

Considering Mineral Rights in Virginia

Description

I. Geographic scope of minerals development in Virginia

It is easy to think of mineral rights issues as geographically centered in, if not limited to, southwestern Virginia. But, both historically and in the present day, minerals have been found, claimed, and produced throughout the Commonwealth. Title examiners, agents, and insurers must account not only for active minerals development, but also inactive historical claims. For us, history is more than anecdote.

Iron was discovered near Jamestown before 1611.^[1] Production flourished after the American Revolution and during the Civil War *in belts of rich iron ore along the flanks of the Blue Ridge mountains, and in the sandstones of the Valley and Ridge Province* through 1942.^[2] Likewise, *Virginia lead deposits played important roles in both the Revolutionary and Civil wars.*^[3]

Like lead, zinc was produced in Virginia from the 1700s through 1981.^[4] Copper was *widely mined in the Piedmont and Blue Ridge provinces, and locally in the Valley and Ridge Province* from the mid- to late-1700s through 1947.^[5] *Gold was mined extensively in Virginia*, from Fairfax County to Buckingham County, prior to the 1849 California gold rush, including Spotsylvania County as early as 1804 and Fauquier County as early as 1818.^[6] Even after 1849, *[c]ommercial gold mining continued on a smaller scale* through 1947.^[7] Manganese was mined as early as 1834 in Frederick County and as recently as 1959 in Augusta County.^[8]

Coal was discovered 14 miles west of Richmond in 1699.^[9] It was produced from the Richmond Basin Coalfield for the better part of two centuries and from coal beds located in Montgomery and Pulaski Counties through the 1950s. ^[10] Production continues, today, in southwest Virginia, along with natural gas.^[11] Natural gas leases also appear to have proliferated in the coastal plain region at least through the 2010s.^[12]

In 2023, aggregate (crushed stone, construction sand, and gravel) was produced from 227 mines located in 49 counties, primarily in the coastal plain region.^[13] Today, fourteen rare earth elements, deemed *critical minerals* by the United States Department of the Interior, not only have been located in Virginia, but also *are considered to have high potential for economic commercial development.*^[14]

Since mineral interests and minerals development are spread throughout the Commonwealth, all title abstractors and examiners, title insurance agents, attorneys, and anyone else interested in real property title issues should find it useful to be aware of the matters set out below.

II. The basic problem

In Virginia,

[O]wnership of coal or other underlying mineral may be separated from the surface by a deed of record . . . thereafter there will be two estates in the same land . . . where such separation has taken place the owner of the surface of the land and the owner of the minerals under it are neither joint tenants nor

tenants in common. They are not the owners of undivided interests in the same subject, but are the owners of distinct subjects of entirely different natures. [15]

Title to minerals may be severed from title to the surface estate by deed or by lease. [16] Generally, a lease will be limited to a term of years and require that royalties be paid during the term of the lease. [17]

Frequently, deeds that convey title to the surface estate, but not title to minerals, will use phrases such as *less and except title to minerals* or *less and except minerals previously severed* or a more specific designation such as *less and except rights reserved (or conveyed!) in the instrument recorded in Deed Book ABC at page 123* to reflect and reveal that minerals interests have been severed from ownership of the surface estate. However, the failure of a deed made after severance to acknowledge the severance does not invalidate the severance. The Virginia Supreme Court has held that possession of the surface, even under a deed which did not acknowledge a prior minerals severance, *did not constitute possession of the mineral estate which had been severed from the surface.* [18]

As time goes on, an omitted reference to a severance can challenge title abstractors and examiners, title insurance agents, and attorneys. While it is . . . *well settled that there may be a severance of the mineral estate from the surface estate, it is also elementary that a conveyance of land without reservation or exception embraces the underlying minerals.* [19] If the severance instrument was recorded outside of the search period, and no deed within the search period indicates that mineral interests were severed, then the false conclusion could be reached that the legal description found in the most recent deed comprises title to both surface and subsurface rights. While *[a] grantor must be considered to have intended to convey all that the language he has employed is capable of passing to his grantee*, no grantor can convey more than he owns. [20]

Some instruments that convey either the mineral or surface estates may do so ambiguously. [21] If the bounds of property conveyed in a deed cannot be determined from the language of the deed itself, then prior deeds in the chain of title, other parol evidence, and various rules of construction may be used to resolve the ambiguity. [22] One such rule is: *There is a conclusive presumption that all property not embraced within the description of a deed is excluded from it.* [23] This particular rule points to two other interesting conclusions: Not only may rights or title to separate surface or subsurface materials, or to resources located at different depths, be conveyed to different grantees, but also any unconveyed mineral rights remain the property of the owner of the surface estate. [24]

Unfortunately, as noted above, disputes may arise just as easily between vertical neighbors as between horizontal neighbors. Mineral interests and surface interests may literally sit beside, on top of, or be intermingled with each other. [25] When disputes arise between competing owners, generally, *there is no Virginia statute giving priority to any of the competing interests.* [26]

Thomas v. Carmeuse Lime & Stone, Inc., 642 Fed. Appx. 253 (4th Cir., 2016), which is an unpublished decision, provides a good example of how these disputes may develop. In *Thomas*, *stone . . . rock . . . and particularly limestone* were severed from the surface estate in 1849, a year that is well outside most title search periods. [27] While that deed authorized development of the severed materials, it also prohibited development *within the enclosure of the yard attached to the said . . . present dwelling house*. [28] The exact structure identified as the *present dwelling house* and the scope of its surrounding enclosure, what techniques could be used to get at the minerals, and the geographic limits of the grant were at issue in the 2016 appeal. [29] *Thomas* demonstrates that minerals severances made over a

century ago can still be enforced; disputes may arise not only as to title to minerals, but also as to the extent to which the surface may be used or disturbed to develop the mineral estate; title to the mineral estate may not be coterminous with surface boundaries; mineral rights may include interests in many surface or subsurface materials, not just fossil fuel resources or metals; and resolving such matters may not only be difficult and complicated, but also costly.

Va. Code §§ 45.2-400 and 45.2-401 appear to authorize a procedure by which unknown or abandoned title to minerals located east of the Blue Ridge Mountains may be consolidated with title to the surface estate.

III. More problems

Many abandoned mines present physical and environmental hazards.^[30] Since title to severed mineral interests, like title to land generally, is not extinguished by time, abandoned mines are physical reminders that severed mineral rights do not disappear. ^[31]

Because unconveyed mineral rights remain the property of the owner of the surface estate, surface owners may dispute title to mineral rights or other subsurface substances or spaces even if they know or suspect that some, but not all, subsurface rights have been severed.^[32] Even apparently expansive grant language can be litigated. For example, in 2014, the Virginia Supreme Court held that a conveyance of *all of the coal* did not include title to coal bed methane.^[33] But, in 2016, the Court held that a conveyance of *all the coal and minerals* did include title to coal bed methane.^[34] Both decisions were issued after Va. Code § 45.2-1621 was adopted, which states: *No conveyance, reservation, or exception of coal shall be deemed to include coalbed methane gas.*

Ownership or use of the mine void may also be controversial. In *Clayborn v. Camilla Red Ash Coal Co.*, 128 Va. 383 (1920), the Virginia Supreme Court *held that a surface estate owner retains ownership of a mine void if the severance deed does not expressly convey the mine void to the mineral estate owner.* ^[35] But, in 1981, the Virginia Assembly adopted what is now codified at Va. Code § 45.2-402, which states: *[T]he owner of minerals shall be presumed to be the owner of the shell, container chamber, passage, and space opened underground for the removal of the minerals.* Litigation ensued regarding the retroactive effect of the 1981 statute and its successors.^[36] Cases have also been brought when the mine void has been used to house waste from other operations.^[37]

Surface owners who are aware that they do not own the minerals beneath their land may still be surprised by the extent to which minerals owners may disturb the surface to access what lies beneath. In 1991, for example, the United States Fourth Circuit of Appeals declined to award damages to a homeowner whose house was harmed by intentionally collapsed mineworks.^[38] This outcome is consistent with the principle that *[t]he express grant of all the minerals or mineral rights in a tract of land is, by necessary implication, the grant also of the right to work them.*^[39]

I do not mean to say that there are no restrictions on developing mineral rights. In *Yukon Pocahontas Coal Co. v. Ratliff*, 181 Va. 195 (1943) and, again, in *Ellis v. Comm'r of Dept. of Mental Hygiene and Hospitals*, 206 Va. 194 (1965), the Virginia Supreme Court held that the mineral owner's right to use the surface, and even to erect mine-related structures on the surface did not permit the minerals owner to erect structures that did not pertain to mining operations. In *Shores v. Shaffer*, 206 Va. 775 (1966), the Court held that a grant of subsurface substances did not permit the severed surface to be removed, even when the surface and subsurface consisted of the same material. And in *Phipps v. Leftwich*, 216 Va. 706 (1976), the Court declined to construe a grant of rights to use the surface *[in] any manner that*

may [be] deemed necessary or convenient for mining . . . without liability for injury to the surface to include the right to strip mine.

Some underground resources may be developed even when mineral rights have not been severed. In those areas where natural gas may be produced, except as to coalbed natural gas, only 25% of the owners of the gas found in a given pool must agree before production may start.^[40] While the gas producer must give notice to known gas owners of the hearing in which a pooling order may be entered, and must also transfer royalties to the state to escrow on behalf of unknown owners, there is no statutory requirement that gas owners be personally informed that gas is being produced or of their right to royalties.^[41] *Such escrowed proceeds shall be deemed to be unclaimed property and shall be disposed of pursuant to the provisions of the Virginia Disposition of Unclaimed Property Act (Â§ 55.1-2500 et seq.)*^[42]

IV. Future development

Minerals and mining are not only part of Virginia's past, but also part of Virginia's future. Today, crushed stone and aggregate production takes place throughout Virginia, but especially eastern Virginia.^[43] Mining, especially for coal, remains an essential part of the economy of southwestern Virginia.^[44] Recently, a Canadian enterprise has expressed interest in mining for gold in the Commonwealth.^[45] In 2024, the Governor announced that mineworks for rare earth minerals would be reopened in Dinwiddie County.^[46]

Natural gas has been located throughout the Commonwealth, but, using conventional production techniques, is not commercially viable outside of western Virginia.^[47] To reach unconventional subsurface reservoirs, *hydraulic fracturing is often combined with the relatively new technique of horizontal drilling.*^[48] While hydraulic fracturing for natural gas is banned in much of eastern Virginia, a natural gas reserve called the Taylorsville Basin lies below parts of northern and central Virginia.^[49] Likewise, while uranium mining is, currently, effectively banned in Virginia, *[t]he largest unmined uranium deposit in the United States is Coles Hill, in Pittsylvania County.*^[50]

The fact that production of these resources is currently constrained by statute should not justify ignoring the potential of their future development. Although not Virginia precedent, the following conclusion from the Supreme Court of Ohio regarding modern gas production technology is worth noting:

[O]wnership rights in today's world are not so clear-cut as they were before the advent of airplanes and injection wells . . . Just as a property owner must accept some limitations on the ownership rights extending above the surface of the property . . . there are also limitations on property owners' subsurface rights. ^[51]

In 2018, the federal District Court for the Northern District of Ohio concluded that, under this Ohio rule, *one has no right to exclude a subsurface invader from portions of the subsurface that one does not use.*^[52]

V. Protecting consumers

Ignoring the title insurance implications of mineral rights is not a good way to protect consumers. The purpose of title insurance is to insure title as it is. The title insurance commitment should be used to align the interests of the proposed insured and the insurer. Omitting exceptions from a title insurance policy does not make adverse facts disappear but, instead, sets up unnecessary disappointment and

invites unfortunate claims. Discussing exceptions — especially unusual exceptions — with the proposed insured in a timely manner enables the consumer to make informed decisions regarding the purchase.

When minerals-related matters need to be addressed in title insurance policies, policy jacket language should not be relied upon to distinguish between title to surface and subsurface real property, but, instead, the insured legal description should be drafted to exclude title to minerals or other substances or other minerals-related rights or interests from the property to which title is to be insured, or mineral rights should be identified as an exception in Schedule B of the policy.

Title insurance must account not only for active minerals development, but also inactive historical claims. For title insurance mavens, history is more than anecdote. Further, even in areas where minerals development is currently restrained, title insurance producers should recognize that insurance continues after laws change.

Careful title examiners will note when mineral interests appear to have been severed from the surface estate and, especially in areas where there is history of minerals development or exploration. Alert title insurance agents will take exception to noted severances. In some instances, searches may need to be pushed back to European settlement or to the local dawn of minerals exploration to exclude the risk of severance. If this is not commercially reasonable, then it may make sense to include a generalized exception if local history of minerals exploration and severancing extends beyond a typical 40- or 60-year title search.

[1] See Christopher Geist, *The Works at Falling Creek*, 29 Colonial Williamsburg Journal 78, 78-83 (2007).

[2] Va. Dept. of Energy, *Iron* (<https://energy.virginia.gov/geology/Iron.shtml>) and *Civil War Minerals* (<https://energy.virginia.gov/geology/CivilWarMinerals.shtml>) (all hyperlinks last visited March 25, 2025).

[3] See Va. Dept. of Energy, *Lead* (<https://energy.virginia.gov/geology/Lead.shtml>).

[4] *Id.* and Va. Dept. of Energy, *Zinc* (<https://energy.virginia.gov/geology/Zinc.shtml>).

[5] Va. Dept. of Energy, *Copper* (<https://energy.virginia.gov/geology/copper.shtml>).

[6] Va. Dept. of Energy, *Gold* (<https://energy.virginia.gov/geology/Gold.shtml>).

[7] *Id.*

[8] Va. Dept. of Energy, *Manganese*, (<https://energy.virginia.gov/geology/Manganese.shtml>).

[9] WALTER R. HIBBARD, JR., VIRGINIA COAL: AN ABRIDGED HISTORY 17 (Theodore J. Clutter, ed., Virginia Center for Coal & Energy Research, Virginia Polytechnic Institute & State University 1990) (Available at https://energy.vt.edu/content/dam/energy_vt_edu/vccer-publications/Virginia_Coal_an_Abridged_History.pdf.)

[10] *Id.* at 1-2 and Va. Dept. of Mines, Minerals and Energy, Div. of Mined Land Reclamation, Abandoned Mine Land Program, *Richmond Coalfield Abandoned Mine Land Program* (available at <https://energy.virginia.gov/mineral->

[mining/images/MidlothianMinePark/Richmond%20Coalfield%20Flyer.pdf.\)](#)

[11] Va. Dept. of Energy, *Coal* (<https://energy.virginia.gov/geology/coal.shtml>) and *Natural Gas* (<https://www.energy.virginia.gov/geology/NaturalGas.shtml>).

[12] See *Id.* and Va. Dept. of Energy, *Hydraulic Fracturing in Virginia* (<https://www.energy.virginia.gov/gas-oil/HydraulicFracturing.shtml>), Steve Szkotak, Associated Press, *Virginia to review natural gas hydraulic fracturing case*, The Daily Jeff, Jun 2, 2014, and Leslie Middleton, *VA Tidewater Communities Educating Themselves on Fracking Issues*, Bay Journal, Dec 5, 2013, updated Jun 15, 2020.

[13] Va. Dept. of Energy, *Sand and Gravel* (<https://energy.virginia.gov/geology/SandandGravel.shtml>).

[14] Va. Dept. of Energy, *Critical Minerals* (<https://energy.virginia.gov/geology/criticalminerals.shtml>).

[15] *Interstate Coal & Iron Co.*, 105 Va. 574 (1906), at 592, citing *Va. Coal & Iron Co. v. Kelly*, 93 Va. 332 (1896) at 338, approved in *Ventro v. Clinchfield Coal Corporation*, 199 VA 943 (1958) at 951.

[16] See *Shenandoah Land & Anthracite Coal Co. v. Hise*, 92 Va. 238 (1895) (incorporating a duty to begin mining operations into a lease that would, otherwise, have stated no consideration), *Hairston v. Hill*, 118 Va. 339 (1916) (distinguishing between lease and license), *Graham v. Smith*, 170 Va. 246 (1938) (interest of a life tenant in leases), and *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44 (2008) (confirming a minerals lease is a contract).

[17] *Levisa Coal Co.* at 57.

[18] *Mountain Mission School, Inc. v. Buchanan Realty Corp.*, 207 Va. 518 (1966) at 523.

[19] *Bostic v. Bostic*, 199 Va. 348 (1957), at 351, citing 13 Mich. Jur., *Mines and Minerals*, Â§ 5, pp. 9, 10, and *Steinman v. Vicars*, 99 Va. 595 (1901) at 601.

[20] See *CNX Gas Company, LLC v. Rasnake*, 287 Va. 163 (2014) at 167-8, citing *Hamlin v. Pandapas*, 197 Va. 659 (1956) at 664.

[21] Ambiguity over whether minerals or rights to other substances were, in fact, severed is the fundamental dispute resolved in the following cases: *Beury v. Shelton*, 151 Va. 28 (1928) (as to Limestone); *Shores v. Shaffer*, 206 Va. 775 (1966) (as to sand and gravel); *Phipps v. Leftwich*, 216 Va. 706 (1976) (as to strip mining); *Dye v. CNX Gas Co., LLC*, 291 Va. 319 (2016) (as to natural gas and coal bed methane).

[22] *CNX Gas Company, LLC*, *supra* note 21, at 166-8.

[23] *Conner v. Hendrix*, 194 Va. 17 (1952), at 26.

[24] See *Swords Creek Land P&S v. Belcher*, 288 Va. 206 (2014), *Harrison v. Wyatt, LLC v. Ratliff*, 267 Va. 549 (2004), and *Yukon Pocahontas Coal Co. v. Ratliff*, 181 Va. 195 (1943).

[25] Va. Code Â§ 45.2-1619(D) acknowledges this reality by requiring developers of coal bed natural gas to coordinate their operations with the owners of underground coal mines.

[26] 2014 Op. Va. Att’y Gen. No. 14-012 (Dec 19, 2014).

[27] See *Thomas v. Carmeuse Lime & Stone, Inc.*, 642 Fed. Appx. 253 (4th Cir., 2016) at 256-7.

[28] *Id.* at 257.

[29] *Id.* at 257-9.

[30] See Va. Dept. of Energy, *Abandoned Mineral Mined Lands* (<https://energy.virginia.gov/mineral-mining/AMML.shtml>) regarding hazards related to orphaned mines.

[31] *Mountain Mission School, Inc.*, *supra* note 19, and *Thomas*, *supra* note 28, are two of the many decisions noted in these materials that interpret deed severances made decades before litigation started.

[32] This assertion follows from the material connected to note 22.

[33] See *Swords Creek Land Partnership*, *supra* note 25.

[34] See *Dye*, *supra* note 22. But note current Va. Code Â§ 45.2-1621 (*No conveyance, reservation, or exception of coal shall be deemed to include coalbed methane gas.*)

[35] *Bailey v. Spangler*, 289 Va. 353 (2015) at 357.

[36] *Id.*

[37] *Levisa Coal Co.*, *Supra* note 17, *Oryn Treadway Sheffield, Jr., Trust v. Consolidation Coal Co.*, 819 F.Supp.2d 625 (W.D. Va. 2011); *Powers v. Consolidation Coal Co.* Case No. 1:12CV00039 (not reported in F. Supp. 2d) (W.D. Va. 2013).

[38] *Vandyke v. Island Creek Coal Co.*, 948 F.2d 1284 (4th Cir. 1991) (affirming *Ball v. Island Creek Coal Co.*, 722 F. Supp. 1370 (W.D. Va., 1989).

[39] *Williams v. Gibson*, 84 Ala. 228 (1888) at 231-2. *Williams* is cited approvingly in *Yukon Pocahontas Coal Co.*, *supra* note 25, *Oakwood Smokeless Coal Corp. v. Meadows*, 184 Va. 168 (1945), and *Phipps v. Leftwich*, *supra* note 26. See also *Clayborn v. Camilla Red Ash Coal Co.*, 128 Va. 383 (1920) at 390: *[T]he conveyance [of minerals (in this case, coal)] . . . carries the right to sink a shaft or drive an opening when necessary upon and through the surface to reach and remove the coal.*

[40] Va. Code Â§ 45.2-1620(C)(3). See also 2009 Op. Va. Att’y Gen. Nos. 09-018 and 09-23 (both dated June 10, 2009).

[41] See Va. Code Â§Â§ 45.2-1618(A) and (B), and 45.2-1620(D).

[42] Va. Code Â§ 45.2-1620(D).

[43] See Va. Dept. of Energy, *Mineral Mining: About Us* (<https://www.energy.virginia.gov/mineral-mining/aboutus.shtml>), *Crushed Stone* (<https://energy.virginia.gov/geology/CrushedStone.shtml>) and *Sand and Gravel* (*supra*, note 14).

[44] Va. Dept. of Energy, *Coal* (*supra*, note 12).

[45] Brian Carlton, *Are Buckingham Gold Deposits Worth Mining? It's Questionable*, The Farmville Herald, Mar 31, 2023. See also Aston Bay, *Virginia Overview* (<https://astonbayholdings.com/projects/virginia-usa/virginia-overview/>).

[46] Office of the Governor of Virginia, *Critical Minerals Producer to Reactivate Operations in Virginia* (Mar 11, 2024) (<https://www.governor.virginia.gov/newsroom/news-releases/2024/march/name-1023271-en.html>).

[47] Va. Dept of Energy, *Hydraulic Fracturing in Virginia* (<https://www.energy.virginia.gov/gas-oil/HydraulicFracturing.shtml>).

[48] *Id.*

[49] See Va. Code Title 45.2, Ch. 16, Art. 4, Va. Code Â§ 45.2-2116, Va. Dept of Energy, *Hydraulic Fracturing in Virginia* (*supra*, note 47) and *Uranium* (<https://energy.virginia.gov/geology/uranium.shtml>). See also Charlie Grymes, *Virginia Places: Natural Gas Resources in Virginia*, (<http://www.virginiaplaces.org/geology/naturalgasresources.html>) and Leslie Middleton, *Potomac Watershed Roundtable Considers Fracking in the Taylorsville Basin*, Bay Journal, Apr 8, 2014.

[50] See Va. Code Â§ 45.2-2116 and Va. Dept. of Energy, *Uranium* (*supra*, note 50).

[51] *Chance v. BP Chemicals, Inc.*, 77 Ohio St.3d 17 (1996) at 26.

[52] *Baatz v. Columbia Gas Transmission, LLC*, 295 F.Supp.3d 776 (N.D. Ohio, 2018) at 785.



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