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## Out of the Black Hole: Reclaiming the Crown of King Coal

Wendy B. Davis

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# Out of the Black Hole: Reclaiming the Crown of King Coal

## **Keywords**

Mineral Rights, Right to Strip Mine, Coal Operators, Adverse Possession

# OUT OF THE BLACK HOLE: RECLAIMING THE CROWN OF KING COAL

WENDY B. DAVIS\*

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## INTRODUCTION

To encourage the development of the great natural resources of a country[,] trifling inconveniences to particular persons must sometimes give way to the necessities of a great community.<sup>1</sup>

Appalachia is poor because of, and in spite of, its wealth of natural resources. Coal has made, and kept, the people of Appalachia poor. Those who have benefited from coal should now repay the people of Appalachia.

For decades, the four-state Appalachian coal fields region has been the poorest in this nation.<sup>2</sup> The percentage of persons below the poverty level in the coal counties is nearly twice the national average, with a median household income of between one half and two-thirds of the national average.<sup>3</sup> “The great irony is that [the Appalachian region] contains some of the nation’s richest resources and its

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1. Pa. Coal Co. v. Sanderson, 6 A. 453, 459 (Pa. 1886).

2. The Central Appalachian Coal Fields comprise the following counties: (Kentucky) Bell, Breathitt, Carter, Clay, Elliott, Estill, Floyd, Harlan, Jackson, Johnson, Knott, Knox, Laurel, Lawrence, Lee, Letcher, Magoffin, Martin, Menifee, Morgan, Owsley, Perry, Pike, Powell, Rockcastle, Rowan, Wayne, Wolfe, Whitley; (Tennessee) Anderson, Campbell, Claiborne, Morgan, Scott; (Virginia) Buchanan, Dickenson, Lee, Russell, Tazewell, Wise; (West Virginia) Boone, Braxton, Clay, Fayette, Kanawha, Lincoln, Logan, McDowell, Mercer, Mingo, Nicholas, Raleigh, Summers, Webster, Wyoming. RONALD L. LEWIS, BLACK COAL MINERS IN AMERICA: RACE, CLASS, AND COMMUNITY CONFLICT 1780-1980 214 n.1 (Univ. of Ky. Press 1987).

3. According to the U.S. Census Bureau, the median household income in 1997 in the United States was \$37,005, with 13.3% of persons below the poverty level. See UNITED STATES CENSUS BUREAU STATE AND COUNTY QUICKFACTS, at <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Mar. 9, 2002). A survey of three counties representative of the coal mining regions of Appalachia exemplifies the contrasting poverty levels of the Appalachian region and the rest of the United States. In Buchanan County, Virginia, the median household income was \$25,812 with a poverty level of 24.7%. See UNITED STATES CENSUS BUREAU STATE AND COUNTY QUICKFACTS, at <http://quickfacts.census.gov/qfd/states/51/51027.html> (last visited Mar. 20, 2002). McDowell County, West Virginia had an median income of \$18,592 with a poverty level of 31.4%. See UNITED STATES CENSUS BUREAU STATE AND COUNTY QUICKFACTS, at <http://quickfacts.census.gov/qfd/states/54/54047.html> (last visited Mar. 20, 2002). Letcher County, Kentucky had a median income of \$22,893 with a poverty level of 26.1%. See UNITED STATES CENSUS BUREAU STATE AND COUNTY QUICKFACTS, at <http://quickfacts.census.gov/qfd/states/21/21133.html> (last visited Mar. 20, 2002). A quick look at previous census results shows that the poverty contrast has existed for a number of years. According to the 1990 Census, five census tracts in Buchanan County, Virginia, had 20.3 to 27.8% of residents below the poverty level. Cathy St. Clair, *Renewal Community Program Meeting Set*, THE VIRGINIA MOUNTAINEER, Sept. 27, 2001, at 1. From 1960 to 1965 three-fourths of the families in Eureka Hollow, a coal town in McDowell County, West Virginia, had incomes below the federal poverty level of \$3,000 per year. BILL PETERSON, COALTOWN REVISITED: AN APPALACHIAN NOTEBOOK 5-6 (Henry Regnery Co. 1972). In 1965, six of the ten poorest counties in America were located in the Kentucky coal fields. JACK E. WELLER, YESTERDAY’S PEOPLE xii-xiii (Univ. of Ky. Press 1965).

poorest people.”<sup>4</sup> The Appalachian coal fields of eastern Kentucky, southwestern Virginia, southern West Virginia, and northwestern Tennessee comprise an area that is more homogeneous than any of these states taken as a whole. It has been argued that the residents of this region would be better off if these counties were united into one state of Appalachia, so that the power and profit could remain in the region.<sup>5</sup>

Coal mining is essentially the only industry in the region. The economic dependence on the coal mining industry combined with the devastating environmental and health effects associated with coal mining, have resulted in unusable real estate, lower education levels, and a generally lower standard of living than anywhere else in this country.<sup>6</sup>

These conditions, however, have resulted in millions of dollars in profits for the large coal mining companies and a significant contribution to the industrial development and wealth of this country. Coal generates more than fifty-one percent of the electricity in this country.<sup>7</sup> Coal fueled the industrial development of the United States after 1890.<sup>8</sup> Nearly eighty percent of the coal consumed in this country was extracted from the Appalachian Mountains.<sup>9</sup> The Appalachians have been effectively used as an economic colony of the industrial northeast, sapping its mineral and timber wealth.<sup>10</sup>

This Article suggests that it is time to repay the people who suffered at the hands of the coal mining companies, and who assisted

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4. PETERSON, *supra* note 3, at 19; *see also* WELLER, *supra* note 3, at xii-xiii (underscoring the ironic nature of the contrast between actual income and profitability of the Appalachian region by noting that eastern Kentucky land companies were the most profitable of America's corporations).

5. *See* GEORGE VECSEY, *ONE SUNSET A WEEK* viii (Saturday Rev. Press, E.P. Dutton & Co., Inc. 1974) (discussing the author's interactions with coal miners and his conclusion that the single state of Appalachia should only consist of the coal-bearing portions of Virginia, Tennessee, Kentucky, Ohio, and West Virginia).

6. *See generally* WELLER, *supra* note 3, at xiii (quoting Arnold Toynbee, an English historian, who compared the Appalachian people to barbarians and accused them of relapsing into “illiteracy and witchcraft” and suffering from “poverty, squalor and ill-health”).

7. Fred Freme, *United States Coal Supply and Demand: 2000 Review*, United States Energy Information Administration (2001) (providing a statistical analysis of the sources of electricity in the United States in 2000: coal 51.4%, nuclear 19.9%, hydro 7.1%, gas 16.3%, and petroleum and other 5.2%), *available at* <http://www.eia.doe.gov/cneaf/coal/page/special/feature.html> (last visited Apr. 1, 2002).

8. RONALD D. ELLER, *MINERS, MILLHANDS, AND MOUNTAINEERS, INDUSTRIALIZATION OF THE APPALACHIAN SOUTH, 1880-1930* 128 (Univ. of Tenn. Press, Knoxville 1982).

9. *Id.*

10. *Id.* at xix.

in the industrial development of the entire country. One suggested form of repayment is reparations from the federal government, funded by the coal companies.<sup>11</sup> The federal government has set a precedent by paying reparations to disparaged groups, and should do at least as much for the Appalachians who have suffered this historical injustice. Billions of dollars have been paid to Japanese Americans, Native Americans, and Hawaiian Natives, for the injustices done to them.<sup>12</sup> The families of the coal workers are no less deserving. Regardless of which coal company is at fault and what percentage of harm was caused by each, the harm to the Appalachian mountaineer is undeniable. Reparations could be used by town and local governments to construct schools, airports, roads, and other infrastructure to improve the standard of living and encourage new industries to relocate to Appalachia.

### I. HISTORY

Life has never been easy in the Appalachian coal fields.<sup>13</sup> Between 1865 and 1915, eastern Kentucky was torn by clan wars.<sup>14</sup> The most famous battles were between the Hatfields of Logan County, West Virginia and the McCoys of Pike County, Kentucky.<sup>15</sup> The Hatfields often crossed the border to vote in Kentucky elections, as well as the West Virginia elections, thereby doubling their voting power. Tolbert McCoy stabbed Big Ellison Hatfield to death at a voting precinct in 1882. When Tolbert and his brothers were arrested, a band of Hatfields took the prisoners from the custody of the law officers and shot them. The McCoys retaliated with murderous raids into West Virginia, followed by retaliatory raids into Kentucky by the Hatfields.<sup>16</sup> Every county had its feud at this time, caused in part by the independence, disdain for religion, and lack of education of the

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11. See *infra* Part XII (discussing the prospect of reparations as a remedy for the devastation caused to Appalachia by coal mining).

12. See Art Alcausin Hall, *There is a Lot to be Repaired Before We Get to Reparations: A Critique of the Underlying Issues of Race that Impact the Fate of African American Reparations*, 2 SCHOLAR: ST. MARY'S L. REV. MINORITY ISSUES 1, 13-18 (2000) (discussing the history and reasoning behind reparations given to such groups).

13. HARRY M. CAUDILL, NIGHT COMES TO THE CUMBERLANDS x-xi (Brown & Co. 1963) (providing a brief summary of the hardships his own family suffered as mountaineers). Indeed, such revelations were recognized by the Supreme Court. See *Watson v. Kenlick Coal Co.*, 498 F.2d 1183 (6th Cir. 1974), *cert. denied*, 422 U.S. 1012, 1013-18 (1976) (Douglas, J., dissenting) (arguing that certiorari should be granted because petitioners were victimized by owners of mineral rights and their raping of the Appalachian land in the same fashion recalled in Caudill's novel).

14. See CAUDILL, *supra* note 13, at 46-51.

15. *Id.* at 47-48.

16. *Id.*

mountain dwellers.<sup>17</sup>

These feuds were not the only problem for the Appalachians. Exploitation by more sophisticated neighbors began in the 1870s, as the wealth of timber in eastern Kentucky and the other Appalachian states became known.<sup>18</sup> Until this time, mountaineers occasionally would cut down a tree and float it downriver in exchange for a dollar or two.<sup>19</sup> In the 1870s, northeastern businessmen came to Kentucky and purchased growing trees for forty to seventy-five cents each, in many cases with the right to leave the tree growing until the businessmen needed the tree.<sup>20</sup> These timber sales provided the only cash in the region. The dangerous work of felling huge trees, however, killed and maimed many of the mountain people.<sup>21</sup>

#### A. *Severance of Mineral Rights*

By 1885, northeastern businessmen had exploited much of the timber and moved on to mineral acquisition. The northeastern businessmen did not buy the land in fee, which would have created a tax liability. Instead, they bought only the rights to the underlying minerals, including coal, gas, and oil.<sup>22</sup> The businessmen hired men of sophistication and charm to flatter the mountaineers.<sup>23</sup> Less than twenty-five percent of mineral deeds were signed by literate sellers.<sup>24</sup> The sellers relied on the savvy buyers for an explanation of the contents of the deeds, the terms of which were to “prove deadly to the welfare of generations of the mountaineer’s descendants.”<sup>25</sup> These “broad form deeds” authorized the buyer to excavate the minerals in any way seen fit. Additionally, the broad form deeds allowed the buyers to build roads and structures on the land as they needed, and often contained a release of any liability for damage to

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17. *See id.* at 46-51 (discussing the general cause of each major clan war that occurred in the Kentucky mountain counties).

18. *See id.* at 63 (stating that the mountaineer was often duped into thinking that his timber was particularly worthless, and as a result, would sell it to a merchant or politician for a price far below its fair value).

19. *See id.* at 67-69 (describing the process of gathering the logs, floating them downstream, and the little compensation received in return).

20. *Id.* at 68.

21. *Id.* at 69 (discussing the dangers that arose in the process of bringing the logs downstream, which often resulted in physical harm as well as the provocation of thievery).

22. *See id.* at 72 (noting that by limiting his rights to the minerals, the profiteer was able to minimize tax liability).

23. *See id.* at 75 (observing that the minerals were often sold for nominal consideration in a fashion similar to that of the sale of timber).

24. *Id.* at 74.

25. *Id.*

the surface land.<sup>26</sup>

John C.C. Mayo was one of the first to create and exploit the broad form deed.<sup>27</sup> Mayo raised \$450 in capital and began acquiring mineral rights in Kentucky. Eventually these rights made him the richest and most powerful coal baron of his time.<sup>28</sup> He bought hundreds of thousands of acres of mineral rights in eastern Kentucky at a price ranging between fifty cents and six dollars per acre.<sup>29</sup> Other buyers paid prices of twenty-five cents to three dollars per acre.<sup>30</sup> "Some mountaineers were reported to have sold entire mountains rich in coal and timber for a mule, saddle horse, or a hog rifle."<sup>31</sup>

Many local residents viewed Mayo as a hero, as they saw little value in their mineral rights and thus were eager to sell.<sup>32</sup> This eagerness resulted in out-of-state investors owning a majority of the land and mineral rights in Appalachia.<sup>33</sup> In 1900, out-of-state investors owned ninety percent of the coal in Mingo and Wayne Counties, West Virginia.<sup>34</sup> By 1910, out-of-state investors owned a major portion of eastern Kentucky. At least eighty-five percent of the minerals had been sold, and out-of-state investors owned seventy-five percent of the

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26. See *Akers v. Baldwin*, 736 S.W.2d 294, 304-07 (Ky. 1987) (noting that the mineral owner is granted extensive authority, but such authority does not permit mining that is oppressive, arbitrary, wanton, or malicious).

27. See Robert M. Pfeiffer, *Kentucky's New Broad Form Deed Law—Is It Constitutional?*, 1 J. MIN. L. & POL'Y 57, 61 (1985-86) (observing that the history of the broad form deed is essentially the story of Mayo). See generally Robert H. Eardley, *The Broad Form Deed Amendment: Does it Still Have a Purpose? An Analysis of the Broad Form Deed Amendment in Light of Ward v. Harding*, 12 J. NAT. RESOURCES & ENVTL. L. 101, 102 (1997) (summarizing the story of Mayo).

28. See Pfeiffer, *supra* note 27, at 61 (noting Mayo's wealth was the result of his expansive acquisitions of land); see also Eardley, *supra* note 27, at 103 (stating that Mayo was the richest person in Kentucky at the time of his death).

29. See Pfeiffer, *supra* note 27, at 61 n.14. After purchasing the mineral rights for a pittance compared to the worth of the coal, Mayo would often hand the selling wife a five-dollar gold piece as a gift. This coin may have been the only money ever owned by the woman, and some were preserved for decades as family heirlooms, shown to visitors as "John Mayo Money." HARRY M. CAUDILL, *THEIRS BE THE POWER: THE MOGULS OF EASTERN KENTUCKY* 69 (1983) (discussing Mayo's ability to win the favor of the locals through generosity that some people considered "legendary").

30. ELLER, *supra* note 8, at 56.

31. *Id.*

32. See *id.* (noting that mountaineers were unaware of the immense value of the natural resources of their land, and because the land was so abundant, often took the land for granted).

33. See *infra* notes 34-35 and accompanying text; see also ELLER, *supra* note 8, at 62-63 (noting that men such as Mayo acquired great prosperity by purchasing land and resources for low prices from local residents and then selling them to outside corporations for a large profit, ultimately resulting in "hand[ing] over the region's economy and its future absentee control").

34. See ELLER, *supra* note 8, at xxi-xxii (asserting that outside businessmen took over large portions of the Appalachian region, resulting in local interest becoming inferior to outside corporate interests).



saleable timber.<sup>35</sup>

Using common mining methods available during this time period, the coal operator was able to extract between 1,000 to 1,500 tons of coal per acre, for each foot in depth of coal seam.<sup>36</sup> In many areas, this seam was up to five feet thick, meaning the operator could recover 5,000 tons per acre, and as much as 20,000 tons if more than one seam was mined.<sup>37</sup> Rights that had been purchased for several dollars per acre were worth thousands of dollars per acre by 1930.<sup>38</sup>

If sellers were less eager to sell their land, the northeastern businessmen resorted to tactics such as resurrecting old titles that often conflicted with newer titles to the settlers.<sup>39</sup> The businessmen hired legal counsel to challenge the deeds of the settlers, resulting in a "long series of legal battles . . . threatening the security of many persons who had actually settled the lands of the counties."<sup>40</sup> A common method used by some developers was to acquire the rights of a single heir when property was left to several heirs, and then request a court to partition the land when the other heirs refused to sell.<sup>41</sup> When the court found this option inequitable, the court would order a public auction, at which time the out-of-state investor undoubtedly would be the high bidder.<sup>42</sup> At one such sale in 1889, a major developer was able to purchase 2000 acres at auction for \$200.<sup>43</sup>

As a result, by the early decades of the twentieth century, land ownership in the Appalachians was concentrated in huge coal companies and investors, unlike coal areas in other states where independent operators owned the land they mined.<sup>44</sup> This

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35. See CAUDILL, *supra* note 13, at 75 (discussing the transfer of much of the Appalachian land to non-residents).

36. A coal seam is a layer of coal located between rock layers that may cover acres of land. See *id.* (explaining that mountaineers sold their land for a disproportionately low value given the vast amount of minerals that could be obtained from each acre).

37. See *id.* (noting that despite the great mineral wealth the land provided, the mountaineer typically received compensation of no more than a half-dollar).

38. See generally *id.*

39. ELLER, *supra* note 8, at 52 (explaining that the speculators capitalized on the typically "obscure" land titles of the mountaineers).

40. *Id.* (quoting EDWIN ALBERT CUBBY, *THE TRANSFORMATION OF THE TUG AND GUYANDOT VALLEYS: ECONOMIC DEVELOPMENT AND SOCIAL CHANGE IN WEST VIRGINIA, 1888-1921* 180 (1962) (Ph.D. dissertation)).

41. See *id.* at 56-57 (detailing the way in which some capitalists would take advantage of obscure land titles in the mountain regions and of their greater access to the court system).

42. *Id.*

43. *Id.* at 57.

44. *Id.* at 72 (noting that ownership by large coal companies was characteristic of the Appalachian region).

concentration of land ownership resulted in an exploitative attitude by coal operators who would simply move on to other regions after devastating the Appalachians.<sup>45</sup>

*B. Nominal Amounts Paid for Mineral Rights*

The devastation of Appalachia began with the grants of timber rights in the late 1800s, when landowners found a source of easy cash in their trees.<sup>46</sup> The devastation became more drastic with the severance of mineral rights.<sup>47</sup> Landowners granted the rights to mine coal for nominal amounts,<sup>48</sup> and often waived the right of the surface owner to recover damages for subjacent support, pollution, or other damages to the surface land, spring or well water, or their homes.<sup>49</sup>

For example, in 1923, a Virginia deed conveyed mineral rights in seven tracts of land, three of which comprised 319 acres, and four of which were of indeterminate size, for a total fee of \$25.<sup>50</sup>

Earlier examples of severance of mineral rights include an 1874 lease that granted all mineral rights in 1,000 acres for 99 years, for the rental fee of ten cents per ton that was never paid.<sup>51</sup> Similarly, an 1890 lease granted rights for 999 years to all of the coal in 112.3 acres of a Kentucky property for one dollar per acre for the fee interest in the coal plus two dollars per acre to lease the surface under which the coal lay.<sup>52</sup> In 1880, the Baltimore and Ohio Railroad bought over 21,000 acres of mineral rights in Wise County, Virginia, for thirty-five cents per acre.<sup>53</sup> Yet another example involved a 999 year lease of

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45. See *id.* (asserting that the companies were mainly interested in making a profit, and this would encourage establishing as many coal operations as possible on the property, leading to the "gluttonous exploitation of the region's coal deposits and to the overdevelopment of the industry itself").

46. See *id.* at 93-127 (providing a detailed discussion of the "timber boom" of 1890-1920, where outside lumber companies acquired much of the timberlands in Appalachia and caused the destruction of a great deal of mountain forests in the region).

47. CAUDILL, *supra* note 13, at 70-77.

48. See ELLER, *supra* note 8, at 56 (commenting that land rich in mineral deposits sold for anywhere from twenty-five cents to three dollars per acre).

49. See CAUDILL, *supra* note 13, at 72-75 (noting that mountaineers often signed deeds passing title to the minerals underlying the land to coal companies without realizing that the deed often also conveyed a variety of other privileges and immunities, such as absolving the coal company from all liability to the landowner for any damages to the land that might occur as a result of the mining operations).

50. *Shores v. Shaffer*, 146 S.E.2d 190 (Va. 1966).

51. *Heirs of Roberts v. Coal Processing Corp.*, 369 S.E.2d 188 (Va. 1988).

52. *Johnson v. Pittsburgh Consolidation Coal Co.*, 311 S.W.2d 537, 538 (Ky. 1958); see also *Bentley v. Pittsburgh Consolidation Coal Co.*, 311 S.W.2d 540, 540 (Ky. 1958) (holding that the instrument was not void merely because it failed to state whether payment for rental was to be made in a lump sum or in installments).

53. See ELLER, *supra* note 8, at 49 (discussing General John Daniel Imboden, one of the first and most zealous promoters of coal development in the southern

coal executed in Kentucky in 1888 that included a rental fee of two dollars per acre, effectively selling the mineral rights in forty acres for \$82.50.<sup>54</sup> Likewise, a Kentucky barber reported that his grandfather sold “a whole valley seven miles long, from ridge to ridge, including the virgin timber and seven seams of coal for \$300 and a saddle horse.”<sup>55</sup>

A 1902 Virginia deed transferred mineral rights in 1,423 acres, with typical broad form deed language.<sup>56</sup> The deed permitted the company to enter onto the land and use the surface “in all or any manner that may be deemed necessary or convenient for mining . . . or otherwise utilizing all or any of the said coal . . . without liability for injury to the surface of said land.”<sup>57</sup> The grantor involved in this deed was an illiterate confederate veteran who received only one dollar per acre for a tract of 1,019 acres, and four dollars per acre for a tract of 404 acres, for a total of \$2635.<sup>58</sup> Similarly, a 1904 deed granted the mineral rights in 702 acres to a coal company, for \$1170, and a bond for \$2340, plus 140 shares of stock in the purchaser.<sup>59</sup> The deed granted all coal, oil, and gas, and all timber over 16 inches diameter, together with such roads, chutes, and other devices “as is necessary for the successful mining and manufacturing and removing said coal.”<sup>60</sup>

These nominal prices for valuable assets were one factor contributing to the devastation of Appalachia. Farmers saw no value in the steeply sloping hills behind their farms and sought the comfort of a few dollars.<sup>61</sup> The descendants of these farmers later had to contend with the flooding caused by strip mining, the pollution caused by coal dust, and the subsidence caused by removal of the coal, as well as other damage to their health, homes, and environment.<sup>62</sup>

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mountains).

54. *Terrill v. Ky. Block Cannel Coal Co.*, 160 S.W.2d 326, 327 (Ky. 1942).

55. JACK E. WELLER, *YESTERDAY'S PEOPLE* 15 (1965).

56. See CAUDILL, *supra* note 13, at 74 (noting that although lawyers often referred to deeds which merely passed title to the minerals under the land as “short-form deeds,” in fact they were “broad form” as they “conveyed a great number of specific contractual privileges and immunities” in addition to the mineral rights).

57. *Phipps v. Leftwich*, 222 S.E.2d 536, 537-38 (Va. 1976).

58. See *id.* at 538-39 (holding that because strip mining was unknown in that area at the time of the execution of the deed, the parties did not intend to allow strip mining, and thus those owning the mineral rights could not remove the coal by this method).

59. *Yukon Pocahontas Coal Co. v. Ratliff*, 24 S.E.2d 559, 561 (Va. 1943).

60. *Id.* at 561.

61. ELLER, *supra* note 8, at 54-56.

62. See generally CAUDILL, *supra* note 13, at 305-24.

*C. Mining Begins*

In the early days of coal mining in Appalachia, it appeared that the new industry would bring prosperity to the region. New railroads were constructed to connect the newly developed towns and to deliver the coal. Many of the coal owners also owned portions of the railroads.<sup>63</sup>

Railroads were constructed in preparation for removing vast amounts of coal.<sup>64</sup> Next, coal towns were built, with homes for the miners, a commissary or camp store, and a rudimentary schoolhouse.<sup>65</sup> The miners' homes varied in quality depending on the size of the mining operation, but many were superior in construction to the homes of the mountaineers.<sup>66</sup> The miners were paid in cash only once per month, but the bookkeeper of the mine would issue scrip, coins minted by the coal company, for the time already worked by the miner.<sup>67</sup> This scrip could only be used at the camp store, ensuring that most of the salary earned by the miners was retained by the coal company. Often the miner had already taken most of his pay in scrip before payday arrived, so there was little real cash to spend elsewhere.<sup>68</sup>

Injuries were frequent and devastating in the early days of mining.<sup>69</sup> Roof collapses, electrocution, crushing injuries, and explosions disabled or killed many.<sup>70</sup> Miners who were injured, and the families of miners who were killed, were ejected from the coal camps, and formed shantytowns in the outlying rural areas surrounding the camps.<sup>71</sup>

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63. See ELLER, *supra* note 8, at 73 (noting that land companies profited not only by owning the mineral rights in the Appalachian region, but also by controlling the transportation of the coal).

64. See *id.* at 65-85 (discussing the coming of the railroad to the Appalachian region in order to tie the "natural and human resources of rural areas to the industrialized core").

65. See CAUDILL, *supra* note 13, at 98-101 (noting that in the more developed coal towns there could also be a hospital or clinic, a recreation hall, a hotel, and an administrative building).

66. See *id.* at 99 ("The mountaineer had never experienced such quality construction and few of them had ever so much as seen a plastered wall. Compared to his cabins and crudely built frame houses the residences [in the coal towns] were indeed enticing.").

67. See *id.* at 114 (explaining that the scrip helped ease the burden imposed by the infrequency of paydays, allowing the miner to acquire the necessities needed before the end of the month).

68. *Id.* (noting that the scrip was what most miners lived on and therefore most only acquired a few dollars in "real money" each payday).

69. *Id.* at 118.

70. See *id.* at 119-21 (noting that many deaths resulted but there is no record of the exact number).

71. See *id.* at 121-22 (remarking that coal companies made little to no attempt to

When the Kentucky coal mines began operations around 1915, unskilled miners who picked and shoveled the coal earned \$1.50 for a ten-hour day. By 1927, wages had risen to \$4 for an eight-hour day, as a result of increases in the selling price of coal.<sup>72</sup> Although the prices at the commissary were also rising, this was a prosperous time for miners and it was not unusual for a miner to own appliances like refrigerators or washing machines, and even a Model T Ford was within his means.<sup>73</sup>

The population of Appalachia grew dramatically between 1880 and 1920.<sup>74</sup> The coal counties of the four-state region had a population of 410,781 in 1880, which grew to 1,235,869 by 1920.<sup>75</sup> During this period, coal production increased five-fold, to where nearly eighty percent of the total national coal production in 1930 was from Appalachia.<sup>76</sup>

In the 1880s, the average Appalachian farm was 187 acres.<sup>77</sup> By 1930, the size had been reduced to only forty-seven acres.<sup>78</sup> Additionally, production of swine, a principle source of food, declined to thirty-nine percent of its former level.<sup>79</sup> The destruction of the American Chestnut trees by blight removed the main source of inexpensive feed for swine. Although the American Chestnut blight played a significant role in the decline of pork production, mining had replaced farming as the predominant industry.<sup>80</sup> This dependence on a single industry continues in Appalachia today and is the cause of many of the region's problems.

The Great Depression hit the mountain region harder than most areas.<sup>81</sup> When President Roosevelt began public assistance programs,

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assist in the care of injured workers, and after being expelled from the towns, widows, orphans, and cripples could barely subsist).

72. *See id.* at 142 (noting the gradual increase in wages from the beginning of operations).

73. *Id.*

74. RONALD L. LEWIS, *BLACK COAL MINERS IN AMERICA* 123 (Univ. Press of Ky., 1987).

75. *See id.* (noting that a large percentage of the new residents were African Americans, lured from the Alabama farms by the promise of higher wages in the coal mines).

76. *Id.* at 122.

77. ELLER, *supra* note 8, at xix.

78. *Id.*

79. *Id.* (citing U.S. Dept of the Interior, Census Office, *The Tenth Census: 1880, Agricultural Statistics, III*); U.S. Department of Commerce, Bureau of the Census, *Fifteenth Census of the United States, 1930: Agriculture; the Southern States, II Pt. 2.*).

80. After the death of the chestnut trees, the Appalachian residents were unable to continue inexpensive hog farms, and many turned to the mines as their only alternative. *See* LEWIS, *supra* note 74, at 182.

81. *Id.* at 183.

three-quarters of the inhabitants of the Cumberland region of Kentucky were eligible.<sup>82</sup> In most other coal field counties, at least one-third of the population was eligible for relief.<sup>83</sup> Since that time, Appalachia has fallen victim to the cyclical economy of the price of coal.<sup>84</sup>

The severance of mineral rights from the surface land appeared as easy money to the mountaineers in the early 1900s.<sup>85</sup> As a result, the mineral owners dominated the surface-owning mountaineers, whose homes and farms were subject to damage and destruction by the mineral owners, frequently without any resulting liability imposed.<sup>86</sup> The nominal amounts paid by the mineral owners for this power was woefully inadequate compensation for the unforeseeable future harm to the Appalachian peoples' farms, homes, and livelihood.<sup>87</sup>

#### *D. Futility of lawsuits against coal operators*

Courts in the coal mining regions of Appalachia have a long history of favoring coal companies.<sup>88</sup> Since the turn of the last century, the courts have been adamant in their support of the mining industry, at the expense of any individual rights. In 1882, the U.S. Supreme Court stated, "it is the policy of the country to encourage the development of its mineral resources."<sup>89</sup> The Pennsylvania Supreme Court followed this reasoning in 1886, stating, "[t]o encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community."<sup>90</sup> The judicial presumption that

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82. *Id.* at 184.

83. WELLER, *supra* note 55, at 19.

84. *Id.*

85. *Id.*

86. *Id.*

87. Compare WELLER, *supra* note 55 (discussing the economic hardships of mountaineers), with *Large v. Clinchfield Coal Co.*, 387 S.E.2d 783 (Va. 1990) (discussing the extensive surface rights that mineral owners had over the land).

88. The author does not suggest that coal companies are *always* victorious in Appalachian courts. The handful of cases that were decided against coal operators highlight the pervasiveness of decisions enforcing the rights of the mineral owners at the expense of the surface owners. See generally *Clayborn v. Camilla Red Ash Coal*, 105 S.E. 117, 122 (Va. 1920) (holding that a coal company cannot use the surface to haul coal from another tract of land that it leases); *Goodykoontz v. White Star Mining Co.*, 119 S.E. 862, 864 (W. Va. 1927) (enjoining a mining company from further removing and pulling support pillars from a lower seam that would result in subsidence of an upper seam); *Yukon Pocahontas Coal Co. v. Ratliff*, 24 S.E.2d 559, 563 (Va. 1943) (granting an injunction to restrain a coal operator from building miners' houses, hotels, hospitals, and gardens for employees); *Cogar v. Sommerville*, 379 S.E.2d 764, 769 (W. Va. 1989) (enforcing a statute prohibiting strip mining near homes).

89. *Steel v. St. Louis Smelting & Ref. Co.*, 106 U.S. 447, 449 (1882).

90. *Pa. Coal Co. v. Sanderson*, 6 A. 453, 459 (Pa. 1886).

the rights to mine coal are superior to all other rights has contributed to the devastation of the surface lands in Appalachia.

Cases brought against coal companies are often dismissed or decided by summary judgment, denying the plaintiff the benefits of a trial.<sup>91</sup> Suits against coal companies may also be subject to outrageous delays, with no relief granted for decades, until the plaintiffs exhaust their funds, energy, and hope. For example, a group of homeowners filed a complaint in February 1968, against a coal operator in Buchanan County, Virginia.<sup>92</sup> The homeowners sought damages and injunctive relief because of air pollution caused by coal dust.<sup>93</sup> After a grant of summary judgment for the coal company, remands resulted in questions of jurisdiction and other procedural issues, keeping the case in the courts for seven years, with no relief granted to the homeowners.<sup>94</sup>

One of the longest cases in Virginia history is *Heirs of Roberts v. Coal Processing Corp.*,<sup>95</sup> in which the plaintiffs sought to collect rent of ten cents per ton on a 99 year lease of coal rights.<sup>96</sup> No rental payments were ever made to the surface owners, despite the removal of millions of tons of coal over three decades.<sup>97</sup> The surface owners filed the case in 1955, and as of June 10, 1988, the case was still in the courts, held up by procedural issues.<sup>98</sup> As these cases illustrate, the courts are reluctant to impose liability on coal companies.

## II. EXTENT OF MINING RIGHTS

After selling their mineral rights for pennies, the surface owners, or their descendants, later learned that the sale included extensive rights to the surface land. The sale of mineral rights also granted the coal operators the right to pollute their streams and air; destroy their spring, which may have been the only source of drinking water; and destroy the surface land through subsidence cracks, fissures, swales and floods.<sup>99</sup> Coal operators also claimed the right to add haulage

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91. See, e.g., *Schultz v. Consolidation Coal Co.*, 475 S.E.2d 467 (W. Va. 1996) (granting summary judgment for the coal company based on an insufficient procedural history for the pertinent regulation).

92. *Mullins v. Beatrice Pocahontas Co.*, 432 F.2d 314, 315 (4th Cir. 1970).

93. *Id.*

94. See *Mullins v. Beatrice Pocahontas Co.*, 489 F.2d 260, 262 (4th Cir. 1974) (remanding the proceedings based on jurisdictional issues related to the coal company).

95. 369 S.E.2d 188 (1988).

96. *Id.* at 188-89.

97. *Id.* at 190.

98. See *id.* at 191 (noting that the court remanded the case for further proceedings stemming from the coal company's statute of limitations plea).

99. See *Large v. Clinchfield Coal Co.*, 387 S.E.2d 783, 786 (Va. 1990) (upholding

roads wherever convenient to the coal operations, drill gas wells with miles of pipes to drain away the methane gas, and add tipples, buildings, and other structures as necessary or convenient to their business, all of which had a significant impact on the surface owners' ability to farm or use their land.<sup>100</sup> Deeds were traditionally construed against the grantor, even though it was the grantee coal operator who generally drafted the mineral rights deeds.<sup>101</sup> Surface owners were required to prove that the coal company's actions were arbitrary, wanton, or malicious, and not merely negligent, to be entitled to any damages for the destruction of their surface land.<sup>102</sup>

Coal operators were consistently granted rights superior to the surface owner, even allowing the coal operator to destroy the house and garden of the surface owner, so long as the coal operator paid compensation for the improvements destroyed.<sup>103</sup> In the 1916 leading Virginia case of *Stonegap Colliery v. Hamilton*,<sup>104</sup> a surface owner sought damages for subsidence, when cracks, fissures and holes appeared in the surface, making the land unsafe and unsuitable for agriculture. All of the springs and streams were diverted and destroyed. The severance deed at issue reserved the coal and "all the usual mining privileges."<sup>105</sup> The court acknowledged the long line of cases holding that surface owners have a right to subjacent support unless expressly waived.<sup>106</sup> However, this right is limited by the mineral owner's right to interfere with "those subterranean streams and percolations of water which appear upon the surface as springs, and that to hold the owner of the [minerals] accountable for damages for their disturbance would be in effect to say that he could

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a coal company's right to perform "longwall" coal mining, even though it was decided that this particular type of mining would cause subsidence damage to the surface land); *see also* *Stonegap Colliery Co. v. Hamilton*, 89 S.E. 605 (Va. 1916) (determining that a coal company is not liable for the drying up of a surface spring caused by its mining, if it is done in a usual and ordinary way).

100. *See* *Lauff v. Pittsburgh Coal Co.*, 15 Pa. D. & C. 532 (Pa. 1930) (holding that coal operators have a right to conduct such activities without liability for injury to the property unless there is proof of negligence).

101. *See* *Ward v. Harding*, 860 S.W.2d 280, 281 (Ky. 1993) (interpreting conveyance of minerals by broad form deeds to allow extraction of those minerals by any methods known at the time of conveyance).

102. *Tolliver v. Pittsburgh-Consolidation Coal Co.*, 290 S.W.2d 471, 472 (Ky. App. 1956).

103. *See* *McIntire v. Marian Coal Co.*, 227 S.W. 298, 300 (Ky. 1921) ("The mineral estate under the deed is dominant, superior, and exclusive in every circumstance or condition where the owner there of shall deem it necessary or convenient to make such use of the surface as the deed allows.").

104. 89 S.E. 305 (Va. 1916).

105. *Id.* at 308.

106. *Id.* at 311.



have no use of his minerals.”<sup>107</sup> The court denied any recovery to the surface owner.<sup>108</sup> This decision paved the way for future courts to validate waivers of liability or to deny responsibility for the loss of subterranean streams or springs.

Applying reasoning similar to that used by the Virginia Supreme Court of Appeals in *Stonegap Colliery*, the Supreme Court of Appeals of West Virginia in *Squires v. Lafferty*<sup>109</sup> held that incident to ownership of mineral rights is the right to use “all the means [necessary] to obtain it.”<sup>110</sup> The court enjoined the surface owners from preventing the coal owner from using a four-acre tract of land as a public highway to transport machinery and equipment.<sup>111</sup>

Following the trend of *Stonegap Colliery*, the Virginia Supreme Court of Appeals later strengthened the rights of mine operators by finding a corporation not liable for polluting a spring.<sup>112</sup> In *Oakwood Smokeless Coal Corp. v. Meadows*,<sup>113</sup> surface owners sued a coal company operating on adjoining land for contaminating a spring that supplied drinking water. Percolating water dripping from the roof of the mine ran down the mountain and seeped into the spring in sufficient quantities to make it undrinkable.<sup>114</sup> The court found that “the [mine] owner cannot be held liable for permitting the natural flow of mine water over his own land, into the watercourse . . . the discharge of this acidulated water is practically a condition upon which the ordinary use and enjoyment of coal lands depends.”<sup>115</sup> The court further stated that, “[t]he right to mine coal without the right to drain the mine is no right at all.”<sup>116</sup> Though the lessor did not list drainage as a granted right in the deed, the court found that the right to drainage “is fundamentally inherent where a mine owner is given the right to ‘all other usual mining privileges necessary for the

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107. *Id.* at 312.

108. *Id.*

109. 121 S.E. 90 (W. Va. 1924).

110. *Id.* at 90.

111. *Id.*

112. *See Oakwood Smokeless Coal Corp. v. Meadows*, 34 S.E.2d 392, 395 (Va. 1945) (explaining that the court should gauge the incidental rights of a miner on a case by case basis and such rights would thus be dependent on changing conditions and circumstances).

113. *Id.* at 393.

114. *Id.* at 393-94 (explaining that the water flowed from a ventilation shaft installed by the mining company pursuant to statutory requirements).

115. *Id.* at 395 (quoting *Pa. Coal Co. v. Sanderson*, 6 A. 453, 457 (Pa. 1886)).

116. *Id.* at 396 (indicating that the original deed gave the predecessors all rights and privileges necessary for the full enjoyment of their mining right). The initial contract granted the mining interest full right to undermine subjacent support, the right to ingress and regress, along with all other privileges necessary for the full use of the mineral grant. *See id.* at 392.

full enjoyment of the premises hereby granted . . . .”<sup>117</sup>

A particularly onerous 1907 deed granted a coal company broad mineral and any surface rights deemed necessary or convenient by the coal company.<sup>118</sup> The grantor reserved use of the surface for agricultural purposes “so far as such use is consistent with the rights” conveyed to the coal company.<sup>119</sup> The court held that the coal company acted within its rights by occupying and improving the 142 acres because the grants given to the coal company in the original deed were so sweeping.<sup>120</sup> The court also held that the coal company could occupy the land enclosed or occupied by the surface owner as long as they did not “destroy or render useless . . . [the surface owner’s] residence, barn, garden, orchard, well, and such structures as are of a permanent and substantial nature.”<sup>121</sup>

Later courts granted even broader rights to coal operators, including allowing destruction of the surface owner’s residence. In *Russell Fork Coal Co. v. Hawkins*,<sup>122</sup> the Kentucky Court of Appeals found a strip miner not liable for the loss of the plaintiff’s home that resulted from a flooding incident.<sup>123</sup> In this case the strip-mining operation created a large excavation, nearly seven feet deep and covering nearly four acres, which filled with water, resulting in a substantial lake.<sup>124</sup> After an intense storm caused flash flooding, home owners argued that the coal company’s negligence contributed to the damage.<sup>125</sup> Harry Caudill described the situation in his book:

The Russell Fork Coal Company had cut off the top of a mountain on Weddington Fork of Ferrells Creek, leaving ten acres of loose earth, mixed to a great depth with stones and fragments of trees. This vast mass of unstable rubble lay on the upper reaches of a narrow valley, on the floor of which several families made their homes. It was created in an area which had been battered by flash floods throughout its history, so that even the feeblest of minds could have anticipated their recurrence at almost any time. On the night of August 2, 1945, the calamity came in the form of a cloudburst, and foreseeably, thousands of tons of dirt, rocks, and shattered tree trunks from the devastated mountain were flung down the hillside

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117. *Id.* at 397.

118. *McIntyre v. Marian Coal Co.*, 227 S.W. 298, 298-99 (Ky. App. 1921).

119. *Id.* at 299.

120. *Id.* at 299-300. The court stated earlier in the opinion that it would construe any ambiguity in the deed in favor of the grantee. *Id.* at 299. The court further explained that “[t]he terms of the deed could hardly be broader or more sweeping in favor of the grantee.” *Id.*

121. *Id.* at 300.

122. 223 S.W.2d 887 (Ky. 1949).

123. *Id.* at 892.

124. *Id.* at 888.

125. *Id.* at 888-89.

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into the raging creek. Like a titanic scythe the rolling rubble swept downstream, working havoc among the houses, stores, and farms. When the dazed inhabitants recovered sufficiently they sued the coal company for damages . . . .<sup>126</sup>

The court found that the plaintiffs' loss was "brought about by the forces of nature over which man has no control and that it is not shown by the evidence that their loss was caused by the negligence of [the strip miner]."<sup>127</sup>

Additionally, courts are reluctant to grant damages against coal companies that are the result of blasting, typically the subject of strict liability in other settings. In 1982, the Kentucky Court of Appeals reversed an award of \$50,000 for the complete destruction of the plaintiff's home as a result of a strip miner's blasting activity.<sup>128</sup> The court held that the coal company was liable for damages to the natural state of the surface but limited damages to the reasonable cost of repair.<sup>129</sup>

The Fourth Circuit, applying the laws of the Appalachian states, also uses a variety of methods to deny recovery against coal companies, even in cases where the plaintiffs have suffered the loss of their homes.<sup>130</sup> In *Ward v. Island Creek Coal Co.*,<sup>131</sup> the plaintiffs argued that sink holes and severe damage to their well and septic system resulted from the coal company's failure to maintain subjacent support for their property.<sup>132</sup> Major structural damage to their house, outbuildings, sidewalks and the surface of their land appeared in 1987.<sup>133</sup> The defendant conducted longwall mining under the plaintiffs' property until 1986.<sup>134</sup> The court upheld a summary judgment verdict favoring the coal company because the first significant damage to the property occurred more than five years before the filing of the suit.<sup>135</sup> Controlling the decision is the Virginia statute of limitations, which provided that every action for injury to

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126. CAUDILL, *supra* note 13, at 308.

127. *Russell Fork Coal Co.*, 223 S.W.2d at 892.

128. *Island Creek Coal Co. v. Rodgers*, 644 S.W.2d 339, 350 (Ky. Ct. App. 1983).

129. *Id.* at 344 (holding as a matter of first impression, that "natural state" is the condition of the surface, including reasonable and foreseeable improvements at the last time the coal company took minerals from the earth).

130. See *Ward v. Island Creek Coal Co.*, No. 93-1823, 1995 WL 371676, at \*1 (4th Cir. June 22, 1995) (affirming summary judgment in favor of coal company defendants; noting that homeowner's claim is barred by Virginia's five-year statute of limitations pertaining to property damage; and requiring evidence of surface damage, not just subterranean erosion).

131. *Id.*

132. *Id.* at \*1.

133. *Id.*

134. *Id.*

135. *Id.*

property must be brought within five years from the point of injury.<sup>136</sup>

In 1989 a federal district court in West Virginia did not find a coal operator liable, even though the plaintiff's home had been destroyed by the methane gas released from the mine.<sup>137</sup> In *Ball v. Island Creek Coal Co.*,<sup>138</sup> the operator used the longwall mining method, which consequently caused methane gas to be released, causing three gas fires on the surface.<sup>139</sup> The surface owner also alleged that his home and dairy building were destroyed by fire when he turned on a light in his basement, igniting the methane gas.<sup>140</sup> Nevertheless, the court granted summary judgment for the coal operator, determining that contemplation of a particular underground mining technique at the time the parties executed the deed was not relevant to the permissibility of that technique.<sup>141</sup> Therefore, the waiver of subjacent support was valid even though the parties had not contemplated longwall mining in the original deed.<sup>142</sup>

The above is merely a partial list to illustrate the extent of damages suffered by surface owners, and the reluctance of the courts to impose liability on coal companies. The frequent damage to real estate, including destruction of dwellings, has contributed to the low standard of living in Appalachia.

### III. RIGHT TO STRIP MINE

One of the most damaging ways to exploit mineral rights is through strip mining.<sup>143</sup> Courts and legislatures have struggled for decades with the competing concerns that arise when the surface soil and vegetation are stripped away to allow access to the coal. Unlike the *Ball* case, where a federal court stated that the type of mining in use at the time of severance was irrelevant,<sup>144</sup> a 1976 Virginia court, in *Phipps v. Leftwich*,<sup>145</sup> determined the intent of the parties when the severance deed was executed by deducing whether coal companies

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136. *Id.* at \*1-2 (holding that the five year statute of limitations accrued from 1983; the plaintiffs filed the action in 1991); *see also* VA. CODE ANN. § 8.01-243(B) (1999).

137. *Ball v. Island Creek Coal Co.*, 722 F. Supp. 1370 (W.D. Va. 1989).

138. *Id.*

139. *Id.* at 1371.

140. *Id.*

141. *See id.* at 1373-74 (noting that parties to a deed should expect improvement in mining techniques over time).

142. *Id.* at 1371-74 (relying on *Stonegap Colliery Co. v. Hamilton*, 119 Va. 271 (1916)).

143. *See Phipps v. Leftwich*, 222 S.E.2d 536, 537 n.1 (Va. 1976) (explaining that strip mining entails removing the strata above the coal and then extracting the coal that is uncovered).

144. *Ball*, 722 F. Supp. at 1370.

145. 222 S.E.2d 536 (Va. 1976).

used strip mining at the time of such deed.<sup>146</sup> *Phipps* involved a 1902 deed that conveyed mineral rights in typical broad form deed language.<sup>147</sup> The language included the following: “in all or any manner that may be deemed necessary or convenient for mining . . . or otherwise utilizing all or any of the said coal . . . without liability for injury to the surface of said land . . . .”<sup>148</sup> In light of the deed’s language, the successor in interest to the surface owners sought a declaratory judgment to prevent strip mining.<sup>149</sup> In support of their interpretation of the deed, the owners presented testimony that underground mining was the only method used in 1902.<sup>150</sup> Because the parties to the 1902 deed contemplated only underground mining, the court affirmed an injunction prohibiting strip or surface mining without the consent of the surface owners.<sup>151</sup>

In light of the courts’ difficulties in adjudicating conflicts between strip miners and landowners, the Kentucky and Tennessee legislatures took the power to determine strip mining rights away from the courts.<sup>152</sup> The damage from strip mining in Kentucky, where entire mountains have disappeared, is generally considered to be the worst in the nation.<sup>153</sup> Historically, strip miners have not restored the land after completing strip mining operations.<sup>154</sup> In *Green v. Asher Coal Mining Co.*,<sup>155</sup> the court noted that during heavy rains, vast quantities of loose rock, dirt, and coal are washed down the mountains, often destroying homes, flooding rivers, and dumping debris in backyards.<sup>156</sup> In a 1956 decision, the Kentucky Court of Appeals found that a broad form deed granted the right to strip mine, a decision which remained in effect for three devastating decades.<sup>157</sup>

However, in November 1988, paralleling the Virginia *Phipps* decision, the Kentucky legislature passed the “Broad Form Deed Amendment,”<sup>158</sup> which amended the Kentucky Constitution Section

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146. *Id.* at 537-38.

147. *Id.*

148. *Id.*

149. *Id.* at 538.

150. *Id.* at 540.

151. *Id.* at 542.

152. *See, e.g.*, 1988 KY. ACTS. CH. 117 § 1; TENN. CODE ANN. § 59-8-308(k) (Supp. 1980) (repealed 1984).

153. CAUDILL, *supra* note 13.

154. *Id.*

155. 377 S.W.2d 68 (Ky. App. 1964).

156. *Id.* at 69.

157. *Buchanan v. Watson*, 290 S.W.2d 40, 42-43 (Ky. Ct. App. 1956) (holding that the deed’s silence on strip mining did not preclude the defendant from strip mining the land).

158. 1988 KY. ACTS CH. 117 § 1.

19(2), providing:

In any instrument . . . purporting to sever the surface and mineral estates . . . which fails to describe the method of coal extraction to be employed . . . in the absence of clear and convincing evidence to the contrary . . . the intention of the parties . . . was that the coal be extracted only by the method . . . commonly in use in Kentucky in the area affected at the time the instrument was executed . . .<sup>159</sup>

A 1980 Tennessee statute contained similar provisions.<sup>160</sup>

Prior to the Broad Form Deed Amendment to the Kentucky Constitution, which limited the right to strip mine, many cases were brought to determine whether owners of mineral rights had the right to strip mine.<sup>161</sup> The *Buchanan v. Watson*<sup>162</sup> case allowed strip mining based on a 1903 deed whereby the owner deeded the mineral rights and released the grantee from any liability.<sup>163</sup> The court found this broad grant to allow strip mining, or any other method of removing the coal, even though coal companies did not practice strip mining in the area in 1903.<sup>164</sup> The opinion stated that:

[T]he owner of the mineral has the paramount right to the use of the surface in the prosecution of its business for any purpose of necessity or convenience, unless this power is exercised oppressively, arbitrarily, wantonly, or maliciously, in which event the surface owner may recover for damages so occasioned.<sup>165</sup>

In 1974, a creative plaintiff attempted to convince the Sixth Circuit that destruction of property by strip mining was actionable under the Civil Rights Act in *Watson v. Kenlick Coal Co.*<sup>166</sup> The court found that the interpretation of the broad form deeds by the Kentucky courts did not amount to an unconstitutional taking of the surface owner's rights.<sup>167</sup> Furthermore, the issuance of a permit to strip mine was not sufficient state action to support a claim under 42 U.S.C. § 1983.<sup>168</sup>

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159. KY. CONST. § 19(2).

160. TENN. CODE ANN. § 59-8-308(k) (Supp. 1980) (repealed 1984); *see also* Doochin v. Rackley, 610 S.W.2d 715, 719-20 (Tenn. 1981) (upholding the constitutionality of the statute).

161. *See, e.g.,* *Buchanan v. Watson*, 290 S.W.2d 40 (Ky. Ct. App. 1956).

162. *Id.* at 41-42.

163. *Id.*

164. *Id.* at 42-43 (highlighting the fact that strip mining was the only feasible way for the miners to extract the coal).

165. *Id.* at 43 (citations omitted).

166. 498 F.2d 1183 (6th Cir. 1974) (arguing that the owners of the mineral rights, by strip mining the land, denied the plaintiffs their due process rights and unlawfully took their land without just compensation).

167. *Id.* at 1189-91.

168. *Id.* at 1192-93 (maintaining that the right to strip mine and the waiver of damages originates in the broad form deed, not the state licensing authority).

The U.S. Supreme Court denied certiorari in the *Watson* case, over the impassioned dissent of Justice Douglas.<sup>169</sup> Justice Douglas first noted that the Kentucky statute that prohibited strip mining without the consent of the surface owner, would moot the claim for injunctive relief, but not the claim for damages for past actions.<sup>170</sup> In lengthy quotes from Harry Caudill's book, *Night Comes to the Cumberlands*, Justice Douglas mentioned the difficulty of proving damages, but stated that "such obstacles cannot justify throwing [the petitioners] out of court at the pleading stage."<sup>171</sup> Justice Douglas urged that the state action of granting strip mining permits, combined with the court cases enforcing the rights of the coal companies, constituted sufficient state action for a civil rights claim.<sup>172</sup>

If a petitioner came to us claiming that he had entered into a written contract for the sale of his car, and that the state courts, in an action upon the contract, had interpreted the term 'car' to include not only his automobile but his house, dog, and vegetable garden as well, I would hesitate to characterize as wholly frivolous his claim that he had been deprived of property without due process of law.<sup>173</sup>

The last in a line of Kentucky cases allowing strip mining based on general grants in broad form deeds was *Akers v. Baldwin*.<sup>174</sup> Chief Justice Stephens wrote the majority opinion of the court, while two justices submitted separate, concurring opinions and two other justices wrote a dissent. In this case, strip mining did not exist at the time of the severance.<sup>175</sup> Thus the surface owners had requested an injunction to prevent strip mining.<sup>176</sup> The court found unconstitutional a Kentucky statute that required courts to find that parties intended coal to be mined by methods in use at the time the deed was executed.<sup>177</sup> Interestingly, this statute strongly resembled the 1988 Kentucky Broad Form Deed Amendment, which was passed in an attempt to circumvent the court's finding of unconstitutionality by

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169. *Watson v. Kenlick Coal Co.*, 422 U.S. 1012, 1012-19 (1975) (Douglas, J., dissenting).

170. *Id.* at 1012 n.1 (citing KY. REV. STAT. ANN. § 350.060 (1975)).

171. *Id.* at 1019.

172. *Id.* at 1017 (citing *Buchanan v. Watson*, 290 S.W.2d 40 (1956) and *Martin v. Ky. Oak Mining Co.*, 429 S.W.2d 395 (1968)).

173. *Id.* at 1019.

174. 736 S.W.2d 294 (Ky. 1987), *overruled by* 1998 KY. ACTS ch. 117 § 1.

175. *Id.* at 297.

176. *Id.* at 296.

177. *Id.* at 309-10 (determining that the legislature improperly passed Sections 381.930-945 of the Kentucky statutes because it was the judiciary's responsibility "to determine the issues presented in the interpretation of past transactions," not the legislature's responsibility).

amending the constitution.<sup>178</sup> The Broad Form Deed Amendment eventually overruled *Akers*. The court in *Akers* found that the mineral owner could strip mine, using the entire surface, but had to pay damages to the owner of the surface for harm to the surface, unless the deed expressly stated the permitted method of mining and contained an express waiver of damages.<sup>179</sup>

The West Virginia Supreme Court of Appeals affirmed a grant of summary judgment in favor of a coal company in *Russell v. Island Creek Coal Co.*,<sup>180</sup> finding that a grantee's waiver of the right to recover damages negated the strip miner's obligation to restore the land.<sup>181</sup> The plaintiffs granted the coal company the right to strip mine.<sup>182</sup> The strip mining operations contaminated a spring used by the plaintiffs for drinking water.<sup>183</sup> The plaintiffs brought suit relying on the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA),<sup>184</sup> alleging that the statute required that the land be restored to its "approximate original contour" and pre-mining use as farm land.<sup>185</sup> The court found that the plaintiffs waived their rights to the spring in the deed granting the right to surface mine.<sup>186</sup> The court allowed the coal operator to violate the mandates of a statute

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178. 1988 KY. ACTS ch. 117 § 1.

179. *Akers v. Baldwin* 736 S.W.2d 294, 305 (Ky. 1987), *overruled by*, KY. ACTS ch. 117 § 1.

180. 389 S.E.2d 194 (W. Va. 1989) (holding that the West Virginia Surface Coal Mining and Reclamation Act is not inconsistent with the Federal Surface Mining Control and Reclamation Act, and that the property owners waived their private rights to their water in the conveyance to the mining company).

181. *See id.* at 204 (concluding that, if a property owner knowingly waived the requirement of the West Virginia Surface Coal Mining and Reclamation Act that water be replaced, they may not then bring a private cause of action for money damages or injunction).

182. *Id.* at 196.

183. *Id.* at 197.

184. W. VA. CODE ANN. §§ 22-3-1 to 22-3-30 (Michie 1998).

185. *See Russell*, 389 S.E.2d at 197. Plaintiffs argued for monetary damages in the form of \$20,000 for failure to replace their water source at the conclusion of its operations as required by their interpretation of the West Virginia Surface Coal Mining and Reclamation Act and Federal Surface Mining Control and Reclamation Act. *Id.* Plaintiffs also argued for equitable relief to require the coal company to replace their water and to restore the property to its pre-mining use as farm land. *Id.* at 197 n.7.

186. *Id.* at 204. The court quoted the language of the deed as follows:

[T]he right to strip the said surface, sub-surface and other strata overlying all of said coal; . . . the right to deposit anywhere upon the said surface, sub-surface and/or the space remaining after the removal of any of said coal, such earth, rock, stone, slate and other material as may be produced in connection with the operations hereunder . . . all *without liability* by the grantee, its successors or assigns, *for damages* arising out of the exercise of such rights to the surface or sub-surface or anything therein or thereon or *to the springs and water courses therein or thereon*.

*Id.* at 196.



merely because the deed from a private individual contained a waiver of rights. The statute contemplates waivers,<sup>187</sup> and the court indicated its intent to broadly interpret such waivers, even if the effect is to undermine the purposes of the statute.<sup>188</sup>

Even more damaging than strip mining, mountain-top removal coal mining became common in the 1990s in West Virginia and Kentucky.<sup>189</sup> Environmentalists have noted the drastic “change in the topography, which leaves the land more subject to floods, results in the pollution of streams and rivers, and has an ‘incalculable’ impact on wildlife.”<sup>190</sup> The top of the mountain is actually removed, and all rock and soil is placed in a nearby hollow or valley; the coal is then removed, and the mountain top is theoretically replaced to its original contour.<sup>191</sup> Environmental groups have alleged that the West Virginia Department of Environmental Protection has abused its discretion in issuing permits allowing mountain-top removal, and failed to ensure reclamation.<sup>192</sup> Courts have not favored these environmentalists’ suits, rejecting challenges to the state laws or their enforcement.<sup>193</sup>

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187. See W. VA. CODE ANN. § 22-3-24(b) (emphasis added):

Any operator shall replace the water supply of an owner of interest in real property who obtains all or part of the owner’s supply of water for domestic, agricultural, industrial or other legitimate use from an underground or surface source where the supply has been affected by contamination, diminution or interruption proximately caused by the surface-mining operation, *unless waived by the owner*.

188. See *id.* § 22-3-2(b)(1) (recognizing that the first purpose of the West Virginia Surface Coal Mining and Reclamation Act is “[t]o protect the public and the environment from the adverse effect of surface-mining operations.”).

189. See *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 286 (4th Cir. 2001) (finding that mountaintop-removal coal mining became widespread in the 1990s), *cert. denied*, 122 S. Ct. 920 (2002).

190. *Id.* (quoting Penny Loeb, *Special Report: Shear Madness*, U.S. NEWS & WORLD REP., Aug. 11, 1997).

191. See *id.* (defining mountaintop-removal mining); see also 30 C.F.R. § 785.14 (2001):

Mountaintop removal mining means surface mining activities, where the mining operation removes an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill, except as provided for in 30 CFR 824.11(a)(6), by removing substantially all of the overburden off the bench and creating a level plateau or a gently rolling contour, with no highways remaining, and capable of supporting post-mining land uses in accordance with the requirements of this section.

192. See, e.g., *Bragg*, 248 F.3d at 286; see also *W. Va. Highlands Conservancy v. Norton*, 147 F. Supp. 2d 474, 475-76 (S.D.W. Va. 2001) (dismissing conservancy group plaintiff’s federal complaint against the Director of the West Virginia Division of Environmental Protection, which requested the court to enjoin the Director from issuing any future surface mining permits).

193. See, e.g., *Bragg*, 248 F.3d at 286 (rejecting plaintiffs’ claims); *Norton*, 147 F. Supp. 2d at 475-76 (dismissing plaintiffs’ claims).

Although strip mining has been limited by recent court decisions and legislative action, the devastation caused by strip mining is still in evidence everywhere in Appalachia. The stripped vegetation results in floods and mudslides that damage homes and crops. Reclamation legislation exists<sup>194</sup> but is rarely enforced. In addition to the Federal Surface Mining Control and Reclamation Act of 1977,<sup>195</sup> many states have adopted surface mining reclamation acts, including West Virginia, Virginia, and Kentucky.<sup>196</sup> The enforcement of waivers of water rights or surface damages by the surface owners limits the effectiveness of these statutes.<sup>197</sup> Although strip mining recovery regulations have somewhat limited the harm caused by new strip mines, in many areas the destruction was already substantial before the adoption of these regulations.

#### IV. SUBSIDENCE

Subsidence occurs when a portion of land sinks, shifts, cracks, or changes shape because of the removal of underground coal.<sup>198</sup> Many surface owners have suffered damages to their homes and crops by subsidence, but courts are reluctant to impose liability on the coal companies for this type of harm.<sup>199</sup> Mining methods used in the early 1900s, where pillars were used to hold up rooms of coal, resulted in sinkholes and slow subsidence occurring over decades as the pillars slowly eroded. Longwall mining, which has been in common use for only the past few decades, has resulted in immediate and more

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194. See, e.g., 30 U.S.C. §§ 1201-1328 (1994) (authorizing reclamation for regulation of surface coal mining operations, protection of environmental rights of surface and land owners, and others with legal interest in land).

195. *Id.*

196. See West Virginia Surface Coal Mining and Reclamation Act, W. VA. CODE ANN. §§ 22-3-1 to 22-3-30 (Michie 1998); Virginia Coal Surface Mining Control and Reclamation Act of 1979, VA. CODE ANN. §§ 45.1-226 to 45.1-270.7 (Michie 2000); Mineral Deeds, KY. REV. STAT. ANN. §§ 381.930-381.945 (Banks-Baldwin 2000). Many of these statutes acknowledge waivers or other limitations of coal operators' obligations.

197. See, e.g., *Russell v. Island Creek Coal Co.*, 389 S.E.2d 194, 204 (W. Va. 1989) (finding that plaintiffs had no cause of action because they knowingly waived the requirement of the West Virginia Surface Coal Mining and Reclamation Act that water be replaced by the coal company).

198. See *Nat'l Wildlife Fed'n v. Lujan*, 928 F.2d 453, 455 (D.C. Cir. 1991) (defining and providing background to subsidence control regulation); see also *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 739 (D.C. Cir. 1988) (defining subsidence as occurring when "a patch of land over an underground mine sinks, shifts, or otherwise changes its configuration.").

199. See, e.g., *Large v. Clinchfield Coal Co.*, 387 S.E.2d 783, 786 (Va. 1990) (reversing a trial court's ruling and refusing to enjoin a defendant coal company from continuing its mining operations despite undisputed evidence of subsidence caused by the coal operator's mining).

drastic subsidence.<sup>200</sup> “Longwall mining is a mining technique by which coal is removed without leaving pillars to support the mine roof. The mine roof is held up by self advancing hydraulic supports that progress forward with the cutting equipment, allowing the roof to collapse behind the supports.”<sup>201</sup> “The difficulty with longwall mining is that, as practiced in the United States today, it causes subsidence of the surface overlying and in the vicinity of the [channel of coal being mined] and often results in loss or damage to natural water sources.”<sup>202</sup>

When land subsides from longwall mining, or other methods of mining, the surface can sink as much as six feet, depending on the depth of the coal seam removed. Surface cracks or fissures may appear, depending on the topography, the flexibility of the surface, and the type of overlying rock. The sunken area from longwall mining can be as large as 3,000 to 5,000 feet long and up to 700 feet wide.<sup>203</sup> Different composition of the surface and rock layers over the removed coal can result in uneven sinking, which can cause the real estate to have irregular bumps, ridges, and cracks, destroying the value of the surface for construction, agriculture, or other uses.<sup>204</sup> Areas surrounding the mined area are also affected, by a phenomenon known as the “angle of draw,” where the impact on the surface covers a wider area than the area mined.<sup>205</sup> Landslides,

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200. See *id.* at 784 (conceding that longwall coal mining involves the removal of all the coal in a seam without leaving any pillars of coal behind, which results in the subsidence of the land surface). Justice Russell, in dissent, recognized that not only was there undisputed evidence that the coal operator’s longwall mining was causing subsidence, but the coal company had no intention of restoring the land to its former condition after extracting all of the coal and departing. *Id.* at 787.

201. See J. Thomas Lane, *Fire in the Hole to Longwall Shears: Old Law Applied to New Technology and Other Longwall Mining Issues*, 96 W. VA. L. REV. 577, 584 (1994) (quoting *Porter v. Consolidation Coal Co.*, No. 86-1396 (W.D. Pa. Aug. 18, 1988), *aff’d*, 870 F.2d 651 (3d Cir. 1989)). Both the district court memorandum and order, as well as the circuit court’s decision affirming the district court in *Porter*, are unpublished opinions. However, both opinions can be found as Exhibits A and C respectively in *Culp v. Consol Pennsylvania Co.*, No. CIV.A.87-1688, 1989 WL 101553, at \*14-22 (W.D. Pa. May 4, 1989).

202. See Joshua I. Barrett, *Longwall Mining and SMCRA: Unstable Ground for Regulators and Litigants*, 94 W. VA. L. REV. 693, 695 (1992) (examining the general and specific provisions of the Surface Mining Control and Reclamation Act of 1977 and the state programs approved to implement it as they relate to modern longwall mining).

203. See, e.g., *Large*, 387 S.E.2d at 785 (discussing the effects of longwall mining).

204. See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 474-75 (1987) (describing the detrimental effect of coal mine subsidence, including damage to structures, to the land itself so that development is difficult or impossible, and to farming since the land cannot be plowed or prepared properly).

205. See Barrett, *supra* note 202, at 695-96 (discussing the types and extent of subsidence damage).

slipping, and destruction of springs and streams are also common.<sup>206</sup>

In addition to damage to the surface, removing coal can damage seams of coal located above the seam being mined. Rights of owners of upper seams of coal are afforded greater protection for subsidence than surface owners. The rights of subjacent support of owners of other coal seams depends on two factors: if the upper or superincumbent seam was the first to be severed, and the severing fee owner did not waive the right to subjacent support of all overlying strata, then the upper seam has the right to support.<sup>207</sup>

In 1983, federal regulations were promulgated requiring underground coal operators to correct material damage to structures resulting from subsidence by repairing or compensating the owners, but only to the extent required under state law.<sup>208</sup> Thus, it is necessary to review the case law of each state to determine liability for subsidence.

The Surface Mining Control and Reclamation Act of 1977 ("SMCRA"),<sup>209</sup> requires strip miners to restore the surface to its original contour.<sup>210</sup> The West Virginia Supreme Court held that SMCRA applies also to underground operations, holding that the operator of an underground mine is required to "correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses which it was capable of supporting before subsidence."<sup>211</sup> Notwithstanding this requirement, waivers of support are not invalidated by SMCRA.<sup>212</sup>

206. *Id.*

207. See Robert Louis Shuman, *Subjacent Support: A Right Afforded to Surface Estates Alone?*, 97 W. VA. L. REV. 1111, 1119-20 (1995) (summarizing rulings of two West Virginia cases, which reveal dependency of support rights of overlying coal strata on these two factors).

208. See 30 C.F.R. § 817.121(c)(2) (2001) ("The permittee must correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses that it was capable of supporting before subsidence damage."); see also *Nat'l Wildlife Fed'n v. Lujan*, 928 F.2d 453, 455-56 (D.C. Cir. 1991) (defining land subsidence and providing a brief regulatory history).

209. 30 U.S.C. §§ 1201-1328 (1994).

210. See *id.* § 1266(b)(1) (requiring coal operators to "adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of such surface lands.").

211. *Rose v. Oneida Coal Co.*, 466 S.E.2d 794, 801 (W. Va. 1995).

212. See *Schultz v. Consolidation Coal Co.*, 475 S.E.2d 467, 469 (W. Va. 1996) (affirming a lower court's finding that nothing in the SMCRA has invalidated the state's common law allowing property owners to waive subjacent support).

A waiver of subjacent support for subsidence resulting from pillar removal was common at the time the severance deeds were executed, and such a waiver also is valid for subsidence resulting from longwall mining.<sup>213</sup> If a severance deed contains an express waiver of surface support, a majority of courts have held that the mineral rights owner is permitted to use longwall mining, notwithstanding the fact that the parties to the original severance deed did not contemplate the longwall mining method.<sup>214</sup> Although many states, in theory, require compensation to surface owners for damage to the surface, many courts have refused to consider surface subsidence or other injury caused by longwall mining worthy of compensation.<sup>215</sup> This refusal perpetuates the favorable treatment of coal interests by Appalachian courts.

#### A. Kentucky

The Kentucky legislature passed Section 19(2) of the Kentucky Constitution, commonly known as the Broad Form Deed Amendment, in 1988.<sup>216</sup> This amendment prohibited the mineral owner under a broad form deed from strip mining, unless this method was in use at the time of the deed's execution or expressly authorized in the deed.<sup>217</sup> This amendment generally is perceived as

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213. See Timothy W. Gresham & Monroe Jamison, *Do Waivers of Support and Damage Authorize Full Extraction Mining?*, 92 W. VA. L. REV. 911, 935-36 (1990) (explaining a district court decision permitting use of longwall technology under severance deeds waiving subjacent support and liability for damages in Virginia, and noting that courts generally uphold waivers against claims for subsidence-related damages, subject to some limitations on enforceability of such waivers); Lane, *supra* note 201, at 602 (noting importance of court recognition of a type of subsidence that results from longwall mining).

214. See Judy Jones Lewis, Comment, *Severance Deed Waivers of the Surface Estate's Right to Subjacent Support as a Basis for Longwall Mining Rights*, 6 J. MIN. L. & POL'Y 309 (1991) (noting that a series of cases from Ohio, Pennsylvania, and Virginia effectively have established a rule that a mineral estate owner has the right to use the longwall mining method if a severance deed contains an express waiver of subjacent support). Cf. Robert E. Beck, *Protecting the Public Interest or Surface Owners from their Own Folly?: A Close Look at "Preventing" Subsidence Under the Surface Mining Control and Reclamation Act of 1977 (SMCRA)*, 21 S. ILL. U. L.J. 391 (1997).

215. See Lewis, *supra* note 214 (noting that, even in states that prohibit surface mining without additional compensation to surface owners when such mining techniques were not originally contemplated by the parties, courts in these states consistently have refused to apply similar reasoning to longwall mining).

216. See KY. CONST. § 19(2) (delineating, in part, rules of construction for mineral deeds relating to coal extraction); see also KY. REV. STAT. ANN. § 350.060 (Banks-Baldwin 1988) (prohibiting strip mining without an appropriate permit).

217. See KY. CONST. § 19(2) (stating, in relevant part, that severance instruments that do not expressly state the method of coal extraction to be employed shall be interpreted to mean that the parties agreed to the method commonly used in the respective area of Kentucky at the time of the deed's execution).

permitting longwall mining.<sup>218</sup> It also views the inherent subsidence as merely an improvement of the room and pillar method and not as a new method of mining.<sup>219</sup>

Kentucky courts have long held that mineral owners' rights are subservient to surface owners' rights to be free from subsidence.<sup>220</sup> However, this acknowledgement has not led to recovery of damages by surface owners. Damages for subsidence are measured by the difference in the market value of the surface before and after the subsidence occurred, as determined by appraisers.<sup>221</sup>

The issue of value, however, rarely is considered because the courts often dismiss cases based on a lack of causation or waiver of liability. A 1997 case, for example, involved a longwall mining operation that caused subsidence, destroying an upper strata of coal and mining equipment belonging to the owner of the upper strata.<sup>222</sup> The severance deed contained an express waiver of liability and, because the deed was executed between sophisticated business persons, the court refused to find any liability for subsidence.<sup>223</sup>

A Kentucky court similarly denied recovery for subsidence in a 1940 decision.<sup>224</sup> That court found that damage to a surface owner's

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218. See *Karst-Robbins Coal Co. v. Arch of Ky.*, 964 S.W.2d 419, 424 (Ky. Ct. App. 1997) (noting that Section 19(2) of the Kentucky Constitution was intended "only to prohibit strip mining operations conducted pursuant to broad form deeds in the absence of the surface owner's consent," but not to additionally prohibit use of modern techniques of underground mining such as longwall mining); see also Eardley, *supra* note 27, at 107-09 (explaining that the Broad Form Deed Amendment was not intended to preclude longwall mining).

219. See *Karst-Robbins Coal Co.*, 964 S.W.2d at 424 (concluding that "the modern longwall mining is not a separate method of 'underground, surface, auger or open pit mining' . . . and that it therefore is not an excluded 'method' of mining for purposes of Section 19(2)") (internal citations omitted); see also Eardley, *supra* note 27, at 111 (noting that longwall mining is viewed as a modern underground mining technique and, thus, does not constitute a separate mining method under the Broad Form Deed Amendment).

220. See *N. E. Coal Co. v. Hayes*, 51 S.W.2d 960, 961-62 (Ky. Ct. App. 1932) (stating that surface owners' rights to have surface maintained in its natural state, free from subsidence or parting of soil, are absolute).

221. See *H.B. Jones Coal Co. v. Mays*, 8 S.W.2d 626, 629 (Ky. Ct. App. 1928) (holding that permanent injury, which results from subsidence of surface through removal of subjacent support by a mineral owner, shall be compensated by calculating the difference in the market value of the surface before and after the infliction of injury).

222. See *Karst-Robbins Coal Co.*, 964 S.W.2d at 422 (discussing a tort action, which sought compensatory and punitive damages for mining damage and destruction of certain mining equipment).

223. See *id.* (stating that the parties kept abreast of one another's activities and that the deed clause, expressly waiving the damages liability waiver clause, absent arbitrary, wanton, malicious, or gross negligence, was enforceable).

224. See *Bogar v. Fordson Coal Co.*, 142 S.W.2d 143, 145 (Ky. Ct. App. 1940) (refusing damages to surface owner where owner failed to adequately prove that damages were caused by mining operations).

property (including the sinking by several feet of a one-acre field, cracking in the surface, and pollution of a well) was caused by "weather conditions."<sup>225</sup> An earlier court similarly denied recovery for a well's destruction because the coal operations took place under adjoining property, not directly under the land of the plaintiff surface owner.<sup>226</sup> Thus, Kentucky surface owners are unlikely to recover for subsidence because of the state courts' tendency to interpret waivers broadly and their reluctance to find causation.

### B. Tennessee

In the few reported cases involving subsidence in Tennessee, the state courts have been willing to impose liability for subsidence but the damages granted to surface owners have been nominal. For example, in the 1946 case of *Campbell v. Campbell*,<sup>227</sup> the Tennessee Court of Appeals upheld an award of \$250 for damages to the surface caused by subsidence.<sup>228</sup> The plaintiffs owned the surface of a one-acre lot and much of the coal had been removed twenty years earlier.<sup>229</sup> The defendants removed the supports by blasting, thereby causing damage to a well and subsidence of the land.<sup>230</sup>

### C. Virginia

Unlike the Kentucky courts that often dismiss subsidence cases on waiver and causation issues, Virginia courts are likely to grant summary judgment to coal operators in subsidence cases, refusing to find the effects worthy of compensation. In the leading 1916 Virginia case of *Stonegap Colliery v. Hamilton*,<sup>231</sup> a surface owner sought damages for subsidence.<sup>232</sup> Cracks, fissures and holes appeared in the surface,

225. See *id.* at 155 (noting that voluminous testimony suggested that surface conditions complained of resulted from "slides" that had been common in the vicinity for several years due to weather conditions).

226. See *W. Ky. Coal Co. v. Dilback*, 294 S.W. 478, 479 (Ky. Ct. App. 1927) (holding that although surface owner retains an absolute right to ensure absence of damage to his surface caused by subsidence or parting of the soil from mining directly under the surface, such a right does not extend to damages caused by mining operations on adjacent land and, thus, coal mine operator is not liable to adjacent land owner for damages to a well resulting from the subsidence of lateral support, absent proof of negligence).

227. 199 S.W.2d 931 (Tenn. Ct. App. 1947).

228. See *id.* at 935 (refusing to overrule a lower court's construction of the deed or to alter damages awarded).

229. See *id.* at 933-34 (noting that no evidence of surface damage existed after the initial extraction twenty years earlier).

230. See *id.* at 934 (noting that supports had to be blasted out and that the subsidence occurred shortly after the mining operations of defendants, thus establishing proximate cause of the damage).

231. 89 S.E. 305 (Va. 1916).

232. See *id.* at 307 (involving an action of trespass to recover damages allegedly

making the land unsafe and unsuitable for agriculture, and all the springs and streams supplying the land were diverted and destroyed.<sup>233</sup> The court acknowledged the long line of cases holding that surface owners have a right to subjacent support unless expressly waived.<sup>234</sup> This right, however, is limited by the mineral owner's right to interfere with "those subterranean streams and percolations of water that appear upon the surface as springs."<sup>235</sup> According to the court, to hold the mineral owner responsible for damage caused by such disturbances effectively would preclude the owner's use of his or her minerals.<sup>236</sup>

In the 1989 case of *Breeding v. Koch Carbon, Inc.*,<sup>237</sup> a federal district court came to a different conclusion when faced with the destruction of a spring.<sup>238</sup> The court enforced the absolute right to subjacent support because the severance deed lacked any waiver from the surface owner.<sup>239</sup> The severance deed language mimicked the language used in the *Stonegap Colliery* case,<sup>240</sup> providing a grant of coal and "all the usual and necessary mining privileges."<sup>241</sup> The *Breeding* court followed the rule that if a miner withdraws subjacent support for the land of another and causes subsidence, even if the subsidence would have occurred in the absence of artificial additions to the land, the miner "is strictly liable not only for the harm to the land caused by the subsidence, but also for any harm to the artificial additions on the land that results from the subsidence."<sup>242</sup> The court did not require the surface owner to prove negligence by the coal operator and placed the burden of evidence on the coal operator to demonstrate that the subsidence would not have occurred in the

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resulting from the mining and removal of the coal under the plaintiff's lands by the defendant, without leaving sufficient natural or artificial supports to prevent subsidence).

233. *Id.*

234. *See id.* at 311 (citing cases from several states wherein such courts construed deeds as upholding the right to subjacent support by a surface owners, absent an express waiver thereof).

235. *Id.* at 312.

236. *Id.*

237. 726 F. Supp. 645 (W.D. Va. 1989).

238. *See id.* at 650 (concluding that the defendant is strictly liable because "[t]he deed severing the surface estate of the plaintiffs from the mineral estate does not contain a waiver of the surface owner's common law right of subjacent support").

239. *See id.* (explaining that a Virginia court will find a waiver only when the language in a deed is "clear and unequivocal").

240. *Stonegap Colliery Co.*, 89 S.E. at 311; *see also Breeding*, 726 F. Supp. at 650 (characterizing the severance deed language as "correspond[ing] so closely to the language of the deed in *Stonegap*").

241. *Breeding*, 726 F. Supp. at 650.

242. *Id.* at 648.



absence of improvements or buildings.<sup>243</sup> In denying summary judgment, the court found no waiver of support to prevent liability for loss of a spring.<sup>244</sup>

Although the *Breeding* case upheld significant rights for surface owners in Virginia, less than a year later these rights evaporated.<sup>245</sup> In the 1990 case of *Large v. Clinchfield Coal Co.*,<sup>246</sup> the court determined that subsidence from longwall mining did not cause appreciable damage. Owners of eighty-one acres of unimproved surface land in Dickenson County sought an injunction against a coal company that owned the coal under the surface.<sup>247</sup> The coal company planned to employ the “longwall” method of mining that would result in the surface subsiding into five ditches, each three feet deep, 3,000 to 5,000 feet long, and 600 to 700 feet wide.<sup>248</sup> The court relied on the coal company’s experts who claimed that the surface would not crack, and that there would be no damage to the timber, stream, or spring.<sup>249</sup> In denying the injunction, the court found no evidence of physical damage and stated that a claim for subjacent support required appreciable damage to the surface estate or diminution in its use.<sup>250</sup> Justices Russell and Stephenson, in a strong dissent, likened the effect on the surface to the “consequences of a major earthquake.”<sup>251</sup> In referring to the coal company’s expert testimony, the dissent noted, “‘experts’ can be found to support any proposition.”<sup>252</sup>

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243. See *id.* at 648-49 (rejecting the defendant’s argument because the defendant failed to introduce evidence demonstrating that subsidence would not have occurred in the absence of its mining activities).

244. See *id.* at 650 (noting that a waiver must be clear and unequivocal and that the Virginia Supreme Court had previously determined that a similar grant of “all” of the coal along with the “usual mining privileges” did not constitute such a waiver).

245. See *Large v. Clinchfield Coal Co.*, 387 S.E.2d 783, 785 (Va. 1990) (rejecting the plaintiff’s contention that the court should award it subjacent support if the subterranean owner caused any subsidence on the surface, regardless of whether there is surface damage or diminution of use).

246. *Id.*

247. The plaintiffs contended that the mining related activities of Clinchfield Coal Company would result in surface subsidence and further damages. *Id.* at 784.

248. See *Clinchfield Coal Co.*, 387 S.E.2d at 785 (explaining that in this method, Clinchfield Coal Company would erect five panels under the plaintiff’s property and would remove coal from the seam in each panel).

249. See *id.* (“[T]he evidence of record is sufficient to support the trial court’s finding that there would not be any appreciable damage to the surface resulting from Clinchfield’s longwall mining.”).

250. See *id.* at 786 (requiring surface owners to establish that there is a reasonable probability that irreparable harm will result from the removal of the subjacent support in order to be entitled to a prohibitory injunction).

251. *Id.* at 787 (Russell, J., dissenting).

252. *Id.* (Russell, J., dissenting) (characterizing as “incredible” the expert testimony that claimed that the severe subsidence in this case would not have a negative impact on wells, springs, surface watercourses, surface drainage, erosion

In a 1991 Fourth Circuit opinion, *Vandyke v. Island Creek Coal Co.*,<sup>253</sup> a homeowner brought an action against a coal operator, alleging subsidence damage to his home and other buildings.<sup>254</sup> The court granted summary judgment to the coal company, relying on the waiver language in the severance deed that granted the right to remove the coal “without leaving any support for the underlying strata and without any liability for damage which may result from the breaking of said strata . . . .”<sup>255</sup> The court followed the decision in *Ball v. Island Creek Coal Co.*,<sup>256</sup> rejecting the plaintiff’s reliance on *Stonegap*<sup>257</sup> and *Phipps v. Leftwich*.<sup>258</sup> The pattern of these cases suggests that Virginia surface owners rarely recover damages for subsidence.

#### D. West Virginia

Similar to the other state court decisions examined above, West Virginia courts have found that the right to subjacent support is absolute, and have held that surface owners need not prove negligence of the coal mining company to recover for subsidence.<sup>259</sup> Despite the acknowledgement of this right, the West Virginia courts follow the other state courts in generously interpreting waivers in favor of coal operators, and in refusing to find harm to surface owners.<sup>260</sup>

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control, growing crops, and tree roots).

253. No. 91-3022, 1991 U.S. App. LEXIS 27680, at \*1 (4th Cir. Nov. 22, 1991).

254. The plaintiffs alleged that the mining activities of Island Creek Coal Company compromised the subjacent support of the plaintiffs’ homes and other property and that this loss of support damaged the structures. *See id.* at \*2.

255. *Id.* at \*3.

256. 722 F. Supp. 1370 (W.D. Va. 1989). The *Vandyke* court noted that two years earlier, the *Ball* court rejected arguments that were similar to the arguments that Vandyke attempted to advance in his case. *Vandyke*, 1991 U.S. App. LEXIS 27680, at \*3-4.

257. 80 S.E. 305 (1916). Vandyke acknowledged that the language in the deed that conveyed the mineral rights to Island Creek Coal Company appeared to waive his right to receive subjacent support but cited the *Stonegap* decision for the proposition that the court should not enforce the waiver. *Vandyke*, 1991 U.S. App. LEXIS 27680, at \*3.

258. 222 S.E.2d 536 (1976). Vandyke cited the *Phipps* decision for the proposition that the court should limit the meaning of the deed’s language to what the parties likely contemplated upon executing the deed. *Vandyke*, 1991 U.S. App. LEXIS 27680, at \*4.

259. *See, e.g.*, *Drummond v. White Oak Fuel Co.*, 140 S.E. 57, 59 (W. Va. 1927) (noting this principle, the court stated: “The authorities say that absolute support is due a surface tract, unless the right thereto is impaired by deed . . . .”).

260. *See, e.g.*, *Sendro v. Consolidation Coal Co.*, 1991 WL 757723, \*7 (N.D. W. Va. Mar. 27, 1991) (reiterating a West Virginia Supreme Court of Appeals holding cited in several West Virginia decisions that “[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation.”) (quoting *Cotiga Dev. Co. v. United Fuel Gas Co.*, 128 S.E.2d 626 (W. Va. 1962)).

A West Virginia Court granted summary judgment to a coal company in a 1991 case, *Sendro v. Consolidation Coal Co.*,<sup>261</sup> in which a surface owner alleged damages resulting from longwall mining.<sup>262</sup> In 1984, the plaintiff surface owner entered into a contract with the defendant coal operator.<sup>263</sup> The three-year contract provided that the coal operator would pay the plaintiff \$5,325 and additional amounts for subsidence-related property damage.<sup>264</sup> The defendant's mining activities damaged the plaintiff's home and the plaintiff refused to accept the coal company's offer which was consistent with the contract terms.<sup>265</sup> The 1902 severance deed waived subjacent support, stating that the coal company may mine "without leaving any support for the overlying stratus and without liability for any injury which may result to the surface."<sup>266</sup> The court concluded that the waiver was valid and unambiguous, and prohibited any liability for damage that the defendant's negligent, or even grossly negligent, mining had caused.<sup>267</sup> According to the court, the 1902 waiver prevented the plaintiff from recovering for subjacent support, even if the defendant was grossly negligent, so plaintiff's only chance of recovery depended on the contract.<sup>268</sup> The court summarily rejected the plaintiff's claims for fraud, emotional pain and suffering, embarrassment, anguish, and depression, and allowed them to go to trial only on the issue of whether the coal company had breached the 1984 contract.<sup>269</sup>

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261. *Id.*

262. *See id.* at \*8 (concluding that the court would grant summary judgment to Consolidation Coal Company on two of the three counts but one of the claims raised questions of fact that a jury must decide).

263. *See id.* at \*1 (noting that on May 15, 1984, the parties signed the contract that determined the amount of compensation the plaintiffs would receive for longwall mining-induced damages).

264. *See id.* (explaining that if the plaintiffs incurred property damage, an inspection team would assess the amount of damage and issue a report that would be binding on the parties).

265. The defendant wrote a check in accordance with the findings of a December 8, 1987 inspection but the plaintiff rejected the check and filed suit on January 9, 1989. According to the plaintiff, the defendant: (1) conducted its mining in a negligent manner; (2) breached the terms of the 1984 contract; and (3) employed fraud to induce the plaintiff's agreement to the 1984 contract. *See id.*

266. *Id.* at \*4.

267. *See id.* at \*5:

[P]laintiffs by their predecessors validly waived any right that they might have had to subjacent support for the tract in question as well as any right to recover from defendant for damages resulting from subsidence caused by negligent or grossly negligent mining. The Court also must conclude that there is no evidence to support a claim for damages for willful, wanton, or reckless mining.

268. *See id.* at \*6 (concluding that the 1984 contract provided plaintiffs with a common law contract option).

269. *See id.* at \*8 (finding that while damages for emotional pain and suffering, embarrassment, anguish, and depression may be recoverable upon claims of fraud,

Similar to the *Sendro* case, the court in *Schultz v. Consolidation Coal Co.*,<sup>270</sup> recognized the surface owners' right to support, but continued the trend to generously interpret waivers.<sup>271</sup> The *Schultz* court found that a valid waiver of support was not invalidated by the WVSCMRA<sup>272</sup> or the regulations enacted pursuant thereto.<sup>273</sup> The coal company, prior to litigation, induced the surface owner to accept \$21,500 for the damage caused to their home by insisting that the company was not liable to pay any amount for subsidence damage as a result of the deed waiver.<sup>274</sup> The surface owner argued that the coal company fraudulently obtained their agreement to accept the damage settlement because, in fact, the coal company had a duty to pay for all subsidence damage.<sup>275</sup> The court affirmed summary judgment for the coal company, finding no fraud on the part of the coal company.<sup>276</sup>

In *Rose v. Oneida Coal Co.*,<sup>277</sup> a West Virginia court denied recovery for damage to a water supply.<sup>278</sup> Surface owners claimed that the coal operator destroyed the surface owners' water supply and caused

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they are not recoverable, under West Virginia law, upon claims of real property damage).

270. 475 S.E.2d 467 (W. Va. 1996).

271. See *id.* at 476-77 (reciting West Virginia common law, and finding that subjacent support is inherently connected to land, even upon the sale of subsurface mining rights, if in the absence of a valid waiver); see also *Smerdell v. Consolidation Coal Co.*, 806 F. Supp. 1278, 1278 (N.D. W. Va. 1992) (ruling that an original deed to mineral rights, granted to Consolidation Coal Co. by the land owner in privity to the current land owner, precluded the awarding of compensation for property damage as a result of subsidence from mining practices).

272. W. VA. CODE ANN. §§ 22-3-1 to 22-3-30 (Michie 1998).

273. See *Schultz*, 475 S.E.2d at 476 (finding that no fraud could be found on the part of Consolidation Coal Co. regarding their representation of their responsibilities to the land owner under the WVSCMRA because the legislative history behind the statute is "murky at best"); see also *id.* at 471 n.6 (finding that, in general, the WVSCMRA does not apply at all to the operation of an underground mine which adversely affects surface water supplies when that mining took place prior to October 24, 1992, when applicable federal legislation, which may or may not cover such incidents, was enacted).

274. See *id.* at 470 (making clear that while, on many occasions, Consolidation Coal Co.'s representative asserted to the land owners that they had a choice between accepting the payment or receiving "nothing" because the mining company was not liable under the WVSCMRA, the land owners did, nonetheless, consult with legal counsel before accepting the payment and depositing the funds into their account).

275. See *id.* at 470 n.2 (pointing out that the land owners initially claimed fraud based upon the mining firm's alleged misrepresentation that the firm could mine within 300 feet of the land owners' dwelling without permission, but later amended this claim after their own expert witness testified to the detriment of the theory).

276. See *id.* at 471 n.8 (finding fault with the land owner's argument of entitlement to "property damages" based upon misrepresentations made by the mining company regarding the company's duty to repair damages to "structures"). The court refers to this argument as "mix[ing] apples with oranges." *Id.*

277. 466 S.E.2d 794 (W. Va. 1995).

278. See *id.* (recounting that the "damage" in this case to the surface water actually consisted of a loss of water from both a house well and from springs upon the land).

subsidence of the surface.<sup>279</sup> The court found that the SMCRA<sup>280</sup> as well as the WVSCMRA,<sup>281</sup> applied only to surface mining, not underground coal mining, and therefore upheld the lower court's ruling that there was no recovery for destruction of surface water.<sup>282</sup> The court did, however, disagree with the lower court as to subsidence damages and held that under both statutes, the operator of an underground mine is required to "correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses . . . ."<sup>283</sup> The court remanded the case for a determination as to subsidence damages.<sup>284</sup>

The courts' reluctance to impose liability on coal companies causes turmoil when a dispute arises between a strip miner and a deep mine company with competing interests in the same real estate.<sup>285</sup> The West Virginia Supreme Court of Appeals was divided on a case between a surface strip miner and a deep mine coal company who owned the underground rights to the same land.<sup>286</sup> The surface owner's 1986 deed included a waiver of subjacent support.<sup>287</sup> The strip miner ran a smaller operation, using strip mine methods on the

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279. See *id.* at 796 (recounting that these claims of damage originally arose in previous litigation between the same parties, resulting in the court's ruling that a previous waiver of subjacent support prohibited the awarding of damages under a common law claim, differentiated from the complaint brought in this case for damages arising in violation of the WVSCMRA).

280. 30 U.S.C. §§ 1201-1328 (1994).

281. See *Rose*, 466 S.E.2d at 798 (discussing the interplay between state and federal regulations in which the state regulation, if found to be relatively less stringent, must give way to the federal regulation (primacy of federal law)).

282. See *id.* at 798-99 (interpreting the breadth of the WVSCMRA and the SMCRA based largely upon a plain reading of the language of the legislation, taken as a whole, to exclude damage done to the surface water by underground mining operations).

283. *Id.* at 801.

284. See *id.* at 731-32 (clarifying, as in previous cases, that recovery under the pertinent legislation is limited to damage done to the land itself, which is to be differentiated from damage done to structures upon the land).

285. See generally THE CHARLESTON GAZETTE ONLINE, *Mining the Mountains* (1998-2002) (recounting major trends and issues on the subject of strip mining in West Virginia over the last few years), available at <http://www.wvgazette.com/static/series/mining> (last visited Apr. 1, 2002).

286. See *Antco, Inc. v. Dodge Fuel Corp.*, 550 S.E.2d 622, 626 (W. Va. 2001) (noting how this case differs from the typical surface owner versus mineral owner case which the court usually hears and detailing the parties' contractual relationship).

287. See *id.* at 625 (reprinting pertinent excerpts of the deed, including the following portion: "There is excepted and reserved unto the Grantor of the proper owner thereof, all the several seams of coal and all of the deep [word "deep" inserted by hand and initialed by the parties] mining rights . . . All without being liable for any injury or damage to the surface of the lands . . .").

110 acres of which they owned the surface.<sup>288</sup> The strip miner eventually found that a limestone quarry was a more profitable use of the property.<sup>289</sup> The limestone operation required a large rock-crushing machine.<sup>290</sup> The defendant's deep mining operations caused subsidence that damaged the rock crusher and other quarry equipment.<sup>291</sup> In the process, the defendant violated the terms of its mining permit by exceeding the area to be legally mined and undermining the land under the quarry.<sup>292</sup> The circuit court granted summary judgment for the defendant, based partially on the waiver of subjacent support.<sup>293</sup> On appeal, the West Virginia Supreme Court of Appeals affirmed this ruling but expressed concerns about the violations of the promises made in the mining permit application, and remanded the case for re-trial.<sup>294</sup> Justice Davis wrote a strong dissent, joined by Justice Maynard, expressing concern that coal operators should not be exposed to liability for language in their permit applications.<sup>295</sup>

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288. *Id.* Language in the deed which transferred subsurface rights specified: [W]ithout being liable for any injury or damage to the surface of the lands and without being required to leave or provide subjacent and lateral support for the overlying and adjoining strata or surface or anything therein or thereon including structures or improvements now or hereafter erected thereon and water or water courses therein or thereon, and without being liable for any surface damage and damages of any sort howsoever caused or arising from the removal of, and all operation in connection with mining said coal by the Grantor or the proper owner . . . "

289. *Antco Inc.*, 550 S.E.2d at 626.

290. *Id.*

291. *Id.* at 627.

292. *See id.* at 626-27 (citing actual notices of violation served on the defendant coal company by the State of West Virginia for the same violations which are claimed in the lawsuit: exceeding the area to be legally mined under permit and improperly undermining the land underneath the plaintiff's quarry).

293. *Id.* at 627 (agreeing with the lower court that a valid waiver was in place when the subsurface mining took place which caused the surface damage in question, but disagreeing with the lower court's second finding that this valid waiver precluded any further material facts from being considered).

294. *See id.* at 634 (reasoning not that the plaintiff would necessarily prevail upon this argument, but that proof of the defendant's prima facie negligence in violating its mining permit created issues of material fact that rendered the lower court's summary judgement inappropriate).

295. *See id.* at 635 (Davis, J., dissenting) (arguing that "[i]t is patently unfair to maintain that deed waivers are permitted under state law, yet render them ineffective after-the-fact due to the very conduct that was the subject of the waiver.").

Subsidence can be particularly damaging to graveyards.<sup>296</sup> A West Virginia court upheld a jury finding of negligence, where a coal company's operations caused cracks and holes to appear in the surface of a family cemetery.<sup>297</sup> Nonetheless, the court reversed and remanded the case for a new determination of damages, finding an award of punitive damages unwarranted absent a showing of wanton or malicious acts.<sup>298</sup> As this case illustrates, even when the plaintiffs prove their case against the coal companies, the courts are likely to deny significant damage awards and keep plaintiffs in the court system for years, increasing the time and expense required to enforce rights against the coal companies.

### *E. Pennsylvania*

While there are differences of opinion as to whether Pennsylvania should be included in the Appalachian coal field states, Pennsylvania has been severely impacted by mining.<sup>299</sup> Like the other Appalachian states, the Pennsylvania courts are just as likely to grant summary judgment for coal companies, denying recovery for subsidence, or other damages where a valid waiver is a factor.<sup>300</sup> In addition to this

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296. See Patrick C. McGinley & Barbara S. Webber, *Pandora in the Coal Fields: Environmental Liabilities, Acquisitions, and Dispositions of Coal Properties*, 87 W. VA. L. REV. 665, 683-84 (1995) (outlining the environmental audit which is now required under federal law, including provisions which make mining inappropriate where it may cause damage to adjacent or overlying cemeteries); see also Gresham & Jamison, *supra* note 213, at 911-14 (giving an overview of the procedures involved in deep mining and some of the patterns of damage which may result).

297. See *Bennett v. 3 C Coal Co.*, 379 S.E.2d 388, 390-92 (W. Va. 1989) (recounting various accounts of the damage which occurred at the family graveyard, including wide cracks and holes which would require either being refilled or having the bodies of up to eighteen persons exhumed and reburied elsewhere).

298. See *id.* at 394-95 (assigning error to both the awarding of punitive damages in a case of simple negligence and to the trial court's ruling that the plaintiff could speak of monetary amounts to the jury in his opening and closing statements which were not supported by the evidence presented at trial).

299. See generally Penina Kessler Lieber, Comment, *Pennsylvania Surface Mining Legislation: A Regulatory Mire*, 47 U. PITT. L. REV. 517 (1986) (offering a general overview of state and federal laws which effect coal mining in the State of Pennsylvania and providing information about coal mining methods and their environmental consequences).

300. See generally *Culp v. Consol. Pa. Coal Co.*, No. CIV.A.87-1688, 1989 WL 101553, at \*1 (W.D. Pa. May 4, 1989) (affirming summary judgment for the defendant coal company, stating that "[t]he plain language of the deeds in the present case makes clear that the parties anticipated mining of all of the coal in the Pittsburgh seam without regard to the support of the surface"); *Commonwealth v. Fitzmartin*, 102 A.2d 893 (Pa. 1954) (finding that a deed which reserved all coal in and under surface of land together with right to mine that coal without liability for damages to the land constituted an implied waiver of grantee's right to surface support); *Charnetski v. Miner's Mills Coal Mining Co.*, 113 A. 683 (Pa. 1921) (upholding lower court's judgment for defendant coal company, finding that land was deeded to plaintiff without rights to surface support); *Atherton v. Clearview Coal Co.*, 110 A. 298 (Pa.

problem, Pennsylvania has by far the highest number of total deaths from coal worker's pneumoconiosis ("black lung"), with nearly nine thousand deaths between 1987 and 1996.<sup>301</sup> Pennsylvania was one of the first states to enact a statute regulating subsidence, in 1966.<sup>302</sup> Coal mining operators, however, are required to prevent subsidence damage to public buildings, dwellings and cemeteries to the extent technologically and economically feasible.<sup>303</sup> The statute, by its language, does not prohibit planned subsidence.<sup>304</sup>

A U.S. District Court in Pennsylvania granted summary judgment for a coal operator in a subsidence case in *Culp v. Consol. Pennsylvania Coal Co.*<sup>305</sup> The owner of superincumbent interests sued the coal operator for longwall mining damage to both the surface and superincumbent seams to which he held title.<sup>306</sup> The defendant's rights to mine under the plaintiff's land arose from forty-eight coal severance deeds executed in the early 1900s, and from this the defendant claimed the right to cause subsidence of overlying mineral interests.<sup>307</sup> Each individual deed included a waiver of the right to

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1920) (upholding a ruling for the defendant coal company based upon the language of the waiver, stating that "[w]hat was reserved was the right to mine and remove all the coal underlying, without liability, under any circumstances, for any damage to the surface . . ."); *Weakland v. Cymbria Coal Co.*, 105 A. 558 (Pa. 1918) (finding for defendant coal company based upon waiver which stated "in clearest terms the intention of the grantor that it should not be liable for damages for failure to support the surface"); *Commonwealth ex rel. Keator v. Clearview Coal Co.*, 100 A. 820 (Pa. 1917) (ruling in favor of the defendant coal company, based upon written waiver, seeking to mine coal under a public school); *Stilley v. Pittsburgh Buffalo Co.*, 83 A. 478 (Pa. 1912) (ruling in favor of defendant coal company on basis of waiver meeting the requirement of containing "apt words or implication").

301. NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, PUB. NO. 2000-105, WORK-RELATED LUNG DISEASE SURVEILLANCE REPORT (1999); *see also* NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, PUB. NO. 2000-105, CRITERIA FOR A RECOMMENDED STANDARD OCCUPATIONAL EXPOSURE TO RESPIRABLE COAL MINE DUST, (1995) (providing a broad overview of the many health risks associated with coal mining, including those of pneumoconiosis).

302. *See* The Bituminous Mine Subsidence and Land Conservation Act, PA. STAT. ANN. tit. 52, §§ 1406.1-1406.21 (West 1998).

303. *See* *People United to Save Homes v. Dep't of Env'tl. Prot.*, Nos. 1855C.D.2000 and 1938C.D.2000, 2001 WL 1472632, at \*6 (Pa. Commw. Ct. Nov. 21, 2001) (interpreting The Bituminous Mine Subsidence and Land Conservation Act, PA. STAT. ANN. tit. 52, § 1406.5).

304. *See id.* (refuting the argument that a mining company must avoid all activity under public property if subsidence will occur as a result).

305. 1989 WL 101553, at \*1.

306. *See id.* (listing the plaintiff's complaints against defendant coal company and the relief sought, including declaratory judgment that the plaintiff has a right to surface support, an injunction against further mining activities, and damages for nuisance and trespass).

307. *See id.* at \*1-3 (differentiating ten distinct language variations from among the several dozen deeds, and finding that all ten variations "uniformly and expressly authorize the removal of all of the coal in the Pittsburgh seam, without liability for damages").



subjacent support.<sup>308</sup> The court granted summary judgment for the defendant based on the waiver language.<sup>309</sup>

Similarly, in *Porter v. Consolidated Coal Co.*,<sup>310</sup> the court granted summary judgment to a coal operator relying on waiver language.<sup>311</sup> The severance deeds waived “all surface damages or damages of any sort arising there from, or from the removal of all of said coal.”<sup>312</sup> Surface owners sued the coal operator for conversion, trespass, private nuisance, and negligence because the coal operator planned to use longwall mining to extract coal, which would have caused subsidence of the surface land.<sup>313</sup> The court found it irrelevant that longwall mining techniques were known at the time of the severance deed because of the broad waiver language.<sup>314</sup> Each of the jurisdictions indicated above is similar in broadly interpreting and strictly enforcing waivers of support and surface damage, disregarding the legislative intent in more recent regulations requiring restoration of the surface.<sup>315</sup>

## V. ADVERSE POSSESSION

The coal operators are also favored in adverse possession suits, where mineral owners are allowed to benefit from the adverse possession of the surface estate.<sup>316</sup> Surface owners’ claims of adverse

308. See *id.* at \*3 (reviewing ten categories of deeds and finding that each category contained language, such as “hereby waiving all damages arising therefrom,” expressly waiving the right to recover damages for removing support).

309. See *id.* at \*14 (holding that the language of the deed clearly and unambiguously granted the defendant the right to remove all coal in the seam without liability for damages).

310. No. 86-1396, 1989 WL 101553, at \*14 (W.D. Pa. Aug. 18, 1989) (cited as Exhibit A in *Culp v. Consol. Pa. Coal Co.*, No. 97-1688, 1989 WL 101553 (W.D. Pa. May 4, 1989)).

311. See *id.* at \*17 (finding that the language in the severance deeds waiving liability for subsidence damage was not ambiguous).

312. *Id.* at \*16.

313. See *id.* at \*14 (stating plaintiff’s allegations that defendant’s use of longwall mining would reduce the value of the surface and subsurface estates).

314. See *id.* at \*15, \*17 (addressing plaintiff’s argument that when the deeds were executed, the plaintiffs could not have contemplated that longwall mining would cause subsidence, but finding no language in the deeds restricting defendant’s use of specific mining techniques).

315. See Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1202(a)-(b) (1994) (establishing a nationwide program to protect society and the environment from the adverse effects of surface mining and to assure that the rights of surface owners are protected from mining operations); 30 C.F.R. § 816.133 (2001) (requiring disturbed areas to be restored, in a timely manner, to the condition that would support the uses the land was capable of supporting before the mining); see also Mickey Webster, *Recent Developments in Surface Mining: An Examination of Black Mountain and Bragg v. Robertson*, 15 J. NAT. RESOURCES & ENVTL. L. 267, 269 (2001) (providing an overview of the regulations for surface mining operations).

316. See, e.g., *Clevinger v. Bull Creek Coal Co.*, 98 S.E.2d 670, 672 (Va. 1957)

possession of the mineral rights rarely succeed.<sup>317</sup> In *Clevinger v. Bull Creek Coal Co.*,<sup>318</sup> the Virginia court held that possession and cultivation of the surface is presumed to be possession for the benefit of the owner of the minerals, so the land could not be considered abandoned.<sup>319</sup> The effect of this decision was to set aside a grant of fee from the Commonwealth to the possessor of the surface, so that the mineral rights of the coal company were not affected.<sup>320</sup>

In *Ventro v. Clinchfield Coal Corp.*,<sup>321</sup> a 1958 Virginia case, the court denied the surface owner's claim of adverse possession of coal rights.<sup>322</sup> The surface owner had sporadically mined coal for his household use, using a wheelbarrow and hand tools.<sup>323</sup> The surface owner also sold coal to neighbors and to local schools.<sup>324</sup> The coal company had paid the taxes on the coal, and protested when the surface owner leased the coal rights to a third party.<sup>325</sup> Although acknowledging that mineral rights could be adversely possessed, the court deemed the surface owner's mining and selling of coal too sporadic to make an effective adverse possession claim.<sup>326</sup>

In *Mountain Mission School, Inc. v. Buchanan Realty Corp.*,<sup>327</sup> the court again denied adverse possession of the mineral rights to the surface

(holding that cultivation of the surface land shows that the land is not abandoned and therefore, inures to the benefit of the owner of the coal estate).

317. See, e.g., *Ventro v. Clinchfield Coal Corp.*, 103 S.E.2d 254, 261 (Va. 1958) (holding that a surface owner's sporadic mining of coal does not establish adverse possession of mineral rights).

318. 98 S.E.2d 670 (Va. 1957).

319. See *id.* at 672 (describing that at common law, when the mineral estate has been severed from the surface estate, the owner of the surface holds possession for the benefit of the mineral owner, as a bailee).

320. See *id.* (holding that surface land that had been cultivated for forty-three years cannot be considered "waste and unappropriated land" subject to grant by the Commonwealth and therefore the land inures to the benefit of the coal estate).

321. 103 S.E.2d 254 (Va. 1958).

322. See *id.* at 261 (holding that Ventro's possession of the coal was not actual, open, notorious, and hostile).

323. See *id.* at 259 (reviewing testimony of witnesses who stated that Ventro mined some coal, but no machinery was used and there was no indication of commercial mining).

324. See *id.* at 259-60 (stating that Ventro sold small quantities of coal and made oral claims of ownership of the coal).

325. See *id.* at 258 (describing previous conveyances of the land and plaintiff's claim of adverse possession of coal and minerals).

326. See *id.* at 261:

[T]he nature of his sporadic and limited mining operations was in keeping with the recognized relations existing between surface owners and owners of the coal and mineral rights. His mining operations were not antagonistic to the interests of [the owners of the mineral estate] but were tacitly permitted, and thus not adverse to their ownership of the coal and other minerals.

327. 151 S.E.2d 403 (Va. 1966).

owner.<sup>328</sup> To determine whether the surface owner could make a claim of adverse possession of the mineral estate, the court required evidence of commercial mining, which was not present.<sup>329</sup> Kentucky courts found similar results in *White Log Jellico Coal Co. v. Zipp*<sup>330</sup> and *Ward v. Woods*.<sup>331</sup> Very few cases exist where a surface owner has prevailed on a claim of adverse possession of a mineral estate.<sup>332</sup>

Courts have also favored coal operators in condemnation proceedings.<sup>333</sup> When the mineral rights were condemned in a recent Kentucky case, the court denied any share of the condemnation proceeds to the surface owner who had reserved the right to extract coal for household uses.<sup>334</sup> As this case illustrates, courts generally favor mineral owners to the detriment of surface owners not only in adverse possession cases, but other legal proceedings as well.<sup>335</sup>

## VI. DEATH AND DESTRUCTION CAUSED BY MINING DISASTERS

The devastating impact of coal mining on the people of Appalachia is also evident in the numbers of miners killed or maimed while working in the mines. Between 1930 and 1972, a total of 1.5 million miners were injured in the mines.<sup>336</sup> Between March 18, 1839 and September 23, 2001, 15,196 people were killed in 717 mining disasters.<sup>337</sup> On December 26, 1945, twenty-four men died on Straight Creek in Bell County, Kentucky, in an underground mine fire and explosion.<sup>338</sup> Four months later, one hundred and eleven men

328. *Id.*

329. *See id.* at 407 (holding that the school's ownership of the surface was mere possession of the surface only and not adverse possession of the mineral estate because there had never been commercial mining of the land).

330. 32 S.W.3d 92, 95 (Ky. Ct. App. 2000) (holding that there was "no behavior sufficiently hostile or notorious" in part because the mining did not take place for the fifteen years that the statute required for adverse possession).

331. 310 S.W.2d 63, 65 (Ky. 1958) (finding that removal of some coal for domestic use did not suffice for a surface owner's adverse possession claim).

332. *See* *Diederich v. Ware*, 288 S.W.2d 643, 647-48 (Ky. 1956) (holding that surface owner prevailed on an adverse possession claim because the owners of the mineral estate were on notice and the surface owner operated the two oil wells).

333. *See, e.g.,* *Bailey v. K.Y.B.C. Land Corp.*, 39 S.W.3d 29, 31 (Ky. App. 2001) (awarding all proceeds from condemnation of the mineral estate to the coal operator).

334. *See id.* (stating that the surface owner's right to mine coal for household purposes does not diminish the coal operator's ownership of all mineral rights).

335. *See id.* (holding that the only compensation the surface owner could receive would be from condemnation proceedings against the surface estate and not from the mineral estate).

336. PETERSON, *supra* note 3, at 50.

337. *See* Mining Data, available at <http://www.cdc.gov/niosh/mining/data/disall.html> (last visited July 8, 2002). This statistic does not include those miners killed in incidents that involved fewer than five deaths. *Id.*

338. *See* CAUDILL, *supra* note 13, at 292 (describing the deaths as the "worst

burned to death in an explosion in Centralia, Illinois.<sup>339</sup>

In 1957, the Bishop mine in Tazewell, Virginia blew up twice, killing thirty-nine miners the first time and twenty-seven miners the second.<sup>340</sup> In 1958, at the Amonate mine in the same area, an explosion killed twenty-two men.<sup>341</sup> Cosby Ann Totten, a female miner, explained, "[f]rom the time I was a child, someone was always getting killed or crippled. I was going to funerals when I wasn't really old enough to know what they were."<sup>342</sup>

A 1968 mine explosion killed 78 miners at Consolidated Coal Company's mine near Farmington, West Virginia.<sup>343</sup> Sixteen miners had been killed at the same mine in a 1954 explosion.<sup>344</sup> In 1970, a total of 254 miners died in mining accidents, compared to 203 in 1969.<sup>345</sup> As of 1972, one out of twelve miners who began mining early in his working years could expect to be killed before reaching retirement age.<sup>346</sup> On December 19, 1984, a faulty air compressor started a fire that killed twenty-seven coal miners near Orangeville, Utah.<sup>347</sup>

Coal companies claim that mining has become safer in recent years.<sup>348</sup> The Mine Safety and Health Administration reported seventy-two mining deaths in 2001, the lowest number in decades.<sup>349</sup>

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postwar disaster" of the Kentucky plateau).

339. *See id.* (stating that as a result of the explosions, the union demanded protection and called for a federal safety code).

340. *See* RANDALL NORRIS & JEAN-PHILIPPE CYPRES, *WOMEN OF COAL* 16 (Univ. Press of Ky. 1996) (recounting the story of Cosby Ann Totten, a female miner, who did not want to go into the mines because of the possibility of explosions).

341. *See id.* (explaining that three of her relatives were killed in the Amonate mine explosion).

342. *Id.*

343. *See* PETERSON, *supra* note 3, at 48-49 (noting that twenty-four investigations between 1963 and 1968, conducted by the U.S. Bureau of Mines found that the mine violated federal regulations and other safety standards).

344. *Id.* at 49 (describing the 1954 and 1968 explosions and the union's inadequate response to safety violations).

345. *Id.* at 50 (stating that despite a 1969 federal mine safety law, coal mining "remains the nation's most dangerous industrial occupation"); *see also* Ben A. Franklin, *The Scandal of Death and Injury in the Mines*, in *APPALACHIA IN THE SIXTIES; DECADE OF REAWAKENING* 99, Editor's Note at 108 (David S. Walls & John B. Stephenson eds., 1972).

346. *See* PETERSON, *supra* note 3, at 48-49 (reporting that evidence suggests that coal mining is becoming more dangerous).

347. *Cf.* Jay Reeves, *4 Dead, 9 Others Missing in Mine*, *LEXINGTON HERALD-LEADER*, Sept. 25, 2001, at A4 (describing a mine explosion in Brookwood, Alabama, which left four dead and nine missing, as "the worst loss of life" since the Utah mining disaster).

348. *See* *Mining Deaths Reach Record Low in USA*, *USA TODAY*, Jan. 4, 2002, at 3A (attributing the decline in mine accidents to an historic low to more policing by regulators and mining companies' efforts to increase safety).

349. *See id.* (reporting forty-two deaths in coal mines and thirty deaths in other mines in 2001).

Notwithstanding this positive trend, there is no dispute that mining historically has been one of the most dangerous professions, and continues to threaten the lives of those employed in the mines.<sup>350</sup> On September 24, 2001, thirteen miners were killed in the Blue Creek No. 5 mine in Brookwood, Alabama.<sup>351</sup> The mine roof caved in, hitting electrical equipment, which caused sparks to ignite the methane.<sup>352</sup> Forty-five minutes later, a second explosion occurred, killing rescuers.<sup>353</sup> The dangers of mining are evidenced by the memorial statues to miners, which are in front of many government buildings in Appalachia, honoring the miners killed on the job.<sup>354</sup> In Appalachia, these mining memorials are more common than military war memorials.

## VII. ENVIRONMENTAL IMPACT

Coal mining operations have caused water, air, and aesthetic pollution of the Appalachian region.<sup>355</sup> For example, the West Virginia Department of Environmental Protection (“WVDEP”) stated in May, 2001 that there were eighty-three mine sites in “continuous violation of effluent water pollution limits.”<sup>356</sup> Although the Federal Surface Mining Control and Reclamation Act<sup>357</sup> requires restoration of abandoned mines, the Secretary of the WVDEP admitted that the state program “does not meet the requirements of federal law

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350. See Reeves, *supra* note 347 and accompanying text.

351. See *id.* at A1 (stating that four miners and nine rescuers died in the worst mining accident in the United States since 1984).

352. See *id.* (explaining that ignited methane caused an explosion in an area of the mine where six people were working).

353. See *id.* at A4 (noting that miners who had previously escaped went back into the mine to rescue workers, but were hit by the second underground explosion).

354. See generally *Mining Museums and Miners' Memorials* (noting various mining museums and memorials that remember the contribution of miners and accidents that accompanied the mining industry and providing links to each state's memorials), at <http://www.msha.gov/training/museum/museum.htm> (last visited Feb. 23, 2002). See, e.g., Kimberly Hefling, *Coal Towns Bet Their Futures on the Past*, THE SUNDAY GAZETTE MAIL, Nov. 29, 1998, at 1C (noting that a memorial to miners who died stands outside Portal 31, a mine that operated between 1920 and 1960 in Lynch, Kentucky).

355. See, e.g., James Huffman, *The Allocative Impacts of Mineral Severance: Implications for the Regulation of Surface Mining*, 22 NAT. RESOURCES J. 201, 222 (1982) (noting that the diversity of pollution from coal mining is a kind of “externality” where the costs of mining are passed on to others).

356. *W. Va. Highlands Conservancy v. Norton*, 147 F. Supp. 2d 474 (S.D.W. Va. 2001).

357. See 30 U.S.C. § 1270(a)(2) (1994) (allowing any person having an interest who is or may be adversely affected by coal mining to bring suit on his/her own behalf against the Secretary or the appropriate state regulatory authority to compel compliance with the Act).

because the funding is totally inadequate.”<sup>358</sup> A suit by an environmental organization challenging the state program was dismissed.<sup>359</sup>

Suits by injured homeowners have been similarly unsuccessful.<sup>360</sup> In 1944, a Kentucky court denied recovery to a homeowner, finding no nuisance even though a coal company created a refuse pile that spontaneously combusted and burned continuously for over three years.<sup>361</sup> Smoke from the refuse pile traveled 2,770 feet to pollute the air around the plaintiff's home, making his home uninhabitable and destroying the rental value of a building nearby.<sup>362</sup> The court found that the broad form deed, originally granted to John C.C. Mayo, waived the right to sue for nuisances.<sup>363</sup>

In *Mullins v. Beatrice Pocahontas Co.*,<sup>364</sup> a similarly unsuccessful coal dust case, a group of homeowners filed a complaint against a coal operator in Buchanan County, Virginia, seeking damages and injunctive relief, because of air pollution caused by coal dust.<sup>365</sup> The homeowners alleged that the dust produced by the coal operations “blackens lawns and trees, destroys crops, ruins the paint on buildings and corrodes cars and trucks.”<sup>366</sup> The trial court granted summary judgment for the coal operator.<sup>367</sup> When the homeowners appealed, the court found the severance deeds waived damages from air pollution and dust.<sup>368</sup> Nevertheless, the court held that “the surface cannot be burdened by dust that is not the product of ordinary

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358. *W. Va Highlands Conservancy*, 147 F. Supp. 2d at 476.

359. *See id.* at 481 (finding that a federal court cannot order a state official to follow state law and dismissing claim for a lack of subject matter jurisdiction).

360. *See generally* Consolidation Coal Co. v. Mann, 181 S.W.2d 394, 396-97 (Ky. 1944) (concluding that the mining operation could not be conducted without dumping in the location adjacent to the plaintiff's residence and plaintiff knew this when he acquired the land).

361. *See id.* at 395-96 (noting that the homeowner realized that the dumping of coal could combust and burn, and thus, refused to hold the business liable for damages for injury to adjacent property).

362. *See id.* at 395 (stating that the smoke was not constant but often heavy enough that it would not dissipate and instead travel in damaging quantities to pollute the air around the homeowner's residence).

363. *See id.* at 396 (holding that by taking title to property with the knowledge of the coal dumping effects, the homeowner “licensed” the coal company to maintain the nuisance).

364. 432 F.2d 314 (4th Cir. 1970).

365. *See id.* at 315 (identifying claim of property owners that the dust from the coal processing plant destroys property and is unhealthy to breathe).

366. *Id.*

367. *See id.* (finding that title to the homeowners' land derived from deeds that conferred mineral rights on the coal company).

368. *See id.* at 317 (reasoning that the homeowner's deeds reserved, to the coal company, coal and minerals and the right of prospecting coal and minerals with an easement for underground haul ways, the coal company is exonerated from liability for pollution).

operations or by dust which the coal operator reasonably can control.”<sup>369</sup> The court remanded the case, and the trial court again found for the coal operator.<sup>370</sup> When the homeowners appealed, alleging errors in the standards of proof and admission of hearsay evidence, the court ignored their allegations and decided that the trial court may have lacked jurisdiction to hear the case, and remanded once again.<sup>371</sup> In 1974, the district court decided that diversity jurisdiction was proper.<sup>372</sup> The Fourth Circuit affirmed the decision on jurisdiction in November 1975.<sup>373</sup> After the coal operator had kept this case in the courts for seven years, the court did not grant any relief to the homeowners.

In the 1974 Kentucky case of *Kentland-Elkhorn Coal Co. v. Charles*,<sup>374</sup> the court similarly denied relief to surface owners for coal dust pollution.<sup>375</sup> The surface owners relied on a nuisance theory.<sup>376</sup> The court required proof that the coal operator chose a more harmful procedure when one less harmful was equally available, reversing the trial court’s judgment for the surface owners.<sup>377</sup> Justice Stephenson’s concurring opinion suggested strict liability should be imposed upon the mineral owner for damages to the surface owner’s improvements, a theory that has never been accepted by a majority.<sup>378</sup>

In addition to air pollution, coal production causes water pollution.<sup>379</sup> Coke ovens bake coal at 3000 degrees Fahrenheit forty-

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369. *Id.* at 319.

370. *See* Mullins v. Beatrice Pocahontas Co., 489 F.2d 260, 261 (4th Cir. 1974) (noting that summary judgment had initially been granted against all property owners, that the court later reversed and remanded for a trial on the merits, and that after trial, judgment again resulted in favor of the coal company to defeat any injunction).

371. *See id.* (remanding the case to consider whether the court had personal jurisdiction over the coal company because the company was incorporated in Delaware but never identified its principle place of business).

372. *See* Mullins v. Beatrice Pocahontas Co., 374 F. Supp. 282, 283 (W.D. Va. 1974) (determining that diversity jurisdiction should be based on the coal company’s bulk of corporate activity and principle place of business).

373. *See* Mullins v. Beatrice Pocahontas Co., 530 F.2d 969, 969 (4th Cir. 1975) (affirming the district court’s finding but publishing no opinion).

374. 514 S.W.2d 659 (Ky. 1974).

375. *Id.*

376. *See id.* at 662 (applying a nuisance approach to the claim by characterizing the unreasonableness of a method for mineral recovery as oppressive).

377. *See id.* at 663 (finding evidence of imprudent operation by the coal company where the company did not do all it could do to minimize harm and reversing because of error in the jury instructions).

378. *See id.* at 667 (Stephenson, J., concurring) (reasoning that because older case law states that rights contained in a deed to a property do not absolve the mine operator from liability, strict liability should be imposed for damages to the surface owners’ improvements and concurring in the reversal judgment only because of an error in the jury instructions).

379. *See generally* DUANE LOCKHARD, COAL: A MEMOIR AND CRITIQUE 150-54 (1998)

eight hours to produce carbonized coal, a higher temperature fuel that is used in steel production.<sup>380</sup> Many coal seams contain substantial amounts of sulfur.<sup>381</sup> These coke ovens dump sulfur dioxide into the air as the coal bakes.<sup>382</sup> Water is used to cool the carbonized coal before transport, releasing vast clouds of steam, creating artificial rain that mixes with the sulfur dioxide to cause concentrated acid rain.<sup>383</sup> When water touches the sulfur, toxic sulfuric acid is produced, which flows downstream into the creeks and rivers, killing vegetation and wildlife.<sup>384</sup> The impact on nearby vegetation and river water is clearly visible in distressed vegetation and discolored water surrounding the coke oven site.<sup>385</sup>

Courts have ignored the environmental damage caused by mining. A farmer was denied recovery for pollution of a stream and wells by mine runoff, because the farmer could not prove what percentage of the pollution was caused by the mine, compared to the percentage of pollution that was contributed by the farmer's sawmill and wash house.<sup>386</sup>

Floods occurred in Buchanan County, Virginia causing significant damage to Grundy in 1937, 1957, and again in 1977.<sup>387</sup> It is tempting

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(describing the muddy yellow discoloration of most rivers bordering the coal mines of West Virginia resulting from the dark yellow mine water of diluted sulfuric acid).

380. See generally ABRAHAM GESNER, A PRACTICAL TREATISE ON COAL, PETROLEUM, AND OTHER DISTILLED OILS 67-70 (Augustus M. Kelley Publishers 1968) (1865) (describing the baking process where a fire burns the furnace at the bottom and a blast of air is driven through the oven to deprive oxygen, avoid combustion, and produce carbonized coal).

381. See LOCKHARD, *supra* note 379, at 150-54 (noting that coals vary in the amount of sulfur they contain and Midwestern coal is generally heavily composed of sulfur, whereas Wyoming coal can be burned without producing sulfur).

382. See GESNER, *supra* note 380, at 67-70 (noting that objections to coke ovens surround the process of burning which releases vapors through upward distillation).

383. See The Manufacturer of Coke (stating that the gases generated by the heat of the ovens would burn slowly and emit in the air the odor of rotten eggs, and explaining that once the controlled burning in the coke oven was complete, hundreds of gallons of water would flush the finished coke coal), at <http://the-old-miner.virtualave.net/coke2.html> (last visited Mar. 2, 2002); see also Coal History (noting that sulfur and nitrogen form during combustion of the coal and can contribute to the formation of acid rain), at <http://vcc.netscope.net/coalhist.htm> (last visited Mar. 2, 2002).

384. See generally Panther Coal Co. v. Looney, 40 S.E.2d 298, 299 (Va. 1946) (describing property damage caused by mine water containing acids and minerals, which would discolor the ground and kill plants and grasses, as it flowed down the side of a mountain stream onto the property-owner's land).

385. See *id.* (describing the environmental damage caused by the sulfuric discharge of burning coal that pollutes the air and nearby waters).

386. See *id.* at 305 (holding that the property-owner did not prove the elements of his case because he offered no evidence to show what proportion of the damage resulted from the acts of the coal company and the coal company could not be held responsible for the entire damage to the property).

387. See Ellen Nakashima, *In Grundy, VA., A Debate Ebbs and Flows*, WASH. POST., May 6, 1997, at B1 (remarking that some residents want to move the town to higher



to say that river flooding is an “act of God” and not the responsibility of man, however, these rivers would not flood if the hillsides had not been devastated by strip mining, subsidence, and the loss of vegetation.<sup>388</sup>

After a mountain is strip mined, the coal operators push all the dirt and debris over the mountain and into the valleys.<sup>389</sup> If there is heavy rainfall in the spring, the water washes the debris off the mountain causing flooding and property damage, as happened in 1977 in Cranks Creek, Kentucky.<sup>390</sup> Another shocking example of such flooding occurred in February 1972 when one hundred twenty-five people were killed and over one thousand homes were destroyed by a coal operator-instigated flood at Buffalo Creek, West Virginia.<sup>391</sup>

The foregoing are merely illustrative examples of the environmental destruction caused by coal mining operations in Appalachia.<sup>392</sup> Some of the damage can be reversed or repaired if significant action is taken soon.<sup>393</sup> Decades of coal removal have left the area in desperate need of repair and attention.<sup>394</sup>

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ground because of the damage caused by the floods).

388. See GERALD M. STERN, *THE BUFFALO CREEK DISASTER* 11 (1976) (quoting one West Virginia flood survivor as stating, “I didn’t see God running any bulldozer”).

389. See NORRIS & CYPRES, *supra* note 340, at 78 (describing how the resulting flood at Cranks Creek, Kentucky led to new strip mining legislation). See generally Art Wolfe, *Corporations as Ships: An Inquiry into Personal Accountability and Institutional Legitimacy*, 19 PEPP. L. REV. 49, 55 (1987) (describing how unnatural dams were formed by pushing mine waste into nearby valley streams).

390. See NORRIS & CYPRES, *supra* note 340, at 78 (claiming that it took new legislation to force coal companies to pay settlements to the flooded community of Cranks Creek).

391. See generally STERN, *supra* note 388, at 11 (portraying the survivors’ stories of the flood at Buffalo Creek and exploring how the resulting lawsuit led to the uncovering of corporate irresponsibility, and ultimately, accountability).

392. *Id.* See generally C. PETER GOPLERUD III, *COAL DEVELOPMENT AND USE: THE LEGAL CONSTRAINTS AND INCENTIVES* 111-13 (1983) (exploring the adverse environmental consequences associated with coal mining, and specifically describing concerns related to mine waste).

393. See Ken Ward Jr., *Massey Settles 11 Citations in Summer Flooding*, CHARLESTON GAZETTE, Dec. 20, 2001, at 9A (describing suits against subsidiaries of coal companies over damage caused by flooding in an effort to curb environmental violations and to force companies to pay restitution); see also Associated Press, *Suit Blames Two Coal Companies For Flooding That Killed Woman*, KY. LEXINGTON HERALD-LEADER, Sept. 29, 2001, at C3 (alleging that woman’s death was due to negligent behavior on the part of the coal mining companies, who installed improper drains).

394. See Lee Mueller, *E. Kentuckians Suspect Removal of Earth’s Surface Increased Runoff Damage*, KY. LEXINGTON HERALD-LEADER, Aug. 7, 2001, at A1 (quoting the director of Pike County Emergency Services as stating, “You know that there’s got to be some relationship there . . . It’s never happened like this before. You take all the trees and strip the forest floor from the hillsides and there’s nothing there to deter the runoff.”).

## VII. HEALTH IMPACT

Coal operations cause black lung, cancer, eye problems, and other health effects on both miners and residents living near the coal fields.<sup>395</sup> Tobacco use by coal workers exacerbates many of the symptoms associated with these illnesses.<sup>396</sup> Worse still, miners' mortality rate from respiratory diseases has been estimated at four times that of the general population.<sup>397</sup> Edith Crabtree, from Man, West Virginia, stated:

My father was killed by black lung. I lost four brothers to black lung. My first husband had black lung when he died, and my second husband died from black lung . . . Women and children live in the coal fields, too, and they breathe coal dust just like the men do, and they end up with asthma. I even know some women who've died from black lung . . . but they couldn't get any compensation because they weren't coal miners.<sup>398</sup>

Many doctors, as well as modern mine owners, allege that black lung is a disease of the past.<sup>399</sup> Recent regulations and better ventilation techniques have improved the air quality in mines significantly.<sup>400</sup> However, such improvements are still very recent, and usually employed by only the largest and most technologically advanced mining companies.<sup>401</sup> Thus, black lung remains a key issue within the coal mining community today.

For example, between 1987 and 1996, the National Center for Health Statistics reported that a total of 18,245 coal workers died

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395. See generally J. DAVITT MCATEER, COAL MINE HEALTH AND SAFETY: THE CASE OF WEST VIRGINIA 105-11 (1970) (noting the critical role doctors play in Appalachian coal mining areas because of the constant need for medical testimony during workers' compensation and social security disability disputes).

396. See BARBARA ELLEN SMITH, DIGGING OUR OWN GRAVES: COAL MINERS AND THE STRUGGLE OVER BLACK LUNG DISEASE 211-12 (1987) (listing the individual and environmental factors which potentially affect the development of black lung disease, including smoking).

397. See CAROL A. B. GIESEN, COAL MINER'S WIVES: PORTRAITS OF ENDURANCE 56 (1995) (approximating that one of every ten coal miners will die from the consequences of black lung).

398. NORRIS & CYPRES, *supra* note 340, at 20.

399. See SMITH, *supra* note 396, at 217-18 (stating that, in 88.5% of modern cases reviewed, there was insufficient evidence of black lung, and also suggesting that the "prospects of receiving financial benefits" encouraged miners to "create symptoms" related to black lung).

400. See, e.g., Mandatory Safety Standards-Underground Coal Mines, 30 C.F.R. § 75 (2001) (requiring a minimum percentage of oxygen and setting maximum levels for noxious gases); see also Federal Mine Safety Agency Announces Improved Ventilation Rules, MSHA News Release No. 96-005 (Mar. 11, 1996) (improving the safety of workers by implementing new rules regarding ventilation in the coal mines, as ventilation is the primary means of preventing dangerous accumulations of explosive gases in the mines).

401. See Franklin, *supra* note 345, at 101-02; HARRY M. CAUDILL, A DARKNESS AT DAWN 22 (1976).

from black lung disease.<sup>402</sup> The Appalachian coal fields of West Virginia, Virginia, Kentucky, and Tennessee account for 5,727 of these deaths, with an additional 8,898 from Pennsylvania alone.<sup>403</sup> The Mine Safety and Health Administration also reported that while about 50 percent of the samples of coal mine air exceeded the permissible dust exposure limit in 1970, this number was reduced drastically to less than fifteen percent for the years 1982 to 1994.<sup>404</sup> Although this appears to be a vast improvement, the Occupational Safety and Health Administration samples indicated that over thirty percent of the 1984 and 1985 samples exceeded the permissible exposure limit, and over forty percent of the samples exceeded the limit in 1986.<sup>405</sup> Moreover, the National Institute of Occupational Safety and Health has indicated that the risk of affliction with black lung increases dramatically with length of time in the mining profession.<sup>406</sup> Between fourteen and forty percent of tested employees who had worked more than thirty years in the mines had x-rays indicating black lung disease.<sup>407</sup>

In addition to the respiratory problems that miners face, back pain often plagues those working in the mines.<sup>408</sup> Where seams of coal are too thin for shaft or deep mining, drift mines are used to tunnel into the sides of a mountain.<sup>409</sup> The seams in drift mines are typically less than three feet thick, requiring the miners to work all day on their hands and knees.<sup>410</sup> “For a miner who avoids being crippled, burned or buried alive, the usual question is which will give out first—his

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402. *Work-Related Lung Disease (WoRLD) Surveillance Report 1999*, NATIONAL CENTER FOR HEALTH STATISTICS [hereinafter WoRLD 1999] (tabulating total number of deaths and potential years lost due to coal workers' pneumoconiosis for each state and the District of Columbia), at <http://www.cdc.gov/niosh/W99T2-5.html> (last visited Feb. 23, 2002).

403. *Id.*

404. *Work-Related Lung Disease Surveillance Report 1996*, National Institute for Occupational Safety and Health, DHHS (NIOSH) Pub. No. 96-134.

405. *Id.*

406. See WoRLD 1999, *supra* note 402 (tabulating the number and percentage of miners found to have evidence of black lung, as determined through an X-ray study completed by the National Institute of Occupational Safety and Health).

407. *Id.*

408. See GIESEN, *supra* note 397, at 43-44 (illustrating the cramped conditions of the mines by noting that men often entered the mines lying down).

409. See JOHN C. TUCKER, MAY GOD HAVE MERCY: A TRUE STORY OF CRIME AND PUNISHMENT 5 (1997) (explaining the differences between the three ways in which coal is mined in Buchanan County, Virginia—strip mining, drift mining, and deep shaft mining).

410. See *id.* (enumerating the disadvantages that drift miners face compared to other deep shaft miners, including small work areas and lack of unionization); see also GIESEN, *supra* note 397, at 44 (explaining that bigger working areas would cost the coal companies money, so tunnels are only as wide and high as necessary).

lungs, his back or his knees.”<sup>411</sup>

The coal industry also is responsible for health problems other than miners’ black lung and back problems. Air and water pollution from the coal industry have caused an increased incidence of eye problems, respiratory disease and cancers in those residing in coal mining areas. According to the National Cancer Institute, the Appalachian coal counties are in the highest ten percent of the nation for cancer mortality for white women, and in the highest twenty percent of the United States for white males for mortality from all forms of cancer.<sup>412</sup> A principal mining region, McDowell County, West Virginia, is among the lowest eight counties in the United States for life expectancy; Perry County, Kentucky and Mingo County, West Virginia are not much better.<sup>413</sup> The health of all Appalachian residents has been adversely affected by the coal industry, not only the health of those miners who work underground.<sup>414</sup>

#### IX. TAX REVENUE

Although Appalachian mountain land is assessed at low values, for years many coal companies paid little or no taxes on their mineral rights.<sup>415</sup> Some surface owners were unaware that their land had been severed, because the severance occurred decades ago and title searches and legal representation are not customary for purchasers.<sup>416</sup> If the tax assessor was similarly uninformed, the surface owner may have been the sole taxpayer.<sup>417</sup>

Furthermore, some coal operators attempted to influence the tax assessors by developing close relationships with those in charge of taxation through hiring the chairman of the Board of Tax

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411. TUCKER, *supra* note 409, at 5.

412. Susan S. Devesa, et al., *Atlas of Cancer Mortality in the United States: 1950-94*, NIH Pub. No. 99-4564 (1999).

413. See Ryan O’Neil, *Life Expectancy Across The Country* (listing counties with lowest life expectancy at birth for females born in 1990 as McDowell County, WV (8th lowest); Perry County, KY (11th lowest) and Mingo, WV (13th lowest)), at <http://www.insure.com/life/expectancy199-4.html> (last updated Feb. 1, 1999).

414. See NORRIS & CYPRES, *supra* note 340, at 20 (stating that everyone—men, women, and children—should have medical insurance to cover the effects of the coal industry).

415. See MCATEER, *supra* note 395, at 175-80 (finding that coal companies are paying about one-tenth of the property taxes in West Virginia, and yet the companies own almost forty-four percent of the land).

416. See generally Michelle Andrea Wenzel, Comment, *The Model Surface Use and Mineral Development Accommodation Act: Easy Easements for Mining Interests*, 42 AM. U. L. REV. 607, 613-18 (1993) (detailing the history of severed mineral ownership and noting that, by 1990, the concept of estate severance was well-established in the United States).

417. CAUDILL, *supra* note 29, at 65.

Supervisors to represent them, as their attorney or accountant.<sup>418</sup> Coal companies kept assessments on the mineral rights, real estate, and miners' homes low to minimize their taxes.<sup>419</sup> Consequently, the government itself was required to meet the demands of the rising populations servicing the mines by providing roads, schools, and postal services.<sup>420</sup> Yet, as the counties had insufficient tax revenue to properly meet these demands, counties began to issue bonds to pay for roads and schools, thereby creating a treacherous debt load from 1914 to 1929.<sup>421</sup> This public debt caused the Depression to hit Appalachia harder than other regions, and recover more slowly.<sup>422</sup>

In 1967, the owners of ninety percent of the land in Clairfield, Tennessee, paid only four percent of the taxes.<sup>423</sup> This situation has been remedied in many counties today, with twenty-nine coal seams identified as taxable by the Buchanan County, Virginia Commissioner of Revenue.<sup>424</sup> Now, although the coal seams generate revenue, strip mining and other mining effects can remove real estate from the tax base, thereby lowering the collected revenues of towns and counties already stressed.<sup>425</sup> If property is strip-mined or otherwise devastated by subsidence or detritus from coal operations, the surface owner may abandon it and refuse to pay taxes, unconcerned that the authorities may take the land in a tax sale.<sup>426</sup> Abandoned mines are a common sight throughout Appalachia, and this wasted land

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418. See CAUDILL, *supra* note 13, at 126 (noting that local politicians were regularly paid by the coal companies—developing a direct, but largely ignored, conflict of interest).

419. See *id.* (alleging that the coal companies suggested the value of their property worth and how much of it was to be taxed).

420. See *id.* at 126-27 (decrying the fact that governments over-taxed individual citizens to meet the burden of essential local services, while coal companies retained low property taxes).

421. See *id.* at 129 (adding that the counties could barely pay the interest on the bonds with such low taxes on coal companies, let alone affect the principal).

422. See *id.* at 167 (stating that the principal causes and effects of the Depression had been getting progressively worse in Appalachia long before the stock market crash of 1929).

423. See NORRIS & CYPRES, *supra* note 340, at 60 (describing the recollections of Marie Cirillo, a member of Alliance for Communities Service in Clairfield, Tennessee, of the results of a study conducted by law students at Vanderbilt University in 1967).

424. Telephone Interview by Michael Platt, Associate Articles Editor for the American University Law Review with Vicki M. Davis, Office of the Commissioner of Revenue, Buchanan County, Virginia (Feb. 22, 2002).

425. See Huffman, *supra* note 355, at 216, 229 (noting that strip mining is a process that results in the partial or total destruction of the surface land, leaving it useless and valueless); see also *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707, 711 (3d Cir. 1985) (noting one purpose of a Pennsylvania statute regulating subsidence and bituminous coal mining was to preserve a tax base for municipalities and enhance the economic welfare of the state).

426. CAUDILL, *supra* note 13, at 317.

symbolizes lost revenue to the towns and lost value to the farmers who could have made use of the surface.<sup>427</sup>

## X. IMPACT ON EDUCATION

Because the wages paid to miners are higher than most available alternative employment, residents in the Appalachian coal fields are discouraged from seeking higher education.<sup>428</sup> Minimum wage for an inexperienced miner employed by the Consol Energy mine in Oakwood, Buchanan County, Virginia, was \$60,000 in 2001, more than double the average wage in any other industry in the area.<sup>429</sup> In the first quarter of 2001, the average weekly wage in Buchanan County, Virginia, was \$559 for an annual average of \$29,068.<sup>430</sup> This average is skewed because mining is the top employment category, involving 23% of the area jobs.<sup>431</sup> The average mining weekly wage was \$973, nearly double the average of all industries.<sup>432</sup>

Fewer residents in the coal fields finish high school or attend college, in part because of the financial opportunities in the mines.<sup>433</sup> According to the 1990 census, in Leslie County, Kentucky, only 6.6 percent of the population over the age of twenty-five had attained a Bachelor's degree or higher, and 40.4% were high school graduates.<sup>434</sup> Pike County, Kentucky, had only 7.7% college graduates

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427. See Laurence Hammack, *Prison Profits Replace a Waning Coal-Mining Industry*, ROANOKE TIMES, Dec. 9, 2001, at A1 (noting that the "landscape of far Southwest Virginia is replete with reminders of how coal was once king," including the common sight of abandoned mines).

428. Miners were not always paid high wages. Prior to the unions, miners often worked long hours for only a few dollars per day, not enough to feed a family. PETERSON, *supra* note 3, at 74-75. The unions also caused problems for the miners, making promises that were not fulfilled and causing battles between workers and employers. The union wars are too extensive a topic to be adequately covered in this article. For an excellent discussion, see *id.* at 24-94.

429. Interview with Terry Suder, Mine Superintendent, Consol Coal Co. (Aug. 8, 2001).

430. See Virginia's Electronic Labor Market Access, Here's Average Weekly Wage Information for Buchanan County (performing data research for Buchanan County, Virginia), at <http://www.velma.vec.state.va.us/vajs/front.asp> (last visited Feb. 22, 2002).

431. *Id.*

432. *Id.*

433. See Steve Myers, *Mining Ushered in Era of Rural Dependence*, CHARLESTON DAILY MAIL, May 3, 1999 (arguing that the existence of company coal towns, catering to most necessities of daily life, prevented a prosperous middle class from developing in Appalachia, which resulted in low levels of higher education and training), at <http://www.dailymail.com/static/specialsections/lookingback/lb05031.htm> (last visited Feb. 22, 2002).

434. U.S. BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK 232 (12th ed. 1994).

and 50.2% high school graduates.<sup>435</sup> In McDowell County, West Virginia, only 4.6% were college graduates and 42.3% were high school graduates.<sup>436</sup> In Buchanan County, Virginia, only 6.4% were college graduates and 42.5% high school graduates.<sup>437</sup> These statistics are in stark contrast to the national averages of 20.3% college graduates and 75.2% high school graduates in 1990.<sup>438</sup> Other coal counties in Appalachia have similar statistics, with a little more than one-third as many college graduates and about two-thirds as many high school graduates as the national average.<sup>439</sup>

The problems of under-education in Appalachia have existed for decades.<sup>440</sup> In 1972, 21.3% of the population of McDowell County, West Virginia was illiterate.<sup>441</sup> At that time, the average mountaineer had only a sixth grade education and the illiteracy rate in the Appalachians was the highest in the nation.<sup>442</sup> Although the coal companies promised company schools in the coal towns, the teachers often lacked even a high school diploma.<sup>443</sup> The schools have improved, but the dependence on coal has left the region with insufficient career opportunities even when education is available.<sup>444</sup>

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435. *Id.*

436. *Id.* at 624.

437. *Id.* at 582.

438. *Id.* at 6.

439. Of the counties I have identified as constituting the Appalachian region, *see supra* note 2, the unweighted average percentage of persons over the age of twenty-five who have attained an education level of high school or better, according to the 1990 Census, is 49.9%, which is only two-thirds the national average. The unweighted average percentage of those over the age of twenty-five who have received a Bachelor's degree or higher is 7.6%, which is about one-third the national average. U.S. BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK 218, 323, 498, 512, 582, 596, 610, 624 (12th ed. 1994).

440. See Amy C. Bushaw, *Small Business, Local Culture, and Global Society: Some Examples From the United States*, 5 J. SMALL & EMERGING BUS. L. 223, 235 (2001) (noting that the Appalachian region is "marked by low levels of education, high unemployment, early marriages, high rates of infant mortality, and lower than average life expectancies").

441. See PETERSON, *supra* note 3, at 6 (recounting the results of a survey conducted by the Council of Southern Mountains, West Virginia Branch, McDowell County Chapter, Inc., an organization established under President Johnson's War on Poverty). At the same time, the national illiteracy rate was 7.8%. *Id.*

442. See *id.* at 21-22 (explaining that the nature of the land in Appalachia forced its settlers to live under pioneer conditions even into the twentieth century, leaving them generally "easy to exploit, easy to promise to, and easy to betray"; one such promise being the promise of education).

443. See *id.* at 22 (describing the promise of education as merely one of several betrayals perpetrated by coal companies, who under-financed schools and supplied inadequate teachers).

444. See generally Myers, *supra* note 433 (stating that there were relatively few local landowners and that the coal companies owned the towns). As a result, independently owned small businesses never took hold and a prosperous middle class never developed. *Id.* Therefore, people depended on corporate interests to sustain their livelihood, leaving few career opportunities. *Id.*

When a vocational school opened in McDowell County in the 1960s, ninety-five percent of its graduates left the Appalachian region because of a lack of employment opportunities at home.<sup>445</sup>

## XI. REPARATIONS

The federal government has poured a substantial amount of money into Appalachia in the form of disability, food stamps, black lung benefits, and other programs.<sup>446</sup> These funds, however, have not significantly improved the lives of Appalachian residents because these benefits have been paid to individuals.<sup>447</sup> The author suggests that funding provided to community and local government projects would have a greater impact, and that it is time for a more comprehensive program to lift this region up to the level of the rest of the country.

The author proposes federal legislation to pay reparations to the residents of Appalachia, who lost their land, health, and standard of living, all for the production of coal.<sup>448</sup> Reparations provide a remedy

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445. See PETERSON, *supra* note 3, at 9 (noting this was part of an exodus, during the 1960s, of twenty-eight percent of the population of McDowell County, West Virginia, due to lack of jobs). But see Andrew M. Isserman, *Socio-Economic Review of Appalachian Economy*, 16 (Nov. 1996) (noting that every one of a group of fifty-four growing high wage industries are present in Appalachia), available at <http://www.arc.gov/research/pdf/evolve.pdf> (last visited Feb. 22, 2002). Isserman's report, provided by the Appalachian Regional Commission, states that "[t]he presence of the growing, high-wage industries in Appalachia is encouraging testimony that the hoped for diversification of the Appalachian economic base and its more favorable integration into the national economy is occurring." *Id.* at 19. Isserman concludes that while much of Appalachia is growing faster, economically, than much of the nation, there are still parts lagging behind, especially in Central Appalachia. *Id.* at 23.

446. See Isserman, *supra* note 445, at 2 (reporting that since 1964, more than two thousand miles of highways have been completed to reduce isolation, and \$14 billion has been spent to help Appalachia "achieve a diversified economic base and a competitive, self-sustaining economy"); see also 7 U.S.C. §§ 2011-2036 (1994 & Supp. V 1999) (outlining food stamp program); 30 U.S.C. §§ 901-945 (1994) (outlining black lung benefits).

447. See Lawrence E. Wood & Gregory A. Bischak, *Progress and Challenges in Reducing Economic Distress in Appalachia: An Analysis of National and Regional Trends Since 1960* 1 (Jan. 2000) (finding that about one-quarter of the counties designated by the Appalachian Regional Commission as "distressed" in 1960 remain distressed today), available at <http://www.arc.gov/research/pdf/progress.pdf> (last visited Feb. 22, 2002).

448. See Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657, 1660 n.8 (1999) (reserving the term "reparations" for "payments made by governments to injured parties who have no reasonable expectation of recovery in court"). Professor Levmore speaks of payments that are made long after the harm is suffered and long after "a regretted legal regime has been changed." *Id.* at 1660. While some courts, through the passage of time, regret, and little government opposition might order the government to make reparative payments, Professor Levmore states that the recent notable payments have all been legislative in origin. *Id.* at 1686 n.66. Compared to the domestic context, international reparations (or war reparations) are "state-to-state political remedies for violations of international



to a group for injustices which have been perpetrated against them.<sup>449</sup> The focus of reparations is generally on past harm,<sup>450</sup> although the evidence of current distress of the Appalachian region should provide additional entitlement to financial assistance. Reparations have been paid to Native Americans,<sup>451</sup> Hawaiians,<sup>452</sup> Holocaust victims,<sup>453</sup> and Japanese Americans incarcerated during World War II.<sup>454</sup> Studies are now underway, and suits expected, to demand reparations for the descendents of former African slaves.<sup>455</sup> All of

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law." *Id.* at 1691. See also K. Lee Boyd, *Are Human Rights Political Questions?*, 53 RUTGERS L. REV. 277, 298-99 (2001) (arguing that war reparations differ significantly from the judicial remedies sought for violation of international human rights laws). Professor Boyd states that "the purpose of war reparations is to discharge state responsibility" for breach of international law. *Id.* at 299. Unlike judicial remedies, war reparations occur as a result of the political process—a product of international negotiations that result in legislation much like treaty provisions. *Id.* at 299-300.

449. See Hall, *supra* note 12, at 11 (describing the purpose of reparations in the context of compensating African Americans for a long history of oppression and discrimination).

450. See Levmore, *supra* note 448, at 1658.

451. See 25 U.S.C. §§ 1401-1408 (1994) (appropriating funds for payment of judgments assessed by the Indian Claims Commission); 43 U.S.C. §§ 1601-1629h (1994 & Supp. V 1999) (providing for settlement of all land, hunting, and fishing claims of Alaskan native groups); see also Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 484 n.22 (1998) (describing individual reparative payments made to Native American tribes).

452. See S.J. Res. 19, 103d Cong., Pub. L. No. 103-150, 107 Stat. 1510, 1513 (1993) (apologizing for the overthrow of the Kingdom of Hawaii); Kimberly A. Costello, Note, *Rice v. Cayetano: Trouble in Paradise for Native Hawaiians Claiming Special Relationship Status*, 79 N.C. L. REV. 812, 832 (2001) (indicating that "[f]ederal funding and grants to Hawaiian natives have exceeded more than \$440 million in recent years").

453. See Levmore, *supra* note 448, at 1690 n.83 (noting that the West German government enacted legislation in the 1950s authorizing payments to Holocaust survivors and Israel).

454. See 50 App. U.S.C. §§ 1989b-1989b-9 (1994) (authorizing restitution for the internment of Japanese Americans during World War II); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 450-51 (1998) (describing the Civil Liberties Act of 1988 and the reparations paid to Japanese Americans).

455. See Anthony Gifford, *The Legal Basis of the Claim for Slavery Reparations*, HUM. RTS., Spring 2000, at 16 (proposing a legal framework for African Americans to assert a claim for reparations, based on a Crime Against Humanity theory); Hall, *supra* note 12, at 11 (exploring underlying issues of race in the United States using the case of reparations for African Americans); Tuneen E. Chisolm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 682 (1999) (arguing that an "equitable society" cannot be achieved without paying reparations to African Americans, and assessing the Civil Liberties Act of 1988 as a precedent for race-based reparations); Donald Aquinas Lancaster, Jr., Comment, *The Alchemy and Legacy of the United States of America's Sanction of Slavery and Segregation: A Property Law and Equitable Remedy Analysis of African American Reparations*, 43 HOW. L.J. 171, 172-73 (2000) (arguing that the U.S. government, through its common law and Supreme Court decisions, ratified the practice of slavery and segregation, and suggesting several legal theories under which African Americans could assert a reparations claim against the federal government). See generally Randall Robinson, *THE DEBT: WHAT AMERICA OWES BLACKS* (2000)

these movements for reparations provide useful precedents for how reparations can be used as a means to address past wrongs. Although the injustices inflicted upon these groups vary in degree and kind, in each situation, physical and financial harm was inflicted upon an identifiable group of people for the benefit of others.

During World War II, after the attack on Pearl Harbor, the U.S. government imprisoned more than 120,000 Japanese Americans in internment camps.<sup>456</sup> At the end of the war, most of those imprisoned were paid by the government only \$25 and train fare when they were released.<sup>457</sup> The Japanese internees sought reparations through the federal government. Fifty years later, the federal government apologized to the Japanese American community, and paid \$20,000 to each of 65,000 people in reparations.<sup>458</sup> The Civil Liberties Act of 1988<sup>459</sup> set an important precedent by acknowledging that Japanese Americans were harmed as a group and therefore should be compensated as a group, regardless of the length of individual internment or proof of actual harm.<sup>460</sup> Surviving internees and their next of kin are eligible to receive reparations.<sup>461</sup> This public recognition of the suffering of a group provides a chance for victims to mourn their loss and acts as a reminder that abuses of human dignity cannot be ignored.<sup>462</sup>

The Appalachian mountaineers and their descendants are equally deserving of reparations. Whereas Japanese Americans were confined by the U.S. government on the basis of their national origin, Appalachian miners suffered a slow and agonizing death from Black

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(discussing the arguments in favor of paying reparations to African Americans).

456. See John Tateishi & William Yoshino, *The Japanese American Incarceration: The Journey to Redress*, HUM. RTS., Spring 2000, at 10 (tracing the history of Japanese American reparations).

457. See Westley, *supra* note 454, at 450 (describing the minimal assistance initially given to Japanese Americans who had been interned during World War II, pursuant to the Japanese-American Evacuation Claims Act of 1948, 50 App. U.S.C. §§ 1981-1987 (1994)).

458. See *id.* at 451 n.86 (describing the reparative payments made to Japanese Americans under the Civil Liberties Act of 1988, totaling \$1.25 billion).

459. 50 U.S.C. App. §§ 1989b-1989b-9 (1994).

460. See Westley, *supra* note 454, at 451 (arguing that while there were some deficiencies in the government's implementation of the Civil Liberties Act of 1988, "the importance of the legislation lies in the precedent established for compensation of wronged groups within the American system").

461. See *id.* at 451 n.88 (noting the fact that compensation to Japanese Americans was based on group membership, a crucial and groundbreaking aspect of the Civil Liberties Act of 1988).

462. See *id.* at 452 (suggesting that such public recognition also allows for "[m]emorialization" which "symbolizes respect" for loss and injustice suffered); Yamamoto, *supra* note 451, at 478 (1998) (describing the profound benefit reparations provided to many Japanese-American internees who had internalized blame and doubt regarding discriminatory actions).

Lung disease, or died in mining disasters, and therefore should be compensated. The Japanese Americans' internment was intended to benefit all Americans by protecting the national security. Similarly, the harm inflicted on the Appalachian mountaineers was intended to benefit all Americans by contributing to the industrial development of this country. Governmental action was involved in both situations, although less directly in the case of the Appalachian mountaineers. The government contributed to the plight of the mountaineers by granting mining permits, broadly interpreting deeds and laws to benefit the coal operators, denying liability against coal operators in the courts, and neglecting to enforce stringent health and safety regulations in the mines.

The German government, German industry, and the United States formed a joint Foundation to provide a fund of \$10 billion (U.S.) in exchange for the dismissal of pending and future Holocaust slave labor claims cases in U.S. courts.<sup>463</sup> A U.S. District Court in New York approved a settlement agreement between two Swiss Banks and Holocaust victims that established a fund of \$1.25 Billion (US) in exchange for the victims releasing the banks and other industry from liability.<sup>464</sup> The parties to the Foundation agreement<sup>465</sup> recognized the legal hurdles faced by the victims, including "justiciability, . . . statutes of limitation, jurisdictional issues, forum non conveniens, difficulties of proof, and certification of a class of heirs."<sup>466</sup> Thus, the Foundation Agreement provided an alternative to the courts by which the harms suffered by the Holocaust victims could be remedied.

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463. See Agreement Concerning the Foundation "Remembrance, Responsibility, and the Future," July 17, 2000, U.S.-F.R.G., 39 I.L.M. 1298 (entered into force Oct. 19, 2000) (establishing the Foundation, in lieu of the courts, as the exclusive recourse for all pending and future claims against German companies arising from the Holocaust and WWII); see also Madeline Doms, *Compensation for Survivors of Slave and Forced Labor: The Swiss Bank Settlement and the German Foundation Provide Options for Recovery for Holocaust Survivors*, 14 TRANSNAT'L L. 171, 193-97 (2001) (describing the creation and terms of the Foundation as established to make payments to those who provided slave labor during the Holocaust).

464. See *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 143-44 (E.D.N.Y. 2000) (compensating slave labor survivors, refugees refused entry to Switzerland, persons who deposited assets in Swiss banks, and survivors whose assets were stolen); see also Doms, *supra* note 463, at 174 & n.24 (emphasizing that the settlement agreement was extraordinary, as most other claims had been dismissed on various procedural grounds).

465. Agreement Concerning the Foundation "Remembrance, Responsibility, and the Future," July 17, 2000, U.S.-F.R.G., 34 I.L.M. 1298 (entered into force Oct. 19, 2000).

466. See *id.* at 1304, annex B, para. 8 (addressing additional equitable considerations, including the necessity for speedy resolution given the age of the plaintiffs, and difficulties faced by the heirs of the deceased).

In discussing the reparations to the Holocaust victims, one scholar has commented, "when a State or government has through its official organs—its laws and customs—despoiled and victimized and murdered a group of its own inhabitants and citizens on the basis of group membership, that state or its successor in interest has an unquestionable moral obligation to compensate that group materially on the same basis."<sup>467</sup> By enforcing the broad form deeds and otherwise favoring the coal companies, the U.S. government, through the courts, has despoiled and victimized the Appalachian mountaineers and therefore has a moral obligation to compensate them.<sup>468</sup>

The Lakota tribes received a judgment against the United States now estimated to be worth over \$315 million, although they have refused the money.<sup>469</sup> The Lakota instead have demanded the return of the Black Hills to Sioux tribal authority.<sup>470</sup> Royalties amounting to \$300 million per year are owed to other Native Americans for mining, grazing, oil drilling, and other activities on land owned by Native Americans.<sup>471</sup> Royalties for use of the Native American land are required to be paid into a trust fund managed by the Department of the Interior.<sup>472</sup>

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467. Westley, *supra* note 454, at 456. The author describes the principle of reparations law following the Luxembourg Agreements in September of 1952, and the impact of Chancellor Konrad Adenauer's view of moral duty to compensate for losses suffered under the previous regime. *Id.* at 453-57. This view was remarkable, the author notes, as international law did not require Germany to make reparations, nor did the Allied Powers put pressure on the Chancellor to make reparations. *Id.* Nonetheless, the Luxembourg Agreements became the basis of legislation that provided reparations to Israel, to the Conference on Jewish Material Claims, and to individuals. *Id.*

468. See *supra* notes 14-26 (chronicling the use of the broad form deed, which granted not only mineral rights but extensive rights to build, excavate, or damage lands without liability, and the refusal of the courts to offer remedies).

469. See John P. La Velle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning The Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RESOURCES J. 40, 67-68 (2001) (explaining that "[w]hat appeared to non-Indians as an expensive and generous settlement of an old land claim was viewed by the Lakota as just another colonial buyout of Indian title for which the legal system created a complex justification to legitimate the sale or expropriation").

470. See *id.* (describing the importance of land in Native American culture, particularly where, as here, the land in question is sacred and plays a significant role in cultural identity).

471. See *Report on the National Academy of Public Administration: The Bureau of Indian Affairs: Hearing Before the Senate Comm. on Indian Affairs*, 106th Cong. 559, at 97-98, exh. 2 (2000) [hereinafter *Hearing*] (statement of Mona Infield, Supervisory Computer Specialist, Dep't of the Interior, Office of Info. Res. Mgmt.) (detailing checks process, amounts paid, number of account and tract holders, and a managed balance of \$350 million).

472. See *Hearing, supra* note 471, at 88-89 (statement of Mona Infield) (describing the Office of Information Resource Management's primary function as ensuring that

The Appalachian land has been destroyed by strip mining, subsidence, acid rain, flooding, and coal dust, and the return of those lands to their rightful owners is not possible.<sup>473</sup> Monetary reparations, sufficient to begin to repair the damage caused by mining, are justified and necessary to repair this historical injustice.

Federal funding and grants exceeding \$440 million have been paid to Hawaiian natives.<sup>474</sup> These reparations were deemed justified by the dispossession of native land and attacks on cultural practices.<sup>475</sup> Reparations for Hawaiians are used to create jobs, training, education, and improve health programs, similar to the reparations suggested for the Appalachian mountaineers.<sup>476</sup> This federal money “trickles through the economy, improving conditions for everyone.”<sup>477</sup> The Appalachian mountaineers similarly need funds for education, health care, and housing as well as the restoration of their environment.

Whether reparations are considered compensation to equalize the status of the Appalachians, or reparations to pay for a historical injustice, the Appalachians are owed reparations by the beneficiaries of coal. The federal government should grant reparations to the Appalachians, following the tradition of funds granted to the Hawaiians, Native Americans, Japanese Americans, and other groups. The funding for these reparations should come from the coal companies who have long benefited from their exploitation of the

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payments are made to trust beneficiaries, who “rely on [the] funds to feed, clothe and house themselves”).

473. See *supra* notes 88-215 (describing the destruction of lands in Kentucky, Tennessee, Virginia, and Pennsylvania, and the inability of landowners to win redress in the courts).

474. See Pat Omandam, *Hawaiian Funding Tops \$440 Million*, HONOLULU STAR-BULLETIN, Mar. 20, 2000 (outlining eight programs providing resources including family-based and gifted education programs, employment and vocational programs, elder programs, revolving loan funding, and native languages, faith, and cultural practice programs), available at <http://starbulletin.com/2000/03/20/special/story3.html> (last visited Apr. 1, 2002); Costello, *supra* note 452, at 832 (noting that virtually all such programs include a requirement that beneficiaries are of native Hawaiian ancestry).

475. See generally Costello, *supra* note 452, at 832-33.

476. Jan TenBruggencate, *The State of the Hawaiian*, THE HONOLULU ADVERTISER, Jan. 7, 2001, available at <http://www.honoluluadvertiser.com/specials/stateofthehawaiians/index.html> (last visited Apr. 24, 2002). See also Omandam, *supra* note 474 (describing such programs as being at risk after the U.S. Supreme Court ruling in *Rice v. Cayetano*, 528 U.S. 495 (2000), striking down Hawaiian Affairs, the agency which administers programs designed to benefit Hawaiian citizens who are descendants of native Hawaiians who were once sovereign peoples); Costello, *supra* note 452, at 832-34 (noting that the American overthrow of the Hawaiian government and seizure of land has had documented detrimental effects on native Hawaiians in those areas addressed by the targeting programs, whose ancestry requirements, most agree, served remedial and reparative effects).

477. TenBruggencate, *supra* note 476.

coal fields. Tax revenues collected from the coal operators should be earmarked for use by the Appalachian region.

Reparations should not be paid to individuals.<sup>478</sup> Instead, reparations should be paid to the local town and county governments to develop the currently insufficient infrastructure of roads, passenger rail services, airports, flood control projects, dams, and other needed services as determined locally. A significant portion of the funds should be designated for education, to provide alternative career paths and diversity in industry to eliminate the dependence on coal.

Harry Caudill has suggested that tourism is one approach for the revitalization of Appalachia. Caudill argues that the beautiful green hills and abundant streams can be converted into a tourist attraction for the northeast metropolitan areas, with dams to make streams into lakes.<sup>479</sup> Several streams have already been dammed, creating mountain-top lakes available for boating and fishing.<sup>480</sup> White water rafting excursions have been added to attract tourists.<sup>481</sup> Although a limited number of tourists have been attracted to Appalachia, the lack of convenient airports, good highways, and passenger train service has limited the area's attraction to tourists.<sup>482</sup>

The town of Grundy, Buchanan County, Virginia is an example of the type of projects that could revitalize Appalachia.<sup>483</sup> A project is underway to move the commercial center of the town to higher land to avoid the frequent flooding caused by the mining operations up

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478. Rep. John Conyers, Jr. (D-Mich.) reintroduced a bill, as he has done in every Congress since 1989, in the 107th Congress entitled "Commission to Study Reparations Proposals for African Americans Act." See H.R. 40, 107th Cong. (2001):

Because it is my belief that Blacks have been and are harmed as a group, that racism is a group practice, I am opposed to individual reparations as a primary policy objective. Obviously, the payment of group reparations would create the need and opportunity for institution-building that individual compensation would not. Additionally, beyond any perceived or real need for Blacks to participate more fully in the consumer market—which is the inevitable outcome of reparations to individuals—there is a more exigent need for Blacks to exercise greater control over their productive labor—which is the possibility created by group reparations.

479. See CAUDILL, *supra* note 13, at 386 (noting that as the American population grows and wealth increases, tourism increases to rural areas).

480. See Lynda McDaniels, *Ecotourism Takes Off in the "Heart of Appalachia,"* APPALACHIA, May-Aug. 2001 (observing that "tourism is the fastest growing industry in Southwestern Virginia, with an average annual growth rate of 17 percent").

481. See *generally* Virginia is for Lovers, Official Virginia Tourism Website, at <http://www.virginia.org> (last visited July 9, 2002).

482. *Id.*

483. See Francis X. Clines, *Town Stakes Out Future On Higher Ground*, N.Y. TIMES, Aug. 7, 2001, at A1 (noting that as the county seat, Grundy hopes to serve as an example to its region, where coal mining is diminishing and unemployment rising).

river in West Virginia.<sup>484</sup> The Grundy project uses combined funds of the U.S. Army Corps of Engineers and the Virginia Department of Transportation.<sup>485</sup> For a total cost of \$177 million, the project includes a new four-lane highway, destruction of the downtown area, rebuilding a new downtown commercial center, and flood walls.<sup>486</sup> The new four-lane highway will provide easier access to this remote town, encouraging businesses to relocate. The destruction of dilapidated and flood-damaged buildings will eliminate the depressing appearance. The newly rebuilt downtown will provide businesses with a modern, planned environment with adequate parking, walkways, and facilities to encourage customers to make Grundy a destination.<sup>487</sup> The hope is that Grundy will become an incubator for high-technology businesses, with the new super-fast wireless internet technology.<sup>488</sup>

Additionally, Grundy has been uplifted by the opening of the Appalachian School of Law in 1997.<sup>489</sup> Using funds provided by the county and local individual benefactors, the school currently enrolls 250 students, providing reduced or free tuition for local residents.<sup>490</sup> The school obtained provisional accreditation by the American Bar Association in 2001.<sup>491</sup> A legal career is now possible for people who were formerly forced into mining or leaving.<sup>492</sup>

Other towns in Appalachia could follow the Grundy example, using federal reparations funding to build universities, colleges, or trade schools to encourage career alternatives. Pikeville, Kentucky has already successfully completed a flood control project.<sup>493</sup> An \$80

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484. *Id.* (describing the 1977 flood which killed three people and caused \$15 million in damages).

485. *See id.* (noting that both agencies were operating under federal mandates, with the Army Corps of Engineers charged with flood control, and the Department of Transportation charged with creating a four-lane highway in the area).

486. *See id.* (adding that the combined project saves millions of dollars in federal and state funds).

487. *Id.*

488. *See* Craig Timberg, *Flood-Plagued Town Tries Upward Mobility*, WASH. POST, Dec. 28, 2000, at A1 ("[L]eaders imagine nothing less than a total transformation, as a dingy downtown born of the 19th Century leaps straight to the 21st Century . . .").

489. *See* Laurence Hammack, *Buchanan County Seeks Regeneration*, ROANOKE TIMES & WORLD NEWS, Apr. 15, 2001, at B1 (noting that once the school reaches full enrollment of 350, it is expected to inject more than \$10 million per year into the local economy).

490. *See* Appalachian School of Law, Financial Assistance, at <http://www.asl.edu/Financial%20Aid/financialaid.htm> (last visited June 9, 2002).

491. *See* Information About Accreditation, available at <http://www.asl.edu/miscinfo/accreditation.htm>.

492. Hammack, *supra* note 489, at B1 (quoting community leaders and citizens who felt the town had no future without development efforts).

493. Pat Mestern, *Country Music Highway Keeps it All Kickin'*, NAT'L POST, Dec. 8, 2000, at E10 (describing the Pikeville Kentucky Cut-Thru Project as the most

million project was completed in 1987, re-routing the Levisa River and creating 400 acres of usable land.<sup>494</sup> As a result, Pikeville was recently included in The 100 Best Small towns in America.<sup>495</sup> Floods caused by mining affect many Appalachian towns, and these towns need funds to replace damaged bridges, roads, and buildings, and relocate to higher ground. Improved highway access and attractive towns would assist in attracting tourists, businesses, and students to the area. Tax revenues from coal should be designated to pay for these improvements, but all taxpayers owe a debt to the Appalachian mountaineers for their contribution to the industrial development of this country.

#### CONCLUSION

Supplying coal to power the industry of this nation has taken a toll on the land and residents of the coal fields in Appalachia. The extraction of coal has made a few people and corporations wealthy, while consigning the majority of residents to poverty, illness, and ecological devastation. The federal government has set a precedent by paying reparations to disparaged groups, and should do as much for the Appalachian mountaineers who have suffered this historical injustice. Reparations should be delivered to town and county governments to improve education, transportation, and infrastructure. Mine owners, as beneficiaries of the coal, should pay for such reparations. Payments from all taxpayers are also appropriate, as all U.S. taxpayers benefited from the Appalachian mountaineers' contribution to the industrial development of this country. Without such funding, Appalachia will continue to be an eyesore and embarrassment to the rest of the nation. Reparations could restore these beautiful green hills to their original majesty for the benefit of all Americans.

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impressive "engineering marvel" along the section of U.S. Route 23 between Ohio and Virginia known as the Country Music Highway).

494. See *id.* (explaining that the two kilometer channel cut through the mountain and diverted a fork of the Big Sandy river and required rerouting a railroad).

495. See NORMAN CRAPMTON, THE BEST SMALL TOWNS IN AMERICA: HOW TO FIND A GREAT LITTLE PLACE AS YOUR NEXT HOME BASE (2002).