NOTES

Rock of Ages: Why Kentucky's Use of the Abandonment Test in Deciding the Ownership of Mineral Refuse Is Inadequate

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I. INTRODUCTION

A. *The History of Mineral Refuse and Current Advancements*

SINCE coal was first mined in Kentucky on April 13, 1750,[2] it has greatly impacted the Commonwealth. The legal community has certainly not been immune from this impact, as courts within the state have issued countless decisions concerning the coal and mineral industry. A century of litigation has yet to resolve many of these issues, as Kentucky courts are consistently being asked to further shape the law surrounding the mineral industry. An issue currently garnering attention concerns the ownership of mineral waste and refuse. While the coal mining process has always produced waste, technological improvements and state regulation have radically changed the amount of waste and disposal processes of mining refuse.[3] These developments are forcing legislative reconsideration of century-old property law, as well as obviating the need for a new approach to decide these challenging and complex property disputes. In addition, these developments have demonstrated that several general principles of property law, long used in the area of mineral ownership, are insufficient and lacking.

Early mining processes were limited in their ability to separate valuable minerals, such as coal from the mineral waste.[4] Therefore, when the waste was disposed, commonly through the creation of a refuse pond that

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2 KY COAL MKTG. AND EXP. COUNCIL & KY. COAL ASS'N, KENTUCKY COAL FACTS 4 (1995-1996).

3 SOCIETY OF MINING ENGINEERS, ELEMENTS OF PRACTICAL COAL MINING 514 (Samuel Cassidy ed., Port City Press 1973).

4 Foreman v. Beaverhead County, 161 P.2d 524, 525 (Mont. 1945).

was covered with soil when the mining operation ceased,[5] commercially valuable minerals were buried along with the waste.[6] Other methods of waste disposal included, and still include, the creation of well-maintained piles on the surface of the ground.[7] Advances in technology now allow for the easy separation of these minerals from wastes.[8] Due to the easy removal of these wastes, mineral extraction operators are re-mining areas, especially former refuse ponds, taking advantage of the minerals located on or buried just below the surface.[9]

This innovative practice has led to complex disputes over the ownership of this waste. These disputes typically occur between the owners of the surface estate and the owners of the mineral estate.[10] Kentucky has long recognized the division of a parcel of land between surface and mineral owners.[11] The effect of this division is to create separate and distinct estates in the surface and minerals,[12] with the holder of each estate considered a landowner.[13] Furthermore, the surface owner is deemed to hold possession of the minerals beneath the land as trustee for the legal owner of the mineral estate.[14] Not surprisingly, it is immensely important to ascertain which elements of the land are passed through a deed to the mineral estate as well as those that remain with the owner of the surface estate, as the financial implications for both parties are immense. Principally, minerals, such as oil, gas, coal, or timber, are considered real estate as long as they remain unsevered from the soil.[15] If the mineral estate is sold to another, such realty will be considered conveyed in that transaction, as long as the minerals remain in place.[16] Logically, anything not conveyed in the mineral estate will be retained by the owner of the surface estate, including any personal property upon the land.

Minerals are converted from real estate to personal property upon severance from the soil.[17] It is generally accepted that refuse incident

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5 SOCIETY OF MINING ENGINEERS, *supra* note 3, at 514–15.

6 *See Foreman*, 161 P.2d at 525 ("Tailings are the waste material remaining after the removal of the valuable minerals . . . .").

7 Elk Horn Coal Corp. v. Allen, 324 S.W.2d 829, 831 (Ky. 1959).

8 *See Foreman*, 161 P.2d. at 525 (plaintiff processed wastes and removed valuable materials).

9 *See id.* at 524–25.

10 *See Elk Horn*, 324 S.W.2d at 830 (suit by coal company operating under mineral deed against surface owners over who owned dump containing "red dog").

11 Kincaid v. Magowan, 12 Ky. Op. 673, 678 (Ky. 1884).

12 Vanbever v. Evans, 177 S.W.2d 148 (Ky. 1944).

13 Gabbard v. Sheffield, 200 S.W. 940, 943 (Ky. 1918) (quoting *Kincaid*, 12 Ky. Op. 673).

14 Eli v. Trent, 241 S.W. 324, 325 (Ky. 1922).

15 Williams' Adm'r. v. Union Bank & Trust, 143 S.W.2d 297, 300 (Ky. 1940).

16 *Id.*

17 Hail v. Reed, 15 B. Mon. 479, 1854 WL 3852, *6, (1 B. Mon. 1854).

to mining is considered personal property.[18] The issue presented by the mining of wastes that have long been disposed of or abandoned is whether the wastes retain their status as personal property, thus passing with the surface estate in any subsequent land transfers, or whether they revert to realty and pass as part of the mineral estate. The determination of whether the mineral refuse constitutes personal property or real estate has great financial magnitude, as the prevailing party will possess commercially valuable minerals. Despite the importance of this issue, Kentucky has only addressed the matter twice, both times in a quite limited and unsatisfactory fashion.[19] Other states addressing the issue have promulgated a variety of tests to determine whether mine refuse constitutes real or personal property.[20] With the recent developments in mining technologies, disputes among surface and mineral estate owners are likely to increase.

This Note seeks to outline Kentucky's limited treatment of the issue, followed by an examination of alternative tests employed by other jurisdictions. In conclusion, this Note will advocate a new approach for Kentucky courts to decide the aforementioned ownership disputes. Section I provides a history of Kentucky law surrounding this issue, specifically the continued reliance on the abandonment test. Following an examination of the advantages and disadvantages of this test, a discussion will follow as to the lack of guidance to be found within Kentucky's administrative regulations and statutory law, despite the heavy regulation of the mining industry. Section II will then look to the tests employed by other states, beginning with the test that looks to the intent of the extractor when the refuse was deposited. After examining the merits and disadvantages of the intent approach, this Note will look at an additional alternative test, which asserts that mineral wastes that are embedded or intermingled within the earth constitute real property.

After detailing the many advantages of the position, as well as discussing its limitations, Section III will propose a new test for Kentucky courts to adopt when considering the ownership of mineral wastes. The new approach is a two–pronged amalgam of the other tests, ordered in a manner which will provide Kentucky with an innovative and just manner through which to adjudicate these immensely important and often complicated property disputes. The proposed test will incorporate the benefits of other approaches, with substantial modification, so as to eliminate the inherent limitations contained within any one test. The first prong of the proposed test will involve the adoption of an alternative test which holds that wastes intermingled or fixed within the earth constitute real property. The status of the wastes as intermingled or not intermingled, which is an objective

18 Gilberton Coal Co. v. Schuster, 169 A.2d 44, 45 (Pa. 1961).

19 Elk Horn Coal Corp. v. Allen, 324 S.W.2d 829 (Ky. 1959) (holding that mineral refuse was not "stone" for purposes of mineral deed).

20 *See infra* notes 74–84, 85–103.

analysis, should constitute a rebuttable presumption. The second prong of the proposed test is that either party is permitted to introduce subjective, contrary evidence to rebut the presumption established under the first prong. This subjective analysis prevents any unfairness created by a purely objective analysis. Though other states interchangeably employ multiple tests,[21] no state has explicitly adopted a hybrid examination such as the one advocated in this Note.

B. Principles of Deed Interpretation

In order to fully understand disputes over the ownership of mineral waste, it is necessary to have a general understanding of deed interpretation. It is especially helpful to understand the principles regarding reservations and exceptions in land conveyances, a fertile source of disputes between surface and mineral owners. One such general principle is that the conveying instrument must be read as a whole.[22] Courts have noted that in order to achieve fair interpretation of a broad form mineral deed, they must not only consider the language of the conveying instrument, but also the intent of the parties.[23] This intent is to be determined from the deed as a whole.[24] In doing so, conveyances should be interpreted just as other contracts.[25] Second, the language of the deed should be construed without consideration of extrinsic evidence, unless the language of the deed is "so ambiguous or obscure in meaning as to defy interpretation."[26] Conveying language is deemed ambiguous if it is "'reasonably susceptible'" to different interpretations.[27] In analyzing extrinsic evidence, the subsequent acts of the parties following the land conveyance should be given great weight.[28]

In most disputes over the ownership of mineral wastes, as evidenced by the cases to be discussed in this Note, the language of the deed is insufficient to determine ownership. In fact, the varying tests and approaches presented within this paper are chiefly concerned with the various types of extrinsic evidence that should be taken into consideration by courts when deciding these difficult ownership questions. A third general principle is that the deeding instrument should be construed "most strongly against the grantor and in favor of the grantee."[29] This has also been held specifically in the

21 Hayes v. Alaska Juneau Forest Indus., Inc., 748 P.2d. 332, 335 (Alaska 1988).

22 Hosbach v. Head, 284 S.W.2d 684, 685 (Ky. 1955).

23 Ward v. Harding, 860 S.W.2d 280, 288 (Ky. 1993).

24 Yunkers Co-Ex'rs v. Mason, 284 S.W.2d 98, 99 (Ky. 1955).

25 Wright v. Bethlehem Minerals Co., 368 S.W.2d 179, 181 (Ky. 1963).

26 *Hosbach*, 284 S.W.2d at 685 (Ky. 1955).

27 Hoskins Heirs v. Boggs, 242 S.W.3d 320 (Ky. 2007) (quoting Blevins v. Riedling, 158 S.W.2d 646, 648 (Ky. 1942)).

28 Sword v. Sword, 252 S.W.2d 869, 870 (Ky. 1952).

29 *Hosbach*, 284 S.W.2d at 685.

case of a mineral deed[30] and in determining exactly what substances are conveyed in a deed or lease of the mineral estate.[31] These three principles are to be applied concurrently.[32] An important principle of interpretation, especially when construing deeds written decades prior, is that "[w]ords may in time shift in meaning, but in a deed they must be read in the sense in which they were commonly used where the deed was written, and in which the grantor and grantee then understood them."[33]

C. Existing Kentucky Law and the Abandonment Test

Kentucky has only once decided a dispute between surface and mineral estate owners, in the 1959 decision, *Elk Horn Coal Corp. v. Allen*.[34] In *Elk Horn*, the appellees, as surface owners, instituted an injunction proceeding against the appellant, owner of the mineral estate, concerning the use of a large slate dump pile, which was above ground.[35] The slate dump contained "red dog," which had commercial use in highway and railroad construction, as well as also being used in manufacturing at the time.[36] The coal company had maintained the slate dump while conducting mining operations on the property.[37] The appellees contended that the slate dump became personal property, and thus part of the surface estate, when the coal company ceased operations on the site and left the slate dump on the property.[38]

Kentucky's highest court, in deciding whether the slate dump constituted the personal property of the surface owner, adopted the abandonment test.[39] The court held that, "[i]n order to establish an abandonment of property, there must be a showing of actual acts of relinquishment, accompanied with the intention to abandon."[40] The court then noted that "[m]ere lapse of time and nonuser [sic]" are not enough to establish abandonment.[41]

While the *Elk Horn* decision certainly supports the contention that Kentucky has adopted the abandonment test, an approach also employed by other states, the decision appears to be heavily influenced by the particular facts of the case. The majority of the court's analysis in the

30 Isaacs v. Inland Steel Co., 205 S.W.2d 681, 682 (Ky. 1947).

31 Rudd v. Hayden, 97 S.W.2d 35, 36 (Ky. 1936).

32 *Hosbach*, 284 S.W.2d at 685.

33 Franklin Fluorspar Co. v. Hosick, 39 S.W.2d 665, 667 (Ky. 1931).

34 Elk Horn Coal Corp. v. Allen, 324 S.W.2d 829 (Ky. 1959).

35 *Id.* at 830.

36 *Id.*

37 *Id.*

38 *Id.* at 831.

39 *Id.* at 830.

40 *Id.*

41 *Id.*

decision focuses on the mineral deed conveyed to the appellants, which gave Elk Horn the right to "dump, store, and leave upon said land any and all muck, bone, shale, water or other refuse from said mines" along with an "unlimited time" to utilize the benefits of the deed.[42] Thus, the court's analysis required cursory deed interpretation, as opposed to a more factually complicated dispute that would require broader interpretation, which would have provided precedent for more complex disputes. For example, the slate dump was located above ground, as opposed to mineral wastes long buried beneath the soil, and there were no subsequent land transfers.[43] The *Elk Horn* decision has yet to be cited by a Kentucky court with respect to the abandonment of mine tailings, though it was cited in an unreported Ohio decision.[44]

Despite its limitations, there is a discernible advantage to the abandonment test. First, the test does provide predictability. This is due to the heightened standard of proof, as the abandonment test requires not only objective acts of relinquishment, but also requires a finding of a subjective intent to abandon.[45] Because the standard of proof is so high, it is likely that the mineral waste will be deemed the property of the mineral estate owner. While this may be an unfairly skewed test, it is nevertheless predictable in application. One advantage to predictability is a decrease in litigation, as parties and counsel are better able to resolve disputes without instituting suit.

The disadvantages of the abandonment test are many. As previously mentioned, this test sharply favors the mineral owner by merely applying principles of abandonment, with a highly elevated burden of proof. Many disputes over the ownership of mineral wastes will arise decades later. This means that the current mineral and surface owners—those currently involved in the litigation—were not the owners when the waste was originally disposed. Under the abandonment test, it could be nearly impossible for the surface owner to establish the intent of a mineral owner who disposed of the waste decades ago. A lack of available evidence as to the intent of a depositor decades prior is an insufficient reason to deprive a party of property rights. The abandonment test is simply inadequate in the face of complicated property disputes, and in no way provides sufficient precedent for further adjudication of these cases.

The test promulgated in the *Elk Horn* decision has its roots in a prior case, *Ellis v. McCormack*.[46] *Ellis* involved a dispute over the ownership of

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42 *Id.*

43 *Id.*

44 Mead Corp. v. Huntington Nat'l Bank, 1983 WL 3170, at *2 (Ohio Ct. App. April 25, 1983).

45 *Id.*

46 Ellis v. McCormack, 218 S.W.2d 391 (Ky. 1949).

coal slack, which was left by the lessee after cessation of mining activities.[47] Inferring an intent to abandon from the facts presented, the *Ellis* Court found that the appellee had "abandoned" the slack pile.[48] One of the facts presented was the selling of the necessary equipment to the appellant, without mention of the slack pile.[49] The use of the abandonment test originated in the *Ellis* decision, though the subjective intent requirement was certainly weakened in this decision by applying an inference of intent with little to substantiate that inference. Interestingly, the Kentucky Court of Appeals chose to cite the *Ellis* decision when explaining the abandonment test in a recent unreported decision.[50] To date, the *Ellis* decision has yet to be cited in any decisions concerning the ownership of mineral wastes.

The abandonment test is widely employed by a host of states, including California,[51] Montana,[52] Nevada,[53] Pennsylvania,[54] and Utah.[55] These states have tended to employ the abandonment test in a similar manner to that of Kentucky courts. Additionally, other states have utilized the rule in broader settings. For example, in *Baker v. Waite*, a District Court of Appeals in California applied the abandonment rule in determining who deserves proceeds from a miner's lien.[56] In *Conway v. Fabian*, the Supreme Court of Montana used the abandonment rule to help decide a trespass action.[57] Notably, in none of the jurisdictions employing the abandonment rule is there a case on point dealing with complicated ownership disputes, when the dispute arises decades after the waste is deposited.

Though use of the abandonment rule concerning the ownership of mineral waste is sparse, the rule has been widely employed among Kentucky courts to decide other property issues. In *Harper v. Johnson*, the Court of Appeals of Kentucky, then the highest court within the state, utilized the abandonment test in deciding an action for declaratory and injunctive relief brought by tenants.[58] The court employed the same elements as those presented in the *Elk Horn* decision, noting "[i]t is well settled that

47 *Id.* at 392.

48 *Id.* at 391–92.

49 *Id.*

50 Kelley v. Nationwide Auto Restoration, L.L.C., 246 S.W.3d 470, 473 (Ky. Ct. App. 2007) (citing *Ellis*, 218 S.W.2d at 392).

51 *See* Jones v. Jackson, 9 Cal. 237, 245 (1858); Baker v. Waite, 322 P.2d 512, 514 (Cal. Dist. Ct. App. 1958).

52 *See* Conway v. Fabian, 89 P.2d 1022, 1029 (Mont. 1939).

53 *See* Esmeralda Water Co. v. Mackley, 208 P.2d. 821, 824–28, 831–32 (Nev. 1949).

54 *See* Fidelity–Pennsylvania Trust Co. v. Lehigh Valley Coal Co., 143 A. 474, 476–81 (Pa. 1928).

55 *See* Stephen Hays Estate, Inc. v. Togliatti, 38 P.2d 1066, 1068–69 (Utah 1934).

56 Baker v. Waite, 322 P.2d 512, 514–15 (3d Dist. 1958).

57 *Conway*, 89 P.2d. at 1029–30.

58 Harper v. Johnson, 294 S.W.2d 928 (Ky. 1956).

abandonment of property is an intentional surrender or relinguishment [sic] of a claim or right to the property. There must be a concurrence of intention and an act manifesting that intention."[59] The abandonment rule was also used in *Middlesboro Town & Land Co. v. Louisville & N.R. Co.*, an action to quiet title to tracts of land.[60] In another case, the rule was used to determine whether a lessor had the right to re–enter and take possession of leased premises.[61]

It appears that the Kentucky courts in the *Elk Horn* and *Ellis* decisions merely applied already established property concepts to adjudicate. Unfortunately, the abandonment rule is inadequate to decide these cases. Notably, states that have developed different guidelines for determining the ownership of mineral wastes have all fashioned tests that deal specifically with the extraction of natural resources.[62] This evidences the contention that these property disputes are so unique as to require a specialized analysis in order to ensure fair decision making. Such fairness is simply impossible under the abandonment rule.

D. Lack of Guidance within Kentucky's Administrative Regulations and Statutory Authority

Mining is a heavily regulated industry within Kentucky; the volume of provisions devoted solely to the extraction of natural resources serves as evidence.[63] Not surprisingly, due to the fact that unregulated mining operations "create hazards dangerous to life and property,"[64] administrative regulations are quite detailed concerning the disposition of mineral waste. The regulations have many requirements, including extensive reporting as to the design of the waste facility and sites, stability analyses, moisture content, and particle size gradation.[65] Despite the numerous reporting requirements, there is no explicit requirement that the coal operators state

59 *Id.* at 930.

60 Middlesboro Town & Land Co. v. Louisville & N.R. Co., 120 S.W.2d 394, 396 (Ky. 1938).

61 *See* Rice v. Rice, 50 S.W.2d 26 (Ky. 1932).

62 *See infra* notes 74-84, 85-103 and accompanying text. These tests include the intent of the extractor controls, wastes that are intermingled with the earth constitute real property, and mine tailings deposited for disposal are real property.

63 Several titles within Kentucky's Administrative Regulations are devoted solely to natural resources, including regulations 400, 401, 402, and 405 (2007). The state of Kentucky has also created an entire agency, known as the Natural Resources and Environmental Protection Cabinet. 400 KY. ADMIN REGS. 1:090 (2007). Furthermore, within the Natural Resources and Environmental Protection Cabinet is the Department for Surface Mining Reclamation and Enforcement, which is charged to "adopt rules and administrative regulations for the strip mining of coal." 405 KY. ADMIN. REGS. 1:020 (2007).

64 405 KY. ADMIN. REGS. 7:050 (2007).

65 *Id.*

their future intent as to the waste disposal sites. Thus, sparse guidance—and evidence—can be gleaned from the administrative regulations directly concerning ongoing mineral waste disposal.

Other regulations provide that coal waste must be disposed of by the approved processes set forth by the Kentucky Environmental and Public Protection Cabinet, which calls for disposal in coal waste banks through very specific and detailed means.[66] This regulation is also largely unhelpful because modern mining technologies prevent commercially valuable minerals from being deposited as waste. The fact that these valuable minerals are no longer deposited as waste is a marked difference from prior coal mining practices, which have been the catalyst for a plethora of litigation.[67] There is simply no regulation that speaks to the ownership of mineral wastes, or even to the remining of mineral waste areas. It appears that such remining is merely governed under the general provisions.

A survey of Kentucky's statutes is also unhelpful, as there are no statutes that provide relevant authority or guidance concerning this issue, even though the legislature has devoted an entire title to mines and minerals.[68] The only related provisions deal with the severed mineral interests of unknown or missing owners.[69] These provisions seek to explain the process that occurs when a person severs minerals from a tract of land in which he does not own and there is an unknown or missing owner, which is defined as "any person vested with a severed mineral interest and whose present identity and location cannot be determined from the records of the county in which the land is located or by diligent inquiry."[70] If there is a missing owner, "the Circuit Court of the county in which the minerals or the major portion thereof lies shall have the power to declare a trust therein, appoint a trustee for the unknown or missing owners and authorize the trustee to sell, execute and deliver a valid lease thereon . . . ."[71] This is the extent to which the statutes address the ownership of minerals or mineral waste in unique situations, such as with missing owners. There are no guidelines or rules of interpretation within the statutes that speak to disputes between surface and mineral estate owners. Unsurprisingly, there are also no guidelines or rules that address disputes over mineral waste.

It should be noted that Kentucky's legislature could deal with this issue quite easily, with the passage of legislation that either announces a rule or provides a standard through which courts are to adjudicate. As previously explained, the legislature has crafted a plethora of laws dealing with mineral,

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66 405 KY. ADMIN. REGS. 18:140 (2007).

67 *See* Foreman v. Beaverhead County, 161 P.2d. 524 (Mont. 1945).

68 KY. REV. STAT. ANN., Title XXVIII.

69 KY. REV. STAT. ANN. §§ 353.460–.476 (West 1982).

70 KY. REV. STAT. ANN. § 353.460 (West 2008).

71 KY. REV. STAT. ANN. § 353.464 (West 2008).

oil, and gas extraction.[72] While many of the statutes and regulations deal with the processes of the operators and heavily regulate these processes with an environmental focus, some of the statutes and regulations deal with relations between landowners, minerals owners, and neighboring landowners. An example of this is the previously discussed statute, which explains what an individual is to do if he or she wishes to mine on lands and the owner is either missing or unknown.[73]

This demonstrates that Kentucky's legislature has felt compelled to authorize and establish a statutory scheme to deal with an issue relating to the ownership of minerals. While this statute does not concern the ownership of mineral waste, it is a useful corollary. It demonstrates that the legislature is capable of taking an issue that could involve extensive, complicated, and expensive litigation and set forth a conclusive and streamlined procedure through which to effect fair and efficient resolutions.

There is no known instance of any state entering the regulatory arena in this fashion and declaring which rule or approach a court must use in adjudicating disputes over the ownership of mineral waste. Though this measure is not advocated in this Note, there would be advantages to this approach. First and quite obviously, the creation of a statute would eliminate any current debates over the use of other tests and thus would provide a strong amount of predictability. Second, during the passage of the law, there would likely be extensive research completed with practitioners and industry professionals alike providing information and guidance.

There is one large disadvantage to the legislature establishing a rule through which the ownership of mineral waste will be decided. This demerit is that there is simply no way to predict what rule the legislature would adopt. It does not matter whether a deficient rule, such as the abandonment test, is adopted by the courts of the Commonwealth or whether it is formally established through the statutory action of the legislature. The deficiency is not lessened by the endorsement of the legislature. Therefore, there is no truly expected benefit to be derived from legislative involvement on this issue. While hopefully the legislature would take care in the creation of such a statute, there is simply no guarantee. In addition, the possibility of undue influence by special interest groups within the mineral extraction industry is always a possibility that could lead to an unjust law.

II. ALTERNATIVE TESTS EMPLOYED IN OTHER JURISDICTIONS

A. *Intent of the Extractor Controls*

The first alternative test presented, while different from that utilized by

72 *See* title 405 KY. ADMIN. REGS. (2007).

73 KY. REV. STAT. ANN. §§ 353.460–476 (West 1982).

Kentucky, is equally deficient in addressing complex ownership disputes. The test employed by Alaska,[74] California,[75] and Arizona[76] looks to the intent of the extractor when the mining refuse was extracted and placed on the disposal site. For example, in *Hayes v. Alaska Juneau Forest Industries, Inc.*,[77] the dispute was between the state of Alaska and the appellee as to the ownership of minerals contained in tailings which covered submerged lands.[78] The facts surrounding this litigation are significant as they closely mirror disputes likely to arise in Kentucky. The wastes in this case were created by nearby mining operations and deposited over a twenty-five year period.[79] The state asserted that the waste had since become real estate, as opposed to the personal property of the depositor.[80] Alaska asserted that because the tailings constituted real estate, they would have passed to Alaska at statehood from the United States.[81] The court then acknowledged that although mine wastes may become real estate through abandonment, this is not the only way. The court, establishing another test, asserted that when mine refuse is "deposited for the purpose of disposal, as distinct from being stockpiled for future use, it becomes real estate even though they are not abandoned."[82] Under this test, it is the intent of the depositor at the time of disposal that is dispositive.

The approach in *Hayes* is quite divergent from the abandonment test, as only the purpose of disposal at that time is important, and not the later actions of the depositor. For example, a mineral owner may create a slack pile of mineral refuse, intending later to see if the pile contains any commercially valuable "red dog." After the cessation of mining activities, the operator may decide not to explore this possibility. Under the abandonment test, it will be the latter action—the decision to determine whether "red dog" exists—that will be important. In the intent of the extractor test, only the purpose with which the slack pile was created is significant. Obviously, a very different outcome can be reached under the intent of the extractor test as to that reached under the abandonment test.

Other states that employ the intent of the extractor test mirror the analysis utilized by the Alaska court. Arizona has actively been using the test for almost a century, holding that it is the intention with which the refuse was deposited that controls in determining whether the refuse is

74 *See* Hayes v. Alaska Juneau Forest Indus., Inc., 748 P.2d. 332, 334-35 (Alaska 1988).

75 *See* State *ex rel.* Dept. of Water Resources v. Superior Court of Butte County, 208 Cal. App. 2d 659, 664-65 (Cal. Dist. Ct. App. 1962).

76 *See* Steinfeld v. Omega Copper Co., 141 P. 847, 848 (Ariz. 1914).

77 *Hayes*, 748 P.2d. at 332.

78 *Id.* at 333.

79 *Id.*

80 *Id.* at 334.

81 *Id.*

82 *Id.* at 334-35.

realty and thus under the ownership of the mineral owner, or whether the refuse constitutes personal property.[83]

A significant advantage of the intent of the extractor test is that it appears fairer than the abandonment test. Unlike the abandonment test, there is no automatic skewing in determining the ownership of the mineral waste. By focusing on a discrete moment, when the waste is disposed, courts are better able to adjudicate decisions by narrowing the volume of facts that impact the outcome. This is an especially useful test if the dispute occurs shortly after the refuse deposit.

Disadvantages of the intent of the extractor test are readily apparent. The most significant demerit is the difficultly, if not impossibility, of determining the intent of a depositor if the deposit occurred decades prior. While the language of the deeding instrument may provide guidance, courts may be left without any tangible proof as to the intent of the depositor. For example, in *Steinfeld v. Omega Copper Co.*, the court, in determining the intent of the extractor, relied almost exclusively on the testimony of the depositor in ruling.[84] One must question what recourse would have been available to the court had this testimony been unavailable.

Another disadvantage is that current owners of mineral and surface estates will have their rights determined by actions that may have occurred decades prior, actions of which they were unaware when land conveyances were transacted. Focusing on the intent of the extractor could allow a court to disregard the expectations of the current parties, a proposition that strikes many as unfair.

A final disadvantage under this test is that interested parties are afforded even less predictability than under the abandonment test. Further, the test cannot truly be applied in the absence of litigation. The abandonment test, in looking for acts of relinquishment, retained a modicum of objectivity. By focusing entirely on the intent of the depositor, a completely subjective examination, parties cannot begin to predict the court's decision because the test necessitates the taking of testimony and evidence. In sum, the intent of the extractor is equally unsatisfying in deciding complicated questions of mine refuse ownership. While the test certainly has positive attributes, it should not be adopted by Kentucky because of its many disadvantages.

B. Wastes Intermingled with the Earth are Real Property

An alternate test promulgated in a few states is unconcerned with the intent of the depositor at the time of the deposit and at the time of

83 Steinfeld v. Omega Copper Co., 141 P. 847, 848 (Ariz. 1914).

84 *Id.*

abandonment. Montana,[85] Nevada,[86] and Ohio[87] all hold that mine waste deposits mingled or embedded in the earth constitutes real property. In *Foreman v. Beaverhead County*, the Supreme Court of Montana clearly explained the rule.[88] In *Foreman*, the court was forced to determine the status of mine waste deposited over a period of years.[89] The refuse contained valuable minerals, a fact known to the company at the time of disposal, but the available machinery and processes were not capable of separating the minerals from the waste.[90] The land containing the tailings was later sold to the plaintiff, who began recovering the mineral waste. The issue in *Foreman* was whether the recovery of minerals constituted recovery of personal property, thus excusing the plaintiff from paying real property taxes.

The court then explained the test to determine the status of the mineral waste, noting that "if [mineral waste deposits] are permitted to spread upon and to mingle with the earth, they become a part thereof and are real estate, but if they are kept separate and apart therefrom, as in the instant case, they are personal property."[91] In a later decision, which mirrored the dispute in *Foreman*, *Pfizer, Inc. v. Madison County*, the Supreme Court of Montana cited that decision, and it continued the use of the test.[92]

Ohio employed the "intermingled" test in In Re *Appropriation of Easements for Highways Purposes*.[93] In this decision, the Supreme Court of Ohio held that waste stone did not constitute personal property and thus should be included in calculating the fair market value of real estate in an action in which the state wished to establish an easement.[94] The waste stone was the result of an abandoned quarry,[95] and the stone refuse had been dumped over and down a hill for many years prior to the origination of the dispute.[96] Because the waste stone was now embedded in and on top of the soil, the court held that the refuse did not constitute personal property, but instead was merely real estate.[97] This decision demonstrates

85 Darby Spar, Ltd. v. Dep't of Revenue, 705 P.2d 111 (Mont. 1985).

86 Rogers v. Cooney, 7 Nev. 213 (Nev. 1872).

87 *In Re* Appropriation of Easements for Highway Purposes, 190 N.E.2d 446 (Ohio 1963).

88 Foreman v. Beaverhead County, 161 P.2d. 524, 525 (Mont. 1945).

89 *Id.* at 524.

90 *Id.*

91 *Id.*

92 Pfizer Inc. v. Madison Co., 505 P.2d 399, 401 (Mont. 1973).

93 *In Re* Appropriation of Easements for Highway Purposes, 190 N.E.2d 446, 449 (Ohio 1963).

94 *Id.*

95 *Id.* at 447.

96 *Id.*

97 *Id.* at 449.

an alternative use for this test, indicative of the broad applicability of this approach. It should be noted that the Ohio decision has been quite important precedent in the calculation of fair market values in eminent domain cases and has been broadly cited by a host of courts and secondary sources.[98]

Despite the limited usage of this test, it possesses many advantages. The most significant advantage to looking at whether the wastes are intermingled with the earth is that it is a purely objective test. By removing the subjective elements that weaken the adequacy of the other tests, measurable evidentiary difficulties are eliminated. Whereas it may be impossible to determine the intent of the operator when the mine refuse was deposited decades earlier, under this test, there is no temporal evidentiary hindrance. As demonstrated in the *Foreman* decision, disputes arising many years after the initial deposit present complicated ownership questions.[99] The court was allowed to rely exclusively on the status of the waste in relation to the topography of the soil in reaching its decision.[100] Further, the court is not forced to look back to the time of deposit. Instead, it is free to look at the current state of the waste, which greatly simplifies the necessary fact-finding. The chronological advantages of this test are great and cannot be overstated.

Not only does this test simplify decision making through the removal of complicated evidentiary standards, it also provides for fair adjudication. There is intuitive appeal to the visual approach presented by this test. If one purchases a parcel of land upon which mine tailings have been scattered on the ground and are invisible to the eye, or if the parcel contains a former slurry pond a few feet beneath the surface, it is unlikely that that the purchaser would consider these elements personal property. However, if someone purchases a tract of land upon which a well-contained and orderly gravel pile is located, said purchaser would likely view the pile as personal property. Such reasoning is equally applicable when there has been a sale of either just the mineral or surface estate. Thus, not only does this test simplify the required evidentiary findings, it also protects the reasonable expectations of both the purchaser and the seller, especially if the seller has retained a portion of the land, such as the surface estate. This is well demonstrated in the *Foreman* decision, as the plaintiff bought the land to

98 This decision has been cited in cases such as *Cincinnati v. Banks*, 757 N.E.2d 1205 (Ohio Ct. App. 2001); *Wray v. Stvartak*, 700 N.E.2d 347 (Ohio Ct. App. 1997); and *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement*, 962 F.2d 1192 (6th. Cir. 1992) (applying Ohio law). In addition, the decision has been cited extensively in Ohio practice guides for eminent domain, such as in 38 Ohio Jur. 3d Eminent Domain § 148 (2008) and 38 Ohio Jur. 3d Eminent Domain § 186 (2008).

99 Foreman v. Beaverhead County, 161 P.2d. 524 (Mont. 1945).

100 *Id.*

recover the minerals from the tailings visibly spread upon the earth.[101] It may be inferred that the plaintiff assumed he was merely using the personal property he had bought, rather than utilizing real estate. When the court agreed with this contention, finding the tailings to constitute personal property, the plaintiff's reasonable expectations were fulfilled.[102] It follows that the purchase price would have varied greatly had the plaintiff and the seller thought the land being sold was conducive to mining.

A final advantage is the great level of predictability afforded by this test. This predictability results from the objective examination required, as parties are better able to discern their respective property rights by merely conducting a visual examination. Furthermore, parties may be able to resolve disputes without instituting legal action, a consequence of the high level of predictability associated with this test. By providing property owners with a clear, easily applied rule, parties are better able to understand their rights not only when a dispute arises, but at the point of purchase and contract as well.

Despite the overwhelming advantages of a test which looks to whether the wastes are embedded or intermingled with the earth, there are disadvantages. One disadvantage is that the court may be required to make difficult judgment calls, as it may not be clear whether the waste is embedded in the soil or merely resting on top of the soil in a disorderly fashion. A modification of the facts in *Foreman* provides an explanation of this concern. In *Foreman*, the tailings were deposited in well-defined piles, marked with bulkheads.[103] One must question the outcome of *Foreman* if the facts were altered so that the tailings were in a generally confined area, yet in a non-cohesive pile without well-defined boundaries. In such a close case, the intermingled test does not provide further guidance in how to adjudicate. Thus, it is likely that different courts, reviewing the same facts, may decide cases differently as a result of the insufficiency of this test.

Because of the difficulty presented by close cases, another disadvantage is that the test provides little predictability in these situations. While decisions may be expected in clear fact patterns, there is little, if any, predictive value within the test in difficult factual disputes. This shortcoming should be taken into account when considering the utilization of this test.

III. Advocating a New Test for Kentucky

Though Kentucky has utilized the abandonment test exclusively when dealing with the ownership of mineral wastes,[104] this practice should be

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101 *Id.* at 524-25.

102 *Id.* at 525-26.

103 *Id.* at 524.

104 Elk Horn Coal Corp. v. Allen, 324 S.W.2d 829, 830-31 (Ky. 1959); Ellis v. McCormack,

discontinued. Kentucky courts should instead adopt a hybrid test, which incorporates the advantages of a variety of approaches, simultaneously diminishing the weaknesses presented by the reliance on any one test. While no state has formally adopted the use of more than one test, a few states routinely employ multiple approaches. For example, in the Alaska decision *Hayes v. Alaska Juneau Forest Industries, Inc.*,[105] the court employed two different approaches. First, the court utilized the abandonment test, holding that if mine wastes are abandoned, they become real estate.[106] If the mine tailings are not abandoned, they remain the personal property of whoever created the refuse.[107] In addition to the abandonment test, the Alaska court also employed the intent of the extractor test.[108] The court noted, "[w]here mine tailings are deposited for purpose of disposal, the tailings are considered realty."[109] Thus, the Alaskan court recognized—and employed—two tests concurrently.

Alaska is not the only state to utilize more than one approach in deciding disputes over the status of mineral wastes. Montana also employed multiple tests in *Conway v. Fabian.*[110] In *Conway*, the Supreme Court of Montana employed the abandonment test, which contained both an objective and subjective analysis, as the court looked for both acts and intentions of relinquishment, to decide the ownership of mine tailings that were the waste product of a quarry mill.[111] The court then quoted an Arizona decision, *Steinfeld v. Omega Copper Co.*, noting "'[t]he intention with which the owner of the property extracted the ore from the ground and the purpose and intention of the owner with which it was placed on the dump is controlling in arriving at a solution of the question of whether the ore after having been extracted and placed in the dump was personalty or realty.'"[112] The Montana court followed the trend of the Alaska courts by utilizing both the abandonment test and the approach that looks to the extent of the extractor.

Though the varied approaches utilized by Alaska and Montana are to be applauded, the two approaches the courts employed are not a combination that Kentucky courts should adopt. This is because of the overwhelmingly subjective nature of both the abandonment test and the intent of the

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218 S.W.2d 391, 392 (Ky. 1941). These are the only cases in which Kentucky courts have decided the ownership of mineral wastes, with both courts relying only on the abandonment test.

105 Hayes v. Alaska Juneau Forest Indus., Inc., 748 P.2d 332 (Alaska 1988).

106 *Id.* at 335.

107 *Id.*

108 *See supra* notes 74–84 and accompanying text.

109 *Hayes*, 748 P.2d at 336.

110 Conway v. Fabian., 89 P.2d 1022 (Mont. 1939).

111 *Id.* at 1029–30.

112 *Id.* at 1029 (quoting Steinfied v. Omega Copper Co., 141 P. 847 (Ariz. 1914)).

extractor approach. While the abandonment test does look to actual acts of relinquishment in addition to requiring an intent to abandon,[113] the subjective element is still a significant element of the test. Under the intent of the extractor approach, as demonstrated in *Hayes*, the "intention" of the extractor and depositor controls,[114] necessitating a subjective analysis. As previously explained,[115] such subjectivity leads to difficult evidentiary requirements. Thus, the varied approach utilized by Montana and Alaska is inadequate because the subjective element remains important in both tests.

Kentucky instead should adopt an amalgam approach that eliminates the necessary reliance on subjectivity. The first component of this proposed test should be to adopt the approach which holds that wastes intermingled or fixed within the earth constitute real property.[116] This approach should be the first element to which a court looks when deciding a dispute over the ownership of mineral waste. Under this approach, the courts would employ the reasoning of the Montana court in *Foreman*.[117] As the Supreme Court of Montana explained, "[i]f [mineral wastes] are permitted to spread upon and to mingle with the earth, they become a part thereof and are real estate, but if they are kept separate and apart therefrom, as in the instant case, they are personal property."[118] Thus, courts should first look to the objective status of the wastes. The court will need to issue a finding of fact concerning the status of these wastes, which will state whether the visual condition of the mineral refuse supports the contention that the wastes are either personal property or real estate. This finding of fact should be a rebuttable presumption. This presumption may be reversed by the introduction of subjective evidence supporting a contrary contention. The evidence should be grounded in tangibility, such as was demonstrated by the decision in *Elk Horn Coal Corp. v. Allen*.[119] In *Elk Horn Coal Corp.*, the plaintiff's assertion that he had not abandoned the tailings was supported by the language of the conveying instrument, which provided the plaintiff unlimited time to store and deposit mineral refuse upon the surface, which had been retained by the seller.[120] Thus, the subjective element, which may rebut a presumption, cannot merely be unsubstantiated testimony. If so, the entire purpose of eliminating the subjectivity of the abandonment

113 Elk Horn Coal Corp. v. Allen, 324 S.W.2d 829, 830 (Ky. 1959).

114 *Hayes*, 748 P.2d at 336–37.

115 *See supra* notes 74–84 and accompanying text.

116 *See* Re Appropriation of Easements for Highway Purposes 190 N.E.2d 446 (Ohio 1963); Rogers v. Cooney, 7 Nev. 213 (Nev. 1872); Spar, Ltd. v. Dep't of Revenue, 705 P.2d 111 (Mont. 1985).

117 Foreman v. Beaverhead County, 161 P.2d. 524, 525 (Mont. 1945).

118 *Id.*

119 Elk Horn Coal Corp. v. Allen, 324 S.W.2d 829, 830–31 (Ky. 1959).

120 *Id.* at 832.

test would be diminished.

In adopting this new, two-pronged approach, Kentucky will have no need to employ the abandonment test in future mineral refuse disputes. This is evident upon examination of the two elements of the abandonment test, which are an actual act of relinquishment coupled with a stated intention to abandon.[121] The actual acts of relinquishment requirement will be subsumed within the first prong of the proposed test, which looks to the current status of the wastes. If the mineral wastes have been "permitted to spread upon and to mingle with the earth,"[122] then the logical assumption would be that the wastes had been abandoned. Conversely, if the mineral refuse "[is] kept separate and apart"[123] from the soil, then there would likely not be an appearance of abandonment, as careful maintenance would strongly imply a continued claim of ownership. The second element of the abandonment test looks to an intention of abandonment.[124] Under the proposed approach, this would also be integrated into the opportunity to rebut the presumption created by the objective examination of the current status of the mineral waste.

There is a strong correlation between the two elements of the abandonment test and the newly proposed test, as the components of the former are easily incorporated into the latter. What is different, and better, about the new approach is that the court's focus is greatly widened. As these cases can be immensely complicated and fact intensive, the narrow focus on abandonment will prove insufficient, as demonstrated when the test fails in more complex disputes. Under this new approach, the court is free to consider more factors and considerations in an orderly and logical manner.

With the shortcomings of the subjective elements in disputes over the ownership of mineral waste, one may wonder why the proposed approach contains such a component at all. This is especially true as significant attention has been given to the lessened predictability associated with the subjective tests. This second prong is necessary to eliminate the disadvantages demonstrated in the *Foreman* decision, such as the decreased predictive value in "close" cases.[125] As discussed, the *Foreman* decision was a close one: the status of the mineral tailings, while deemed to be personal property, easily could have been determined to be real estate.[126] In these close decisions, the court must be able to consider extrinsic evidence to allow for fair adjudication. This additional evidence constitutes the second prong of the proposed approach. By being able to consider testimony of

121 *Id.* at 830.

122 *Foreman*, 161 P.2d. at 525.

123 *Id.* at 525.

124 *Elk Horn Coal Corp.*, 324 S.W.2d at 830.

125 *See Foreman*, 161 P.2d at 526.

126 *Id.* at 525–26.

the parties to the action, the language of the deeding or leasing instrument, industry standards and practices, and other relevant information, the court will be able to determine the status of the tailings in the fairest manner achievable. In "easy" cases, where the status of the waste as intermingled or not is readily ascertainable, parties will be able to determine their rights more easily, often without instituting action. In difficult cases, parties must be able to submit all evidence relevant to the adjudication of the waste dispute. This broad allowance of testimony necessarily requires the introduction of subjective evidence, which may prove dispositive in otherwise close cases. Thus, the second prong of the test, albeit subjective, is necessary.

CONCLUSION

Kentucky continues to be a world leader in the production of coal.[127] So long as the industry remains viable and strong, disputes over the ownership of mineral wastes are likely to continue. Due to the importance of this issue, Kentucky must discard its use of an abandonment test that, while playing an important role in other areas of property law, is insufficient and not conducive to fair and well-reasoned adjudication of these complex disputes. In discarding the abandonment test, the courts should consider the advantages and limitations presented by the approaches employed elsewhere in the country. By adopting the approach this Note has advocated, Kentucky will enjoy the benefits of objectivity which look to the status of the mineral waste to determine if it is intermingled with the earth, while also considering the intent of the extractor. As an industry leader in mineral extraction, it is time for Kentucky to establish a new approach which is conducive to the continuing improvements in mining technology and the accompanying litigation these advances present.

127 KY. COAL MKTG. AND EXP. COUNCIL, *supra* note 2.