



January 1988

***Akers v. Baldwin*: The Broad Form Deed Dilemma Revisited**

Patrick J. Sheeran
University of Kentucky

David T. Wilson II
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/jnrel>



Part of the [Oil, Gas, and Mineral Law Commons](#), and the [Property Law and Real Estate Commons](#)

[Right click to open a feedback form in a new tab to let us know how this document benefits you.](#)

Recommended Citation

Sheeran, Patrick J. and Wilson, David T. II (1988) "*Akers v. Baldwin*: The Broad Form Deed Dilemma Revisited," *Journal of Natural Resources & Environmental Law*: Vol. 4 : Iss. 1 , Article 9.

Available at: <https://uknowledge.uky.edu/jnrel/vol4/iss1/9>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in *Journal of Natural Resources & Environmental Law* by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Akers v. Baldwin: The Broad Form Deed Dilemma Revisited

INTRODUCTION

An article in the initial publication of this *Journal*¹ addressed the constitutionality of Kentucky's Mineral Deed Act² and concluded that "it is clear that the final word on broad form deeds in Kentucky has yet to be heard."³ Two years later in *Akers v. Baldwin*, the Kentucky Supreme Court proved the truth of those words.⁴ *Akers* is the latest in a long line of decisions addressing the rights granted by the infamous broad form deed.⁵ This Comment will address the ramifications of *Akers v. Baldwin* in a three pronged analysis: (1) summarizing the judicial history of broad form deeds so as to put the *Akers* decision in proper perspective, (2) analyzing the holding of *Akers*, and (3) assessing the future implications of the decision.

I. HISTORICAL BACKGROUND

A. *Broad Form Deed*

Owners of real property have the right to sever the mineral and surface estates.⁶ This right to sever, which creates separate and distinct legal estates in land, results in a conflict between the owners of the surface and the owners of the minerals there-

¹ Pfeiffer, *Kentucky's New Broad Form Deed Law - Is it Constitutional?*, 1 J. MIN. L. & POL'Y 57 (1985).

² KY. REV. STAT. ANN. §§ 381.930-.945 (Bobbs-Merrill 1984) [hereinafter KRS]. See *infra* note 90 for the text of the statute.

³ Pfeiffer, *supra* note 1, at 96.

⁴ *Akers v. Baldwin*, 736 S.W.2d 294 (Ky. 1987).

⁵ See *infra* notes 11-14 and accompanying text.

⁶ Kincaid v. McGowen, 4 S.W. 802 (Ky. 1887). See Pfeiffer, *supra* note 1, at 57 (noting 4 S.W. 802).

under.⁷ The use of the broad form deed as a vehicle for severing the mineral estate from the surface estate has further spurred the conflict.

The typical broad form deed is described as a form that provides mineral owners the right to "use and operate the same and surface thereof . . . in any manner that may be deemed necessary or convenient for mining."⁸ In addition, the deed contains a release by the surface owner of any claim for damages inflicted by the mineral owner in the use of the surface.⁹ The broad form deed was commonly employed in the Eastern Kentucky coal fields in the early 1900s to acquire mineral rights.¹⁰ It is known for the tremendously detailed description of the rights conveyed.¹¹ Inevitably, the duty of interpreting these deeds, especially regarding the right to strip mine, has been left to the court of last resort in the Commonwealth.

B. Broad Form Deed Interpretation—Pre-Buchanan

One of the first Kentucky cases to interpret the respective rights of the mineral and surface owners under a broad form deed was *McIntire v. Marion Coal Co.*¹² Specifically, the high court evaluated the right of the surface owners to use the surface for agricultural purposes according to the provisions of a 1907 deed. The deed granted the mineral owners the right "to use and operate the said land and the surface thereof"¹³ as deemed *necessary* or *convenient* for the full and free exercise and enjoyment of any and all the property.¹⁴ The deed also contained a reservation to the surface owners that provided for the use of

⁷ 736 S.W.2d at 297 (The court noted that the severance can be achieved by a lease of the mineral rights, by a deed creating a fee simple interest in the minerals, and by a sale of the surface with a reservation of the minerals.).

⁸ *Schneider, Strip Mining in Kentucky*, 59 KY. L.J. 652, 653 (1971).

⁹ *Id.*

¹⁰ *Martin v. Kentucky Oak Mining Company*, 429 S.W.2d 395, 396 (Ky. 1968).

¹¹ See *Watson v. Kenlick Coal Co.*, 498 F.2d 1183 (6th Cir. 1974) (for an example of the tedious description of the rights conveyed by a broad form deed). Pfeiffer, *supra* note 1, at 59 (noting 498 F.2d 1183).

¹² 227 S.W. 298 (Ky. 1921).

¹³ *Id.* at 298.

¹⁴ *Id.* (emphasis added).

the surface for agricultural purposes, so long as that use did not conflict with the rights of the mineral estate owner.¹⁵

In evaluating the rights of the surface owners to use the surface, the court stated:

The Marion Coal Company has the right and could by showing the necessity or convenience thereof use and occupy the whole surface of the land in question, even to excluding the plaintiff [surface owner] and taking his house and garden . . . [t]he mineral estate under the deed is dominant, superior and exclusive in every circumstance or condition where the owner thereof shall deem it necessary or convenient to make such use of the surface as the deed allows.¹⁶

The court, in granting these broad rights to the mineral owner, did state that the coal company was to provide satisfaction or adjudged compensation for damage to improvements.¹⁷ However, the damages provision set forth in *McIntire* was disregarded in later decisions, only to be resuscitated by *Akers v. Baldwin*.

Fifteen years after the decision in *McIntire*, the court further expanded the rights of the mineral estate owner by holding that a deed conveying minerals included the right to remove the minerals by strip mining, as opposed to the traditional deep shaft method.¹⁸ This decision set the stage for the plethora of law suits which followed.

C. *Broad Form Deed Interpretation in Buchanan v. Watson*

*Buchanan v. Watson*¹⁹ squarely addressed the right of a mineral owner to strip mine under a broad form deed. The deed in question, granted to John C.C. Mayo²⁰ in 1903, was an

¹⁵ *Id.* at 299.

¹⁶ *Id.* at 300.

¹⁷ *Id.*

¹⁸ *Rudd v. Hayden*, 97 S.W.2d 35 (Ky. 1936).

¹⁹ 290 S.W.2d 40 (Ky. 1956). (The court decided one related case, *Treadway v. Wilson*, 192 S.W.2d 949 (Ky. 1946), in between 97 S.W.2d 35 and 290 S.W.2d 40. The court in *Treadway* held that the mineral owner had the paramount right to the use of the surface, but remanded for the trial court to determine if the proposed method for excavation was oppressive.)

²⁰ See H. CAUDILL, NIGHT COMES TO THE CUMBERLANDS 72-76, 305-07 (1962) (describing the life and accomplishments of the legendary John C.C. Mayo).

“archetypal broad form deed;” that is, it severed the mineral estate, granted all mineral rights to Mayo, and waived any claims of damages against the grantee.²¹

The *Buchanan* court noted that the Chancellor had found the only feasible way to excavate was by strip mining, that strip mining would result in the destruction of the surface above the coal,²² and that the parties of the deed had not contemplated strip mining nor destruction of the surface.²³ Nonetheless, the court held that the parties intended to convey the coal and that to deny strip mining, which was the only feasible process for removal, would defeat the principle purpose of the deed.²⁴ In addition, the court held that the mineral owner would not be liable to the surface owner for damages unless the mineral owner exercised his rights “oppressively, arbitrarily, wantonly or maliciously.”²⁵

The ultimate effect of the *Buchanan* decision was succinctly summarized in the *Akers v. Baldwin* decision by Chief Justice Stephens who wrote:

under our decision in *Buchanan*, the owners of mineral rights under a typical broad form deed have virtually absolute right to mine the minerals by any means, past, present or future, and in the course of such mining to literally obliterate the surface with little or no recourse for the surface owner.²⁶

Although criticism of the *Buchanan* decision flowed fast and free, an analysis of the criticism is beyond the scope of this comment.²⁷

²¹ Greenwall, *On the Constitutionality of Kentucky's Mineral Deed Act*, 13 N. KY. L. REV. 219 (1986).

²² 290 S.W.2d at 42.

²³ *Id.* at 42.

²⁴ *Id.*

²⁵ *Id.* at 43.

²⁶ 736 S.W.2d at 302.

²⁷ See Randall & Pagoulatos, *Surface Mining Environmental Quality: An Economic Perspective*, 64 KY. L.J. 549 (1975-76); Schneider, *supra* note 8; Note, *Kentucky's Experience with the Broad Form Deed*, 63 KY. L.J. 107 (1974-75); Pfeiffer, *supra* note 1, at 62. See also Annotation, *Grant, Reservation, or Lease of Minerals and Mining Rights as Including, Without Expressly So Providing, The Right to Remove the Minerals By Surface Mining*, 70 A.L.R. 3RD 383 (1976).

D. *Broad Form Deed Interpretation—Post-Buchanan*

Four years after the decision in *Buchanan*, its holding was expanded to permit auger or strip mining²⁸—even when conventional methods were available.²⁹ In 1960 Kentucky's high court decided *Wiser Oil Co. v. Conley*,³⁰ which involved a lease executed in 1917 granting the lessee oil and gas rights.³¹ In *Wiser*, the plaintiff oil company began production under the lease by "water flooding" which resulted in extensive damage to the defendant's surface.³² After distinguishing *Buchanan* because that deed contained a waiver of damages,³³ the court allowed the surface owner to recover damages by unanimously concluding that:

it was the intention of the parties that oil should be produced by drilling in the customary manner that prevailed when the lease was executed. Any exemption from liability would there-

²⁸ *Blue Diamond Coal Co. v. Neace*, 337 S.W.2d 725 (Ky. 1960) (The court indicated that the mineral estate had been severed by a deed "virtually identical" to the one in *Buchanan v. Watson*, 290 S.W.2d 40 (Ky. 1956). The court's holding that the mineral owner had the right to choose *any* technique was in response to an argument that deep mining would have sufficiently recovered the coal. *Id.*

²⁹ *Kodak Coal Co. v. Smith*, 338 S.W.2d 699 (Ky. 1960) (Based on facts analogous to those in 337 S.W.2d 725, the court unanimously held that the mineral owner had the right to mine by strip and auger even though the trial court found that the coal could be mined by other methods.).

³⁰ 346 S.W.2d 718 (Ky. 1960).

³¹ *Id.* at 720.

³² *Id.* "Water flooding is a method of forcing oil from underground by pumping water into the wells." *Id.*

³³ *Id.* at 721. The court reasoned that:

There is a vital difference between the terms and conditions of the mineral deed involved in the *Buchanan* case and the language embraced in the oil and gas lease under consideration here. The mineral deed contained an express waiver of damages which this Court stated was sufficiently broad to prohibit a recovery for any destruction of damages from strip mining that might result to the surface. The waiver of damages condition was the controlling feature in the *Buchanan* case. On the other hand, the oil and gas lease has no stated waiver provision and furthermore, we do not believe such a provision can be read into it. *Id.*

But see *Crowley v. Round Mountain Coal Co.*, 374 S.W.2d 825 (Ky. 1964) (The court said "the waiver-of-damage clause was not a controlling factor in the *Buchanan* decision.").

fore be limited to the damages which might be caused by this contemplated means of bringing oil to the top.³⁴

In 1968 the court's unanimous support of the *Buchanan* doctrine splintered. In *Martin v. Kentucky Oak Mining Co.*,³⁵ the court split 4-3 in favor of following *Buchanan*.³⁶ As for *Wiser*, the majority stated, "We do not feel compelled in this to explain, justify, reconcile or distinguish *Wiser*. The court has decided to adhere to *Buchanan* whether or not it conflicts with *Wiser*."³⁷

*Commerce Union Bank v. Kinkade*³⁸ was the last decision in the procession of cases following *Buchanan*. In *Commerce Union*, the court prohibited a coal company from strip mining the coal by holding that the deed in question³⁹ was not a broad form deed.⁴⁰ According to the majority in *Akers*, the effect of *Commerce Union* was to limit the virtually unfettered power of the mineral owner over the surface owner to broad form deeds and to require that each challenged deed be considered on a case-by-case method.⁴¹ The court in *Commerce Union* mandated that the mineral owner could conduct mining operations contrary to the rights usually implied in a mineral deed when the deed severing the minerals resulted "in a definite enlargement of specified mining rights."⁴²

³⁴ *Id.* at 722 (In allowing the surface owner to recover for damage that resulted in a method of mining that was not contemplated when the deed was entered, the court substantially departed from *Buchanan v. Watson*, 290 S.W.2d 40 (Ky. 1956).). In 290 S.W.2d 40, damages were denied regardless of the fact that the destructive process was not contemplated by the parties to the deed. *Supra*, notes 19-27 and accompanying text.

³⁵ 429 S.W.2d 395 (Ky. 1968).

³⁶ *Id.* at 399. The majority recognized the merit and persuasiveness of the landowner's argument. However, the arguments were not deemed sufficiently forceful "to prevail against the long entrenched role of our previous cases in reliance upon which property rights have vested." *Id.*

³⁷ *Id.* at 402. (Dissenting Judge Hill responded with the often cited observation, "Wiser and Buchanan are as inconsistent as sin and salvation.").

³⁸ 540 S.W.2d 861 (Ky. 1976).

³⁹ *Id.* at 862-63.

⁴⁰ *Id.* at 864. The court examined the cases which involved broad form deeds and concluded that the mineral deeds in 540 S.W.2d 861 did not contain language so extensive as to subordinate the rights of the surface estate to the demands of the mineral estate.

⁴¹ 736 S.W.2d at 304.

⁴² 540 S.W.2d at 863.

II. *Akers v. Baldwin*—The Holding

A. *Factual Background*

The final opinion handed down as *Akers v. Baldwin* actually reflects the Kentucky Supreme Court's decision on two cases⁴³ consolidated by the court. In the first, *Akers v. Baldwin*, Everett Akers and several other property owners in Floyd County, Kentucky filed suit in U.S. District Court against the Kentucky Natural Resources and Environmental Protection Cabinet. These surface owners sought an injunction⁴⁴ prohibiting the state from issuing mining permits to the mineral owner, Falcon Coal Company. Akers contended that the deed which severed the mineral and surface estates did not give the right to strip mine;⁴⁵ he also relied upon the Mineral Deed Act⁴⁶ with which the Kentucky legislature intended to govern the legal consequences of the relationship between the mineral and surface estates when a severance⁴⁷ has been effected. Akers' injunction request contended that the state regulatory agency's decision to issue a mining permit was a violation of the Surface Mining Control and Reclamation Act (SMCRA),⁴⁸ which required the state agency to enforce its federally-approved program.⁴⁹ If the state fails to meet SMCRA requirements, the Office of Surface Mining is entitled to enforce the guidelines.⁵⁰ Falcon Coal and other mining interests⁵¹ challenged the constitutionality of the Mineral Deed

⁴³ 736 S.W.2d at 296.

⁴⁴ *Akers v. Baldwin*, 785 F.2d 307 (6th Cir. 1986) (table) (text in Westlaw).

⁴⁵ *Id.*

⁴⁶ See *infra* notes 89-96 and accompanying text.

⁴⁷ See 4 D. VISH, *COAL LAW AND REGULATION*, § 80.01[3] (1983) (describing the doctrine of severability in the context).

⁴⁸ Surface Mining Control and Reclamation Act of 1977 § 522 [hereinafter SMCRA], 30 U.S.C. §§ 1201-1328 (1982).

⁴⁹ 785 F.2d 307.

⁵⁰ SMCRA § 504, 30 U.S.C. § 1254 (1982). "Secretary shall prepare . . . promulgate and implement a federal program for a state . . . if such state . . . fails to implement, enforce, or maintain its approved state program so provided for in this chapter." *Id.*

⁵¹ Brief of Intervenors at 1, *Akers v. Baldwin*, 85 SC-392-CL (Ky. July 2, 1987) (The other intervening coal companies were Golden Oak Mining Co., Highland Coal, Inc., Lost Mountain Mining, Inc., Penbroke Coal Co., and Shamrock Coal Co.).

Act and the Kentucky Supreme Court certified the constitutional issue.⁵²

In the second case, *Baker v. Wooten*,⁵³ Baker had been denied access to the Wooten property in which Baker's lessors held the mineral rights which had been severed from the surface estate by a 1910 deed.⁵⁴ The Wootens contended that the new broad form deed statute⁵⁵ constituted a bar to the strip mining of their property.⁵⁶ The Perry Circuit Court declared that the recently enacted⁵⁷ statutes were determinative and precluded the strip mining of the property.⁵⁸ The Kentucky Supreme Court granted a request that the subsequent appeal of this ruling be transferred.⁵⁹

B. Majority Holding

1. Right To Strip Mine Under A Broad Form Deed

The court first addressed the correctness of the thirty-one year old *Buchanan v. Watson* decision. The majority observed that an analysis of *Buchanan* involved two major issues: the right of the mineral owner to strip mine, and the obligation to respond with damages for the use of the surface.⁶⁰

In addressing the right of the mineral owner to strip mine, the court summarized the holdings of prior cases by stating that "the only restriction (unless one appears in the deed) is that the use of said surface may not be oppressive, arbitrary, malicious or wanton."⁶¹ The *Akers* court then reexamined and reaffirmed

⁵² *Akers v. Baldwin*, 736 S.W.2d 294 (Ky. 1987).

⁵³ *Baker v. Wooten*, No. 83-CI-429 (Perry Cir. Ct. 1983).

⁵⁴ 736 S.W.2d at 296.

⁵⁵ See *infra* notes 89-96 and accompanying text.

⁵⁶ 736 S.W.2d at 297.

⁵⁷ KRS § 381.940 (enacted July 13, 1984). See *infra* notes 89-96 and accompanying text.

⁵⁸ 736 S.W.2d at 297.

⁵⁹ *Id.*

⁶⁰ *Id.* at 304.

⁶¹ *Id.* This standard was set forth in *Buchanan v. Watson*, 290 S.W.2d 40, 43 (Ky. 1956).

the cases establishing this rule.⁶² The court surmised that the provisions in broad form deeds are clear and overwhelming and, in the absence of ambiguity, extrinsic evidence could not be introduced to vary or explain the deeds.⁶³ The fact that a certain technique of mining was not known at the time the deed was created was “simply not relevant.”⁶⁴

In limiting the introduction of extrinsic evidence to situations involving ambiguity, the court accepted the coal companies’ argument that “unless an instrument is found to be ambiguous, the intention of the parties must be gathered from what it says.”⁶⁵ Moreover, the court aided the mineral owners’ position by refusing to consider whether strip mining was contemplated when the broad form deed was executed.⁶⁶

In accepting the contention of the mineral owners, the court rejected a variety of arguments proffered by the surface owners supporting the proposition that *Buchanan* was a faulty decision. Specifically, the surface owners contended that *Buchanan* was “a radical departure”⁶⁷ from traditional deed construction, and it allowed the mineral owner to destroy the surface by a method of extraction that the parties had not contemplated.⁶⁸ The landowners insisted that the court should follow the guidelines set

⁶² 736 S.W.2d at 302-04. See *supra* notes 6-42 and accompanying text for an analysis of the relevant cases.

⁶³ 736 S.W.2d at 304.

⁶⁴ *Id.* at 305.

⁶⁵ Brief of Intervenor, *supra* note 51, at 9. The coal companies relied upon the following authority: *Kentucky-West Virginia Gas Company v. Browning*, 521 S.W.2d 516 (Ky. 1975); *Lambert v. Prichard*, 284 S.W.2d 90 (Ky. 1955); *Gibson v. Sellers*, 252 S.W.2d 911 (Ky. 1952); *Bland v. Kentucky Coal Corporation*, 206 S.W.2d 62 (Ky. 1947). *Id.*

⁶⁶ *Id.* The mineral owners place great reliance upon *Gibson v. Sellers*, 252 S.W.2d 911 (Ky. 1952) for the proposition that specific contemplation of surface mining by the parties was irrelevant. The case involved the question of whether or not the conveyance of “minerals” at a time when oil rights had little or no value and were not important should be construed as including oil and gas. “Minerals” was deemed to include oil and gas, and the intention of the parties was limited to the four corners of the agreement.

⁶⁷ Brief of plaintiff Everett Akers at 47, *Akers v. Baldwin*, 85-SC-392-CL (Ky. July 2, 1987) (Plaintiff cites the following as representative of the traditional and applicable method of deed construction in Kentucky: *Combs v. Combs*, 166 S.W.2d 969 (Ky. 1942); *Chaney v. Chaney*, 189 S.W.2d 268 (Ky. 1945); *Smith v. Kentland Coal and Coke Company*, 276 S.W.2d 663 (Ky. 1955).).

⁶⁸ *Id.* at 48.

forth in *Wiser Oil Company v. Conley*⁶⁹ and *Holladay v. Peabody Coal Company*,⁷⁰ which indicated that the intention of the parties at the time the deed was executed should control.⁷¹

2. *Obligation To Pay Damages To The Surface Owner*

After thirty years of allowing the *Buchanan* doctrine to dominate the mining industry, in *Akers v. Baldwin* the Kentucky Supreme Court finally signalled its readiness to join the growing trend toward allowing damages for surface destruction. Although the court upheld *Buchanan* to the extent it allowed the mineral owner to strip mine under a broad form deed,⁷² it reversed that portion of *Buchanan* that upheld the waiver of damages provisions in broad form deeds.⁷³ Specifically, the court mandated that, if the owner of minerals under a broad form deed causes injury to the surface when recovering such minerals, "the mineral owner shall respond in damages to the owner of the surface."⁷⁴ Stating that "the doctrine of *stare decisis* impels us to overrule precedent only with considerable thought and care,"⁷⁵ the court decided that the injustice worked by a denial of damages caused it to reconsider and reverse *Buchanan's* literal application of a waiver of damages as illogical, unfair, and contrary to the best interest of the public.⁷⁶

To illustrate the injustice which prompted this reversal, the court stated that in denying damages to the surface, "[t]his in the land is not the servient estate, it is no estate."⁷⁷ The court stressed that the destruction of the surface "would never have been anticipated"⁷⁸ by the grantor of the mineral estate and that it was "grossly unconscionable to allow such harm without the

⁶⁹ 346 S.W.2d 718 (Ky. 1960).

⁷⁰ 560 S.W.2d 550 (Ky. 1977) (Peabody sought to acquire a permanent easement for constructing and maintaining a roadway and coal conveyor system over land of appellants from a mine opening not located on appellant's properties.).

⁷¹ 346 S.W.2d at 722; 560 S.W.2d at 554-55.

⁷² 736 S.W.2d at 305.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 736 S.W.2d at 306.

⁷⁸ *Id.* at 307.

awarding of damages.”⁷⁹ The court opined that it was highly unlikely that the parties who entered the agreement creating the two estates knew or contemplated that the surface could or would be totally destroyed without recourse for the original party.⁸⁰ The court also observed that Kentucky was “standing naked and alone”⁸¹ with its denial of damages for the surface estate. In overruling the damages portion of *Buchanan*, the court added, that “to the extent *Commerce Union Bank v. Kinkade* is inconsistent with the present opinion, *Commerce Union Bank* is overruled.”⁸²

In allowing the surface owner to recover damages, the court deemed relevant the knowledge, contemplations, and anticipations of the parties concerning the resultant surface destruction. By comparison, these factors were deemed “simply not relevant”⁸³ when determining that broad form deeds grant the right to strip mine.

The court limited recovery of damages under broad form deeds to those deeds which severed the estates prior to the effective date of *Buchanan* (May 4, 1956) and after July 2, 1987.⁸⁴ In effect, those broad form deeds that were used to sever minerals in reliance upon *Buchanan* were excluded from payment

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 306. In noting that Kentucky is standing “naked and alone in the view under *Buchanan*,” the court cites the following decisions of other jurisdictions and then indicates that it was time for a change: *Doochin v. Rackley*, 610 S.W.2d 715 (Tenn. 1981); *Phipps v. Leftwich*, 222 S.E.2d 535 (Va. 1976); *Franklin v. Callicoot*, 119 N.E.2d 688 (Ohio 1954); *West Virginia-Pittsburgh Coal Co. v. Stoney*, 42 S.E.2d 46 (W. Va. 1947); *Barker v. Mintz*, 215 P. 534 (Colo. 1923); *Stewart v. Chernicky*, 266 A.2d 259 (Pa. 1970). *Id.* However, study of these six cases reveals that four of them prohibited strip mining under facts comparable to those at hand. Only two, *Barker* and *Stewart*, allowed strip mining to proceed if damages were paid to the surface estate. Further, *Barker* permitted strip mining, coupled with payment for damages, if the surface was wild and used only for pasturage.

⁸² 736 S.W.2d at 304. See *infra* notes 106-12 and accompanying text.

⁸³ 736 S.W.2d at 305. See *supra* text accompanying note 64.

⁸⁴ The slip opinion excluded payment of damages for severance “made between the effective date of *Buchanan* and the finality date of this decision.” *Akers v. Baldwin*, 85-SC-392-CL, at 28 (Ky. July 2, 1987). Since the finality date was not until September 24, 1987 an eleven week window period existed in which mineral owners could transfer property without paying compensation. The final decision changed that wording to read the “initial decision date” effectively eliminating this loophole. See *Louisville Courier Journal*, Sept. 25, 1987 § A, at 1, col. 5.

of damages. Damages would still be precluded where a severance deed contained both a waiver of damages and a specific description of the mining method to be used.⁸⁵

The court opted for a common method of determining damages, known as the diminution measure:⁸⁶

The measure of damages shall be the difference in the market value of the surface estate, including all improvements thereon, immediately before and immediately after the use of the surface by the mineral owner. 'Use of the surface' shall include any and all reclamation of the surface by the mineral owner.⁸⁷

This measure has been the standard measure of permanent damages to real property in Kentucky.⁸⁸

3. *Constitutionality of Kentucky's Mineral Deed Act*

In 1984⁸⁹ the Kentucky General Assembly addressed the growing controversy by passing the Mineral Deed Act.⁹⁰ The Act

⁸⁵ 736 S.W.2d at 305.

⁸⁶ D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 5.1 (1973).

⁸⁷ 736 S.W.2d at 307.

⁸⁸ See *Middle States Coal Co. v. Hicks*, 608 S.W.2d 56 (Ky. App. 1980); *Texaco, Inc. v. Melton*, 463 S.W.2d 301 (Ky. 1971); *Kentucky Stone Co. v. Gaddie*, 396 S.W.2d 337 (Ky. 1965); *River Queen Coal Co. v. Mencer*, 379 S.W.2d 461 (Ky. 1964); *United Fuel Co. v. Rowe*, 375 S.W.2d 264 (Ky. 1964).

⁸⁹ In 1974 the General Assembly passed legislation requiring that an application for a strip mining permit could not be issued without consent of the surface owner, even though the deed severing the mineral estate gave the mineral owner the right to strip mine. KRS § 350.060(2) (1974). The Kentucky Supreme Court, however, ruled the statute unconstitutional in *Department for Natural Resources and Environmental Protection v. No. 8 Ltd.*, 528 S.W.2d 684 (Ky. 1975).

⁹⁰ KRS §§ 381.935-.945 (1984). The Statute reads as follows:

381.930. Purposes of KRS § 381.935 to 381.945. - The purposes of KRS § 381.935 to 381.945 are as follows:

- (1) To facilitate and require the demonstration of a clear understanding between the owners of surface and mineral estates in land concerning their respective rights to use and occupy or injure the surface of the land;
- (2) To protect the security of titles to land and improvements thereto;
- (3) To promote the free alienability of land;
- (4) To prevent hardship and injustice to surface or mineral owners arising from uncertainty of the law;
- (5) To promote the conservation and the full and efficient use of all natural resources of the state, including the land, the making of improvements to the land, the growth of agriculture, the development of the new industry

provided a rule of construction for deeds severing the mineral and surface estates. Specifically, K.R.S. section 381.940 provided that if the deed fails to specifically identify the method of mining to be employed:

it shall be held, in the absence of clear and convincing evidence to the contrary, that the intentions of the parties to the instrument was that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed.⁹¹

The court in *Akers* held that the effect of this statute, if constitutional, would be the disappearance of strip mining under broad form deeds.⁹² The court, however, deemed the statute

and the general economic well-being of the state and its people;

(6) To codify a rule of construction for mineral deeds relating to coal extraction so as to implement the intention of the parties at the time the instrument was created; and

(7) To foster certainty and uniformity in the operation of the law. (Enact. Acts 1984, ch. 28, § 1, effective July 13, 1984).

381.935. Definitions. - For the purpose of KRS § 381.940, "method" and "methods" means underground, surface, auger, or open pit mining and nothing in KRS § 381.940 shall be interpreted to adversely affect the use of modern equipment or machinery with respect to mining methods permitted under KRS § 381.940 (Enact. Acts 1984, ch. 28 § 3, effective July 13, 1984).

381.940. Rules of construction for mineral deeds relating to coal extraction. - In any instrument heretofore or hereafter executed purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals, which fails to state or describe in express and specific terms the method of coal extraction to be employed, or where said instrument contains language subordinating the surface estate to the mineral estate, it shall be held, in the absence of clear and convincing evidence to the contrary, that the intention of the parties to the instrument was that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be used in Kentucky in the area affected at the time the instrument was executed, and that the mineral estate be dominant to the surface estate only for the purposes of coal extraction by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed. (Enact. Acts 1984, ch. 28 § 2, effective July 13, 1984.).

381.945. Written agreement in deed directing how surface to be reclaimed. - In any deed in which the minerals are severed from the surface, the present owners of the surface rights may enter into a written agreement directing how the surface shall be reclaimed, and how the property shall be left after the extraction of the minerals, and in compliance with federal and state rules and regulations. (Enact. Acts 1984, ch. 28, § 4, effective July 13, 1984).

⁹¹ *Id.* at § 381.940.

⁹² 736 S.W.2d at 307 (Ky. 1987).

unconstitutional.⁹³ Opponents of the legislation offered a variety of arguments that would render the statute unconstitutional. For instance, the intervening coal companies argued that the statute violated section 19 of the Kentucky Constitution by impairing the obligation of contracts.⁹⁴ Additionally, the intervening parties contended that the statute deprived individuals of property without due process of law thereby violating the fifth and fourteenth amendments of the U.S. Constitution.⁹⁵ Opponents of the Mineral Deed Act also maintained that the Act constituted a taking without just compensation and therefore violated section 13 of the Kentucky Constitution.⁹⁶

The *Akers* court, however, "found it unnecessary to discuss"⁹⁷ these grounds of alleged unconstitutionality. Instead, they accepted the fourth argument of the mineral owners and struck down the statute as an "illegal legislative excursion into the judicial authority."⁹⁸

The logic used by the court was that the statute dictated the type of mining required under broad form deeds in the absence of "clear and convincing evidence to the contrary."⁹⁹ The court, however, felt that no "clear and convincing" evidence existed since strip mining was non-existent in the years broad form deeds were executed.¹⁰⁰ Hence, the court concluded that the statute created an irrebuttable presumption constituting a substantive rule of law and was therefore "constitutionally impermissible."¹⁰¹ The statute was unconstitutional because "the power to make rules and to determine substantive issues of law is solely within the power of the judiciary."¹⁰² In summarizing, the court

⁹³ *Id.* at 310.

⁹⁴ Brief of Intervenor, *supra* note 51, at 21.

⁹⁵ *Id.* at 29.

⁹⁶ *Id.* at 33.

⁹⁷ 736 S.W.2d at 310.

⁹⁸ *Id.* at 307.

⁹⁹ *Id.* at 308.

¹⁰⁰ *Id.* at 309.

¹⁰¹ *Id.*

¹⁰² *Id.* The court concluded that the creation of a "substantive rule of law" by the General Assembly violated the following section of the Kentucky Constitution:

§ 27 *Legislative, executive and judicial departments*

The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them confined to

held that “[w]hen an act of the General Assembly violates the principle of the separation of powers . . . [the court is] obligated to vitiate such legislative action.”¹⁰³

C. *Dissent*

Akers v. Baldwin upheld the *Buchanan v. Watson* decision allowing mineral owners under broad form deeds to strip mine and struck down the Mineral Deed Act prohibiting such strip mining, but the court split 4-3 on both of these issues.¹⁰⁴ Obviously, if a justice unpersuaded by the arguments of the mineral owners replaces one of the justices accepting the argument (Stephens, Liebson, Vance and Gant) the tenuous balance of *Akers* could be easily rearranged. The decision to overrule the exclusion of damages as set forth in *Buchanan* is stable, however, since the justices reached a unanimous conclusion.¹⁰⁵

III. *Akers v. Baldwin*—The Ramifications

Two of the three aforementioned conclusions unequivocally reaffirm the tremendous rights of mineral owners under broad form deeds. By upholding the right granted in *Buchanan*, while simultaneously striking down the Mineral Deed Act, the court removed any doubt that mineral owners in Kentucky have a

a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

§ 28 *Power of one department not to be exercised by the other*

No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

§ 109 *The judicial power; unified system; impeachment*

The judicial power of the Commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the circuit court and a trial court of limited jurisdiction known as the district court. The court shall constitute a unified judicial system for operation and administration. The impeachment powers of the general assembly shall remain inviolate. *Id.*

¹⁰³ 736 S.W.2d at 310.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

right to strip mine under broad form deeds. The decision, however, may have raised as many questions as it answered.

A. Effect of Akers v. Baldwin on Commerce Union Bank v. Kinkade

In discussing *Commerce Union Bank v. Kinkade*¹⁰⁶ the *Akers* majority noted that *Commerce Union* restricted the virtually unlimited rights of mineral owners under broad form deeds and required that each challenged deed be considered on a case-by-case basis.¹⁰⁷ Unfortunately, the *Akers* court went on to hold that "to the extent *Commerce Union* is inconsistent with the present opinion, *Commerce Union* is overruled."¹⁰⁸

This statement implies that *Commerce Union* conflicts with *Akers*, yet close analysis fails to reveal the inconsistency. Consequently, whether *Commerce Union* presents "good law" is unclear. This dilemma is significant since *Commerce Union* constitutes a logical, well-reasoned opinion¹⁰⁹ which, as *Akers* noted, requires a deed-by-deed analysis. In short, *Commerce Union* held that all mineral deeds carry with them certain implied rights to use the surface as reasonably necessary to exploit the mineral.¹¹⁰ *Commerce Union* indicates that only deeds creating "a definite enlargement of specified mining rights" permit the owner to conduct mining operations contrary to those rights typically implied in a mineral grant.¹¹¹

Commerce Union created an analytical framework to determine whether a deed conveyed the right to strip mine; specifically, did the language in the deed constitute a *definite enlargement of specified mining rights*? This framework represented a vast improvement over the traditional technique of hinging the right to strip mine on the characterization of a deed as a "broad form" or "Mayo" variety.¹¹²

¹⁰⁶ 540 S.W.2d 861 (Ky. 1976).

¹⁰⁷ 736 S.W.2d at 304.

¹⁰⁸ *Id.*

¹⁰⁹ Interview with Robert M. Pfeiffer, Assistant Professor of Law, University of Kentucky, in Lexington, Kentucky (Oct. 14, 1987).

¹¹⁰ 540 S.W.2d at 863. (citing *Wiser Oil Company v. Conley*, 346 S.W.2d 718 (Ky. 1960)). See *supra* text accompanying note 30.

¹¹¹ 540 S.W.2d at 863.

¹¹² Interview, *supra* note 109.

Since *Akers* only overrules *Buchanan* and its progeny (including *Commerce Union*) regarding the exclusion of damages, the holding of *Commerce Union* apparently remains unaffected since *Commerce Union* makes no reference to damages. Consequently the meaning behind the court's overruling of *Commerce Union*, but only to the extent it conflicts with *Akers*, is pointlessly perplexing.

B. Exclusion of Damages Occuring Between Buchanan v. Watson and Akers v. Baldwin Decisions

In overruling *Buchanan* regarding the surface owner's waiver of damages,¹¹³ the *Akers* court restored a semblance of equality to the rights of mineral and surface owners. However, the court limited the payment of damages by excluding the mineral owner from liability for "all conveyances by broad form deed, and leases and mining efforts under broad form deeds, made between the effective dates of *Buchanan*, May 4, 1956, and the initial rendition date of this decision."¹¹⁴ This prospective application of the allowance for damages may affect but a miniscule portion of the surface area subject to potential strip mining under the still-viable *Buchanan*:

Akers appears to exempt not only conveyances by broad form deed after *Buchanan* but also 'leases and mining efforts under broad form deeds' made post-*Buchanan* and pre-*Akers* . . . *Akers* thus appears to allow the benefits of such leases or conveyances to the assigned under future conveyances pertaining to the same property.¹¹⁵

When the severance of the estate is based upon a broad form deed, or a lease under a broad form deed, the application of this holding is straightforward. Simply put, the mineral owner is not liable for damages if the deed was entered into during the interval excluded by *Akers*. However, the exclusion of "mining

¹¹³ 736 S.W.2d at 305.

¹¹⁴ See *supra* note 84.

¹¹⁵ Address by Paul R. Collins, Kentucky Mineral Law Symposium, in Lexington, Kentucky (Oct. 2, 1987).

efforts” under broad form deeds is not so clear. What constitutes a “mining effort”? Do damages that result from surveying constitute a “mining effort” and thereby preclude liability for damages to the surface estate?¹¹⁶ Does exploration qualify as a “mining effort” and shield the mineral owner from liability from damages? Further, does the mere submission of a mining permit achieve “mining effort” status? Lastly, does collecting baseline water samples months before the application for a mining permit is submitted constitute a “mining effort”? Obviously, the delineation between what is and is not a mining effort is unclear - yet potentially significant.

C. *Measurement and Payment of Damages*

The court’s decision to abandon the portion of *Buchanan v. Watson* that precluded the payment of damages is an attempt to reconcile the law in Kentucky with the needs of the surface owners.¹¹⁷ The court held that damages would be the difference in the market value immediately before and after the “use of the surface” by the mineral owner.¹¹⁸ The value of the surface includes all improvements, and the “use of the surface” includes any and all reclamation.¹¹⁹

Although the court expressed good intentions in allowing surface owners to recover damages, the application of *Akers* is so restricted that recovery is highly unlikely. For instance, if a broad form deed was used to sever the estates prior to *Buchanan* and the surface was subsequently stripped, recovery would be barred by Kentucky’s statute of limitations.¹²⁰ Similarly, any conveyance, lease, or mining effort conducted in reliance upon *Buchanan* precludes the recovery of damages. Thus, the only instances in which damages are available under *Akers v. Baldwin*

¹¹⁶ It seems safe to assume that the requirements that the method of mining not be “oppressive, arbitrary, wanton or malicious” still applies to deeds executed in the time period between *Buchanan v. Watson*, 290 S.W.2d 40 (Ky. 1956) and *Akers v. Baldwin*, 736 S.W.2d 294 (Ky. 1987).

¹¹⁷ 736 S.W.2d at 306.

¹¹⁸ *Id.* at 307.

¹¹⁹ *Id.*

¹²⁰ KRS § 413.120(4) provides a five year statute of limitations for actions arising from trespass on real property.

is when the deed was activated prior to *Buchanan* and was not relied upon as a basis for a conveyance, lease or mining effort during the "grace period" between *Buchanan* and *Akers*. The recovery of damages will be the exception rather than the rule.

Should the above requirements be met and damages be recoverable, the measure of damages will be the difference between fair market value of the surface immediately before use by the mineral owner and immediately after all reclamation has been completed.¹²¹ Granted, this standard for measuring damage to real estate is well established in Kentucky,¹²² yet it does not seem appropriate for assessing strip mining damages. This problem with this measurement is that, following the enactment of the Surface Mining Control and Reclamation Act of 1977, the miner is required to conduct extensive reclamation of the surface.¹²³ Consequently, the value of the surface is quite often greater after the reclamation than before the strip mining began.¹²⁴ Thus, in those few instances in which damages are recoverable, the amount of damages may be zero when based on the currently applicable formula.

The above remedy does not take into account reparation for the loss of use or enjoyment of the surface estate. Such deprivation is of prime concern when the property in question is a homesite or farm from which income or pleasure might be derived.

One proposal for a fair measure of damages applicable in the instant situation is that "[s]uch damages . . . would be measured by the reduction in the value of the land for surface use."¹²⁵ This measure would compare the difference between the fair market value of the surface uses before strip mining and after mining and reclamation with the addition of compensation

¹²¹ 736 S.W.2d at 307.

¹²² *Island Creek Coal Co. v. Rodgers*, 644 S.W.2d 339 (Ky. 1982). See *supra* note 88.

¹²³ SMCRA §§ 101-908, 30 U.S.C. §§ 1201-1328 (1982).

¹²⁴ Interview with F.A. Lewis, Professional Mining Engineer, in Lexington, Kentucky (Oct. 10, 1987). Following reclamation the surface will usually be suitable for farming. Prior to strip mining and reclamation the surface is often not tillable. Therefore, the value after stripping may be greater than before stripping. *Id.*

¹²⁵ Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 WYO. L.J. 107, 115, reprinted at 34 OKLA. L. REV. 28, 37 (1981).

for the interference with the surface estate which may have denied the owner the use of the property.¹²⁶ Basing any measure of "use"¹²⁷ on the way the property had been used before mining would be a meaningful method of measuring the lost "use." As noted previously, with the requisite reclamation to be effected by the mineral estate, no damages may actually be forthcoming, unless the surface owner is at least compensated for the deprivation of the enjoyment and use of his estate.¹²⁸

One commentator has suggested that a rule which allows the mineral owner to destroy the surface creates, in effect, "a private right of condemnation"¹²⁹ and that damages appropriate for condemnation should be applied. The traditional measure of damages in condemnation is the fair market value of the property taken, plus damages minus any benefit to the undisturbed property.¹³⁰ The depreciation of adjoining lands is also taken into account by this formula.¹³¹

Lastly, in those few situations in which the surface owner is entitled to recover damages under *Akers*, and damages exist according to the formula, payment is not required until any and all reclamation of the surface is complete.¹³² Since the actual mining could last an indeterminable number of years, and since reclamation could easily last an additional 5 to 10 years after mining is concluded, the mineral owner could be forced to literally wait *decades* before payment of damages is received. Justice Stephenson, writing a separate opinion in *Akers* in which he dissented in part and concurred in part, expressed the hope that the damages allowable under *Akers* will be paid in advance

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Where reclamation is involved, "there is a risk that establishing the value of interference with the surface estate . . . subject to reclamation will result in a swearing contest between expert witnesses." J. Lowe, *What Substances Are Minerals?*, 30 ROCKY MTN. MIN. L. INST. § 2.05[2](c) (1984).

¹²⁹ Norvell, *Developing Land Characterized by Separate Ownership of Oil and Gas and Surface Movable Coal and Uranium - The Other Side of Aker v. Guinn and Its Progeny*, 33 OIL & GAS INST. 193, 200 (1982).

¹³⁰ P. NICHOLS, *THE LAW OF EMINENT DOMAIN*, § 12.[4] (rev. 3d ed. 1985).

¹³¹ See, e.g., *Bader v. Jefferson County*, 119 S.W.2d 870 (1938) (damages allowable for impact on adjacent property).

¹³² 736 S.W.2d at 307.

to the surface owner,¹³³ although this point was not clarified by the *Akers* majority opinion. The mineral owner's right to ravish the surface could have been made contingent upon the prior payment of compensation to the surface owner; otherwise, the surface owner had no protection whatsoever against the subsequent insolvency of the miner.

Some courts have predicated the right of the mineral owner to destroy the surface on the balancing of the likely injury to the surface against the value, economic and societal, of the minerals to be extracted.¹³⁴ Unless the minerals to be removed were worth proportionately more than the land surface to be disturbed or there existed a strong public policy necessitating extraction, the mineral owner would not be allowed to disturb the surface even though damages would be forthcoming. Under this theory, the mineral estate is "treated as 'dominant' in the sense that it can be developed whenever it is economical to do so . . . [while preserving] surface values which were probably not intended to be bargained away by what is so often a rather casual expression of intent leading to a potentially destructive burden."¹³⁵

Other jurisdictions have seen the need to statutorily protect this vulnerable interest of the surface owner and require that, where a severance of the estates has occurred, the surface owner may demand security from the mineral owner and, if such security is not forthcoming, the miner may be enjoined from proceeding.¹³⁶ Kentucky does not have such a statutory measure of protection but does, through its regulatory program, require bonds to be posted for the guarantee of the reclamation expense.¹³⁷ If Justice Stephenson's hopes are well-founded¹³⁸ and

¹³³ *Id.* at 315.

¹³⁴ *New Mexico & Arizona Land Co. v. Elkins*, 137 F. Supp. 767 (D.N.M. 1956), *appeals dismissed with consent of appellees*, 239 F.2d 645 (10th Cir. 1956); *Barker v. Mintz*, 215 P. 534 (Colo. 1923).

¹³⁵ R. Maxwell, *The Meaning of Minerals - The Relationship of Interpretation and Surface Burden*, 8 TEX. TECH. L. REV. 255, 280, 282 (1966-67).

¹³⁶ COLO. REV. STAT. ANN. § 34-48-106 (1984); IDAHO CODE § 47-609 (1977); N.D. CENT. CODE § 38-02-10 (1987); S.D. CODIFIED LAWS ANN. § 45-4-13 (1983); WYO. STAT. § 30-1-119 (1977).

¹³⁷ KRS § 350.060(11).

¹³⁸ See *supra* text accompanying note 133.

compensation will be required in advance, *Akers v. Baldwin* will become more meaningful to the owner of the surface estate.

CONCLUSION

The majority opinion in *Akers* clearly accentuates the reluctance of Kentucky's high court to revoke the rights of mineral owners under broad form deeds as established in *Buchanan v. Watson*. Conversely, the 4-3 split on this issue exposes the fragile status of the precedent.

By overturning that portion of *Buchanan* which excluded payment of damages to the surface owner, the court recognized the unfairness of prior holdings. The practical effect of this decision, however, will be virtually nil.

The statutory response of the General Assembly to the perceived inequalities surrounding *Buchanan* and its progeny accurately reflects the public sentiment regarding those decisions. Whether the decisions in *Akers* will effectively placate the public anxiety is, of course, yet to be seen. In retrospect, the introduction of this comment seems to also be an appropriate conclusion, for it is readily apparent "that the final word on broad form deeds in Kentucky has yet to be heard."¹³⁹

PATRICK J. SHEERAN AND DAVID T. WILSON, II

¹³⁹ Pfeiffer, *supra* note 3, at 96.