

Supreme Court Affirms Coal Company's Efforts to Exercise Surface Rights

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A recent decision by the Kentucky Supreme Court affirms prior decisions relating to surface rights granted under severance deeds and rejects the effort to restrict a coal company's exercise of such surface rights.

Under well-established Kentucky law, a severance deed which conveys the coal carries with it the right to utilize the overlying surface to dig for the coal, remove it and transport it, even if such rights are not specifically described in the deed. Understandably, one cannot convey the coal to someone and then deny them the right to use so much of the surface as is necessary to gain access to, remove the coal and haul it away.

Conversely, Kentucky courts have been consistent in ruling that while the grantee of the coal under a severance deed has the right to make reasonable use of the surface that overlies the conveyed coal, there are no implied rights to haul foreign coal across the surface (or otherwise use or burden the surface in support of its operations on other properties) unless the original severance instrument specifically grants those rights.

Most broad form severance deeds, in keeping with their name, grant broad surface rights to the coal grantee, including the right to use the surface to support the mining of coal on adjacent or other properties controlled by the coal owner and including the right to haul foreign coal across the surface. Of course, the 1988 Amendment to Kentucky's Constitution disallowed the right to conduct strip mining under broad form deeds (under most circumstances). Since the adoption of that Amendment, some anti-coal interests have sought to challenge all of the rights granted under broad form deeds, arguing that a coal company should be required to get the surface owner's permission to use the surface overlying the coal when it opens up a portal, makes surface installations supporting the underground mining and hauls the coal away. In other words, they have sought to overturn the age-old law of rights to use the surface to mine the coal, even when such rights were expressly granted in the original severance deed.

The recent decision in *Hazard Coal Corporation, Whitaker Coal Corporation, Perry County Coal Corporation, Locust Grove, Inc. and TECO Coal Corporation v. Larry J. Knight, et al*, 325 S.W.3d 290 (Ky. 2010), rejects those arguments. The Supreme Court decided that a broad form deed that granted the coal owner a "right-of-way for any and all Railroads and ways...together with the right to enter upon said lands, use and operate the same, and surface thereof...in any and every manner that might be deemed necessary or convenient for mining and removing therefrom...and for the transportation therefrom of said articles, and the right to use of such, as well as for the removal of the products taken out of any other land owned or hereafter acquired by the Grantee" was an enforceable grant of surface rights and the coal grantee and its successors were entitled to construct and operate a haul road across the surface of the property to haul coal mined from other properties. In fact, the broad form language grants the coal owner full "easement-granting power" with respect to the surface estate. The Supreme Court rejected the claims of the surface owner that the coal owner was trespassing on the surface owner's surface by using the haul road to haul foreign coal.

Although this decision confirms a well-established line of decisions, it is important in its own right in that we do not see the Supreme Court address mineral property rights on a frequent basis and it appears to put to rest (and soundly rejects) once and for all the argument that the Broad Form Deed Constitutional Amendment goes beyond prohibiting surface mining under broad form deeds and has broader implications. It does not.

This decision will be applicable in permitting matters as well. It stands for the proposition that a coal severance deed which grants broad surface rights will be sufficient to support the coal owner's rights to make certain uses of the surface without having to obtain a separate agreement with the surface owner. The original severance deed should be sufficient evidence of the coal owner's surface rights.

This decision is a Kentucky Supreme Court decision and has no precedential value beyond the confines of Kentucky.