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## Strip Mining - The Costruction of Mineral Deed Reservations and Exceptions - Department of Forests & (and) Parks v. George's Creek Coal & (and) Land Co.

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**STRIP MINING—The Construction of Mineral Deed Reservations and Exceptions. Department of Forests & Parks v. George's Creek Coal & Land Co., 250 Md. 125, 242 A.2d 165 (1968).**

In 1931, George's Creek Coal Company, the fee simple title holder of a mountainous tract of rocky, timbered, and unimproved land which it had held since 1910, conveyed the tract to McMillen who was engaged in the timber and pulpwood business. The deed broadly excepted and reserved the mineral rights and the privilege to enter upon the land to mine, excavate, and remove the coal. Liability was waived for any damage to the overlying surface. After McMillen had cleared the land of timber, he conveyed the tract subject to the exception and reservation of the Company to the United States who in 1954 sold it to the State of Maryland who incorporated it as part of a state forest.

Desirous of removing the coal by strip mining, the Company applied to the Board of Public Works for permission in 1964.<sup>1</sup> Permission was granted subject to the approval of the Department of Forests and Parks. Approval was not obtained whereupon the Company filed a bill for a declaratory decree to enable them to strip mine the coal. The Circuit Court for Garrett County granted the decree. The chancellor was of the opinion that the reservation was sufficiently broad in its terms and phraseology to include strip mining as well as any known method of mining coal and that the original parties to the deed had no intention of preserving the surface of the land.

Evidence presented in the lower court established that strip mining was the only economical means that could be utilized to remove the coal and that strip mining was a well known and practiced method of mining in the area when the contracting parties made the original reservation. However, on appeal the State contended that such extrinsic evidence need not be considered in construing the deed because the intent of the parties was expressed in the language of the deed. It was the contention of the State that the deed should be construed against the grantor because if the grantor had intended

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1. See Department of Forests & Parks v. George's Creek Coal & Land Co., 250 Md. 125, 242 A.2d 165, 173 (1968). Permission of the Board of Public Works is not required by statute or regulation.  
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to reserve the right to strip mine the coal, it would have expressly provided for strip mining in the language of the deed. The Company maintained that the language of the deed was not clear and that it was necessary in order to determine the true intention of the parties to consider what the circumstances were which resulted in the execution of the deed. As to the State's contention that the deed should be construed against the grantor, the Company argued that only when the intent could not be ascertained in light of the surrounding circumstances should the deed be strongly construed against the grantor.

The court reasoned that just because the right to strip mine was not included in the deed did not foreclose the right to mine by stripping. For that matter, no specific provisions were made for either deep mining or auger mining. The court was not persuaded that strip mining should be excluded as a method of removal because specific mention was not made of any of the three methods.

Since the precise question presented in this case had not been litigated in Maryland, the court looked to its neighbor State of Pennsylvania for a guideline. After ascertaining the intent of the parties by recourse to the subject matter and circumstances surrounding the original deeds which were acquired by the State of Pennsylvania to a tract of mountainous and unimproved land for the purpose of a wildlife preserve, *Commonwealth v. Fitzmartin* upheld the right of the coal company to strip mine.<sup>2</sup> Although strip mining was not specifically mentioned in the deeds, the mineral rights were reserved and the broad mining rights waived liability for damages to the land. The coal could not be mined except by stripping.

In comparing the facts of the principal case with *Fitzmartin*, Justice McWilliams, writing for an unanimous court, observed that the reservation in the Pennsylvania case was more limited and not as specific as the reservation of the Maryland case. Because the language and circumstances of the two cases were so similar, the court *held*, in affirming the decree of the lower court, that when the language of the deed is not

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2. *Commonwealth v. Fitzmartin*, 376 Pa. 390, 102 A.2d 893 (1954).

clear and when the parties to the deed make no express limitation as to the mining method, consideration of the subject matter and of the surrounding circumstances may be resorted to in order to determine the true intent of the parties.

For the most part, the courts, when discussing the strip mining issue have failed to consider the effect of reclamation acts in construing the reservations and exceptions of mineral deeds. *Department of Forest & Parks* is no exception. Maryland has had a strip mining act since 1947.<sup>3</sup> However, the court commented on the statute only in responding to the State's motion alleging lack of jurisdiction and improper venue. The Pennsylvania courts, Maryland's source of authority for its holding, have expressed high regard for reclamation legislation in some cases<sup>4</sup> and failed to consider it in others.<sup>5</sup> The Kentucky cases have not encouraged reclamation even though they have stimulated strip mining.<sup>6</sup>

The authority for Maryland's reclamation act is based on the exercise of the police power for the general welfare of the people.<sup>7</sup> It is designed to protect and conserve the natural resources of the state by improving, restoring, and reclaiming areas affected by strip mining.<sup>8</sup> The major provisions of the act require: (1) the Land Reclamation Advisory Committee to recommend and establish guidelines for the reclamation of areas disturbed by open-pit mining; (2) every operator to be licensed by the Bureau of Mines before he commences a strip mining operation; (3) a penalty bond to be filed at two hundred dollars per each acre affected by the mining which will be forfeited if the operator does not perform the requirements of the act; (4) the regrading of the surface to restore the terrain to as near normal as possible and to minimize the presence of rocks and toxic materials; (5) the planting of vegetation within a year if practicable at discretion of the State Forester or approval for the use of the land for another purpose; and (6) the filing of necessary reports and maps.<sup>9</sup>

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3. MD. CODE ANN. art. 66C, §§ 657-74 (Supp. 1968).

4. *Wilkes-Barre Township School Dist. v. Corgan*, 408 Pa. 383, 170 A.2d 97 (1961); *Rochez Bros., Inc. v. Duricka*, 374 Pa. 262, 97 A.2d 825 (1953).

5. *Commonwealth v. Fitzmartin*, 376 Pa. 390, 102 A.2d 893 (1954).

6. Comment, *Reclamation of Strip Mining Spoils*, 50 Ky. L. J. 524, 557 (1962).

7. MD. CODE ANN. art. 66C, § 657 (Supp. 1968).

8. *Id.*

9. MD. CODE ANN. art. 66C, §§ 657-74 (Supp. 1968).

Generally, most states who have enacted strip mining legislation follow a basic pattern similar to Maryland's act. Maryland's statute is not as strict as some state's statutes, but is typical of most of them.<sup>10</sup> At the present time, sixteen states have enacted surface mining laws.<sup>11</sup> It is predicted that most states which engage in open pit or surface mining operations will have enacted legislation by the end of 1969.<sup>12</sup> If the states are not successful in regulating surface mining, it is safe to assume that the federal government will become involved in the reclamation and preservation of our nation's land.

Although the court in *Department of Forests & Parks* granted the decree allowing strip mining, it left no doubt as to how it felt when it observed that unless the parties could come to terms, their decision in the case would result in the "scarification and uglification" of the area.<sup>13</sup> However, as noted previously, whether the land could be reclaimed by adherence to the strip mining act was not discussed. Commenting on the scale of values that the two original parties had when the deed was executed, the court termed their way of thinking as unadmirable. Even though the two original parties obviously did not consider the possibility of reclamation, it is doubtful that the court would have been so critical of the intent of the parties if it would have discussed the merits of effective strip mining legislation. This anti-strip mining attitude of the court is reflected in other cases and commentaries.

Strip mining has commonly been characterized as "rape of the land."<sup>14</sup> It has been deemed synonymous with surface violence, destruction, and disfiguration.<sup>15</sup> These strong reactions are evoked because in stripping the land of the surface soil and rock which lie over the coal bed, "long, successive ridges of unsorted, ugly, and unproductive waste" are cre-

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10. See Meiners, *Strip Mining Legislation*, 3 NATURAL RESOURCES J. 442 (1964).

11. *State Regulation of Surface Mining*, 2 ABA SECT. N.L.R. Newsletter 8 (July, 1969).

12. *Id.*

13. *Department of Forests & Parks v. George's Creek Coal & Land Co.*, 250 Md. 125, 242 A.2d 165, 166 (1968).

14. Brooks, *Strip Mine Reclamation and Economic Analysis*, 6 NATURAL RESOURCES J. 13 (1966).

15. *Rochez Bros., Inc. v. Duricka*, 374 Pa. 262, 97 A.2d 825 (1953).

ated.<sup>16</sup> Where the terrain is relatively flat, area stripping transforms the surface into "giant washboards."<sup>17</sup> The strips left following contour stripping which is used in mountainous areas look like "looped shoestrings" as they lace around the periphery of the mountain.<sup>18</sup> Senator Lausche of Ohio remarked that anyone who has aesthetic values would "weep at the cruelty of mankind in destroying and butchering the beauty of the land."<sup>19</sup> Aside from the aesthetic problem, stripping is said to pollute our air and water; create safety and health hazards; and disturb the public with excessive noises and vibrations.<sup>20</sup>

Despite the devastating effects that strip mining has on the surface of the land, economic and technological changes favor surface mining over deep mining.<sup>21</sup> Four-fifths of all the solid fuels and ores produced in the United States in 1965 were surface mined.<sup>22</sup> The strip mining of coal is essential for the success of the coal industry and the economics of those states who practice it.<sup>23</sup> The crucial question involved is whether the benefits of strip mining exceed the costs. In his economic analysis of strip mining, David B. Brooks contends that the problem is one of "allocation of resources."<sup>24</sup> The goal of national productivity, which he defines as the "maximization of the net value of output from the resources that society puts into production," must be balanced against the cultural and aesthetic values of our society.<sup>25</sup> Effective regulation of strip mining can insure the continued benefits of strip mining while eliminating the social costs.

Although much legislation has been and will be enacted to curb the problems of strip mining, the courts will continue to play a major role in weighing and balancing the conflicting interests in the strip mining controversy. Generally, the difficulties of deciding whether strip mining may be employed

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16. Brooks, *supra* note 14, at 13.

17. *Id.* at 14.

18. *Id.*

19. 109 CONG. REC. 3413 (daily ed. March 7, 1963) (remarks of Senator Lausche).

20. Bosselman, *The Control of Surface Mining: An Exercise in Creative Federalism*, 9 NATURAL RESOURCES J. 137, 139 (1969).

21. *Id.* at 137.

22. U.S. Dep't of the Interior, *Surface Mining and Our Environment*, 42 (1967).

23. Comment, *Reclamation of Strip Mining Spoils*, *supra* note 6, at 525.

24. Brooks, *supra* note 14, at 43.

25. *Id.*

as a method of mining arise where (1) the express privileges of strip mining must be interpreted; (2) the language of the deed is so broad as to be susceptible of either granting or withholding the stripping privilege by implication and; (3) the only economical method of removing the coal is by stripping, but no provision for stripping is contained in the deed.<sup>26</sup> Some Pennsylvania cases seem to imply that the right to strip mine exists whenever the language of the deed does not expressly or by implication exclude strip mining and if the reservation is sufficiently broad to constitute a waiver of adjacent support.<sup>27</sup> On the other hand, the West Virginia courts have construed deeds so strictly that strip mining is not allowed unless it is expressly included in the language of the deed.<sup>28</sup> An analysis of the Kentucky cases indicates that strip mining may be conducted under the typical broad form deed without liability for damages unless the action is "oppressive, arbitrary, wanton or malicious."<sup>29</sup> In attempting to summarize the law of strip mining coal, Robert T. Donley was doubtful that the conflicting views of the various courts could be "woven into the seamless fabric of the law."<sup>30</sup> This emphasizes the need that our courts have a uniform test for interpreting deed reservations and exceptions in strip mining cases.

In light of the emotional clamor which has pressured the states to enact reclamation acts to conserve the natural resources of our nation, it appears that the prospect of reclamation should be an increasingly important factor to consider in construing the reservations and exceptions of mineral deeds in the future. The ineffectiveness of the early reclamation acts and the failure of the courts to consider them will not be static. As the reclamation acts become more effective, the courts will increase their reliance upon them. Effective reclamation acts ensure that the rights of the surface owner and the holder of the mineral estate will not be jeopardized by defective deeds. The failure to provide for a specific method

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26. 3 AMERICAN LAW OF MINING § 16.85 (1969).

27. Note, *Mines and Minerals—Implied Right to Strip Mine Coal*, 58 W.VA. L. REV. 174 (1956).

28. *Id.*

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

30. Donley, *Some Observations on the Law of the Strip-Mining of Coal*, 11 ROCKY MTN. MIN. L. INST. 123, 147 (1966).

of mining would not prohibit the utilization of a new technological method in the future. If a reclamation test were adopted, the courts could shift their emphasis from subjective attempts to determine the intent of the contracting parties to an objective analysis of the effectiveness of the reclamation acts. For example, if Maryland's comparatively effective reclamation act would have been considered in *Department of Forest & Parks*, the court could have reached the same result without recourse to the myriad of construction rules which have originated in the strip mining litigation.

Reclamation is another thread which should be woven into the fabric of strip mining law. This additional factor could be the key to uniformity that previously has not existed in those states which have adjudicated the strip mining issue. It is submitted as strip mining reclamation acts become more effective that any method of severance will be allowed unless specific language denying such method, or language limiting severance to certain methods is contained in the reservation or exception.

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