

Mineral Rights in Central Appalachia: A Brief History of the Broad Form Deed in Kentucky and Tennessee

Blakely Elizabeth Whilden

Introduction

The history of land ownership in central Appalachia points to significant questions about equity in contracting surface and subsurface rights to the estate and the valuable minerals below. Many argue that it is this history that has left the Appalachian region economically deprived, poverty stricken, and environmentally ravaged.¹

Upholding the broad form deed has been attributed as a “critical failure” on the part of the federal courts to protect the environment of the Appalachian region.² In short, the broad form deed³ was a tool used by coal companies to access the coal beneath the surface. When broad form deeds were executed by landowners and mineral estate owners, the rights to the mineral estate transferred from the landowner to the mineral estate owner—often an out-of-region energy company.⁴ By the mid-1980s, the Appalachian Land Ownership Task Force documented that in the eighty counties surveyed across central Appalachia, seventy-two percent (72%) of the surface was owned by an absentee owner: forty-seven percent (47%) owned by out-of-state owners and the remaining fifty-three percent (53%) owned by out-of-county owners.⁵ While the

¹ Brian Banks, *High above the Environmental Decimation and Economic Domination of Eastern Kentucky, King Coal Remains Firmly Seated on Its Gilded Throne*, 13 Buff. Env't'l. L.J. 125, 126-127 (2006).

² *Id.* at 171.

³ *The “Broadform” Deed: A Sample*, in WEST VIRGINIA: DOCUMENTS IN THE HISTORY OF A RURAL INDUSTRIAL STATE 194 (Ronald L. Lewis & John Hennen, Jr., eds. 1991), available at www.as.wvu.edu/WVHistory/documents/073.pdf.

⁴ Dean Hill Rivkin, *Lawyering, Power, and Reform: The Legal Campaign to Abolish the Broad Form Mineral Deed*, 66 Tenn. L. Rev. 467, 479 (1999).

⁵ *Id.*

Appalachian region is rich with natural resources, the people of Appalachia remain some of the poorest in the country.⁶

History of Horizontal Severance and the Broad Form Deed

Traditional property law allowed a landowner exclusive rights to his land from the center of the earth to the “heavens above.”⁷ Under this traditional notion of property law, a landowner owns the rights to the surface estate and any resource found below the surface.⁸ Further, the ownership of the surface and mineral estate was transferred only after the new owner personally surveyed the land and was symbolically presented with some “physical manifestation” of the land, including, for example, soil from the land.⁹ To transfer any rights to subsurface materials—coal, for instance—the current owner would have to include that material in his presentation of the physical manifestation of the land to the new owner.¹⁰

The doctrine of estate severance—allowing separate legal ownership of multiple land strata—traces back to sixteen and seventeenth English common law that permitted the creation of “royal mines.”¹¹ The King of England was permitted to enter privately owned land to excavate saltpeper below the surface while maintaining the surface owner’s right to the surface estate.¹² English colonists brought the concept of royal mines to America, and, with the onset of the Industrial Revolution, horizontal severance was utilized by mining companies to access subsurface minerals.¹³ By the early twentieth century, horizontal severance was accepted by jurisdictions across the country. In *Del Monte Mining & Milling Co. v. Last Chance Mining &*

⁶ Wendy B. Davis, *Out of the Black Hole: Reclaiming the Crown of King Coal*, 51 Am. U.L. Rev. 905, 906 (2002).

⁷ Banks, *supra* note 1, at 129.

⁸ *Id.* at 130.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Michelle Andrea Wenzel, Comment, *The Model Surface Use and Mineral Development Accommodation Act: Easy Easements for Mining Interests*, 42 Am. U.L. Rev. 607, 608, 615 (1993).

¹² *Id.*

¹³ *Id.* at 616.

Milling Co., in which Last Chance Company was mining below the surface estate of Del Monte Company, the Supreme Court of the United States recognized the doctrine of horizontal severance.¹⁴

Horizontal severance allows the surface estate owner to maximize the use of the surface for agricultural or other purposes while simultaneously allowing the mineral owner to maximize the use of their subsurface mineral estate.¹⁵ With horizontal severance fully accepted by jurisdictions across the country, agents employed by coal companies approached landowners in central Appalachia to negotiate access to their subsurface resources.¹⁶ The broad form deed was the primary tool used to transfer subsurface rights from surface estate owners to landowning agents.¹⁷ The firms that purchased the subsurface mineral rights through an agent in turn leased these rights to mining companies to extract the subsurface coal. The broad form deed sold access to “all coal, minerals, and mineral substances . . . by drilling, mining” to the agent.¹⁸ The broad form deed further provided that the mineral estate owner would be free from “any and all liability or claim or damage. . . resulting directly or indirectly from such use or occupation, or the exercise of said rights and privileges, or any or all of them.”¹⁹

The broad form deed, while widely used in Appalachia, was by no means a perfect tool. Courts noted that the common disparity between the bargaining power of the landowner and the land agent in negotiating the terms of the broad form deed often resulted in the landowner receiving a very low price for access to the subsurface estate.²⁰ In addition to receiving nominal

¹⁴ 171 U.S. 55 (1897).

¹⁵ Wenzel, *supra* note 11, at 608.

¹⁶ Rivkin, *supra* note 4, at 480.

¹⁷ *Id.*

¹⁸ *The “Broadform” Deed: A Sample*, in WEST VIRGINIA: DOCUMENTS IN THE HISTORY OF A RURAL INDUSTRIAL STATE 194 (Ronald L. Lewis & John Hennen, Jr., eds. 1991), available at www.as.wvu.edu/WVHistory/documents/073.pdf.

¹⁹ *Id.*, at 196.

²⁰ Rivkin, *supra* note 4, at 480.

fees for ownership of the mineral rights, surface owners often waived the right to recover for damage to the surface estate.²¹ These deeds often failed to specify the method for extraction, expected disturbances to the surface estate, and possible compensation available to the surface owner in the event of damage to the surface estate.²² This ambiguity left surface estate owners at a significant disadvantage when resolving disputes regarding surface damage.²³ As evidenced by the discussion below, the mineral estate was the dominant force in the relationship between the surface and subsurface owners.

In the late nineteenth and early twentieth century, coal was extracted primarily through underground mining, which caused minimal impact to the surface estate.²⁴ As mining technology evolved to include more disruptive means of extraction, however, conflicts between surface owners and mineral owners escalated.²⁵

Surface mining is a destructive method of coal extraction. Across Appalachia, surface mining became the preferred means of coal extraction causing underground seams of coal to be exposed to the surface for more efficient extraction.²⁶ Bulldozers, trucks, and explosives became commonplace on surface mining sites.²⁷ Damage—often substantial—to the surface estate is inevitable using these mining techniques.²⁸ Mountaintop removal is one of the most invasive types of surface mining, and literally involves removal of mountaintops to expose the coal seam below. Surface mining also causes damages to the water resources of the surface estate.²⁹ Broad form deeds were negotiated and signed when underground mining—not surface mining—was

²¹ Davis, *supra* note 6, at 912.

²² Wezel, *supra* note 11, at 619

²³ *Id* at 621, 622.

²⁴ Rivkin, *supra* note 4, at 481.

²⁵ *Id* at 482.

²⁶ Banks, *supra* note 1, at 139.

²⁷ Rivkin, *supra* note 4, at 481.

²⁸ *Id*.

²⁹ Banks, *supra* note 1, at 142.

common practice. The broad form deed did not predict the use of these invasive and destructive mining practices, and thus surface estate owners were at a significant disadvantage when attempting to mitigate damage to their estate.³⁰

A Tale of Two States: Kentucky and Tennessee

The broad form deed was widely used in Kentucky and Tennessee to sever surface and subsurface ownership. In these states, and in other mineral-rich states, conflicts arose between surface estate owners and mineral owners regarding damage to the surface due to extraction practices.³¹ Kentucky and Tennessee courts and legislatures approached the resolution of these conflicts in two distinct ways.

A. Kentucky

The use of the broad form deed in Kentucky was validated by the 1956 landmark case *Buchanan v. Watson* in which a surface owner brought suit against the mineral rights owner when the mineral owner attempted to employ destructive mining practices.³² In short, the Kentucky Court of Appeals held that despite the fact that the broad form deed does not explicitly allow surface mining, the deed nonetheless allows the mineral owner to extract coal by appropriate means as long as the work is not “performed . . . in an arbitrary, wanton, or malicious manner.”³³ Citing the possibility of “great confusion and much hardship,” the Court was unwilling to disaffirm the broad form deed agreement.³⁴ This decision left the surface owner

³⁰ Wenzel, *supra* note 11, at 621, 622.

³¹ Rivkin, *supra* note 4, at 482.

³² 290 S.W.2d 40 (Ky. 1956).

³³ Rivkin, *supra* note 4, at 482.

³⁴ Buchanan, *supra* note 32, at 44.

with the significant burden of proving that extractors were “malicious” in their use of the surface estate.³⁵

Twelve years later, a coalition of civil rights and environmental rights groups filed suit to again try to nullify the broad form deed.³⁶ In *Martin v. Kentucky Oak Mining Co.*, the owners of the surface estate sought declaratory judgment against a coal company—the mineral estate owner—attempting to strip mine on the surface estate.³⁷ The Kentucky Court of Appeals again upheld the use of the broad form deed by insisting that the fact that neither party predicted the use of strip mining is irrelevant.³⁸ Justice Edward Hill’s dissenting opinion in this case, however, provided some hope to the surface estate owners and the coalition fighting the use of the broad form deed. He was “shocked and appalled that the court . . . would lend its approval and encouragement to the diabolical devastation and destruction of a large part of the surface . . . without compensation to the owners thereof.”³⁹

The Kentucky legislature took interest in this issue, and with the support of citizens across the state, passed two bills—one in 1974 and another in 1984—requiring the surface estate owner’s consent to surface mining before surface mining practices could begin.⁴⁰ The Kentucky Courts, however, twice upheld the broad form deed by striking down these laws in *Dept. of Natural Resources & Environmental Protection v. No. 8 Ltd. of Virginia*⁴¹ and *Akers v. Baldwin*.⁴²

³⁵ Wenzel, *supra* note 11, at 626.

³⁶ Rivkin, *supra* note 4, at 483.

³⁷ 429 S.W.2d 395 (Ky. 1968).

³⁸ *Id.*

³⁹ *Id.* at 402.

⁴⁰ Rivkin, *supra* note 4, at 486.

⁴¹ 528 S.W.2d 684 (Ky 1975).

⁴² 736 S.W.2d 294 (Ky. 1987).

In a final attempt to strike down the use of the broad form deed in 1988, the Kentucky legislature amended the state constitution to require that any agreement severing rights between the surface estate and subsurface estate must articulate “in express and specific terms the method of coal extraction to be employed” or else the intention of the parties will be assumed to have agreed to the method of extraction “known to be in use in Kentucky in the area affected at the time the instrument was executed.”⁴³ This constitutional amendment applied not only to future agreements, but to all past broad form deed signed in Kentucky. The Kentucky courts upheld the constitutional amendment, and thus overturned *Buchanan*, in *Ward v. Harding* in 1993.⁴⁴ In conclusion, Kentucky no longer recognizes the broad form deed as a legal tool to sever the surface and mineral estates, or to support the destruction of the surface estate in the process of accessing subsurface minerals.

B. Tennessee

Tennessee, like Kentucky, has within its boundaries rich coalfields, particularly in its northwestern mountain region. And similar to other states in the region, the broad form deed was widely used to sever the surface and mineral estates, primarily for the extraction of coal.⁴⁵ Tennessee’s history of disaffirming the use of the broad form deed was informed by the court battles that waged to their north, and Tennessee courts came to a resolution regarding the broad form deed just four years after the legislature took action on the issue.⁴⁶ With the support of citizen groups, in 1977, the Tennessee legislature passed the Tennessee Surface Owner Protection Act⁴⁷ (“Act”).⁴⁸ The Act created a rebuttable presumption when interpreting the broad

⁴³ Rivkin, *supra* note 4, at 496.

⁴⁴ 860 S.W.2d 280 (Ky. 1993).

⁴⁵ Rivkin, *supra* note 4, at 489.

⁴⁶ *Id.*

⁴⁷ Tenn. Code Ann. § 66-6-102 (1993).

⁴⁸ Rivkin, *supra* note 4, at 490.

form deeds, that the deed, unless explicitly stated, allows only the “method of extraction . . . prevailing at the time” the parties signed the deed.⁴⁹ Subsequently, a Tennessee surface estate owner brought suit against a coal company and mineral estate owner to assert his rights to the surface estate once the company applied for a permit to surface mine in the case of *Doochin v. Rackley*.⁵⁰ The Tennessee Supreme Court upheld the surface estate owner’s rights to the surface estate under Act in *Doochin*.⁵¹

Conclusion

Certainly, Kentucky and Tennessee’s struggle to negotiate rights between surface and subsurface owners are not unique. Landowners across the coal rich mountains of West Virginia, Virginia, and Ohio executed broad form deeds giving up rights to the subsurface estate.⁵² Congress took note of property rights conflicts and other regulatory challenges arising from the practice of surface mining, and passed the Surface Mining Control and Reclamation Act (“SMCRA”)⁵³ of 1977.⁵⁴ SMCRA allowed citizen involvement in the process of permitting for surface mines, and promised to provide better enforcement of new and existing laws regulating surface mining.⁵⁵ SMCRA fails, however, to directly address the use of the broad form deed and severance.⁵⁶ SMCRA continues to regulate the environmental effects of coal mining today, including reclamation of abandoned mines and existing mine sites.

⁴⁹ *Id.*

⁵⁰ 610 S.W.2d 715 (Tenn. 1981).

⁵¹ *Id.*

⁵² Davis, *supra* note 6, at 912.

⁵³ 30 U.S.C. 1201-1328 (1994).

⁵⁴ Rivkin, *supra* note 4, at 489.

⁵⁵ *Id.*

⁵⁶ *Id.*