

Opinion No. 68-22

February 16, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Honorable Robert E. Ferguson Senator, Eddy County Box 350 Artesia, New Mexico

QUESTIONS

Can a mining operator dump debris on adjacent land the surface rights to which have been purchased by the mining company, but the mineral rights to which are in the ownership of the state, but under lease to a private individual? The mineral interests were leased from the state prior to the mining operator's purchase of the surface rights from a private owner, and the use of the surface as a debris dump would severely impede or possibly even preclude access to the mineral interests below.

CONCLUSION

See analysis.

OPINION

{*40} ANALYSIS

This office notes at the outset that no facts other than those above were furnished this office. Further, no copy of any lease or contract was furnished this office. Any conclusion contained in this opinion could be altered by agreements among the parties.

The owner of the mineral estate has the right to appropriate the mineral estate. He may dig through the surface and use so much of the surface as is reasonably necessary for mining. Further, the owner of the mineral estate may deposit minerals on the surface estate so long as the depositing is reasonable to his operations in the mining and does not unreasonably restrict use of the surface estate, **Wardell v. Watson**, 93 Mo. 107, 5 SW 605 (1887); **Grell v. Lumsden**, 206 Iowa 166, 220 NW 123 (1928); **Sherrill v. Erwin**, 31 Tenn. App. 663, 220 SW2d 878 (1948). This is true whether or not the owner of the mineral estate owns the surface estate. **Wardell v. Watson**, supra. The surface owner has the right to enjoy his estate free from annoyance except as may reasonably arise from the mineral owner's mining activities, **General Refractories Co. v. Swetman**, 303 Ky. 427, 197 SW2d 908 (1946).

In the absence of any special facts pertinent to this request, these general statements may be made. When the surface estate and the mineral estate are owned by two different legal entities, the use and enjoyment of the respective estates are relative. They must be exercised with due regard for the rights of the other estate owner. The

surface estate owner may use the surface in any way not inconsistent with the rights of the mineral estate owner. **General Refractories Co. v. Swetman**, supra; **Blue Diamond Coal Co. v. Press Eversole**, (Ky. 1952), 253 SW2d 580.

These general statements lead to this conclusion. If the surface estate owner, in dumping debris over the area where the mineral estate exists, unreasonably restricts the mineral estate owner's access to the minerals, then the dumping is illegal. Of course, such a restriction could be contracted away by either party.

By: Donald W. Miller

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