement of Notice and Permission

At least 30 days before a coal developer applies to the PSC for a permit to surface mine coal, he must give notice to the surface owner of the type of land disturbance or mining operation contemplated. The act defines "disturbance" as any alteration of the topsoil whether for actual mining or exploration. Mining operation includes any activity the purpose of which is to discover coal or to remove if from the ground. The notice must be sufficiently detailed so the surface owner can evaluate the extent of the land disturbance on his use of the property, and it must be accompanied by a U. S. geological survey topographic map showing the specific locations of the mining operation. This requirement seems to apply whether the surface owner owns the coal or not.

The PSC cannot issue the mining permit unless a statement by the surface owner consenting to surface mining on his land accompanies the application for the permit. This consent requirement can be met by a certified copy of the surface lease or a coal lease executed by the surface owner in favor of the coal developer or his agent. The act does not specifically require that these leases refer to surface mining. Apparently the legislature assumed that the giving of a lease contemplates surface mining. A modern coal lease would seem to imply by its nature that surface mining is contemplated. A surface lease would not necessarily indicate that surface mining is contemplated. Normally this will not be a problem since a surface lease would likely recite the use to which the land is to be put, and a landowner dealing with a coal company should at least inquire as to the company purpose in leasing the land. If the coal developer acquires surface leases through an agent, however, problems might arise when the surface owner does not know he is dealing with a representative of a coal developer. Apparently if the lease was not given to the developer or his agent, it will not fulfill the consent requirement.

Once the coal developer has given the notice and obtained the consent, he can obtain a mining permit if he complies with the other conditions required by the mining permit and the reclamation law.[11/] If the developer desires to include additional land beyond that contained in the original permit, the act states that he must file the appropriate consent or lease forms with his application. The act says nothing, however, about having to give notice to the surface owner although he may not get consent unless he does.

Whenever a surface owner refuses to give his consent and there is no applicable lease, the coal developer or the coal owner can bring an action in district court to determine the relative rights of the parties and establish the measure of damages to the surface owner. When the court is satisfied that the surface owner will be adequately compensated, it must issue an order allowing the PSC to issue a surface mining permit without the surface owner's consent.

The foregoing procedure offers no problem where but for the absence of surface owner consent, as provided in this act, the coal owner or developer has the right to strip mine. There may be situations in North Dakota, however, where the coal owner or developer does not have the right to strip mine because that right was not given when the coal ownership was severed from the surface ownership. Does this act now give that coal owner or developer the right to strip mine upon payment of damages as determined by the court? The act does not specifically answer this question, but there are several aspects to the act that suggest the coal owner or developer has not acquired such a right.

First, it is clear that it is not just the function of the court to determine damages but to determine "the relative rights of the parties." One aspect of the relative rights of the parties certainly should be whether the coal owner or developer has any right to strip mine without this statute. Second, the legislature made its purpose clear: "It is the purpose of this act to provide the maximum of constitutionally permissible protection to surface owners . . . " It would be improper to interpret an act designed to protect surface owners as giving coal owners strip mining rights they did not have previous to the act.

The act does not define "adequate compensation" and does not require that the compensation be paid or even exactly determined before the order is issued. What does it provide regarding surface damage payments?

10/ See footnote #8 on page 3.

11/ These requirements, set out in North Dakota State University Extension Bulletin No. 22, Legal Aspects of Coal Leasing and Sales, and Strip Mine Reclamation in North Dakota must be met for all land to be strip mined.

B. Determination of Surface Damages

Three different situations can arise with respect to recovery for surface damages: (1) the surface owner has given his consent, but has not agreed to the measure of surface damages; (2) the surface owner has given his consent, and has agreed to the measure of surface damage; or (3) the coal developer obtained his permit through court action without the consent of the surface owner. In all three situations the act provides that some surface damages will be recoverable, but the amount of recovery may vary depending on the category in which the particular surface owner belongs. In any event, the right to recover surface damages is declared unwaivable and any agreement between the parties which purports to exclude such damages is to be given no legal effect. The three situations will be discussed in the above order followed by a general discussion.

1. Consent but no agreement as to damages. First, the act requires the coal developer to annually pay an amount of money equal to the damages suffered by the surface owner for "loss of agricultural production" caused by the mining activity. Agricultural production is defined as "the production of any growing grass or crop attached to the surface of the land, whether or not the grass or crop is to be sold commercially, and the production of any farm animals, whether or not such animals are to be sold commercially." However, it must be shown that the land was "regularly" used for agricultural production before any damages can be recovered. The act does not define "regularly." The payments cover only land actually mined, disturbed, or to be disturbed during the year when production is interrupted. The payments cease once the land has been reclaimed sufficiently to satisfy the reclamation plan.

The measure of damages, loss of production, may present problems of proof. Loss of production appears to be concerned with the annual net profit made on the acreage in question and not with an increase in net worth. How much production has been lost? The production of agricultural land depends on many things which are not capable of easy measurement. It may vary with the amount and time of available moisture, planting time, type of crop chosen that year, seed and fertilizer used, etc. The law does not deal with these problems. Perhaps the requirement that the land has been regularly used for agricultural production is for purposes of having a base to judge the profitability of the land to the farmer or rancher. Furthermore, the act provides that the amount of damages may be determined by any formula mutually agreeable to the developer and surface owner.

Second, when any surface mining operation[12] comes within 500 feet of a farm building, the coal developer must pay the building owner either (1) the fair market value of the building or (2) the "entire cost" of moving the building to a location where mining operations will not come within 500 feet of the building. The law does not say who determines whether the building will be paid for or whether it will be moved. The option seems to be in the developer.

The law refers to the "entire cost" of moving the building. Does this include the cost of moving the contents of the building, such as 20,000 bushels of wheat? It would seem that the cost of moving the wheat is a part of the cost of moving the building since the building cannot be moved without moving the wheat. However, it is not clear that this will be the result.

If the surface owner has to sue to recover surface damages under the law, he is entitled to reasonable attorney's fees in addition to the damages.

The law provides that the surface damages are to be paid in addition to any amount recoverable under a mineral lease executed by the surface owner, such as bonus, rents, or royalties, unless the lease provides for surface damage payments. Any attempt to waive this right to surface damage payments is declared void. What is not clear is whether a lease provision that royalties are in lieu of any surface damages would constitute an invalid attempt at waiver or an acceptable agreement on the measure of damages. In actual dollars and cents received by the surface owner, this may not make much difference, since the coal developer may insist on lower rent or royalty payments when he has to make separate provision for surface damages.

2. Consent with agreement as to damages. When the surface owner has consented to the mining operation and agreed with the coal developer on the amount of damages to be paid, a statutory minimum still applies. If the agreement provides for more damages than the statute, the agreement governs; if it provides for less, the statute governs. But it is not clear what this statutory minimum is. An argument can be made that it is only a requirement that the cost of moving buildings is provided for. Another argument can be made that it includes both items discussed above where consent is given; but there is no agreement as to surface damage payments, namely, loss of agricultural production and cost of moving buildings. This problem will have to be resolved.

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[12] See footnote #7 on page 3.

Here too a surface owner who has to sue to recover surface damages due under the act is entitled to recover reasonable attorney's fees in addition to the damages.

3. Consent through court actions. Where the surface owner has refused to give his consent, damages include compensation for "lost production, lost land value, and loss of the value of improvements." Only when the court is satisfied that the surface owner will be compensated for these can the court authorize the PSC to grant a mining permit without the consent of the owner. The recovery for loss of land value and value of improvements is important. These are not recoverable in situations one and two. This portion of the statute does not appear to be limited to agricultural land, although a court might so decide, given the stated purpose of the act.

4. General discussion. While loss of land value is recoverable in situation three, perhaps recognizing that complete reclamation is not possible, the act does not deal specifically with loss of appreciation in land value. It does not deal with other losses that might fall outside of lost agricultural production and which might amount to economic loss to the surface owner. These include income from recreational activities, such as hunting or fishing; intangibles, such as the loss of mortgage value; and the future cost of replacing the improvements. A fence valued at $500 today might cost $1,500 to replace five years later after the land has been reclaimed.

The law does not deal with the loss sustained by a person who is leasing the surface. The owner of the surface receives compensation for his loss, but the tenant does not, except perhaps in a lawsuit against his landlord. Similarly, the law says nothing about the landlord who may be liable to his tenant when mining operations interfere with the tenant's enjoyment of the property.

Most difficulties can and should be worked out between the surface owner and coal developer before mining begins. The above problems should be kept in mind when the surface owner negotiates an agreement to allow the developer to strip mine the coal. Any other problems of special circumstances should also be dealt with at the start, if possible, and not left to future negotiations or lawsuits. For example, if mining will disturb a road or fence essential to use of land not mined, provision should be made for replacement.

The act does provide some recovery of attorney's fees when the surface owner has to sue to recover the money due him under the act. There is a difference between an action by an owner who consents to the mining and one who does not. If the owner consented to the mining and then has to sue, he is entitled to attorney's fees if his suit is successful. If the owner does not consent to the mining and is sued by the coal developer, the surface owner can recover attorney's fees only if the amount finally adjudged due him is in excess of that tendered by the coal developer.

C. Coal Developer's Financial Obligation to Reclaim

The law states unequivocally that the financial burden of reclamation rests entirely with the coal developer. The North Dakota reclamation law provides that before a mining permit is issued a developer must post a bond to assure that reclamation takes place. This act makes it clear that the financial responsibility of the coal developer is not limited to the amount of the bond, but extends to whatever is necessary to reclaim the land. The North Dakota reclamation law also provides that when the coal developer applies for a permit to mine he must submit a comprehensive reclamation plan. This act provides that if the developer does not begin reclamation pursuant to that plan within one year after completion of the mining operation, the surface owner may notify the Public Service Commission. That Commission must then use all legally authorized measures at its disposal to get complete compliance with the reclamation plan. These measures include ordering cessation of mining and forfeiture of bond and court action to obtain fines or imprisonment. The act also allows the surface owner to maintain a lawsuit to recover any money due him under this portion of the act plus reasonable attorney's fees. However, it is not clear how the surface owner would be due money under this section unless it is for money the surface owner has spent in reclamation efforts when the coal developer failed to do it. Perhaps the legislature intended to give the surface owner a right to damages if the developer fails to reclaim, measured by the cost of reclamation.

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by Lowell P. Bottrell*

II. Surface Owner Protection Act.

The 1981 North Dakota Legislature amended the Surface Owner Protection Act, but did not significantly change the spirit or purpose of the Act. The Act states that the legislative purpose remains the same: "to provide the maximum amount of constitutionally permissible protection to surface owners from the undesirable effects of development, without their consent, of minerals [coal] underlying their surface."

The definition of "mineral developer" was changed after a recent North Dakota Supreme Court decision. Initially the term "mineral developer" was defined as "the person who acquires the mineral rights or lease for the purpose of extracting or using the mineral for nonagricultural purposes (emphasis added)." The Supreme Court determined that under the rules of statutory construction and because the mineral estate was defined to be "an estate in or ownership of all or part of the minerals [coal] under a specific tract," that the legislature must have intended to mean that a mineral developer must have all the interest in the coal. The 1981 legislature amended this definition to define a mineral developer as one who "acquires at least seventy-five percent of the mineral [coal] rights or a lease of at least seventy-five percent of the mineral [coal] rights . . ."

This definition becomes important when the mineral developer seeks a permit from the Public Service Commission to mine coal. A developer who cannot obtain the consent of all the surface owners may bring an action in district court to establish the relative rights of the parties, determine the measure of damages to the surface owner, and obtain consent of the court to mine. Prior to the 1981 amendment, the mineral developer would have to own or have under lease 100 percent of the coal rights to invoke the statute. [Note, as previously discussed, consent to develop need not be given; the court must decide whether the surface owner will be "adequately compensated for the lost production, lost land value, and loss of the value of improvements due to the mining activity."] Now the mineral developer must own or have under lease at least 75 percent of the coal rights in order to be able to invoke the statutory consent remedy.

The Supreme Court decision which brought about this change involved a surface owner who owned a 1/64th remainderman interest in the surface and 1/64th of 75 percent of the coal. The ownership of such a minute fractional interest in the mineral [coal] interest let the owner bar the mining company and other mineral [coal] owners from invoking that portion of the surface owner protection statute which allows the mineral developer to obtain the consent of the district court to mine.

Two other changes were enacted in 1981. First, the owner of a farm building may waive his right to

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have coal developed within 500 feet of any farm building without the mineral the farm building or paying for its fair market value. A surface owner (assuming the building owner also owns the land upon which the building is built) should be cautious when signing an agreement giving consent to mine. The surface owner should be sure that the waiver clause is not contained in the agreement (or coal lease) unless he specifically desires it to be.

Second, words of assignment and successors in title were added to this Act to bind any assignment of a mineral lease or surface lease in favor of a mineral developer by a predecessor in title.

A couple of examples may serve to illustrate this change. If John Doe executed a mineral or surface lease with Acme Coal Co. in 1980 and then died leaving all his property and mineral interests to Sally Doe, Sally would be bound by the lease. Sally would be considered a successor in title. This would ordinarily be true under general contract and property laws even if the statute did not contain the succession language.

A second example would be if instead of dying, John Doe sold the property to Tom Smith. Here Tom would be an assignee and be bound by the previously issued mineral lease. This also would ordinarily be true under general contract and property law principles.

Overall the changes do not drastically depart from the original intent of the legislation. If there is potential for coal development on your property, be sure to seek the counsel of an experienced attorney to insure that your rights as a surface owner are protected.